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Linda C. McClain
Boston University School of Law

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The Family, the State, and American Political Development as a Big Tent: Asking Basic Questions about Basic Institutions

Linda C. McClain
Boston University

This article evaluates the proposition that the relationship between the family and the state should be more central to the study of American political development. It compares parallel efforts in the 1980s by pioneering feminist political and legal theorists to put on the table such issues as the public/private distinction between the polity and the family, assumptions about the role of the family (and of women's wifely and maternal labor) in the political order, and injustice within the family. It illustrates how legal scholars regularly examine not only the evolution over time of family definitions, forms, and gender roles, but also the evolution of how various forms of the state have regulated and supported the family. The article suggests that the study of American political development is a "big tent" within which scholars from diverse disciplines may benefit from fruitful conversations about parallel inquiries. To indicate the importance of the contextual and temporal examination of the family and the state, the article analyzes the recent landmark Supreme Court opinion, Obergefell v. Hodges *(2015), which held that same-sex couples may exercise the fundamental right to marry in every state.*

Keywords *family law; marriage; feminist theory; right to marry; American political development; social institutions*

What is the relationship between the family and the state and why does that relationship merit close scholarly examination? To complicate and refine this overly broad question about two putative monoliths: How, over time, has the family, as a basic social institution, evolved with respect to family definition and forms, the family's expected place in the political order, its public and private dimensions, and the rights, responsibilities, and roles of family members? How, over time, have the various forms, levels, and branches of "the state" – whether

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defined as local, state, or federal government or administrative, judicial, or legislative actors – shaped and responded to this evolution? By what means and for what ends has "the state" (broadly defined) regulated and supported the family? What role have contested and evolving political values and constitutional ideals of liberty (in particular, privacy and autonomy) and of equality (in particular, racial equality and sex equality) played in understanding the proper scope of such regulation? What light does this complex history of the relationship between family and state shed on contentious battles, in recent decades, over family status – and, particularly, access to marital status?

A premise of this symposium is that examining these types of basic questions about two basic institutions should be a vital part of the study of American political development, and yet "the family is a topic that has often been overlooked in political science."[1] American political development is a relatively new "political science subfield," that "emerged in the 1980s."[2] However, this problem of overlooking the family brings to mind similar observations made in pioneering work during that same period by feminist political theorists such as Jean Bethke Elshtain and Susan Moller Okin, among others.[3] Those pioneering scholars put on the table issues such as how political theory (both historical and contemporary) rested on a public/private distinction between the polity and the family, how it assumed the role of the family (and women's wifely and maternal labor within it) in the political order and in social reproduction – and how it nonetheless failed to address the relevance of justice to the family and the gendered division of labor within it. In roughly that same period, pathbreaking work in family law and the emerging field of feminist legal theory challenged the positioning of family and state and of public and private, and the supposed neutrality of law. Family law and feminist legal scholars such as Martha Fineman, Catharine MacKinnon, Martha Minow, and Frances Olsen (among others) laid a foundation for new methodologies and paths of inquiry on neglected questions about the family and the state.[4]

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1. Susan Burgess, "Family, State, and Difference in Political Time," *Polity* 48 (2016): 140–45, at 140.

2. Rogers M. Smith, "Ideas and the Spiral of Politics: The Place of American Political Thought in American Political Development," *American Political Thought* 3 (2014): 126–36.

3. Jean Bethke Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (Princeton, N.J.: Princeton University Press, 1981); Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, Inc., 1989); see also Carole Pateman, *The Sexual Contract* (Stanford, Calif.: Stanford University Press, 1988).

4. See, for example, Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991); Martha Albertson Fineman and Nancy Sweet Thomadsen, *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991); Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989); Martha A. Minow, "'Forming Underneath Everything That Grows': Toward a History of Family Law," *Wisconsin Law Review* (1985): 819–98; Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96 (1983): 1497–1578.

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At the time of these parallel developments in political and legal theory, the U.S. Supreme Court's turn, in the 1970s, to modern sex equality jurisprudence was still a relatively new feminist victory.[5] The Court required the application of heightened (intermediate) scrutiny to laws that used sex-based classifications because such laws, many of which regulated the family and marital rights and responsibilities or treated husbands (and fathers) and wives (and mothers) differently for purposes of governmental programs (such as military and Social Security benefits), often rested on archaic and outmoded gender stereotypes.[6] In the following decades, feminist conversations and debates about gender, sameness and difference, intersectionality, essentialism, identity, and equality have become increasingly complex. Similarly, family law scholars have grappled with the growing diversity and complexity of contemporary family life and with the relationship between family life and family law.

As a legal scholar who entered the academy in the early 1990s and who works in both feminist legal theory and family law, I mention these parallel developments in political science and law in order to situate my contribution to this symposium. Given the focus in the study of American political development on the significance of the contextual and the temporal, it seems appropriate, in this concluding article, to give this history of relatively recent scholarship. On the one hand, happily, the study of the family as a social institution and of its relationship to the state is no longer as neglected by scholars – in political

5. As is well known, Justice Ruth Bader Ginsburg, working as a law professor with the ACLU Women's Rights Project, successfully litigated such Equal Protection cases as *Reed v. Reed*, 404 U.S. 71, 76 (1971), in which the Court first struck down a sex-based classification that favored men over women to be administrators of estates, saying such classifications must bear a "fair and substantial relation to the object of the legislation;" *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which the Court struck down a military rule disadvantaging female service members and their spouses and came one vote short of adopting "strict scrutiny" for sex-based classifications; and *Craig v. Boren*, 429 U.S. 190 1976, in which the Court settled on the intermediate scrutiny test for sex-based classifications. In *Stanton v. Stanton*, 421 U.S. 7 (1975), for example, the Court noted the role of outmoded gender role stereotypes in striking down a child support law that ended such support for females at 18, and males at 21.

6. A recent book on Justice Ginsburg states that, "of all her clients," she was "fondest of Stephen Wiesenfeld," a widower whose wife died in childbirth but who was denied Social Security benefits paid to surviving spouses because he was a father rather than a mother. Irin Carmon and Shana Knizhnik, *Notorious RBG: The Life and Times of Ruth Bader Ginsburg* (New York: Dey St., William Morrow Publishers, 2015), 70. Ginsburg's brief on Wiesenfeld's behalf argued that this rule reflected "the familiar stereotype that, throughout this Nation's history, has operated to devalue women's efforts in the economic sector," and that "just as the female insured individual's status as breadwinner is denigrated, so the parental status of her surviving spouse is discounted." The Court struck down the sex-based rule in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). In *United States v. Virginia*, 518 U.S. 515 (1996), now on the bench, Justice Ginsburg explained that, post-*Reed v. Reed*, the Court's approach to "official classifications based on gender" has been that "the State must show at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" In addition, "the proferred justification" must be "exceedingly persuasive" and "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."

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science or law – as it was decades ago. In the 1990s, political scientists such as Theda Skocpol[7] and historians such as Linda Gordon published influential studies of the development of public policies for which family status was relevant, such as mother's pensions.[8] Similarly, historians (particularly feminist historians) who treated gender as an important, even indispensable, category of analysis have produced valuable studies of the historical development of public policy concerning families and the welfare state, including the role of women's activism and philanthropy in such state-building.[9] Other relevant strands of work bearing on the relationship between the family and the state include studies of gender and citizenship.[10] If we see the subfield of American political development as a big tent, arguably, there is by now an impressive body of work by historians, legal scholars (including family law scholars and legal historians), political scientists, comparativists in different fields, and no doubt scholars in other fields, that contributes to a contextual and historical approach to the study of the relationship between the family and the state. To mention an influential book to which I will return later in this article, historian Nancy Cott's *Public Vows: A History of Marriage and the Nation*, although not expressly framed or reviewed as a work on American political development, explored the relationship between ideas and institutions,[11] showing how the Founders' political theory of marriage shaped federal and state law and policy over time, even as marriage as an institution evolved.[12] Moreover, Cott traced

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7. The intellectual history of the American political development subfield is outside of the scope of this article, but "historical institutionalism" or "historical institutional" analysis (associated with Skocpol and others) is an approach associated with it. See, for example, Smith, "Ideas and the Spiral of Politics," 126 (see note 2 above); Theda Skocpol, "Why I Am an Historical Institutionalist," *Polity* 28 (1995):103–06.

8. Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, Mass.: Harvard University Press, 1992); Linda Gordon, *Pitied but Not Entitled: Single Mothers and the History of Welfare* (New York: Free Press, 1994).

9. See, for example, Felicia A. Kornbluh, "The New Literature on Gender and the Welfare State: The U.S. Case," *Feminist Studies* 22 (1996): 170–97, at 173, observing that feminist scholars have "emphasized the historical contingency and fluidity that have characterized all welfare systems," and reviewing Gordon, Skocpol and several other books that explore "maternalism"; Virginia Sapiro, "Book Review" of *Protecting Soldiers and Mothers, Political Science Quarterly* 108 (1993–1994): 738–39, observing that Skocpol's book adds "gender analysis" to her approach and observing that "many of us have argued that it is impossible to understand the development of the American state without taking account of its gender basis."

10. See, for example, Linda K. Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (New York: Hill & Wang, 1998); Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (New York: Oxford University Press, 2001).

11. On the argument that the study of American political development should include "interpretive analyses of ideas" as well as the study of institutions, see Smith, "Ideas and the Spiral of Politics,"127 (see note 2 above); George Thomas, "Political Thought and Political Development," *American Political Thought* 3 (2014): 114–25.

12. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass.: Harvard University Press, 2000). I make the observation in the text based on the fact that, although Cott's book was reviewed in history, feminist, American studies, and legal journals, among others, I did not find any reviews

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over time the puzzle of marriage's simultaneous public and private dimensions.[13]

On the other hand, as the contributions to this symposium make clear, much work remains to be done. Fortunately, these articles by political scientists all offer exciting examples of generative and creative scholarship that employ diverse methodologies. Although some of the contributions focus on earlier historical periods, while others focus on the present, each of them engages with some of the foundational questions noted above. In this article I will first discuss how these basic questions feature in family law and suggest some parallel avenues of inquiry pursued by political science scholars and legal scholars investigating the family and the state. I will situate the contributions to this symposium in the context of their asking basic questions about basic institutions. I will suggest that present-day issues concerning both growing family and marriage inequality *and* equality show the importance of sustained study of the relationship between the family and the state. With respect to marriage equality, to indicate the importance of the sort of contextual and temporal examination that the study of American political development encourages, I will examine the recent, landmark opinion, *Obergefell v. Hodges* (2015), which held that same-sex couples may exercise the fundamental right to marry in every state and that states may not refuse to recognize their valid out-of-state marriages.[14] I will briefly conclude by considering the idea of American political development as a big tent under which scholars from many disciplines may engage in fruitful conversations and scholarly exchanges as they work on common questions about the family and the state and on the relationship between these two basic institutions.

Basic Questions Posed in Family Law and in the Study of American Political Development

Elshtain and Okin wrote at a time when "the family" generally connoted the marital, heterosexual family engaged in rearing children. Although the Supreme Court had begun to look more critically at sex-based classifications by the 1970s, the legal regime still reflected traces of the common law model of marriage, with a hierarchy of the male "head" of household/breadwinner and the female caregiver/dependent. Further, as feminist legal scholars recognized, replacing gender

published in political science journals, nor did any review that I read associate her book with the study of American political development.

13. *Ibid.*, 1. Cott observes that, while people view marriage as "a matter of private decision-making and domestic arrangements," "the monumental public character of marriage is generally its least noticed aspect".

14. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

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hierarchical laws with formal equality did not automatically result in substantive equality, given the force of cultural norms about gender roles and the gendered lives of men and women.[15]

Family life today is more diverse and complex. Family law itself has moved decisively away from gender hierarchy and complementarity, but it struggles to catch up to new patterns of intimate relationship, new pathways to becoming a parent, and new forms of caretaking. As a legal scholar invited to contribute to this symposium, I am mindful that questions about the dynamic relationship between the family and the state are vitally relevant to many areas of law and policy. Thus, I begin my Family Law course (and my casebook on the subject) by posing several orienting questions: "First, what is a family? Second, why do families matter and to whom do they matter? To members of families? Society? Third, what is the relationship between families and the law? Why – and how – does law [government] regulate families?"[16] I then pose the same questions about marriage. Throughout the course, I invite students to focus on the question, "From what to what?" That is, how has family law evolved over time? How have notions of family privacy – and of public and private – developed and changed? How has the institution of marriage changed and what cultural, constitutional, and legal factors account for that transformation? Similarly, how does contemporary family law answer the question, "Who is a parent?,"[17] and how has that answer evolved? Throughout the study of family law, salient questions include whether and why an historical doctrine should be entirely abolished (or abrogated), entirely preserved, or retained but transformed in light of contemporary societal and family values and the realities of contemporary family life. Moreover, family law wrestles with the basic tension between the declaration that there is a constitutionally protected " 'private realm of family life which the state cannot enter,' " and the caveat that, "of course, the family is not beyond regulation."[18]

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15. Fineman, *The Illusion of Equality*, criticizes formal equality in the context of divorce (see note 4 above); see also Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (New York: Routledge, 1995), 47–49, explaining the concept of a "gendered life."

16. Douglas E. Abrams, et al., *Contemporary Family Law*, 4th ed. (St. Paul, Minn.: West Publishing, 2015), 2–3.

17. On the definition of parentage as arguably the most contentious issue of family law, see Linda C. McClain and Daniel Cere, ed., *What Is Parenthood?: Contemporary Debates about the Family* (New York: New York University Press, 2013), 41.

18. *Moore v. City of East Cleveland*, 419 U.S. 494 (1977), quoting, on the "private realm," *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In constitutional precedents about regulating the family, marriage, and parental rights and responsibilities, the Supreme Court often engages in what James Fleming and I elsewhere describe as a "two-step" process: step one is "a declaration that something is 'fundamental' and 'private,' " which is quickly followed by step two, a "clarification that it is neither absolute nor beyond regulation"; see James E. Fleming and Linda C. McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* (Cambridge, Mass.: Harvard University Press, 2013), 249.

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In reading the contributions to this symposium, it is evident that work by political scientists on the family, the state, and American political development should be of great interest to family law scholars, just as the work of family law scholars would be informative for the former. Indeed, such legal scholarship might even be included as part of a "big tent" of scholarship on American political development, which already includes other fields such as history and sociology, as noted above. For example, questions of family definition and why family status matters are central concerns in family law scholarship. Bound up with those concerns is the role of the state in setting the terms for official recognition of a family or of a family member, whether as a legally recognized parent or as a legally recognized spouse in a legally valid marriage.

Three of the articles in this symposium address aspects of this family definition/recognition problem. Focusing on contemporary examples, Alison Gash and Priscilla Yamin, in "State, Status, and the American Family," invite attention to the power of the state in defining family – as it were, "licensing family" – and conferring (or declining to confer) official status on certain households.[19] In "Civic Membership, Family Status, and the Chinese in America 1870s–1920s," Julie Novkov and Carol Nackenoff look back to the late nineteenth and early twentieth century to demonstrate that determinations of familial and marital status were crucial in the context of Chinese women and children seeking citizenship or permanent residency.[20] Their article also shows, as did Gash and Yamin, the need to resist a monolithic conception of "the state," since their research reveals multiple and sometimes conflicting sources of governmental power: Congressional statutes, administrative rulings, and judicial opinions.

Another salient theme in this symposium is the question of why families matter – a question bound up both with family definition and regulation. Gash and Yamin, for example, illustrate the importance of *functional* definitions of family: when unconventional families (e.g., gay or lesbian co-parents or persons with disabilities who live in a group home) can show that they *function* as a family, then courts have reasoned by analogy to confer legal status upon them. This is the so-called "functional turn" in family law, particularly evident in the law of parenthood.[21] If someone who is not a biological or adoptive parent – a "legal stranger" to a child – nonetheless behaves toward the child as a parent, engaging in nurturing and caretaking, and if a parent-child bond develops, then

19. Alison Gash and Priscilla Yamin, "State, Status, and the American Family," *Polity* 48 (2016): 146–164.

20. Julie Novkov and Carol Nackenoff, "Civic Membership, Family Status, and the Chinese in America 1870s–1920s," *Polity* 48 (2016): 165–85.

21. Susan Frelich Appleton refers to family law's "functional turn" to capture "the rise of legal recognition for those who perform a family relationship, even in the absence of formal or biological connection." See her "Gender and Parentage: Family Law's Equality Project in Our Empirical Age," in McClain and Cere, *What Is Parenthood?*, 237–56, at 237 (see note 17 above).

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the law in many states will treat that person as a legal parent. Both the functional approach and reasoning by analogy have helped gay and lesbian co-parents to secure legal status without biology, marriage, or gender complementarity.[22] Analogy also played a major role in the significant legislative and judicial victories of same-sex couples asserting the right to marry. Litigants stressed – and legislators and courts recognized – that same-sex couples were similar to straight couples in their aspiration to marry, their capacity to have a marital relationship and, notably, their desire to have and their capacity to rear children.[23] Being similarly situated is, of course, relevant for arguments rooted in the Constitution's equal protection clause, but nonetheless, this line of argument relying on analogical reasoning and the functional equivalence of opposite-sex and same-sex couples – both as adult partners and as co-parents – has triggered criticism that it promotes assimilation and hinders the broad protection of family pluralism.[24]

The articles in this symposium also give attention to the roles that families play in our political order – which is one way that families matter – and what it means to say that the family is a social institution with both private and public dimensions. With respect to why conceptions of the role of the family matter, in "The Family-State Nexus in American Political Development: Explaining Women's Political Citizenship," Eileen McDonagh evaluates the relative prominence over time of the use by proponents of women's suffrage and women's rights of four different "family-state frames," that is, four distinct arguments about the relationship between the family and the state. Her fascinating

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22. For an informative case study of litigation efforts by LGBT advocates in California from the mid-1980s through the mid-2000s, see Douglas NeJaime, "Marriage Equality and the New Parenthood," *Harvard Law Review* 129 (2016): 1185–1266.

23. Ibid. See also *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 963–64 (Mass. 2003), observing that same-sex couples "have children for the reasons others do – to love them, to care for them, to nurture them" – but the "task of child rearing" is made "infinitely harder by their status as outliers to the marriage laws." In two trials held in federal constitutional challenges to state marriage laws barring same-sex couples from marrying (California's Proposition 8 and Michigan's marriage amendment), expert witnesses for the plaintiffs brought out this sameness and the absence of constitutionally significant difference. See *Perry v. Schwarzenegger*, 704 F. Supp.2d 921 (N.D. Cal. 2010); *aff'd, Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). In *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), the Supreme Court vacated the Ninth Circuit opinion in *Perry* on standing grounds – not on the merits – but this left the district court opinion intact. In *DeBoer v. Snyder*, 793 F. Supp. 2d 757, 761, 771 (E.D. Mich. 2014), the federal district court favorably quoted expert testimony offered at trial that "quality of parenting" rather than "gender" is the key factor affecting child outcomes and observed: "The overwhelming weight of the scientific evidence supports the 'no differences' viewpoint." The Sixth Circuit reversed the district court in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), but was reversed subsequently by the United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

24. NeJaime, "Marriage Equality and the New Parenthood," addresses the criticism that marriage equality is assimilationist and hinders broad family pluralism (see note 22 above). Another prominent example of this criticism is Nancy J. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Our Families Under Law* (Boston: Beacon Press, 2008).

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typology contrasts, in particular, liberal arguments that viewed the family and the state as separate, disconnected institutions, with republican motherhood frames, in which women participated indirectly in the state by vitally contributing as wives and mothers in the home – and also with arguments from the "subverted liberal frame" that viewed family and state as engaged in analogous "maternal" work of providing care to those in need.[25] The republican motherhood frame reminds us of how, for much of U.S. history, women's family roles (as wives and mothers) served to justify their dependency as well as their exclusion from equal rights and full participation in society, while the "subverted" republican motherhood frame enlisted women's role in raising virtuous citizens to insist that women needed formal political participation in the state to ensure that the state promoted their maternal family roles. And yet, McDonagh concludes that the least known of these frames, the subverted liberal frame, which viewed "women's maternal roles in the family" as "analogous to the government's role in the state, because both institutions are defined as being responsible for providing care to those in need," became a prominent frame in the twentieth century.[26]

Gwendoline Alphonso's contribution to this symposium also addresses the question of why families matter, highlighting the important "work" of families in engaging in successful social reproduction. In her article, "Resurgent Parenthood: Organic Domestic Ideals and the Southern Family Roots of Conservative Ascendancy, 1980–2005," she illustrates the intense concern in Congress over the functions carried out by the family, particularly the work of parents in producing capable, responsible children who will become capable, responsible citizens. She observes that legislative views about the proper scope of regulating the family depended in part on the underlying ideal of the familial household and whether particular kinds of parents are capable of carrying out their politically vital work or whether, instead, they require monitoring, educating, or bolstering.[27] This aspect of Alphonso's article resonates with Gash and Yamin's argument that family is an "arm" of the state, since governmental concern that particular family forms may not function as successfully as the idealized nuclear, marital family is a reason for being suspicious of and seeking to deter the formation of such families. The most prominent example is 1990s welfare reform, in which lawmakers repeatedly

25. Eileen McDonagh, "The Family-State Nexus and American Political Development: Explaining Women's Political Citizenship," *Polity* 48 (2016): 186–204. On republican motherhood, McDonagh cites the influential work of Linda K. Kerber; see Kerber's *Women of the Republic: Intellect and Ideology in Revolutionary America* (New York: W.W. Norton, 1986).

26. McDonagh, "The Family-State Nexus," 197 (see previous note).

27. Gwendoline M. Alphonso, "Resurgent Parenthood: Organic Domestic Ideals and the Southern Family Roots of Conservative Ascendancy, 1980–2005," *Polity* 48: (2016): 205–23.

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identified single-mother (fatherless) households as a social problem and held the marital family to be the normative family form, an "essential institution of a successful society, which promotes the interests of children."[28] In sum, when they are read together, these four articles offer rich engagement with basic questions about the family and the state.

Two Contemporary Issues about the Place of Families: Greater Family Inequality and Equality

In this part of the article, I will suggest that present-day issues concerning family inequality and equality show the importance of sustained study of the relationship between the family and the state in work on American political development, as in the field of family law. Families, as I observed in *The Place of Families*, "are at the center of a number of important contentious public debates in the United States," and underlying those debates is often a premise that "a significant link exists between the state of families and the state of the nation, and that strong, healthy families undergird a strong nation."[29] The debates that were then current, a decade ago, focused on questions such as: what responsibility government and employers should have for care work and addressing the work/life challenges faced by parents and other caregivers; whether government should promote "responsible fatherhood" and "healthy marriage" as objectives of welfare reform (issues touched upon in Alphonso's and Gash and Yamin's articles); whether same-sex couples should be allowed to marry; and whether it was time to move beyond marriage.[30]

As I write a decade later, some of those issues continue to resonate. As we enter a new presidential campaign cycle, we will no doubt hear once again about the need to move beyond talk of family values to actual policies that value families and about how being a parent is one of the most important jobs a person can have.[31] At the same time, two newer developments that warrant mention here concern

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28. Gash and Yamin quote findings from the Personal Responsibility and Work Opportunity Reconciliation Act of 1996; see "State, Status, and the American Family," 161 (see note 19 above). Family law historians point out that welfare law, or "family law for the poor," is often excluded from the "canon" of family law, and that such "public" families are subject to regulation seemingly at odds with notions of family privacy. See Jill Elaine Hasday, *Family Law Reimagined* (Cambridge, Mass.: Harvard University Press, 2014), 195–97. Hasday notes that Jacobus ten Broek called this the "dual system of family law" in his classic article, "California's Dual System of Family Law: Its Origin, Development, and Present Status," *Stanford Law Review* 16 (1964): 257–317.

29. Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, Mass.: Harvard University Press, 2006), 1.

30. I discuss those debates in Chapters 3 through 7 of *The Place of Families* (see previous note).

31. For an analysis of these themes in prior presidential campaigns and agenda, see Linda C. McClain, "Federal Family Policy and Family Values from Clinton to Obama, 1992–2012 and Beyond," *Michigan State Law Review* (2013): 1621–1718.

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movement both in the direction of greater inequality *and* equality among families. Both developments suggest that sustained study of the family and the state, and of the history of their relationship, is important. The first development is the growing gulf between more affluent and less affluent families and the evident disappearance of marriage from the lives of a growing number of people and communities in the United States. Scholars and commentators identify a class-, race-, and gender-based "marriage gap" or marriage divide and argue that family inequality is a potent dimension of growing economic inequality.[32] Moreover, another factor contributing to family and income inequality is that, when people do marry, they increasingly engage in "assortative mating," that is, they marry people like themselves in income and education, which affects children's starting points.[33] Further, neighborhoods are "now more segregated by income," and there are "stark parenting divides linked less to philosophies or values and more to economic circumstances and changing family structures."[34] As a result, "the lives of children from rich and poor American families look more different than they have in decades."[35]

I can only touch on the issue of growing family inequality here,[36] but it is an appropriate concern for political scientists. It implies questions about the allocation of private and public responsibility for the rearing of children and about the economic and social preconditions for stable family life. It also raises fundamental questions about a national commitment to equal opportunity, given the "diverging destinies" of children born into marital versus nonmarital families.[37] Strikingly, while the welfare reform debates of the 1990s appealed to the "family values" of the

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32. For demographic and opinion data, see Wendy Wang and Kim Parker, Pew Research Center, "Record Share of Americans Have Never Married: As Values, Economics and Gender Patterns Change," 2014 at http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/; National Marriage Project, "The State of Our Unions: Marriage in America 2010: When Marriage Disappears," 2010 at http://stateofourunions.org/2010/SOOU2010.php.

33. Tyler Cowen, "How a Marriage of Equals May Promote Inequality," *New York Times*, December 27, 2015, Bus. Section (The Upshot), 6. This growing incidence of assortative mating "increases the effects of class in defining marriage markets and in increasing inequality between families"; see also June Carbone and Naomi Cahn, *Marriage Markets: How Inequality is Remaking the American Family* (New York: Oxford University Press, 2014), 63.

34. Pew Research Center, "Parenting In America: Outlooks, Worries, Aspirations are Strongly Linked to Financial Situation," December 17, 2015, at http://www.pewsocialtrends.org/files/2015/12/2015-12-17_parenting-in-america_FINAL.pdf; Claire Cain Miller, "Class Divisions Growing Worse, From Cradle On," *New York Times*, December 18, 2105, A1.

35. Cain Miller, "Class Divisions Growing Worse" (see previous note).

36. For a fuller discussion, see Linda C. McClain, "Is There a Way Forward in the 'War over the Family?,'" *Texas Law Review* 93 (2015): 705–42, and Linda C. McClain, "The Other Marriage Equality Problem," *Boston University Law Review* 93 (2013): 921–70. A helpful discussion appears in Carbone and Cahn, *Marriage Markets* (see note 33 above).

37. *See* Robert Putnam, *Our Kids: The American Dream in Crisis* (New York: Simon & Schuster, 2015); Sara McLanahan, "Diverging Destinies: How Children are Faring Under the Second Demographic Transition," *Demography* 41 (2004): 607–27.

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middle and working class, contending that reform of welfare law must bring the poor into alignment with such values, present-day diagnoses find growing family complexity and instability in working class families and communities. Indeed, conservative analyst Charles Murray (one of the most influential critics of pre-1990s welfare law) contends that a falling away from core values, or the "founding virtues," is a significant cause of this family instability in "white working-class communities" and finds men to be the primary culprits.[38] The migration of the term "fragile families," from its original context of the study of children born primarily to unmarried parents in large cities,[39] to now describe – in some accounts – a much broader swath of American families, illustrates concern about growing family instability.[40] Although it is beyond the scope of this article, I should note additional dimensions of the family inequality problem that are of interest to legal scholars and scholars working on American political development: the impact upon families and family stability of immigration and citizenship law and policy and of America's record levels of incarceration.[41]

The second significant development in the last decade is the move toward greater *equality* among types of families, in particular, the successful efforts by same-sex couples to be able to marry. Just a decade ago, after the landmark decision in *Goodridge v. Department of Public Health* (2003), Massachusetts was the

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38. Charles Murray, *Coming Apart: The State of White America, 1960–2010* (New York: Crown Forum, 2012). Addressing Murray's arguments is outside the scope of this article. Interested readers may consult McClain, "The Other Marriage Equality Problem," 958–65 (see note 35 above) and Carbone and Cahn, *Marriage Markets*, 29–35, where they suggest that Murray gets the demographic trends correct but then engages in "blaming the victim" by minimizing the structural economic factors at work (see note 33 above).

39. On the Fragile Families and Child Wellbeing Study, see http://www.fragilefamilies.princeton.edu/.

40. See McClain, "The Other Marriage Equality Problem," 946 (see note 36 above), which quotes a statement on page 15 of the National Marriage Project report, *When Marriage Disappears: The New Middle America*, that marriage among the "moderately-educated middle" is beginning "to resemble the fragile state of marriage among the poor," probably with similar "attendant problems of economic stress, partner conflict, single parenting, and troubled children."

41. For examples of such work on immigration by legal scholars, see, for example, Kerry Abrams and Kent Placenti, "Immigration's Family Values," *Virginia Law Review* 100 (2014): 629–709, at 708, arguing that "immigration and citizenship law deal with parentage in ways that often seem misguided and counter-productive." See Kari E. Hong, "Famigration (Fam-Imm): The Next Frontier in Family Law," *Virginia Law Review Online* 100 (2014): 63–81, commenting on the Abrams and Placenti article and explaining the use of the term "famigration" (or "Fam-Imm law") – by analogy to "crimmigration" – to refer to the field of legal scholarship "in which family law doctrines, principles, and statutes are employed to critically examine the ways in which immigration law is recognizing [or failing to recognize] families." For work by an American political development scholar, see, for example, Dan Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton, N.J.: Princeton University Press, 2002). On mass incarceration, see, for example, legal scholar Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012) and American political development scholar Marie Gottschalk's *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge, U.K.: Cambridge University Press, 2006) and *Caught: The Prison State and the Lockdown of American Politics* (Princeton, N.J.: Princeton University Press, 2014).

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only state in which same-sex couples were able to enter into civil marriage and a majority of states had – or would soon have – "defense of marriage" laws or constitutional amendments barring such marriages. Over the next decade, both through legislative change and judicial rulings, same-sex couples secured the right to marry in a growing number of states. In June 2015, the United States Supreme Court, in *Obergefell v. Hodges* (2015), held that same-sex couples may exercise the fundamental right to marry in every state and that states may not refuse to recognize their valid out-of-state marriages.[42] On the one hand, the majority's opinion resolved the federal constitutional question, opening up civil marriage to same-sex couples in those states where it was not yet available. On the other hand, the four sharply worded dissents, with their dire predictions of the impact of the majority's opinion on those who continue to believe in traditional marriage, have fueled calls for resistance to the Court's opinion as a form of judicial tyranny that threatens the religious liberty of those who oppose this "new orthodoxy," that is, the expanded definition of civil marriage.[43] As this issue goes to press, there are proliferating challenges about the scope of such liberty in the cases of public officials, religious organizations, merchants, and business owners. In his dissent, Chief Justice Roberts also contended that the majority's reasoning immediately invited the question of whether states had any lawful basis for maintaining the bar on plural marriage, a contention carrying forward the "slippery slope" arguments that have long accompanied opposition to marriage by same-sex couples.[44]

Obergefell through the Lens of an American Political Development Approach to the Family and the State

Relevant to this symposium is not only how the different opinions in *Obergefell* conceptualize the relationship between the family and the state, or, more

42. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

43. See American Principles Project, "Statement Calling for Constitutional Resistance of Obergefell v. Hodges," at http://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF/.

44. *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J.). Reportedly inspired by *Obergefell* in their complaint, a Montana man, his legal wife, and his spiritual wife have filed suit in federal district court in Montana, challenging Montana's bigamy law after a clerk refused to issue him a marriage license to wed his spiritual wife. See *Complaint in Collier et al. v. Fox* (filed August 27, 2015), at http://online.wsj.com/public/resources/documents/2015_0827_collier.pdf. For competing arguments about whether opening civil marriage to same-sex couples leads inevitably to official recognition of plural marriage, compare Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy & the Future of Marriage* (Princeton, N.J.: Princeton University Press, 2015), who argues that these two forms of marriage are on completely different historical trajectories, with the former following from greater gender equality in marriage and the latter leading to gender inequality, with Ron C. den Otter, *In Defense of Plural Marriage* (New York: Cambridge University Press, 2015), who contends that constitutional principles that support extending marriage to same-sex couples also support plural marriage.

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precisely, between marriage and the state, but also how they approach history and tradition with respect to present-day constitutional controversies over the right to marriage. What light do these different opinions shed on understanding marriage as a basic social institution and the state's authority to regulate it? My brief analysis will suggest that the majority's approach resonates with an American political development/historical institutionalist understanding in insisting that basic institutions like marriage develop and change over time – as does governmental regulation of them – as the understanding of constitutional principles evolve. By comparison, the dissenting opinions insist that marriage – and governmental interest in it – are essentially unchanging and that any revision over time has not altered marriage's universal and fixed meaning.

With respect to why marriage matters, it is striking that both Justice Kennedy, writing for the majority, and Chief Justice Roberts, in dissent, cite Cicero in support of the idea that marriage is the first bond of society, followed by that of parent and child.[45] Why does marriage matter, in Justice Kennedy's opinion? Two of the four principles he identifies about why the right to marry is fundamental stress individual rights and the *private*, personal dimensions of marriage: "the right to personal choice regarding marriage is inherent in the concept of individual autonomy" and "choices about marriage shape an individual's destiny."[46] Marriage also "supports a two-person union unlike any other in its importance *to the committed individuals*."[47]

The other two principles that Kennedy identifies, however, go to the role of marriage as a social – or public – institution and the place it occupies in society. He writes that marriage "safeguards children and families" and "affords the permanency and stability important to children's best interests."[48] In words that have invited criticism by some proponents of greater family pluralism and diversity,[49]

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45. *Obergefell*, 135 S. Ct., at 2594 (Kennedy, J.); 2613 (Roberts, C.J.).

46. Ibid., at 2599.

47. Ibid. (emphasis added).

48. Ibid., at 2600.

49. For an illustration of different views of Justice Kennedy's focus on children's interests, see, for example, Serena Mayeri, "Marriage (Inequality) and the Historical Legacies of Feminism," *California Law Review Circuit* 6 (2015): 126–36, who argues that the majority opinion does not "bear the marks" of feminism's "campaigns against discrimination based on nonmarital status," and instead "laments the fate of children with unmarried parents as inherently difficult and demeaning," but suggests that over time *Obergefell*'s principles might come to apply to nonmarried individuals and families; Catherine Smith, "Obergefell and the Interests of Children," at http://prawfsblawg.blogs.com/prawfsblawg/2015/07/obergefell-and-the-interests-of-children.html, observes that, "although the decision may be viewed as an affirmation of conservative values that privilege married people, it also lays the foundation for a more expansive foundation of family"; NeJaime, "Marriage Equality and the New Parenthood," 1249–1250. (see note 22 above), acknowledges, on the one hand, that the Court "envision[ing] nonmarital life, including nonmarital childrearing as inferior" and its "rhetorical insistence on the priority of marriage" "exacerbates" concerns that "marriage equality will lead courts and legislatures to limit nonmarital paths to legal parentage for nonbiological parents," but argues, on the other, that "by affirming the equal worth of same-sex couples' family formation and by mainstreaming same-sex parenting, marriage equality can function

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Kennedy states that when same-sex couples are excluded from marriage and "the recognition, stability, and predictability [it] offers," their children "suffer the stigma of knowing their families are somehow lesser" as well as 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."[50] Such exclusive marriage laws, thus, cause children to suffer "harm and humiliation."[51] The important care work that parents do is important to Kennedy's analysis: the fact that so many states allow gay men and lesbians to adopt and foster children "provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families."[52]

Finally, drawing on the observations of Alexis de Tocqueville, Kennedy observes that "marriage is a keystone of our social order;" for that reason, states and the federal government have "made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities."[53] As Kennedy concludes: "the States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order."[54] Notably, Kennedy cites (among other works) a book repeatedly relied upon in marriage equality litigation, Nancy Cott's *Public Vows: A History of Marriage and the Nation*,[55] to state that the idea of marriage as a "great public institution" has "been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential."[56] This opinion recognizes significant continuity *and* change, as elaborated below, and seems compatible with an American political development/historical institutionalist understanding of the institution of marriage and ideas about it.

Kennedy's majority opinion readily illustrates explicit and implicit assumptions about the relationship between the family and the state. By focusing on marriage as a vital social institution, and holding that same-sex couples may be allowed to enter into it, he implicitly endorses the proposition that marriage is a vital place in which parents, regardless of sexual orientation, engage in the important work of social reproduction. In his analysis of marriage's role in the social order, he asserts the fundamental sameness of different- and same-sex couples in their ability to

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as an important precedent for the growth of intentional and functional parenthood for all families, not only inside but also outside marriage."

50. *Obergefell*, 135 S. Ct., at 2600–2601.

51. Ibid. This language about harm and humiliation first appeared in Justice Kennedy's earlier majority opinion in *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013), striking down part of the federal Defense of Marriage Act. Post-*Windsor*, numerous litigants and courts quoted the language. See, for example, *Baskin v. Bogan*, 766 F.3d 648, 659 (7th Cir. 2014).

52. *Obergefell*, 135 S. Ct., at 2600.

53. Ibid., at 2601.

54. Ibid.

55. Ibid., at 2596, citing Cott, *Public Vows* (see note 12 above).

56. *Obergefell*, 135 S. Ct. at 2601, citing Cott.

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realize marriage's purposes: "It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society," for "same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment of its highest meaning."[57] The Court, in other words, resolved the issue of family definition by looking to the private and public dimensions of marriage and why the state supports the institution of marriage. It concludes that the principles underlying its jurisprudence apply with equal force to same-sex couples.

The majority and dissenting opinions differ sharply on the constitutional relevance of history and tradition for resolving the question of the scope of the fundamental right to marry. Thus, Chief Justice Roberts argues in his dissent that marriage has held a constant and universal meaning over the millennia, and that it arose (citing James Q. Wilson's *The Marriage Problem*) as a social institution to address problems of parental investment presented by nature.[58] Roberts appeals to the "responsible procreation" argument that is prominent in defenses of state and federal "defense of marriage" laws and in some judicial majority and dissenting opinions: that marriage handles the reproductive consequences of heterosexual sexuality by channeling men and women into a social institution that integrates sexuality, reproduction, and parenting.[59] This "singular understanding," he asserts, prevailed throughout the history of the United States and, because the Constitution says nothing about marriage, states should be allowed to continue to adhere to the one-man, one-woman definition reflecting that understanding.[60]

By contrast, Justice Kennedy insists that the history and tradition of marriage as an opposite sex union begins but does not end the inquiry. Marriage's history is one of "continuity and change," and the institution (even as "confined" to "opposite sex relations") has "evolved over time."[61] Once again, he cites Cott's *Public Vows*. In contrast to viewing the institution of marriage as (in Roberts's terms) "singular," unitary, and unchanging, Kennedy deploys Cott's work to show not only the multiple and changing meanings of marriage, but also that the state's regulation of marriage has shaped the institution over time.[62] Such changes,

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57. Ibid., at 2602.

58. Ibid., at 2613 (Roberts, C.J.), citing James Q. Wilson, *The Marriage Problem* (New York: Harper Collins, 2002). For an analysis of the influence of Wilson's work and his own active participation in marriage litigation, see Linda C. McClain, "James Q. Wilson's – and Society's – Marriage Problems" (unpublished paper), at papers.ssrn.com/sol3/papers.cfm?abstract_id=2511229.

59. See, for example, *Goodridge*, 798 N.E. 2d at 995 (Cordy, J., dissenting), articulating this argument and citing Wilson's *The Marriage Problem*.

60. *Obergefell*, 135 S Ct., at 2513.

61. Ibid., at 2595.

62. A full history of the decades-long struggle for marriage equality would show the significant role played not only by Cott's *Public Vows* and other books on the history of marriage, but also by expert testimony by Cott and other scholars in various constitutional challenges to state and federal marriage laws. Cott's work has informed the work of many legal scholars (myself included) and political scientists (including some contributors to this symposium).

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Kennedy states (again citing Cott), "were not mere superficial changes," but "worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential."[63] Further, to illustrate the evolution of marriage in light of evolving understandings of constitutional guarantees of liberty and equality and of "new insights" about what once seemed "natural and just," Kennedy offers two examples. One is the Court striking down anti-miscegenation laws in *Loving v. Virginia* (1967).[64] Stressing the Court's twin holdings based both on equality (the Constitution's equal protection clause) and liberty (the due process clause), Kennedy's language speaks of an evolving understanding: "The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions."[65] The second example (citing a friend of the court brief filed by Historians of Marriage and the American Historical Association) concerns striking down sex-based classifications in marriage: even after the "gradual erosion of coverture, invidious sex-based classifications remained common in marriage into the mid-20th century"; such classifications "denied the equal dignity of men and women."[66] Recounting the dawn of the Court's new approach to equal protection mentioned above, Kennedy explains the role of evolving understanding in generating that change: "Responding to a new awareness, the Court invoked Equal Protection principles to invalidate laws imposing sex-based inequality on marriage."[67]

Kennedy concludes that these "new insights have strengthened, not weakened, the institution of marriage."[68] Worth mentioning is Kennedy's observation about the role of social change in bringing about revisions to the institution of marriage:

> Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.[69]

Drawing on another friend of the court brief filed by historians, Kennedy then elaborates on a similar "dynamic" in "the Nation's experiences with the rights of gays and lesbians."[70] He stresses that, "in the late 20th century, following substantial cultural

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63. *Obergefell*, 135 S. Ct. at 2595–2506, citing Cott as well as Hendrik Hartog, *Man and Wife in America* (Cambridge, Mass.: Harvard University Press, 2000).

64. Ibid., at 2602 (citing *Loving v. Virginia*, 388 U.S. 1 (1967).

65. Ibid., at 2603.

66. Ibid., at 2595-2596.

67. Ibid.

68. Ibid., at 2596. The *Goodridge* court similarly observed that "alarms about the imminent erosion of the 'natural' order or marriage were sounded over the demise of anti-miscegenation laws and the expansion of the rights of married women," but "marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution." *Goodridge*, 798 N.E.2d at 967.

69. *Obergefell*, at 2596.

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and political developments, same-sex couples began to lead more open and public lives and to establish families," which led not only to "extensive discussion of the issue" in governmental and private sectors and to shifting public attitudes, but also to the issue of the "rights of gays and lesbians" reaching the courts.[71]

This brief discussion of *Obergefell* has shown how Justice Kennedy, drawing on the work and court filings of historians, brought marriage's history of "continuity and change" to bear on the constitutional question of the scope of the fundamental right to marry. Kennedy similarly drew on friend of the court briefs by historians to recount the evolving understanding of sexual orientation and of the place of gay men and lesbians in society, which shaped the Court's evolving approach to the import of constitutional liberty and equality for their intimate relationships.[72] The focus in the majority opinion on the significance of history and on change seems resonant with the works in this symposium, in the tradition of works on American political development that, as Susan Burgess puts it, "emphasize the importance of historical context for understanding the complex development of institutions, policies, and culture."[73]

Conclusion

The articles in this symposium demonstrate the vitality and importance of studying the relationship between the family and the state. They use diverse methodologies to study different temporal contexts and, in doing so, unearth significant insights about this relationship. In conclusion, it seems appropriate to observe that, as we enter a new, post-*Obergefell* landscape of possibilities for family life, new questions of family definition and family regulation arise. As political scientists, historians, and others working in the American political development tradition explore those new questions, their work will likely inform and enrich the work of legal scholars, as it has in the past.[74] So too, it is evident from this symposium that legal

70. Ibid., citing Brief for Organization of American Historians as Amicus Curiae, at 5–28.

71. Ibid., at 2596.

72. Ibid., at 2596–97. Commenting upon Justice Kennedy's reliance on these two briefs filed by historians, Nancy Cott observed that "history really matters in Obergefell v. Hodges..." Nancy F. Cott, "Which History in Obergefell v. Hodges," Perspectives on History, July 2015, at http://historians.org/publications-and-directories/perspectives-on-history/summer-2015/which-history-in-obergefell-v-hodges. Cott was a signatory to the brief filed by Historians of Marriage and the American Historical Association (see text accompanying note 66 above)

73. Susan Burgess, "Family, State, and Difference in Political Time," 140–45 (see note 1 above).

74. Legal scholars, as well as courts, as noted above, have frequently cited Nancy Cott's work. Theda Skocpol's and Linda Gordon's work on the development of social policy has also informed legal scholars' work on the welfare state, on the role of marital or family status for governmental entitlement programs, and on the administrative state. See, for example, Kristin Collins, "Administering Marriage: Marriage-Based Entitlements, Bureaucracy and the Legal Construction of the Family," *Vanderbilt Law Review* 62 (2009): 2134–2235. To offer a personal example, contributions by Rogers Smith, Eileen McDonagh, Nancy Hirschmann, and Gretchen Ritter appear in my interdisciplinary volume, co-edited with Joanna L.

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scholarship on the family is already informing the work of scholars working on American political development; it is likely to continue to do so.[75] If one thinks of scholarship on American political development as a proverbial big tent, then it might be fruitful for legal scholars and political scientists to come to appreciate even more that we are engaging in parallel efforts to address common questions and become more mindful of our mutual efforts.[76] Especially with respect to the study of the family and the state, I believe that more cross-disciplinary conversations and cross-fertilization will be valuable.[77]

Linda C. McClain *is Professor of Law and Paul M. Siskind Research Scholar at Boston University School of Law, where she is also an affiliated faculty member of the Women's, Gender, and Sexuality Studies Program. Her book publications relevant to this symposium include* The Place of Families: Fostering Capacity, Equality, and Responsibility *(Harvard University Press, 2006); and* Ordered Liberty: Rights, Responsibilities, and Virtues *(Harvard University Press, 2013; with James E. Fleming). She may be reached at* lmcclain@bu.edu.

Grossman, *Gender Equality: Dimensions of Women's Equal Citizenship* (New York: Cambridge University Press, 2009).

75. In this children's rights/children and the law scholar, for example, Novkov and Nackenoff cite work by my colleague Kristin Collins on "*jus sanguinis* citizenship." See Kristin A. Collins, "Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation," *Yale Law Journal* 123 (2014): 2134–2235. Both Alphonso and Gash and Yamin cite work by family law scholar/children and the law scholar Barbara Bennett Woodhouse. See Barbara Bennett Woodhouse, "A Public Role in the Private Family," *Ohio State Law Journal* 57 (1996): 393–430. Martha Fineman's argument, first in *The Neutured Mother, the Sexual Family, and Other Twentieth Century Tragedies* (New York: Routledge, 1995), and subsequently in *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004), that, for all relevant purposes, we do not need the category of marriage but should shift governmental subsidies to the parent-child or caretaker-dependent relationship and leave intimate adult relationships to the realm of contract, has sparked much discussion by political scientists and philosophers. See, for example, Maxine Eichner, *The Supportive State: Families, Government, and America's Political Ideals* (New York: Oxford University Press, 2010); Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for Their Divorce* (Princeton, N.J.: Princeton University Press, 2010); Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012).

76. For example, legal historians such as Kris Collins, Kerry Abrams, and Rose Cuizon-Villazor study the relevance of family, marital status, and race to immigration and naturalization policy. Another area of intense interest by family law scholars, feminist legal theorists, and critical race theorists is the relevance of family and marriage to welfare policy, for example the welfare reform debates of the 1990s and 2000s, and on such issues as the treatment of single mothers and governmental campaigns to promote healthy marriage and responsible fatherhood. Some of that work could enrich the analyses offered by Alphonso and by Gash and Yamin.

77. To be sure, there are already regular academic conferences at which scholars from political science, history, law, and other disciplines who are engaging in the study of American political development gather, for example the "Policy History" conference as well as various legal history conferences. I would also be remiss in not mentioning the annual book review issue of the *Tulsa Law Review* (of which I serve as co-editor, along with political scientist Ken I. Kersch), which provides a venue for scholars from law, political science, history, and other disciplines to write about recent books about law (broadly conceived). These issues include both books, and reviews of them, that are written by scholars of American political development (including the contributors to this symposium).

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