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FAMILY, THE LAW, AND THE CONSTITUTION(S)

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Abstract

This article explores the constitutional reasons for and the constitutional implications of the current trend to sever family rights from family status. In the last 30 years, courts and legislatures have increasingly recognized a variety of different family forms by granting relationship rights (domestic partnership privileges, civil union status, visitation rights, de facto parent status) without expanding (much) on the legal definition of either marriage or parenthood. This article explains why this might be so by unpacking the constitutional treatment of family relationship. It argues that when state and federal constitutions recognize a right to family status (marriage or parenthood per se), they are honoring an expressive right to label oneself with a status that has social meaning. Because what gives this expressive right its content is the social meaning of the institution, the scope of one's right to family status is cabined by the social understanding of that status. The article also argues that constitutions protect family relationships for reasons other than just their expressive value, however. It suggests that the rights and obligations of both marriage and parenthood, particularly in their tendency to treat two as one for legal purposes, provide critical sources of identity and autonomy to family members. The current trend to disaggregate family rights from family status suggests that legal actors may be more eager to protect the constitutive benefits that flow from family rights than the expressive benefits that flow from family status. The article argues, however, that the trend to disaggregate family rights from status actually undermines both aspects of the constitutional protection of relationship. First, the proliferation of alternative means of recognizing family relationships may well undermine the social meaning of marriage and parenthood per se and thereby make claims to marital or parental status frivolous. Second, the tendency to grant people the rights of family relationships without necessarily imposing upon them the burdens of family relationship undermines the constitutive nature of legally recognized family relationship and therefore undermines the purpose of constitutional protection. Finally, the more legally varied family-like relationships become, the more necessary it will be for courts to insert themselves inside those relationships in ways that will undermine the privacy and autonomy values that justify treating family relationships as special. Although not primarily about gay marriage, all of the analysis presented here has implications for the same-sex marriage debate.

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I. Introduction

Few scholars of constitutional or family law think of Michael H. and Holly Puterbaugh as having much in common. Michael H. was the wealthy, worldly young man who bounced between homes in Los Angeles and St. Thomas, sometimes with the married woman with whom he was having an affair, sometimes with the child born as a result of the affair, but not always or in any permanent sense with either of them.¹ Holly lived in a small town in Vermont with her partner of 27 years. Together, they ran a Christmas tree farm.² Both Michael H. and Holly went to court claiming a constitutional right to family status. Michael was claiming a right to parental status. Holly was claiming a right to marital status. Neither won what they wanted, but neither went home completely empty handed.

¹ Michael H. v. Gerald D., 491 US 110 (1989).

² See Lois R. Shea, *Same-Sex Marriage Hopes Go North*, THE BOSTON GLOBE Nov. 17th 1998.

Indeed, they received strikingly comparable remedies. Justice Stevens, the swing vote in *Michael H. v. Gerald D.*, voted to deny Michael the status of father because whatever the rights that his biological connection and relationship to his biological daughter gave him, they were honored by a state statute that allowed him to petition for visitation rights.³ Holly, a plaintiff in *Baker v. Vermont*⁴ was given the right to form a civil union, which brought with it almost all of the rights and duties of marriage, but not marriage itself. In other words, Michael was denied parental status but not all the rights of parenthood. Holly was denied marital status, but not all the benefits of marriage.

This article explores just how comparable Holly and Michael's claims are and how common they are becoming. For the past 30 years, alternative family structures have put pressure on the law to recognize different kinds of family relationships. In response to that pressure, the law has started to grant alternative family members rights, without granting them family status. Often, as in the cases of Holly and Michael, this disaggregation of family rights from family status has a constitutional dimension. At other times, family law judges and state legislatures embrace the distinction between family rights and family status, even though there is no clear constitutional need to do so. This article explains this trend by analyzing how and why the law recognizes family relationships, paying particularly close attention to how and why constitutions treat family relationships the way they do.

The constitutional analysis presented here suggests that federal and state constitutions afford some, though not particularly robust, protection to both marital and parental *status*. In other words, people can win positive constitutional claims to family status, but those claims are cabined by the social meaning of marriage and parenthood. The article also suggests that constitutions recognize the importance of relationship in another way. It argues that part of what constitutions protect when they protect family relationship is a right to be treated as something other than an autonomous individual, a right to be viewed as in relationship with another as a legal matter. Sometimes this form of constitutional protection manifests itself as a negative right to be free from state interference into a relationship, but sometimes it manifests itself as a positive right to a set of state rules that treat two as one.

Understanding that there may be constitutional protection of both relationship status and relationship rights helps explain both why courts and legislatures have disaggregated family rights from family status and why that disaggregation may be dangerous. Conferring family status honors the expressive value implicit in labeling, while conferring relationship rights honors the constitutive benefits that flow from legally recognized relationship. The trend to disaggregate rights (and obligations) from status suggests that courts and legislatures are more eager to honor the constitutive benefits gained from family rights, than they are to honor the expressive benefits that flow from

³ There was much dispute about whether someone like Michael actually could obtain visitation rights under the California statute. The dissent thought not, but the important point for this inquiry is that Michael was denied parental status, but that denial seemed to hinge on him still being able to fight for some of the benefits of parental status.

⁴ 744A2d 864 (1999).

family status. Moreover, the ability to disaggregate rights from status allows courts and legislatures to recognize alternative relationships without completely disrupting the social meaning of either marriage or parenthood. This article will argue, though, that the tendency to disaggregate rights from status may ultimately weaken all constitutional protection of family relationship because widespread disaggregation could undermine both the social meaning of family status and the constitutive benefits that are realized when the law treats two as one.

Although this article is not (primarily) about gay marriage, it provides a number of insights into the gay marriage debate. First, it helps explain why gays and lesbians have not been more successful in securing the right to marital status. Because family status is defined and cabined by social meaning, gay and lesbian claims to status are highly contingent on subjective understandings of that meaning, and because courts and legislatures can give gays and lesbians some legal recognition of their relationships, they feel less compelled to provide status. Second, the expressive theory offered here helps explain what it is that gays and lesbians acquire when they acquire the right to marry. That is, it explains how marital status is something other than just the rights and obligations of marriage. Third, the conclusions offered here suggests that people who believe that the law should continue to foster and protect marriage for everyone should be wary of settling for anything short of marital status for gays and lesbians.

The argument proceeds as follows. Part II provides a brief description of what has been happening to claims for family recognition in the last 30 years. It describes the various ways courts and legislatures have embraced the disaggregation of family rights from family status in both the marital and parental contexts. “Domestic partnerships” and “Civil Unions,” “De Facto Parents” and “Equitable Parents” are now widely used legal constructs that treat people as entitled to the rights (and sometimes liable for the obligations) of legally recognized relationship. The proliferation of these new legal categories demonstrates how the law has responded to the need to treat people as in relationship legally, even as the law has resisted expanding the traditional legal statuses of marriage and parenthood.

Part III then analyzes the legal treatment of marriage more fully. It explores what marriage means socially as a way of helping explain what it might mean legally. Part III pays particularly close attention to the discordant federal and state themes of marriage. For years, there have been two discourses of family law. The first, constitutional and mostly federal, speaks of the expressive and emotional benefits that flow from family relationships. It is a lofty discourse that invokes themes of autonomy, personal meaning and self-fulfillment. The second discourse, common law or statutory and mostly state, elaborates on how and why the state imposes obligations (and rights) on family members. This second discourse is blunt, often harsh and deeply resistant to claims of autonomy and self-fulfillment. When one puts the two discourses together, one realizes, for instance, that marriage is a relationship into which “the law steps [] and holds the parties to various obligations and liabilities.”⁵ *and* is “intimate to the point of being sacred.”⁶ It

⁵ *Maynard v. Hill*, 125 US 190 (1888).

⁶ *Griswold v. Connecticut*, 381 US 479 (1965)

is both a “vital personal right essential to the orderly pursuit of happiness”⁷ and an institution in which the parties’ interests are subservient to the state’s.⁸ How can that be? Part III suggests that one way to reconcile the constitutional and statutory discourses in family law is to recognize that when the Constitution protects family relationships it is protecting both the expressive autonomy-promoting benefits implicit in making a statement about oneself and the constitutive, often autonomy-denying benefits implicit in legally binding oneself to another. The expression protected with the former is limited by the social meaning of family status because it is that social meaning that makes the expression meaningful. The strength of the bind created by the latter is determined by the state, but the Constitution may well afford some protection to both.

Part IV explores the expressive claim in more detail. It examines constitutional doctrine in both the marital and parental context to bolster the claim that when the constitution protects the right of individuals to secure marital or parental status it is, for the most part, securing the right of individuals to express themselves through the labels of “married” or “parent.” Because of the immensely meaningful role that family relationships play in our lives, the ability to proclaim family status is very important to people. Thus, while no one refutes a state’s ability to define the particular parameters for marriage and parenthood, the cases strongly suggest that a state is not free to define marriage and parenthood out of existence or beyond recognition. If an individual’s relationship comports well enough with the social understanding of family status, he or she is constitutionally entitled to express him or herself through that status.

Part V explores the constitutive claim in more detail. It fleshes out why a constitution would protect not just marital and parental status but marriage and parenthood as relationships. Drawing on psychological and philosophical theories of relationship, as well as on the legal scholarship of both marriage and parenthood, Part V argues that marriage and parenthood are protected legally for remarkably similar reasons. They are protected because being entwined with another legally, economically, morally, and socially has such a profound effect on who one is, what one wants and how one sees oneself in the world. When the law treats one as in family relationship with another, the law honors the liberty associated with being able to exist with another as a private, intimate and autonomous entity.⁹

Putting parts IV and V together, one can see why courts and legislatures have embraced the disaggregation of family rights from family status. Disaggregation allows the law to recognize alternative family forms, to treat two as one for some purposes, without infinitely expanding the social meaning of either marriage or parenthood. Part VI suggests that there may be costs to this disaggregation, however.

⁷ *Loving v. Virginia*, 388 US 1 (1967)

⁸ *Dickson v. Dickson*, 9 Tnn (1 Yer) 100, 112 (1826)(Marriage “is a connection of such deep-based and solemn character that society has even more interest in preserving it than the parties’ themselves.”)

⁹ Part V does not make the claim that the U.S. Constitution compels states to treat people as in family relationship with another. One’s view on that question will largely depend on whether one believes the Constitution ever compels a bare minimum of law. Part V does make the claim that if there is a minimum floor of law that the Constitution must provide, relationship rights to both partners and children may well be included in that floor.

Part VI offers a preliminary analysis of some of the consequences that might flow from the continued disaggregation of family rights from family status and indicates that the trend to disaggregate may put both dimensions of the constitutional treatment of relationship in jeopardy. First, the proliferation of alternative means of recognizing family relationship may undermine the constitutional protection of family status by undermining the social meaning of the status. We may be moving toward a culture in which no one's claims to marriage or parenthood per se seem compelling because no one knows what marriage or parenthood *mean*. Among other things, this suggests that gays and lesbians may want to be wary of merely accepting civil unions or domestic partnership because the expressive benefits that flow from marriage will be decreasingly valuable as marriage comes to mean less and less. Second, when (as they often do) courts and legislatures grant family rights without necessarily imposing family obligations, they weaken the constitutive nature of legally recognized relationship. The less completely one is entwined with another and the less one has obligations in addition to rights, the less formative and defining the relationship is to one's selfhood. Hence, the less important it is for the Constitutions to recognize the relationship. Third, the more legally varied and individuated family-like relationships become, the more necessary it will be for courts to insert themselves inside those relationships in order to ascertain the individual rights and responsibilities involved. The more courts insert themselves inside some family relationships, the less likely courts will be to honor notions of relationship privacy and autonomy in general.

To many people, these threats to the constitutional protection of marriage and parenthood may not be troubling. There are strong arguments that we are better off without any legal protection of family relationships because the protection of marriage is autonomy-denying¹⁰ and has come largely at the expense of women¹¹ and the protection of parenthood is extraordinarily limited¹² and has come largely at the expense of children.¹³ Moreover, not all people marry or even want to, and many people that do marry fail to experience marriage as anything like the transcendent experience that the law is supposed to foster and protect.¹⁴ Comparably not all people parent or even want to, and many that

¹⁰ See Anita Bernstein, *For and Against Marriage*, 102 MICH. L. REV. 129 (2003) (doing an "accounting" on marriage; weighing its significant costs against its supposed benefits).

¹¹ SEE LEE TEITELBAUM, *FAMILY HISTORY AND FAMILY LAW* 1985 WIS. L. REV. 1135 (doctrines of family autonomy hurt the less powerful member of the family); Laura A. Rosenbury, *Friends With Benefits*, 106 MICH. L. REV. 189, 219 (2007) ("the law of marriage may be more about gender than about intimate relationship or companionship . . . with wives more often than husbands sacrificing their individual desires for the good of the unit.").

¹² See *Newdow v. Elk Grove Village*, 542 U.S. 1 (2004) (denying a non-custodial father standing to challenge state practices regarding the education of his child); Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L. J. 1523, 1545-48 (1998) (discussing ways in which the rights of parents are compromised when parents are not married).

¹³ See Barbara Woodhouse, *Who Owns the Child, Meyer and Pierce and the Child as Property*, 33 WM & MARY L. REV. 995 (1992)

¹⁴ It is worth noting, however, that most marriages are not as temporary as most people think. Despite the well-worn adage that half all marriages end in divorce, the most recent data, reliably analyzed, suggests that only 41% of people who have ever married subsequently divorce. See Dan Hurley, *Divorce Rate: It's Not as High as You Think*, NEW YORK TIMES, April 19 2005. Some demographers put the rate at closer to 50%

do abuse and/or ignore the privileges the law affords them as parents. That marriage and parenthood can serve as critical sources of happiness, autonomy and identity does not mean that they necessarily do so. For these reasons, among others, the contemporary academic attack on the legal treatment of marriage and parenthood often suggests that the law should simply get out of the relationship business altogether.¹⁵ This article is agnostic on the normative question of whether legal recognition of family is good, but it does suggest that the legal treatment of family status and family relationships is in jeopardy.

To date, very few scholars have made the link this article does between the constitutional treatment of marriage and parenthood. Some scholars have even explicitly separated the two kinds of family relationships, assuming or briefly declaring that they have nothing to do with each other.¹⁶ This article argues that isolating the constitutional treatments of

but those rates usually include 2nd and 3rd (and even later) marriages, which have always been more likely to end in divorce. See www.smartmarriages.com/divorcestats.html. Even if one puts the divorce rate for first time marriages at 50%, and the divorce rate of 2nd time marriages at 60% (generous statistics both), one must recognize that the re-marriage rate for women (which is *lower* than the remarriage rate for men), is 75%. Most of the people who divorce thus re-marry and a significant portion of them (40%) stay married. That means that at least 2/3 of the population experience long term marriages. See "Cohabitation, Marriage, Divorce, and Remarriage in the United States", Vital and Health Statistics Series 23, Number 22, (Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for health Statistics, July 2002):

http://www.aamft.org/Press_Room/CDC_series23_7_2002.pdf and "Number, Timing, and Duration of Marriages and Divorces: 2001 (U.S. Census Bureau, U.S. Dept. of Commerce) Household Economic Studies, Feb. 2005:

<http://www.census.gov/prod/2005pubs/p70-97.pdf>

¹⁵ More commentators seem eager to dispense with marriage than parenthood, see, for instance, Martha A. Fineman, *The Meaning of Marriage* in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (A. Bernstein, ed. 2006) (advocating eliminating marriage, but strengthening parenthood); Cass R. Sunstein, *The Right to Marry*, 26 CARD. L. REV 2081, 2104 (2005) (questioning the benefits of marriage while assuming that the law's treatment of parenthood is appropriate). Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 11 Va. L. Rev. 1535 (1993) (arguing that marriage is irredeemably gendered). Few people argue for dispensing with the idea of parenthood, but several argue for opening the category up significantly. See Katharine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (arguing that adults who have played significant roles in children's lives should be given legal rights); Barbara Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parent's Rights*, 14 CARD. L. REV. 1747 (1993) (arguing to provide parental rights to adults who have supported a mother during pregnancy). I have suggested that perhaps we should restrict our notion of parenthood, at least in infancy, so as to minimize the role of biology. See Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB POLICY 1 (2004).

¹⁶ Anita Bernstein writes that "marriage is different . . . from the other key status category of family law – parenthood – in that the relation between parent and child addresses a relatively clear and uncontroverted need. Infants cannot survive without resources from adults." See Bernstein, *supra* note 10 at 132. Not one of the cases addressing the right to parental status involved children's needs though. In all but one case in which a man has claimed a right to parental status, the child's needs were being readily met by both the mother and another man. See Michael H. v. Gerald D., *supra* 1; *Quilloin v. Wolcott*, 434 US 246 (1978); *Lehr v. Robertson*, 463 US 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979). In the one case when there was not another man to provide for the child, the state was claiming a desire to do so. See *Stanley v. Illinois*, 405 US 645 (1972). Cass Sunstein compares state conferral of marital status with parental status

marriage and parenthood from each other makes little sense. Some notion of both marriage and parenthood are pre-legal,¹⁷ but once taken over by law, the statuses of both marriage and parenthood have been fully manipulated by it. Indeed, the two statuses have been legally defined and justified with reference to each other. Traditionally, who one was married to and whether one was married determined whether one had legal status as a parent,¹⁸ and “the main end and design of marriage [was] to ascertain and fix upon some certain person to whom the care, the protection, the maintenance, and the education of the children should belong. . . .”¹⁹ More contemporaneously, even as the concepts of marriage and parenthood came to exist – in the real world – as not necessarily inclusive of the other, the vast majority of cases ever discussing the constitutional dimensions of either parenthood or marriage refer to parenthood and marriage together, as if the rights are clearly akin to each other.²⁰ Most important, even though parental rights are usually cast as negative rights and marital rights are usually cast as positive rights, both rights are protected for the same reasons. This article highlights those reasons so that we can better evaluate how the law protects family.

Before proceeding, the reader should be warned that I paint the constitutional picture presented here with a very broad brush. In particular, I collapse two different kinds of distinctions: distinctions between the federal and state constitutions on the one hand and distinctions between different constitutional provisions (most notably due process and equal protection) on the other. I collapse these distinctions because they are remarkably unimportant to my argument. First, the relationship between a state constitution and state

and assumes (wrongly, I think) that parental status is afforded substantially more protection. “If I am the biological parent of a child, the state must have an extremely good reason to sever my relationship with that child.” Sunstein, *supra* note 15 at 2104. Presumably, Sunstein was referring to the clear and convincing evidence the state must have of abuse and neglect before terminating a pre-existing parent’s legal status as parent, but all of the cases just cited involved biological fathers and Michael H. was biological father who also had an established relationship with his child. In all of those cases, the court vested parental status in someone else simply because the state thought that would be in the best interest of the child.

¹⁷ For marriages pre or extra legal origins, see MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* (1989) (“No one knows when the shift from biological to cultural patterns of mating occurred. Nor, for that matter, does anyone yet know much about what is innate and what is cultural in man. With the help of ethnologists, anthropologists and sociologists, we have gained some understanding of how different mating customs and rituals may have evolved in simply societies.”); for parenthood, see RICHARD DAWKINS, *THE SELFISH GENE* (1989) (describing parental investment and behavior from an evolutionary standpoint)

¹⁸ The husband of the mother was conclusively presumed to be the father of a child for years. Even when courts allowed individuals to challenge that presumption, it was extraordinarily difficult to do until DNA testing. See Baker, *supra* note 15 at 22-23. The unmarried biological mother of a child was also treated very differently – and was entitled to far fewer parental rights legally – than a married biological mother of a child. See Caban v. Mohammed, *supra* 16 (unmarried biological mother still had to adopt her won genetic offspring with a man if she was to be treated on par with a married mother).

¹⁹ 1 WILLIAM BLACKSTONE, *COMMENTARIES* 443

²⁰ Meyer v. Nebraska, 262 US 390, 399 (1923) “the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children” “[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, procreation, contraception, family relationships and child rearing and education’” Zablocki v. Redhail, 434 US 374, 385 (1978), quoting Carey v. Population Services, 431 US 678. ; “This court has long recognized . . . freedom of personal choice in matters of marriage and family life” Cleveland Bd of Educ. v LaFleur, 414 U.S. 632, 639-640 (1974).

family law is essentially the same as the relationship between the federal constitution and state family law. The constitutional questions, whether brought under a state or federal document, involve the same kinds of constitutional values,²¹ the same kinds of analysis,²² the same precedents,²³ and the same balance of power issues.²⁴ Collapsing the federal/state distinction allows one to proceed with a constitutional analysis without having to filter through the different political and social perspectives that clearly do distinguish many state supreme courts from the federal one.

Second, although some scholars believe that different provisions of the Constitution afford substantially different kinds of protection in family matters,²⁵ the cases themselves suggest otherwise. The three most prominent U.S. Constitutional cases involving the right to marry, for instance, were decided under different (or entirely ambiguous) constitutional provisions.²⁶ At least one state high court has collapsed the due process and equal protection inquiry because “[i]n matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts [so] frequently overlap”²⁷ Because the overlap is so substantial, this article proceeds to ask questions about the extent to which constitutions protect family relationships and family status, not which part of the constitution protects what.

II. The Disaggregation of Family Status from Family Rights (and Obligations)

In the past 30 years, it has become abundantly clear that many people, not just people in traditional family relationships, very much want the law to treat them as in relationship with another. When asking for legal recognition of their relationships, these people do not make contract claims. They do not claim an entitlement based on an agreement with

²¹ See *Baker v. Vermont*, supra note at 870-873 (discussing principle of equality under Vermont Common Benefits Clause, noting how it is slightly different than federal Equal Protection clause, but also explaining notions of equality); *Goodridge v. Dep't of Pub. Health*, 798 NE2d 941, 956-960 (Mass. 2003) (discussing what it means for something to be a civil right, using U.S. supreme Court cases); *Lewis v. Harris*, 188 NJ 415, 434-436, 908 A.2d 196 (NJ 2006) (discussing meaning of the term fundamental liberty interest under the New Jersey due process clause using U.S. Supreme Court cases).

²² See *Baker*, *Goodridge* and *Lewis*, supra note 21 (state cases following U.S. Supreme court as guidance on questions of scrutiny).

²³ See *id.*

²⁴ See in particular, *Baker v. State*, at 887-889 (discussing importance of deferring to legislature); *Lewis v. Harris* at 458-462 (*id.*).

²⁵ See Sunstein, supra note 15 (arguing that marriage cannot be effectively analyzed under substantive due process doctrine and should be analyzed under equal protection principles).

²⁶ See *Loving v. Virginia*, 388 US 1, 12 (1967) (marriage is a Substantive Due Process right); *Zablocki v. Redhail*, 434 US 374, 384 (1977) (marriage protected as a fundamental right under the Equal Protection clause); *Turner v. Safely*, 482 US 78, 95 (1987) (leaving undiscussed the provision of the constitution that the Court relied on to protect a right to marry.)

²⁷ *Goodridge*, supra note 21 at 953 (citing Mass. and U.S. cases). The one state court that made much of the distinction between substantive due process and equal protection, see *Lewis v. Harris*, 908 A.2d 196 (2006), offers virtually no explanation for why equality principles necessitate granting the rights and obligations of marriage, but not the status of marriage. The due process/equal protection distinction that the New Jersey Supreme Court made allowed it to come to a (possibly) wise and judicious result – an equal protection right to the rights and obligations of marriage, but no substantive due process right to marital status – but in the end one is left wondering why the equality principles do not apply to status as well.

another. They make status claims, or claims of entitlement based on the nature of their emotional and physical relationship to another.²⁸

For reasons that have a great deal to do with the United States' "shadow" or "employee" welfare state, many of the initial claims to status in the partner context were made in the private sector. They were made by employees who wanted to give their partners access to the considerable array of welfare benefits that, in the United States, are provided by employers to employees and their families.²⁹ Notably, these claims were made predominantly by same-sex cohabitants, not by opposite sex cohabitants, even though opposite sex cohabitants outnumber their gay counterparts by a significant margin.³⁰ Opposite sex couples may not have pushed as hard for these benefits because they knew their claims would ring hollow given their option to marry, or, they may not have pushed hard because they actually did not want them. If they had wanted to be treated as one by the outside world, they could marry. It was the same sex couples who had no other means of being treated as one.

The first employer to offer domestic partner benefits to its employees was the Village Voice, in 1982.³¹ In 1992, Lotus Development Corporation became the first publicly traded company to do so. By 2001, more than 2500 public and private employers extended health care benefits to domestic partners.³² Although not as obviously public as a state-conferred status of domestic partnership, the employer-recognized plans cannot be viewed as purely private either. The state underwrites employer plans with extensive tax subsidies³³ and government planners routinely rely on private employer plans when they design health care policy.³⁴ Thus, for some time, the law has been recognizing status-based relationships even while not granting family status.

At the same time employers were beginning to recognize relationship status in the private sector,³⁵ same-sex marriage advocates were beginning their campaign for legally

²⁸ In using the term "status" here I do not mean claims to a particular *legal* status (marriage or parenthood, for instance). I mean claims based on their lives as lived, not on explicit or implicit agreements. See, for instance, the affidavit that UCLA uses to determine entitlement to domestic partner benefits. "We are each other's sole domestic partner and intend to remain so indefinitely. We are in a relationship of mutual support, caring and commitment. We are financially interdependent." Cited in Grace Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV 1265 1289 (2001)

²⁹ These benefits include health and disability insurance and access to retirement plans. In most other industrialized countries, these type of claims would be made in the public sector because it is the state that plays the primary role in providing social insurance programs.

³⁰ See Blumberg, *supra* note 28 at 1286.

³¹ See Human Rights Campaign, What Are Domestic Partner Benefits, at http://www.hrc.org/worknet/dp/dp_whatisdpa.asp

³² *Id.*

³³ See I.R. C. § 410(b) (1994).

³⁴ See Susan J. Blumenthal, MD, Jessie B. Rubin, Michelle E Tessler, Fereson Lin & David Mathus, US Presidential Candidates Prescriptions for a Healthier Future: A Side-by-Side Comparison, Huffington Post, 9 July 2007. Huffingtonpost.com/susan-blumenthal/US-Presidential-Candid

³⁵ Most of these employer based programs confer benefits without requiring significant obligation. To the extent these plans confer pension rights, they often do not require that an employee share pension accumulation with their ex-partner in the event of separation.. See Blumberg, *supra* note at 1291-92.

recognized gay marriage. Although successful in only one state so far, this campaign has clearly influenced domestic partnership legislation in several state legislatures, including those whose Supreme Courts ruled just shy of requiring marriage. Pursuant to *Baker v. Vermont*³⁶ and *Lewis v. Harris*,³⁷ the state legislatures of both Vermont and New Jersey were required to pass legislation that allowed gay and lesbian couples to access a fully equal set of relationship rights and obligations as those available to straight couples.³⁸ Neither Vermont or New Jersey had to call it marriage, but both states had to afford gays and lesbians the right to enter a status that included all of the same rights and obligations of marriage. The states of Connecticut and New Hampshire have also adopted quite comprehensive civil union legislation,³⁹ and Oregon, Maine, Washington, the District of Columbia and California have all adopted domestic partnership legislation.⁴⁰ The state of Hawaii, after its Supreme Court ruled that the state Equal Rights Amendment forbade the state from prohibiting gays and lesbians from marrying each other, brokered a kind of compromise in which the voters approved a constitutional amendment defining marriage as “between a man and a woman,” but the state legislature passed domestic partner legislation allowing two people who could not marry each other the right to register as domestic partners.⁴¹ Hundreds of municipalities have also adopted domestic partner legislation, though these provisions operate more like private employer recognition than state recognition because they involve few, if any, tax, property or future income consequences.

The American Law Institute’s Principles of the Law of Family Dissolution⁴² also recommends treating couples who do not acquire marital status as being legally in relationship to each other. Although some have criticized these provisions for denying couples who do not want to be treated as an entity the freedom to be single,⁴³ the ALI has clearly recommended treating non-married people who have not contracted into or around the background rules of marriage, as if they were married. This treatment includes, importantly, holding both parties economically accountable to the other in the event of dissolution. Both property and compensatory payments (traditionally known as maintenance or alimony) are to be awarded to domestic partners in accordance with the

Married people, in contrast, are required to share pension benefits. Although there is virtually always fighting about how much should be shared and why, every state in the country gives a divorcing spouse a claim to pension rights earned by the other spouse during the course of the marriage.

³⁶ 744 A.2d 864 (Vt. 1999).

³⁷ 908 A.2d 196 (NJ 2006).

³⁸ See infra notes 93-100 and text accompanying .

³⁹ See summary of state legislation giving same sex couples some form of relationship status, but not marriage <http://lambdalegal.org/nationwide-status-same-sex-relationships.html>.

⁴⁰ Id.

⁴¹ See Blumberg, *supra* note 28 at 277-78.

⁴² See American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter ALI PRINCIPLES] , Chapter 6.

⁴³ See, in particular, Elizabeth Scott, *Domestic Partnerships, Implied Contracts and Law Reform*, in RECONCEIVING THE FAMILY: CRITIQUES ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 331 (Wilson ed.) (2006) [hereinafter RECONCEIVING THE FAMILY] . See also , Margaret Brinig, *Domestic Partnership and Default Rules*, Id. At 269; Marsha Garrison, *Marriage Matters: What’s Wrong with the ALI’s Domestic Partnership Proposal* Id. At 305.

same principles as those used in the marriage context.⁴⁴ In other words, the law is treating people as married even though they are not married.

In the parental arena, there has been a comparable and mostly concurrent trend. In part because adults lead more fluid lives than they used to, in part because DNA testing allows us to determine genetic parentage with certainty, in part because artificial insemination has become so much more readily available, and in part because gay and lesbian parenting has become less taboo,⁴⁵ non-traditional parents now routinely petition courts for parental rights. And sometimes, legal parents petition courts in order to hold non-traditional parents liable for parental obligations.⁴⁶ Grandparents, step-parents and other third parties often enjoy statutorily protected rights to visitation,⁴⁷ and numerous scholars have called for a more expansive, less exclusive view of parenthood, one that leaves room for the law to recognize many different kinds of adult relationships in a child's life.⁴⁸

In response to these trends, many courts have developed “de facto parent” doctrines, “equitable parent” doctrines, and “parenthood by estoppel” doctrines.⁴⁹ Usually these doctrines involve giving non-traditional parents visitation rights. Less often, they involve holding non-traditional parents liable for child-support. As in the cohabitation area, the American Law Institute has called for legal recognition of these alternative parenting relationships. Advocating the adoption of both a “de facto parent” class and a “parenthood by estoppel” doctrine, the ALI supports an expansion of parental rights and, far more rarely, parental responsibility.⁵⁰ In short there has been widespread creation of legally cognizable parental relationships, even in people who do not have the legal label of parent.⁵¹

⁴⁴ See ALI PRINCIPLES, *supra* note 43 at §§ 6.05, 6.06

⁴⁵ For more on how all of these factors are forcing us to come to terms with what we think the defining features of parenthood should be, see Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, (forthcoming Georgia Law Review, 2008).

⁴⁶ See Baker, *Bargaining or Biology* *supra* note 15 at 15-16.

⁴⁷ See e.g. Margaret Mahoney, *Step-parents as Third Parties In Relation to Their Step-Children*, 40 FAM. L. Q 81, n. 82 (2006) (“The visitation status in a number of states include stepparents under an umbrella provision that authorizes visitation petitions by ‘any person.’ . . . In other jurisdictions, the unrestricted category of stepparents is specifically included in the visitation statute.”) 21 J. FAMILY ISSUES 246, 247-248 (2000) (“Grandparent visitation rights law were enacted in all 50 states over a period of 23 years.”) These rights must be treated as somewhat secondary to parental rights, but they are still cognizable, see *Troxel v. Granville*, 530 US 57 (2000). A host of grandparent visitation statutes have been upheld even after *Troxel*.

⁴⁸ Bartlett, *supra* note 28 (suggesting that legal notions of parenthood should be expanded when the nuclear family has failed); Naomi Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L. J 1 91997) (advocating the designation of many adults as “parents”); Woodhouse *supra* note 15 (advocating a more care-based approach to parental rights).

⁴⁹ See Baker, *Bionormativity*, *supra* note 45.

⁵⁰ For more on the asymmetrical way in which the ALI treats parental rights and responsibilities, see Katharine K. Baker, *Asymmetric Parenthood*, in RECONCEIVING THE FAMILY at 121-128 *supra* note 43.

⁵¹ The ALI Principles of Family Dissolution leave the determination of legal parenthood to someone else. One comment explains that determinations of legal paternity are “a matter outside the scope of these Principles.” § 3.03 cmt. D, at 418. For more on why passing over the question of legal parentage is inconsistent with the idea of embracing the task of determining parental-like rights and obligations, see Baker, *Asymmetric Parenthood*, *supra* note 50 at 126-127.

This article's analysis of the dual dimensions of the constitutional treatment of relationship helps explain the widespread tendency to disaggregate relationship rights from relationship status. As family structures proliferate, something compels the law to recognize them even as something else restricts the law's embrace of them. As Part IV will argue, what keeps courts and legislatures from embracing many different kinds of marriage and multiple forms of parenthood is an allegiance to the social meaning of the institutions of marriage and parenthood. That social meaning is not fixed, but neither is it infinitely capacious. People only have a right to those institutions and to the expressive potential implicit in their labels if those individuals' situations comport to the social understanding of those terms.

The law has been far more willing to legitimate claims for family rights though. It has been willing to treat two people as one and force others to do the same.⁵² It has been willing to award visitation rights to people who never enjoyed the legal status of parent and never attempted to get it.⁵³ Although initially resistant,⁵⁴ many legal actors now feel compelled to honor most family relationships as lived, even if they do not feel compelled to change the definition of marriage and parenthood as legally defined. Before fleshing out why this might be so, we must first analyze the legal concept of marriage in more detail.

III. What is Marriage?

Sam and Sally have lived together for 3 years. They bought a condominium together. They love and cherish each other. Shortly after they bought the condominium, they decided to pledge themselves to each other. In the privacy of their own home, they promised to love each other and to support each other materially and emotionally for the rest of their lives. They did not get married because they did not believe that others should have anything to do with their private relationship.

Mark and Mary have lived together for three years. They bought a condominium together. They love and cherish each other. Shortly after they bought the condominium, they decided to get married. They did not want a big party. They just wanted to pledge themselves to each other, to promise to love each other and support each other materially and emotionally. They

⁵² This is what many aspects of domestic partnerships and civil unions do.

⁵³ See ALI PRINCIPLES, *supra* note 42, Chapter 2 (describing de facto parent doctrine); *ENO v. LMM*, 711 NE2d 886 (Mass. 1999) (awarding visitation rights to a non-biologically related lesbian co-parent); *JAL v. EPH*, 682 A2d 1314 (Pa. Super. 1996) (same).

⁵⁴ The early gay marriage cases did not fair well. See *Baker v. Nelson*, 191 NW2d 185 (Minn. 1971), 409 US 810 (1972) (denying gay male couple the right to marry); *Alison D. v. Virginia M.*, 572 NE2d 27 (NY 1991) (denying non-biologically related lesbian co-parent any visitation or custody rights). Several more state high courts have also resisted more recent claims to gay marriage, see e.g. *Conaway v. Deane*, 932 A2d 571 (Md. 2007) (denying any right to same sex marriage); *Hernandez v. Robles*, 855 NE2d 1 (NY 2006).

went to City Hall, filled out the necessary form and found a judge to officially marry them. Then they went to lunch.

The law has always differentiated between what Sam and Sally did and what Mark and Mary did, but how the law has described what Mark and Mary did has varied greatly, not just over time and place, but in choice of rhetoric. As suggested, the constitutional (mostly federal) discourse has described what Mark and Mary did in terms of autonomy and self-fulfillment. The common law and statutory (mostly state) discourse has defined what Mark and Mary did in terms heavy with regulation and obligation. Thus the U.S. Supreme Court “routinely categorizes the decision to marry as among the personal decisions protected by the right of privacy,”⁵⁵ while the Supreme Court of Illinois confidently refers to marriage as a “a civil contract between three parties, the husband, the wife and the State?”⁵⁶ It is hard to see how marriage is at once, a personal, private institution, and a contract to which the state is a party.

To resolve the apparent tension between the two discourses, one needs to ask not just about what Mark and Mary do when they get married, but why they got married. First, getting married involves availing oneself of the legal incidents of marriage. The list of the standard material and nonmaterial incidents of marriage has been recited or referenced by almost every court to consider the question of same-sex marriage⁵⁷ and it is detailed in the legal scholarship on marriage.⁵⁸ It is a list that involves the variety of ways in which the law requires the government and private actors to treat married people as a unit.

Second, getting married involves making a statement about the nature of one’s relationship. Indeed, most people get married, I submit, not in order to secure the material and non-material benefits that accompany marriage, but because the act of getting married conveys widely understood messages of unity and commitment.⁵⁹ Getting married – instead of just making a promise – signifies a greater commitment in part because it is public (it is harder to break a promise that everyone knows one has made), in part because state rules make it more onerous to break, but also because by marrying, people attach themselves to an institution that is bigger than themselves. Individuals

⁵⁵ *Zablocki v. Redhail*, 434 US 374, 384 (1977), citing, inter alia, *Whalen v. Roe*, 429 US 589, 598-600, *Carey v. Population Services*, 431 US 678 (1977), *Loving v. Virginia*, 388 US 1, 12 (1967).

⁵⁶ *Hewitt v. Hewitt*, 394 NE2d 1204, 1210 (1979).

⁵⁷ See e.g., *Goodridge v. Dept of Pub. Health*, 798 NE2d 941, 955-56 (Mass. 2003); *Lewis v. Harris*, 908 A2d 196, 215 92006); *Baker v. Vermont*, 744 A.2d 864, 870 (1999); *Hernandez v. Robles* 855 N.E.2d 1, 2 (2006)

⁵⁸ See Bernstein, *supra* note 10; Sunstein, *supra* note 15 at 1090; David Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. Rev. 447 (1996)

⁵⁹ There is little question that, on average, those who commit to each other through marriage end up making a more binding commitment than those who commit to each other without getting married. See Marsha Garrison, *Marriage Matters*, *supra* note 43 at 308 (citing studies showing that only 10% of cohabitants who do not marry are together after 5 years, whereas 80% of first marriages survive past 5 years and 66% of first marriages survive past 1-0 years.)

may feel free to define the terms of their own marriage for each other,⁶⁰ but if they associate themselves with the institution of marriage, their relationship will necessarily be interpreted by others in certain ways. For instance, it is very likely that others will view a marriage as a relationship involving shared values, shared resources and significant emotional support.⁶¹ Any given marriage may not involve these things and the state is limited in the extent to which it can enforce the sharing of these things, but sharing these things is what most people think married people do because that is what marriage *means*. Thus getting married is a way of sending a message about one's relationship. One sends that message to the world, to one's partner and quite probably to oneself. The ability to send that message to all those people appears to be enormously important to people. Most people do it and even more people want to do it.⁶²

One might think that marriage's ability to express personal commitment in this way is what the Supreme Court has been eager to protect as fundamental. After all, rights to health insurance and tenancy-by-the-entirety hardly seem like the stuff of which sacred intimacy is made.⁶³ And if, as some have suggested,⁶⁴ *all* the constitution protects is the right to personal expression, then it is fairly easy to see why gay marriage advocates have had a hard time securing the right to marriage (as opposed to the incidents of marriage). As just suggested, the expressive potential of marriage depends heavily on the social meaning of marriage. Getting married makes a statement because of what people understand marriage to mean. Commitment is a part of that meaning, but it is not necessarily the only part of that meaning. The totality of the social meaning of marriage is indubitably informed by historical understanding. Marriage simply would not mean the same thing if it were created yesterday.

Because the social meaning of marriage draws on history and gays were not an obvious part of that history, and because what gives marriage its expressive potential is the social meaning of marriage, it has been relatively easy for courts and legislatures to separate out the panoply of rights and obligations of marriage from marriage itself. If what the constitution protects is the expressive character of marriage, and that expressive character only exists if there is a shared understanding of marriage, newcomers to the

⁶⁰ Many individuals may also not feel this freedom. Social norms exert powerful forces on the parties to a marriage and are likely to make them feel more committed and less free to define the relationship as they want. See Elizabeth Scott, *Social Norms and the Legal Regulations of Marriage*, 86 VA. L. REV. 1901 (2000).

⁶¹ People assume marriages involve this kind of sharing because of the social norms associated with marriage. See *id.*

⁶² See *infra* notes 190-191 (more than 83% of women ages 35-44 have married and even more women express a desire to get married.) Because getting married also involves getting a marriage license, marriage involves governmental speech as well. In granting the license, the state says "this relationship is worthy of the rights and obligations that we confer on married people" Gays and lesbians fighting for the right to marry are claiming a right to have the government extend that speech to them, but the arguments they have recently used as to why the government should do so have been rooted in the personal expressive value that marriage provides to the people who marry. See *infra* text accompanying notes 93-100.

⁶³ See *Griswold*, *supra* note 6 (marriage is "intimate to the degree of being sacred")

⁶⁴ This seems to be what Cass Sunstein suggests. To the extent there a right to marry counts as fundamental (under the Equal Protection Clause) it is "because of the expressive benefits that come from official, state-licensed marriage.") Sunstein, *supra* note 15 at 2096.

institution who are not necessarily included in the shared understanding do not necessarily get access. According to this logic, the Constitution does not have much to say about the panoply of rights and obligations that accompany marriage. That is the mundane (and constitutionally irrelevant) state discourse. The constitutional vision of marriage is referring to something else and that something is rooted in the expression that flows from marriage's social meaning.

As explained in the Introduction, however, this article argues that the constitutional protection of marriage involves something more than just the protection of the expression implicit in attaching oneself to the institution. In particular, the right to be married involves the right to be considered as part of a unit, to have another person's needs, wants and desires determine one's own needs, wants and desires. It is a right rooted not in self-expression or autonomy but almost in their opposite. It is a right rooted in the human flourishing that comes from relationship. After all, what seems sacred, or at least awe-inspiring and worthy of protection is not that two people make the promise, but that they actually keep it, by being able to subordinate the "I" to the "We." The state rules and regulations that accompany marriage, shared property, tax law, evidentiary privileges etc., facilitate and often necessitate subordinating the I to the We. The state rights and obligations are therefore a very important part of what marriage is.

Seen in this light, the state discourse of obligation actually has everything to do with the constitutional discourse of self-fulfillment. One attains many of the spiritual and emotional benefits of marriage by allowing oneself to be treated as something other than an autonomous individual, by binding oneself to another. Seen in this light, the import of the constitutional discourse of marriage also has important parallels in the constitutional discourse of parenthood. Marriage, like parenthood, is a status based on relationship. The constitution protects not so much the right to have the status (though for both marriage and parenthood, it does afford some protection to status) but the right to be treated as deeply entwined with another. This is why the inherently public institution of marriage⁶⁵ actually does have something to do with privacy doctrine. When the law treats marriage as private, it refuses to see the parties as individuals and instead treats the relationship as an entity. It treats married people as it treats parents and children, as units which thrive best if left alone.

Part IV of this article will now examine the constitutional cases on marriage and parenthood to show that constitutions do, on occasion, protect the expressive right to both be married and to be called a parent. Part V will then elaborate on the more novel claim that constitutions also protect a right to be treated as legally connected to one's partner and "one's" child.⁶⁶

⁶⁵ NANCY COTT, PUBLIC VOWS 1 (2000) ("The monumental public character of marriage is generally its least noticed aspect.")

⁶⁶ I place the quotation marks around the possessive pronoun because we often do not think of the possessive quality of the relationship as attaching until the law decides that it does. Until one has adopted a child or until one has been adjudicated the father of a child or unless one has lived in a parental-like relationship with the child, one does not usually consider the child to be one's own. See *infra* Part IIIB, for more on how the law has always played a predominant role in defining parenthood, notwithstanding certain presumptions about the importance of biological connection.

Part IV: The Expressive Right to Family Status

Given the extent of uncontroversial state regulation of marriage and parenthood,⁶⁷ it is not intuitively obvious that a constitution would afford any affirmative right to marital or parental status. What does such a right look like if the states are free to manipulate its content? This Part analyzes the Supreme Court cases on marriage in light of the history of marriage as a public institution and suggests that constitutions do protect a right to express marital status, but that right to expression is protected only to the extent that the expression sends a message that people understand. This Part also analyzes the constitutional cases on parental status. While less obviously about expression, it is clear from context that assuming the status of legal parent sends a message also. It sends a message suggesting that one is uniquely situated vis a vis a child,⁶⁸ and that the law recognizes one's relationship with that child even if the state is free to dictate the amount of time one can spend with that child and the degree of responsibility one must assume. The marital status cases help explain the parental status cases by highlighting the importance of status as expression. Like the marital cases, the parental status cases suggest that the Constitution protects one's right to legal status as parent as long as one has acted sufficiently in accord with the social understanding of parenthood.

A. The Marriage Cases

The Supreme Court has always recognized that marriage is very important. In *Maynard v. Hill*, decided in 1888, the court wrote that marriage is “the most important relation in life.”⁶⁹ It is the “foundation of the family and of society without which there would be neither civilization or progress.”⁷⁰ In *Skinner v. Williamson*, the Court wrote that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”⁷¹ It was not until 1965, though, in *Griswold v. Connecticut*, that the Court rooted

⁶⁷ Very few people dispute that the state has extensive power to set licensing requirements (including age limits and waiting periods) to enter marriage and to extensively regulate the process of dissolving marriage. Comparably few people dispute the state's ability to define many of the contours of parenthood, see *infra*.

⁶⁸ With a two-parent norm, one parent is arguably not uniquely situated because there is one other person with that status vis-à-vis the child, but the state has traditionally been very wary of expanding that 2-parent norm. See Baker, *Bionormativity*, *supra* note 45.

⁶⁹ 125 US 190, 205 (1888).

⁷⁰ *Id.* At 211. The idea that marriage, particularly a male-headed household defined by marriage and including children, was central to civilization and progress was common at this period. See NANCY COTT, *PUBLIC VOWS* 114-15 (discussing political science views that monogamy and wedlock were primordial elements from which all law proceeded), 157 (marriages that “distinguished citizen-heads of households had enormous instrumental value for governance because orderly families [were] able to accumulate and transmit private property and to sustain an American people descended from them.” (2000).

⁷¹ *Skinner v. Williamson*, 316 US 535 (1942). Of course, marriage and procreation do not necessarily go hand in hand. There have always been childless couples and there have always been children born out of wedlock. This is more true today than it was in 1942, but it was still obvious then. *Skinner* was a case involving sterilization. Technically, it did not have anything to do with marriage. The race can survive by

the constitutional protection of marriage in privacy doctrine. Famously drawing on a whole slew of constitutional provisions, including cases that afforded privacy to the relationship between parents and children,⁷² but also including the first, fourth and fifth amendments, the Court held that the various specific guarantees of the Constitution “create zones of privacy.”⁷³

The privacy argument in *Griswold* was particularly compelling. The statute at issue prohibited the use, not just the sale, of contraceptives. Enforcement of the prohibition would have required an invasive search of people’s bedroom, possibly even breaking in on people during the act.⁷⁴ The idea of the state actively policing that activity strikes many as absurd. Indeed, by 2005, the Court found that most people’s adult, consensual sexual activities are entitled to certain privacy protection, regardless of whether they are married and regardless of the gender of the participants.⁷⁵

If *Griswold* had marked the end of the Supreme Court’s marriage jurisprudence, *Griswold* might just be the first case to recognize that adult consensual sexual activities are entitled to privacy protection. Marriage was the vehicle in which that privacy was recognized because, at that time, many states criminalized consensual adult sexual activity outside of marriage. If that had been the case, the marriage language in *Griswold* might well be dismissed as irrelevant.

Griswold came to mean more than that though. Subsequent cases invoked the language of *Griswold* as support not for a right to privacy in marriage, but for a right to marriage itself. This use of *Griswold* made good sense because the language the Court used in *Griswold* spoke to so much more than just sexuality:

Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁷⁶

This language suggests that marriage is not just a sexual association with which the state should not interfere, it suggests that marriage is an important part of a full life. It makes

procreating out of wedlock. One might argue that the court included the idea of marriage only because marriage was the only legal forum for procreation in 1942, but it is just as possible that the court understood that successful procreation – defined not just as producing children, but as raising them to be productive members of civilization – requires paying attention to the adult relationships that surround the children, not just the physical act of producing a child.

⁷² See *Pierce v. Society of Sisters*, 268 US 510 (1925) and *Meyer v. Nebraska*, 262 US 390 (1923), both cited in *Griswold*, 381 US at 481. The concurrence by Justice Goldberg cited *Pierce*, *Meyer* and *Prince v. Massachusetts*, 321 US 158 (1943), another case involving a parents’ rights to raise their children free from governmental interference. 381 US at 494.

⁷³ *Griswold* 381 US at 484.

⁷⁴ If the crime was in the use, one might well argue that the state would have had to prove use, not just possession.

⁷⁵ *Lawrence v. Texas*, 539 US 558 (2003).

⁷⁶ *Griswold*, 381 US at 486.

marriage sound like, as the concurrence in *Griswold* (quoting the dissent in *Poe v. Ullman*)⁷⁷ noted “an institution which the State must not only allow, but which always and in every age it has fostered and protected.”⁷⁸ It is that language that readily turned *Griswold*, a case which technically involved a negative right to be free from governmental interference, into support for the proposition that the state may have to provide a positive right of access to the institution of marriage.

All of the marriage cases brought after *Griswold* involved unmarried people requesting marriage, not married people requesting privacy. Three different factual scenarios reached the U.S. Supreme Court. Richard and Mildred Loving married in the District of Columbia, but wanted to reside and stay married in the state of Virginia.⁷⁹ Virginia prohibited interracial marriage. Roger Redhail wanted to marry his current girlfriend even though he was in arrears on a child support obligation owed to a child he had sired, while a teenager, several years before.⁸⁰ Wisconsin law denied the right to marry to people who could not prove that their pre-existing children were “not then and not likely thereafter to become public charges.”⁸¹ Leonard Safely was in jail in Missouri and wanted to get married. Prison regulations prevented him from doing so.⁸²

The first case, *Loving v. Virginia* is notorious for being simultaneously straightforward and obtuse. As a matter of equal protection doctrine, the ban on interracial marriage was readily struck down by the Supreme Court because the ban on interracial marriage was a transparent state endorsement of white supremacy. But in the final three (very short) paragraphs of *Loving*, the Court quotes *Skinner* and *Maynard* (though not *Griswold*) to declare that marriage is protected by the Due Process Clause because it is one of the “basic civil rights of man fundamental to our very existence and survival.” The Court then quickly put in a qualification: “to deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classification . . . is surely to deprive . . . due process of law.”⁸³ The first part of this throw-away section at the end of the *Loving* opinion thus seems to suggest that the Constitution protects a right to marry because marriage is so fundamental to existence. The subsequent line qualifies that right by suggesting that denial of the right to marry may be permissible in some instances, but not “on so unsupportable a basis” as race.

Eleven years after *Loving*, Roger Redhail applied for a marriage license and was denied because he owed child support. The majority in *Zablocki v. Redhail* found that the Wisconsin statute restricting the ability of poor people to marry violated the Equal Protection Clause. As support for the idea that marriage is a fundamental right worthy of protection under that clause, the Court cited almost every constitutional case having anything to do with parenting,⁸⁴ procreation,⁸⁵ marriage,⁸⁶ or other family relationships.⁸⁷

⁷⁷ 367 US 497, 553

⁷⁸ *Griswold*, 381 US at 499 (Goldberg concurring)

⁷⁹ *Loving v. Virginia*, 388 US 1 (1967)

⁸⁰ *Zablocki v. Redhail*, 434 US 374 (1978).

⁸¹ 434 US 374, 375 (1978)

⁸² *Turner v. Safely*, 482 US 78 (1987).

⁸³ *Loving* 388 US at 12.

⁸⁴ *Meyer*, *Pierce*, and *Prince*, *supra* note 72 are all cited, 434 US at 385.

For reasons the Court did not make entirely clear, the totality of all of those cases suggested that there are strong constitutional protections of family life. If, the Court argued, the Constitution protects people's ability not to bring a child into life,⁸⁸ or to live with children in a non-traditional family,⁸⁹ then it should also protect people's ability to create a traditional family setting.

When Leonard Safely wanted to get married, in jail, the Court finally felt compelled to explain in a little more detail why the Constitution protected a right to marry. Relying only on *Zablocki* for the idea that there is a fundamental right to marry, the Court tried to explain why. Marriage is "an *expression* of emotional support and public commitment."⁹⁰ It "may be an exercise of religious faith as well as an *expression* of personal dedication."⁹¹ It "is often a precondition to the receipt of governmental benefits . . . property rights . . . and other, less tangible benefits (e.g. the legitimation of children born out of wedlock)".⁹² All of those reasons augered in favor of letting Leonard Safely marry.

The expressive qualities of marriage, noted explicitly first by the *Turner* court, have been particularly important to the constitutional treatment of same sex marriage recently. In *Baker v. State*,⁹³ the Vermont Supreme Court expressly noted the symbolic importance of marriage, though it curiously determined that marriage's symbolism was not at issue, writing that it was the "plaintiffs claim to the secular benefits and protections of . . . [marriage] . . . that . . . characterize[d] this case."⁹⁴ In other words, the Court determined that there was a an expressive component of marriage that was distinct from the panoply of rights and benefits marriage affords. The Court found that the Vermont Common Benefits Clause (which is highly analogous to the U.S. Constitution's Equal Protection Clause)⁹⁵ afforded plaintiffs the rights and benefits, but not the symbolism of marriage.

⁸⁵ Eisenstadt v. Baird, 404 US 438 (right of non-married people to contraception), *Roe v. Wade*, 410 US 113 (right to abortion); *Carey v. Population Services*, 431 US 678 (same) *Cleveland Board of Education v. LaFleur*, 414 US 632 (right to not be fired for being pregnant)

⁸⁶ *Skinner*, *Griswald*, and *Loving* are all cited, 434 US at 385.

⁸⁷ *Smith v. OFFER* (rights of foster parents), 431 US 816 (1977); *Moore v. City of East Cleveland*, 431 US 494 (1977) (rights of non-nuclear family to live together).

⁸⁸ 434 US at 386, citing *Roe v. Wade*, 410 US 113 (1973).

⁸⁹ *Id.* Citing *OFFER* and *Moore*, *supra* note 87.

⁹⁰ *Turner v. Safley*, 482 US 78, 95 (1987) (emphasis added)

⁹¹ *Id.* At 96 (emphasis added)

⁹² *Id.*. This last item explicitly invokes the state discourse. The state treats married people differently in material ways, though the last "benefit," the legitimation of children is particularly weak because for the most part, by this time, states are not allowed to treat illegitimate children differently than legitimate children, see generally IRA ELLMAN, PAUL KURTZ, ELIZABETH SCOTT, LOIS WITHORN AND BRIAN BIX, *FAMILY LAW: CASES, TEXT, PROBLEMS* (4th ed.) 1035-1038 92004) (describing the evolution of the constitutional doctrine on illegitimate children), and the process of legitimation could be accomplished by simply signing a birth certificate or an acknowledgement of paternity. See Uniform Parentage Act, discussed *infra* note 114.

⁹³ *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

⁹⁴ *Id.* At 889. It is not at all clear why the court decided that the plaintiffs were not asking for the symbolic aspects of marriage itself. The dissent certainly thought that the plaintiffs were asking for the symbolic aspects of marriage.

⁹⁵ *Id.* At 865.

In *Goodridge v. Dept. of Public Health*⁹⁶ the Supreme Judicial Court of Massachusetts highlighted the expressive aspects of marriage in granting the right to same sex marriage. The first line of the opinion reads simply: “Marriage is a vital *social* institution.”⁹⁷ It noted that marriage is a function of “community”⁹⁸ and that it is “at once a deeply personal commitment to another human being and a *highly public* celebration”⁹⁹ No doubt, the Massachusetts court emphasized the expressive value in order to explain why it was going further and requiring marriage in a way that the Supreme Court of Vermont did not in *Baker*.

The New Jersey plaintiffs in *Lewis v. Harris*¹⁰⁰ adopted the Massachusetts Court’s rhetoric, arguing that marriage is the “ultimate *expression* of love, commitment and honor you can give to another human being.” “[O]thers know immediately that you have taken steps to create something special.”¹⁰¹ The New Jersey Supreme Court did not deny the expressive value of marriage, but found that it was not protected for gays and lesbians under either the substantive due process or equal protection clauses of the New Jersey Constitution. The New Jersey court did find, however, that same sex couples had an equal protection right to the same rights and obligations of marriage that opposite sex couples enjoyed.

The idea that marriage has an important expressive dimension is also evident from the way scholars discuss it. As David Chambers argued in his support of gay marriage, “marriage is the single most significant communal ceremony of belonging.”¹⁰² Carol Sanger notes that civil marriage “is a convention that signals an acceptance of certain obligations. It does so publicly (often ceremoniously) and as a matter of law.”¹⁰³ Cass Sunstein has argued that the right to marry counts as fundamental only “because of the expressive benefits that come from official, state-licensed marriage.”¹⁰⁴

That marriage must serve some kind of expressive function becomes clear once one looks at the history of marriage. Every state and every religious tradition, at least for the last 600 years, has required that a witness be present at the marriage ceremony.¹⁰⁵ Marriage,

⁹⁶ 798 NE2d 941 (Mass. 2003)

⁹⁷ Id. At 948 (emphasis supplied).

⁹⁸ Id. (marriage is “one of our community’s most rewarding and cherished institutions”)

⁹⁹ Id. At 954 (emphasis supplied)

¹⁰⁰ 908 A.2d 196 (NJ 2006).

¹⁰¹ *Lewis v. Harris*, 908 A.2d 196, 225-26 (Poritz, C.J., concurring and dissenting) (quoting plaintiffs’ briefs)(emphasis added).

¹⁰² Chambers, *supra* note 58 at 450.

¹⁰³ Carol Sanger, *A Case for Civil Marriage*, 27 *CARD. L. REV.* 1311,1317 (2006).

¹⁰⁴ Sunstein, *supra* at 2096

¹⁰⁵ See GEORGE P. MONGER, *MARRIAGE CUSTOMS OF THE WORLD: FROM HENNA TO HONEYMOONS*, (“The most important thing (about a wedding ceremony) . . . is that it be public;”) Edith Turner & Pamela Frese, *Marriage*, in *ENCYCLOPEDIA OF RELIGION*, Vol. 8 2d 2d. (“Two elements are used to mark a marriage whether there is a ceremony or not: the sharing of food between the bride and groom . . . and the necessity of a public statement on the requirement of witnesses.”) In Catholic history, the requirement that a priest be present at the ceremony started out as a custom, but later became a requirement. Glendon, *supra* note at 24. The Jewish tradition asks at least 2 or 3 witnesses to sign the Ketubah as evidence of their witnessing

unlike other promises that we might ask the law to regulate, cannot be made “just” between two people. Others must be there. That is why our hypothetical Mark and Mary had to go to City Hall even though they did not want a party.

Common law marriage, the equitable legal doctrine through which courts conferred marital status on people who cohabited and acted as if they were married, always required the parties to hold themselves out (to the public) as married.¹⁰⁶ Historian Nancy Cott entitled her comprehensive review of American marriage, “Public Vows.”¹⁰⁷ If marriage were only about privacy, as the Supreme Court’s rhetoric sometimes suggests, than none of these public requirements would make any sense. The ubiquitous public requirements of marriage suggest that at some fundamental level marriage is about making a statement to others.

As suggested in Part III, however, expressive value is dependent on social meaning. It would make little sense to secure for someone the right to say “x” if no one understood what “x” meant. Thus, to the extent that the constitution protects people’s ability to secure marital status because marriage serves as a unique form of expression, that protection must be limited by social meaning. What “others know immediately”¹⁰⁸ about the statement of marriage depends on what others think marriage is, and that social understanding is not fixed. Marriage means something different today than it did 100 years ago. To some, that contemporary meaning is clearly capacious enough to include gay men and lesbians.¹⁰⁹ To others, it is not.¹¹⁰ The fundamental rights language in *Loving* suggests that interracial marriage, even if nowhere near normative, was not inconsistent enough with the social meaning of marriage to permit states to ban it.”¹¹¹ The plaintiffs in *Zablocki* and *Turner* were entitled to marital status because what they were claiming was a right to express themselves through a very traditional form of marriage. As Sunstein notes, “the expressive benefits of marriage are contingent on a particular constellation of social norms; there is nothing inevitable about them.”

B. The Parenthood Cases

The Supreme Court cases addressing parental status suggest that the rights of people to secure parental status are also “contingent on a particular constellation of social

the promise. Muslim ceremonies also require witnesses. See Monger, *supra* this note at 170. Every state in this country requires someone, either an agent of the state or of a religious faith or some third party specially deputized for the task to be present at the marriage ceremony. It simply is not marriage if there is not someone else there.

¹⁰⁶ “[O]ne element essential to the proof of . . . [common law marriage] . . . is a general and substantial holding out or open declaration to the public . . . There can be no secret common law marriage.” In re Estate of Dallman, 228 NW2d 187, 190 (Iowa 1975)..

¹⁰⁷ See COTT, *supra* note 65.

¹⁰⁸ See *supra* note 101.

¹⁰⁹ *Goodridge v. Dept. of Pub. Health*, 798 NED 2d 941 (Ma. 2003) (finding that gays and lesbians have a constitutional right to marriage).

¹¹⁰ *Lewis v. Harris*, 908 A.2d 196 (NJ 2006) (accepting the state’s right to define the social meaning of marriage in heterosexual terms).

¹¹¹ Sunstein *supra* note 15 at 2098.

norms.”¹¹² For the most part, parentage, like marriage, is a question of state law. State parentage acts determine who enjoys presumptions of parenthood (a woman giving birth to a child, for instance, or a man married to that woman or a man listed on a birth certificate), and what procedures, if any, exist for rebutting those presumptions.¹¹³ State law also determines when a parent can be displaced as a parent, by whom, and when.¹¹⁴ For years, state statutes have assigned paternal status in cases of artificial insemination¹¹⁵ and state statutes now routinely designate who should be considered the mother in cases of surrogacy.¹¹⁶

Nonetheless, the Supreme Court has recognized some constitutional right to be declared a parent. In 1972, Peter Stanley, who had lived with his three biological children and their mother for most of the children’s lives, challenged an Illinois dependency statute that presumed the children to be parentless if their unwed mother was dead.¹¹⁷ The Court held that the Constitution guaranteed a man who had “sired and raised” his children, an opportunity to be heard before the state could declare his children wards of the state. Thus, the Constitution seemed to protect Stanley’s right to the legal status of father.

Several years later, Leon Quilloin tried to block the adoption of the 11 year old child he had sired (though never lived with) using a comparable claim: The Constitution

¹¹² Id.

¹¹³ Virtually all states have parentage acts establishing not only presumptions of parenthood, but statutes of limitations for contesting those presumptions. Today, most states allow most presumptions of parenthood to be rebutted with DNA evidence, but the ability to do so can be limited temporally both by statutes of limitations, see e.g., Cal. Fam Code §§ 7540-7541 (giving those who wish to challenge a presumption of paternity two years from the discovery of relevant facts) and estoppel principles. See *Markov v. Markov*, 758 A.2d 75, 81 (Md. 2000) (denying husband right to challenge paternity because he accepted role as father despite having had a vasectomy before the children were born); *In Re Cheryl*, 746 NE2d 488, 497 (Mass. 2001) (holding non-biological father responsible for child support because he continued to fill the role of father even after acquiring reason to believe he as not the father)

¹¹⁴ See Uniform Parentage Act (2002). As a preliminary indication of how complicated parentage questions can become, the first Comment to the Act notes “[f]our separate definitions of “father” are provided by the Act to account for the permutations of a man who may be so classified.” The Uniform Act generally requires that claims to establish paternity be brought within two years of the child’s birth, §607, or two years of an acknowledgement of paternity, §609. Actions to disestablish paternity of a presumed father may be brought at any time, but only if the presumed father never had sex with the mother at the probable time of conception and never held himself out as father. §607. The cases make clear that courts’ willingness to change a presumed father’s status is very fact specific. A genetic father can sometimes displace a presumed father but not always. A presumed father can sometimes relinquish his status if he can find the biological father or if the biological father willingly comes forward. On the other hand, if two men are competing for the status of father (or competing not to be the father) courts often disregard biology altogether and use a Best Interest of the Child standard to determine paternity. See *Baker, Bargaining or Biology*, *supra* note 15 at 12-14.

¹¹⁵ See e.g. Uniform Parentage Act, *supra* note 115, §§704, 705. Often, these statutes distinction between formal inseminations performed by a licensed physician and those performed informally. The husband of the impregnated woman is considered the father if the insemination was done by a licensed physician, but not necessarily if it was not. See e.g. CALIF. FAM. CODE §7613 (2003). Although there may be reasons for making this distinction (a licensed physician lobby, for one), it is not clear that those reasons have much to do with protecting the interests of those whom we normally think of protecting in parentage determinations.

¹¹⁶ See Institute for Law Science and Technology, *The Laws of Reproductive Technology*, <http://www.kentlaw.edu/islt/reprotech.html>.

¹¹⁷ *Stanley v. Illinois*, 405 US 645 (1972).

guaranteed him rights as a father, including the right to keep someone else from adopting the child because he had sired the child, periodically paid child support and seen the child on occasion.¹¹⁸ The Supreme Court readily dismissed Quilloin's claim, finding that whatever constitutional interest Quilloin had in being a father was adequately protected at a Best Interest of the Child hearing in which a judge found that the child's best interest would be served by vesting fatherhood in someone else. Quilloin was stripped of his status as father.

A potential father named Robert Lehr tried again. He argued that the mother of his biological two-year old girl had prevented him from developing any kind of relationship with the girl and that fact, coupled with his biological connection and his willingness to assume parental responsibility, should guarantee him the right to block the child's adoption by another man.¹¹⁹ The Court said no, finding that Lehr's failure to develop a relationship, even if it was due to the mother's intransigence, minimized any constitutional claim he might have. The Court explained: "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."¹²⁰ The state court was free to vest fatherhood in someone else.

In 1989, Michael H. seemed poised to capitalize on the idea that one's constitutional right to status as father turned on the twin requirements of biology plus relationship. Michael H. could establish that he was the biological father of a child, Victoria, whom he had lived with from time to time, who called him Daddy, and whom he had supported (though others had as well) throughout her life. The Court nonetheless rejected Michael's assertion that he had a constitutional right to be declared the father, finding that the state was free to vest paternal status in the husband of the biological mother, who had also supported Victoria, who was still married to the mother and who was willingly accepting paternity. The California statute at issue embodied a centuries old marital presumption of paternity.¹²¹ Thus, the Court held that the Constitution did not stand in the way of the state conferring parental status on the husband of the mother in the same way it always had.¹²²

The potential fathers in these parenthood cases probably wanted more than just status. They wanted the rights, and maybe even the obligations, that accompany familial status.¹²³ It is important to underscore though, that particularly at the time these cases

¹¹⁸ Quilloin v. Walcott, 434 US 246 (1978)

¹¹⁹ Lehr v. Robertson, 463 US 248 (1983).

¹²⁰ Id. At 260 quoting Caban v. Mohammed, 441 US 380, 397 (1979) (Stewart, J. dissenting).

¹²¹ See Baker, *Bargaining or Biology*, *supra* note 15 at 22-25 (analyzing the strength of and rationale behind the marital presumption of paternity.)

¹²² As noted in the introduction, though, Justice Stevens, the swing vote, opted against giving Michael the right to parental status because the California statute already provided interested third parties (including Michael) a right to petition for the rights traditionally associated with parenthood. In other words, Justice Stevens thought Michael was entitled to the rights of parenthood, but not necessarily the status. 491 US 133-134 (Stevens, J. concurring in the judgment)

¹²³ Comparably, the plaintiffs in *Loving*, *Zablocki* and *Turner*, see *supra* text accompanying notes 83-92, probably wanted the rights (and maybe the obligations) of marriage, not just the status.

were decided, most of these men would have gotten minimal visitation time with their children and no right to major parental decision-making.¹²⁴ Judges routinely gave the vast amount of custodial time and all major decision-making authority to the custodial parent.¹²⁵ Thus, most of what these men were fighting for was the right to be called a father. This right included the right to exclude someone else from that label, but little else substantively. What they were fighting for was a legal label that, if it has value apart from the rights it may (but does not necessarily) enable, has value because it has some social meaning that gives it significance.

Quilloin, *Lehr* and *Michael H.* all suggest limits on the scope of any constitutional right to parental status, but they also all take the question seriously. That is to say, none of them suggest that *Stanley* was wrongly decided and none of them simply state that the state is free to confer parental status on whomever it wants, free from any constitutional constraint on the definition of parenthood. In a thoughtful essay, Professor David Meyer has suggested that this limited, though probably existent, constitutional protection of parental status may be analogous to the constitutional treatment of property.¹²⁶ The Constitution forbids states from taking property¹²⁷ even as it gives states the extensive discretion to define it.¹²⁸ Virtually everyone concedes that states have the ability to modify the requirements of adverse possession or adopt a different rule for ground water use or tinker with the Rule Against Perpetuities, even though all of those changes affect property rights.¹²⁹ Comparably, few people question the state's ability to honor, or not, surrogacy contracts, to recognize, or not, second-parent adoption,¹³⁰ to determine, for the most part, who is entitled to parental status. This does not mean that states have the right to redefine property or parenthood beyond social recognition, however. Just as community expectations, or the social meaning of property, help set limits on state's

¹²⁴ The exception to this is *Stanley*, who, because there was no other parent at the time he petitioned, would have enjoyed exclusive parental rights.

¹²⁵ See L. HARRIS, L. TEITELBAUM, J. CARBONE, FAMILY LAW 622-23 (“When the best-interest standard first took hold, the courts were convinced that custody needed to be awarded to one, and only one parent. . . . [T]he participation of the other parent . . . depended on the cooperation of the custodial parent. Certainty in decision-making authority was considered essential.”); ALI PRINCIPLES, *supra* note 42 at § 2.08 cmt. a (“Traditionally, one parent received custody of a child . . . while the other parent was awarded visitation. Visitation . . . [was] . . . often quite minimal.”)

¹²⁶ David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, in RECONCEIVING THE FAMILY, *supra* note 43 at 47, 61.

¹²⁷ U.S. Const., Amendment V.

¹²⁸ “Property interests are not created by the Constitution, ‘they are created and their dimensions are divined by existing rules or understandings that stem from an independent source such as state law.’” *Cleveland Bd. Of Educ. v. Loudermill*, 470 US 532, 538 (1985) quoting *Bd. Of Regents v. Roth*, 408 US 564, 577 (1972). See also Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1402, 1415 (1991) (Property rights serve “twin roles – as protector of individual rights against other citizens, and as safeguard against excessive government interference.” “To reconcile American Law’s double-edged reliance on property concepts, [we] must successfully distinguish between the courts’ role as definers and defenders of property rights.”)

¹²⁹ See JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 953-54 (4th ed., 2006)

¹³⁰ Second parent adoption is the term of art used to describe adoption by two parents of the same gender. It is called “second parent” adoption because, usually, a new parent is adopting without any former parent relinquishing parental rights. See *Sharon S. v. Superior Ct*, 73 P2d 554 n.10 (Cal. 2003).

ability to expand or contract property interests,¹³¹ “social expectations about the nature of parenthood are likely to apply a constitutional brake on state-law efforts to withdraw and reassign parent status.”¹³²

C. Summary

Social expectations about the nature of marriage and parenthood inform the constitutional inquiry with regard to those statuses. Both marital and parental status bring with them rights and obligations, but the statuses have meaning apart from those rights and obligations. That is why gays and lesbians in Vermont and New Jersey continue to fight hard for marriage even though they have access to the full panoply of rights and obligations of marriage and that is why some people fight for the label of parent even if they are unlikely to enjoy any substantial parental rights. People claiming a right to marital or parental status are claiming a right to have their relationship understood by others in certain commonly understood ways. In granting family status, the state itself expresses something (that this is a relationship worthy of state-conferred status),¹³³ but it also enables the recipients of the status to proclaim to the world their unique relationship with another person. The analysis of marriage, which is perhaps more readily seen as expression, helps elucidate how claims to parental status are expressive claims also.

By highlighting the social meaning of marriage and parenthood I by no means want to suggest that their legal import is limited to that social meaning. Indeed, Part V argues that the law protects more than just the expressive potential of legal labels.¹³⁴ As more plaintiffs mount claims to both marriage and parenthood though, it is important to distill out the constituent parts of the claims. When granting the rights to marry in *Turner* and *Goodridge*, or when writing about marriage, either in briefs, or in scholarship, courts, advocates and scholars have all emphasized the expressive function of marriage.¹³⁵ That marriage serves this expressive function is manifest from its history. While it is not exactly clear why the expression implicit in marriage is important to people, it is clear that it is enormously important to people. Possibly just because it is so important to people, when asked to, the Supreme Court has honored the right of people to take that expressive act.

Of course, the U.S. Supreme Court has not been asked to grant that expressive right to gay men and lesbians and most people predict that the present court would not grant such a right if asked. This Part has suggested that the reason that the Supreme Court would

¹³¹ See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV 885, 939 (2000) (Supreme Court’s protection of property deeply informed by “general expectations about kinds of interests that are commonly regarded as being property in our society.”)

¹³² Meyer, *Partners*, *supra* note 126 at 62.

¹³³ See *supra* note 62 .

¹³⁴ Moreover, it is almost certainly the case that the expressive potential fo marriage and parenthood and the constitutive dimensions of marriage and parenthood overlap. The extent to which the state treats marital and parent-child relationships as unities, see *infra* Part VC, affects the social meanings of those statuses and hence what it is that they express.

¹³⁵ See *supra* notes 90-92 (language in *Goodridge* and *Turner*); for briefs, see text accompanying notes 100-101 *supra*; for scholarship , see Chambers, *supra* note 58 ; Sunstein, *supra* note 15.

not feel compelled to grant that right stems from the inherently limited nature of protecting marriage as expression. Marriage only expresses something if there is a common understanding of what marriage means. If enough people would view the state conferral of a marriage license on a gay or lesbian couple as gobbledygook, then granting the right to marry could easily be viewed as nonsensical because no one would understand what was being expressed.

Comparably, claims to parental status are limited by cultural understandings of what parenthood means. If one man is conforming to and has consistently conformed to the social understanding of father while another male has not, neither biological connection nor established relationship necessarily entitles that second man to paternal status. The state is free to confer status or not unless in not doing so it clearly offends the social understanding of parenthood.

This is not to say that expressive claims are only successful if they present as completely traditional relationships. *Loving* recognized the legitimacy of a still very rare form of marriage and *Stanley* recognized the legitimacy of unwed fatherhood, an even more suspect form of parenthood than it is now. In each case, though, the courts found that the plaintiffs were entitled to call themselves, respectively, “married” and “parent,” notwithstanding the wide discretion that states have to determine access to and the substantive requirements of marriage and parenthood.

V. The Constitutive Right to Relationship

On the day after the wedding, that is, on the day after one has invoked one’s constitutional right to express to the world and one’s partner one’s deep love and commitment, these are among the constraints the law imposes. One loses control over approximately 50% of all the earnings one brings to the marriage.¹³⁶ One significantly curtails one’s ability to pursue any non-remunerative life activity, if in so pursuing, one would be unable to meet future support obligations to one’s spouse.¹³⁷ One loses the right to mortgage any property held in tenancy by the entirety, unless one’s spouse agrees. One loses the right to petition a court to enforce many explicit and implicit agreements between one’s spouse and oneself, particularly if those agreements pertained to duties thought intrinsic to the marriage.¹³⁸ One also often loses the right to keep

¹³⁶ In non-community property states, this is not technically true because the property is not conceived of as “marital property” until the divorce proceeding, but, at divorce, whether in a community property or equitable distribution regime, all earnings earned during the course of the marriage are considered property subject to distribution at divorce. See ELLMAN ET AL., *supra*, note 92 at 270-276. Most jurisdictions divide marital property approximately evenly at divorce, *id.*, though sometimes the primary wage earner or the spouse with access to more other resources is left with significantly less than 50% of the marital property. See *In Re Marriage of Pierson*, 653 P.2d 1258 (Or. 1982) (wife got less than 50% of the marital property because she came into an inheritance after the couple had split.)

¹³⁷ All states provide for some spousal maintenance in some instances. After some movement away from substantial spousal maintenance awards in the 1970s and 80s, the current trend is toward more substantial maintenance awards. See generally, ALI PRINCIPLES, *supra* note 43, Chapter 5 .

¹³⁸ *Balfour v. Balfour*, L.R. 2 K.B. 571 (C.A. 1919) (most agreements between husband and wife are not meant to be enforceable at law); *Borelli v. Brousseau*, 16 Cal. Rptr. 16 (Cal. App. 1993) (refusing to enforce a promise to leave more money for spouse because for lack of consideration because wife’s

inherited property, particularly if that property was used by both parties to the marriage.¹³⁹ One loses the right to testify in court about what one has heard, if one's spouse said it.¹⁴⁰ In some states, one loses the right to sue one's spouse in tort, particularly if the tort was unintentional.¹⁴¹ Given this formidable – and not even complete – list of restrictions on one's autonomy, one might question why so many people are clamoring for the right to get married.¹⁴²

The obligations the state imposes on parents are less numerous, but arguably stricter and more onerous. Once one is a legal parent, one simply loses the right to walk away from that relationship unless the state and the other parent agrees.¹⁴³ One cannot unilaterally divorce one's child. A parent is obligated to support his or her child until the child is at least 18 years old. If one is a custodial parent – regardless of how the other parent left – one is responsible for physically caring for the child. Failure to do so is a criminal offense.¹⁴⁴ If one is a non-custodial parent, one loses the right to allocate one's resources for one's children as one chooses. In all states, parental support obligations are set

promise to care for and support her husband was part of her marital duty); see generally, Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 Harv. L. Rev. 492 (2005) (law does not compensate women for work performed in marriage).

¹³⁹ In some community property states, inherited property is considered marital property. See HARRIS, TEITELBAUM *supra* note 125 at 48. Many equitable distribution states treat any commingled property as marital property. For instance, in Illinois “the affirmative act of augmenting nonmarital property by commingling it with marital property” creates a presumption that the nonmarital (inherited) property is subject to distribution as marital property. See *In re Marriage of Smith*, 427 NED 2d 1239, 1245-46 (Ill. 1981).

¹⁴⁰ The spousal communications privilege treats as privileged any communication made in confidence from one spouse to another as long as the spouses are not accusing the other of wrongdoing. See GEORGE FISHER, EVIDENCE 839-841 (2002). Most jurisdictions extend the privilege to both the communicator and the listener, meaning that the either spouse can bar the other from revealing marital confidences. *Id.*

¹⁴¹ For a comprehensive discussion of the state of interspousal tort immunity, see Carl Tobias, *Interspousal Tort immunity in America*, 23 Ga L Rev 359 (1989).

¹⁴² The idea that the acceptance of pre-nuptial agreements allows most of these obligations to be overridden by private contract is much exaggerated. The Uniform Premarital Agreement Act, adopted in the early 1980s suggested that premarital agreements should be interpreted like other commercial contracts, but many courts and the recent ALI PRINCIPLES soundly reject that standard, advocating instead some sort of review under the traditional unconscionability standard and/or procedural protections. See Ellman et al., *supra* note 92 at 737-766. Unconscionability is defined with reference to what the spouse would be entitled to under the state marital property distribution rules. Whatever the law of prenuptial agreements states, I find particularly persuasive comments relayed to me one day over lunch, by a practicing family law attorney in Chicago. He commented “I don't know a family law attorney who doesn't think he can beat any prenup he sees.” (Comments of Joel Levin, June, 2007). Even if this statement exaggerates the situation somewhat, it suggests that there are significant costs and roadblocks to contracting around the background marital property distribution rules.

¹⁴³ One cannot effectively relinquish parental rights (put the child up for adoption) unless the other parent relinquishes also. If one legal parent wants to be a parent and the other parent does not, the first parent still has the right to hold the second parent responsible for child support. See Baker, *Bionormativity*, *supra* note 45. Once the child is old enough, even if both parents want to relinquish parental rights, it is highly unlikely the state would accept their relinquishment because it is highly unlikely the child could be adopted.

¹⁴⁴ The first parent to abandon a child is not charged with neglect as long as there is someone else to provide for the child. But if the “last parent standing” exercises similar agency, he or she is charged with abandonment and neglect. ELLMAN ET AL, *supra* note 92 at 1127-1139 (discussing general provisions for civil and criminal child abuse and neglect proceedings).

pursuant to rigid guidelines which allocate resources to the child based on a percentage of what the non-custodial parent earns.¹⁴⁵ The constitutionally protected parental “right to the companionship, care, custody and management of . . . children [may be] . . . an interest far more precious than any property right,”¹⁴⁶ but there seems much in the state discourse of parenthood that is detrimental to parents’ autonomy and property interests.

Why do people care so much about entering into these relationships in which they compromise so much liberty and property? It is not just because of the expressive value that comes from making these commitments. To put it in economic terms, it is not just because when one weighs the benefits of the expressive utility, against the negative utility associated with the restrictions on autonomy and property, one still comes out ahead. It is instead because the restrictions on autonomy and property inform and enrich the relationships involved thus providing their own form of positive utility. The harsh and restrictive nature of the state treatment of relationship gives meaning and content to those relationships and makes them, hopefully, independent sources of happiness, autonomy and identity. Thus, the state restrictions which so obviously inhibit individuals’ ability to shape their own lives as individuals help create relationships through which people (re)constitute themselves as something other than individuals.

A. The Law and the Importance of the Adult Relationships

1. Marriage as Constitutive

Contrary to the once popular slogan suggesting that people need relationships the way fish need bicycles,¹⁴⁷ it is by now conventional psychological wisdom that “[p]eople are constructed in such a fashion that they are inevitably and powerfully drawn together . . . wired for intense and persistent involvements with one another.”¹⁴⁸ Most of the pre-eminent latter 20th century psychoanalytic theorists constructed and worked within paradigms that assumed the primacy of relationship.¹⁴⁹ The foundational work of both Ronald Fairbairn and John Bowlby rested on the notion that one of, if not *the*, central human motivation is finding and maintaining strong emotional bonds.¹⁵⁰ Libido, in the words of Fairbairn, is “primarily object-seeking” not pleasure seeking.¹⁵¹ Law

¹⁴⁵ See Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 PEPP. L. REV. 359, 362-363 (2007)(explaining child support guidelines).

¹⁴⁶ *Santosky v. Kramer*, 455 US 745, 758 (1982) (quoting *Stanley v. Illinois*, 405 U.S. at 651).

¹⁴⁷ “A woman needs a man as much as a fish needs a bicycle.” None of the relational theory analyzed in this section suggests that heterosexual attachment is necessary, only that attachment is necessary. Individuals need to exist in relationship much more than fish need bicycles. Who those relationships are with may not matter that much at all.

¹⁴⁸ STEPHEN MITCHELL, *RELATIONAL CONCEPTS IN PSYCHOANALYSIS: AN INTEGRATION* 22 (1988)

¹⁴⁹ Object-relations theory, upon which much of the following argument is based, was originally shunned by the American Psychoanalytic Association, but later was incorporated into psychoanalytic thinking. See PETER FONAGY, *ATTACHMENT THEORY AND PSYCHOANALYSIS*

¹⁵⁰ MITCHELL, *supra* note 148 at 23-29

¹⁵¹ Ronald Fairbairn, *An Object-relations Theory of the Personality* 84 (1952). See also *id.*, at 31 (“The ultimate goal of the libido is the object . . .)The notion that the human desire for sex is related to the human desire for relationship could have important implications for understanding why and the extent to which the constitution protects sexual experience. See Ian Ayres and Katharine K. Baker, *A Separate*

professor Kenneth Karst puts it in less technical language, “to be human is to need to love and be loved.”¹⁵² Seeking relationships is a critical part of what human beings do. In turn, those relationships become a critical part of who human beings are.

That the law, particularly constitutional law, has seemed somewhat confused about the importance of relationship is not particularly surprising. Most liberal and social contract theory assumes that human beings are ontologically autonomous.¹⁵³ Isolated individualism is thought to be the primal human state, and the Bill of Rights was arguably drafted to protect people’s ability to maintain their distinctive individual identity free from state interference.¹⁵⁴ From a social contract perspective, people can be legally situated in relationship with others and develop obligations to those others only because those people consented to those relationships and obligations.¹⁵⁵

At some exceedingly broad level, one can characterize both marriage and parenthood as choices in this way – one consents to be married for better or worse and one assumes the risk of onerous burdens when one becomes a parent - but choice is a remarkably thin way to describe how most people experience their familial obligations. One does not choose to take care of a permanently disabled spouse or choose to love an obstinate, rude and disloyal child; one just does it. It is more instinctive than chosen precisely because one is not just an individual who made commitments that may or may not have been chosen. Instead, one is part of a unit. As George Fletcher writes, when it comes to explaining one’s primal loyalties, “logic runs dry and one must plant one’s loyalty in the simple fact [of belonging.]”¹⁵⁶

One meets others’ needs in family relationships because the interdependence that demarcates family undermines and obfuscates one’s sense of self. In Fletcher’s language “the distance between subject and object” is blurred.¹⁵⁷ Milton Regan writes that individuals core attachments “are not externally related to their self-conceptions. They are constituent of their identities and . . . premises for their agency.”¹⁵⁸ Karst comments that “our intimate associations are powerful influences over the development of our personalities.”¹⁵⁹ Loyalties and duties to the other are not something that one has earned

Crime of Reckless Sex 72 U. CHI. L. REV. 599, 662 (2005) (arguing that when it has protected sexual activity, the Supreme Court has been careful to define that activity as an important element of expression within a *relationship*, not a protected activity in and of itself)

¹⁵² Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 632 (1980).

¹⁵³ For a discussion of how both liberal and critical legal theorists conceptualize the self as ontologically autonomous see Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-15 (1988).

¹⁵⁴ NANCY HIRSCHMAN, *RETHINKING OBLIGATION: FEMINIST METHOD FOR POLITICAL THEORY* 5 (1992).

¹⁵⁵ *Id.*

¹⁵⁶ GEORGE FLETCHER, *LOYALTY* 61 (Here Fletcher is talking about the experience of loyalty generally. When discussing spouses in particular, he suggests that the marital evidentiary privileges essentially operate as privileges against self-incrimination because the distance between the object and the subject becomes so blurred that hurting one’s spouse is hurting oneself. *Id.* At 81).

¹⁵⁷ *Id.*

¹⁵⁸ MILTON REGAN, *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 24 (1998).

¹⁵⁹ Karst, *supra* note 152 at 636.

or that one owes or that one chooses to accept, they are a matter of self-interest because the self and the other have become one.¹⁶⁰

The choice to enter a relationship is thus not just an expression about who one wants to be with, it is a choice that alters who one is.¹⁶¹ It is fundamentally constitutive as well as expressive.¹⁶² Moreover, as Regan suggests “spouses . . . don’t simply help each other construct separate individual identities . . . [T]hey participate in the creation of a shared identity.”¹⁶³ When the law recognizes marriage, the shared identity created by the relationship comes to have a legal status – an autonomy - of its own.

As a matter of doctrine, the Supreme Court has recognized this form of marital autonomy only once, in *Griswold*, and in *Eisenstadt v. Baird*.¹⁶⁴ Justice Brennan suggested that marital autonomy might not exist at all. “[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”¹⁶⁵ There is very little way to square this individualistic language in *Eisenstadt* with the entity language in *Griswold*.¹⁶⁶ Technically, one need not do so because one could readily find an individual right to be free from state interference into contraceptive decision-making (a right that would attach to the plaintiffs in both *Eisenstadt* and *Griswold*), but if *Griswold* is nothing more than a precursor to *Eisenstadt*, then it would make no sense to quote it in the later cases having to do with family relationships in general and marriage in particular. More important, there is a long, deep and venerable common law history of treating the marital unit as an entity, with an autonomy of its own.¹⁶⁷ Justice Brennan completely ignored this well-established law in suggesting that married people do not constitute an entity. The law has always treated married people as an entity for economic, evidentiary, and other legal purposes. In Martha Fineman’s words, the doctrine “articulate[s] . . . what might be characterized as an ethic or ideology of family privacy,”¹⁶⁸ which she goes on to re-articulate as autonomy.

The autonomous treatment the law affords relationships enables a universe, or at least a community, that serves as a buffer against the outside world. “When we come home to

¹⁶⁰ See LAURENCE D. HOULGATE, FAMILY AND STATE 39 (1988) (describing solicitude not as something that he owes his family members but as instinctive obligation) See also, MILTON REGAN, FAMILY LAW AND THE PURSUIT OF INTIMACY 113 (1993) (one dives into to save a drowning child (or spouse) as much to serve one’s own interest as the other’s.)

¹⁶¹ Or at least it can alter who one is and, for relationships that do work out, it does alter who one is.

¹⁶² For more on the constitutive aspects of accepting responsibility, see Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992) (developing the constitutive responsibility paradigm and suggesting that a person’s responsibilities define who a person is)

¹⁶³ REGAN, FAMILY LAW *supra* note 160 at 94.

¹⁶⁴ 405 US 438 (1972) (*Eisenstadt* involved state restrictions on the distribution of contraceptives to unmarried people.)

¹⁶⁵ 405 US at 453.

¹⁶⁶ See *supra* note 76.

¹⁶⁷ *McGuire v. McGuire* is the most famous case. 59 NWd 336 (Neb. 1953). In *McGuire*, the Nebraska court refused to find justiciable a wife’s claim to a higher living standard even though it was clear that the couple could afford to live more comfortably.

¹⁶⁸ Martha Fineman, *What Place for Family Privacy*, 67 GEO WASH L REV 1207, 1215 (1999)

our families,” writes Laurence Houlgate “we return to a relationship of intimacy, defined by conditions of mind, not overt action, by trusts and devotion, instead of formal rules and duty.”¹⁶⁹ The abstract and formalistic relationships that define most peoples’ non-family life leave us searching for relationships that operate differently. Families provide those relationships by “emphasizing ‘shared commitment’ rather than rules.”¹⁷⁰

In her analysis of American’s understanding of fairness, Jennifer Hochschild observes that norms of distribution and desert vary in different realms.¹⁷¹ In the socializing domain (which she describes as family, school, and friends) norms of equality and need predominate. What one is entitled to (love, care, even material goods, sometimes) depends not on what one has accomplished or what one promised, but simply on the fact that one is a member of that domain. Indeed, psychological literature suggests that “promoting an ‘exchange orientation’ may be inimical to the process of establishing intimacy. It leads people to monitor their partners and keep running accounts in a way that makes momentary violations [too] salient. . . .”¹⁷² It is being in the family, not what one does in the family that determines entitlement, just as it is being in the family, not what one has promised, that determines obligation.¹⁷³ The strength of the familial norms of entitlement explain how family can operate as such a haven. One is entitled because one is of the family. One need not prove anything.

The law honors these alternative norms of entitlement by leaving the families alone while in tact and by emphasizing membership not contribution at dissolution. As Fineman writes, the “ideology of state non-intervention is rooted in idealization, but also references the perceived pragmatics of family relationships and the acknowledged limitations of legal . . . systems as substitutes for family decision-making.”¹⁷⁴ By refusing to import its own rules, the law encourages parties to work things out on their own, to forge their own sense of purpose as an entity, and to develop norms that facilitate their lives together. The process of working it out bolsters a sense of intimacy precisely because the abstract and formalistic rules of law have no relevance. There are no

¹⁶⁹ HOULGATE *supra* note 160 at 35.

¹⁷⁰ Karst, *supra* note 152 at 639.

¹⁷¹ Jennifer Hochschild, What’s Fair: American Beliefs About Redistributive Justice 47-50 (1981).

¹⁷² John G. Holmes and Susan D. Boon, *Developments in the Field of Close Relationships: Creating Foundations for Intervention Strategies*, 16 PERS SOC PSYCHOL BULL 23, 27 (1990). See also Lenahan O’Connell, *An Exploration of Exchange in Three Social Relationships: Kinship, Friendship and the Marketplace*, 1 J. OF SOC AND PERS RELAT. 333, 341-342 (1984) (finding no reciprocity norm in exchanges between kin members and close friends. “Many believe that friendship and kinship bestow a license to request help without imposing any imperative obligation to reciprocate.”)

¹⁷³ The familial norm of entitlement is very different than one’s sense of entitlement in more public spheres. Hochschild suggests that inequality norms are acceptable and even preferable in the market domain, where there is an acceptable theory of desert that explains disparity. HOCHSCHILD, *supra* note 170 at 49 Equality is the operative norm in the political realm, but it is not material or emotional goods that are distributed in that realm, it is political rights. (To the extent that one asks Americans to view economic rights as political rights, they usually deny or transform the hypothetical. *Id.* At 48). Law plays a huge role in constructing the theories of desert in the market domain and in constructing the nature of the participatory rights in the political realm, but it plays much of less of a role in the social domain. It defines the social domain and then usually lets distributions within that domain work themselves out, until parties within the domain call on the law to interfere, i.e. at divorce or termination of parental rights.

¹⁷⁴ Martha Fineman, *supra* note 166 at 1214.

universal truths for relationships.¹⁷⁵ The intimacy and trust of family relationships, an intimacy and trust born from sharing not only day-to-day life, but also the “distinctly personal aspects of one’s life”¹⁷⁶ create “attachments and commitments”¹⁷⁷ that the law honors by making exit difficult and by refusing to interfere in most day-to-day life.¹⁷⁸ These restrictions are simultaneously taxing and liberating. “Bonds of lasting intimacy leave family members undeniably vulnerable, but the same relationships and loyalties that seem to tie us down are, paradoxically, the sources of strength most likely to lift us up.”¹⁷⁹

The law’s treatment of relationships thus privileges the entity over the individual. Through property rules¹⁸⁰ explicit statutes,¹⁸¹ and common law duties,¹⁸² the law sets norms not just for sharing, but for fusing, for making it difficult for individuals to think about their property or their needs as distinct from those of their partner. In setting these norms, the law facilitates the fulfillment what may be core (or at least a widely held) human needs to transcend self in the context of relationship.

When legal relationships dissolve and the law does get involved by setting maintenance awards, courts do not focus on individual contributions or needs. Although divorce “reforms” in the 1970s and 1980s tinkered with the idea of making maintenance a function of individual need or contribution,¹⁸³ the recent judicial and statutory trends have rejected these reforms as inimical to the idea of marriage and shifted the emphasis to the length of the marriage (the amount of time of belonging) not individual sacrifice or entitlement.¹⁸⁴ In other words, whatever one contributed or did as a spouse, if one was

¹⁷⁵ As Hillary Clinton commented at a time when the entire world was looking at her marriage through a microscope and wondering how it could possibly work, “I have learned a long time ago that they only people who count in any marriage are the two people that are in it.” Maureen Downey, *Saturday Talk*. THE ATLANTA JOURNAL AND CONSTITUTION, Jan. 31, 1998.

¹⁷⁶ *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984).

¹⁷⁷ The language comes from *Roberts*. *Id.* Regan also suggests that trust flows from the intimacy of day to day life. “Trust “can flow out of the progress of a relationship with another, as daily experience incrementally and almost imperceptibly creates a milieu in which persons come to trust each other. . . .” REGAN, ALONE TOGETHER, *supra* note 166 at 25

¹⁷⁸ The refusal to interfere, as manifested in the spousal immunity doctrines, the evidentiary privileges and the common law doctrine of non-interference, see *McGuire v. McGuire*, *supra* note 166, is a common law, not a constitutional doctrine. It operates in much the same way as the constitutional doctrine of parental autonomy does though.

¹⁷⁹ Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV 865, 912 (1989).

¹⁸⁰ See *supra* notes 136-139.

¹⁸¹ See e.g. Cal. Civil Code §5132 “A married person shall support the person’s spouse while they are living together, “ § 4802 “a husband and wife cannot, by any contract with each other, alter their legal relationship, except a to property . . . “.

¹⁸² For instance, the necessities doctrine requires a spouse, if able, to pay for another spouse’s “necessaries.” See ELLMAN ET AL, *supra* note 92 at 159-161.

¹⁸³ See ELLMAN ET AL, *supra* note 92 at 363-364 (discussing “reforms” in alimony laws) and at 380-386 (discussing the problems with the rationales that alimony “reform” relied on) .

¹⁸⁴ See *id.* at 386 “Marital duration appears to be a critical factor for nearly every court asked to make an award for ‘support alimony’ – alimony with no definite termination date that is intended to provide the obligee with a more comfortable living standard.” . See also ALI PRINCIPLES *supra* note 42, § 5.04 Cmt. C “Despite the conceptual difficulties with the contract and contribution rationales, the cases reflect an enduring intuition that the homemaker in a long-term marriage has some claim on the other spouse’s post-

married for long enough, one is entitled to maintenance. It is the fact of belonging that matters.¹⁸⁵

2. Marriage as Oppressive?

This noble and psychological story about how and why the law respects relationship has thus far (purposefully) neglected to mention how very devastating the traditional treatment of relationship has been for women, notwithstanding maintenance laws designed to protect them somewhat. As Lee Teitelbaum recognized over 20 years ago, “[w]hen courts refuse to resolve . . . [intra-family] disputes, that decision is sounded on the principle of family autonomy . . . [H]owever, the practical consequence of many, if not all, of these decisions is to confer or ratify the power of one family member over others.¹⁸⁶ Despite the reciprocal rights and obligations that the law imposed on husbands and wives, for thousands of years, it was all too clear that the refusal of the law to interfere let a man abandon or ignore his obligations to his spouse and/or use force against his wife if he thought that, for any reason, she was ignoring her obligations.¹⁸⁷ Because women had so few options in life outside of marriage, they were completely dependent on the largesse of their husbands within it.

The fact that for centuries marriage has served as an institution that allowed the law to subordinate women’s property interests and ignore women’s physical and emotional well-being might well auger in favor of constitutional suspicion of marriage, not reification of it. One could easily argue that the equality principles embedded in the Equal Protection Clause require the law to scrutinize the ways in which the law privileges relationship precisely because, as Teitelbaum observed, by privileging relationships the law privileges the more powerful at the expense of the less powerful and thereby denies the less powerful full voice and participation in society.

Furthermore, as I have previously suggested, the legal recognition of marriage may not be that important to women because they are already more likely to experience life as a web of connection to others. Women may meet their core human need to transcend self in relationship more easily than men do.¹⁸⁸ Women may not need marriage because they do not *crave* intimacy the way men do; as Robin West writes, “We just do it. It is

divorce income. That intuition does not depend on any assumption that the parties made explicit promises to one another, but on the belief that the relationship itself gives rise to obligations. . . . The remedy is proportional to the marital duration because the obligations recognized under this section do not arise from the marriage ceremony alone, but develop over time as the parties’ lives become entwined.”

¹⁸⁵ Comparably, child support awards are set pursuant to rigid statutory grids as a way of preventing judges from making individual assessments about children’s needs or desires. What a child is entitled to is a function of the fact of her legal relationship to her parent, not as a function of her particular situation. See Baker, *Bargaining or Biology*, supra note 15 at 7-8. . . .

¹⁸⁶ See Teitelbaum, supra, note 11 at 1144.

¹⁸⁷ See Elizabeth Schneider, *The Violence of Privacy* 23 CONN. L. REV. 973 (1991) (analyzing the myriad ways that privacy doctrine has allowed men to control and abuse women in marriage).

¹⁸⁸ See Baker, supra note 12 at 1549-1558 (describing how the traditional justifications for the treatment of marriage ignore the substantial feminist literature that suggests that women may crave and need formalism and independence not altruism and intimacy because caring and connection seem to come so much more easily to women)

ridiculously easy.”¹⁸⁹ Perhaps, when the Supreme Court has referred to the human flourishing that marriage enables, it has been seeing the world through a distinctly male lens, and whatever values may be served by fostering the intimacy of marriage, those values pale in comparison to the equality concerns that seem antithetical to it.

Reasonable minds may well disagree on this question. The contemporary empirical evidence continues to show that the vast majority of women marry,¹⁹⁰ even more women express a desire to marry,¹⁹¹ and those women who do marry are happier, healthier and wealthier than those who do not.¹⁹² To be sure, there are correlation/causation concerns with this data. Marriage may make people happier, healthier and wealthier, but happy, healthy and wealthy people are probably more likely to marry.¹⁹³ Moreover, state policies and norms supporting marriage help explain why married people would feel happier (they are comporting with a social norm), healthier (they have easier access to health insurance) and wealthier (they get preferable tax treatment).¹⁹⁴ Maybe the only reason women want to marry is because they will be considered normal and get access to health care and tax benefits. After all, there are numerous women who cherish their “emotional individualism”¹⁹⁵ and flourish both psychologically and materially outside the confines of marriage. Maybe without state support of marriage many more women would not go near it.

Maybe. But at times it seems as if the feminist critique of marriage is running into the same road block that the feminist critique of sexuality did.¹⁹⁶ For much of the 1980s

¹⁸⁹ West, *supra* note 153 at 18. (“Intimacy is not something which women fight to become capable of. We just do it. It is ridiculously easy.”) The gendered facility with intimacy may explain why, historically, marriage has been more psychologically beneficial to men. See generally STEVEN NOCK, *MARRIAGE IN MEN’S LIVES* (1998).

¹⁹⁰ U.S. Census, S2201, 2006 American Community Survey. Of women over age 15, only 27.3% are never married. Of women between the ages of 35-44, only 16.4% are never married.

¹⁹¹ Polling Nations, questions to 13-24 year olds, 52 % definitely want to get married and 40% probably want to get married. <http://poll.orpub.com> .

¹⁹² Steven Nock writes “The many beneficial effects of marriage are well-known. Married people are generally healthier; they live longer, earn more, have better health and better sex lives, and are happier than their unmarried counterparts. . . . Some disagreement may exist about the magnitude of such effects, but they are almost certainly the result of marriage, rather than self-selection.” See NOCK, *supra* note 189 at 3 (citing numerous studies). For a more recent study, see Alois Sututzer and Bruno Frey, *Does marriage make people happy or do happy people get married*, 35 J. OF SOCIO-ECONOMICS 326, 3--- (2006) (finding that marriage continues to be highly correlated with happiness for both men and women and that “[i]t is unlikely that . . . selection effects can explain the entire difference in well-being between singles and married people.”) See also, Goive Marriage, M. Hughes and C. Style, *The Family Life Cycle – Internal Dynamics and Social Research Consequences*, 58 *Sociology and Social Res.* 56-68 (1983) (marriage improves women’s lives substantially).

¹⁹³ Grumpy, sick and poor people are not seen as particularly good marital prospects. Nonetheless, the studies cited in note above suggest that it is unlikely that benefits of marriage could be entirely do to selection effects.

¹⁹⁴ See Bernstein, *supra* note 10 at 161-163 (and notes cited therein).

¹⁹⁵ See Rachel F. Moran, *How Second-Wave Feminist Forgot the Single Woman*, 33 *Hofstra L. Rev.* 223, 228 (2004).

¹⁹⁶ For recent contributions to the feminist critique of marriage and legal family, see Rosenbury, *supra* note 11 at 212 (“Elevating [family relationships] over friendships contributes to gender inequality by encouraging individuals to engage in domestic coupling rooted in a history of patriarchy and then stigmatizing those who lie outside of that coupling” (citations omitted)); Dan Markel, Jennifer Collins, and

feminism consistently emphasized how women's subordination was sexualized and how sexualized domination permeated women's lives.¹⁹⁷ In the words of Catharine MacKinnon, women's sexuality was "defined by men, forced on women, and constitutive of the meaning of gender."¹⁹⁸ In response, though, numerous women, many of them self-defined feminists, challenged the feminist orthodoxy, asking (to paraphrase Kathryn Abrams) "what are we supposed to do about sex while we are fighting for freedom?"¹⁹⁹ The numerous women, many of them feminists, who continue to enter into the institution of marriage may be asking a comparable question, "what are we supposed to do about family while we are fighting for freedom?"

Much of the feminist critique of marriage argues that marriage is, as MacKinnon said women's sexuality was, "defined by men, forced on women and constitutive of the meaning of gender."²⁰⁰ Yet despite what has been a century of feminist criticism of marriage,²⁰¹ there still appears to be something in marriage that many women – including women with a strong commitment to gender equality – value.²⁰² Even while conceding that the institution of marriage is deeply infused with patriarchal norms and hidden forms of oppression, women enter it willingly. It could be that women are just terribly misguided about how bad marriage will be, or it could be that many women have decided that there is something worthwhile in the marital norms that state and culturally sponsored marriage impart.²⁰³ The analysis above suggests that what women may value

Ethan Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 ILL. L. REV 1147, 1190 ("the family often served (and in some cases, continue[s] to serve) to perpetuate patriarchy, gender hierarchy, or domestic violence.") See also, Polikoff, *supra* note 15 .

¹⁹⁷ Kathryn Abrams, *Sex Wars Redux*, 95 Col. L. Rev. 304, 307-310.

¹⁹⁸ CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 149 (1989).

¹⁹⁹ Abrams, *supra* note 198 at 311 ("sex radicals argued [that] the subordination of pleasure to a virtually exclusive focus on identifying and preventing danger deprived women of a resource vital to self-understanding and resistance. The sex radicals asked "what women were supposed to do about sex while they were fighting for freedom."")

²⁰⁰ See Rosenbury, *supra* note 11 at 219 ("marriage, as shaped by the state, plays a vital role in maintaining gender inequality"); Markel, Collins and Leib, *supra* note 197 at 1193 ("benefits to the family facilitate the perpetuation of gender hierarchy and domestic violence"); Polikoff, *supra* note 15 at 1536 (marriage is "the worst of mainstream society" and "an inherently problematic institution.").

²⁰¹ For early critiques see Emma Goldman, *Marriage and Love*, in *Red Emma Speaks* 158, 164-65 (Alix Kates Shuman ed., 1972) (The institution of marriage makes a parasite of woman . . . It incapacitates her for life's struggle, annihilates her social consciousness, paralyzes her imagination, and then imposes it gracious protection, which is in reality a snare, a travesty on human character.)

²⁰² Commitment to gender equality is correlated to educational level, as is marriage rate. For the link between commitment to gender equality and education, see Richard J. Harris & Juanita M. Firestone, *Changes in Predictors of Gender Role Ideologies Among Women: A Multivariate Analysis*, 38 SEX ROLES 239, 240 (1998). For the link between marriage rate and education, see Detp. Health and Human Services, Natl. Center for Health Statistics, *Cohabitation, Marriage, Divorce and Remarriage in the United States* 4 (2002) ("In addition to race and employment status, other characteristics of individuals that have been found to be related to higher probability of getting married include higher education and earnings.") See http://www.aamft.org/Press_Room/CDC_series23_7_2002.pdf

²⁰³ It could also be that regardless of whether women think that the law's treatment of relationship is particularly important to their experience of it, that is, even if women would readily be able to forge intimacies and fusions without the law's help, women who want to forge those intimacies with men want the law's help because they believe that the legal treatment of relationship does help men overcome a more individualistic outlook toward life. See Baker, *supra* note at 12 at 1595 ("wives may benefit from the

is the human flourishing that seems to flow from fusion with another and the nourishment one gets from a defined community that can close its doors to the outside world.²⁰⁴ This line of argument would also explain why so many gay men and lesbians want to get married. Some commentators bemoan the elevation of “we” language in contemporary gay discourse,²⁰⁵ but there is little doubt that within the gay community there is a strong endorsement of the we.²⁰⁶ Committed, interdependent, hard-to-break relationships matter powerfully to people and the law plays a role in making those relationships more committed, interdependent and hard to break. When the law recognizes marital relationships, it fosters and facilitates the formative and constitutive roles that those relationships can play in people’s lives.

B. The Law and the Importance of Parental Relationships

1. Parenthood as Constitutive

When the law recognizes parental relationships, it fosters and facilitates the formative and constitutive role that parenthood plays in people’s lives also. The justification for the legal treatment of parenthood almost perfectly parallels the justification for the legal treatment of marriage. Parenthood enables people to feel powerful love, to fuse with others and to reconstitute themselves in the context of relationship. Like marriage partners, children are critical sources of love. Adults have children, Jeffrey Bluestein writes “not because . . . [children] will continue the family, or are potential sources of relief and aid, but because they are new bonds of love.”²⁰⁷ Like marriage, parenthood requires a relinquishment of self, a fusing of self with other such that a parent’s decision to run into a burning building to save her child can hardly be construed as an act of altruism.²⁰⁸ It is an act of self-interest.

Being a parent is also a means of re-constructing oneself.²⁰⁹ Parenting requires accepting the responsibility that allows one to achieve what Katharine Bartlett refers to as

extent to which legal protection of marriage encourages their husbands to become more caring, intimate, and selfless.”)

²⁰⁴ As Anne Dailey remarked “while the closed doors of the home have shielded abuse, isolation and exploitation, they have at the same time nurtured love and commitment.” Anne Dailey, *Constitutional Privacy and the Just Family*, 67 TULANE L. REV. 955, 1021 (1993).

²⁰⁵ See Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006) (“the rights-bearing subject of the lesbian right movement has now become ‘the couple’ – a We. It is a domesticated couple and it is a couple that seeks a particular location within a genealogical kinship grid that sutures the couple to the nation.”)

²⁰⁶ See e.g., JONATHAN RAUCH, *GAY MARRIAGE* (2004) and the numerous same sex marriage cases brought by claimants eager to be considered a “we.”

²⁰⁷ Jeffrey Bluestein, *Child Rearing and Family Interests*, in *HAVING CHILDREN* 115, 118 (Onora O’neill & William Ruddick eds., 1979).

²⁰⁸ Mit Regan explores this kind of hypothetical, suggesting that a stranger’s decision to rescue a drowning child can barely be analyzed on the same terms as a mother’s because the mother’s “decision” seems so much like an instinctive act of self-preservation. REGAN *supra* note 160 at 113.

²⁰⁹ At a colloquial level every parent understands this. That is why so many parents come to see their lives as having two very distinct phases, pre-children and parental, and those phases are not just about sleep deprivation and the facility with which one changes a diaper or installs a car seat.

an “ennobled self.”²¹⁰ The ability to construct oneself in this ennobled way, to accept the responsibility for “nurturing and loving and educating one’s children . . . is central to our conception of human flourishing.”²¹¹ As David Richards suggests “[c]hild-rearing is one of the ways in which many people fulfill and express their deepest values about how life is to be lived.”²¹²

The parental rights cases, including *Meyer v. Nebraska*,²¹³ *Pierce v. Socy of Sisters*,²¹⁴ *Prince v. Mass.*,²¹⁵ *Wisconsin v. Yoder*,²¹⁶ and *Parham v. J.R.*,²¹⁷ particularly when coupled with other “parent-like” cases, *Moore v. City of East Cleveland*,²¹⁸ and *Smith v. OFFER*,²¹⁹ recognize that parenthood plays a key constitutive role in people’s lives. Thus, allowing the state to bar parents from pursuing certain desired educational paths for their children would offend the “relation between individual and state . . . upon which our institutions rest.”²²⁰ An adult must be free to steer a child in the “ways he should go.”²²¹ The state cannot “standardize its children” by requiring that they go to public school.²²² In dissent, in *Bowers v. Hardwick*, Justice Blackmun wrote that the Constitution protected parenthood because “parenthood alters so dramatically an individual’s self-definition.”²²³ The parent- child relationship serves as a source of independent identity for both parent and child.

The Court has also made clear that the “the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promoting a way of life’.”²²⁴ “It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”²²⁵ In *Prince* (a parenthood case), the Court foreshadowed the language in *Griswold* (a marriage case), referring to the interests at stake in child-rearing as “sacred.”²²⁶ That sacredness was made all the more explicit in

²¹⁰ Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L. J. 293, 301 (1988) (citing Nel Noddings, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 5) (1984)).

²¹¹ Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 938, 962 (1996)

²¹² David A. J. Richards, *The Individual, The Family and The Constitution, A Jurisprudential Perspective*, 55 NYU L. REV 1, 28 (1980).

²¹³ 262 US 390 (1923).

²¹⁴ 268 US 510 (1925).

²¹⁵ 321 US 158 (1944)

²¹⁶ 406 US 205 (1972).

²¹⁷ 442 US 584 (1979).

²¹⁸ *Moore v. City of E. Cleveland*, 431 US 494 (1977).

²¹⁹ *Smith v. OFFER*, 431 US 816 (1977)

²²⁰ *Meyer*, 262 US at. 628.

²²¹ *Prince*, 321 US at 164.

²²² *Pierce v. Socy of Sisters*, 268 US 510, 535 (1925)

²²³ *Bowers v. Hardwick*, 478 US 186, 205 (1985) (Blackmun, J. dissenting) (citing *Moore* at 500-06).

Bowers had to do with a consensual sexual relationship between two adults (in some sense, marriage-like); *Moore* had to do with a relationship between a grandmother and her grandchild (in some sense parent-like). Again, when the Court writes about why it protects either marriage or parenthood, it tends to conflate the reasons.

²²⁴ *Smith v. OFFER*, 431 US at 843 (quoting *Griswold*)

²²⁵ *Moore*, 431 US at 503-04.

²²⁶ *Prince*, 321 US at 165

Wisconsin v. Yoder,²²⁷ which respected parents' rights to withdraw their children from public school at age 14 because the rights of parents include the right to raise children within the tenets of the Amish religion. It was impossible to afford the parents religious freedom without affording them parental freedom because the freedom to believe and act in accordance with their religious beliefs, a freedom that we often consider a basic *individual* right, includes a basic *relational* right, the right to raise one's children in accordance with those beliefs.

The way the Constitution honors the potential for people to enrich and define themselves through parenthood is by leaving the parental relationship alone. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."²²⁸ Parents are afforded great freedom to structure their relationships with their children as they choose. There are mandatory schooling laws, and child labor restrictions and the outside boundaries of abuse and neglect, but, for the most part, the state steers clear of interfering with the parental relationship. Parents are presumed to act in their children's best interest.²²⁹ As recently as 1989, Justice Brennan re-affirmed the soundness of the substantive due process cases that treated the parental relationship as outside of the ambit of state regulation.²³⁰

In most of these cases, the Court was not careful to separate out the interests of the parents and the interests of the children,²³¹ and in *Parham v. J.R.*, the court realized that such an effort was probably pointless. The child's "interest is inextricably linked with the parents' interest in and obligation for the welfare and the health of the child."²³² Child and parent are one for legal purposes.²³³

2. The Parallels to Marriage

This explication of the parental rights cases suggests that parenthood and marriage should be protected for comparable reasons. Indeed, the parental rights cases, more explicitly than the marriage cases, explain why it is that the law needs to care about relationship

²²⁷ 406 US 205 (1972).

²²⁸ *Prince v. Mass.*, 321 US 158, 166 (1944).

²²⁹ *Parham v. J.R.*, 442 US 584 (1979).

²³⁰ Citing *Meyer v. Nebraska*, 262 US 390 (1923) and *Pierce v. Soc'y of Sisters*, 268 US 510 (1925), Justice Brennan wrote "I think I am safe in saying that no doubts the wisdom or validity of those decisions." *Michael H. v. Gerald D.*, 491 US 110, 143 (1989) Brennan, J. dissenting).

²³¹ But see Justice Douglas dissenting in *Wisconsin v. Yoder*, 406 US 205, 244 (1972) ("On this important and vital matter of education, I think the children should be entitled to be heard"). See also Woodhouse, *supra* note 13 (arguing that the refusal to consider the children's perspectives in *Meyer* and *Pierce* reflects a paradigm that inappropriately treats children as property.).

²³² 442 US 548 [2503]. The Court acknowledged that "some parents may at times act against the interest of their children . . . but [that] is hardly reason to discard wholesale those pages of human experience that teach that parents generally do act in the children's best interest." [2504].

²³³ In *Troxel v. Granville*, 530 US 57 (2000), the Court backtracked from this position somewhat, finding that grandparents may have a right to visit their grandchildren against the wishes of a parent, if it is in the child's best interest. Courts are still required to (rebuttably) presume, however, that parents do act in the best interest of their children.

rights and obligations at all. The law needs to honor family relationship rights because family relationships provide critical sources of identity. They help steer people “in the way they should go.”²³⁴ They afford people a sense of being “inextricably linked” with another,²³⁵ and they treat “rights and high dut[ies]”²³⁶ as coming of a piece. Family relationships allow us to share the “intimacy of daily association”²³⁷ which in turn allows us to “pass on our most cherished values”²³⁸

Thus, despite what some commentators have suggested, the invocation of the parenthood cases in the marital cases makes good sense. In his article on marriage, Cass Sunstein writes that when the Court evaluated the constitutional dimensions of marriage it “went off track [and into the cases involving parenting and procreation] because of the intuitive connection between sexuality and reproduction (protected by substantive due process) and marriage (not easily analyzed in the same terms).”²³⁹ To assume that marriage cannot be analyzed in the same terms as parenting and procreation may well be to assume something wrong about the legal treatment of parenting or marriage, however. Marriage, like parenthood, shapes identity. Both marriage and parenthood create sources of loyalty and intimacy that root one in something other than oneself or the state.²⁴⁰ In striking down the regulations in *Meyer* and *Pierce*, the Court emphasized the important mediating function that families can play as an interim institution between the individual and the state.²⁴¹ By citing *Meyer* and *Pierce* in *Skinner*, *Griswald* and *Zablocki*, the Court suggested that marriage plays that intermediary role as well.

Comparably, the birth control and abortion cases say something about the constitutional import of relationship. The liberty interests served both by allowing people to procreate and allowing them not to have everything to do with affording people some measure of control over which and what kind of relationships will come to define them. The rights

²³⁴ *Prince* 321 US at 164.

²³⁵ *Parham at 2503-04.*

²³⁶ *Pierce at 535.*

²³⁷ *Smith v. OFFER 431 US at 844. ,*

²³⁸ *Moore at 503-04*

²³⁹ Sunstein, *supra* note at 2097.

²⁴⁰ Intermediary institutions can be critical sources of identity, see Anne C. Dailey, *Federalism and Families*, 143 U PENN L. REV 1787, 1858-1960 (1995) (discussing the communitarian argument about the “constitutive effect that social affiliations have on the development of the human identity.”) and critical buffers from the state. As Jean Eshtain writes, “it is no coincidence that all 20th century totalitarian orders labored to destroy the family as a locus of identity and meaning apart from the state.” JEAN ELSHTAIN, *THE FAMILY AND CIVIC LIFE* 55 For more on the importance of intermediary institutions, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1088 (1980).

²⁴¹ The Court in *Meyer* explained that American values were critically different than those proposed by Plato in the IDEAL COMMONWEALTH. Plato described a world in which all training of young males was the responsibility of the state. The Court wrote: “Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and the state were wholly different from those upon which our institutions rest.” 262 US at 402. In *Prince* the Court wrote, “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligation. “ 268 US 510 at 535. For more on this, see Dailey, *supra*, note 205 at 1017 (“constitutional protection of the family ought to reflect an understanding of the family’s distinct role as a vital interim institution serving the communal ends of political life”)

to abortion and birth control are not just about the rights to be free of an unwanted pregnancy, they are about the rights to be free of unwanted relationships.²⁴² Those rights are important because of the ways in which relationships, particularly relationships that are understood by the parties and by others to be familial, define who we are.²⁴³

Even if one discounts heavily the hyperbole in *Maynard* (marriage is “the most important relation in life”) and *Skinner* (marriage is “fundamental to the every existence and survival of the race”), and even if one dismisses the rhetoric about nobility in *Griswold* as mostly dicta, it still seems clear from those cases, which have almost nothing to do with expression,²⁴⁴ that marriage is important for reasons other than just its expressive potential. The parental rights cases, which are cited in so many of the marriage cases, help explain what those reasons might be. The rights and obligations of marriage, like the rights and obligations of parenthood, are important because, for many, those rights and obligations help shape people’s identity and afford them the context and liberty, as children and as adults, to constitute themselves in the world.

C. Confused Nomenclature

Part of the reason the connection between marriage and parenthood has not been made more clearly may stem from the imprecise and somewhat circular language the Court has used to protect family relationships. Three related and overlapping terms are often used: intimacy, privacy and autonomy. When speaking about family relationships, the Supreme Court has used the word intimacy frequently,²⁴⁵ though no one thinks of there as being a right to intimacy. Instead, there is (maybe) a right to privacy and there are doctrines of family and parental autonomy. Scholars of the court and of these concepts suggest that the terms all have something to do with each other. In his famous article on privacy and autonomy,²⁴⁶ published just after *Roe v. Wade*, Louis Henkin argued that when the Supreme Court used the word privacy it really meant autonomy, or the right to

²⁴² Admittedly, this right is gendered. Women have the right to terminate a potential relationship in a way that men do not and because a mother can effectively prevent a father from relinquishing his paternal relationship, see Baker, *Bionormativity*, *supra* note 45, men can have relationships forced on them. This gendered (and arguably unfair) treatment of relationship in the parental context may have come from the recognition that for years men just walked away from parental relationships without much fear of ever being dragged back into them., legally or emotionally.

²⁴³ To suggest that the constitutional treatment of marriage has nothing to do with these other treatments of relationship may be to suggest that marriage is some lesser form of relationship than parenthood, arguably either because the marital relation is somehow a legal construct in the way that other family relationships are not, or because parental relationships are simply more important to people than marital ones. Both of those assumptions are misguided. The law has always defined parental status pursuant to a set of criteria that it set, sometimes involving biology sometimes not. See *supra* notes and text accompanying 113-116. Parenthood, particularly fatherhood, is no more pre-legal than is marriage. Moreover, many people, particularly men, define marriage as the most important relationship in their life. See NOCK *supra* note 189. If the relation of parent to child is worthy of constitutional protection because of the way in which that relation shapes our identity, than the relation of spouse to spouse may well be also.

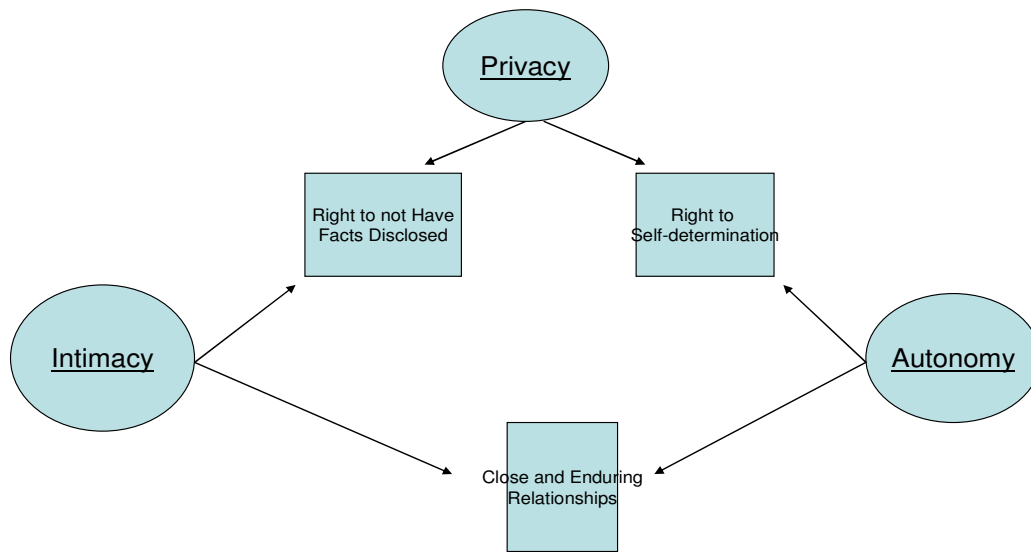
²⁴⁴ *Griswold* may have something to do with sexual expression, see *supra* text accompanying note 73-75, but the discussion of marriage has little to do with what is expressed through marriage.

²⁴⁵ *Griswold*, 381 US at 486 (in context of marriage); *SMITH*, 431 US at 843 (in context of parental-type relationships).

²⁴⁶ Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV 1410 (1974).

be free from governmental regulation.²⁴⁷ In her famous article on privacy, Ruth Gavison argued that there are actually two kinds of privacy, the right to self-determination (often thought of as autonomy) and the right not to have facts about oneself known. In his article on intimate associations, Kenneth Karst argued that this latter right, the right not to have facts disclosed, is also part of our understanding of what constitutes intimacy.²⁴⁸ The other understanding of intimacy involves “close and enduring association between people”²⁴⁹ or relationship. Meanwhile, Jennifer Nedelsky argues that the term autonomy has no meaning outside the context of relationship. “When we ask ourselves what enables people to be autonomous, the answer is not isolation, but relationships.”²⁵⁰ Thus, a right to privacy may be a right to autonomy, which has no meaning outside the context of relationship.

Diagrammatically, the etymology looks something like this:



This etymological overlap helps explain some of the doctrinal confusion with regard to relationship. Sometimes that which is protected when we protect relational privacy is the

²⁴⁷ Id.

²⁴⁸ “The first meaning of intimacy is synonymous with one of the meaning of privacy: an intimate fact is a private fact, the sort of information about a person that is not normally disclosed.” Karst, *supra* note 152 at 636.

²⁴⁹ Id.

²⁵⁰ Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thought and Possibilities*, 1 YALE J. L. AND FEMINISM 7, 12 (1989).

right not to have things disclosed,²⁵¹ but sometimes it is the right to self-determination.²⁵² Sometimes, by autonomy, we mean the right to be free from governmental regulation,²⁵³ but sometimes we mean the right to be treated as intertwined with others.²⁵⁴ What makes intimate relationships special is that they are both private and autonomous. The people in them exclude the rest of the world, but include each other in a way that makes them both independent and interdependent. When the Supreme Court recognizes the importance of relationship, it is acknowledging the critical role that relationship can play in our lives and it is acknowledging the importance of letting relationships thrive outside of the law.

D. A Due Process Requirement?

Given the primary role that legally recognized family relationships play and have always played in people's lives, there is a strong argument that the Constitution must recognize them. In his article on the constitutional dimensions of tort law, John Goldberg argues that the Constitution requires the state to provide "bodies of law that fit certain descriptions, including laws of ownership, *familial relations* and enforceable agreements, as well as law for the redress of wrongs."²⁵⁵ Goldberg rests much of his argument on the historical role that the government has played in the redress of private wrongs,²⁵⁶ but his arguments from history work just as well in family relations as they do in tort. Indeed, the Court has relied heavily on history to explain why it feels compelled to protect the family, despite there being no mention of the family in the Constitution. "The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family – a relation as old and as fundamental as our entire civilization – surely does not show that the Government was meant to have the power to do so."²⁵⁷ "Our decisions establish that the Constitution protects the sanctity of the family because the institution of the family is deeply rooted in the Nation's history and tradition."²⁵⁸

Just as government has always provided some redress for private wrongs and therefore might be compelled to continue to provide some floor of redress, so the government has

²⁵¹ The communication privilege is the most obvious example, but so is the kind of privacy the court seemed eager to protect in *Griswold* – the right not to have the government snooping around one's bedroom.

²⁵² The right not to be a parent protected in *Roe* can be viewed as a right to self-determination as can the right of Mr. Redhail to reconstitute himself in the context of relationship. In both contexts, the Court used the word privacy to describe what it was protecting. See *Roe*, 410 US at 152-153; *Zablocki*, 434 US at 384.

²⁵³ The court in *Prince* referenced parental "freedom" to raise their children as they wanted, 321 US at 166 and the court in *Loving* spoke of the "freedom" of choice to marry, 388 US at 12.

²⁵⁴ *Meyer*, *Pierce*, *Prince* and *Parham* all suggest that part of what parental autonomy means is the right to have the state view the parent-child relationship as an entity, instead of treating parents and children as separate.

²⁵⁵ John C.P. Goldberg, *The Constitutional Status of Tort Law*, 115 YALE L. J. 524 (2005) (emphasis added).

²⁵⁶ Steven Heyman has also argued that history strongly supports a Constitutional requirement that the state provide a bare minimum of protection from for private wrongs. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L J 707 (1992).

²⁵⁷ *Griswold*, 381 US at 496 (Goldberg concurring).

²⁵⁸ *Moore*, 431 US at 1938.

always recognized some family rights and obligations and therefore may be compelled to continue to do so. Exactly what the floor is, as Goldberg suggests, will be a function of a variety of factors, including contemporary understandings of (in the tort context) wrongs and presumably (in the relationship context) family.²⁵⁹ Thus, Goldberg finds no problem in the elimination of the torts of seduction or alienation of the affections because evolving understandings of women's rights and women's agency coupled with women's ability to sue in their own right rendered questionable whether the "wrongs" originally meant to be addressed were still considered wrongs.²⁶⁰ Comparably, the current tendency to recognize marital and parental rights even if not legal status as spouse or parent suggests that contemporary understandings of legally relevant relationships have progressed some. The state supreme courts in Vermont and New Jersey found themselves constitutionally obliged to grant the rights and obligations of marriage even if though they did not feel compelled to grant marriage to gays men and lesbians.²⁶¹ Courts and legislatures often feel compelled to grant parental rights even if not the status of parenthood.²⁶² The floor for state-recognized relationship rights in these cases seems to have shifted up.

Goldberg is careful to point out that his notion of due process does not treat "as natural or neutral a set of baselines for constitutional analysis arbitrarily drawn from the common law."²⁶³ Instead, he is suggesting that scholars should "self-consciously theorize a connection between public and private law."²⁶⁴ The tension between the constitutional and (mostly) federal discourse of family law, on the one hand, and the statutory or common law and (mostly) state discourse, on the other, cries out for such a unifying theory in the family law context. As Goldberg notes, "there is a long tradition of holistic thinking in Anglo-American constitutional law, one that treats private law not as sub or non-constitutional, but as part of an overall constitutional order."²⁶⁵ Understanding the constitutional protection of relationship as incorporating many of the state laws that treat two as one, in ways that both expand and restrict autonomy, follows that tradition of holistic thinking.

E. Summary

Just as the analogy to marital status helped elucidate what claims to parental status are, so the analogy to parental rights helps elucidate why the law should (or must) recognize marriage-like relationships. Though often confused by its own overlapping rhetoric, the Supreme Court has consistently recognized that significant autonomy, privacy and intimacy values are implicated by the legal treatment of family relationship. In the parental rights context, the court has more clearly articulated how the law's protection of relationships affords people the relational context and freedom to constitute themselves in the world. The Supreme Court's understanding of why parental relationships are

²⁵⁹ For the list of factors Goldberg would use to determine the floor, see Goldberg, *supra* note 255 at 613.

²⁶⁰ *Id.* (The conversion of the husband's property interest in his wife's body, or the disruption of the marital relation no longer seemed like wrongs).

²⁶¹ See discussion of *Baker v. Vermont* and *Lewis v. Harris* *supra* notes 36-38 and text accompanying.

²⁶² See *supra* text accompanying notes 46-51.

²⁶³ Goldberg, *supra* note 255 at 625

²⁶⁴ *Id.*

²⁶⁵ *Id.*

important finds support in the psychological and philosophical theories of adult relationship and family.

The law has always facilitated and helped sustain family relationships by treating them as distinct and free to flourish (or not) pursuant to their own rules, but governed, if at an end, by notions of fusing and sharing. Given how critical these relationships are to peoples' lives and how strong a role the law has always played in protecting them, one can argue that the state has an affirmative obligation to recognize some forms of family rights and obligations. The current trend to provide the rights of relationship to non-traditional family members, even while resisting the expansion of traditional notions of family status, may reflect a sense of this affirmative duty.

VI. Consequences

Regardless of whether one thinks states must provide some minimal rubric of relationship rights, and regardless of whether one thinks the current tendency to disaggregate relationship rights from family status provides adequate redress to those who fail to secure family status, it is not clear how long the tendency to disaggregate rights from status can last. Nor is it clear that the tendency to disaggregate marital and parental rights from their corresponding statuses is a good idea for those who care about the legal protection of relationships. Disaggregation undermines the social meaning of both marriage and parenthood. It also tends to minimize the importance of family obligation and thus makes legally recognized relationship less formative. Finally, disaggregation makes it much less likely that courts will continue to honor the doctrines of family autonomy. The Part explores these likely consequences of disaggregation.

A. Diminution in Meaning

First, as the traditional incidents of marriage and parenthood are increasingly disaggregated from the statuses with which they are associated, the social meaning of the statuses themselves is diffused. It is harder to know what both marriage and parenthood *mean* in a world in which many who do not have the status are treated as if they do. The Supreme Court of New Jersey recognized this irony when it denied same sex couples the right to the status of marriage in part because it had granted them the right to the incidents of marriage: "plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples."²⁶⁶ The Court thus explicitly acknowledges that the marital label loses some of its importance if people can acquire rights without the label.

In addition to the status losing potency when the rights with which it is associated can be dissociated from the label, the social norms that inform the status' meaning (and are a key part of its stability) may be undermined by the existence of alternative legally recognized relationships. As Elizabeth Scott writes "marriage gets its stability in part from the intricate web of social norms regulating spousal behavior."²⁶⁷ Marriage

²⁶⁶ Lewis v. Harris ,908 A.2d at 450.

²⁶⁷ Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L. Q. 537, 562 (2007).

alternatives may well not incorporate those social norms and it is not clear that marriage can retain them in the face of alternatives. If states develop many ways of viewing partners as in relationship with each other, there will be less reason for people to “know immediately” what the relationship means because it will be harder to internalize which social norms apply to which relationships. Perhaps the social norms that we now associate with marriage will continue to attach to those who marry even if there are alternative relationships available, but alternative statuses will likely have a weaker norm network supporting them.²⁶⁸ This will affect not only the people in those alternative statuses, but people in marriages as well. If people who are in domestic partnerships feel less bound by norms of stability and fidelity and if a married person knows many people in domestic partnerships, the married person’s allegiance to those traditional marital norms may seem far less obligatory.²⁶⁹

The political debate that followed *Baker v. Vermont* illustrates just how important the social norms and social meaning of marriage is perceived to be. The debate, fueled by anti-gay-marriage advocates on one side and pro-gay-marriage advocates on the other, involved who would be permitted to enter the newly created status of “civil union.” The anti-gay-marriage advocates wanted the state to recognize all sorts of couples who could not marry but who desired to share benefits (mothers and sons, good friends, two sisters etc.).²⁷⁰ The pro-gay-marriage advocates vigorously opposed this kind of relationship categorization because they wanted civil unions to mean what marriage means and to have the same social norms control. The anti-gay marriage advocates wanted civil unions to be something totally different than marriage. They did not want gays and lesbians to access the social norms of marriage.

Opponents of gay marriage continue to endorse this “friends with benefits” idea precisely because it keeps marriage’s meaning unique, intact and away from gay people.²⁷¹ Thus, the Vermont experience suggests that even when the sides are not fighting over whether gays and lesbians have a right to the use of the term “marriage,” they are still fighting over the social norms associated with marriage. The anti-gay marriage advocates want to create wholly different statuses for which those norms would be nonsensical. The pro-

²⁶⁸ It is likely that any norms accompanying civil unions or domestic partnerships will be weaker than norms accompanying marriage simply because those statuses are new and people have not had time to internalize the norms associated with them.

²⁶⁹ It could cut the other way. Married people might feel more bound by traditional marital norms precisely because there were alternatives available and they chose marriage. I am not contending that the availability of alternatives will necessarily erode the social norms associated with marriage. I am only contending that it may.

²⁷⁰ This position tracks the recent proposal from Laura Rosenbury to allow people to share the different kinds of benefits that marriage provides with a variety of different kinds of friends. See Rosenbury, *supra* note 11. The anti-gay marriage advocates in Vermont were careful to limit the people who could get benefits to those who could not legally marry though. In other words, a man and a woman could not have entered the alternative status just to secure benefits. See e-mail from Beth Robinson, Chair, Vermont Freedom to Marry Taskforce, 2/22/08 (on file with author). Rosenbury would not restrict the class of “friends” who could get benefits.

²⁷¹ See Sheila Kast interview with Professor Teresa Stanton Collett, NPR Weekend Edition Sunday, 7/16/06 (endorsing the idea of “reciprocal beneficiaries” because it allows people to provide benefits for each other without any connotation of a sexual relationship.)

gay-marriage advocates, if they cannot get marriage, at least want access to marriage's norms. As the anti-gay-marriage advocates may intuitively understand, the more that civil unions and other forms of partnership are akin to marital norms, the less clear it will be what marriage itself means.

If marriage does come to seem less important, as the New Jersey Supreme Court suggests that it will once alternative partnership paradigms are recognized, and if marital norms lose more of their strength, as may happen with alternative paradigms providing what will likely be weaker norms, then there is every reason to believe that the proliferation of alternatives to marriage, even though created in the name of preserving marriage, will ultimately undermine the institution. At a minimum, it will make claims to marital status seem more frivolous because it will be less clear that those who are deprived of marriage are deprived of anything significant.

Creating alternative legal forms of parent-like relationships will likely have a comparable effect. It is already clear that creating alternative forms of parenthood dilutes the parental rights of those who are otherwise parents. Here, it is important to underscore a key difference between marriage and parenthood. Expanding the kinds of marital-like relationships available does not alter the *legal* rights and obligations associated with marriage.²⁷² The rights and obligations of different unions may vary depending on whether they are marriages or civil unions or domestic partnerships and, as just analyzed, the social meaning and social norms associated with those unions may vary depending on a variety of exogenous and endogenous factors including the existence of other forms of partnership, but if A is married to B and C is domestic partnered with D, A's legal rights and obligations vis a vis B are not likely to be affected by C's legal rights and obligations vis a vis D.²⁷³ Parenthood is often more complicated. If A and B are parents of C, and D is a de facto Parent of C, then D's semi-parental status clearly undermines the legal rights and obligations of A and B. The more of a privilege that D has to exercise visitation or custodial rights, the less exclusive are A and B's rights as parents.

If, as may well be the case,²⁷⁴ we are moving toward a world of multiple parenthood, that is, if we are moving toward a world in which it is far more common for more than one or two people to have relationships claims to a child, then it is likely that the social meaning of parenthood will diminish in importance. If, for instance, it is relatively common for a child to have a de Facto parent in addition to one or two "regular" parents, or if, as is now the case in Louisiana, courts feel comfortable naming three parents,²⁷⁵ then it is unlikely that claims for parental status per se will have much resonance. Why should someone

²⁷² This assumes a world without polygyny and polyamory. A world with multiple marriage partners would present the same problems as the kinds of issues we currently have with multiple parenthood. For a thoughtful discussion suggesting that maybe we should not automatically take polyamory off the table, see Elizabeth Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 NYU REV. L & SOC. CHANGE 277 (2004).

²⁷³ As just suggested, the social norms associated with A's partnership with B may affect the social norms associated with C's marriage to D.

²⁷⁴ See Bartlett, *supra* note 15; Baker, *Bionormativity*, *supra* note 45 .

²⁷⁵ See *Smith v. Cole*, 553 So.2d 847, 855 (La. 1989) (conferring legal status of father on both genetic father and husband of the mother).

like Michael H. fight for the status of father if it is commonplace for people like him to get visitation rights without having parental status? Mistery Quilloin and Lehr²⁷⁶ would not need to block the adoption of their biological child by another man; they could just assume 3rd parent status, with rights (and possibly obligations). In other words, just as the proliferation of many legal forms of partnerships may make claims to marriage itself seem frivolous, so the proliferation of many forms of quasi-parenthood may make claims to parental status per se seem frivolous.

The expressive value of getting married or being a legal parent simply will not be as weighty if there are numerous different ways of assuming the same rights and obligations. People without the legal label will be treated just as people with the legal label are treated, and thus the label itself will lose some of its meaning. This diminution in meaning is dangerous for those claiming a positive right to marital or parental status because the less obvious it is that marriage and parenthood have coherent meaning, the less obvious it is that those who are deprived of those statuses or deprived of anything.

B. Diminution in Burden, Diminution in Benefit

Second, as detailed above, the often harsh and restrictive obligations that state law imposes on marital partners and parents makes sense in light of the ways in which people are enriched and ennobled when the law treats two as one. In crafting the legal rules that require sharing and assume fusing, the law helps people transcend self through relationship. Thus, to again quote Bruce Hafen, “the same relationships and loyalties that seem to tie us down are, paradoxically, the sources of strength that most lift us up.”²⁷⁷ It is because the desire to transcend self in this way is so primary and constitutive that the government may have an obligation to recognize family rights and obligations.

When separating the incidents of status from the statuses themselves, however, courts and legislatures have demonstrated a clear preference for bestowing the benefits of relationship, while not necessarily imposing relational obligations. In the domestic partnership area, employers, legislators and courts are much more likely to allow partners access to third party benefits (health and disability insurance) than to require domestic partners to assume long-term financial responsibility for each other.²⁷⁸ In the parental area, courts and legislators are clearly more comfortable awarding visitation than imposing child support obligations.²⁷⁹ Creating these “marriage-lite”²⁸⁰ and

²⁷⁶ See *supra* text accompanying notes 118-120.

²⁷⁷ See Hafen, *supra* note 179 .

²⁷⁸ See Blumberg, *supra* note 28 at 1290-1292 (noting how by failing to treat domestic partnership pension rights the way it treats marital pension rights, the UCLA domestic partnership program gives domestic partner’s less of a claim on each other’s financial assets). See also RAUCH, *supra* note 205 at 43-46 (referring to domestic partnership as “marriage-lite” and suggesting that such arrangements often don’t include all of the obligations of marriage.)

²⁷⁹ Compare, e.g., *ENO v. LMM*, 711 NE 2d 886 (Mass. 1999) (awarding visitation rights to a non-biological lesbian co-partner in part because of pre-existing agreement to share parenting) with *TF v. BL*, Mass. No 09104 (Aug. 25, 2004) (ruling that a pre-existing agreement in which the non-biologically related lesbian partner agreed to provide support for the child was not binding). See generally, Baker, *supra* note 50 at 121 .

²⁸⁰ See RAUCH, *supra* note 205 at 31.

“parenthood-lite” arrangements not only undermines the meaning of the statuses, it deprives the individuals involved of the important psychological and constitutive benefits that come from obligation. How fused does one feel with someone else if there is no mutual long term obligation to support? How much can a parental relationship change who one is if one is not legally required to do anything for or with the child? Without the traditional obligations of spouse and parent, the roles of partner and caretaker become much less formative and meaningful and therefore less worthy of constitutional protection.²⁸¹

C. Diminution in Privacy

Third, the less prevalent and clear the social meaning of marriage and parenthood are, the less likely it is that constitutions will protect the negative rights and the ideology of privacy associated with family statuses. The more legally varied and individualized family-like relationships become, the less autonomous they will become and the more courts will need to insert themselves inside those relationships, in order to ascertain the individual rights and responsibilities involved.

For instance, domestic partners who have access to each other’s health insurance and rights to hospital visitation, but who do not live in states that treat domestic partners as married for financial purposes, will be left to rely on notions of constructive trust, quasi-contract or contract for adjudication of questions pertaining to property distribution and future financial support. Not only do these theories often fail to render just or consistent results,²⁸² they involve searching inquiries into what actually happened during the course of the relationship. In order to prove a constructive trust that can secure for one an interest in an ex-partner’s property, plaintiffs must demonstrate the extent of their individual contributions to the relationship.²⁸³ Comparably, plaintiffs using claims of implicit contract must parade the details of their relationship before the court in order to establish the agreement pursuant to which they expect to collect.²⁸⁴ Even with this

²⁸¹ In other words, one cannot get the benefits that the constitution wants to secure, without accepting the less appealing state duties.

²⁸² See generally, Ira Mark Ellman, “*Contract Thinking*” was *Marvin’s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365 (2001) (discussing the failure of contract doctrine to incorporate the variety of factors that should go into a spousal compensation award).

²⁸³ See, for instance, *Evans v. Wall*, 542 So.2d 1055 (Fla. Dist Ct. App. 3d Dist 1989) (evidence of plaintiff’s contributions of food, telephone service, furnishings, cooking, washing and cleaning services used to establish a constructive trust that would allow her to receive a share of her ex-partner’s property); *Sullivan v. Rooney*, 404 Mass. 160, 533 NE2d 1372 (1989) (evidence plaintiff gave up job as flight attendant and maintained home for defendant helped establish a constructive trust on the home purchased by her ex-partner); *Minors v. Tyler*, 137 Misc. 505 (City Civ. Ct. 1987) (constructive trust is the appropriate doctrine under which to evaluate male cohabitant’s claim to his ex-partner’s property); *Small v. Harper*, 638 SW2d 24 (Tex. App. Houston 1st Dist. 1982) (id. [with gender’s reversed]).

²⁸⁴ See *Watts v. Watts*, 448 NW2d 292 (Wis. Ct. App. 1989) (court evaluating extensive evidence of parties’ behavior and finances; *Glasco v. Glasco*, 410 NE2d 1325, 1331-32 (Ind. Ct. App. 1980) (“[r]ecover[er] for parties seeking relief [sh]ould be based only upon legally viable contractual and/or equitable grounds which the parties could establish *according to their own particular circumstance.*” (emphasis added)). See also *Bright v. Kuehl*, 650 NE2d 311, 315 (Ind. Ct. App 1995) (following *Glasco*).

evidence, courts often resist finding implicit contracts. As the New York Court of Appeals wrote in *Marone v. Marone*:

As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do. For courts to attempt through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error.²⁸⁵

Marone thus required that plaintiffs show an express contract to provide before they can collect on any promise for future support. Express contract theories prove to be just as intrusive, however, because prohibitions on contracts for sexual services mean that courts take the consideration inquiry very seriously. Thus, in two different cases involving express contract, California courts found consideration when an ex-partner served as chauffeur, bodyguard and social and business secretary,²⁸⁶ but not when another ex-partner served only as social companion and hostess.²⁸⁷ New York courts have found that foregoing a career opportunity for the sake of a relationship is adequate consideration,²⁸⁸ but they will not presume that an unemployed ex-partner forewent career opportunities.²⁸⁹

It is precisely these kinds of detailed particularities of different relationships that courts have traditionally ignored in the name of allowing family relationships to construct themselves on their own. As discussed, legal obligations and liabilities have attached because of the fact of family status and regardless of the particular details of individual family arrangements. The more courts get into the details of "families" without that status, the less allegiance they may feel to the ideology of family privacy in general.

Comparably, a child who has legally cognizable relationships with numerous adults is a child who is much more likely to have his schooling decisions, religious upbringing and extracurricular activities determined by a court than by one or two parents. It is already clear that in cases of divorce, courts evaluate religious practices,²⁹⁰ choice of community

²⁸⁵ *Marone v. Marone*, 413 NE2d 1154, 1157 (NY 1980).

²⁸⁶ *Wharton v. Dillingham*, 202 Cal. App3d 447 (4th Dist. 1988).

²⁸⁷ *Bergen v. Wood*, 14 Cal. App. 4th 854 (2d Dist. 1993) (Curiously, the court refused to find consideration here because the parties' never cohabited. Thus, apparently, cohabitation is an essential part of the consideration necessary for a support promise, even though sexual services alone are an impermissible basis for consideration.)

²⁸⁸ *McCullon v. McCullon*, 96 Misc 2d 962 (Sup. 1978).

²⁸⁹ *Cohn v. Levy*, 725 NYS2d 376 (2d Dpt. 2001) (The Court emphasized that the plaintiff had not held a job in some time [she had been previously married], but the court did not explain how it thought she would have provided for herself if she had not been in the relationship. Presumably, she had to have foregone whatever other means of support would have kept her provided for, but the court did not acknowledge this.)

²⁹⁰ *In re Hadeen*, 619 P.2d 372 9Wash 1980); *Mentry v. Mentry*, 190 Cal. Roptr. 843, 850 (Cal. Ct. App. 1983).

decisions,²⁹¹ and financial entitlements.²⁹² The ability of parents to make these difficult, value-laden child rearing decisions is what makes parenthood “central to our conception of human flourishing.”²⁹³ Yet the more people there are with rights to rear one particular child, the less any one parent of that child is able to “inculcate and pass down [his or her] most cherished values.”²⁹⁴ Moreover, the more adults with relationship rights to a child, the more potential legal disputes there are and the more likely it is that a court, not a parent, will be determining what is in the child’s best interest. The constitutive benefits of parenthood, and the privacy of all of the parents involved, will be seriously compromised.

D. Summary

All of the consequences discussed here are speculative. What people understand marriage and parenthood to mean may not change in the presence of many comparable alternatives. It is even possible that the meaning of the traditional statuses will become more rigid as those with the statuses seek to distinguish themselves from others.²⁹⁵ Perhaps relationship rights that are not accompanied by relationship obligations can help shape identity and ennoble a self just as well as regimes that impart rights and obligations together. Perhaps courts asked to adjudicate pecuniary claims between ex-non-marital partners will simply adopt the ideology of family privacy and cease conducting more probing inquiries into the nature of the sharing and consideration between the two parties. This all seems unlikely though.

The liberalization of many social norms associated with family has already put the social meaning of marriage and parenthood in flux. For most people, obligations probably are a defining feature of relationship. The divorce rate, though stabilized, has already led to a significant increase in judicial supervision of financial and parenting questions for divorced families with children. It seems unlikely that family law judges will suddenly feel compelled to pull back from interfering with cases for support.²⁹⁶

Thus, the traditional constitutional treatment of relationship is already under stress. The further disaggregation of rights from status is likely to exacerbate that stress. If one is suspicious of the value of the traditional constitutional treatment of relationship, the continued disaggregation of rights from status should not be a cause for concern. If one thinks there is value in both the expressive and constitutive benefits that flow from the

²⁹¹ Ramirez-Barker v. Barker, 418 SE2d 675, 680 (NC Ct. App 1992 (holding that primary custodian could not move in order to be closer to relatives); In re Marriage of Sheley, 895 P2d 850, 856 (Wash. Ct. App 1995) (custodial mother could not move out of Seattle area).

²⁹² If family income is over a certain amount, courts determine the “realistic needs of the children,” Peterson v. Peterson, 434 NW2d 732, 738 (S.D. 1989); See also, In re Marriage of Bush, 547 NE2d 590, 596 (Ill. 1989).

²⁹³ See Gilles, *supra* note at 962.

²⁹⁴ See Moore, *supra* at 503-04.

²⁹⁵ This is presumably why some conservatives were willing to endorse a Constitutional Amendment that defined marriage as between a man and a woman but allowed others to enter Civil Unions.

²⁹⁶ See Carbone, *supra* note . The title of the article is *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*; Baker *supra* note 45 (discussing the myriad of ways in which the traditional understanding of parenthood is being challenged.)

traditional constitutional treatment of relationship, then disaggregation presents more of a problem.

VII. Conclusion

Despite the academic critique of the legal treatment of family relationship, many, many people continue to ask the law to recognize their family relationships. Marriage and parenthood, partnership and caretaking may look very different today than they did fifty years ago, but for the most part, people are not rejecting the law's role in shaping and defining family relationships, they are asking the law to draw family shapes and make family definitions that include them.

To the extent that litigants have made constitutional claims to be included in traditional definitions of family, they have not been that successful. Constitutions do not afford particularly robust protection to family status. Claimants have been much more successful in securing relationship rights, however. Sometimes these rights are granted, under state constitutions, in lieu of conferring traditional status; sometimes these rights are granted legislatively; sometimes courts simply create doctrines that recognize relationship rights and obligations between non-traditional family members.

Given the role the law has always played in honoring and fostering family relationships, and given the import of these relationships to many constitutional values, including our senses of liberty, autonomy and privacy, it may be that these new rights have been recognized because the relevant legal actors appreciate the state's affirmative duty to recognize relationship rights. Courts and legislatures feel compelled to honor certain relationships legally even if they don't feel compelled to afford those relationships family status. When looked at as a whole, the Supreme Court doctrine on relationships certainly suggests that there is some constitutional requirement that the law respect family relationships for reasons other than just their expressive potential, for reasons that have to do with the formative role that family relationships play in many people's lives.

If one believes that the law's role in fostering and promoting these relationships is beneficial and important, though, this article suggests that courts and legislatures should be wary of disaggregating relationship rights from relationship status in the way that they have. While jealously guarding what it means to be married and what it means to parent, courts and legislatures have created an alternative regime of relationship rights that ultimately may undermine some of the most important ways that the law honors relationship. Cafeteria-style family rights require a degree of judicial construction and monitoring and evaluation that is antithetical to the privacy, intimacy and autonomy values that motivate the law to respect relationship in the first place.

Concretely, what this means is that if one believes in the legitimacy and importance of legal marriage, then one should be wary of supporting "marriage—lite" arrangements because the very existence of alternative structures will foster a legal culture that is used to inserting itself inside relationships to define and evaluate them instead of leaving them alone. Comparably, if one believes in the importance of parental autonomy and privacy,

one needs to be wary of alternative parenting constructs that give courts not only the discretion, but often the duty, to make traditional parenting decisions.

Conservative and (some) liberals can even agree on the analysis to this point. They can agree that the disaggregation of rights from status is dangerous. Where they will part ways is in what to do about it. To conservatives, the response to the danger will be to try to reign in the liberal social norms and values that have allowed alternative family forms to flourish. If alternative family forms cease to exist in such numbers, the pressure on the law to recognize them will obviously dissipate. To liberals who believe that many non-traditional relationships should be recognized by law, the response to the danger will be to try to fight all the harder for family status. If non-traditional family members are entitled to marital and parental rights then they should be entitled to marriage and parenthood. Affording them something lesser not only leaves alternative family members with something lesser, it undermines the institutions of marriage and parenthood for everyone.