AGAINST MARRIAGE ESSENTIALISM: A LEGAL GROUNDING FOR *OBERGEFELL* AND SAME-SEX MARRIAGE

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When the Supreme Court found a constitutional right to same-sex marriage in Obergefell v. Hodges*, many thought the Court was exercising its political will rather than its legal judgment. Noting the absence of same-sex marriage in early American history and assuming that marriage is a relatively static and timeless social institution (a view that the author calls "marriage essentialism"), many concluded that Obergefell could not have been grounded in legal precedent.*

In this Article, however, the author argues that marriage was itself evolving in numerous ways in the centuries and decades prior to Obergefell*. Marriage was evolving from a hierarchically organized relationship of status, which gave certain religious and communal institutions a great amount of* de facto *control over patterns of marital relation and sexual and reproductive liberty, to a more autonomously governed private relationship, grounded primarily in respect for personal choice and concern for the emotional well-being of partners in intimate relationships. In addition, whereas the early traditions of marriage in America supported two illiberal and inegalitarian caste systems, relating to sex and race, marriage had already become much more egalitarian, libertarian, and diverse in function. Hence, the real legal question in* Obergefell *was not whether—given a fixed but mistaken conception of marriage as having an essential core — there was any direct legal precedent for same-sex marriage in the United States. The real legal question was whether—given the recent developments in the social institution of marriage in America prior to* Obergefell*—it violated the Equal Protection Clause to give Americans unequal rights to participate in this new and more libertarian form of marriage, based solely on their sexual orientations and resulting romantic choices. The Supreme Court answered this question in the affirmative,*

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but the false premise of marriage essentialism has prevented many from understanding the correct legal grounding for this case.

To support these claims, the author draws on the views of four of the symposium contributors, and offers a final, synthesized viewpoint on the role that contemporary marriage should play in American society. Given recent developments in marriage, the author suggests that attempts to stifle same-sex marriage can undermine personal religious liberty. The author also considers how the move from status-based to contract-based marriage may affect the promotion of child welfare, and how the law should respond.

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I. INTRODUCTION

The question posed for this part of the symposium is whether marriage should remain the cornerstone of family law. This is a normative question: it contains a "should" and does not just call for a description of the current legal and social states of affairs. The four ensuing contributions approach this normative question from different angles. A surprising consensus, nevertheless, emerges with respect to a separate, purely descriptive fact: *marriage evolves*. Marriage evolves with human society and, in part, to support different forms and visions of human society. No serious study of the proper role of marriage in contemporary society can proceed without some recognition of this fact.[1]

To say that marriage evolves is to reject another currently popular view, which I call "marriage essentialism." Marriage essentialism holds that marriage has always had certain timeless and universal features, which define its core or essence.[2] This is a purely descriptive view about a

1. For a good example of how to study marriage's evolution, see Stephanie Coontz, *The World Historical Transformation of Marriage*, 66 J. OF MARRIAGE & FAM. 974 (2004).

2. Lynn Wardle argues, for example, that "marriage is not merely a positivist creation, but a fundamental human relationship deeply imbedded [sic] and essentially defined in human nature and history." Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1371 (2007).

social institution. Although descriptive views cannot ground normative views on their own,[3] some believe that marriage essentialism establishes that marriage must also remain true to its supposed core, regardless of how marriage functions within a larger set of evolving social institutions.[4]

Though marriage essentialism may be false, its assumption can affect both constitutional reasoning and popular perceptions of legal change. When, for example, the Supreme Court recently found a constitutional right to same-sex marriage in *Obergefell v. Hodges*[5], Chief Justice Roberts charged the majority with "order[ing] the transformation of a social institution that has formed the basis of human society for millennia—for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs."[6] Neither the plaintiff nor the majority seriously disputed that claim[7]—choosing instead to argue that the ruling merely allows more people to participate in a millennia-old institution.[8] Still, for many so-called "marriage traditionalists," who believe in marriage essentialism, this way of framing the decision made it appear legally unprecedented and rooted more in policy preference than law.[9] Indeed, as Laurence Tribe has noted, "[e]ven among those who emphatically agree" with the decision, "many are quick to claim that [the majority] opinion was heavy on rhetoric and light on legal reasoning—a political masterstroke but a doctrinal dud."[10]

3. For classic discussion, see DAVID HUME, A TREATISE OF HUMAN NATURE 521 (Ernest C. Mossner ed., Penguin Books 1984) (1739) (observing that arguments of this form conclude by proposing a type of relation that cannot be logically derived from any combination of purely descriptive premises); *see also* W. K. Frankena, *The Naturalistic Fallacy*, 48 MIND 464, 467 (1939) ("Hume's point is that ethical conclusions cannot be drawn validly from premises which are non-ethical."). Of course, this does not mean that descriptive facts cannot warrant normative conclusions if further (normative) premises are granted.

4. For a succinct description of these arguments, see William N. Eskridge, Jr., *A History of Same-Sex Marriage,* 78 VA. L. REV. 1419 (1993). Eskridge notes that some "[o]pponents of same-sex marriage argue that the concept is oxymoronic. Marriage, they say, must involve a man and woman because . . . that is the definitional essence of marriage . . . ." *Id.* at 1421.

5. 135 S. Ct. 2584 (2015).

6. *Id.* at 2612 (Roberts, C.J., dissenting).

7. After noting the "centrality of marriage to the human condition," the majority suggests that "the institution has existed for millennia and across civilizations," and has generated "untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms." *Id.* at 2594. The majority then goes on to say that "[i]t is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex." *Id.* Later, the majority notes that "[t]he petitioners acknowledge this history . . . ." *Id.* At the same time, however, the majority decision does spend *some* time discussing certain other historical transformations to marriage. *See id.* at 2595 (explaining that the "history of marriage is one of both continuity and change," and noting that the "institution—even as confined to opposite-sex relations—has evolved over time.").

8. *See id.* at 2612.

9. For example, Roberts argues that "[a]lthough the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage." *Id.* at 2611 (Roberts, C.J., dissenting). Later, he implies that the majority has "confuse[d its] own preferences with the requirements of the law." *Id.* at 2612.

10. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 16 (2015). Tribe thus suggests that "[i]n certain circles, it has become a sign of sophistication to speak of Justice Anthony M. Kennedy's seminal gay rights decisions, *Obergefell v. Hodges* now foremost among them, with a knowing condescension." *Id. But see* Kenji Yoshino, Comment, *A New Birth of Freedom?:*

The combined contributions to this symposium nevertheless paint a more complex picture of domestic marriage, which—I believe—can place *Obergefell* in a different light. Although written by scholars with different normative views on marriage, the contributions show that marriage was already evolving within the United States prior to *Obergefell*. Marriage continues to evolve domestically post-*Obergefell*. In addition, people on both sides of the debate give reasons for the institution to evolve and thereby seek to participate in its evolution. These facts undermine the claim that marriage has always been a static social institution, even just within the United States.

More specifically, from the eighteenth through the early twenty-first centuries, domestic marriage evolved from a communally and hierarchically organized relationship of status, which gave certain religious and communal institutions great *de facto* control over patterns of marital relation and sexual and reproductive liberty, to a more autonomous form of private relationship, grounded primarily in equal respect for the personal choices and emotional flourishing of both partners.[11] These changes track one of Henry Sumner Maine's central observations in his famous studies of *Ancient Law*.[12] In this book, Maine suggests that the family was once the primary legal unit in many ancient legal systems, but that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[13] He explains this observation as follows: "Starting, as from one terminus of history, from a condition of society in which all the relations of persons are summed up in the relations of Family, we seem to have steadily moved toward a phase of social order in which all these relations arise from the free agreement of individuals."[14]

Consistent with Maine's world historical observation, domestic marriage was, in fact, still evolving away from a status-based institution in the centuries prior to *Obergefell*.[15] Domestic marriage was evolving toward a more pluralistic, egalitarian and contract-based institution, which is better adapted to promoting the deep personal relationships that can help attach people to life.[16] These facts allow for a different understanding of both the novelty and legal grounding of *Obergefell*. On the view I will be

Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015) (arguing that *Obergefell* had a deep history of precedential development).

11. *See infra* Part II.

12. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS (New York, Charles Scribner & Co. 1871).

13. *Id.* at 165.

14. *Id.* at 163.

15. *See infra* Part II.

16. Bernard Williams famously discusses the importance of deep personal attachments in grounding many peoples' lives. *See* BERNARD WILLIAMS, *Persons, Character and Morality*, *in* MORAL LUCK 197, 210–15 (James Rachels ed., 1981). When canvassing the empirical literature on happiness, Ed Diener similarly notes that "marriage and family satisfaction is one of the most important predictors of [subjective well-being]." Ed Diener, *Subjective Well-Being*, 95 PSYCHOL. BULL. 542, 556 (1984) (citations omitted). However, "the effects for marriage [alone] are positive but not always strong." *Id.* Hence, it does not appear to be marriage per se—but rather marriage *or other close personal relationships* with the right emotional and functional qualities—that promotes well-being.

developing here, a federal constitutional right to same-sex marriage was not the only thing that was virtually unprecedented[17] when *Obergefell* was decided. Equally unprecedented was this more pluralistic, egalitarian and contract-based institution of marriage, which had been evolving for some time throughout the United States, and from which some same-sex couples were still being excluded in some states. When, however, institutions evolve in new ways, they can generate new but perfectly ordinary questions of equal protection. This is part of what happened in the years leading up to *Obergefell*—or so at least I will argue. As domestic marriage evolved in a more egalitarian and contract-based direction and functioned less to channel sexual activity into purely procreative forums, it became increasingly unclear why states could grant people unequal access to this particular *form* of marriage based solely on their sexual orientations and resulting romantic choices.

When compared to older institutions of marriage in early American history, contemporary marriage is much better adapted to promoting the personal liberty, well-being, and equal relations of marital partners. Despite some religious objections to *Obergefell*, I will argue that contemporary marriage is also better adapted to promoting some forms of *personal* religious freedom.[18] But the story about marriage does not end here. To the extent that contemporary marriage is better adapted to promote these particular values, it may be less well adapted to promote the best interests of childrearing.[19] This problem cannot be ignored because some special challenges to child development can arise in circumstances of divorce or related changes in romantic affiliation.[20] These challenges are not going anywhere anytime soon because they are intrinsic to the libertarian form that marriage now takes in the United States. If, however, the laws that govern marriage are no longer well adapted to fostering best childrearing, then current debates over which form of marriage (e.g.,

17. I say virtually because some Courts of Appeals had recently found a federal constitutional right to same-sex marriage, while other states had allowed for same-sex marriage as a matter of legislation. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

18. *See infra* Parts II & III.

19. *See infra* Part V.

20. For example, there is empirical evidence that correlates divorce with decreases in child welfare. *See, e.g.,* Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95 (2001) ("A large body of social science research demonstrates clearly that children whose parents divorce generally fare poorly compared to children who grow up in intact families. Children of divorce suffer economic hardship because their family income declines. Their academic performance tends to be inferior, and they have more adjustment and behavior problems than children whose parents stay together. Many children of divorce are resilient, of course, and recover from the dislocation of divorce. It is clear, however, that divorce represents a significant risk factor that threatens the well-being of children."). At the same time, however, other evidence suggests that "children who are exposed to serious conflict in their parents' marriage are better off when conflict is reduced by divorce." *Id.* at 97. Hence, it is unclear whether it is divorce or the types of marital conflict that often lead to divorce are the real *causal* factors that can undermine children's well-being. Later sections will thus discuss how the law can help mitigate these conflicts at least in relation to some coparenting arrangements. *See infra* Part IV.

same-sex or opposite-sex) is better suited for this purpose[21] may be something of a distraction. What we really need is a separate legal status of parentage, which is specially crafted to promote child welfare and operates regardless of the vicissitudes of contemporary marriage.[22] To compliment the broad historical move from status to contract in the relations between marital partners, we need a partial return to status with respect to parenting.

To support these views, I draw on key points made by four contributors to this symposium. Because the synthesis I offer goes beyond a sum of these parts, I do not claim that any particular contributor would subscribe to the final views proposed. This article should instead be viewed as an attempt to build upon certain key points developed in this Symposium to clarify the changing roles that religion and contemporary marriage should play in American family law going forward. I will be arguing against the view that *Obergefell* was legally unprecedented and against the view that there is an irreconcilable tension between the goals of marriage equality and religious liberty, properly construed.

II. FROM STATUS TO CONTRACT IN DOMESTIC MARRIAGE LAW BEFORE *OBERGEFELL*

Chief Justice Roberts's comments in *Obergefell* suggest that there has been a single, timeless, and universal social institution of marriage, which has formed the basis of all human societies for millennia throughout the world.[23] The combined contributions to this symposium nevertheless paint a more complex picture of marriage—even just within the domestic legal arena.

For example, in the first contribution to follow, Kari Hong observes that quite a few legal changes relevant to marriage were occurring for opposite-sex couples prior to *Obergefell*.[24] These changes were redefining the fundamental legal meaning and function of marriage within American society. The broad evolution was from a social institution that focused on the channeling of individual sex and procreation into certain prescribed forums by religious groups to a social institution that focused more on individuals' free and equal access to choose and define their long-term, committed relationships in publicly recognized ways.[25]

21. For representative contributions to this debate, *see, e,g.*, Timothy F. Murphy, *Same-Sex Marriage: Not a Threat to Marriage or Children*, 42 J. SOC. PHIL., 288 (2011); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children,* 1997 U. ILL. L. REV. 833, (1997).

22. *See infra* Part V.

23. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (Roberts, C.J., dissenting).

24. Kari E. Hong, *Obergefell's Sword: The Liberal State Interest in Marriage*, 2016 U. ILL. L. REV. 1417, 1421 ("Marriage as a means of personal self-definition and shared humanity did not originate in the lesbian and gay community. Rather, the reshaping of marriage's purpose by heterosexual individuals is what permitted marriage equality to be logically and seamlessly extended by *Obergefell*.").

25. *Id.* at 1422–36.

To illustrate, Hong observes that "up until the 1960s, the fifty states marshaled their police powers to confine legal sex to marriage and to ensure that any sex that occurred in a marriage was procreative."[26] Those laws had, however, largely eroded with respect to heterosexual couples long before *Obergefell* was decided.[27] Statutes criminalizing illicit cohabitation (i.e., the cohabitation of non-married couples) were also popular during the 1960s, but these statutes were abolished in all fifty states prior to *Obergefell*.[28] Even within opposite-sex marriages, the domestic laws of many states once criminalized certain forms of non-procreative sexual conduct, like sodomy (which referred also to opposite-sex sodomy).[29] Many states similarly criminalized the production of information or distribution of contraceptives,[30] and numerous states drew much sharper legal distinctions and granted different rights to parental support to children born within and outside of wedlock.[31]

Hong focuses on how early American marital traditions functioned to channel the sexual and reproductive behavior of private citizens. These early traditions also, however, played a well-known role in the subjection of women. Although unmarried women in America had the right to own property and engage in certain occupations on their own, married women lost much of this autonomy under the common law doctrine of coverture.[32] William Blackstone famously explained this traditional doctrine as follows:

> By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing.[33]

As part of the early common law, husbands also acquired the legal right to engage in corporal punishment or "chastisement" for wifely disobedience, so long the punishment did not inflict permanent injury.[34]

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26. *Id.* at 1426.

27. *Id.* at 1435–36

28. *Id.* at 1424

29. *Id.* at 1427. In fact, some states still have antifornication statutes—albeit ones that are not seriously enforced. *See* Robert E. Rains, *The Future of Justice Scalia's Predictions of Family Law Doom*, 29 B.Y.U. J. PUB. L. 353, 386 (2015) ("Anti-fornication criminal statutes will remain for some time on the books in a dwindling number of states, but not really enforced except perhaps in a deal where someone charged with a more serious sexual offense is offered a plea.").

30. *Id.* at 1424–25.

31. *Id.* at 1425–26.

32. *See, e.g.*, Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2127 (1994) ("For centuries the common law of coverture gave husbands rights in their wives' property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or holding property in their own names.").

33. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (1765) (citations omitted).

34. *See, e.g.*, Reva B. Siegel, "*The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) ("The Anglo-American common law originally provided that a husband, as master of his household, could subject his wife to corporal punishment or 'chastisement' so long as he did not inflict permanent injury upon her.").

Given these early common law doctrines, traditional marriage in early America organized families into male-governed legal units—akin in many ways to what Maine described in many ancient legal systems.[35] Married women were incapable of contracting or owning property of their own[36]—a situation that Justice Black later referred to as the "archaic remnant of a primitive caste system."[37] Rejection of the doctrine of coverture, which began in the nineteenth century, was thus a major advance for women's equality: it allowed women greater capabilities to function as autonomous agents in civil society and become less dependent on their husbands and marriage. As Reva Siegel explains, "reform of the old common law coverture rules translated the status relationship of husband/wife into new juridical forms."[38] The abolition of the law of coverture was not completed during the nineteenth century,[39] but during this period, "the legal system began to eschew relations of hierarchy, and to assert the juridical equality of persons formerly related in hierarchical terms."[40] Marriage thus began to evolve slowly from a gender-inflected caste system toward a more egalitarian and contractual relationship between equals.

Of course, the most notorious caste system in early America was the institution of slavery. Traditional laws of marriage played a role in maintaining this caste system and subsequent forms of racial segregation as well. The law did this by criminalizing interracial marriages in forty states between 1800 and 1967—but not thereafter.[41]

If one tries to harmonize these early domestic legal facts, traditional marriage functioned for much of early United States history as a mechanism whereby certain religious and social organizations were able to channel the sexual and procreative activities of American citizens into certain religiously or communally prescribed forms.[42] The institution of

35. *See* HENRY SUMNER MAINE, ANCIENT LAW 164–65 (1871).

36. *See, e.g.*, Siegel, *supra* note 32 at 2127.

37. United States v. Yeazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).

38. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN L. REV. 1111, 1115 (1997).

39. *See, e.g.*, Siegel, *supra* note 34, at 2127.

40. Siegel, *supra* note 38, at 1115–16.

41. *See* Hong, *supra* note 24 at 111.

42. Christianity's rejection of same-sex marriage and attempt to control the sexual and reproductive activity of its members originated not out of aversion to homosexuality per se but rather out of a broader form of asceticism in late antiquity that devalued all forms of sensual pleasure. *See generally* David F. Greenberg & Marcia H. Bystryn, *Christian Intolerance of Homosexuality*, 88 AM. J. SOC. 515 (1982); *see id.* at 524 ("Christian hostility to homosexuality was not directed against that alone, but toward all forms of sexual activity."); *see also id.* at 523 ("Emphasis is placed on curbing anger and controlling the appetites for food and sex. In tones of unrelieved pessimism, the ascetic literature portrays the world as a vale of suffering and disappointed hopes. Secular sources of happiness are described as inevitably transitory. Deliverance was attainable only through renunciation of the world and oneself . . . .").

Some early Christian sects were so strict in this regard that they required self-castration or complete sexual abstinence (even within marriage and for purely reproductive purposes) as a condition of church membership. *Id*. at 525. This is an aspect of Christian traditions relating to marriage that most "marriage traditionalists" ignore but, "[b]y the 4th century [BCE], church councils forbade self-castration . . . and by the late 4th to early 5th centuries, perfectionism, including sexual abstinence as a

marriage also functioned in two deeply inegalitarian and illiberal ways. First, it promoted a number of patriarchal social norms that worked to the social, political, and economic disadvantage of women: "The law gave a husband rights in his wife's person, labor, and property," and "[a] wife was correspondingly expected to submit to her husband and serve him."[43]

Second, the traditional institution of marriage functioned to maintain racial segregation—genetically, economically, and by refusing to endorse the development of certain deep bonds of interracial affiliation. Current genetic evidence suggests that contemporary "African-Americans" have substantial "mixed" heritage.[44] According to one recent source noted by Dr. Henry Louis Gates, Jr., for example, contemporary African Americans appear to have between twenty-two percent and twenty-nine percent "White" genetic ancestry on average.[45] Because early American law simultaneously criminalized interracial marriage and disfavored the inheritance and parental support rights of children born out of wedlock,[46] however, African-Americans have not generally received their proportionate share of the intergenerational wealth transfers from their "White" ancestors. Traditional marital law is thus one unjustifiable contributing cause of contemporary economic inequalities between the so-called races.[47]

Traditional marriage also functioned to slow down the process of racial integration. Elizabeth Anderson has recently compiled a range of social scientific research to show that racial segregation operates as an independent cause of many other unjustifiable and continuing forms of racial inequality.[48] Because of racial inequalities in wealth and business accumulation in America,[49] and because initial job placements typically

requirement for church membership, had been clearly rejected." *Id.* "The policy that emerged was one of accepting sexuality only within marriages." *Id.* This policy helped "reconcile[] the public demand for asceticism and personal purity with the necessities of organizational survival." *Id.* These developments also generated a normative view of marriage as the unique conduit through which sexual and reproductive activity should take place—and only for purely reproductive purposes.

43. *See* Siegel, *supra* note 38 at 1116.

44. I use the terms "African-American" and "mixed" in scare quotes because I do not believe that folk biological concepts of "race" track biologically real facts, for reasons I explain in Robin Kar & John Lindo, *Race and the Law in the Genomic Age: A Problem for Equal Treatment Under the Law*, in THE OXFORD HANDBOOK OF LAW & TECHNOLOGY (forthcoming 2016). I believe that many people still intuitively accept folk biological concepts of race, but that inferences rooted in these beliefs are systematically more prejudicial than probative. *See id* at 24.

45. *See,* Henry Louis Gates, Jr., *Exactly How 'Black' is Black America?* ROOT (Feb. 11, 2013, 12:21 AM), http://www.theroot.com/articles/history/2013/02/how_mixed_are_african_americans.html (presenting genetic evidence on African-Americans from a number of private genetic testing companies, including Ancestry.com, 23andme.com, and FamilyTreeDNA.com, and suggesting that African-Americans who submitted personal DNA for testing to one of these three private sites exhibited, on average, somewhere between 65-75% "sub-Saharan," 22-29% "European", and .6-2% "Native American" genetics).

46. *See* Hong, *supra* note 24, at 1425.

47. For a comprehensive discussion of existing racial inequalities, including economic ones, see DOUGLAS MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM (2007).

48. *See generally* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION (2010).

49. *See id.* ch. 2.

arise from informal social networks that are undermined by segregation,[50] racial segregation "causes blacks to suffer higher rates of poverty and unemployment and undermines blacks' abilities to accumulate financial assets and become entrepreneurs."[51] When these economic inequalities accumulate both geographically and along racial lines, racial groups are left with different tax bases on average.[52] These facts help to "concentrate[] poverty in black neighborhoods and den[y many black communities] public services such as adequate police and fire protection, trash pickup, and decent schools."[53] Differences like these "exacerbate[] social disorders engendered by life in neighborhoods shut off from avenues of opportunity—crime, gang activity, idleness, blight, low school achievement, dropping out, teenage parenthood, absent fathers, and welfare dependency."[54] Segregation also "causes a divergence between black and white English dialects, and interracial miscommunication due to divergence of other social norms."[55]

Although racial segregation causes many of these differences, the resulting differences interact with more universal human cognitive processes to give content to racial stereotypes.[56] For example, segregation helps to maintain perceptions of in-group/out-group status along racial lines. Because humans naturally "attribute positive behaviors of in-group members dispositionally, and negative behaviors situationally, while reversing these attributions to out-group members,"[57] these forces tend to generate racial stigma and implicit racial bias. These problems are only exacerbated when people implicitly or explicitly accept folk biological conceptions of race—or mistaken view that race is a real, heritable property that neatly separates people into biological kinds.[58] Hence, "[s]egregation causes patterns of racial inequality that influence the ways racial groups represent one another."[59] For much of American history, and in many parts of the United States, traditional marriage helped propagate these problems by promoting racial segregation.

To the extent that the traditional institution of marriage formed the basis for early American society, traditional marriage thus promoted a particular type of society. It is a society that gave certain religious and communal institutions a great amount of *de facto* control over the pat-

50. *See id.* ch. 2.
51. *Id.* at 44.
52. *Id.* ch. 2.
53. *Id.* at 44.
54. *Id.*
55. *Id.*
56. *Id.* ("Given that practices of social closure make race highly salient as a social category and identity marker, people will try to make sense of the observed effects of segregation by constructing stereotypes about racial groups. The group inequalities generated by segregation provide much of the content of these stereotypes.").
57. *Id.* at 46.
58. Kar & Lindo, *supra* note 44 (arguing that folk biological concepts of race, which are still more widely held than many acknowledge, prove more prejudicial than probative of any real biological facts about persons).
59. ANDERSON, *supra* note 48, at 44.

terns of reproduction, parentage, filial relationship, and sexual activity of individual Americans. The institution also functioned in part to maintain certain long-standing, but morally indefensible, sex and racial caste hierarchies. This is clearly not the institution of marriage that recent proponents of marriage equality sought to legalize for same-sex couples in *Obergefell*. Although many marriage essentialists assume that absence of legal precedent for same-sex marriage of that kind in early America renders *Obergefell* legally ungrounded,[60] that would be precedent of the *wrong* kind.

But just as many of the early legal facts about marriage in the United States can be harmonized, so too can many of the more recent legal developments prior to *Obergefell*. As Hong argues, these developments reflect a very different conception of marriage, which is more focused on the value of individual consent, autonomy, and respect for the choices of individuals to define the committed romantic relationships that they seek to engage in and are given public approval for.[61] The institution is not yet perfect in these respects,[62] but it is much better.[63]

For example, in the years prior to *Obergefell*, marriage had evolved so that it was no longer tied so closely to the religiously proscribed goal of reproduction—even for heterosexual couples. The law no longer confined sexual activity to the marital relationship, and was more permissive of people assigning private value to intimacy apart from its potential for reproduction. These changes gave couples more autonomy to choose the terms of their intimate relationships. With the laws of coverture and chastisement gone, these terms were *more* subject to equal, ongoing input of both partners. With laws against miscegenation gone in every state, marital law no longer played a role in maintaining racial caste hierarchies in any state.

Parallel developments toward private autonomy occurred in the laws relating to divorce. Whereas early American law often allowed for divorce only on certain legally specified grounds (often limited to infidelity, desertion or criminal abuse), the 1970's witnessed the passage of no-fault divorce statutes in almost every state.[64] Soon thereafter, every state had them.[65] These statutes give marital partners the autonomy to dissolve marriages on any private ground[66]—and hence no longer privilege a single conception of the unique function of marriage. In the years prior to

60. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

61. *See* Hong, *supra* note 24 at 1424.

62. *Id.* at 1419.

63. *Id.*

64. *See, e.g.*, Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1534 (1983) ("During the 1970's, almost every state enacted some form of 'no-fault' divorce, which allowed the dissolution of any successful marriage.").

65. *1985 Survey of American Family Law*, 11 FAM. L. REP. (BNA) 3015 (1985).

66. *See, e.g.*, Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 253 (1995) (suggesting that "[u]nder modern no-fault divorce statutes, marriage itself is freely dissoluble," and arguing that this development enhances private autonomy, given the limits of human cognition in relation to "[c]ertain kinds of contracts [that] govern relationships characterized by an involvement that is personally intensive, broad in scope, and potentially long-lasting").

Obergefell, marriage was thus evolving into something very different from its earlier domestic instantiations. Marriage had already become a much more libertarian, egalitarian and diversified institution.

In explaining what is genuinely new about contemporary marriage in America, the marriage historian Stephanie Coontz explains that:

> [W]hen it comes to any particular practice or variation of marriage, there is really nothing new under the sun. But when we look at the larger picture, it is clear that the social role and mutual relationship of marriage, divorce, and singlehood in the contemporary world is qualitatively different from anything to be found in the past. Almost any separate way of organizing caregiving, childrearing, residential arrangements, sexual interactions, or interpersonal redistribution of resources has been tried by some society at some point in time. But the coexistence in *one* society of so many alternative ways of doing all of these different things—and the comparative legitimacy accorded to many of them—has never been seen before.[67]

These are all changes that predated *Obergefell* and made contemporary *marriage* in America a relatively unprecedented institution.

If, however, this is what the legal institution of marriage was evolving into at the state level even prior to *Obergefell*, then granting the legal right to marry the partner of one's choice to some—but not all—Americans, based solely on their sexual orientations and resulting romantic choices, raised a new kind of equal protection question. Indeed, it is precisely because marriage was evolving in this direction for couples with heterosexual romantic proclivities that the constitutional question in *Obergefell* became live when it did.[68] Once marriage was rooted primarily in individual choice and consent,[69] and no longer functioned to limit sexual activity to procreative functions within communally sanctioned forms of pair-bonding,[70] a number of states began granting all Americans the right to marry the romantic partners of their choice.[71] The question then naturally arose whether it violated the federal Equal Protection Clause to allow Americans unequal access to contemporary forms of American marriage based solely on their sexual orientations and resulting romantic choices.

Hence, the real legal question in *Obergefell* was not whether—given a fixed but ultimately mistaken conception of "traditional marriage" as a timeless and unevolving institution—there was any direct precedent for same-sex marriage in the United States. The real legal question was whether—given recent developments in domestic marriage in America

67. Stephanie Coontz, *The World Historical Transformation of Marriage*, 66 J. OF MARRIAGE & FAM. 974 (2004).

68. For a similar claim, see *id.* at 105.

69. *See also* Jana B. Singer, *The Privatization of Family Law*, 1992 WISC. L. REV. 1443, 1444 (describing developments in family law beginning around 1965 as rendering family law "increasingly privatized").

70. *See* Hong, *supra* note 24 at 1423–38.

71. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) (describing states that had legalized same-sex marriage prior to *Obergefell*).

prior to *Obergefell*—it violated the Equal Protection Clause to give Americans unequal rights to marry the romantic partners of their choice. Belief in marriage essentialism has, however, drawn attention away from the evolution of marriage and prevented many from understanding how these changes affected the correct legal framing of this case.

III. ON RECENT MOVEMENTS TO UNBUNDLE LEGAL AND RELIGIOUS MARRIAGE POST-*OBERGEFELL*

In the period leading up to *Obergefell*, many of the debates over marriage equality focused on whether the *law* should recognize same-sex marriages in the way it traditionally recognized opposite-sex marriages.[72] In her contribution, Robin Wilson nevertheless discusses a more recent twist to this debate.[73] Ever since *Obergefell*, some "marriage traditionalists"[74] have begun to argue that marriage should be unbundled from the law in order to preserve it in its "traditional form."[75] Some believe that certain religious communities should forgo legal marriage altogether and engage only in religious marriage.[76]

The first point to recognize about arguments like these is that they are normative arguments for a *change* in the traditional institution of marriage. Because marriage has traditionally been legally recognized in the United States, these people are arguing that marriage should evolve in some ways away from its traditional form.[77] There may be good religious or other reasons for such a change. One cannot, however, consistently make those arguments and claim that *legal recognition* is an essential feature of marriage that must be granted to opposite-sex couples but denied to same-sex couples.

The fact that some "marriage traditionalists" are now offering reasons for marriage to evolve suggests that they recognize marriage evolves. This recognition is not all that new. Many "marriage traditionalists" derive their views on traditional marriage from an interpretation of contemporary Christian doctrine.[78] The historical record suggests that

72. *See, e.g.,* George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 584 (1999) ("The issue here is not the permissibility but the *legal recognition* of same-sex marriages.") (emphasis added).

73. *See* Robin Fretwell Wilson, *"Getting Government Out of Marriage" Post* Obergefell: *The Ill-Considered Consequences of Transforming the State's Relationship to Marriage*, 2016 U. ILL. L. REV. 1445 (2016) [hereinafter *Unbundling*].

74. I use this term in scare quotes because once it is recognized that marriage evolves, the term "traditional marriage" lacks a clear referent.

75. *See id.* at 1448.

76. *See id*.

77. *See id*.

78. *See, e.g.,* Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 225 n.11 (2004) ("At the heart of the pro-marriage movement are fundamentalists who advocate a return to traditional marriage on religious and moral grounds."). For an early statement of marriage essentialism and its relationship to Christian doctrine in the British caselaw, see also Hyde v. Hyde, [1866] L.R.P. & D. 130 at 134 ("[M]arriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.").

Christianity has, however, traditionally played a major role in the evolution of marriage practices throughout the West, and in many other parts of the world.[79] For most of its history, Christianity explicitly sought to reshape the marital and sexual practices of many communities around the world.[80] Hence, at least traditionally, Christianity rejected marriage essentialism and many modern forms of marriage essentialism are decidedly non-traditional.

Professor Wilson is nevertheless a believer in at least one aspect of traditional marriage.[81] She believes in the value of integrating religious and civil understandings of marriage for religious believers and therefore thinks it would be a great loss if religious conservatives were to unbundle the two in the United States.[82] Her point is not, however, that marriage should remain bundled because it has certain universal or timeless features. Rather, she believes that a bundled form of marriage has certain values that are worth preserving, even for those who subscribe to faiths that do not condone same-sex marriage.[83]

I would like to raise two further concerns about the unbundling of religious and legal marriage in the United States. First, because the legal institution of marriage has been evolving domestically, to unbundle legal and religious marriage would be an ambiguous and potentially dangerous act. Prior to *Obergefell*, many legal changes made marriage in the United States much better suited to the free and equal society that America aims to be.[84] It is highly doubtful that opposition to same-sex marriage carries with it opposition to all these prior legal changes, and it is far from clear whether purely religious marriages would incorporate these other developments in domestic marriage. Unbundling marriage could therefore undermine many of the egalitarian and libertarian dimensions of marriage that presently exist in the United States.

Second, and ironically enough, unbundling legal and religious marriage could pose *de facto* threats to individual religious freedom in the United States. Unbundling would give religious authorities greater scope to determine the conditions of marriage without legal scrutiny. Because the formation, alteration, and dissolution of purely religious marriages would not involve any state action, however, there might be nothing to prevent religious obstacles to things like interfaith and interdenominational marriages for many.[85] It is, however, not a very deep form of reli-

79. *See* Dent, *supra* note 72, at 590.

80. *See* PHILIP LYNDON REYNOLDS, MARRIAGE IN THE WESTERN CHURCH: THE CHRISTIANTIZATION OF MARRIAGE DURING THE PATRISTIC AND EARLY MEDIEVAL PERIODS (2001); JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (2d ed. 2012).

81. *See Unbundling, supra* note 73, at 1451–52.

82. *See id.* at 1452.

83. *See id.* at 1480.

84. *See supra* notes 11–20 and accompanying text.

85. Indeed, it is precisely *because* unbundling would give certain organized religions more control over the conditions of marriage that some marriage traditionalists are now arguing for an unbundling. *See Unbundling*, *supra* note 73, at 125–26, 156–57, 161–62, 171–74.

gious freedom if individual Americans can be forced to choose between marrying the romantic partners of their choice and adhering to their sincere religious, moral, or other spiritual convictions. Attachments like these are some of the deepest and most meaningful in many people's lives.[86] If forced to choose between them, many Americans would suffer *de facto* threats to their personal religious freedom. The next section will discuss these threats in further detail.

IV. FURTHER DANGERS OF UNBUNDLING LEGAL AND RELIGIOUS MARRIAGE

If the threats to religious freedom discussed in the last section seem fanciful, then Karin Yefet's contribution to this Symposium serves as a powerful reminder that they are not. Yefet teaches family law at the University of Haifa, and her contribution discusses how marriage law currently works in Israel,[87] the birthplace of both Judaism and Christianity. Although marriage in Israel blends legal and religious elements and so is not completely unbundled,[88] Israeli law shows much greater deference to religious rules governing the creation and dissolution of marriages than American law.[89] The current state of affairs in Israel can thus provide a kind of case study in how marriage might function in the United States if it were more completely governed by religious doctrine.[90]

Israel's approach to marital law can, in fact, present Israeli citizens with hard choices between their religious and intimate affiliations. Most religions within Israel allow only for marriages between two people of the same faith.[91] Hence, when two people who would like to get married subscribe to different faiths, one must typically convert to the other's religion or they will be legally and religiously ineligible to marry.[92] Incentives toward conversion, rather than tolerance of religious difference within marital relationships, are inscribed within the fabric of Israeli marital law.[93]

Similar incentives toward conversion can arise when marriages are no longer functioning. For example, Catholic and Maronite couples cannot divorce under any circumstances in Israel while maintaining their re-

86. *See* Ed Diener, *Subjective Well-Being*, 95.3 PSYCH. BULL. 542, 555–56 (May 1984) (canvassing empirical data that suggests religion and marital satisfaction are two major contributors to people's subjective well-being).

87. *See* Karin Yefet, *Israeli Family Law as a Civil-Religious Hybrid: A Cautionary Tale of Fatal Attraction*, 2016 U. ILL. L. REV. 1505 (2016) [hereinafter *Israeli Family Law*].

88. *See id.* at 1508 (describing Israeli family law as "a hybrid creature of civil and religious elements").

89. *See id.* at 1511–37.

90. *See id.* at 1508 ("This article explores a unique case study of privatized family law in a liberal democratic state in the Western World: Israel."); *id.* (explaining that this case study will help clarify "the consequences of the decision to allocate to religious authorities jurisdictional pockets of an otherwise civil family law regime.").

91. *See id.* at 1513.

92. *See id.* at 1509, 1513, 1525.

93. *See id.* at 1509, 1513, 1523.

ligious affiliation.[94] These couples have, however, found a way to escape this no-exit regime through temporary conversion to Greek Orthodox Christianity, "which does (if begrudgingly) grant religious divorce."[95] This workaround allows Catholic and Maronite couples more autonomy to dissolve their marital relationships, though at some cost to personal religious liberty. Problems can also arise when "one party refuses to cooperate with the temporary conversion plan, either for the love of religion or for the love of blackmailing one's spouse."[96] For example, Yefet describes a particularly troubling case, in which "a Maronite husband sought divorce over the objections of his determined wife who refused to the conversion acrobatics":

> In a radical move, the desperate husband asked the civil family court to
>
> > force his wife to convert to Orthodox Christianity in order to commence divorce proceedings in the ecclesiastical court. Astonishingly, the court did just that, under the aegis of civil tort law, holding that to keep a spouse hostage to a lifeless marriage constitutes a tort of negligence. By refusing to acquiesce to a temporary and merely formal conversion, the court reasoned, the wife in bad faith violated the duty of care she owed her husband and was therefore liable for damages for that negligence thus far, and would further be fined *going forward* for each year in which she persisted in her refusal to convert to Orthodox Christianity.[97]

Clearly, this civil-religious hybridization of marriage is not *simply* promoting personal religious freedom.

Yefet documents a number of other civil law incursions into this religiously oriented system of marital law. These incursions purport to promote values like liberty and equality, but Yefet's assessment of their effectiveness for these purposes is bleak.[98] Citing numerous examples, Yefet suggests that "[p]iecemeal civil intervention designed to curb the injustices of religious law has failed to offset patriarchal rules and to maintain a baseline of fundamental human-rights guarantees. Worse, it often disserves its very objective by exacerbating religious conservatism and familial conflict."[99] She suggests that "men are the primary beneficiaries of the hybrid family regime [in Israel], and women and children its ultimate victims."[100] These assessments should not be wholly surprising. For millennia, traditional marriage within the Abrahamic traditions (i.e.,

94. *See id.*
95. *Id.*
96. *Id.*
97. *See id.*
98. *Id.* at 1514–21.
99. *Id.* at 1560.
100. *Id.* at 1559.

within Judaism, Christianity and Islam) has been strongly patriarchal in orientation.[101]

In current political debates, many assume that giving religious organizations more control over marriage will automatically promote religious freedom. When we talk about promoting religious freedom, however, we need to be very clear what it is we are seeking to promote. Do we seek to promote the personal rights and capabilities of individual American citizens to define and follow the religious beliefs of their choice, and integrate those choices into lives replete with the deep personal relationships that can help attach people to life? Or do we seek to promote the rights of religious organizations to foreclose certain important life choices of their members by forcing them to decide between some of their deepest and most meaningful religious and personal affiliations?[102] These two goals can conflict, which means that neither holds the uncontested title of promoting religious freedom.

In her private discussions with me about her contribution, Yefet brought these points home to me in an especially vivid and personal way. She asked me about my personal religious background and beliefs. I told her that my mother was raised Episcopalian in the Deep South, but interprets her religious tradition in an unusually cosmopolitan way. She views the moral exemplars from every tradition and civilization as having roughly equal power to provide wisdom on how to live. My father, on the other hand, was raised Hindu in Calcutta, but is deeply secular and atheistic, though he is a great appreciator of world cultures. Growing up, we therefore celebrated Christmas, but as a secular holiday in a house filled with Menorahs, Buddhas, Indian religious statutes, African religious icons, and artifacts from many other religions and parts of the world. Perhaps because of this background, I was forced to reflect on what, if anything, religion and spirituality mean to me. Those reflections are always ongoing, but I currently see the moral and spiritual journey in terms that are simultaneously more personal and cosmopolitan than I have yet to find in any single organized religion. I like to seek the depths in every religious and spiritual tradition, while dispensing with what I view to be the inevitable limitations on religion when practiced in human form. Im-

101. For a discussion of the patriarchal orientation of Christian family law, see ADRIAN THATCHE, MARRIAGE AFTER MODERNITY: CHRISTIAN MARRIAGE IN POSTMODERN TIMES (1999). For a discussion of traditional Judaic family law, see Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom,* 20 YALE J. OF L. & FEMINISM 101 (2009). For a discussion of traditional Islamic family law, see Karin Carmit Yefet, *The Pakistani Constitution and Female-Initiated Divorce: Western Liberalism in Islamic Garb,* 34 HARV. J. OF L. & GENDER 553, 557–62 (2011).

102. Yefet notes that under the Israeli marital system,

"[e]ach recognized religious community has its own state-funded tribunals and a separate set of religious codes, and each is state-empowered to exercise its jurisdictional authority over all the residents who belong to it by birth or baptism, irrespective of their subjective religious beliefs or lack thereof. This is because in the Jewish state, a person born into a certain religious faith is forced to remain faithful to it, unless she properly converts to a different religious community. In other words, it is not the individual who chooses religion, but the religion chooses the individual."

Id. at 1509.

portantly, I also view this all as an expression of my personal religious freedom in the United States.

But Yefet informed me that people with views like mine cannot typically get married in Israel without converting to a particular religion. Nor can people who are members of different clearly demarcated organized religions typically get married without one or the other converting.[103] Agnostics and atheists must apparently pretend to be something they are not.[104] These facts made me wonder whether my own parents would have married in such a system. I wondered whether I would have been born into it or enjoyed the same cosmopolitan upbringing and freedom to reflect on religious and spiritual matters. A system that gives organized religions more control over the marital choices of their members can pose *de facto* threats to personal religious freedom.

I have two further concerns about systems like these. First, I worry that they may be poorly suited to promote deeper forms of interfaith relationship, admixture, and dialogue. Second, I worry that this way of organizing society can make it easier for people to mistake what is relatively superficial about religion (viz., membership in a particular religion) with what is more fundamental to all (viz., the search for spiritual growth that can help break the bondage of self and infuse life with a richer sense of purpose and service).

V. ON THE NEED FOR A SEPARATE LEGAL STATUS TO PROTECT CHILD WELFARE

When Chief Justice Roberts says that legally recognized forms of marriage that are limited to opposite-sex couples have formed the "basis" for human society for millennia,[105] he may be thinking of the role these marriages have played in propagating society and promoting child welfare. Many marriage traditionalists argue against same-sex marriage on the ground that it purportedly harms children raised by same-sex couples.[106] This is an empirical question, and there is now a growing empirical literature that seeks to evaluate the relative benefits of opposite-sex as opposed to same-sex marriage for child rearing.[107] This literature

103. *See id.* at 1509, 1513.

104. *See id.* at 1513–14.

105. Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

106. *Id.* at 2590; *see*, *e.g.*, Sherif Girgis et al., *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 246, 260–63 (2011); Margaret Somerville, *The Case Against "Same-Sex Marriage,"* 24 BIOETHICS RESEARCH NOTES 23 (2012); Lynne Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. Rev. 1365 (2007).

107. *See*, *e.g.*, *id.* at 257–58; Gregory M. Herek, *Evaluating the Methodology of Social Science Research on Sexual Orientation and Parenting: A Tale of Three Studies*, 48 U.C. Davis L. Rev. 583 (2014); Abbie E. Goldberg, Nanette K. Gartrell & Gary Gates, *Williams Institute Research Report on LGB-Parent Families*, (July 2014), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-parent-families-july-2014.pdf; 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 (2005).

does not generally support the claims made by opponents of marriage equality.[108]

But there is a deeper problem with this entire debate: it may be addressing the wrong question altogether. Earlier sections suggest that marriage in the United States has been evolving away from a mechanism that channels sexual and reproductive behavior into certain circumscribed forums by religious and communal groups.[109] It has been evolving toward a social institution that supports the creation and maintenance of deep romantic attachments based on shared intimacy and individual choice and consent.[110] To the extent that this is true, however, domestic marriage may *itself* no longer be well adapted to support the best forms of parenting. The move from status to contract in domestic marital law can leave the best interests of children out of the equation. To preserve the values inherent in this move, other legal and social institutions may be needed to protect these other interests. If so, then it may be a distraction to ask what forms of *marriage*—as opposed to what forms of *parenting*—best support child welfare.

In her contribution to this symposium, Merle Weiner canvasses the empirical literature on this topic and suggests that it is generally "best for children to grow up in a loving home with their two parents."[111] Because of recent developments in marital law and society, however, she notes that "most children will miss that experience because the romantic relationships of unmarried and married parents break up at high rates."[112] Whether we like this or not, it is a regular and predictable consequence of a more contract-based approach to marriage. In circumstances of marital dissolution, it is typically *custody law* rather than *marriage law* that we rely on to promote child welfare.[113]

Unfortunately, current custody law is imperfectly suited to promote good parenting through these changes. The empirical literature suggests that the single best predictor of continued child welfare in these circumstances is a *continuing supportive partnership* between parents in child rearing.[114] Because custody proceedings are adversarial in nature, many parents are, however, forced to frame their custody claims in terms of the

108. Some empirical studies find no negative correlation between same-sex parenting and various indicia of child welfare. For summaries of this evidence, see Goldberg et al., *supra* note 106, at 3–4. Of the studies that do purport to find some negative correlations, the findings are merely correlational. For discussion, see Herek, *supra* note 106. Hence, it is unclear whether it is same-sex marriage or *stigma against* same-sex marriage that is causing the real problem. It is, accordingly, unclear which needs to change to promote child welfare. For further discussion of some of these problems, *see*, *e.g.*, Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 82 (2011); Stephen A. Newman, *The Use and Abuse of Social Science in the Same-Sex Marriage Debate*, 49 N.Y.L. SCH. L. REV. 537 (2004); Polikoff, *supra* note 106.

109. *See supra* notes 23–31 and accompanying text.

110. *See supra* notes 64–67 and accompanying text.

111. Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 U. ILL. L. REV. 1535 (2016) [hereinafter *Outside the Custody Box*].

112. *Id.*

113. *Id.* at 1538–39.

114. *Id.* at 1543–44.

best interests of their children, viewed as a zero-sum game.[115] Processes like these can exacerbate tensions between parents and cause unrelated tensions to spill over into the parenting relationship.[116] Also, couples, not unexpectedly, sometimes find it difficult to work together for the benefit of their children when a co-parenting orientation is expected for the first time at the end of the romantic relationship.

Just as there has been a move from status to contract in the basic marital relation, there has been a practical move toward contract in custody relations. In particular, many courts try to incentivize parents to reach voluntary joint custody arrangements.[117] Still, because of the adversarial backdrop of the law, many parents come out of the process with great strains on their capacities to continue mutually supportive partnerships *as co-parents*.[118] Hence, the current law and practice of custody threatens many parents' abilities to maintain supportive parenting partnerships.

In her new book, *A Parent-Partner Status for American Family Law*,[119] Weiner suggests that a more radical change in the law is needed to address these problems. She argues that the law should recognize a distinctive "parent-partner" relation, which is specifically adapted to promote the best interests of children and does not depend on continued marital status.[120] Because of this independence, the rights and obligations that attach to the parent-partner status would not, however, need to be litigated or bargained over in an adversarial context through changes in marital status. Marital changes would thus cause less strain on parents' abilities to maintain supportive parenting partnerships. Children would also have more of a sense of security about what will happen during these changes. To develop the law in this way would be to unbundle legal *marriage* from legal *co-parenting*, thus allowing two distinct institutions to serve two distinct sets of purposes.

When considering the merits of this proposal, marriage traditionalists may want to consider the wisdom contained in Matthew 6:24.[121] There, it is suggested that people cannot serve two masters well, where the specific example is God and money.[122] What is true for individuals is, however, equally true for many social institutions. A single social institution like marriage cannot serve two functions well—at least when these functions can come into regular conflict. Contemporary marriage in

115. *Id.* at 1583–84.

116. *Id.* at 1588–89.

117. *See generally* Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 ILL. L. REV. 1535 (2016).

118. *Id.* at 1589.

119. MERLE H. WEINER, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW (2015).

120. *See* Weiner, *supra* note 118, at 162–64.

121. *Matthew* 6:24.

122. *Id.* ("No one can serve two masters, for either he will hate the one and love the other, or he will be devoted to the one and despite the other. You cannot serve both God and money.").

122. *See generally* ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2004).

America is no longer as well suited to promote child welfare as to promote the types of free and egalitarian intimate relations among partners that help attach many people to life. These values can co-exist with the best interests of children—though we may need to learn to rely less on the institution of marriage for this purpose and more on a richer status of parentage.

This moral can be taken one step further. When marriage and child welfare are linked more in rhetoric (and perhaps history) than current reality, debates over how best to promote child welfare in America become skewed. To help every child reach his or her full potential requires careful thought about a much broader range of issues than "traditional marriage": e.g., access to education, healthcare, social infrastructure, community, moral and spiritual development, and bases for self-esteem. Careful thought must also be given to ways of supporting the types of intimate relationships that can help attach people to life once these children become adults. When political discussions insist on framing questions of child welfare in terms of the sanctity of "traditional marriage," impartial deliberation over how best to promote child welfare is compromised. So too, then, is child welfare.

When it comes to marriage and parenting, Anne Alstott has also drawn on widely accepted psychological theories of child development to suggest that what every child needs most is a continuous caring relationship with *one* parent until fully grown.[123] The empirical evidence correlating divorce with decreases in child welfare is correlational only,[124] and other evidence suggests that divorce in high-conflict marriages can actually help child welfare.[125] Together, these facts suggest that it may be unhappy marriages, which often lead to divorce, that are the real causes of problems with child development that correlate with some divorces.[126] Weiner's contribution focuses on the legal status of co-parentage, but the law may need to focus just as much attention on the more basic legal status of parentage.

123. *See generally id.*

124. For discussion of this evidence, see, e.g., Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95 (2001).

125. *Id.* at 97; *see also* Paul Amato & Alan Booth, A Generation at Risk 237 (1998); Paul Amato, *Good Enough Marriages: Parental Discord, Divorce and Children's Long-Term Well-Being*, 9 VA. J. SOC. POL'Y & L. 71 (2001).

126. *See, e.g.*, Scott, *supra* note 124, at 95.

VI. CONCLUSION

Given the Supreme Court's decision in *Obergefell*, it certainly makes sense to ask with renewed vigor whether marriage should remain the cornerstone of family law. Many believe that this question deserves special attention because *Obergefell* caused a major and unprecedented change in the social institution of marriage. But while the history of same-sex marriage in the United States is fairly recent, this way of understanding *Obergefell* has been colored by the false premise of marriage essentialism. Once that premise is abandoned, one can begin to see the complex ways that marriage had been evolving for many years prior to *Obergefell*. Between the eighteenth century and today, marriage in the United States had slowly been evolving from a communally and hierarchically organized relationship of status, which gave certain religious and communal institutions great *de facto* control over patterns of marital relation and sexual and reproductive liberty, to a more autonomous form of private relationship, which was increasingly grounded primarily in equal respect for the personal choices and emotional flourishing of both partners.[127] These changes were embedded in broader societal developments, which gave private citizens greater rights to sexual liberty, privacy, cohabitation, divorce, and individual autonomy in marital and filial decision. Ultimately, the resulting institution of marriage stands out most in human history for its blended commitments to egalitarianism, pluralism, and freedom of choice.

Together, these changes created a new question of equal protection concerning whether same-sex couples could be excluded from contemporary forms of marriage in the United States based solely on their sexual orientations and resulting marital preferences. Hence, what was relatively unprecedented by the time *Obergefell* was decided was not so much same-sex marriage as the particular type of contemporary marriage from which same-sex couples were still being excluded in some states. The Court held that sexual orientation, which can strongly affect people's intimate and marital preferences, is an insufficiently non-arbitrary and compelling ground to prevent Americans from entering into these contemporary forms of marriage with their partners of choice. But it is important to recognize that this legal ruling makes sense in part because of facts about how contemporary marriage has evolved in the United States. It follows that the relative absence of same-sex marriage throughout most of United States history cannot establish that *Obergefell* was legally unprecedented. Indeed, once one takes a closer look at the recent evolution of marriage in the United States, *Obergefell* should appear less the cause of a major restructuring of family life in America than its natural legal result.

Changes like these do, in fact, warrant renewed attention to questions concerning the relationship between contemporary marriage in the

127. *See supra* Part II.

United States and various other important values—like personal liberty, religious liberty and the welfare of both children and adults. In pursuing these questions, it is, however, a distraction to insist that debates over "traditional marriage" replicate impartial attempts to pursue those other values. Not only does the term "traditional marriage" lack a clear referent but no single institution of marriage is as clearly linked to all these values in reality as in some political rhetoric. Because marriage essentialism is false, it should be rejected.