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Patrick N. Cain and David Ramsey, eds., *American Constitutionalism, Marriage, and the Family:* Obergefell v. Hodges *and* U.S. v. Windsor *in Context*. Lanham, MD: Lexington Books, 2016, 231 pp., $69.94 (hardcover).

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Virtually everyone in America, prior to roughly the mid-1970s, *knew* that marriage was a permanent, conjugal, and exclusive union between one man and one woman ordered toward the raising, education, and legitimation of children. And for this reason, it was accorded a type of formal state recognition and protection not bestowed on other sorts of friendships and free associations. Moreover, the dominant branches of all the major religious traditions treated marriage as an institution so set apart from other interpersonal alliances that it was often described as divinely ordained in some way or another. In the Catholic tradition, for example, the relationship between Christ and His Church was likened to the union of husband and wife.

Over the past four decades or so, each element in this understanding—permanence, conjugality, and exclusivity—began to wither away. With no-fault divorce, permanence did not seem to matter anymore. As the stigma of illegitimacy dissipated, and single-parent homes (partly owing to the rising divorce rate) began to increase, one could have children without either marriage or shame. With the contraceptive revolution combined with the sexual revolution, it was no longer clear that sex belonged exclusively in marriage or that our reproductive powers were just for reproduction and not also (or even exclusively) for recreation. So, eventually, conjugality and exclusivity went the way of permanence.

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Consequently, by 2013, when the US Supreme Court overturned a portion of the Defense of Marriage Act (DOMA) in *U.S. v. Windsor*, same-sex marriage (SSM) was a fait accompli. Thanks to the slow though steady five-decade erosion of each of the elements of marriage—permanence, conjugality, and exclusivity—the Supreme Court's 2015 ruling *Obergefell v. Hodges*, which declared that all states must recognize SSM under the Due Process and Equal Protection clauses of the Fourteenth Amendment, seemed to many people such an obvious deliverance of justice that they could not imagine anyone, except bigots or fanatics, arriving at any other conclusion. And yet the very idea of SSM, just twenty years earlier, appeared to many citizens too difficult to conceptualize, even for those who identified as egalitarian progressives who accepted all the tenets of the sexual revolution. This is because, as some of the contributors to this book argue, most of us had not fully understood the logic of the principles that we had tacitly accepted when we embraced as uncontroversial the Enlightenment liberal view of the human person.

In *American Constitutionalism, Marriage, and the Family*, the reader is introduced to a number of scholarly treatments of marriage, law, and culture that contextualize the present moment in light of the history of matrimony and American jurisprudence. These chapters have their origin in a series of academic panels convened between the summer of 2014 and January 2015 at the annual meetings of three regional political science associations. It is an impressive collection that includes some of the finest writing in political theory. (In regard to the latter, the contributions by Susan McWilliams and James R. Stoner Jr. are the most outstanding.)

The book begins with a piece by the late Peter Augustine Lawler, who died unexpectedly soon after its publication. Entitled "Defending the Christian Idea of Marriage: The Place of the Personal Logos," this chapter sets the table for the rest of the book by exploring the ways in which Enlightenment or modern views of personhood differ from the traditional Christian view and how the former have ultimately overtaken the latter in our wider culture's understanding of marriage, which came to full bloom in *Windsor* and *Obergefell*. The Christian view sees persons as relational by nature, and holds that one's obligations to others that do not arise out of purely contractual choices are not encumbrances that limit one's true self from flourishing, but rather are the ends to which the person is by nature ordered and in which the person finds true fulfillment. Attributing modern views to the influence of John Locke, Lawler argues that it took about two centuries for the culture and its marriage laws to catch up to the individualist, self-interested, and

nonrelational principles of Lockean liberalism that were part of the American Founding, though largely suppressed by the nation's deeply entrenched Puritanical laws and practices. Nevertheless, Lawler argues that the Court's idea of marriage in *Obergefell* and *Windsor* retains the personal element found in the Christian view while discarding the relational. For this reason, he suggests that the Court's view is a Christian heresy.

This philosophical tension—between the modern and the classical—is a common theme that runs through all the chapters in this book, though each author focuses on a different area in which this tension resides.

In chapter 2 Terrence J. Kleven addresses the apparent conflicts between the nature of the household in classical thought and in the Christian West. For the former, he enlists the ideas of Aristotle and Abū Nasr al-Fārābī, and for the latter the work of John Witte Jr. on the understanding of marriage in Christian history. Although he offers a way to reconcile this apparent *aporia*, Kleven is nevertheless critical of the recent jurisprudence on marriage that prioritizes individual private right over communal good. As he puts it, "the current plethora of legal ways to protect individualism is not the only nor even the best recipe for happiness" (43). William C. Duncan's contribution (chapter 3) discusses the slow shift in American marriage jurisprudence from the understanding that marriage is a social institution that advances the common good to the view that marriage is just one type of intimate association that one may enter by exercising one's right to constitutionally protected personal autonomy.

In a chapter entitled "Free and Happy Bonds: *Loving v. Virginia*'s Nineteenth Century Precedent on Marriage and the Pursuit of Happiness," Adam Carrington sees the legal history a bit differently than does Duncan. Carrington maintains that at bottom marriage's legal status, until recently, has always depended almost exclusively on the belief that it is essential to the pursuit of happiness (both private and public), and for this reason cannot be reduced to a mere contract or exercise in personal autonomy. In fact, argues Carrington, this account is the primary feature of the Supreme Court's 1967 *Loving* case that overturned laws banning interracial marriage. However, with *Obergefell*, the Court moves away from this understanding, with a greater emphasis on love and individual autonomy.

Like chapter 4, chapters 5 and 6 focus on marriage in the nineteenth century and what it can teach us about recent marriage jurisprudence. David Ramsey, in chapter 5, examines Justice Curtis's dissent in *Dred Scott*

v. Sandford, which includes an argument for Mr. Scott's emancipation based on his consent to marry while he resided on free soil. In chapter 6, Martha Rice Martini looks at the Court's *Reynolds v. United States* polygamy opinion and contrasts it with the Court's reasoning in *Obergefell*, *Employment Division v. Smith* (1990), and *Washington v. Glucksburg* (1997) as well as the reasoning in the federal district court case *Brown v. Buhman* (2013). Because the courts have largely abandoned the logic of *Reynolds*, Martini concludes, the premises are in place for a future Supreme Court to plausibly argue that nonrecognition of plural marriage is just as much a violation of dignity as is the nonrecognition of same-sex marriage.

Chapter 7 takes us to the legal disputes of the mid-twentieth century on forced sterilization and eugenics. Author Lauren K. Hall argues that judicial minimalists have a tough time with these cases. For example, even though the forced sterilization statute upheld in *Buck v. Bell* (1927) seems prima facie unjust, given judicial minimalism (my term, not hers), there seems to be no constitutional hook by which a judge could strike down such a law. Without substantive due process or equal protection analysis, a minimalist must uphold such a statute as constitutional. Hall, however, maintains that the solution may be found in the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." A Ninth Amendment jurisprudence, argues Hall, would require a sophisticated appeal and defense of those fundamental rights held at common law, including the right of bodily integrity and family autonomy.

Chapters 8, 9, and 10 focus on several overlapping legal questions concerning the family, privacy, and limited government. Mark A. Sully, in chapter 8, argues that the Supreme Court's most important post-1940 cases that seem to support family autonomy are not often what they appear to be, even though they claim to be grounded in cases that held a more robust understanding of family autonomy, such as *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925). Take, for example, *Wisconsin v. Yoder* (1972), a case that upheld the right of Amish parents to remove their children after eighth grade and receive an exemption from a compulsory education law that required all children to remain in school until the age of sixteen. Although the case seems to support family autonomy, Sully argues that if you read the majority opinion closely you find that the Court defends its ruling by pointing to the long-standing achievements of Amish culture in forming its children and thus reducing the state's welfare expenditures. But, as Sully maintains, "this reveals a narrowly economic conception of the individual's duty to the community" (136).

In Chapter 9, Stephen A. Block argues that the liberal understanding of human nature—which is assumed in cases such as *Griswold v. Connecticut* (1965)—makes it virtually impossible for a liberal regime to provide an account as to why certain types of nonliberal institutions, such as the family, should be privileged. If, under liberalism, all human choices in the pursuit of happiness should be honored (as long as they do not interfere with another's), then why should, for example, the state protect the sanctity of the marital bed when it comes to contraception (in *Griswold*) but not the sanctity of the couple's financial portfolio when it comes to the Affordable Care Act's penalty for not purchasing health insurance? (My example, not his.)

Like Block, Patrick N. Cain (in chapter 10) focuses on an apparent incoherency in liberalism that has its roots in *Griswold* but comes to full flower in *Obergefell*. Cain writes: "I argue that although the right to privacy as adopted by the Court is founded and depends upon a notion of personal ownership and freedom that is fully separate from governmental interference and public purposes, its claims ultimately require and culminate in an appeal for public and governmental affirmation of the very thing or activity being held in private" (162). Although this is not an example Cain uses, here is my understanding of what he means. *Griswold* overturned a Connecticut law that prohibited the use of contraception. By appealing to the sanctity of the marital bed (as an instance of the right to privacy), the Court was assuming that contraceptive use was a good that benefits married couples. But if it is a good for married couples, surely it is a good for single people who also engage in sex and do not want to sire or beget children, which is what we get in *Eisenstadt v. Baird* (1972) when the Supreme Court overturned a Massachusetts statute that prohibited the distribution of contraception to unmarried people. It stands to reason then that any employer that would refuse to include contraception in its company health care plan, for alleged religious reasons, is literally harming its employees by not honoring their inviolable identity as sexually autonomous beings. Thus, what began as a right to nongovernmental interference of one's privacy was transformed into an obligation of the government to coerce private support. This is the sort of reasoning that Cain believes is found in *Obergefell*'s majority opinion: because the Court claims to be vindicating the inviolable identity and dignity of same-sex couples, anything short of public affirmation is an injustice. (This, by the way, does not bode well for any public accommodations, including small family-owned wedding vendors, who, for religious reasons, cannot cooperate with the conducting of a same-sex wedding ceremony or its accouterments.)

In chapter 11, Susan McWilliams assesses the reasoning of *Obergefell* in light of Alexis de Tocqueville's *Democracy in America* (1835). She argues that although the idea of SSM is a recent novelty, its emergence cannot be entirely attributed to contemporary fads and enthusiasms. According to McWilliams, Tocqueville detected certain strains of thought in American culture that made *Obergefell* not only possible but virtually inevitable: "By Tocqueville's account, then, the logic of the decision in *Obergefell* is in part a testament to the American conviction that, by the nation's long-standing logic of individual independence, each individual should be free to marry the person whom he or she loves. It is also a testament to the fact that over time, Americans have come to enshrine the category of marriage in the law in terms of calculable, material benefits that accrue to individuals. Over time, seeing marriage in those terms has eviscerated the social and religious origins of marriage" (182).

Parenthood and procreation are the focus of chapter 12, authored by Scott Yenor. He argues that *Obergefell* is a vindication of what he calls the revisionist view of marriage. In contrast to what he calls the traditionalist view, the revisionist view detaches marriage from the idea that it is by nature ordered toward the procreation and the education of children rather than merely a legal agreement intended to facilitate the satisfaction of adult desires. In this fascinating chapter, Yenor explores several important philosophical puzzles about parental responsibility and obligation that are very rarely addressed in the legal literature, even though they are essential to helping us better understand why the traditionalist view seemed so obviously true to virtually everybody up until yesterday.

This book concludes with a contribution by the eminent political scientist James R. Stoner Jr. Entitled "Does the Law and the Constitution of the Family Have to Change?," Stoner begins chapter 13 by reviewing the changes in marriage jurisprudence since 1993. He goes on to argue that even though SSM is the law of the land, we may still be able to recover, sustain, and advance traditional marriage as a social norm without disturbing what the Court gave us in *Obergefell*. To achieve an authentic marriage culture, Stoner maintains, the key is to restore "a regime of law that recognizes the natural family of man and woman and their biological children as the central case deserving of legal recognition" (206). In this, Stoner is relying on deep intuitions that are nearly universal. We see them in the 23andMe and ancestry.com genealogical research craze, in the adopted child who longs to know her true biological roots, in the legal requirement that deadbeat dads and not sperm donors must

pay child support, in the joy of discovering your Italian grandfather was born in Naples and not in New York City as you had always been led to believe, or in the features and characteristics you see in your children that remind you of yourself, your spouse, or your parents. Writes Stoner: "The natural origin of the human child in the union of a woman and a man is a basic fact of human existence, and in the long run, that law will succeed that recognizes rather than contravenes basic human facts" (215).

There is, of course, much more to this book than I could possibly present in this brief review. Suffice it to say, I think it is essential reading for anyone who has an interest in the complicated legal, philosophical, and historical issues that are behind our contemporary debates about marriage and the family. Unfortunately, the way these debates are often conducted online, in public, and at universities and colleges—usually accompanied by rhetorical excesses and personal recriminations—they rarely reveal that the plausibility of each side's case depends on deeper principles that are far from uncontroversial. In this regard, *American Constitutionalism, Marriage, and the Family* is a breath of fresh air.