2006

A Privacy Right to Public Recognition of Family Relationships - The Cases of Marriage and Adoption

David D. Meyer

A PRIVACY RIGHT TO PUBLIC RECOGNITION OF FAMILY RELATIONSHIPS? THE CASES OF MARRIAGE AND ADOPTION

DAVID D. MEYER*

OF the many questions left unanswered by *Lawrence v. Texas*,[1] none has sparked more intense debate than whether the decision implies a constitutional right of same-sex marriage. On its face, *Lawrence* said nothing about marriage. Indeed, in holding that the United States Constitution did not permit Texas to criminalize sexual relations between two consenting, adult men, the Court was careful to set to one side "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[2] By its own terms, *Lawrence* held only that "[t]heir right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government" in the form of criminal sanction;[3] it said nothing about "whether or not [the men's relationship is] entitled to formal recognition in the law."[4]

The distinction drawn by the Court is consistent with traditional understandings that cast constitutional rights in essentially negative terms, including the right to be free from state interference in making decisions or forming relationships falling within the zone of protected privacy.[5] The constitutional right of privacy, the Supreme Court has written time and again, demarcates a "private realm of family life which the state cannot enter."[6] On this understanding, a privacy claim to formal recognition

* Professor and Mildred Van Voorhis Jones Faculty Scholar, University of Illinois College of Law. As a longtime beneficiary of Professor Richard Turkington's pathbreaking scholarship, I am grateful for the opportunity to honor him in this Symposium, and I thank Professor Greg Magarian for the invitation to participate.

1. 539 U.S. 558 (2003).

2. *Id.* at 578.

3. *Id.*

4. *Id.* at 567.

5. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989) (holding that Due Process Clause does not impose affirmative constitutional duty upon state to protect its citizens); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (discussing lengthy history of Court's findings that government has negative obligation to refrain from certain acts, as opposed to affirmative obligation to act, provide or protect); *cf.* Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2809 (2005) (finding no protected property interest, for purposes of procedural due process protection, in expectation of police enforcement of protective order against domestic violence).

6. Prince v. Massachusetts, 321 U.S. 158, 166 (1944); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); Hodgson v. Minnesota, 497 U.S. 417, 447 (1990); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 842 (1977); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).

by the state—in the form of a marriage license, for example—would represent something fundamentally different: a claim on government not to get out of the way, but rather to involve itself by lending its affirmative assistance in fulfilling a couple's relational ambitions.[7]

Even to frame the question points out a basic irony in the claim: the right to *privacy*—originally conceived in Samuel Warren and Louis Brandeis's landmark article as a right to avoid public exposure[8] and developed in *Griswold v. Connecticut*[9] as a right to be let alone in the "sacred precincts" of certain intimate places and relationships[10]—would come full circle as a right to insist upon *public notice and recognition.*[11] While constitutional privacy has barred public intrusion in certain informational, spatial and decisional spheres, a right to affirmative public recognition would push constitutional privacy onto distinctly different ground.[12]

---

7. *See* Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2089-95 (2005) (noting that government provision of economic and non-economic rights to married individuals deviates from usual concept of fundamental rights); *cf.* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1790 (2005) (noting Supreme Court's evident determination in *Lawrence* to "vouchsafe[ ] same-sex couples the right to have consensual sex but not to marry").

8. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

9. 381 U.S. 479 (1965).

10. *Id.* at 485 (suggesting that law prohibiting use of contraceptives could impermissibly lead to police search of homes for signs of use of contraceptives).

11. *See* Carlos A. Ball, *This Is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345, 345 (2005) (observing that "[b]y requesting that their relationships be recognized by the state . . . lesbians and gay men are not asking that it leave them alone; instead, they are asking for state recognition (and thus regulation) of their relationships"); Richard Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 REGENT U. L. REV. 121, 126-27 (2003-2004) (contending that "any attempt to transform a privacy shield into a policy sword [for recognition of same-sex marriage] turns the concept of 'privacy' on its head: the assertion becomes, not that homosexual conduct is private, but that it must be publicly acknowledged, condoned, recognized, and normalized").

12. Contrasting prevailing notions of privacy in European and U.S. law, James Whitman contends that Europeans cherish privacy primarily as a "shield[ ] against unwanted public exposure," whereas Americans chiefly understand privacy as guaranteeing "a kind of private sovereignty within our own walls" against government meddling. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161-62 (2004). He writes:

> Continental privacy protections are, at their core, a form of protection of a right to respect and personal dignity. The core continental privacy rights are rights to one's image, name, and reputation, and what Germans call the right to informational self-determination—the right to control the sorts of information disclosed about oneself. . . .
>
> By contrast, America, in this as in so many things, is much more oriented toward values of liberty, and especially liberty against the state. At its conceptual core, the American right to privacy still takes much the form that it took in the eighteenth century: It is the right to freedom from intrusions by the state, especially in one's own home.

Id. (footnotes omitted). Even if there has been a difference of emphasis between Europe and the United States, both of these conceptions of privacy have found

In the years since *Lawrence*, courts have seized on the decision's reservation of the question of public recognition to hold that *Lawrence* requires decriminalization of private intimacy and nothing more.[13] Even some scholars supportive of gay rights have found merit in a constitutional interpretation that stops short of recognizing a privacy right to same-sex marriage.[14] Cass Sunstein, for example, contends that *Lawrence* should be understood as resting on the principle of desuetude, striking down a rarely enforced sodomy law that was far out of line with popular sentiments without announcing a broader principle of affirmative constitutional entitlement.[15] In Sunstein's view, a distinct virtue of this approach

---

support in U.S. law at one time or another. *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1337-38 (discussing various conceptions of privacy, including right of person to define his or her essence as human being, right of person to engage in his or her own thoughts and actions, and right to determine what information about himself or herself is communicated to others); Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479 (1990) (examining development of right to informational privacy). As Neil Richards has recently pointed out, the distinctions between informational and decisional privacy in U.S. law are sometimes overdrawn, and the values underlying constitutional protection in both contexts are significantly intertwined. *See* Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1115 (2006) (reading "the constitutional privacy cases as having a significant information privacy component").

13. *See, e.g.*, Wilson v. Ake, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005) (stating "the Supreme Court's decision in *Lawrence* cannot be interpreted as creating a fundamental right to same-sex marriage"); Bronson v. Swensen, 394 F. Supp. 2d 1329, 1333-34 (D. Utah 2005) (explaining limitations on Supreme Court's holding in *Lawrence*); Standhardt v. Superior Ct., 77 P.3d 451, 456-57 (Ariz. Ct. App. 2003) (rejecting "[p]etitioners' contention that *Lawrence* establishes entry in same-sex marriages as a fundamental right"); Lockyer v. City & County of San Francisco, 95 P.3d 459, 504 (Cal. 2004) (noting that *Lawrence* does not answer "whether a state may deny same-sex couples the right to marry"); Morrison v. Sadler, 821 N.E.2d 15, 20 (Ind. Ct. App. 2005); Lewis v. Harris, 875 A.2d 259, 272-73 (N.J. Super. Ct. 2005) (finding *Lawrence* does not "indicate that the Fourteenth Amendment bars a state from prohibiting marriage between members of the same sex"); Samuels v. State Dep't of Health, 811 N.Y.S.2d 136, 144 (App. Div. 2006) (explaining court is far from "finding a constitutionally based shield providing protection from criminal prosecution for certain adult consensual conduct carried out in private to using the Constitution as the means to redefine marriage"); *accord* Wilkins, *supra* note 11, at 126 (contending that "the rhetoric—as well as the reasoning—of [*Lawrence*] is exhausted once [a same-sex] couple steps out of its private home and into the public sphere").

14. *See, e.g.*, William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1057-58 (2005) [hereinafter Eskridge, *Body Politics*] (indicating that state limit on marriage to different-sex couples does not seriously implicate liberty issue as discussed in *Lawrence*); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1324-27 (2005) [hereinafter Eskridge, *Pluralism and Distrust*] (suggesting that Supreme Court should defer decision on constitutionality of same-sex marriage).

15. *See* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 54-55 [hereinafter Sunstein, *What Did* Lawrence *Hold?*]; *see also* Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1073-75 (2004) [hereinafter Sunstein, *Liberty After* Lawrence].

is that it allows courts to adhere to a minimalist approach to constitutional adjudication and avoids pushing constitutional principles dangerously ahead of social consensus.[16]

William Eskridge, describing the merits of a constitutional claim to same-sex marriage as "powerfully debatable," likewise concludes that "the politics of tolerance strongly counsels that the Supreme Court do nothing for the time being."[17] Creating the conditions for respectful dialogue without compelling immediate public approval through formal recognition, Eskridge writes, would lower the stakes of judicial review and avoid the sort of "constitutional train wreck" that can come from overreaching popular consensus.[18] And, as Michael Klarman has noted, the line suggested in *Lawrence*—decriminalizing private sexual conduct while withholding public recognition of marriage—hews closely to the contour of popular opinion on these topics.[19]

The question of a constitutional right to public recognition of family relationships is by no means unique to marriage. Lower federal and state courts have relied on the same limiting principle suggested in *Lawrence* to conclude, for example, that the right of privacy does not include a right to adopt children.[20] Whatever protection the privacy right might afford

---

16. *See* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15; Sunstein, *supra* note 7, at 2107-14 (distinguishing benefits of maintaining minimal understanding of right to marry from effects of more expansive view). For a more general statement of Professor Sunstein's argument in favor of minimalism, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

17. Eskridge, *Body Politics*, *supra* note 14, at 1058; William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1092 (2004).

18. *See* Eskridge, *Pluralism and Distrust*, *supra* note 14, at 1324-26 (stating recognition of same-sex marriage "would not only toss down a gauntlet to many religious Americans, but would also foster antigay sentiment supporting a constitutional amendment banning same-sex marriage"); *see also* Case, *supra* note 7, at 1789 (observing that "[i]n the peculiar political climate surrounding same-sex marriage, it may not be regrettable that federal claims can be dodged while state constitutional jurisprudence develops").

19. *See* Michael J. Klarman, Brown *and* Lawrence (*and* Goodridge), 104 MICH. L. REV. 431, 450 (2005). Klarman writes:

> Just as at the time of *Brown* a majority of Americans opposed public school segregation but overwhelmingly supported antimiscegenation laws, so at the time of *Lawrence* public opinion opposed criminal prosecution of private gay sex but supported by a two-to-one margin laws restricting marriage to unions between men and women.

Id. For a further comparison of the public reactions to *Brown* and legal victories for gay rights, see Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from* Brown v. Board of Education *and Its Aftermath*, 14 WM. & MARY BILL RGTS. J. 1493 (2006) [hereinafter Ball, *Backlash Thesis*].

20. *See* Behrens v. Regier, 422 F.3d 1255, 1264-65 (11th Cir. 2005) (emphasizing that "potential parents do not have a privacy interest in adopting a child"); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 812 (11th Cir. 2004) (holding that "[b]ecause there is no fundamental right to adopt or be adopted, it follows that there is no fundamental right to apply for adoption"), *cert. denied*, 543 U.S. 1081 (2005); Mullins v. Oregon, 57 F.3d 789, 794 (9th Cir. 1995)

against state destruction of established family relations, these courts have held, the Constitution cannot be construed to entitle a claimant to the state's affirmative assistance in forming an adoptive relationship. As the Ninth Circuit put it, "[a] negative right to be free of governmental interference in an already existing familial relationship does not translate into an affirmative right to create an entirely new family unit out of whole cloth."[21] Because adoption is "wholly a creature of the state," the courts have dismissed almost out of hand the suggestion that there might be a "fundamental right to adopt or to be adopted":[22]

> The decision to adopt a child is not a private one, but a public act. At a minimum, would-be adoptive parents are asking the state to confer official recognition—and, consequently, the highest level of constitutional insulation from subsequent state interference—on a relationship where there exists no natural filial bond. . . . Accordingly, such intrusions into private family matters are on a different constitutional plane than those that "seek[ ] to foist orthodoxy on the unwilling by banning or criminally prosecuting" nonconformity.[23]

This Article considers whether this line of demarcation can be maintained in the modern constitutional law of privacy—in other words, whether the right of privacy might include a right of public recognition of intimate family relationships. Can courts justifiably say that the right of privacy requires the State to abstain from imposing itself on an intimate relationship and yet does not require the State to accord the relationship any formal status or legal validation?

The answer that I ultimately come to is that *if* government is to stop short of allowing formal recognition—to say, for example, as Florida has, that gays and lesbians may raise children as foster parents or legal guardians free from state interference but that they may not adopt;[24] or, as almost every state has, that gays and lesbians may live together without fear of arrest but they may not marry—government must offer persuasive reasons for its decision to withhold recognition. It is not available, in other

---

(finding genetic link between individual and potential adoptee does not render interest in adoption fundamental); Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989) (finding that "there is no fundamental right to adopt"); Buckner v. Fam. Servs. of Cent. Fla., 876 So. 2d 1285, 1288-90 (Fla. Ct. App. 2004) (agreeing that "the decision to adopt a child is not a private one but a public act which does not partake of a constitutionally-recognized privacy interest"); *In re* Baby Boy C., 805 N.Y.S.2d 313, 325-26 (App. Div. 2005) (recognizing "longstanding principle . . . that adoption is strictly a creature of statute").

21. *Mullins*, 57 F.3d at 794 (citing Lipscomb v. Simmons, 962 F.2d 1374, 1378-79 (9th Cir. 1992)).

22. *Lofton*, 358 F.3d at 809, 812; *see also Behrens*, 422 F.3d at 1264.

23. *Lofton*, 358 F.3d at 810-11 (citations omitted).

24. *See* FLA. STAT. § 63.042(3)(2003) (barring homosexuals from adopting children); *Lofton*, 358 F.3d at at 806-07.

words, to resolve the question by saying simply that the constitutional boundaries of family privacy extend to decriminalization of gay and lesbian relationships but not to adoption or marriage.

In the context of same-sex marriage, those scholars and judges who have been inclined to see a constitutional duty of recognition have mostly followed one of two tacks. First, some have sidestepped due process, finding stronger support for same-sex marriage in the equality guarantees of state and federal constitutions.[25] By focusing on discrimination, equal protection analysis can condemn the selective denial of marriage to same-sex couples without tangling with the distinction between negative and positive rights under the Constitution.

Second, some have found support in *Lawrence* and other cases for a positive right to marry rooted in substantive due process.[26] Carlos Ball, for example, contends that an affirmative right to public recognition of marriage can be justified as an "important exception" to the usual understanding of the Constitution as embodying only negative rights against state interference.[27] The Massachusetts Supreme Judicial Court seemed to be

---

25. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 55-67 (Haw. 1993); Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 120-26 (2005) (examining role of gender in equality to attack same-sex marriage); Case, *supra* note 7, at 1790 (considering potential challenges to barriers to same-sex marriage grounded in gender equality); Eskridge, *Pluralism and Distrust*, *supra* note 14, at 1324-25 (observing that "[a]s a matter of formal equal protection doctrine, one can argue that state bars to same-sex marriage constitute unconstitutional discrimination"); Andrew Koppelman, *The Right to Privacy?*, 2002 U. CHI. LEGAL F. 105, 116-17 (2002) (contrasting sex discrimination argument for recognition of same-sex marriage with right to privacy rationales); Sunstein, *Liberty After* Lawrence, *supra* note 15, at 1074-75 (contending when "certain people are told that they cannot marry, the real objection lies not in due process, but in a possible violation of the Equal Protection Clause"); Sunstein, *supra* note 7, at 2111-13 (examining difficulty in defending same-sex marriage bans against challenges under Equal Protection Clause).

Mark Brown argues similarly in the context of adoption, contending that "[t]he better path [to providing constitutional protection for prospective adoptive placements] . . . is to focus on equality principles of adults, rather than attempt assignments of fundamental rights to children." Mark R. Brown, *Closing the Crusade: A Brief Response to Professor Woodhouse*, 34 CAP. U. L. REV. 331, 337 (2005).

26. *See, e.g.*, Hernandez v. Robles, 794 N.Y.S.2d 579, 601 (Sup. Ct. 2005), *rev'd*, 805 N.Y.S.2d 354 (App. Div. 2005), *aff'd*, No. 86-89, 2006 WL 1835429 (N.Y. July 6, 2006); Mark Strasser, *Monogamy, Licentiousness, Desuetude and Mere Tolerance: The Multiple Misinterpretations of* Lawrence v. Texas, 15 S. CAL. REV. L. & WOMEN'S STUD. 95, 107-11, 139-44 (2005); Jamal Greene, Comment, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989 (2005).

27. *See* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1204 (2004) [hereinafter Ball, *Fundamental Right to Marry*]. Elsewhere, Professor Ball has grounded this duty in the obligation of society to provide the necessary conditions for human self-realization:

> It is not that lesbians and gay men have a universal right to have their relationships and families recognized in the way in which American or Western European law and culture define marriage and family. The

headed in the same direction when it held, in *Goodridge v. Department of Public Health*,[28] that same-sex couples are entitled to marry under the state constitution. The court explained its decision by noting that "[t]he individual liberty and equality safeguards of the Massachusetts Constitution protect both '*freedom from*' unwarranted government intrusion into protected spheres of life and '*freedom to*' partake in benefits created by the State for the common good."[29] Yet, even *Goodridge* ultimately retreated from finding a fundamental right to state recognition of same-sex marriage, instead holding only that the state's differentiation between same-sex and opposite-sex couples failed rational basis review.[30]

Along similar lines, Barbara Woodhouse recently has contended in favor of recognizing a child's fundamental right to be adopted.[31] Analogizing to precedent recognizing a right to marry, Professor Woodhouse argues that "adoption, like marriage, is grounded in ancient customs surrounding the creation of socially recognized family relationships, reduced only in relatively modern times to statutory schemes of law."[32] Adoption, in her view, "is not a benefit created for and conferred by the state, subject to whatever terms and conditions the state may choose to impose; it is the statutory recognition of a fundamental family relationship."[33] She reasons that, "[l]ike marriage, adoption should take its place 'on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.'"[34] Accordingly, "[c]ategorical bans on who may adopt, like categorical bans on who may marry, substantially interfere with the freedom to form family relationships."[35]

> point is broader than that, namely, that society has an obligation to provide for all of its citizens' basic needs and capabilities, including those associated with their most intimate relationships. This requires considerably more than just the noncriminalization of sexual acts that are consensual; it also requires the provision of social structures and the implementation of public policies that allow committed intimate relationships to be formed and maintained.

CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY 107 (2003). The withholding of marriage from same-sex couples is therefore unconstitutional, Professor Ball contends, because it "limits the ability of lesbians and gay men to make choices that are consistent with their wants, values, concerns, and commitments" and thereby "fails to abide by [the state's] obligation to make available to everyone a wide array of meaningful choices through which individuals realize their personal autonomy." Ball, *supra* note 11, at 370.

28. 798 N.E.2d 941 (Mass. 2003).

29. *Id.* at 959 (emphasis added) (citing Bachrach v. Sec'y of the Commonwealth, 415 N.E.2d 832, 832 (Mass. 1981)).

30. *See id.* at 961.

31. Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297 (2005).

32. *Id.* at 308.

33. *Id.* at 316.

34. *Id.* (quoting Zablocki v. Redhail, 434 U.S. 374, 386 (1978)).

35. *Id.* at 318.

In this Article, I sketch an alternative path to finding a constitutional right to state recognition of certain intimate family relationships. It is a path grounded in substantive due process but does not require breaking new ground in justifying broader positive rights under the Constitution. Instead, it proceeds from a realization that *withholding* formal recognition from some relationships, while giving preference to others in a broader regulatory scheme, can itself be a form of damaging intervention in disfavored family relationships. In this way, the duty to extend formal recognition (absent exceptional justification) fits comfortably within the conventional understandings of the privacy right in negative terms, obligating the state to refrain from interposing itself in private family relationships.

This Article presents this argument in three steps. Part I contends that the Constitution, especially after *Lawrence*, in fact protects the intimate relational interests of all persons, not just those who occupy traditional family relationships. Accordingly, persons in intimate relationships that contemporary society would recognize as essentially *family-like*—including committed same-sex couples and adults raising children in *de facto* parenting settings—are constitutionally protected against disruptive state intervention. Part II then explains why the denial of formal state recognition of family bonds may in fact constitute disruptive state intervention. It suggests that unique qualities of marriage and adoption, demonstrated in a growing body of social science research, mean that state limitations on access can in fact impair the dynamics of excluded family relationships. Of course, even damaging state intrusion on protected family relationships is constitutional if supported by sufficiently strong state interests. Accordingly, Part III briefly considers the manner in which state limitations on access might be evaluated by courts in future challenges. The Article concludes by noting that recent government initiatives to demonstrate the powerful social and individual benefits of marriage and parenthood may work, in certainly unintended ways, to build the constitutional case for formal state recognition of non-traditional family relationships.

I. DE FACTO FAMILY PRIVACY AFTER *LAWRENCE*

As an initial matter, it might seem that the difficulty posed for a constitutional claim to affirmative state recognition of family relationships has already been substantially overcome. The Supreme Court, after all, has long accorded substantial constitutional protection to marriage and has specifically recognized a fundamental right to marry.[36] As Professor Ball observed, the Court's marriage decisions fall into essentially two catego-

36. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 94-95 (1982) (finding constitutional right to marry while incarcerated); Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (striking down law denying marriage to parents of unsupported children); Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down law banning interracial marriage).

ries: cases protecting existing and acknowledged marriages from burdensome state interference (such as Connecticut's threat to prosecute marital contraceptive use in *Griswold*), and cases involving the State's refusal to acknowledge the partners' marital status or aspirations in the first instance.[37] While it is possible to read the Court's decisions broadly to state a positive right to formal state recognition of marital status—or perhaps even family status more generally—the cases provide more tenuous support for this proposition than is commonly supposed.[38]

Loving v. Virginia,[39] often regarded as the foundational case announcing a fundamental right to state marriage recognition,[40] might well be understood as involving only a negative right. Mildred and Richard Loving, after all, had not actively sought the state's involvement in their relationship; the state came looking for them. Their case began when the county sheriff burst into their bedroom and arrested them for the crime of residing within their home state after having been lawfully married elsewhere.[41] Convicted and sentenced to banishment from the Commonwealth for twenty-five years, they challenged the constitutionality of Virginia's anti-miscegenation law in order to return home free from arrest and prosecution.[42] In that sense, the case can be seen as presenting a claim of negative right against state intervention in a classic and draconian form.

Zablocki v. Redhail,[43] a second case recognizing the fundamental right to marry, also challenged something more than passive non-recognition by the state. *Zablocki* involved a challenge to a Wisconsin law that prohibited certain parents subject to a child support order from marrying without court approval.[44] The statute did more than simply withhold the state's approval; it provided that any such person who succeeded in marrying

37. *See* Ball, *Fundamental Right to Marry*, *supra* note 27, at 1192.

38. *See* Sunstein, *supra* note 7, at 2082-92 (examining context and scope of Supreme Court's constitutional protection for marriage).

39. 388 U.S. 1 (1967).

40. Professor Ball, for example, writes of *Loving*:

> *Loving* . . . is . . . an important due process marriage case because in it the Court for the first time addressed the significance of the marital relationship from the perspective of due process *in the absence of considerations of privacy and the right to be let alone.* The crux of the constitutional claim in *Griswold* was that the state should leave married couples alone so that they can make important decisions, such as those that relate to the use of contraceptives, about the intimate components of their relationships. The claimants in *Loving*, on the other hand, were not asking that the state leave them alone; instead, they were seeking state recognition (and by implication, state regulation) of their relationship.

Ball, *Fundamental Right to Marry*, *supra* note 27, at 1197 (footnotes omitted).

41. *See* Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 How. L.J. 229, 236 (1998).

42. *See* Loving v. Virginia, 147 S.E.2d 78, 79 (Va. 1966), *rev'd*, 381 U.S. 1 (1967).

43. 434 U.S. 374 (1978).

44. *See id.* at 375 n.1 (discussing WIS. STAT. § 245.10 (1973)).

without state approval—such as by traveling to another state—would be subject to criminal prosecution as well.[45] *Zablocki*, like *Loving*, then, involved a law that deployed coercive sanctions against even those who would marry without the state's affirmative assistance.

The third case recognizing the fundamental right to marry, *Turner v. Safley*,[46] might be characterized in similar terms. In *Turner*, Missouri inmates challenged a prison rule that prohibited marriages involving inmates unless a warden found "compelling" reasons to allow the marriage. "Prior to the promulgation of this rule," the Court noted, "the applicable regulation did not obligate Missouri Division of Corrections officials to assist an inmate who wanted to get married, but it also did not specifically authorize the superintendent of an institution to prohibit inmates from getting married."[47] This distinction is meaningful because in many states it is possible to marry by proxy, without being physically present at the marriage ceremony;[48] accordingly, absent the state's prohibitory intervention, an inmate might well marry without the state's affirmative assistance.[49] The usual distinction between positive and negative liberties is particularly slippery in the prison context, where the state controls every aspect of an inmate's life.[50] Even so, *Turner* itself involved the state interposing itself in a direct and palpable way between inmates and their intended spouses.

Notwithstanding the interventionist quality of the state action in *Loving*, *Zablocki* and *Turner*, it seems implausible to read the cases as carrying no implication whatsoever of a positive claim to marriage recognition.[51] Certainly, although the Supreme Court's opinion did not specifically say, *Loving* was universally assumed to require not only that Virginia abstain

45. *See id.*; State v. Mueller, 171 N.W.2d 414 (Wis. 1969) (sustaining prosecution of Wisconsin man for marrying in Illinois).

46. 482 U.S. 78 (1987).

47. *Id.* at 82.

48. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 206(b), 9A U.L.A. 182 (1998) ("If a party to a marriage is unable to be present at the solemnization, he may authorize in writing a third person to act as his proxy.").

49. *See, e.g.*, Hamilton v. Saxbe, 428 F. Supp. 1101, 1109 n.4 (D. Ga. 1976) (finding proxy marriage to be legally ineffective only because prisoner did not actually assent to marriage); Miner v. State Dep't of Corr. Servs., 524 N.Y.S.2d 390 (N.Y. 1987) (invalidating Kansas proxy marriage of life-term inmate solely because of New York statute prohibiting inmates from marrying); *see also* People v. Tami, No. A099263, 2003 WL 22235337 (Cal. Ct. App. Sept. 30, 2003) (reserving judgment on validity of inmate's proxy marriage, while holding that inmate's putative spouse could not be convicted of falsely representing herself as married).

50. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 719-24 (2005) (suggesting "that there just is no way to speak or think coherently about government 'actions' as opposed to government 'omissions,' because government cannot help but act, in some way or another, when choosing how individuals are to be regulated").

51. *See* Ball, *Fundamental Right to Marry*, *supra* note 27, at 1197-1203; Sunstein, *supra* note 7, at 2089-90.

from imprisoning the Lovings, but also that it regard them *as married* once they returned to the state. In these and subsequent cases, the Court has spoken generally of a right to *marry* without any suggestion that the state could then wholly ignore marriages thus formed. As Cass Sunstein has observed, the Court has not mandated that exercising the right to marry brings entitlement to any particular material benefit related to marital status.[52] But the right must sensibly be construed to entitle married persons at least to whatever expressive benefits flow from the state-sanctioned institution of marriage.[53] Those expressive benefits are necessarily bound up with acknowledgment of marital status and so, in some circumstances at least, the privacy right under the federal Constitution appears to include an affirmative claim to state recognition.

Yet the implications of *Loving* and the other right-to-marry cases remain famously contested for controversies beyond their particular facts, making them an insecure foundation for a broader right to recognition. The cases rationalized recognition of the fundamental right to marry on an unusually generous ground—namely, that marriage is of profound personal importance to the individual partners.[54] Marriage, *Loving* suggested, is a fundamental right because it is "essential to the orderly pursuit of happiness by free men."[55] Yet, the Court has been unwilling to follow the logic of that approach in other contexts, emphasizing instead tradition and history as the markers of fundamental rights under substantive due process. In *San Antonio Independent School District v. Rodriguez*,[56] for example, the Court rejected the suggestion that public education is a fundamental right and insisted that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[57] In *Washington v. Glucksberg*,[58] the Court took the same view in finding no fundamental right of terminally ill patients to medical assistance in hastening death.[59] "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy," the Court reasoned, "does not

52. *See* Sunstein, *supra* note 7, at 2090-92.

53. *See id.* at 2093-96.

54. *Cf. id.* at 2097 (suggesting that "[i]f the right to marry qualifies as fundamental for equal protection purposes, it must be simply by virtue of its importance," even if "importance is not all that is involved").

55. Loving v. Virginia, 388 U.S. 1, 12 (1967)

56. 411 U.S. 1 (1973).

57. *Id.* at 30. By contrast, courts have recognized an affirmative right to public education under state constitutional provisions guaranteeing a free and adequate education. *See* James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 52-53 (2006) (reviewing and endorsing state constitutional theory in context of preschool education).

58. 521 U.S. 702 (1997).

59. *Id.* at 727-28.

warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ."[60]

Continuing disagreement over the appropriate foundation and scope of the fundamental right to marry makes it unlikely, at least for now, that courts will read *Loving*, *Zablocki* and *Turner* alone as compelling affirmative recognition of non-traditional family relationships. Self-determination in choosing to become a parent is also widely regarded as profoundly important to personal fulfillment and happiness. It is partly on this basis that the Supreme Court has closely scrutinized laws that would deny parenthood or substantially burden parental choice.[61] And yet the courts have shown little readiness on that basis alone to find an affirmative obligation of State assistance in attaining parenthood. The State may well be required to get out of the way and allow willing couples to procreate on their own, but there is little support for a privacy entitlement to the State's affirmative facilitation of adoption or medically assisted reproduction.[62] Likewise, although *Roe v. Wade*[63] struck down criminal prohibitions against abortion in recognition of the profound "detriment that the State would impose upon the pregnant woman by denying this choice altogether,"[64] the Court has made clear that states are under no affirmative obligation to provide abortions.[65]

Lawrence v. Texas,[66] however, suggests another possible basis for finding a more limited right of state recognition. Justice Kennedy's opinion for the Court is famously ambiguous because it fails to employ the magic words—privacy, fundamental right and compelling interests—that would help to situate the case in the Court's established substantive due process

60. *Id.* at 727.

61. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 753 (1982) (recognizing due process limitations on state action to terminate parental rights based upon "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Skinner v. Oklahoma, 316 U.S. 535, 543 (1942) (striking down, on equal protection grounds, law mandating sterilization of certain criminals).

62. *See* Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1115-21 (1998); John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 326-30 (2004) (noting problems facing same-sex couples in accessing reproductive technology); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 406 (1983) (noting that, as of 1983, "the right to become pregnant and to parent . . . is still ill-defined and in some respects unprotected by the law"); Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2802-06 (2005) (arguing in favor of recognition of fundamental right to access to in vitro fertilization, but acknowledging that Supreme Court's cases leave significant uncertainty about issue).

63. 410 U.S. 113 (1973).

64. *Id.* at 153.

65. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 316 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977).

66. 539 U.S. 558 (2003).

framework.[67] Justice Scalia and some lower courts since have seized on this omission to characterize *Lawrence* as a rogue rational-basis decision, without lasting implications for the identification of fundamental rights under substantive due process.[68] That feint, however, ultimately seems impossible to square with *Lawrence*'s own strenuous efforts to place its holding in a straight line with *Griswold*, *Eisenstadt v. Baird*,[69] *Planned Parenthood v. Casey*[70] and the rest of the Court's fundamental privacy cases.

Professor Randy Barnett reads *Lawrence* in a fundamentally different way.[71] He, too, finds significance in the Court's failure to employ conventional fundamental-rights analysis, but reads this to signal that the Court has effectively folded all of what once passed for privacy rights into a more general right of "liberty." In his view, the Court means to abandon its practice, established since the demise of *Lochner*-era substantive due process protection of economic liberties, of differentiating between "fundamental" and non-fundamental rights.[72] Instead of privileging "fundamental" liberties with heightened review while relegating "ordinary" liberties to the weak protection of rational-basis review, *Lawrence* indicates that *all* liberties are entitled to a more substantial form of protection under the Due Process Clause.[73]

Although *Lawrence* is ambiguous in significant ways, it is clearly a privacy case. And it ultimately embraces a relational conception of privacy that anchors constitutional protection in the aspiration of persons to intimate association.[74] This is, of course, not the only way to read the case. There is language that describes the liberty interest in more atomistic ways, as grounded in "an autonomy of self," for example.[75] And yet, for

67. *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1896-97 (2004). For a small sampling of the divergent understandings of the decision, see generally Symposium, *Do Same-Sex Couples Have a Right to Marry? The State of the Conversation Today*, 17 YALE J.L. & FEMINISM 65 (2005); Symposium, *Gay Rights After* Lawrence v. Texas, 88 MINN. L. REV. 1021 (2004); Symposium, *Equality, Privacy and Lesbian and Gay Rights After* Lawrence v. Texas, 65 OHIO ST. L.J. 1057 (2004); *Symposium on the Implications of* Lawrence *and* Goodridge *for the Recognition of Same-Sex Marriages and the Validity of DOMA*, 38 CREIGHTON L. REV. 233 (2004).

68. *See Lawrence*, 539 U.S. at 586, 593-94 (Scalia, J., dissenting); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 816-18 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005); State v. Limon, 122 P.3d 22, 29 (Kan. 2005).

69. 405 U.S. 438 (1972).

70. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

71. *See* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, CATO SUP. CT. REV. 21 (2d ed. 2002-2003).

72. *See id.*

73. *Id.*

74. *See* LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 35-36 (2006) (observing that "[a] striking feature of *Lawrence* is its emphasis on autonomy as relational"); *see also* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Rao, *supra* note 62, at 1101-07.

75. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

the most part, the Court explained the Constitution's concern in *Lawrence* as having to do with the formation of durable and essentially family-like intimacy.

The liberty interest that *Lawrence* valued was emphatically not just the individual's desire to engage, as the Court put it, in "a particular sex act."[76] Instead, it was something "more far-reaching."[77] Repeatedly, *Lawrence* circled back to family and emotional commitment to others in explaining the defect in the Texas sodomy law.[78] Sexual conduct, the Court noted, "can be but one element in a personal bond that is more enduring."[79] And, to erase any remaining doubt, the Court directly analogized same-sex intimacy with marital intimacy: "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[80]

Having traced the Court's past affirmation of "constitutional protection [for] personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," *Lawrence* concluded that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[81]

More than anything, this was the key point of departure between *Bowers v. Hardwick*[82] and *Lawrence*. In *Bowers*, the Court simply saw "[n]o connection between family, marriage, or procreation on the one hand"—i.e., the *stuff* of family privacy—"and homosexual activity on the other."[83] *Lawrence*, by contrast, found the connection to be obvious. And it drew support for that conclusion in society's "emerging recognition" that gays and lesbians do indeed construct and live intimate family lives essentially like those of heterosexuals.[84] Even if contemporary society is not yet ready to regard gay and lesbian-led families as fully equal, it is now prepared to concede that they are, in fact, *families*.[85]

The evidence of this consensus is now everywhere. Legislation in a growing minority of states—including California, Connecticut, Hawaii, Maine, New Jersey and Vermont—as well as municipal ordinances throughout the United States, now accord marriage-like status to the regis-

---

76. *Id.* at 565.

77. *Id.* at 567.

78. *See* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1401-04 (2004).

79. *Lawrence*, 539 U.S. at 567.

80. *Id.*

81. *Id.* at 574.

82. 478 U.S. 186 (1986).

83. *Id.* at 191.

84. *See Lawrence*, 539 U.S. at 572.

85. For a fuller articulation of this argument, see David D. Meyer, *Domesticating* Lawrence, 2004 U. CHI. LEGAL F. 453, 486-88.

tered domestic partnerships of same-sex couples.[86] Public opinion polls have shown strong and growing support for according equal material benefits to gay and lesbian families, even while withholding formal marriage rights.[87] Law and public opinion have also moved to recognize the important roles played by de facto parents in non-traditional families. Many states now protect established care-giving relationships in subsequent custody or visitation disputes with a legal parent.[88] A substantial number go further by allowing partners to become parents through "second parent" adoptions or, in a few states, even without adoption based on an acknowledged partnership in planning a child's birth.[89]

The Court's reliance on this consensus in *Lawrence* to strike down Texas's sodomy law suggests a broader scope for the Constitution's protection of family privacy. Even non-traditional or disfavored intimate associations are entitled to protection against active state suppression, at least if society would recognize in them the basic qualities that define and distin-

86. *See* T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 60-70 (2004); American Bar Ass'n Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339 (2004).

87. *See* Ball, *Backlash Thesis*, *supra* note 19, at 1531-32; Gallanis, *supra* note 86, at 57-59; Richard Morin & Claudia Deane, *Poll Finds Growing Support for Gay Civil Unions*, WASH. POST, Mar. 10, 2004, at A6; Harris Poll, *Majorities of Heterosexuals Agree Same-Sex Partners Deserve Same Adoption Benefits and Leave Rights Offered by Employers as Married Co-workers' Spouses Receive*, http://www.harrisinteractive.com\news\allnewsbydate.asp?NewsID=849 (last visited Sept. 28, 2004). In a careful study of public attitudes toward gays and lesbians, Nathaniel Persily, Patrick Egan and Kevin Wallsten note that public acceptance of gay and lesbian relationships has lagged behind the "overwhelming" acceptance of gays and lesbians in the workplace. *See* Nathaniel Persily, Patrick Egan & Kevin Wallsten, *Gay Marriage, Public Opinion and the Courts*, Univ. of Penn. Public Law Working Paper No. 06-17, at 13 (unpublished paper available on SSRN, http://ssrn.com/abstract=900208). Nevertheless, they find that most Americans support "civil unions" or extending marriage-like family benefits to gay couples, even while most Americans continue to oppose same-sex marriage. *Id.* at 40-41.

88. *See, e.g.*, *In re* E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004) (holding that lesbian partner had standing as "psychological parent" to seek custody of child she had helped raise with her partner); Clifford K. v. Paul S., 619 S.E.2d 138, 148-58 (W. Va. 2005) (same); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002); Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865 (2003).

89. *See* Elisa B. v. Superior Ct., 117 P.3d 660 (Cal. 2005) (finding lesbian partner qualified as presumed parent under state's parentage act); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (reaching same result under common law); *see also* Sharon S. v. Superior Ct., 73 P.3d 554 (Cal. 2003) (approving second-parent adoption); *In re* Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004) (same); June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295 (2005); Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125 (2006); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002).

guish *family* association.[90] But this does not necessarily, at least on its own terms, go the next step to establish that these associations are entitled to full social validation through affirmative state recognition. That would require finding a positive entitlement to formal recognition or, as I suggest in the following section, evidence that withholding recognition in fact deals a genuine and invasive harm to family relationships constitutionally entitled to non-interference.

II. DENIAL OF STATE RECOGNITION AND INJURY TO DISFAVORED FAMILIES

Even without constructing a freestanding positive right to state recognition under substantive due process, there is a substantial argument that states should be required to justify a decision to deny formal recognition to constitutionally protected de facto family associations. With respect to both marriage and parenthood, the state's exercise of exclusive control over formal access may well affect and impair the intimate relationships of those who are left on the outside looking in. If this is right, then the State may not characterize its decision to confine the benefits of normalized family status to others as merely "non-intervention" toward those not favored.

A. *The Value of Marriage*

With respect to adult relationships, recent empirical evidence lends support to the traditional intuition that state-sanctioned marriage offers a uniquely stable and beneficial form of adult intimacy. This evidence is discounted by some because it is often associated with a conservative political agenda to promote a traditional model of marriage, and some rhetoric of the "marriage movement" has undoubtedly overstated or misused the data.[91] But there is little dispute about certain basic facts: cohabiting relationships, even those involving children, are generally less stable and less fulfilling than married relationships.[92] Cohabiting relationships are generally shorter, poorer, more susceptible to divorce if the couple later mar-

90. *See* Meyer, *supra* note 85, at 480-85.

91. *See* Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1653 (2005) (criticizing efforts to promote marriage within welfare policy and contending that "the law of marriage has been and is still being used in the United States as a tool for 'civilizing' unruly outsiders, in particular Blacks"); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 348-69 (2006) (critiquing empirical claims of marriage proponents).

92. *See* Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1439-42 (2001); Elizabeth Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 240 (observing that "[i]n the aggregate, marriages last longer and produce greater happiness and less conflict than cohabitation unions"); Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 868 (2005); Marsha Garrison, *Reviving Marriage: Should We? Could We?* 19-22 (Brooklyn Law Sch. Legal Stud. Research Paper No.

ries, and even more prone to domestic violence.[93] Professors Margaret Brinig and Steven Nock report that the disparities between cohabiting and married couples extend beyond material well-being and include differences in the quality and intensity of intimate bonding:

> Compared to married couples of the same duration (i.e., couples who have been together for the same length of time) those in informal (cohabiting) unions are less committed to their partnership . . . , and report poorer quality relationships . . . .[94]

The disparities in security and relationship quality remain even when comparing married and cohabiting unions of long duration: indeed, the limited research available suggests that "longer cohabitation periods are negatively correlated with relationship stability and quality."[95]

Researchers have found, moreover, that the impaired bonding in cohabiting families affects not only the couples involved, but also the partners' relationships with their parents and with their children.[96] Professor Marsha Garrison observes that "[e]ven the arrival of a child does not appear to alter the feeling [among cohabitants] that cohabitation is funda-

---

43, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=829825.

93. *See* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER-OFF FINANCIALLY (2000); Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 408-09 (2004); William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001, 1005-11 (2003); Garrison, *supra* note 92, at 32-35.

94. Brinig & Nock, *supra* note 93, at 409; *see also* WILLIAM J. DOHERTY ET AL., WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 13 (Inst. for Am. Values 2d ed. 2005) (observing that "[c]ouples who live together . . . , on average, report relationships of lower quality than do married couples—with cohabitors reporting more conflict, more violence, and lower levels of satisfaction, and commitment"); Margaret F. Brinig, *Domestic Partnership and Default Rules, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 269, 274-77 (Robin Fretwell Wilson ed., 2006) [hereinafter Brinig, *Domestic Partnership*]; Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668 (1996); Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal, in* RECONCEIVING THE FAMILY: CRITIQUE OF THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 305, 308-09 (Robin Fretwell Wilson ed., 2006) [hereinafter Garrison, *Marriage Matters*]; Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 67 (1995); Scott M. Stanley, *Maybe I Do: Interpersonal Commitment and Premarital or Nonmarital Cohabitation*, 25 J. FAM. ISSUES 496 (2004).

95. Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 846 (2005) (citing Susan L. Brown, *Relationship Quality Dynamics of Cohabiting Unions*, 24 J. FAM. ISSUES 583, 598 (2003)); *see also* Garrison, *Marriage Matters*, *supra* note 94, at 312; Brown & Booth, *supra* note 94, at 675.

96. *See* DOHERTY, *supra* note 94, at 15-16; Brinig & Nock, *supra* note 93, at 409-10; Nock, *supra* note 94, at 67; Wilson, *supra* note 92, at 867-79.

mentally different from marriage."[97] She notes that "[t]he Fragile Family Study, which sponsored in-depth interviews of a nationally representative group of unmarried parents," found that "most of these cohabiting pairs espouse a strong *individualistic ethic* . . . in which personal happiness and fulfillment hold the highest value."[98]

Surveying the available data, Professor Robin Fretwell Wilson points out that married parents appear to invest more in childrearing relationships than do cohabiting parents, even controlling for other factors such as education and income.[99] One 2003 study, for example, found that children living with a biological parent and a stepparent fared better across several key measurements of well-being than did children reared with a parent and another caregiver in a cohabiting household.[100] A second study compared the investments of men in caring for children in their households and found that "the biological child of cohabitants consistently received smaller investments from their fathers than a biological child of married parents, in both blended and non-blended households."[101] Nonbiological fathers who were married to the children's mother also reported that they felt greater warmth toward the children in their care than did unmarried, cohabiting partners.[102] If families eventually break up, "[f]athers [in cohabiting unions] are less likely to stay involved with their children, or to support them."[103]

There is plainly some uncertainty about cause and effect in comparing the family dynamics of married and cohabiting households.[104] Without doubt, *some* of the differences are attributable to selection effects:

97. Garrison, *supra* note 92, at 22.

98. *Id.*

99. *See* Wilson, *supra* note 92, at 864-79.

100. *See* Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 879 (2003); Wilson, *supra* note 92, at 857-59 (discussing Manning & Lamb study).

101. Wilson, *supra* note 92, at 862 (discussing Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 213 (2003)).

102. Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, *in* RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 90, 105 (Robin Fretwell Wilson ed., 2006).

103. Brinig, *Domestic Partership*, *supra* note 94, at 274 (citing Wendy D. Manning, *The Implications of Cohabitation for Children's Well-Being*, *in* JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN AND SOCIAL POLICY 121, 143 (Alan Booth & Ann C. Crouter eds., 2002)).

104. *See id.* at 274-75; DOHERTY, *supra* note 94, at 7-8 (acknowledging significant role of selection effects); MCCLAIN, *supra* note 74, at 127-29 (suggesting that some of apparent disadvantages associated with non-marital child-rearing may stem from poverty or other factors); Kimberly A. Yuracko, *Does Marriage Make People Good or Do Good People Marry?*, 42 SAN DIEGO L. REV. 889, 893-94 (2005) (suggesting that positive parenting effects on children arise from social norms of fidelity and commitment, not from institution of marriage itself). As Steven Nock has noted, "[i]t is impossible to settle the issue definitively through a rigorous scientific experiment: people cannot be randomly assigned to marry or remain single, divorce or

some of the characteristics that lead certain people to marry would make them better parents and more committed, caring partners even if they did not marry.[105] Yet there is reason to believe that at least part of the differences in bonding is attributable to the legal and social attributes of the two institutions.[106]

Marriage brings with it legal incidents and social norms that reinforce commitment and encourage deeper investment by the participants. As Milton Regan observes, legal marriage may reconstitute personal identity, leading spouses to define themselves in part by their commitment to others.[107] "For intimate commitment to be constitutive of identity," he writes, "requires that it be seen as something that derives its value from a source outside the self's choice to engage in it. It requires, in other words, social validation."[108] And "[t]hose who marry participate in a public ritual that marks entry into a social institution that is intended to embody the value of intimate commitment."[109]

Professors Brinig and Nock point out that "the defining difference between legal marriage and informal cohabitation" is that there is no consensus—within society or even within many cohabiting relationships—about "the meaning of cohabitation."[110] In contrast, marriage not only provides a well-defined package of rights and obligations for the commitment-minded, it often shapes and deepens the commitment of the partners once they marry.[111] "[T]he institutional dimensions of marriage," writes Professor Elizabeth Scott, "reinforce commitment":[112]

> [M]arriage is an institution that has a clear social meaning and is regulated by a complex set of social norms that promote cooperation between spouses—norms such as fidelity, loyalty, trust, reciprocity, and sharing. These norms express the unique

remain together." Steven L. Nock, *Marriage as a Public Issue*, 15 THE FUTURE OF CHILDREN 13, 18 (2005).

105. *See* Garrison, *supra* note 92, at 42; Regan, *supra* note 92, at 1440; Scott, *supra* note 92, at 240-41.

106. Professor Doherty and his co-authors observe that "[b]y offering legal and normative support and direction to a relationship, by providing an expectation of sexual fidelity, and by furnishing adults a unique social status as spouses, marriage typically fosters better romantic and parental relationships than do alternatives to marriage." DOHERTY, *supra* note 94, at 15; *see also* Brinig & Nock, *supra* note 93, at 410-11; Garrison, *supra* note 92, at 42; Nock, *supra* note 104, at 20-21; Wilson, *supra* note 92, at 864-79.

107. *See* MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE 22-30 (1999) (describing "the internal stance" toward marriage and contrasting it with "the external stance" in which commitment toward others is dependent upon assessments of personal return and enjoyment); Regan, *supra* note 92, at 1444-45.

108. Regan, *supra* note 92, at 1445.

109. *Id.*

110. Brinig & Nock, *supra* note 93, at 409 (footnote omitted).

111. *See* Regan, *supra* note 92, at 1444-45.

112. Scott, *supra* note 92, at 241.

> importance of the marriage relationship. They are embodied in well-understood community expectations about appropriate marital behavior that are internalized by individuals entering marriage . . . . [M]any marital norms (loyalty, fidelity, trust) create behavioral expectations for both husband and wife that underscore their mutual commitment to the relationship.[113]

To be sure, it is difficult to untangle how much of the observed "marriage advantage" is traceable to social norms and how much to state-conferred marital status itself.[114] But ultimately it makes little sense to try; in the context of marriage, the state's role in defining and regulating marriage has helped to construct and reinforce the relevant social norms, as they have helped to shape the legal institution of marriage.[115]

The norms associated with marital status, moreover, plausibly appear to cut both ways: not only do they strengthen interdependence and commitment within the circle of marriage, they impede on the development of unqualified bonding in relationships left outside. One of the reasons marriage appears to matter to spouses in shaping their conduct is that society regards marriage as the ultimate marker of commitment and permanence. That notion is backed up with legal incidents that make exit costly and cumbersome, even with the availability of unilateral divorce. Couples who are excluded from marriage, therefore, must construct their relationship not only without the benefits conferred by marriage, but also in the face of state-backed norms denigrating the seriousness and substantiality of all non-marital relationships. In this sense, the state's exclusion of some persons from marriage, consigning them to occupy indefinitely the informal status of cohabitation, may not simply deny them a positive benefit, but do them a distinct harm.

---

113. *Id.*; *see also* Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 304 (2001) (observing that "many laws are designed to reflect and facilitate the emotional commitment spouses make to each other").

114. *See* Wilson, *supra* note 92, at 877; Yuracko, *supra* note 104, at 893-94.

115. For lucid accounts of the ways in which government helps shape and enforce social norms through marriage, see generally NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); MCCLAIN, *supra* note 74; Regan, *supra* note 92. As Professor McClain observes, "viewing families solely as a realm of 'private' life, free from governmental intrusion, misses the active role of government in regulating families by defining 'family' and the roles, rights, and obligations of family life." MCCLAIN, *supra* note 74, at 22; *see also* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 997-1008 (1993); James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 167 (2000); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985). *But cf.* Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 114 n.29 (2000) (criticizing emphasis on state's role in constructing family and contending that "[t]he law no more 'creates' the family than the Rule Against Perpetuities 'creates' dirt").

B. *Adoption*

A similar dynamic can be found in the caregiving relationships of adults and children. Studies suggest that the emotional bonds between children and their caregivers are stronger and more satisfying in adoptive families than in foster care, guardianships or other arrangements lacking the legal status of parenthood.[116] Significantly, this is true even when the non-adoptive placements are permanent and stable.[117]

As with marriage, researchers have attributed the advantage in adoptive families partly to the added measure of legal security and social legitimacy associated with entry into formal legal parenthood. Children and caregivers who could not fully normalize their family status through adoption sometimes expressed a frustrating consciousness of their "second class" family status.[118] The perceived insecurity of their status, at least when compared to the privileged status of adoption, sometimes results in a holding back of emotional investment in the relationship in order to protect against the trauma of potential family disruption.[119]

---

116. *See* Michael Bohman & Sören Sigvardsson, *Outcome in Adoption: Lessons from Longitudinal Studies*, *in* THE PSYCHOLOGY OF ADOPTION 93-95 (David M. Brodzinsky & Marshall D. Schechter eds., 1990); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 797-812 (1999); John Triseliotis & Malcolm Hill, *Contrasting Adoption, Foster Care, and Residential Rearing*, *in* THE PSYCHOLOGY OF ADOPTION, *supra*, at 107, 112-15.

117. *See* JOHN TRISELIOTIS ET AL., ADOPTION THEORY, POLICY, AND PRACTICE 57 (1997) ("[L]ong-term and even permanent foster care are not experienced as [being as] secure as adoption.").

118. Professor Woodhouse writes:

> The alternatives to adoption, even permanent guardianship, are less secure than adoption and place children at risk of multiple placements. . . . In addition to lacking the stability of adoption, foster care and legal guardianship do not . . . have "the societal, cultural, and legal significance [of] . . . adoptive parenthood, which is the equivalent of natural parenthood." From the waiting child's perspective, being adopted means a "real" home and a "real" family.

Woodhouse, *supra* note 31, at 323-24 (footnotes omitted).

119. *See* Bohman & Sigvardsson, *supra* note 116, at 104-05. Triseliotis and Hill explain:

> The insecurity present in long-term fostering generated various degrees of anxiety in both the children and their caregivers. Caught between foster parents, the majority of whom wished to offer security and continuity of care, and the possibility of disruption, children were left in an ambiguous position which inevitably affected their sense of identity.

Triseliotis & Hill, *supra* note 116, at 113; *cf.* Wald, *supra* note 113, at 310 (observing that "[t]he emotional quality of the relationship for both the child and the adults may be significantly altered by [a] . . . legal scheme" that withholds formal legal status from functional parent). Based on the same fundamental principle linking relational insecurity and emotional investment, Margaret Brinig and F.H. Buckley have even suggested that married fathers may bond less closely with their children because of the substantial risk that they will lose custody in the event of a divorce. *See* Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 402-03 (1998).

Importantly, researchers have found that formal public recognition of family status is important to children even when they do not perceive their present status as legally insecure. A British study, for example, found that children who had been adopted by their foster families after spending many years living in stable foster homes seemed to attach great significance to the change in their legal status.[120] The researchers wrote:

> As interviewers we were struck by what the law symbolized to these children, something that we had not anticipated. The children seemed to attach a lot of importance to their family membership becoming "legal," even to those who were approaching adulthood. . . .
>
> For these children and young people, the adoption order was a symbolic act creating a deep, satisfying psychological feeling for them. . . . It conveyed to them a sense of security and belonging, the right to feel as part of the family and to call the foster parents, "parents."[121]

By reinforcing social understandings of legal parenthood as the only true and complete form of family childrearing, the law thus imposes itself directly upon excluded relationships. Professors Brinig and Nock compared the well-being of adoptive children with those living in long-term kinship or foster care and concluded:

> That foster care, and to a lesser extent kinship care, has such consistent and negative effects, even after the imposition of such controls, suggests that there is a story to be told about the lives of children in these living arrangements that may explain their diminished expectations, higher depression, and other negative experiences. Part of that explanation, in all likelihood, is the distinction among the statuses as they are incorporated into our cultural belief systems. Quite simply, adoption is a recognized and understood social (and legal) status. Foster care, and especially kinship care, are much less so.[122]

The implication of both lines of research, concerning marriage and adoption, is that unique qualities of intimate bonding are dependent upon formal legal recognition and that the lines of demarcation drawn by the state effectively devalue and destabilize relationships that fall outside legal boundaries. Part of the observed "marriage advantage" and "adoption advantage," after all, depends on the lines drawn and reinforced be-

120. *See* Triseliotis & Hill, *supra* note 116, at 112-13 (noting that study revealed that children who were adopted by foster families associated "temporariness" with foster care and "permanence" with adoption).

121. *Id.* at 114-15 (citations omitted).

122. Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions by Kin Caregivers*, 36 FAM. L.Q. 449, 466 (2002).

tween formal and informal family status.[123] As Carl Schneider observes, the effectiveness of marriage as a "socializing institution," for example, depends upon social recognition that it is importantly different from its alternatives:

> No small part of the force of . . . [social] institutions comes from their distinctiveness. Social institutions offer special benefits and impose special burdens. People who enter those institutions choose to do so, they know they have done so and treat themselves differently because of it, and other people recognize that they have done so and respond accordingly.[124]

But this is a two-edged sword. By privileging marriage and legal parenthood as uniquely valuable and legitimate family relations, government enhances the stability, depth, and prestige of those bonds while simultaneously discounting and denigrating the status of informal alternatives. The differentiation may be perfectly justifiable.[125] The point, however, is that the state's withholding of formal recognition from those who are otherwise prepared to accept the roles those legal institutions require and provide might rightly be seen as a form of intervention undermining their family relations, squarely within the compass of even a purely negative conception of the right of privacy.

III. CONSTITUTIONAL SCRUTINY OF DENIALS OF FORMAL RECOGNITION

So far, I have tried to establish only that governmental decisions to withhold formal recognition from intimate relationships that society regards as essentially family-like can themselves constitute a form of state intervention subject to constitutional scrutiny. My claim is that when, for

123. Professor Brinig points out, for example, that in Western Europe there is a greater similarity between married and cohabiting relationships than in the United States. Brinig, *Domestic Partnership*, *supra* note 94, at 275-76. She observes:

> [T]he reason that cohabitation is closer to marriage in Europe than in the United States may be that in Europe marriage, per se, has been gradually and effectively deinstitutionalized. To the extent that marriage is no longer a legal status carrying different privileges or obligations, and to the extent that such legal changes were in response to popular opinion, we may say that the cultural script that defined marriage as a distinct relationship has been rewritten to equate marriage and cohabitation. If marriage in Europe is treated in law and culture as the functional equivalent of cohabitation, it may no longer produce distinctive results.

Id. at 276.

124. Carl E. Schneider, *Afterword: Elite Principles: The ALI Proposals and the Politics of Law Reform*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 489, 505 (Robin Fretwell Wilson ed., 2006).

125. Professor Schneider, for example, cautions that "blur[ring] the distinction between marriage and cohabitation and between de jure and de facto parenthood" is "problematic not just because social institutions are sustained by their distinctiveness," but also because the categories may reflect fundamentally important differences in "the way people in them think and act." *Id.*

example, Florida says to Steven Lofton and the nine-year-old foster child he has raised since birth that they may not normalize their family status through adoption,[126] the state's decision is likely to affect and cabin the development of their emotional ties. More specifically, my observation is that the state's *selective* recognition of only some families imposes on the interpersonal relations of excluded family members in ways that would not obtain if the state simply stayed out of the business of conferring family status altogether.[127] As such, the state's withholding of formal recognition from family intimates triggers scrutiny as an invasion of their family privacy.[128]

Of course, saying that the state's action would trigger constitutional scrutiny is not the same thing as saying that it would be unconstitutional. Privacy rights, like other individual rights under the Constitution, can be overcome by sufficiently strong public interests. Importantly, however, the state would be put to the burden of justifying its choices. It would not be enough for the state to answer, as in *Lofton v. Secretary of Department of Children and Family Services*,[129] that its decision to withhold formal recognition from a non-traditional family relationship simply fell entirely outside the

126. *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 807-08 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

127. A number of scholars—including marriage proponents and skeptics alike—recently have proposed the wholesale withdrawal of civil regulation and recognition of marriage. *See, e.g.*, MARTHA FINEMAN, THE AUTONOMY MYTH (2004); MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed. 2006); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353 (2004); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006).

128. In this sense, my argument for a fundamental right to adoption is complementary with, but narrower than, Professor Woodhouse's. My argument is founded on the premise that the denial of formal recognition can harm de facto family relationships entitled to constitutional protection against state intervention; the right it supposes would therefore be limited to persons in fact occupying such relationships. Professor Woodhouse's argument, by contrast, "does not depend on the existence of an already formed intimate relationship of parent and child." Woodhouse, *supra* note 31, at 321. Instead, recognizing that "[a]doption, like marriage, is not only about people already in love but also about the opportunity to love," *id.* at 317, she contends that the right-to-marry precedents support an adoption right not only for "children who have already formed de facto parent-child relationships with would-be adoptive parents," but also for "the 'waiting children' who are prevented from finding permanent and stable families of their own by the unconstitutional barriers erected by state adoption laws." *Id.* at 321. Partly for this reason, Professor Brown questions whether Professor Woodhouse's argument runs afoul of conventional doctrine rejecting affirmative constitutional duties by government. *See* Brown, *supra* note 25, at 335 ("The Supreme Court in *DeShaney v. Winnebago County Department of Social Services*, [489 U.S. 189 (1989),] observed that the federal Constitution protects people from government; it does not demand that government volunteer protection or services. . . . I would not say that the *DeShaney* problem is indistinguishable or insurmountable, but I believe *DeShaney* clouds Professor Woodhouse's argument.") (footnotes omitted).

129. 358 F.3d 804 (11th Cir. 2004).

scope of the Constitution's concern for family. In this concluding section, I offer a few preliminary thoughts about the appropriate nature of judicial review in this context, without purporting to reach final conclusions about particular controversies.

First, it is important to emphasize that the appropriate judicial test in this setting is *not* strict scrutiny. A long line of family-privacy cases from at least *Moore v. City of East Cleveland*[130] through *Troxel v. Granville*[131] have made clear the Court's intention to apply a more flexible form of scrutiny. In *Moore* and *Zablocki*, the Court departed from the usual language of "compelling" interests and "narrow tailoring" in describing the governing review, substituting ambiguous verbiage in its place. In *Moore*, for example, having found a burden on Mrs. Moore's fundamental right of family kinship, the Court held only that it would then "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[132] Perhaps these formulations meant to imply strict scrutiny, but the Court's pointed ambiguity suggested to some readers a commitment to an intermediate standard of review.[133]

That conclusion is strongly confirmed by more recent developments. In *Troxel*, the Court strayed even more clearly from strict scrutiny in the course of striking down a state court's order of grandparent visitation.[134] All but one of the Justices agreed that the visitation order burdened the mother's fundamental rights as a parent. Nevertheless, the plurality did

130. 431 U.S. 494 (1977).

131. 530 U.S. 57 (2000).

132. *Moore*, 431 U.S. at 499. Likewise, in *Zablocki v. Redhail*, the Court held that the state's denial of marriage must be subject to "rigorous" scrutiny, under which the regulation must be "closely tailored" to achieve a "sufficiently important" state interest. 434 U.S. 374, 386-88 (1978).

133. *See* 3 RONALD ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.28, at 581 (3d ed. 1999) (noting that "[t]he majority [in *Zablocki*] left the exact nature of the standard of review employed in the case unclear," and concluding that Court's "statements indicate that the Court used a standard of review that approximates one or more of the 'middle level standard[s]' of review"); Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1231 (1999) (concluding that *Loving*, *Zablocki*, and *Turner* established only "quasi-fundamental" right to marry and that "this right is subject to a standard of scrutiny that falls somewhat short of the strict scrutiny accorded fundamental rights"); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 541-48 (2000) (discussing both *Zablocki* and *Moore*); Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 J. LAW & CONTEMP. PROBS. 79, 84 (1988) (concluding that Court applied ambiguous standard of review); Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, *supra* note 62, at 2086-88 (same). Dissenting in *Zablocki*, Justice Rehnquist read the majority to have embraced "the strictest judicial scrutiny," while he read Justice Powell's opinion concurring in the judgment—an opinion which closely tracked Powell's earlier analysis for the plurality in *Moore*—as endorsing "an 'intermediate' standard of review." *Zablocki*, 434 U.S. at 407 (Rehnquist, J., dissenting).

134. *See Troxel*, 530 U.S. at 69.

not suggest that such orders must be justified by "compelling" state interests, but only that trial judges must give some, largely unspecified "special weight" to a parent's reasons for objecting to contact with a non-parent.[135]

Troxel's glaring omission of strict scrutiny—pointedly described as "curious[ ]" by Justice Thomas in a separate opinion[136]—strongly signaled a deliberate effort to leave room for a more flexible accommodation of the contending family interests at stake.[137] Several Justices have expressed basic reservations about the propriety of strict scrutiny in the context of family privacy disputes because of the potential for conflicting claims of individual right.[138] In *Troxel*, Justice Stevens expressed concern that heavily privileging a parent's fundamental right to decide visitation matters could effectively extinguish the mutual interests—potentially weighty in their own right—of children and grandparents to maintain contact.[139]

---

135. *See id.*

136. *See id.* at 80 (Thomas, J., concurring). Justice Thomas wrote:

> The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties.

Id.

137. *See* David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1140-55 (2001). For additional views on the flexible scrutiny applied in *Troxel*, see Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279; Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337 (2002); Stephen G. Gilles, *Parental (and Grandparental) Rights After* Troxel v. Granville, 9 SUP. CT. ECON. REV. 69 (2001).

138. In an address at the University of Pennsylvania Law School, for example, Justice O'Connor observed:

> While constitutional due process doctrine is primarily concerned with the relationship of individuals to the State, the resolution of family disputes focuses primarily on the relationship of individuals with each other. In family cases, the rights of individuals are intertwined, and the family itself has a collective personality. Thus, the due process model may not be the best framework for resolving multi-party conflicts where children, parents, professionals, and the State all have conflicting interests.

Justice Sandra Day O'Connor, Address at the University of Pennsylvania Family Law Symposium: The Supreme Court and the Family (April 2001), *in* 3 U. PA. J. CONST. L. 573, 575-76. As Anne Dailey has observed, "[t]he concept of a self-governing institution immediately poses a profound problem for liberalism's commitment to individual sovereignty. Communal rights are compatible with liberal theory only to the extent that individuals within the relevant community agree." Dailey, *supra* note 115, at 984.

139. *See Troxel*, 530 U.S. at 86 (Stevens, J., dissenting). Justice Stevens indicated:

> Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.

Id. Justice Stevens emphasized the same potential for clashing family rights in explaining why a non-custodial father should be denied standing to challenge the

Justices Stevens, Kennedy and O'Connor each emphasized that family law disputes today often involve non-traditional families in which a non-parent may well have played a primary role in raising a child.[140] Against this backdrop, the Court's decision to jettison strict scrutiny for a more flexible standard capable of balancing the intersecting interests makes considerable sense.

The Court's decision three years later in *Lawrence* confirms the Court's commitment to a flexible approach.[141] Indeed, the Court's failure to employ any clearly recognizable standard of scrutiny in *Lawrence* has led several scholars to detect a more general breakdown of the established "tiers" of scrutiny even beyond the context of family privacy.[142]

In place of strict scrutiny, the Supreme Court has seemed to adjust the strength of its scrutiny—and with it the state's burden of justification—according to several factors, including: (1) the degree of the state's intrusion on protected family relations; (2) the extent to which all family members are united in opposing the state's intervention; and (3) the novelty or venerability of the state's regulation.[143]

How these factors will play out will, of course, vary with the particular case of non-recognition. In the case of same-sex marriage, the long tradition of defining marriage as uniting one man and one woman would

---

recitation of the Pledge of Allegiance at his daughter's school. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-18 (2004).

140. *See Troxel*, 530 U.S. at 63 (plurality opinion) (observing that "[t]he demographic changes of the past century make it difficult to speak of an average American family"); *id.* at 90 (Stevens, J., dissenting) ("The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily."); *id.* at 98 (Kennedy, J., dissenting) (contending that "the conventional nuclear family ought [not] to establish the visitation standard for every domestic relations case" because, "[a]s we all know, this is simply not the structure or prevailing condition in many households"). As one commentary recently noted, "[t]he 2000 Census exposed, in empirical splendor, the divergent forms of the modern American family. Traditional family structures are less prevalent now than ever before in U.S. history." *Developments in the Law: The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2001 (2003).

141. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Meyer, *supra* note 85, at 489.

142. *See* Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1450 (2004) (describing *Lawrence* as "undermin[ing] the traditional tiers of scrutiny altogether"); Michael A. Scaperlanda, *Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 CATH. U. L. REV. 5, 6 (2005) (describing *Lawrence* and *Grutter v. Bollinger*, 539 U.S. 306 (2003), as "the latest in a series of cases trending away from several decades of categorical balancing and toward a new regime of ad hoc or sliding scale balancing in the Supreme Court's equal protection and substantive due process jurisprudence"); *cf.* Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1726-27 (2005) (finding broad evidence in other cases that seams of Court's multi-tiered system of scrutiny "are starting to unravel").

143. *See* Meyer, *supra* note 133, at 579-91 (explaining origins of these factors in Court's family privacy cases).

somewhat decrease the state's burden of justification. The presumed unity of the affected family members in opposing the state's policy would cut in the other direction. And if a state, such as California or Vermont, were to accord a same-sex couple all the tangible benefits of marriage, while reserving only the formal state recognition of the couple *as married*, an assessment of the degree of the burden would turn on the symbolic and expressive benefits that come from formal recognition. As the intensity of the debate over same-sex marriage suggests, the expressive significance of formal recognition is by no means insubstantial.[144]

With respect to this final consideration, it is worth noting a further irony concerning the current administration's policy agenda concerning marriage. The administration has made the promotion of marriage a centerpiece of its domestic policy agenda and has proposed spending hundreds of millions of dollars researching and promoting the unique social and personal benefits of marriage.[145] Every increment of success it has in this regard, however, should enhance our assessment of the detriment the government imposes on same-sex couples by withholding marriage and, therefore, increase the government's burden of justification.

Unless government can offer persuasive proof of its claims of harm to children or other important interests—matters on which the available evidence seems to be inconclusive at best[146]—the administration may succeed in promoting marriage beyond its wildest dreams. The

144. *See* Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1876-77 (1997) (indicating importance to gays and lesbians of formal recognition of same-sex marriage in addition to legal and financial benefits associated with marriage); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 450 (1996) (acknowledging that chief significance of debate over same-sex marriage, for many supporters and opponents alike, is that "permission for same-sex couples to marry under the law would signify the acceptance of lesbians and gay men as equal citizens more profoundly than any other nondiscrimination laws that might be adopted").

145. The amount of the spending proposed ranges from $300 million to $1 billion, depending on how the various initiatives are accounted for. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, THE HEALTHY MARRIAGE INITIATIVE (2006), http://www.acf.hhs.gov/healthymarriage/about/mission.html; *see also* Lynn D. Wardle, *The "End" of Marriage*, 44 FAM. CT. REV. 45, 51 (2006). For a detailed description of some of the administration's policy initiatives to promote marriage, see MCCLAIN, *supra* note 74, at 121-25; M. Robin Dion, *Healthy Marriage Programs: Learning What Works*, 15 THE FUTURE OF CHILDREN 139 (Fall 2005).

146. For recent surveys of the available evidence, see EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 85-94 (2004); Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691 (2003); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001); Wald, *supra* note 113, at 319-29. For a spirited debate on the social science, *compare* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997), *with* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (1998).

demonstrated value of state-sanctioned marriage in deepening the intimate bonds between partners, and between parents and children, would provide a solid foundation for extending the institution to similarly situated same-sex couples as well.[147] The "marriage movement" may have a momentum, then, that exceeds the expectations of some of its proponents.

V. CONCLUSION

In the contemporary clash over same-sex marriage, traditional understandings of the Constitution as a charter of negative rights have served as a barrier to those seeking to ground a right to marriage recognition in substantive due process. It is argued that a claim upon the state for formal recognition of an intimate partnership as marriage amounts to a novel demand for public resources, not an objection to state intervention.

Rather than attempt to construct a theory to support recognition of a positive right to marriage recognition, I have tried in this Article to sketch the outlines of an argument that would subject the withholding of formal recognition to constitutional scrutiny as a form of active state intervention. The argument begins by establishing that many of those who now aspire to state recognition, either as spouses or as parents, are entitled to constitutional protection against state intervention into the relations for which they seek recognition. Particularly after *Lawrence*, constitutional privacy protection extends to all who occupy relationships that contemporary society would concede share in the essential qualities of family. And, as Justice Kennedy's opinion in *Lawrence* reflects, contemporary society has come to accept that the family ties established by gays and lesbians share in those qualities.

Next, the core of the argument draws upon a growing body of social science suggesting that formal recognition of family status—through marriage or through parenthood—may be uniquely valuable to the construction of intimate family bonds. If this evidence is correct, the state's denial of recognition may effectively stunt the development of interpersonal bonds within excluded family relationships. The state's relegation of some relationships to a disfavored and disadvantaged legal status might rightly be understood as actively destabilizing those relationships, triggering constitutional scrutiny even under conventional conceptions of family privacy as a negative right.

---

147. *Cf.* Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same-Sex—or Not at All?*, 34 FAM. L.Q. 271, 274, 279-80 (2000) (suggesting that "the real challenge to marriage comes from the loosening of family ties and interpersonal commitment that characterizes the contemporary, increasingly 'what's-in-it-for-me?' Western culture," and that "[a] rational analysis of what useful social functions are capable of being fulfilled by what unions will quickly yield the answer that, in many particulars, rational law would not differentiate between unions solely on the basis of the sexual orientation of the partners").

All of this leaves open, of course, the question of whether any given refusal of formal recognition could survive constitutional scrutiny. But the argument suggested here provides a constitutional basis for putting states to their proof.