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

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Marriage and Family as the New Property: *Obergefell, Marriage and the Hand of the State*

By Helen M. Alvare
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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 characterized marriage as a governmental entitlement of enormous psychic and material importance. It declared that an individual’s dignity, liberty, social status and even personhood was closely bound to the receipt of a state license recognizing as “marriage” an emotional and sexual bond with another person.

So strong is *Obergefell*’s language and import respecting governmental power to grant or withhold marriage, that the majority’s opinion immediately brings to mind a variation on the important questions raised in two classic texts: Professor Charles Reich’s 1964 *The New Property*, and Professor Mary Ann Glendon’s 1981 *The New Family and the New Property*. The question is: 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?

Justice Kennedy’s opinion for a five-justice majority in *Obergefell* suggests a freshly important variation on the question: what is the significance of the Court’s stress upon a state granted marriage license – a form of “new property” -- 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) and for the future of 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.

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1 The author is grateful to the Summer Research Grant Program of the George Mason University School of Law, and for the research assistance of Lucy Meckley.
3 135 S. Ct. at 2594.
4 135 S. Ct. at 2593.
5 135 S. Ct at 2613.
6 135 S. Ct. at 2602.
7 73 Yale L. J. 733 (1964).
Some may observe immediately that marriage has always been a “governmental entitlement” because the government and no other source has provided marriage licenses; thus Obergefell marks no great change. 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. It also overlooks the way in which Justice Kennedy’s Obergefell opinion both explicitly excises nature from marriage, and is peppered with language describing what a marriage license “does” and “gives” to citizens. 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 of vulnerable human life. It rather frames marriage as a gateway, opened by the state, to a plethora of economic and emotional benefits.

The implications of shifting the understanding of marriage toward a governmental entitlement are undoubtedly large. They will unfold over time. This essay 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. I will take up the subject as follows:

Part I will contrast understandings of marriage in U.S. law during the periods before and after the recent movement for same-sex marriage, capped by Obergefell. It will show 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 will propose the significance for citizen’s freedom of adding “marriage” to the list of entitlements the government offers to some.

Part III will consider the significance for marriage and family life of these goods being folded into the category of “new property”.

The Conclusion will offer 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, especially among the poor and lower-middle-income.

**PART 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 religions of the founders. There did not exist statutory family “codes” with elaborately descriptive provisions concerning a colony’s or a state’s understanding of marriage; nor do such codes exist today. Marriage was rather assumed by all to be the (presumptively) lifelong union of one man and one woman, the guarantor of the continuity of society
through the birth and rearing of children, and a basis for a well-ordered society. So universally accepted was this understanding of marriage, that lawmakers, religious leaders, and other prominent intellectuals sometimes debated about the degree to which citizens should be left entirely free to contract marriages between themselves. Affection for individual freedom of contract, combined with growing affection for the “companionate” (versus patriarchal or other hierarchical) model of the family, also contributed to claims that a man and a woman should be permitted to enter marriage without fulfilling traditional requirements of advance public notice, or witnesses, or solemnization by a religious or legal figure.

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. 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 holding themselves out as a married couple.

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’ unions. Consequently, most colonies, in addition to their accepting common law marriages, required either licenses issued by magistrates, or more likely, a five step process involving: espousal, publication of banns, execution of a contract at church, celebration, and sexual consummation. Eventually, over the course of the 19th century, almost every state adopted a marriage license law, while some also continued to recognize “common law marriages” based upon the couple’s explicit consent, plus evidence of marital life.

Over the last 200 years and more, a remarkably few preconditions have been attached to the receipt of a marriage license across the United States. Those created reflected the social interest in the couple’s eligibility for marriage (e.g. the prohibition on bigamy; opposite-sexes), and marital stability (e.g. age). Many states have waiting periods between the receipt of the license and the timing of the

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10 Michael Grossberg, supra note __, pp. 64-102.
11 Nancy F. Cott, supra note __ at 39.
12 Michael Grossberg, supra note __ at 65.
13 Nancy F. Cott, supra note __ at 28.
14 Grossberg, at 65 & 67-68. See also Nancy F. Cott, supra note __ at 31.
15 Grossberg, at 93.
ceremony in order to allow the couple to reflect upon their marital intentions. Clerks exert virtually no oversight over the couple. Often in fact, only one of the parties need appear and provide information including names, social security numbers and statements about marital status, along with a statement about whether or not the parties are related by any degree of blood or marriage. The license is issued on the same day the application is taken, allowing the marriage to take place immediately, or within a few days.

It can be said generally about these processes that their emphasis was upon governmental recognition of facts and circumstances in the hands of nature and the couple. It was nature that made two sexes, drew them toward one another with the possibility 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 live and flourish. In the words of marriage historian Nancy Cott, reflecting upon the leading 19th century U.S. family law treatise (by Joel Prentiss Bishop): “Bishop endowed the institution with a more inspired genealogy by adding that ‘its source is in 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.”

A constant trait of U.S. marriage recognition law then, from its earliest period to recently, was that the associated societal or state “processes” constituted a minimal aspect of marriage as compared with the naturally given circumstances (opposite-sex, age, single, mutual choice) of the couple seeking marriage.

The Supreme Court acknowledged this reality most specifically in its decisions in Loving v. Virginia overturning an antimiscegenation law – and Zablocki v. Redhail - striking down a state’s child support payment precondition to marriage. Because the couples involved were opposite-sexed, of suitable age, and not previously married or related, their natural rights to marriage were apparent to the Court. 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

17 See e.g. the process for obtaining a marriage license in Maryland at Circuit Court, Queen Anne’s County, MD, Marriage Licenses, at http://www.courts.state.md.us/clerks/queenannes/marriage.html.
18 Nancy F. Cott, supra note __ at 46-47, citing Joel Prentiss Bishop, Commentaries on the Law of Marriage and Divorce (1864), 2.
19 388 U.S. 1 (1967).
“vital personal rights essential to the orderly pursuit of happiness by free men.”\textsuperscript{21} The Zablocki Court referred to similar natural realities when it called marriage of “fundamental importance”\textsuperscript{22} to individuals, and referred three times immediately thereafter to its procreative nature.\textsuperscript{23}

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. This is not altered by the Kennedy opinion’s repeating of what appears to be a list of plaintiffs’ “qualifications” for marriage: their mutual romantic emotions, and their desires for sexual intimacy and social recognition of their commitment. Justice Kennedy is not seriously positing that such matters are legal preconditions for marriage. In fact, a later portion of his opinion explicit acknowledges that opposite-sex couples have long been validly marrying for “many personal, romantic, and practical reasons.”\textsuperscript{24} Nor have any state or federal courts pre- or post-Obergefell seriously characterized this set of dispositions and feelings (romantic emotions, and desires for sexual intimacy and social recognition) as preconditions to the receipt a marriage license. It is more likely that Justice Kennedy repeated these elements of same-sex couples’ relationships to demonstrate a similarity with opposite-sex pairs’ marital dispositions.

\textit{Obergefell} emphasized the “state-given” nature of marriage in a variety of ways. First, the Kennedy opinion frequently, dramatically and in highly emotional language described what the majority believed that a marriage license would give the same-sex couple. 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 opined, however, that state sanctioned marriage would provide same-sex persons the ability to “define and express their identity”,\textsuperscript{25} to experience “nobility and dignity”, “unique fulfillment”,\textsuperscript{26} a “union unlike any other in its importance to the committed individuals,”\textsuperscript{27} and one of “life’s momentous acts of self-definition.”\textsuperscript{28} It would allow the same-sex couple to “find[] freedoms” including “expression, intimacy, and spirituality.”\textsuperscript{29}

The \textit{Obergefell} majority opinion not only regularly highlighted the claimed psychic benefits of state-recognized marriage, but also emphasizes its material benefits. Wrote the Court:

\textsuperscript{21} \textit{Loving} at 12, citations omitted.
\textsuperscript{22} 434 U.S. at 384.
\textsuperscript{23} Ibid.
\textsuperscript{24} \textit{Obergefell} at 2607.
\textsuperscript{25} 2593.
\textsuperscript{26} 2594.
\textsuperscript{27} 2599.
\textsuperscript{28} 2599.
\textsuperscript{29} 2599.
Throughout 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. (citation omitted). Valid marriage under state law is also a significant status for over a thousand provisions of federal law. (citation omitted).30

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.’ (citing Windsor). Marriage also affords the permanency and stability important to children’s best interests.... 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.31

No matter whether or not evidence could be found now or in the future to demonstrate Justice Kennedy’s (unsourced) 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.

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.

Prior to the recent campaign by interest groups asserting that marriage rights were the sine qua non of LGBT equality, it was axiomatic that states took a special interest in marriage – in the vowed sexual union between the man and the woman – and not in other twosomes, because of the state’s interest in the continuation of human society (children) and because married couples both

30 2601.
31 2600.
procreated children and possessed the more stable setting best suited to children’s -- and therefore society’s – needs. In an unbroken string of Supreme Court decisions from the early nineteenth to the late twentieth century (pre-Windsor), the Court had repeatedly recognized with approval, states’ interests in the procreative features of marriage: childbirth and childrearing by the adults who conceived them, and the contribution of these to a stable democratic society.32 Over the past several decades’ struggle over same-sex marriage, no evidence has arisen that the union of the man and the woman is not still uniquely deserving of state attention and support, for these purposes. Justice Kennedy’s Obergefell opinion, however, devotes just one slim paragraph to the proposition that children are not 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.”33 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 do have children.34 Furthermore, premarital investigations regarding couples’ procreativity would run up against barriers of privacy, insufficient information, and changes of mind. Procreation simply is and has always been de facto closely associated in with the type of relationship that men and women have when they marry.

For same-sex couples, on the other hand, a small minority 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. The vast majority of same sex couples with children in their household naturally procreated those children with a partner of the opposite sex in a prior marriage or other relationship.35 In short, there is a natural and socially important difference between same- and opposite-sex intimate unions. Justice Kennedy’s refusal to confront this, for purposes of fashioning a new marriage entitlement for same-sex pairs, 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

33 2601.
35 Garry J. Gates, Family Focus on...LGBT Families: Family formation and raising children among same-sex couples, Nation Council on Family Relations Report, Issue FF51, 2011; 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 (2012).
connection to the democratically enacted law – the Constitution – it claimed to interpret. Justice Kennedy's lack of respect for legal precedent and his lack of seriousness about the Constitution add to the sense that he is simply forcing states to grant a governmental benefit, versus instructing them to respond to a natural human right before which the Constitution, legitimately, must bow.

Even defenders of same-sex marriage lament Justice Kennedy's nonlegal, unprincipled, and sloppy mode of "finding" a new Due Process right to same-sex marriage.36 The Chief Justice's dissent in Obergefell captured the situation most accurately: "The majority's decision is an act of will, not legal judgment"37; it "had nothing to do with" the Constitution.38 It seems impossible to characterize Justice Kennedy's method otherwise.

After first recognizing that there was relevant precedent (Washington v. Glucksberg39) which "insists that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices"40 Kennedy claims without any supporting rationale that this test is inapplicable to the subject of marriage.41 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. To wit, Kennedy writes that constitutional rights do not "come ... 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."42 And what is the source of this "better informed understanding"? Kennedy writes:

- "the 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";

- "Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples";

36 See 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], at 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").
37 2611.
38 2626.
40 2602.
41 Ibid.
42 2602 (emphasis supplied).
-“it would disparage their choices and diminish their personhood to deny them this right.” 43

It is pointless to attempt to analyze legally such vague, tautological, emotive and conclusory language. It’s meanings are infinitely malleable and in the eye of the beholder. None of the four other Justices in the majority wrote concurrences to strengthen or interpret it. It unavoidably leaves the reader with the sense that its judicial authors are willing to legislate to get their way.

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, five Justices feel they have a “better understanding” of marriage than any given state legislature, and have the legal power to force every state to act accordingly. This move, in addition to Obergefell’s divorcing marriage from its natural foundations, and emphasizing what a marriage license “gives” its recipients, 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.

**Part 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 there is a vastly increased sense that marriage is more of a privilege or entitlement dispensed by the state. What are some of the consequence 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 formerly nearly universally understood as prior to government.

There are several circumstances which 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. 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.”44 Same-sex marriage appears to have traveled far to become a “norm,” among at least half the

43 2602.
44 Glendon, The New Family and the New Property, supra note __ at 120.
U.S. population, in very short order. It’s trajectory was marked with the same language now deployed in a Supreme Court opinion establishing marriage law in the 50 states – language indicating that dissenters from the new norm aim to “demean” and “humiliate” LGBT people, given that same sex marriage is inextricably related to LGBT persons’ “dignity” and “personhood.” Precisely because the law today has become what Glendon suggests – a shorthand reference for moral norms – and because same-sex marriage is not only the law, but clothed quite explicitly by Obergefell with normative language, it portends difficulties for citizens even with well-crafted reasoned and religious objections against same-sex marriage.

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. These laws regularly forbid discrimination on the basis of sex, or sexual orientation or marital status. When same-sex marriage is legalized, courts are more likely to entertain lawsuits claiming one or more of these forbidden grounds of discrimination. These lawsuits would be instituted by same-sex couples against individuals and businesses which desire to avoid cooperating with celebrating a same-sex marriage. On the same legal ground, same-sex married employees will sue religious institutions for whom opposite-sexed marriage constitutes part of the very fabric of their entire theology.

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 who, 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. Multi-million dollar corporations, using emotional language about same-sex marriage (and about objectors to it) --

46 Obergefell at 2594.
47 Obergefell at 2594, and 2602.
48 See e.g. The Becket Fund, Odgaard v. Iowa, at http://www.becketfund.org/odgaard/.
language now enshrined as law in Obergefell -- threatened state lawmakers with drastic economic and employment losses if they passed religious freedom protections in connection with same-sex marriage. Individual citizens are also pressured by their private and public employers for dissent from legalized same-sex marriage, on the grounds that their behavior is personally harmful to LGBT people, in the same way Obergefell now asserts.

Obergefell also grants states an enormous set of powers over the lives of children. Historically and still, family law has linked marriage with children. It was naturally linked to children de facto, when marriage was universally understood as an opposite-sex institution due to opposite-sex partners’ powers of procreation. Post-Obergefell, it seems that it is now linked to children de jure. While Justice Kennedy’s opinion specifically disclaimed that procreation is of any special interest to states in the context of their marriage laws, he simultaneously claimed that the Court had often “describe[d] the varied rights 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.” Of course, the Court had previously employed this formula because it assumed that marriage was opposite-sexed. But Justice Kennedy seems to be repeating this formula in Obergefell to suggest that a right to a state-recognized marriage also includes a right to children. This would obviously mean for same-sex couples a right to parent children conceived in prior heterosexual relationships, or by adoption, or by collaborative reproduction using the eggs, sperm and/or wombs of others. This involves, of course, more legal apparatus 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. In other words, the entitlement to one government benefit – recognized marriage – opens the door to more government power via a need for government action to make determine parentage of children not genetically related to one or both members of the same-sex couple. Professor Reich had already observed this dynamic 50 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.”

The further difficulty with states’ new powers respecting children of course, concerns the potential clash with children’s rights. It is a big deal for the state to determine legally one’s “heritage” and one’s descendants. In the words of one now-grown child reared in a same-sex partner home: parentage determinations settle

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52 2600 (citations omitted).

53 Charles Reich, supra note __ at 746.
not just with whom the child must live, but also whom the child is presumably to love, to obey, even to mourn.\textsuperscript{54} Such determinations regularly separate the child from his or her parents, entire ancestry and all living kin.\textsuperscript{55} Although it merits a separate paper altogether, it should at least be mentioned here that there also are outstanding questions about children’s right to know and be known by their biological mother and father, raised even by one of the Justices who joined in the \textit{Obergefell} majority.\textsuperscript{56} There are also myriad unanswered sociological and psychological questions about how children will fare when reared in same-sex partner homes.\textsuperscript{57}

In short a same-sex marriage entitlement gives the state enormous additional authority over additional citizens – all the children who will be reared in same-sex homes. Of course the state has this power respecting some opposite-sex marriages presently, but far less often. There are indeed divorces, adoptions and collaboratively reproduced children in such homes, but the number of these are swamped by the number of children whose parentage is not determined by the state, but rather by nature, pre-governmentally – the mother by genetic connection and gestation, and the father by genetic connection.

There are two perspectives on whether or not \textit{Obergefell} represents the kind of new entitlement that will persist – and thus continue to impact citizens’ freedom as above described – or not. On the one hand, Justice Kennedy’s opinion characterizes this entitlement as touching the very epicenter of human dignity. As such it is the kind of “status” entitlement that Professor Reich urged should be protected against future removal. Reich wrote that “Status [entitlements] must therefore be surrounded with the kind of safeguards once reserved for personality.”\textsuperscript{58} He further described these as including entitlements which affect individual “well-being and dignity in a society where each man cannot be wholly the master of his own destiny.”\textsuperscript{59} According to this description, \textit{Obergefell} could not

\begin{itemize}
\item \textsuperscript{54} Robert Oscar Lopez, \textit{____________}, in Robert Oscar Lopez and Rivka Edelman, eds, \textit{Jeptha’s Daughters: Innocent casualties in the war for family “equality” \textit{________} (2015).}
\item \textsuperscript{55} Robert Oscar Lopez, Jeptha’s Daughters supra note \textit{______}, at \textit{__}.
\item \textsuperscript{56} See e.g. H. H. Rotax, Regarding the child’s right to information about his/her natural parents and regarding the parents’ right to information about the actual maternity or paternity, 56 Prax Kinderspsychol, Kinderspychia 148 (2007), at \url{http://www.ncbi.nlm.nih.gov/pubmed/17410931}; Mhairi Cowden, “No Harm, No Foul”: A Child’s Right to Know Their Genetic Parents, 26 Int’l J. L. Pol. & Fam. 102 (2012), at \url{http://lawfam.oxfordjournals.org/content/26/1/102.short}; Adoptive Couple v. Baby Girl, 133 S. Ct 2552, 2574, 2582 (2013) (“These protections are consonant with the principle, recognized in our cases, that the biological bond between parent and child is meaningful”; “And children have a reciprocal interest in knowing their biological parents.”) (Sotomayor, J. dissenting).
\item \textsuperscript{57} Loren Marks, Same-sex parenting and children’s outcomes: A closer examination of the American psychological association’s ["APA"] brief on lesbian and gay parenting, 41 Social Sci. Res. 735 (2012), at \url{http://www.sciencedirect.com/science/article/pii/S0049089X12000580} (demonstrating that the APA overlooked research which disproved its sweeping conclusion, and drew its conclusion from articles which did not claim to find, or which could not find, the conclusion the APA drew from them).
\item \textsuperscript{58} The New Property, at 785.
\item \textsuperscript{59} Id. at 785-86.
\end{itemize}
have more completely framed the right to a marriage license for a same-sex couple, as a kind of “status” right which it might well be politically difficult to undo.

At the very same time, however, Reich highlight that citizens always remain at risk, when government becomes the source of important entitlements, because government can later extinguish the same. This is most certainly the case respecting same-sex marriage given not only the slim majority by which it cleared the Court (5-4) and its absence of constitutional reasoning, but also the very politicized way in which Supreme Court Justices are now chosen and confirmed. This entitlement is only one vote away from being overturned.

Part 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. 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. Justice Kennedy affirms this outright in Obergefell. – but the opinion tries to strengthen it’s “logical” and positive law credibility further on this point. If one does not look to nature to help determine what marriage is, then it is irrelevant that nature has made the sexual intercourse of the man and the woman the source of every human life. As noted above, while the Kennedy opinion claimed that the well-being of children was part of the foundation of same sex pairs’ entitlement to a state marriage license, he was referring only to children living in same-sex households by the choice and initiative of the same-sex pair who decided – separately from the decision about marriage – to pursue parenting via a custody contest with a prior heterosexual partner, or via adoption or collaborative reproductive technologies. Within the specific ambit of “right” to a marriage-license itself, children have no place.

A second consequence of marriage becoming “new property,” is the newly strong focus on marriage as a means of “getting,” versus “giving.” While there are

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60 Id. at 745.
61 See supra __.
62 See supra __.
brief references in Obergefell about married couples’ desire to take on responsibilities, these are swamped by the opinion’s lengthy and emotive treatment of what is gotten with a marriage license. Among the benefits a state recognized marriage brings, Kennedy’s opinion of course highlights material benefits, as quoted above. It also highlights – more frequently – the psychic. In fact, Justice Kennedy’s opinion was so replete with emotional interpretations of marriage, that even supporters of same-sex marriage wondered aloud at its credibility. Justice Kennedy called state-recognized marriage a “transcendent” reality an answer to the “universal fear that a lonely person might call out only to find no one there, a “profound” union embodying the “highest ideals of love, fidelity, devotion, sacrifice and family.” He wrote that to be denied marriage is to be “condemned to live in loneliness, excluded from one of civilization’s oldest institutions.”

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 “soulmate relationship.” A robust body of research indicates that soulmate expectations are both unrealistic and not conducive to healthy marriages. On the contrary, marriages which emphasize the need for mutual gift-giving and sacrifice appear most successful. It even appears that marriages with a “getting” or even a strong “50/50” egalitarian mindset, are less likely to last.

Obviously avoiding a “marriage as getting” mentality, will be especially important in marriages which involve children, given not only that children require decades of unselfish care, but that they rely on the stability of their parents’ union for their own educational flourishing, and emotional and financial security. Justice Kennedy’s melodramatic portrayal of what couples get from marriage, however, moves in precisely the opposite direction.

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63 Obergefell at 2594 & 2606.
64 See supra ___.
65 See supra ___.
67 2590.
68 2600.
69 2608.
70 2608.
Finally, Obergefell further contributes to destabilizing marriage according to contemporary experts by emphasizing its character as a state-given “individual” entitlement, in deference to the lone citizen’s autonomy, realization of sexual desires and wish for social validation.73 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. 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. Individual rights was the terms of the “ask” and became 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. Professor Glendon agreed respecting marriage 30 years ago, with Henry Maine’s proposition that “The Individual is steadily substituted for the family as the unit of which civil laws take account.”74 She further noted more recent cases showing that in the U.S. “family” rights are “individual powers to resist governmental determination”.75 This was certainly the theme of the Eisenstadt v. Baird 76 decision in 1972 in which the Court extended to singles the right to use contraception formerly given only to the married saying: “Yet 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.”77

For both of these reasons, it was nearly inevitable that Justice Kennedy’s treatment of marriage for same-sex pairs would highlight individual rights and wants. At the same time, this is not a neutral development, given how marriage is already suffering from the consequences of excessive individualism, and given how likely “iconic” the language of his Obergefell opinion will 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, high rates of cohabitation, and higher rates of nonmarriage and divorce among less

73 See e.g Andrew J. Cherlin, The Marriage Go-Round: The State of Marriage and Family in America Today (2009); Isabel V. Sawhill, Generation Unbound: Drifting into Sex and Parenthood without Marriage (2014).
75 Glendon at 44.
77 Eisenstadt at 453.
educated Americans, are raising fundamental questions. 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 poorer 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 supra, 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”.

79 See supra at ___.
80 Andrew Cherlin, supra note ___ at 139.