MARRIAGE AND FAMILY AS THE NEW PROPERTY: *OBERGEFELL*, MARRIAGE, AND THE HAND OF THE STATE

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INTRODUCTION

In the United States Supreme Court decision announcing a constitutional right to same-sex marriage, *Obergefell v. Hodges*, the majority opinion characterizes marriage as a governmental entitlement of enormous psychic and material importance.[1] It declares that an individual's dignity, liberty, social status, and even personhood is closely bound to the receipt of a requested state license recognizing an emotional and sexual bond with another person as "marriage."[2]

So strong is *Obergefell*'s language and import respecting governmental power to grant or withhold marriage[3] that the majority's opinion immediately brings to mind a variation on the important questions raised both in Professor Charles Reich's 1964 classic, *The New Property*,[4] and Professor Mary Ann Glendon's 1981 classic, *The New Family and the New Property*:[5] What is the significance of the rise of governmental entitlements—a form of "new property" distinguished from traditional private property—as a substantial portion of citizens' security?[6]

Justice Kennedy's opinion for a five-justice majority in *Obergefell* suggests a fresh variation on the question: What is the significance of the Court's stress upon a state-granted marriage license—a form of "new property"[7]—as a leading source of individual dignity and material security? More specifically, what is its significance for human freedom (a question asked by both Reich and Glendon)[8] and for the future of

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[1] 135 S. Ct. 2584, 2599–2600, 2604–05 (2015).

[2] *Id.* at 2593–94, 2601–02.

[3] *See id.* at 2598–99, 2601–02 (reviewing and affirming Court precedent holding that marriage is a fundamental right).

[4] Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[5] MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981).

[6] *Id.* at 1–2; Reich, *supra* note 4, at 756, 771.

[7] Reich, *supra* note 4, at 787.

[8] GLENDON, *supra* note 5, at 7 (noting that the economic security and social status of many individuals are increasingly determined by dependency relationships with government); Reich, *supra* note 4, at 756, 771 ("If the day comes when most private ownership is supplanted by government largess, how then will governmental power over

marriage—an institution ironically struggling for relevancy and stability at the same moment that the Supreme Court has ordered states to offer marriage licenses to an additional set of citizens: same-sex couples?[9]

Some may observe immediately that marriage has always been a "governmental entitlement" insofar as the government and no other source has provided the legal recognition and financial benefits that underpin marriage licenses; thus, *Obergefell* marks no great change.[10] This observation, however, overlooks how, in the long history of marriage worldwide and in the United States, marriage was primarily defined by nature and only ratified and made orderly by government.[11] It also overlooks the way in which Justice Kennedy's *Obergefell* opinion both explicitly excises nature from marriage[12] and is peppered with language describing what a marriage license "does" and "gives" to citizens.[13] In the end, *Obergefell* ignores the history of marriage as a pre-governmental, human-instigated union, designed by nature to be the origin and guardian

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individuals be contained? . . . What will happen to the Constitution, and particularly the Bill of Rights, if their limits may be bypassed by purchase, and if people lack an independent base from which to assert their individuality and claim their rights?").

[9] *Compare Obergefell*, 135 S. Ct. at 2604–05 (holding that states must allow same-sex couples to marry), *with* Andrew J. Cherlin, Opinion, *In the Season of Marriage, a Question. Why Bother?*, N.Y. TIMES, Apr. 27, 2013, § SR, at 7 (stating that "[t]oday, marriage is more discretionary than ever" because it has become "a status symbol—a highly regarded marker of a successful personal life"), *and* Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married (noting that an increasing number of Americans are delaying and forgoing marriage).

[10] *Compare* M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081, 1088, 1092 (2010) (noting that many tax and entitlement benefits are dependent upon a couple being married), *and* Amelia A. Miller, Note, *Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage*, 38 LOY. L.A. L. REV. 2185, 2204 (2005) (describing civil marriage as a set of legal protections and benefits from the government based upon issuance of a marriage license), *with Obergefell*, 135 S. Ct. at 2601 (discussing the legal recognition and government benefits exclusively available to married couples).

[11] *See infra* Part I.

[12] *See Obergefell*, 135 S. Ct. at 2599, 2601–02 (stating that "limitation of marriage to opposite-sex couples may long have *seemed* natural and just," but it "is now manifest" that the newly-recognized basic principles undergirding marriage recognition undercut that prior understanding (emphasis added)). To wit: this new understanding of marriage is based upon principles of individual autonomy; the institution's subjective importance to two individuals; the state's interest in communicating to children reared in households with adult same-sex partners that the state regards their families as identical to opposite-sex married homes; and the belief of five Justices on the Court that there is no difference between same- and opposite-sex pairs respecting grounding social order.

[13] *See id.* at 2594, 2599–2602 (majority opinion) (describing a plethora of benefits associated with marriage).

of vulnerable human life.[14] It rather frames marriage as a gateway, opened by the state, to a plethora of economic and emotional benefits.[15]

The implications of shifting our understanding of marriage toward a governmental entitlement are undoubtedly large. They will unfold over time. This Article can only sketch out some initial reflections on the subject, guided at points by the excellent questions about governmental entitlements and family vulnerabilities raised in earlier times by Professors Reich and Glendon.[16] I will take up the subject as follows:

Part I contrasts understandings of marriage in U.S. law during the periods before and after the recent movement for same-sex marriage, which was capped by *Obergefell*. It shows a movement away from the notion that marriage comes "up from nature" and toward the notion that marriage comes "down from the state."

Part II proposes the significance for citizens' freedom of adding "marriage" to the list of entitlements the government offers to some.

Part III considers the significance for marriage and family life of these goods being folded into the category of "new property."

The Conclusion offers a few reflections upon marriage as a form of "new property" in light of one of the most significant problems concerning marriage among vast number of Americans today: the retreat from marriage among the poor and lower-middle-income class.

I. FROM "UP FROM NATURE" TO "DOWN FROM THE STATE"

In the United States, beginning in the colonial era, the meaning of marriage has been largely determined by the citizens undertaking it and based upon the promptings of nature, including human reason and the Christian religion of the Founders.[17] Early understandings of marriage were not derived from marriage laws passed by the states.[18] Marriage was generally understood as the (presumably) lifelong union of one man and

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[14] *See id.* at 2612–13, 2626 (Roberts, C.J., dissenting) (discussing the historical and traditional understanding of marriage as a method of ensuring that children are raised in the context of a stable, lifelong relationship and criticizing the majority for casting aside this understanding).

[15] *See id.* at 2600–01 (majority opinion) (describing the harm suffered by same-sex couples denied a marriage license in the context of social and economic benefits associated with marital status).

[16] *See* GLENDON, *supra* note 5, at 7 (suggesting that the economic security, social status, and family relationships of many individuals are increasingly determined by dependency relationships with government); Reich, *supra* note 4, at 737, 746–47, 761–62 (discussing how government entitlements create dependencies and make individuals vulnerable to increased government power and oversight).

[17] NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9–11 (2000) (discussing how early views of marriage in America were influenced by the Founders, moral and political philosophers, church doctrine, and the common law).

[18] *See id.* at 9 (noting that early understandings of marriage were embedded in general political assumptions and common sense).

one woman, the guarantor of the continuity of society through the birth and rearing of children, and a basis for a well-ordered society.[19] There was a great deal of debate among lawmakers, religious leaders, and other prominent intellectuals about the degree to which citizens should be left free to contract marriages between themselves.[20] Affection for individual freedom of contract, combined with growing affection for the "companionate" (versus patriarchal or other hierarchical) model of the family, grounded strong arguments for complete freedom of contract to marry, without any associated requirements of advance public notice, witnesses, or solemnization by a religious or legal figure.[21]

For these reasons, alongside the practical difficulties of public oversight of marriage in far-flung, rural, and sparsely settled places, "common-law marriage" flourished broadly in the United States.[22] Still, even this form of "unlicensed" and "unsolemnized" marriage required a "mutual agreement to be husband and wife made in public or private," ordinarily combined with cohabitation and an agreement to hold themselves out as a married couple.[23]

Even when the community or the state did impose more formal requirements for marriage, they came in the form of processes by which a man and a woman would notify the community about their marriage in order that parents, and sometimes the community, could exercise some oversight (e.g., age, partner suitability) over the would-be spouses' union.[24] Consequently, most colonies, in addition to accepting common-law marriages,[25] required either licenses issued by magistrates,[26] or more likely, a five-step process involving: "espousals, publication of banns, execution of the espousal contract at church, celebration, and sexual consummation."[27] Eventually, over the course of the nineteenth century, almost every state adopted a marriage license law,[28] while some also

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[19] *Id.* at 2–3, 10.

[20] *See, e.g.*, MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 71–74, 86 (1985) (reviewing examples of the vigorous public debate concerning the appropriate societal treatment of common-law marriage).

[21] *See id.* at 74 (noting that marriage has historically been viewed as a contract, and therefore, the formalities required by nuptial laws were directory in nature, rather than mandatory); STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE, at xvi (1988) (discussing how the companionate family model influenced the public's view of marriage).

[22] *See* COTT, *supra* note 17, at 29, 39 (discussing the general acceptance of common-law marriage among communities and the judiciary, especially in sparsely populated areas).

[23] GROSSBERG, *supra* note 20, at 65–66, 79.

[24] *Id.* at 67.

[25] *Id.* at 73.

[26] COTT, *supra* note 17, at 28.

[27] GROSSBERG, *supra* note 20, at 65, 67.

[28] *Id.* at 93.

continued to recognize common-law marriages based upon the couple's explicit consent plus evidence of marital life.[29]

Over the last 200 years and more, remarkably few preconditions have been attached to the receipt of a marriage license across the United States. Those created in early years reflected the social interest in the couple's eligibility for marriage (e.g., the prohibition on bigamy; opposite sexes)[30] and their likely stability (e.g., age).[31] Today, some states have waiting periods for marriage licenses in order to allow the couple to reflect upon their marital intentions.[32] Clerks exert virtually no oversight over the couple.[33] Generally one or both parties merely need to appear and provide information, including names, social security numbers, and statements about marital status, along with a statement about whether the parties are related by any degree of blood or marriage.[34] The license is issued on the same day the application is taken, allowing the marriage to take place immediately or within a few days.[35]

It can be said overall about these processes that their emphases were upon governmental recognition of facts and circumstances in the hands of nature and the couple.[36] It was nature that made two sexes, drew them toward one another with the possibility even of a one-flesh union, and designed their union to lead to new human life, which life needs a great deal of highly-interested care for an extended period of time in order to flourish. In the words of marriage historian Nancy Cott, reflecting upon the leading nineteenth century American family law treatise authored by Joel Prentiss Bishop:

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[29] GROSSBERG, *supra* note 20, at 101 (noting that common-law marriages remained legal in many states); *see also* COTT, *supra* note 17, at 39 (noting that informal marriages evincing consent of the couple and community acceptance were generally validated by courts).

[30] GROSSBERG, *supra* note 20, at 108, 120.

[31] *Id.* at 105.

[32] *See* Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 751 (2011) (noting that "[w]aiting periods for a [marriage] license are generally nonexistent or minimal"); *see also Marriage Laws*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/table_marriage (last visited Sept. 29, 2015) (listing twenty-six states that have waiting periods associated with marriage licenses and twenty-four that do not).

[33] *See* Candeub & Kuykendall, *supra* note 32, at 751 (noting that a marriage license application requires only "basic personal data").

[34] *Id.* at 751–52; Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1162 (1999).

[35] *See supra* note 32 and accompanying text.

[36] *See* COTT, *supra* note 17, at 40 (noting that state marriage laws were historically viewed as directory, rather than mandatory, because marriage was considered a common right); GROSSBERG, *supra* note 20, at 24 (noting that even after the contractual understanding of marriage began eroding, "[m]arriage law remained wedded to the assumptions that individual choice was the norm [and that] state intervention was only a last resort in special situations").

> Bishop endowed the institution with a more inspired genealogy by adding that "its source is the law of nature." When state legislators went about altering marriage in response to social and economic pressures, they did so with some ambivalence, looking above and behind them as though a more powerful presence were watching.[37]

A constant trait of American marriage recognition law, then, from its earliest period to recently, is that the associated societal or state "processes" constitute a minimal aspect of marriage as compared with the naturally given circumstances and personal choices of the couple seeking marriage.[38]

The Supreme Court acknowledged this reality most specifically in its decisions in *Loving v. Virginia*—overturning an antimiscegenation law[39]—and *Zablocki v. Redhail*—striking down a state's child support payment precondition to marriage.[40] Because the couples otherwise satisfied the legal requirements for marriage, their natural rights to marriage were apparent to the Court.[41] Thus, the *Loving* Court referred to human nature, including the fact of men's and women's procreative potential, when it called marriage "one of the 'basic civil rights of man,' fundamental to our very existence and survival" and "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[42] The *Zablocki* Court referred to similar natural realities when it called marriage of "fundamental importance" to individuals,[43] and referred three times immediately thereafter to its procreative nature.[44]

But with Justice Kennedy's *Obergefell* opinion, there is a decided movement *away* from the notion that marriage emanates from the nature of the couple, and *toward* the notion that marriage is an endowment available from the hand of the state.[45] This is not altered by the Kennedy opinion's repeating of what appears to be a list of plaintiffs'

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[37] COTT, *supra* note 17, at 47 (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 2 (1864)).

[38] *See* GROSSBERG, *supra* note 20, at 24 (noting that marriage laws generally emphasized individual choice over state intervention); *see also id.* at 74 (noting how judges minimized the importance of formal nuptial laws and emphasized the inherently contractual nature of marriage).

[39] 388 U.S. 1, 12 (1967).

[40] 434 U.S. 374, 375, 382 (1978).

[41] *See id.* at 377–78, 384 (holding that government cannot deny the fundamental right to marriage solely because one would-be spouse failed to pay child support); *Loving*, 388 U.S. at 2 (holding that a law prohibiting marriage solely on the basis of race is unconstitutional).

[42] *Loving*, 388 U.S. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[43] *Zablocki*, 434 U.S. at 384.

[44] *Id.*

[45] *See Obergefell*, 135 S. Ct. at 2594–98, 2604 (noting marriage's initial contract-based status in America, tracing its evolution in American culture, and concluding that same-sex marriage is now a fundamental right flowing from the Constitution).

"qualifications" for marriage: their mutual romantic emotions and their desires for sexual intimacy and social recognition of their commitment.[46] Justice Kennedy is not seriously positing that such matters are legal preconditions for marriage. In fact, a later portion of his opinion explicitly acknowledges that opposite-sex couples have long been validly marrying for "many personal, romantic, and practical considerations."[47] Furthermore, state and federal courts pre-*Obergefell* have not generally characterized this set of dispositions and feelings (romantic emotions and desires for sexual intimacy and social recognition) as preconditions to the receipt of a marriage license.[48] It is more likely that Justice Kennedy repeated these elements of same-sex couples' relationships to demonstrate a similarity with opposite-sex couples' marital dispositions.[49]

The *Obergefell* opinion emphasizes the "state-given" nature of marriage in a variety of ways. First, the Kennedy opinion frequently, dramatically, and in highly emotional language describes what the majority believes a marriage license will give the same-sex couple.[50] No such language or list is found in pre-*Obergefell* state family codes or in Supreme Court opinions concerning state marriage laws. The Kennedy opinion pronounces, however, that state-sanctioned marriage will provide same-sex *persons* the ability to "define and express their identity,"[51] to experience "nobility and dignity," "unique fulfillment,"[52] a "union unlike any other in its importance to the committed individuals,"[53] and one of "'life's momentous acts of self-definition."[54] It will allow same-sex couples to "find other freedoms," including "expression, intimacy, and spirituality."[55]

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[46] *See id.* at 2594–95, 2597, 2599–2601 (discussing how mutual love and desires for intimacy and societal recognition have influenced same-sex couples to seek married status).

[47] *Id.* at 2607.

[48] *See, e.g.*, DeBoer v. Snyder, 772 F.3d 388, 406 (6th Cir. 2014) ("With love and commitment nowhere to be seen, States will grant a marriage license to two friends who wish to share in the tax and other material benefits of marriage . . . ."), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584; United States v. Orellana-Blanco, 294 F.3d 1143, 1151 (9th Cir. 2002) (holding that a marriage is not invalidated simply because the parties have motives other than love or companionship); *Ex parte* Alabama *ex rel.* Ala. Policy Inst., No. 1140460, 2015 WL 892752, at *33 (Ala. Mar. 3, 2015) ("State governments do not inquire about whether couples love each other when they seek a marriage license, nor do governments have any justifiable reason to do so.").

[49] *See Obergefell*, 135 S. Ct. at 2599–2602 (discussing how same-sex couples have needs and desires similar to opposite-sex couples).

[50] *See id.* at 2593–94, 2599–2602 (describing economic and social benefits associated with marital status).

[51] *Id.* at 2593.

[52] *Id.* at 2594.

[53] *Id.* at 2599.

[54] *Id.* (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).

[55] *Id.*

The *Obergefell* majority opinion not only regularly highlights the claimed psychic benefits of state-recognized marriage,[56] but also emphasizes its material benefits. Writes the Court:

> [T]hroughout our history [governments] made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law.[57]

Finally, the Kennedy opinion claims that state marriage recognition can improve the lot of children being raised in same-sex households with the two adults who are their legal parents:

> By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Marriage also affords the permanency and stability important to children's best interests.
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> . . . Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.[58]

No matter whether evidence could be found now or in the future to validate Justice Kennedy's claims about what marriage licenses offer to same-sex pairs of adults and to children reared in their households, there is no doubt that his opinion is replete with language indicating that state marriage recognition is an extraordinarily valuable government entitlement.[59]

The *Obergefell* decision next emphasizes the government's role in granting marriage by two methods it uses to achieve its holding: its ignoring of the common sense differences between same-and opposite-sex unions; and its unserious due process analysis. Each of these points is sufficient for its own article, but for reasons of length, I can offer only brief reflections on each.

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[56] *See id.* at 2594–95, 2598–2600 (noting the integrity, dignity, expression, intimacy, and beauty of marriage).

[57] *Id.* at 2601 (citation omitted).

[58] *Id.* at 2600 (citations omitted) (quoting United States v. Windsor, 133 S. Ct. 2694 (2013)).

[59] *See supra* note 50 and accompanying text.

Prior to the recent campaign by interest groups asserting that marriage rights were the *sine qua non* of LGBT equality,[60] it was axiomatic that states took a special interest in opposite-sex marriage because of the state's interest in the continuation of human society (children) and because married couples both procreate children and possess the more stable setting best suited to children's—and therefore society's—needs.[61] In fact, in an unbroken string of Supreme Court decisions from the mid-nineteenth to the late-twentieth century (pre-*Windsor*), the Court consistently affirmed states' interests in marriage and procreation: the birthing and raising of children and the contribution of parenting to society.[62] Despite the ruling in *Obergefell*, the Court's precedent evinces that the union of a man and a woman is still uniquely deserving of attention and support.[63] Justice Kennedy's *Obergefell* opinion, however, devotes just one slim paragraph to the proposition that children are not at all intrinsically tied up with the state's interest in marriage because "it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate."[64] While this is true as far as it goes, it is also clearly a makeweight argument, irrelevant to the actual situation on the ground. Almost ninety percent of married couples have children.[65] Procreation simply is and has always

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[60] *See* Mary Ziegler, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 FLA. ST. U. L. REV. 467, 479 (2012) (noting that same-sex marriage became "an organizational priority for both gay rights groups and their opponents" in the 1990s).

[61] William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 154, 158 (2004).

[62] Troxel v. Granville, 530 U.S. 57, 68–69 (2000); Lehr v. Robertson, 463 U.S. 248, 256–57 (1983); Parham v. J.R., 442 U.S. 584, 602 (1979); Zablocki v. Redhail, 434 U.S. 374, 383, 386 (1978); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 843–44 (1977); Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977); Boddie v. Connecticut, 401 U.S. 371, 389 (1971) (Black, J., dissenting); Loving v. Virginia, 388 U.S. 1, 8, 12 (1967); Prince v. Massachusetts, 321 U.S. 158, 168 (1944); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Maynard v. Hill, 125 U.S. 190, 205 (1888); Murphy v. Ramsey, 114 U.S. 15, 45 (1885); Reynolds v. United States, 98 U.S. 145, 165 (1878); *see also* Brief of Amicus Curiae Helen M. Alvaré in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 9–15, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144) (collecting cases and arguing that "[s]tates have [a] substantial interest in the birth of children" and "the way marriage socializes children").

[63] *See supra* note 62 and accompanying text.

[64] *Obergefell*, 135 S. Ct. at 2601.

[65] *See* GRETCHEN LIVINGSTON & D'VERA COHN, PEW RES. CTR., CHILDLESSNESS UP AMONG ALL WOMEN; DOWN AMONG WOMEN WITH ADVANCED DEGREES 4 (2010), http://www.pewsocialtrends.org/files/2010/11/758-childless.pdf. ("Among 40–44-year-old women currently married or married at some point in the past, 13% had no children of their own in 2008 . . . ."). Furthermore, premarital investigations regarding couples' procreativity would likely run up against barriers of privacy and make accurate information hard to

been closely associated in fact with the type of relationship that men and women have when they marry.[66]

In comparison, a small number of same-sex couples employ medical and social services to rear children obtained via adoption or reproductive technologies, in every case removing the child from one or both of her natural parents.[67] The vast majority of same-sex couples with children in their households naturally procreated those children with a partner of the opposite sex in a prior marriage or other relationship.[68] In short, there is a natural and socially important difference between same- and opposite-sex intimate unions. Justice Kennedy's refusal to confront this in order to give the Supreme Court the power to entitle new groups to marriage licenses emphasizes how much *Obergefell* transforms legal marriage from a naturally given right and privilege into a governmentally-crafted grant.

Finally, the Kennedy opinion casts marriage as governmental largess by its crafting out of whole cloth a substantive due process "analysis" with no apparent connection to the democratically enacted law—the Constitution—it claimed to interpret.[69] Justice Kennedy's lack of respect for legal precedent and lack of seriousness about the Constitution, in the service of redefining what marriage is where marriage licenses are concerned, adds to the sense that he is forcing states to grant a governmental benefit—versus instructing them to respond to a natural human right before which the Constitution must bow.

Even defenders of same-sex marriage lament Justice Kennedy's non-legal, unprincipled, and sloppy mode of "finding" a new due process right to same-sex marriage.[70] The Chief Justice's dissent in *Obergefell* captures

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gather. *Cf. Obergefell*, 135 S. Ct. at 2599 (discussing marriage in the context of a right to privacy).

[66] John Witte, Jr., *Reply to Professor Mark Strasser, in* MARRIAGE AND SAME-SEX UNIONS 43, 45 (Lynn Wardle et al. eds., 2003).

[67] *See* Garry J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, NCFR REP., Winter 2011, at F1–F2 (explaining that children of gay and lesbian couples are most often the product of previous different-sex relationships).

[68] *Id.* at F1; Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752, 756–57 (2012).

[69] *See Obergefell*, 135 S. Ct. at 2597–2602 (finding a fundamental right to marriage in the Due Process Clause based on new insights about the meaning and extent of "liberty"); *see also id.* at 2611–12, 22–24, 26 (Roberts, C.J., dissenting) (arguing that the right announced by the majority's opinion "has no basis in the Constitution" or the "Court's precedent").

[70] *E.g.*, Andrew Koppelman, *The Supreme Court Made the Right Call on Marriage Equality—But They Did It the Wrong Way*, SALON (June 29, 2015), http://www.salon.com/2015/06/29/the_supreme_court_made_the_right_call_on_marriage_equality_—_but_they_did_it_the_wrong_way ("If this is all the explanation they are going to get, then conservatives are right to feel bullied by judicial oligarchs."); Ilya Somin, *A Great Decision on Same-Sex Marriage—But Based on Dubious Reasoning*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-

the situation most accurately: "The majority's decision is an act of will, not legal judgment;"[71] "[i]t had nothing to do with" the Constitution.[72] It seems impossible to characterize Justice Kennedy's method otherwise.

After first recognizing that there is relevant precedent—*Washington v. Glucksberg*,[73] which "insist[s] that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices"[74]—Kennedy claims without any supporting rationale that this test is inapplicable to marriage questions.[75] He then poses a new test supported by no legal precedent and containing no legal standards; it is based, rather, upon what five Supreme Court Justices believe to be good law at any given time.[76] To wit, Kennedy writes that constitutional rights "come not from ancient sources alone [but also] from a *better informed understanding* of how constitutional imperatives define a liberty that remains urgent in our own era."[77] And what is the result of this "better informed understanding"? Kennedy writes:

- "[T]he necessary consequence [of a challenged law] is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[78]
- "Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples."[79]
- "[I]t would disparage their choices and diminish their personhood to deny them this right."[80]

It is pointless to attempt to analyze legally such vague, tautological, emotive, and conclusory language. Its meanings are infinitely malleable and subject to the eye of the beholder. None of the four other Justices in the majority wrote concurrences to strengthen or interpret this logic.[81] It

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on-same-sex-marriage-but-based-on-dubious-reasoning ("Today's Supreme Court decision on same-sex marriage is a great result, but based on dubious reasoning.").

71 *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

72 *Id.* at 2626.

73 521 U.S. 702 (1997).

74 *Obergefell*, 135 S. Ct. at 2602.

75 *Id.*

76 *See id.* at 2602–03 (rejecting an historical approach to analyzing fundamental rights and adopting an approach based on the Court's evolving understanding of liberty); *see also id.* at 2611–12 (Roberts, C.J., dissenting) (criticizing the majority for analyzing fundamental rights based on new constitutional insights rather than established constitutional principles).

77 *Id.* at 2602 (majority opinion) (emphasis added).

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.* at 2591.

unavoidably leaves the reader with the sense that its authors—judges—are willing to legislate to get their way.[82]

At the conclusion of the *Obergefell* majority's substantive due process section, then, an observer knows that while there is nothing in the text of the Constitution about marriage, and nothing in prior due process precedents to confirm a right to same-sex marriage,[83] five Justices feel they have a "better informed understanding" of marriage than any given state legislature, and have the legal power to force every state to act accordingly.[84] This move, in addition to *Obergefell*'s divorcing marriage from its natural foundations, and emphasizing what a marriage license "gives" its recipients,[85] fuels a sense that governmental officials are expending enormous resources, and even burning constitutional bridges, in order to manufacture a new entitlement for certain citizens.

II. THE IMPLICATIONS FOR CITIZENS' FREEDOM WHEN MARRIAGE IS "NEW PROPERTY"

Part I demonstrated that, relative to the time before *Obergefell*, when marriage was legally treated as "up from nature"—a natural, pre-governmental reality to which society and the state contributed some order and stability through recognition and recording—post-*Obergefell*, marriage is a privilege dispensed by the state. What are some of the consequences of such a shift in understanding upon the freedom of citizens? This is a natural or obvious question whenever government assumes a new power. It is an important question especially, however, when government assumes a power to define the meaning and purposes of an institution that existed *prior to* government.

There are several circumstances that render *Obergefell*'s creation of a new legal entitlement to marriage significant for citizens' freedom, beginning with its consequences for citizens' freedom to disagree with the ethical status of same-sex marriage.[86] Mary Ann Glendon noted decades ago that in diverse societies like our own, societies in which "custom and tradition wither and ideas about religion and ethics diverge," it easily happens that "civil law often seems to be the only remaining system of norms common to all or most groups in the population."[87] Same-sex marriage appears to have traveled far to become a "norm" among at least

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[82] *See id.* at 2611–12 (Roberts, C.J., dissenting) (arguing that the decision to allow same-sex marriage should be made through elected representatives and not through the Court because "this Court is not a legislature[, and] under the Constitution, judges have power to say what the law is, not what it should be").

[83] *Supra* note 69 and accompanying text.

[84] *Supra* note 76 and accompanying text.

[85] *Supra* notes 45–59 and accompanying text.

[86] *Obergefell*, 135 S. Ct. at 2642–43 (Alito, J., dissenting).

[87] GLENDON, *supra* note 5, at 120.

half the American population in very short order.[88] Its trajectory was marked with the same language now deployed in the Supreme Court opinion establishing marriage law in the fifty states—language indicating that dissenters from the new norm aim to "demean[]" and humiliate LGBT people,[89] given that same-sex marriage is inextricably related to LGBT persons' "dignity" and "personhood."[90] Precisely because the law today has become what Glendon suggests—a shorthand reference for moral norms[91]—and because same-sex marriage is not only the law, but clothed quite explicitly in *Obergefell* with normative language,[92] it portends difficulties for citizens even with well-crafted, reasoned religious objections to same-sex marriage.[93]

Obergefell also bids to limit citizen freedom because the structure of our civil rights and nondiscrimination laws pave the way for lawsuits against third parties who do not wish to participate in same-sex marriages.[94] These laws regularly forbid discrimination on the basis of sex,[95] sexual orientation,[96] or marital status.[97] With the legalization of same-sex marriage, courts are more likely to entertain lawsuits claiming one or more of these forbidden grounds of discrimination.[98] Some of these lawsuits might be instituted by same-sex couples against individuals and

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[88] *See* Emily Swanson, *Major Survey Shows Most in U.S. Now Support Same-Sex Marriage*, SEATTLE TIMES, Mar. 6, 2015, at A4 (stating that fifty-six percent of Americans support the right to same-sex marriage). *But see* Michael J. New, *In the Wake of* Obergefell*, Three New Polls Show Reduced Support for Same-Sex Marriage*, NAT'L REV.: THE CORNER (July 21, 2015, 2:21 PM), http://www.nationalreview.com/corner/421443/obergefell-same-sex-marriage-poll-reduced-support (showing a decline in support for same-sex marriage after *Obergefell*).

[89] *See Obergefell*, 135 S. Ct. at 2601–02 (stating that it "demeans" same-sex couples to deny them marriage licenses).

[90] *Id.* at 2594, 2599, 2602.

[91] GLENDON, *supra* note 5, at 120.

[92] *See Obergefell*, 135 S. Ct. at 2595–97 (discussing how the history of marriage has evolved to support same-sex unions).

[93] *Id.* at 2625–26 (Roberts, C.J., dissenting) (discussing how the majority's decision does not create accommodation for religious convictions).

[94] Emma Green, *Gay Rights May Come at the Cost of Religious Freedom,* THE ATLANTIC (July 27, 2015), http://www.theatlantic.com/politics/archive/2015/07/legal-rights-lgbt-discrimination-religious-freedom-claims/399278.

[95] *E.g.*, GA. CODE ANN. § 8-3-202(a)(1) (LexisNexis, LEXIS through 2015 Reg. Sess.); ME. REV. STAT. ANN. tit. 5, § 4602(1) (West, Westlaw through ch. 238, 268–377, 2015 First Reg. Sess.).

[96] *E.g.*, CAL. EDUC. CODE § 200 (West, Westlaw through ch. 291, 2015 Reg. Sess.); WASH. REV. CODE § 49.60.030 (Westlaw through 2015 Reg. Sess. & First, Second, Third Spec. Sess.).

[97] *E.g.*, COLO. REV. STAT. § 24-34-502(1)(a) (LexisNexis, LEXIS through 2015 First Reg. Sess.); N.Y. EXEC. LAW § 291(1) (McKinney, Westlaw through L. 2015, ch. 1–237).

[98] *See, e.g.*, Alan Blinder & Tamar Lewin, *Clerk Chooses Jail Over Deal on Gay Unions,* N.Y. TIMES, Sept. 4, 2015, at A1 (reporting on a court clerk who was jailed for refusing to grant marriage licenses to same-sex couples).

businesses that desire to avoid cooperating with celebrating the same-sex marriage.[99] On the same legal ground, same-sex married employees might sue religious institutions for whom opposite-sexed marriage constitutes part of the very fabric of their entire theology.[100]

Obergefell has not only strengthened the hands of private citizens to force other citizens to cooperate with their same-sex marriage *and* to bring with them the power of the state; it has also strengthened the already powerful hand of corporations that, even pre-*Obergefell*, used their considerable economic leverage in sometimes economically stressed states to insist that governments allow same-sex marriage and tightly cabin religious freedoms not to cooperate with it. Such was the case with recent struggles over same-sex marriage and religious freedom in states such as Indiana, Louisiana, and Arizona.[101] Multi-million-dollar corporations, using emotional language about same-sex marriage (and conscientious objectors thereto)—language now enshrined as law in *Obergefell*[102]—threatened state lawmakers with drastic economic and employment losses if they passed religious freedom protections in connection with same-sex marriage.[103] Individual citizens are also pressured by their private and public employers for dissenting from legalized same-sex marriage on the

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[99] *See*, *e.g.*, Brief of Appellants at 1–2, Odgaard v. Iowa Civil Rights Comm'n, No. 14-0738 (Iowa Aug. 4, 2014) (discussing a case in which a couple was sued for refusing to host same-sex weddings in their art gallery).

[100] *See, e.g.*, Amy Leigh Womack, *Former Mount de Sales Teacher Files Discrimination Suit Against the School*, MACON TELEGRAPH, June 30, 2015, at 1 (reporting on a former teacher who filed suit against a Catholic school alleging that he was fired for planning to marry his same-sex partner).

[101] *Cf.* Eric Bradner, *Bobby Jindal Signs 'Religious Freedom' Order Protecting Same-Sex Marriage Opponents,* CNN (May 20, 2015), http:// www.cnn.com/2015/05/20/politics/bobby-jindal-religious-freedom-louisiana (noting concerns of leaders in New Orleans business and tourism industries over alienation of some visitors and conventions as a result of a law being passed to protect businesses that refuse to serve same-sex marriage couples); Tony Cook et al., *Indiana Governor Signs Amended 'Religious Freedom' Law*, USA TODAY (Apr. 2, 2015), http://www.usatoday. com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination /70819106 (mentioning business leaders' opposition to Indiana's Religious Freedom Restoration Act due to fear that discrimination would be permitted against the lesbian, gay, bisexual, and transgender communities); Tal Kopan, *10 Things to Know: Arizona SB 1062*, POLITICO (Feb. 27, 2014), http://www.politico.com/story/2014/02/arizona-sb1062-facts-104031 (referencing the opposition received from major corporations to an Arizona bill that would have broadened protection for nongovernmental entities in regard to free exercise of religion).

[102] *Obergefell*, 135 S. Ct. at 2594, 2599, 2608.

[103] *See* Nicole Hensley, *Corporations, Cities and Celebrities Drive Push to Boycott Indiana After Governor Signs Controversial Religious Freedom Bill*, N.Y. DAILY NEWS (Mar. 27, 2015), http://www.nydailynews.com/news/politics/pledges-boycott-indiana-grow-religion-bill-passes-article-1.2164482 (reporting that companies such as Apple, Yelp, Gen Con LLC, and SalesForce plan to boycott Indiana's new religious freedom law).

grounds that their behavior is personally harmful to LGBT people in the same way *Obergefell* now asserts.[104]

Obergefell also grants states an enormous set of powers over the lives of children.[105] Historically and still, family law has linked marriage with children.[106] Marriage was naturally linked to children *de facto*, when it was universally understood as an opposite-sex institution due to opposite-sex partners' powers of procreation.[107] Post-*Obergefell*, it seems that marriage is now linked to children *de jure*. While Justice Kennedy's opinion specifically disclaims that procreation is of any special interest to states in the context of their marriage laws,[108] it simultaneously claims that the Court has often described "the varied rights [of childrearing, procreation, and education] as a unified whole: '[T]he right to "marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause.'"[109] Of course, the Court had previously employed this formula because it assumed that marriage was opposite-sexed and therefore generally capable of producing children.[110] But Justice Kennedy seems to be repeating this formula in *Obergefell* to suggest that a right to state-recognized marriage *also* includes a right to children.[111] For same-sex couples this obviously implies a right to legally parent children conceived in prior heterosexual relationships, by adoption, or by collaborative reproduction using the eggs, sperm, and/or wombs of others. This involves, of course, more legal apparatuses in order to enforce various court orders, contracts, or other agreements establishing the parentage of each child, given that gestation and genetic connection or both—the usual markers of parentage—will be absent in every case.[112] In

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[104] *See, e.g.*, Blinder & Lewin, *supra* note 98 (discussing a Kentucky county clerk who was detained for contempt of court when she refused to issue same-sex marriage licenses); Dave Lee, *Mozilla Boss Brendan Eich Resigns After Gay Marriage Storm*, BBC NEWS (Apr. 4, 2014), http://www.bbc.com/news/technology-26868536 (discussing the resignation of a corporate executive after receiving heavy criticism regarding his opposition to same-sex marriage).

[105] *See Obergefell*, 135 S. Ct. at 2600–01 (discussing how recognizing a fundamental right to same-sex marriage helps protect children).

[106] *See supra* note 62 and accompanying text.

[107] Witte, *supra* note 66, at 45.

[108] *Obergefell*, 135 S. Ct. at 2601.

[109] *Id.* at 2600 (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

[110] *Id*. at 2614 (Roberts, C.J., dissenting) (arguing that precedential due process cases were based on a traditional description of marriage as between a man and a woman for the purpose of procreation).

[111] *See id*. at 2600–01 (majority opinion) (discussing the benefits that children receive from marriages recognized by the state).

[112] *See* Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 331–33 (1995) ("[T]he current legal framework fails to reflect the reality of families of consent creating children through

other words, the entitlement to one government benefit—recognized marriage—opens the door to more government power via a need for government action in order to make parentage determinations. Professor Reich already observed this dynamic fifty years ago when he wrote that "government's power grows forthwith; it automatically gains such power as is necessary and proper to supervise its largess."[113]

The further difficulty with the states' new powers respecting children, of course, concerns the potential clash with children's rights. It is a big deal for the state to legally determine one's "heritage" and one's descendants.[114] In the words of one now-grown child reared in a same-sex partner home: parentage determines not just with whom the child must live, but also whom the child is presumably to love, to obey, and even to mourn.[115] Such determinations regularly separate the child from his or her parents, entire ancestry, and all living kin.[116] Although this topic merits a separate paper altogether, it should at least be mentioned here that there are also outstanding questions about children's rights to know and be known by their biological mother and father,[117] raised even by one of the Justices who joined in the *Obergefell* majority.[118] There are also outstanding sociological and psychological questions about how children will fare when reared in same-sex-partner homes.[119]

In short, a same-sex marriage entitlement gives the state enormous authority over additional citizens—all the children who will be reared in same-sex homes.[120] Of course, the state presently has this power

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collaborative reproduction. Many of these families involve gay and lesbian parents who face a legal system which often refuses to recognize, let alone protect, their families.").

[113] Reich, *supra* note 4, at 746.

[114] *See* Mhairi Cowden, *'No Harm, No Foul': A Child's Right to Know Their Genetic Parents*, 26 INT'L J.L. POL'Y & FAM. 102, 120–21 (2012) ("The state's involvement in the conception of [donor-conceived] children causes it to acquire duties towards them that it does not hold to children at large.").

[115] Robert Oscar López, *The Call of the Child*, *in* JEPHTHAH'S DAUGHTERS: INNOCENT CASUALTIES IN THE WAR FOR FAMILY 'EQUALITY' 19, 21, 26–27 (Robert Oscar López & Rivka Edelman eds., 2015) [hereinafter *The Call of the Child*]; Robert Oscar López, *The Lost Manifesto of Manuel Half*, *in* JEPHTHAH'S DAUGHTERS: INNOCENT CASUALTIES IN THE WAR FOR FAMILY 'EQUALITY', *supra*, at 30, 33.

[116] *The Call of the Child*, *supra* note 115, at 27–28.

[117] Cowden, *supra* note 114, at 107.

[118] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2574, 2582 (2013) (Sotomayor, J., dissenting) (noting that "the biological bond between parent and child is meaningful" and "children have a reciprocal interest in knowing their biological parents").

[119] *E.g.*, AMERICAN PSYCHOLOGICAL ASSOCIATION, LESBIAN & GAY PARENTING 8 (2005).

[120] *See*, *e.g.*, Dawn Stefanowicz, *A Warning from Canada: Same-Sex Marriage Erodes Fundamental Rights*, PUB. DISCOURSE (Apr. 24, 2015), http://www.thepublicdiscourse.com/2015/04/14899 (discussing the Canadian government's increased power over children since its legalization of same-sex marriage).

respecting children in opposite-sex marriages, but far less often.[121] There are indeed collaboratively reproduced children and children from divorces and adoptions in such homes,[122] but these home are swamped by children whose parentage is not determined by the state, but rather by nature, pre-governmentally—the mother by genetics and gestation, and the father by genetics.[123]

There are two perspectives on whether *Obergefell* represents the kind of new entitlement that will persist—and thus continue to impact citizens' freedom as above described. On the one hand, Justice Kennedy's opinion characterizes this entitlement as touching the very epicenter of human dignity.[124] As such, it is the kind of "status" entitlement that Professor Reich urged should be protected against future removal.[125] Reich wrote that "[s]tatus [entitlements] must therefore be surrounded with the kind of safeguards once reserved for personality."[126] He further described these as including entitlements that affect individual "well-being and dignity in a society where each man cannot be wholly the master of his own destiny."[127] According to this description, *Obergefell* could not have more completely framed a same-sex couple's right to a marriage license as a kind of "status" right,[128] which it might well be politically difficult to undo.

At the very same time, however, Reich highlighted that citizens always remain at risk when government becomes the source of important entitlements, because government can later extinguish the same.[129] This is most certainly the case respecting same-sex marriage, given not only the slim majority by which it cleared the Court (5-4),[130] but also the very politicized way in which Supreme Court Justices are now chosen and

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[121] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (describing the state's ability to intrude on the parent-child relationship as *parens patriae* in limited circumstances).

[122] Gates, *supra* note 67, at F2.

[123] *See* Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf ("Same-sex couples who consider themselves to be spouses are more than twice as likely to be raising biological, step, or adopted children when compared to same-sex couples who say that they are unmarried partners (31% versus 14%, respectively).").

[124] *See Obergefell*, 135 S. Ct. at 2601–02 (stating that marriage offers dignity to couples and is central to the social order).

[125] Reich, *supra* note 4, at 785.

[126] *Id*.

[127] *Id*. at 786.

[128] *Obergefell*, 135 S. Ct. at 2601.

[129] Reich, *supra* note 4, at 740.

[130] *Obergefell*, 135 S. Ct. at 2591.

confirmed.[131] This entitlement is only one vote away from being overturned.[132]

III. THE IMPLICATIONS FOR MARRIAGE WHEN MARRIAGE IS "NEW PROPERTY"

As described at length above, Justice Kennedy's *Obergefell* opinion posits marriage as less a pre-governmental reality and more a matter of state largess—a governmental guarantee of security and stability, and even happiness and freedom at the material, emotional and spiritual levels. In short, Kennedy makes marriage the kind of "new property" considered by Professors Reich and Glendon.[133] What are some of the consequences of such a development upon marriage? There are at least four.

A first consequence might be as follows. When human nature as a "given" exits the stage where marriage is concerned—to be replaced by positive law only—childbearing goes with it. Thus, *Obergefell* consolidates and "codifies" all that went before it in the same-sex marriage debate insofar as children were concerned: marriage is, by Supreme Court determination, simply not intrinsically concerned with children.[134] Justice

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[131] *E.g.*, Steven H. Goldberg, *Putting the Supreme Court Back in Place: Ideology, Yes; Agenda, No*, 17 GEO. J. LEGAL ETHICS 175, 180 (2004) (discussing the rise of Supreme Court appointments conforming to political agendas over the last half of the twentieth century).

[132] *See* Jonathan Topaz & Nick Gass, *Republican Presidential Candidates Condemn Gay-Marriage Ruling*, POLITICO (June 26, 2015), http://www.politico.com/story/2015/06/2016-candidates-react-supreme-court-gay-marriage-ruling-119466 (quoting Republicans Rick Santorum, who noted that the minimum five out of nine justices voted in favor of *Obergefell*, and Rick Perry, who said he would appoint Constitutionally conservative justices ostensibly to overrule *Obergefell*); John Yoo, *Judicial Supremacy Has Its Limits*, NAT'L REV. (July 6, 2015), http://www.nationalreview.com/article/420810/obergefell-judicial-supremacy (explaining that opponents of the Court's ruling in *Obergefell* can alter the ruling by changing the members of the Court to a more conservative bench that will restore the states' power to control family law and marriage).

[133] *See supra* notes 3–6, 124–28 and accompanying text.

[134] Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 945 (Mass. 2003) ("[I]t is the exclusive and permanent commitment of marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." (footnote omitted)); *see also* Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181, 195 (2005) (summarizing the marriage debate: for opponents of gay marriage, procreation (i.e. children) is the foundation of marriage; for advocates of gay marriage, procreation has never been the deciding factor, as exemplified by marriages between sterile couples, elderly couples, and couples who do not desire to have children); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 593 (2005) (noting that the pro-same-sex marriage debaters would be more successful basing their arguments on equality of gays and lesbians than engaging in their opponents' argument that marriage is inherently about children because opponents of gay

Kennedy affirms this outright in *Obergefell*,[135] but the opinion tries to strengthen its "logical" credibility by arguing that the positive laws of the states have not conditioned the right to marry on childbearing.[136] If one does not look to nature to help determine what marriage is, then it is irrelevant that nature has made sexual intercourse between men and women the source of every human life. As noted above, while the Kennedy opinion claims the well-being of children as one of the justifications for establishing a right to same sex marriage,[137] logically, it refers only to children living in same-sex households by the choice of same-sex pairs who decide—separately from the decision about marriage—to pursue parenting via a custody contest with a prior heterosexual partner, adoption, or collaborative reproductive technologies. Within the specific ambit of a "right" to a marriage license, children have no place.

A second consequence of marriage becoming "new property," is the recent focus on marriage as a means of "getting," versus "giving."[138] While there are brief references in *Obergefell* to married couples' desire to take on responsibilities,[139] these are swamped by the opinion's lengthy and emotive treatment of what is acquired with a marriage license.[140] Among the benefits that a state-recognized marriage brings, Kennedy's opinion of course highlights material benefits, as quoted above.[141] It also highlights—more frequently—the emotional.[142] In fact, Justice Kennedy's opinion is so replete with emotional interpretations of marriage that even supporters of same-sex marriage have wondered aloud at its credibility.[143] Justice

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marriage who focus on children are mainly concerned with maintaining tradition, not children's welfare); Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 409–14 (2009) (noting that the argument that procreation and children are not the foundation of marriage which arose in the 1970s–1990s strongly influenced the courts to rule in favor of the companionate view of marriage in recent years).

[135] *Obergefell*, 135 S. Ct. at 2601 ("An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate.").

[136] *Id.* at 2600–01.

[137] *See supra* note 58 and accompanying text.

[138] *See supra* notes 50–59 and accompanying text.

[139] *Obergefell*, 135 S. Ct. at 2594, 2606.

[140] *Supra* notes 50–60 and accompanying text.

[141] *Supra* note 57 and accompanying text.

[142] *Supra* notes 51–56 and accompanying text.

[143] *See* Michael Cobb, *The Supreme Court's Lonely Hearts Club*, N.Y. TIMES (June 30, 2015), http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html ("In granting same-sex couples 'equal dignity in the eyes of the law,' Justice Kennedy throws everyone under the 'just married' limo. Dignity—the state of being worthy of honor or respect—is undeniably appealing. One reading of the majority opinion suggests, however, one isn't dignified unless one can be married."); *supra* note 70 and accompanying text.

Kennedy calls state-recognized marriage a "transcendent" reality,[144] an answer to the "universal fear that a lonely person might call out only to find no one there,"[145] and a "profound" union embodying the "highest ideals of love, fidelity, devotion, sacrifice, and family."[146] He writes that to be denied marriage is to be "condemned to live in loneliness, excluded from one of civilization's oldest institutions."[147]

Third, Justice Kennedy's florid prose is reminiscent of a contemporary and unhealthy trend to portray marriage unrealistically as the culmination and infinite experience of a "soul-mate model."[148] A robust body of research indicates that soul-mate expectations are both unrealistic and not conducive to healthy marriages.[149] On the contrary, marriages that emphasize the need for mutual gift-giving and sacrifice appear most successful.[150] Marriages with a "getting" or even a strong "50/50" egalitarian mindset are less likely to last.[151]

Obviously, avoiding a "marriage as getting" mentality will be especially important in marriages that involve children, given that children not only require decades of unselfish care, but also that they rely on the stability of their parents' union for their own educational flourishing and emotional and financial security.[152] Justice Kennedy's emphasis on what couples get from marriage, however, undermines his argument that marriage will further the basic needs of children.

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144 *Obergefell*, 135 S. Ct. at 2594.

145 *Id.* at 2600.

146 *Id.* at 2608.

147 *Id.*

148 *See id.* ("No union is more profound than marriage . . . ."); W. Bradford Wilcox, *The Evolution of Divorce*, 1 NAT'L AFF. 81, 83 (2009) (stating that the contemporary "soul-mate model" of marriage is based on subjective happiness).

149 Wilcox, *supra* note 148, at 83; *see also* Elizabeth A. Sharp & Lawrence H. Ganong, *Raising Awareness About Marital Expectations: Are Unrealistic Beliefs Changed by Integrative Teaching?*, 49 FAM. REL. 71, 71 (2000) (stating that the soulmate ideal is an extreme romantic belief and higher endorsement of such beliefs is associated with lower satisfaction in marriage); W. Bradford Wilcox & Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate Versus Institutional Models of Marriage*, 39 SOC. SCI. RES. 687, 688 (2010) (arguing that partners in marriages structured on the soulmate ideal rather than more traditional marriages are more likely to feel unfulfilled and see divorce as inevitable and necessary).

150 Jeffrey Dew & W. Bradford Wilcox, *Generosity and the Maintenance of Marital Quality*, 75 J. MARRIAGE & FAM. 1218, 1219–20 (2013), http://generosityresearch.nd.edu/assets/119703/gen_and_marriage_equality.pdf.

151 *See* Alfred DeMaris, *The 20-Year Trajectory of Marital Quality in Enduring Marriages: Does Equity Matter?*, 27 J. SOC. & PERS. RELATIONSHIPS 449, 449 (2010) (stating that "relationships are imbalanced whenever people's rewards are incommensurate with their contributions to the relationship" and that "[s]uch imbalance generates psychological distress, which tends to erode relationship quality.").

152 *See* Monte Neil Stewart, *Marriage Facts*, 31 Harv. J. L. & Pub. Pol'y 313, 352–53 (2008) (noting that "children receive maximum private welfare when they are raised by a married mother and father in a low-conflict marriage").

Finally, *Obergefell* further contributes to destabilizing marriage, according to contemporary experts, by emphasizing its character as an "individual" entitlement the state gives in deference to the lone citizen's rights to a sense of self, assertion of autonomy, realization of sexual desires, and wish for social validation.[153] Immediately, it is possible to see the irony in this situation: the movement for same-sex marriage, which pursued a legal and social blessing for a union of two persons, is won largely in terms of individual rights.[154] On the one hand, such a conclusion was inevitable because of the virtually complete overlap of the movement for same-sex marriage with the cause of gaining acceptance for homosexual persons and their sexual practices.[155] Individual rights were the terms of the "ask" and have become the terms of the "answer."

The individualistic terms of the same-sex marriage right were also inevitable because the cultural and legal understanding of opposite-sexed marriage had decisively moved in that direction for decades. Quoting Henry Maine, Professor Glendon agreed that "[t]he Individual is steadily substituted for the Family as the unit of which civil laws take account."[156] She further noted more recent cases showing that in the United States "famil[y] rights" are "*individual* powers to resist governmental determination."[157] This was certainly the theme of the *Eisenstadt v. Baird* decision in 1972, in which the Court extended to singles the right to use contraception, which was formerly given only to the married.[158] The Court said, "[y]et the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[159]

For both of these reasons, it was nearly inevitable that Justice Kennedy's treatment of marriage for same-sex pairs would highlight

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[153] *See, e.g.*, ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 87–90 (2009) (charting the gradual change since the 1970s from spouses viewing themselves as partners in a companionship marriage to the current trend of individuals seeking self-development and self-fulfillment from marriage); ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 31–35 (2014) (citing a shift in modern social norms partly attributable to a rise in economic affluence which has resulted in marriage being seen as a vehicle for self-gratification rather than traditionally as a means of economic security or a prerequisite to having children).

[154] *See Obergefell*, 135 S. Ct. at 2605–06 (discussing the importance of protecting fundamental rights).

[155] *See id.* at 2604 (associating the denial of same-sex marriage with "disrespect and subordinat[ion]"); Somin, *supra* note 70 (arguing that the denial of same-sex marriage is discriminatory).

[156] GLENDON, *supra* note 5, at 43 (quoting SIR HENRY SUMNER MAINE, ANCIENT LAW 168 (London, John Murray, Albemarle Street, 1870) (1861)).

[157] *Id.* (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 987 (1978)).

[158] 405 U.S. 438, 453–55 (1972).

[159] *Id.* at 453.

individual rights and wants.[160] At the same time, this is not a neutral development, given how marriage is already suffering from the consequences of excessive individualism[161] and given how "iconic" the language of his *Obergefell* opinion will likely become.

CONCLUSION

The Supreme Court's treatment of marriage as a form of "new property" comes at a critical time for marriage in the United States. Older age at first marriage, higher rates of cohabitation, and higher rates of nonmarriage and divorce among less-educated Americans are raising fundamental questions.[162] Many are asking: Are most men and women even naturally inclined toward marriage? Is there anything fundamentally important, for human and social progress, about stable marriage? Will high or even higher numbers of women continue to have children without marriage? How will those children fare? If the children born outside of marriage are suffering, what is the solution? Do we actually care about children's rights and interests, or far more about adults? If we care about children, is the solution more marriage or more governmental transfers, or both? Is stable marriage for the poor even a reasonable possibility without a significant and very difficult-to-obtain closing of the current and scandalous gap between the well-off and the poor?

As mentioned above, Americans are increasingly inclined to understand marriage as an individual accomplishment, a "capstone" to economic, career, and other personal achievements. It appears that the consequences of such a view include less marriage and more marital instability, particularly for the least privileged. With *Obergefell*, the Supreme Court has planted its flag in the territory where marriage is largely about "getting" and "achieving."

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[160] *See supra* notes 51–57 and accompanying text.

[161] *See supra* notes 153–56 and accompanying text.

[162] *See generally* CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA, 1960–2010, at 155–57, 160–61, 163–66 (2012) (providing data on changing marriage trends among lower- and middle-income demographics and discussing the ramifications on United States communities and families).