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THE SUPREME COURT'S FAMILY LAW DOCTRINE REVISITED: INSIGHTS FROM SOCIAL SCIENCE ON FAMILY STRUCTURES AND KINSHIP CHANGE IN THE UNITED STATES

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"[T]he right to marry is of fundamental importance for all individuals . . . . [It is] the most important relation in life. . . ."
Justice Thurgood Marshall, Griswold v. Connecticut (1978)[1]

"[Elite South Carolinian] siblings . . . frequently had more in common. . .and their connections lasted longer than their ties to parents or spouses."
Lorri Glover, All Our Relations: Blood Ties and Emotional Bonds among the Early South Carolina Gentry (2000)[2]

"The primary bond in the Navajo kinship system is the mother-child bond . . . ."
Gary Witherspoon, Navajo Kinship & Marriage (1975)[3]

"California law, like nature itself, makes no provision for dual fatherhood . . . ."
Justice Antonin Scalia, Michael H. v. Gerald D. (1989)[4]

"From the point of view of the children, there may be a number of women who act as 'mothers' toward them."
Carol B. Stack, All Our Kin: Strategies for Survival in a Black Community (1974)[5]

I. INTRODUCTION: KINSHIP, KINSHIP CHANGE, AND THE PROBLEMATIC NATURE OF LAW AS DESCRIPTIVE, PRESCRIPTIVE OR EXPRESSIVE

Kinship is defined as "a system of rights and responsibilities between particular categories of people,"[6] and refers not only to biological

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1 434 U.S. 374, 384, 98 S. Ct. 673, 679–80 (1979) (Marshall, J.).

2 LORRI GLOVER, ALL OUR RELATIONS: BLOOD TIES AND EMOTIONAL BONDS AMONG THE EARLY SOUTH CAROLINA GENTRY x (2000).

3 GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE 21 (1975).

4 491 U.S. 110, 118 & n.3, 109 S. Ct. 2333, 2339 & n.3 (1989) (Scalia, J.).

5 CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 63 (1974).

6 Anita Ilta Garey & Karen V. Hansen, INTRODUCTION TO FAMILIES IN THE U.S.: KINSHIP AND DOMESTIC POLITICS at xviii (Karen V. Hansen & Anita Ilta Garey, eds. 1998). *See also* ROBERT PARKIN, KINSHIP: AN INTRODUCTION TO BASIC CONCEPTS (1997) (describing the concept of kinship). As discussed further herein, see *infra* at Part III, kinship studies in the field of anthropology experienced several periods of waxing and waning. During the 1960s–1980s, Levi-Strauss and others dominated the field, followed in late 1980's and early 1990's by cultural anthropologists, particularly feminist cultural anthropologists whose deconstruction of kinship notions exposed them as primarily culturally contingent, gendered, and ultimately phenomenologically non-existent. *See id.* at ix. As a result of this critique, some

or legal connections between people but also to "particular positions in a network of relationships."[7] In a number of its decisions defining the scope of Constitutional protection for adult-child or intimate adult human relationships—the category of kin at issue in this Article,[8] the United States Supreme Court relies upon historical traditions and norms in defining the parameters of Constitutional protection of current practices and relations.[9] In doing so, the Court often fails to account for the true

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anthropologists came to view kinship as no longer a viable area of study. Personal communication with anthropologist Sascha Goluboff, October 12, 1999. However, during the last decade of the 20th century, kinship studies underwent a revival, see PARKIN at ix–x. Kinship studies revived, perhaps in part, as a result of the deconstruction itself but also due to the related Gay, Lesbian, Bisexual, Transgendered movement for recognition of alternative family structures. *See generally* THE ETHICS OF KINSHIP: ETHNOGRAPHIC INQUIRIES (2001) (James D. Faubion, ed.); PARKIN, *supra*, at ix–x; *see also* KATH WESTON, FAMILIES WE CHOOSE (1991). In addition, the advent of new procreative technologies challenged embedded cultural notions of what is a "true" or "real" family. *See generally* JEANETTE EDWARDS ET AL., TECHNOLOGIES OF PROCREATION: KINSHIP IN THE AGE OF ASSISTED CONCEPTION (2d ed. 1999).

[7] *See* Garey & Hansen, *supra* note 6.

[8] *See, e.g.*, *Griswold*, 381 U.S. at 485–86 (1965) (right to contraception based on sanctity of marital relationship); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry is a basic civil right); Zablocki v. Redhail, 434 U.S. 374, 387 (1978) (right to marry is fundamental), Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (unmarried father's interest in parental relationship requires procedural due process); Lehr v. Robertson, 463 U.S. 248, 262 (1983) (biological link between child and unmarried father must be accompanied by a full commitment to parental responsibilities to receive Constitutional protection), Michael H. v. Gerald D., 491 U.S. 110, 111 (1989) (sanctity of marital relationship overrides unmarried father's interest in parenting his biological child with married woman). *Cf.* Roe v. Wade, 410 U.S. 113, 164 (1973) (abortion included in the individual's liberty interests); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (holding the right to determine whether or not to bear or beget a child is right of an individual, and extending right to unmarried persons). *Cf.* Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986) (no Constitutional right to engage in homosexual sodomy) *with* Lawrence v. Texas, 123 S.Ct. 2472, 2483, 2484 (2003) (overruling *Bowers* and finding substantive due process protection).

[9] *See, e.g.*, Bowers, 478 U.S. at 194, 196 (1986) (Burger, C.J., concurring) (relying on history to demonstrate that the right to engage in sodomy is not deeply rooted in American tradition and therefore is not a constitutionally protected right); *Michael H.*, 491 U.S. at 111 (discussing the protection of the marital family as a fundamental right and focusing on tradition, common-law and modern statutes and case law to support its view that marriage is a fundamental right); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1997) (holding "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition"); Parham v. J.R., 442 U.S. 584, 602 (1979) (stating "[the Court's] jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children"). *But cf. Loving*, 388 U.S. at 7–8 (rejecting Virginia's historical practice of "preserv[ing] racial integrity" and preventing the development of "a mongrel breed of citizens"); Romer v. Evans, 517 U.S. 620, 629–30 (1996) (refusing to uphold an amendment to the Colorado state constitution which allowed discrimination based on sexual orientation): *Lawrence*, 123 S. Ct. at 2483–84 (overruling *Bowers*, 478 U.S. 186, and holding that sodomy laws violate liberty interests when applied to consensual private sexual behavior between same-sex adults and rejecting historical practices in reaching its decision striking down anti-miscegenation laws and anti-gay statutes). In contexts other than the family, the Court has also referred to historical practices to define the scope of a particular Constitutional right or protection, sometimes in connection with substantive due process analysis, and at other times not. *See, e.g.*, Cruzan v. Director, Missouri

richness of Americans' historical and present-day family-related kinship practices and beliefs, as sociologists, historians, and cultural anthropologists carefully and fully expose them to be.[10]

Dep't of Health, 497 U.S. 261, 269–83 (1990) (evaluating history to determine whether there exists a Constitutional liberty interest in the right to die); International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679–80 (1992) (evaluating historical use of airports and other transportation terminals as public fora to determine scope of free speech right); Washington v. Glucksberg, 521 U.S. 702, 710 (1997) (evaluating history to determine whether there is substantive due process protection for assisted suicide); Chauffers, Teamsters, et al. v. Terry, 494 U.S. 558, 565–67 (1996) (analyzing history to determine scope of Constitutional right to a jury in a civil case).

There is of course a large body of scholarship talking about the Supreme Court's fundamental rights and substantive due process jurisprudence. *See, e.g.*, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 501–04 (1997) (critiquing substantive due process as not textually supported by the Constitution); *see generally* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85; Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

As a subset of this scholarship, there is also a body of traditional Constitutional law scholarship analyzing, critiquing, and arguing in support of the Supreme Court's use of history in crafting the scope of fundamental rights. *See, e.g.*, Veronica C. Abreu, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the "Deeply Rooted" Test Should Not be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment's Due Process Clause*, 44 B.C. L. REV. 177, 188–90 (2002) (arguing that the Court often overlooks or selectively reads history and tradition to define fundamental rights); Erwin Chemerinsky, *History, Tradition, the Supreme Court and the First Amendment*, 44 HASTINGS L.J. 901, 912–19 (1993) (critiquing the Supreme Court's use of history to deny constitutional protection of certain rights); *see generally* Lucian E. Dervan, *Selective Conceptions of Federalism: The Selective Use of History in the Supreme Court's States' Rights Opinions*, 50 EMORY L.J. 1295 (2001) (discussing the justices' selective use of history, specifically in last two decades); William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631 (1999) (critiquing the Court's historical research in *Bowers); see also* Anna Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809 (1997) (outlining the court's long-standing tradition of selectively reading history in order to produce the desired result); John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 CHI. L. REV. 502 (1964) (focusing on the use of history to determine original intent). However, little attention has been paid by legal scholars or the courts to cultural anthropologists' contrary findings about Americans' views of kinship as they relate to the Supreme Court's defining of family structure that are discussed in this Article.

[10] *See generally* Garey & Hansen, *supra* note 6, at xix–xii ("The family is not universal; nor is it unchanging. The family must be culturally situated and placed with a historical moment. All societies and cultures have webs of kinship relationships, and the design of these webs changes over time and differs across cultures. And even if, looking backward in time, we see dimensions of eighteenth-century family life that seem familiar, we cannot assume that those features held the same meaning in 1776 as they do at the turn of the twenty-first century . . . . Families and kinship networks exist in a historical and social context; that is, they exist in a constant state of flux."). *See also infra* at Part III (discussing some of the anthropological studies of American kinship practices).

While the question of whether the Court or the Congress is better equipped to interrogate these kinds of studies is beyond the scope of this Article, it is the case that Congress sometimes does no better than the Court, relying upon historical, in some ways 'invented' or at least overgeneralized, norms of kinship relationships when determining which relationships receive benefits and protections. For example, the United States Census and the Family and Medical Leave

For the Court, there is of course a doctrinal demand for looking to history when defining which family-related rights and structures fall within substantive due process protection; although the incorporation debate unlocked the door,[11] Justice Harlan's *Poe v. Ullman* dissent and its progeny fully opened the door, previously simply left ajar.[12] This Article

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Act of 1993, 29 U.S.C. §§ 2601–2654 (2000), embody narrow definitions of family that exclude a number of cultural groups' kinship arrangements. *See* discussion of the United States Census, infra at n.318 and 339, and the family definition in the Family and Medical Leave Act of 1993, infra at n.315 and 339. On the notion of the invention of history and historical traditions, see THE INVENTION OF TRADITION (Eric Hobsbawm & Terence Ranger, eds.) (1983). In the Hobsbawm vein, the Ozzie and Harriet nuclear family model is invented rather than actual, and idea which is explored further in Part II in the discussion of historical studies of Southern, landed, slave-holding gentry. *Accord* STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992); STEPHANIE COONTZ, THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES (1997). For example, the United States Census and the Family and Medical Leave Act of 1993.

[11] *See, e.g.*, Twining v. New Jersey 211 U.S. 78 (1908); Palko v. Connecticut, 302 U.S. 319 (1937). These earlier incorporation cases first address the role of tradition in interpreting the scope of individual rights protections in the Constitution. The ideological debates between Justices Black and Frankfurter on the incorporation process turn on similar methodological questions. *See, e.g.*, Adamson v. California 332 U.S. 46 (1947); Duncan v. Louisiana 391 U.S. 145 (1968).

[12] Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting) (speaking of the balance struck between "respect for the liberty of the individual. . . and the demands of organized society" as determining the scope of substantive due process protection, Harlan states: "The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."). *See also* Moore v. City of East Cleveland, 431 U.S. 494, 501-02 (citing this same section of Harlan's *Poe* dissent in striking down a housing ordinance's limited definition of a family); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 849 (1992) (noting that the Court in *Griswold*, 381 U.S. 479 (1965), adopted Harlan's *Poe* language, despite the fact that the majority in that case had not addressed that issue in *Poe*). Prior to *Poe*, the issue of the scope of the 14th Amendment was wrapped up in the incorporation debate more generally. For a discussion of the incorporation debate, see Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193 (1992).

This doctrinal call for historical analysis in determining the scope of substantive due process protection is related to, but different in both purpose and method, from the historical analysis demanded in original intent analysis (including original intent analysis of whether the Constitution demands substantive due process protection in the first place). *See, e.g.*, *Poe*, 357 U.S. at 539–45. Justice Harlan's discussion in of whether the Fourteenth Amendment includes substantive due process protection occurs in his analysis of whether there is particular substantive due process protection for married couples' use of contraception. *Id.* at 545–49. For a discussion of historical analysis to determine original intent, see Wofford, *supra* note 9. In analyzing original intent, the purpose is to determine the meaning the Framers intended as to a particular word or clause in the Constitution. The process of intention-analysis thus looks to sources directly tied to the drafting of the Constitution itself, such as *The Federalist Papers*, to determine the original meaning. For a competing argument that resorting to history to determine original intent should be merely one tool in determining the meaning of the Constitution, see Wofford, *supra* note 9, at 503–04. *Cf.* Seth Barrett Tillman, *The Federalist Papers as Reliable Historic Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 617–18 (2003) (arguing that the Federalist papers provide weak evidence of the Framers' intent with respect to anything but the broadest of questions about Constitutional structures and their purposes). By contrast, in substantive due process analysis, the purpose of looking to history is to determine which practices are so regularly engaged in by the general public,

suggests that when the Court analyzes substantive due process protection by determining which liberty interests are "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[13] it needs to engage a thicker—to use Toni Massaro's term[14]—descriptive account of historical kinship practices and Americans' views of what is fundamental in relation to family makeup. That is, although there may be such a doctrinal demand for resort to history, analysis *of* that history should engage not just external, formal, structural relationships (typically synonymous with legal definitions, in a neatly circular and "mutually reinforcing" fashion)[15] but also both to less formal kinship relationships,

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without incurring legal prohibitions or punishments, as to constitute established traditions deserving of protection under the Due Process Clauses of the Fifth and Fourteenth Amendments. *See* U.S. CONST. AMEND. XIV. Justice Scalia insists that the measure of protected traditions is whether there are statutes that purport to protect those traditions. *See Michael H.*, 491 U.S. at 122, n.2, and 127–28, n.6 (1989). In dissent, Justice Brennan insisted that there need not be statutory provisions in order for something to constitute a protected tradition. *Id.* at 140 (Brennan, J., dissenting) (referring to an interest "traditionally *protected by* our society . . . rather than one that society traditionally has thought important (with or without protecting it) . . . ."). This Article rejects Justice Scalia's approach and favors Justice Brennan's. A majority of the Court also has subsequently rejected Justice Scalia's approach in Footnote 6 of *Michael H.*, in which he proposed that the appropriate point for measuring whether there was substantive due process protection for a particular interest was at the moment of ratification of the Fourteenth Amendment. *See Casey*, 505 U.S. 833, 847 (1992) ("It is also tempting. . .to suppose that the Due Process Clause protects only those practices. . .that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. . . . But such a view would be inconsistent with our law.").

In contrast with original intent analysis, the process of determining tradition for substantive due process purposes does not necessarily require looking to particular historical political actors or documents but, rather, opens up a much wider array of resources for analysis. It may be the case, however, that the narrow focus of much of the Court's family-related decisions are tied to the ostensible practices of those of the Framers' ilk (meaning white, landed, educated, Anglo-Saxon men) is simply a carryover of the intentionalism process of analysis. *See* Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 103 (2002) (discussing positionality of justices as straight, white, male, wealthy jurists as affecting their perspective on tradition).

[13] *Michael H.*, 491 U.S. at 122 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). *See also* E. Gary Spitko, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1339 (1990) (critiquing Justice Scalia's narrow approach, in Footnote 6 of *Michael H.*, to analyzing the relevant tradition).

[14] Toni Massaro, *Gay Rights: Thick and Thin*, 49 STAN. L. REV. 45 (1996).

[15] David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 810 (1999) (noting that legal definitions of family map onto social definitions precisely because they both "purport to rest upon" the same thing: "widespread and longstanding practice and social attitudes concerning family organization.") In his article, Professor Meyer makes a compelling argument for an expanded family structure for children caught between sets of parents, one biological and one adoptive. *Id.* at 806–07. As to this particular part of his argument, however, that social and legal definitions of family are in accord, I would agree but only if the argument further takes into account the critique that I suggest in this Article and that Professor Meyer notes briefly in his article, that this supposed longstanding practice and attitude about families is not universally shared in all class and cultural groups in the United States. *Id.* at 806. Professor Meyer's point is that "[t]he preference for the parent-child model of child rearing is expressed repeatedly and unmistakably in

as well as the meanings attributed by the participants and their cultural community *to* those formal and informal relationships both historically and currently.[16]

In addition, however, resort to history to define the parameters of protected present-day kinship practices should strike us as particularly troubling when it yields results that are in direct contradiction with actual current social norms or practices. That is, even if the Supreme Court's resort to history is doctrinally sound and its actual analysis of historical norms is accurate (something that this Article questions, and that the Court in *Lawrence* noted with respect to same-sex intimacy),[17] present-day Americans' views and practices of kinship relations are simply much more fluid and complex than many of the Supreme Court's decisions allow.[18] Further, under current substantive due process doctrine, resort to history to define fundamental rights warranting substantive due process protection will always yield this more general result: that historical social norms will trump current social norms. Justice Brennan, in his dissent in *Michael H. v. Gerald D.*, noted a version of this problem:

> [In] the plurality's world, [we may not] . . . deny 'tradition' its full scope by pointing out that the rationale for the conventional rule has changed over the years. . . . [I]nstead, our task is simply to identify a rule denying the asserted interest and not to ask whether the basis for that rule—which is the true reflection of the

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legal doctrine." *Id.* at 806-807. This is accurate. My critique is that this preference in law is flawed from the outset, since it requires looking through too narrow a lens coupled with a claim of universality for the image revealed.

Notably, one of Professor Meyer's sources for his comment about shared and longstanding views of kinship is David Schneider's AMERICAN KINSHIP: A CULTURAL ACCOUNT, discussed at length below. See *infra* at Part III. David Schneider himself, however, issued a caveat to his own work twelve years later that his research was strictly limited to white, urban, middle-class families. DAVID SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 121 (1980). In particular, Schneider notes that class differences affect notions of kinship, AMERICAN KINSHIP, *supra* at 122, as does ethnicity. *Id.* As Schneider notes, Sylvia Yanagisako, also discussed herein at Part III, has demonstrated that Japanese-American kinship structures differ from those described in his own work, and Phyllis Chock has done likewise with Greek-Americans. *Id.*, and see discussion herein at notes 216 (Chock's work on Greek-Americans) and 225 (Yanagisako's work on Japanese Americans).

16 *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 797 (1983) (discussing the importance of evaluating the meanings attached to beliefs and intentions and that these meanings necessarily derive from the societal context in which those beliefs and intentions arose).

17 *See, e.g.*, Eskridge, *supra* note 9, at 631; Goldstein, *supra* note 9 at 1074-1075; *see also Lawrence*, 123 S.Ct. at 2482–83); *cf.* Doug Rendleman, *Remedies*, 39 BRANDEIS L.J. 535 (2001) (discussing the Court's poor historical analysis in the context of remedies).

18 *See, e.g., Michael H.*, 491 U.S. 110, 140 (1989) (Brennan, J., dissenting). *Cf. Moore*, 431 U.S. at 505–06 (stating that families include a broader notion than the nuclear marital family).

> values undergirding it—has changed too often or too recently to call the rule embodying that rationale a "tradition."[19]

That is, not only are social norms by nature not fixed (particularly those that arise in the context of human relationships, and even more particularly, in a country comprised primarily of immigrant families),[20] these social norms further require group assent to exist and have force.[21] When statutory or court-defined legal rules intend to operate expressively, as is often true with family law statutes and cases, some scholars suggest they can "influence the development of social norms,"[22] whether intentionally or unintentionally on the part of the legal actors.[23] Other scholars however, most notably Nancy Dowd, cogently demonstrate that in the area of family law, the cultural norms and practices surrounding families demonstrate remarkable resistance to legal prescription or control.[24] Regardless of whether family-related laws are thought to operate

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[19] *Michael H.*, 491 U.S. at 140 (Brennan, J., dissenting) ("In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, moreover, the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one . . . . Even if we can agree, therefore, that 'family' and 'parenthood' are part of the good life, it is absurd to assume that we can agree on the content of those terms . . . .").

[20] *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting). On the fluidity of kinship relations, see Garey & Hansen, *supra* note 6, at xx ("Families and kinship networks exist in a historical and social context; that is, they exist in a constant state of flux."). On the impact of immigration on kinship change, see discussion of the work of Sylvia Yanagisako, infra at Part III. On the disconnect between family law and family in action, see Nancy Dowd, *Law, Culture and Family: The Transformative Power of Culture and the Limits of Law*, 78 Chi-Kent L. Rev. 785 (2003) (arguing that cultural norms about family resist the influence of law).

[21] *See* Lawrence Lessig, *The Regulation of Social Meaning*, 61 U. CHI. L. REV. 943 (1995); ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (199!); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000). *See also* THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD (1990) (detailing the history of how biological conceptions of sex are historically and culturally contingent and are in fact located within a system of gender); Shaun Nichols, *On the Genology of Norms: A Case for the Role of Emotion in Cultural Evolution*, 69 PHILOSOPHY OF SCIENCE 234 (2002) (discussing the role of emotion in the prevalence of certain norms). *See* Toni Massaro, *Shame, Culture and American Criminal Law, 89 Mich. L. Rev. 1880, 1883 (1991); Toni Massaro, The Meanings of Shame – Implication for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 688 (1997) (discussing the necessity of group agreement for norms to have teeth); Richard H. McAdams, *Group Norms, Gossip and Blackmail*, 144 U. PA. L. REV. 2237, 2291 (1996) (discussing "conditions under which members of close-knit groups can threaten to invoke certain norm sanctions, such as shame and reputational loss").

[22] Meyer, *Family Ties*, *supra* note 15, at 805 (discussing expressive function and social norms functions of law in the context of guardianship versus adoption). For other scholarship on the expressive function of law, see generally Lessig, *supra* note 21; Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

[23] *See* Meyer, *Family Ties*, *supra* note 15, at 803–05 (discussing how the "expressive dimension" is sometimes intended and sometimes is not); *contrast* Dowd, *supra* note 20 (arguing that cultural norms about family resist the influence of law).

[24] Dowd, *Law, Culture and Family*, *supra* note 20.

descriptively, expressively or normatively, by insisting on cementing present-day social norms in historical practice, under some of its current jurisprudence, the Supreme Court creates legal mandates that insist we behave as our ancestors (and for many present-day Americans, this will be *other people's* ancestors), never to evolve.[25]

As this Article demonstrates, tying these mandates to Western European laws—whether present or past—may well be significantly disconnected from and therefore problematic for regulation even of U.S. families of Western European descent because immigration itself impacts kinship change.[26] To avoid this incongruous result, we must develop a new way of analyzing the scope of fundamental rights concerning families. This Article suggests that such an approach should be both fluid enough to account for cultural differences in kinship structures[27] and also decoupled from historical practices no longer reflective of modern-day beliefs and norms.[28] This Article suggests as one possible approach that the Court consider decades of research by sociologists, historians and cultural anthropologists on Americans' understanding and practice of kinship relationships.[29] The studies of contemporary kinship structures

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25 Justice Scalia, in *Michael H.*, explicitly endorses this idea: "[The purpose of the Due Process Clause] is to prevent future generations from lightly casting aside important traditional values . . . ." *Michael H.*, 491 U.S. at 122, n.2. Scalia also suggests in this footnote and its accompanying text that the determination of what has traditionally been protected means, in part, that there be some explicit protection for the interest, or at least not a prohibition on it. *Id.* This narrow focus on existing legal protections has been critiqued for flying in the face of the Fourteenth Amendment's enactment as a protection for minorities against majoritarian tyranny, not only by Justice Brennan, in dissent in *Michael H.*, but also by other legal scholars. *See Michael H.*, 491 U.S. at 140–41 (Brennan, J., dissenting); *see also, e.g.*, Spitko, *supra* note 13, at 1352–59 (exploring this issue and analyzing the Court's rejection of majoritarian rule in *Loving*); David A. Strauss, *Tradition, Precedent and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1085–98 (1990).
Justice Scalia actually goes further than simply saying analysis of current statutes should guide the Court and states that analysis should be restricted to those statutes in effect at the time of ratification of the Fourteenth Amendment. *Michael H.*, 491 U.S. at 148, n.6. A majority of the Court in *Planned Parenthood v. Casey*, directly rejected this idea. Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833 (1992). For a related discussion concerning original intent analysis binding the present to the past, see, e.g. Wofford, *supra* note 9 at 502–03 (1964).

26 *See* discussion of Yanagisako's study of kinship change between first and second-generation Japanese-Americans, infra at Part III.

27 *See infra* at Part III (discussing cultural variations in kinship structures). *Cf.* David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791, 810–11 (2002) ("The Court's understanding of 'religion,' however, has been strikingly more expansive and fluid than its conception of 'family.'").

28 *See infra* at Part II(A)(2) (discussing the trap of historical practices binding subsequent generations).

29 *See infra* at Part III (discussing cultural anthropologists' studies of kinship structures). At the same time, this approach continues to rely upon individual rights protections afforded by the U.S. Constitution as exemplified by *Loving v. Virginia*, so as to avoid the pitfall of binding minority groups (and courts) to current but discriminatory majority group beliefs, but

demonstrate that careful examination of those structures reveals a great deal of variety in values and practices surrounding kinship ties. The studies of historical kinship practices do the same. At a minimum, all of these studies suggest that the Court's broad-sweeping declarations about American families need to be revisited and closely reexamined.

Part II analyzes the central Supreme Court cases on kinship in the areas of adult-child relations and the formation and regulation of adult intimate relations. This Part discusses the fetishization[30] of supposed historical kinship practices caused by current substantive due process doctrine and suggests that in some of those cases, the Court has an overly simplistic understanding of what those practices were and meant.

Part III then turns to studies of kinship practices produced by anthropologists, historians and sociologists on families that depict a wide range of kinship practices. This section first addresses some of the theoretical views in anthropology as to the nature of kinship. This Part argues that not only anthropology, but also other disciplines' studies of American kinship practices should, but have not, informed the Court's development of kinship doctrine. While one might argue that the Court is ill equipped to adequately assess non-legal materials, this section first notes that resort to non-legal materials in reaching its decisions is not without precedent in the Supreme Court.[31] This section then demon-

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with the added guidance of recent anthropological theory which can serve to cabin substantive due process doctrine.

30 The term "fetish" refers to "any thing or activity to which one is irrationally devoted." WEBSTERS NEW WORLD COLLEGE DICTIONARY 501 (1997). "Fetish" and "fetishism" often reference eroticization of otherwise non-erotic objects. *Id.*

31 Since *Muller v. Oregon*, 208 U.S. 412 (1907), the Justices have regularly referred to non-legal materials in court opinions, whether in the form of dictionaries, newspapers, Internet sites, or various other sources of support for their arguments. *See* Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279 n.2 (1996) (noting that *Muller* is the first case in which the Court referenced social science materials, based in part on Louis Brandeis' brief, which led to the coining of the term "Brandeis Brief" for legal briefs that cite social science evidence); John M. Conley & David W. Peterson, *The Science of Gatekeeping: The Federal Judicial Center's New Reference Manual on Scientific Evidence*, 74 N.C. L. REV. 1183, 1184 (1996) (discussing the Court's reference to Brandeis' social science evidence in both *Muller* and *Brown v. Board of Education*, 347 U.S. 483, n. 11 (1954)). *See also* P. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 173–77 (1976) (discussing *Brown*'s footnote 11); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, Part III (1955) (discussing same); Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002) (arguing that the *Brown* Court did not, in fact, rely on social science evidence in reaching its decision); James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659 (2003); J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L. J. 137 (1990) (discussing non-use by the Court of psychological evidence about juror behavior). *Cf.* J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L. J. 137, 148–50 (1990) (discussing instances of the Court rejecting psychological evidence in favor of "[the Court's] own experience and common sense," or ignoring it altogether). *See generally* John Hasko,

strates that using social science descriptions of kinship practices brings into question some of the Court's underlying rationales in some of its cases.

Part III.A then describes several illustrative studies of kinship in the United States, revealing the complexity discussed above. This Part further analyzes how the divergent kinship practices reflected in these studies would in some cases support and in other cases alter or undermine the Court's conclusions as to American kinship norms and practices, and thus theoretically might require the Justices to revisit the results of several specific cases.

This Article concludes that these anthropological, historical, and sociological studies not only bring into question the accuracy of the Court's historical account, they also suggest that the Court's focus on historically Western European kinship practices is now too narrow to adequately and appropriately delineate an appropriate set of parameters for legal protections of contemporary kinship relations. The image that emerges from this research is a multi-faceted picture of American cultural diversity of kinship practices that can and do change both in practice and in meaning over time. The Court's static, monocular image of American families simply does not account for the reality of American kinship practices.

II. THE UNITED STATES SUPREME COURT'S CONSTRUCTION OF FAMILIES

This Part analyzes the Court's construction and deployment of specific definitions of family. A number of legal scholars have addressed the relationship between law and the changing American family.[32] Some scholars, most notably Martha Minow, have raised the concern about narrow definitions of family generally, and have questioned whether functional rather than formal definitions should control, but have done so without engaging in a comprehensive review of the Supreme Court's doctrine on that point.[33] A number of other scholars have addressed the

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Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions, 94 LAW LIBR. J. 427 (2002); Samual A. Thumma & Jeffery L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999) (presenting, at length, instances of the Court's citation to dictionaries in its opinions).

32 In addition to the sources cited in the footnotes that follow, see generally Meyer, *Self-Definition*, *supra* note 27 (comparing the Court's narrow scope of family definition in contrast with its broad scope in defining religion); Nancy Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L. Q. 523 (1999) (addressing the impact of law on gay and lesbian families).

33 Martha Minow, *Redefining Families: Who's In and Who's Out*, 62 U. COLO. L. REV. 269 (1991). Martha Fineman has also addressed the functional approach, albeit in less detail. *See* Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 394–96 (1993). *See also* Note, *Looking for Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104

Court's limited definition of families.[34] Richard Storrow and David Meyer, for instance, describe the Court's narrow definition of family within the context of privacy doctrine generally.[35] Alison Harvison Young has evaluated the Court's cases as they relate to new reproductive technologies.[36] As a doctrinal way out of the Court's narrow definition of family, David Meyer also has proposed an "open balancing approach" that would weigh asserted state interests in withholding recognition of a particular family relationship against the intrusion such a regulation would have on individuals' self-definition of family.[37] Jill Elaine Hasday has discussed the limitations of the Court's family definitions in the contexts of federalism and localism.[38] None of these scholars, other than Minow in passing, suggest that the Court might look to sources of empirical data and discover a different picture of families in the United States that could guide it in expanding the parameters of Constitutional protection.[39] Nor do any of these scholars address, as this section does, the

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HARV. L. REV. 1640 (1991); Angie Smolka, *That's the Ticket: A New Way of Defining Family*, 10 CORNELL J. L & PUB. POL'Y 629 (2001); *cf.* Hubert J. Barnhardt, *Let the Legislatures Define the Family: Why Default Statutes Should Be Used to Eliminate Potential Confusion*, 40 EMORY L. J. 571 (1991) (arguing for legislative control over defining families rather than the courts, and briefly engaging in a description of the Court's cases in this area, but without critiquing them); *cf.* Note, *Changing Realities of Parenthood: The Law's Response to the Evolving American Family and the Emerging Reproductive Technologies*, 116 Harv. L. Rev. 2052 (2003) (discussing state law responses to reproductive technology's impact on family structures).

34 *See, e.g.*, RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 626 (3d ed. 1999) (discussing the confusion in the Court's cases following the rejection of substantive due process for economic legislation). For articles specifically discussing the Supreme Court's narrow definition of family, see, e.g., C. Ray Cliett, *How a Note or a Grope Can be a Justification for the Killing of a Homosexual: An Analysis of the Effects of the Supreme Court's Views on Homosexuals, African-Americans and Women*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 219 (2003); Rebecca Ginzburg, *Altering "Family": Another Look at the Supreme Court's Narrow Protection of Families in Belle Terre*, 83 B.U. L. REV. 875 (2003) (describing the Court's family definition in *Village of Belle Terre* in the context of communal living); Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527 (2001) (discussing the importance of family definitions because they circumscribe the scope of privacy rights); Mark Strasser, *Family, Definitions and the Constitution*, 25 SUFFOLK L. REV. 981 (1991) (briefly discussing the Supreme Court's cases in arguing for "family" being the root from which Constitutional rights should flow); Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. § 1409 In* Nguyen v. INS, 20 LAW & INEQ. 275 (2002).

35 David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527 (2000); see Storrow, supra note 34.

36 Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505 (1998).

37 Meyer, *Self-Definition*, *supra* note 27, at 837–44.

38 Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998).

39 *See* Minow, supra note 33; *cf.* Meyer, *Self-Definition*, *supra* note 27, particularly 791–93 and 808–10 (pointing out the divergence between the Court's definition and the pic-

particular lack of evidentiary support for the basic factual claim upon which the Court privileges nuclear families—at least nuclear marital families—over other family forms: namely, that marriage sits at the center of American kinship. Finally, although several scholars have addressed functional approaches to family definitions, none have tracked the Court's own ambivalence about a formal versus functional approaches to definitions of families.[40]

This Part first outlines the central themes revealed in the review of the Court's cases. Analysis of the cases themselves moves roughly, but not exclusively, chronologically. This Part first addresses the Court's earliest cases discussing family relationships, albeit dicta in these cases, the Court's rhetoric about families, and marriage in particular, is subsequently picked up in its later cases where family-related rights begin to be defined. This Part then explores the shift in the Court's cases from rhetorical accounts of marriage to its deployment of that language in grounding other family-related rights of adult intimates. The discussion then moves to the Court's handling of adult-child kinship ties, again demonstrating how these ties in some cases end up as derivative of a marital tie, despite the fact that that marital tie had not yet been established as a fundamental right by the Court. Next, this Part addresses the Court's actual right to marry decisions. Finally, this Part addresses the Court's specific cases that embrace broader notions of family, first addressing family ties between adults and children and then ties between adults in non-marital relationships and conduct that occurs in those relationships.

A. THE SUPREME COURT AND KINSHIP

Whom do we name as "family"? Should legal recognition and protection of inter-personal relationships turn on the *form of* or on the *functions served by* these relationships?[41] In the case of a divergence between expressed beliefs (whether in the form of a statute, or otherwise)

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ture of the modern American family as revealed by the U.S. Census, but noting that the Court's current family jurisprudence will not allow for expansion to include these changing families).

[40] *Id.*; *see also* Paris R. Baldacci, *Pushing the Law to Encompass the Reality of Our Families: Protecting Lesbian and Gay Families from Eviction from Their Homes—Braschi's Functional Definition of "Family" and Beyond*, 21 FORDHAM UR. L.J. 973 (1994); William C. Duncan, *"Don't Ever Take the Fence Down": The "Functional" Definition of Family-Displacing Marriage in Family Law*, 3 J. L. & Fam. Stud. 57 (2001). Many of these authors focus upon state law cases such as *Braschi v. Stahl*, 544 N.Y.S.2d 784 (1989) (functional definition of family in housing context), and *Alison D. v. Virginia M.*, 552 N.Y.S.2d 321 (1990) (functional definition used in custody context).

[41] For an argument in support of a functionalist approach to families, *see* the more recent version of Martha Minow's article, *Redefining Families*, *supra* note 33, reprinted in FAMILIES IN THE U.S. 7. (2d ed. 1998).

and actual practices, which of these should trump?[42] The approach to answering these questions that has been taken by the Court in its cases addressing family-related Constitutional rights yields an image of American kinship that is significantly at odds with depictions in the social sciences' competing descriptions.

The Court's family-related cases fall under several different Constitutional provisions and doctrines. First, the Fourteenth Amendment's Equal Protection Clause[43] covers several of these cases.[44] Second, as the Court points out in *Moore v. City of East Cleveland*,[45] the Due Process Clause of the Fourteenth Amendment and the Fourteenth Amendment's substantive due process doctrine trigger the protections found in many of the Court's family law cases.[46] Third, the related, and, in one view,

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42 Justice Scalia would say that statutes should trump practices. *See, e.g., Michael H.*, 491 U.S. at n.2. Adultery is one example of a divergence between societally expressed beliefs—both in the form of criminal statutes against it and in non-legal verbalization of disapproval—and actual practices of all-too common adultery among adults in the U.S. . *See* C. Quince Hopkins, *Rank Matters, But Does Adultery?: Adultery and Honor in the U.S. Military*, 9 U.C.L.A. WOMEN'S L. J. 177 n.9 (1999) (discussing disjuncture between American's expressed views on adultery versus their actual practices in the context of Monicagate).

To investigate this divergence further, one might also ask, in what way are social relations different from professional relations? For instance, what, if anything, distinguishes an emotionally detached, but fiscally engaged parent/child relationship from an employer/employee or trust/trustee relationship? Parkin makes this exact distinction, that kinship relations are opposed to master/servant or other comparable relationships. *See* PARKIN, *supra* note 6. One might also then ask, to what extent and in what way are these apparent differences meaningful or important? These related queries fall outside the scope of the focus of this Article but would be a logical starting point for further exploration of this issue.

43 U. S. CONST., amend. XIV, §1.

44 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 7–12 (1967) (discussing the Equal Protection Clause of the Fourteenth Amendment as prohibiting marriage restrictions based on the race of the parties); Zablocki v. Redhail, 434 U.S. 374 (1978)(same, in the context of the class of poor persons); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972)(rights of unmarried persons to determine whether to bear or beget a child is protected under the Equal Protection Clause of the Fourteenth Amendment). Both *Loving* and *Zablocki* are also arguably substantive due process cases. See *Loving*, 388 U.S. at 12–13, and *Zablocki*, 434 U.S. at 384, both discussing marriage as a liberty interest under the Due Process Clause of the Fourteenth Amendment. My contention is that neither of these cases can be understood without taking into account the race- and class-based aspects of the statutory provisions challenged in those cases.

45 431 U.S. 494 (1977).

46 *See, e.g.*, Roe v. Wade, 410 U.S.113 (1973) (decision whether or not to have an abortion is a liberty interest within the scope of the Fourteenth Amendment), reaffirmed in *Casey*, 505 U.S. at 846–51; *Moore* , 431 U.S. at 502–03; *but cf.* ROTUNDA & NOWAK, *supra* note 39, at 596–98, 603 (discussing the Court's focus on the Equal Protection Clause rather than the Due Process Clause from 1890–1936 and then again after 1937 and ultimately the blending of substantive due process and equal protection analysis). In 1938, the Court decided *United States v. Carolene Products Co.*, in which the majority "indicated it might not follow the rejection of substantive due process in areas which touched upon specific constitutional guarantees or disadvantaged certain minority groups." ROTUNDA & NOWAK, supra note 39. at 627 (discussing *United States v. Carolene Products Co.*, 304 U.S. 144 n.4 (1938)). As discussed above, the Court's substantive due process doctrine draws upon the right to liberty contained within the Fourteenth Amendment's Due Process Clause. *See infra* at 22; U. S. CONST.,

overarching, right to privacy[47] underlies some of these and several other cases discussed below.[48] Each of these Constitutional provisions triggers its own analytical framework, with varying degrees and variations in emphasis on history.

The following discussion focuses upon many of the central Supreme Court cases addressing family relationships and the regulation of behavior within those relationships. Four themes or threads appear in the cases discussed in this section. First, one finds broad rhetorical pronouncements touching on various disciplines including history, sociology, and psychology.[49] Second, as discussed above, we see the Court resorting to history in various ways and with varying degrees of depth of analysis, as support for its rulings or as defining the proper result in the cases before it.[50] Third, in these cases the Court engages in the legal construction of kinship, by establishing definitional parameters of "family," but at the same time moving back and forth between very narrow and very broad definitions of "who's in[side] and who's out[side]"[51] of the defined area. Finally, one can see a shift from case to case in the Court's focus on the forms (and formal legal status) of kinship relations, to a focus on the functions that kinship ties serve, and then back again to an emphasis on

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AMEND. XIV, § 1. *See also, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding parents' right to control children's upbringing constitutes a liberty interest within the scope of the Due Process Clause of the Fourteenth Amendment); *Loving*, 388 U.S. at 1 (right to marry is a liberty interest under the Fourteenth Amendment's Due Process Clause); cases discussed *infra* at note 43.

47 *See* ROTUNDA & NOWAK, *supra* note 34, at 634. Many of the cases discussed herein are often described as privacy cases, although some of them in fact never actually refer to any right to privacy. One view is that the right to privacy is an after-the-fact unifying gloss developed by the Court (and now expanded upon by commentators), which refers to these earlier cases as falling within its rubric. *See, e.g.*, Carey v. Population Services International, 431 U.S. 678, 684-85 (1977) (quoting *Roe*, 410 U.S. at 152–53 ("While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . procreation, . . . contraception . . . family relationships . . . and child rearing and education.")). *See also* Webster v. Reproductive Health Services, 492 U.S. 490, 547 (1989) (Blackmun J., concurring and dissenting in part). It is primarily the contraception and abortion cases, and tangentially the right to marry cases, that refer explicitly to the right to privacy, while other cases focus on equal protection or more general language about fundamental rights or liberty interests. In a related way, the "state's interest" prong of substantive due process analysis was developed subsequent to the original development of the doctrine itself. *See, e.g.*, Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L. J. 2087 n.131 and accompanying text (2002).

48 *See, e.g., Griswold v. Connecticut,* 381 U.S. 479 (1965) (married person's right to contraception falls within the right to privacy derived from the penumbra of several of the rights outlined in the Bill of Rights); *see also infra* note 77 and accompanying text.

49 *See*, the discussion of *Reynolds v. United States,* 98 U.S. 145, (1878), *infra* at notes 54-61 and accompanying text.

50 *See infra* at Part II.A.

51 Minow, *Redefining Families*, *supra* note 33. *See also infra* Part II.A.

forms.[52] Each of these themes creates the space or opportunity for consideration of sociological and cultural anthropological studies and theory of kinship practice.

1. *The Court's Deployment of Marriage Rhetoric as a Persuasive, Rather than Doctrinal Tool*

The modern-day Court's kinship and family-related decisions sit squarely within its substantive due process and privacy doctrine; the development of substantive due process and privacy protection in the context of kinship occurred primarily during the 1960s through 1980s, perhaps then abandoned for a decade and then picked up again in *State v. Lawrence*.[53] A century prior to this time, however, the Supreme Court, in *Reynolds v. United States*,[54] first directly addressed the interface between families and the Constitution.[55] In *Reynolds* and several other cases, both ancient and contemporary, the Court employed grand rhetoric about families in general and marriage in particular to bolster its decisions on such diverse topics as legislative power, polygamy, and contraception.[56] While the particular substantive topics in those cases are less directly relevant to the discussion here, and although these sweeping statements about family and marriage are not necessarily even critical to the outcome of those cases, the early rhetoric flavors subsequent decisions to such a degree that they require separate attention.

a. The Early Kinship Rhetoric Cases: Marriage as Bedrock in *Reynolds v. United States* and *Maynard v. Hill*

The Court began its project of describing and circumscribing families in an opening volley involving Utah's proscription of polygamy. Upholding the conviction of a Mormon polygamist despite his free exercise of religion claim, the Court stated in *Reynolds* that:

> Polygamy has always been odious among the northern and western nations of Europe, and until the establish-

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52 *Id.*

53 *See* Meyer, *supra* note 15, at 805–06 (noting that the Court has not followed "a single course" in defining the parameters of family privacy). *Cf.* Pamela S. Karlan, *Loving Lawrence*, *available at* Paper ID: Stanford Public Law Working Paper No. 85 http://papers.ssrn.com/paper.taf?abstract_id=512662; (March 2004).

54 Reynolds v. United States, 98 U.S. 145 (8 Otto) 145, (1878).

55 Professor Peggy Cooper Davis points out that in *Meister v. Moore*, 76 U.S. 96 (1877), a case decided a year prior to *Reynolds*, property ownership turned on the legitimacy or illegitimacy of what was essentially a common law marriage. As Professor Davis also notes, however, this earlier case was not a Fourteenth Amendment case falling squarely within the development of family law doctrine. PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES, 29–30 (1997).

56 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 535 (1965).

> ment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.[57]

The Court's factual claim here—that polygamy has "*always been odious among northern and western nations of Europe . . . [and] was almost exclusively a feature of the life of Asiatic and of African people*"—is problematic for a number of reasons. First, the statement may well be factually accurate, but the Court fails to cite to any evidence in its opinion to support the empirical claim. In addition, neither of the parties cited to any evidence in their briefs that would lend support to the factual claim and that we might imagine the Court was referencing when it penned this statement.[58] To reach its conclusion on this factual point, therefore, what *did* the Court rely upon? The absence of actual evidence or testimony or citation to authority on this point suggests that most likely the Court relied upon its own beliefs about the reality it described. To push the point further, perhaps individual justices relied upon their knowledge of their own "northern and western European" family ancestry—that the practice of polygamy was absent from European cultures. This reliance upon a generalized sense of history, of historical practices, and more particularly one's own family history as indicative of actual historical practice, again might have hit the factual bull's-eye in *Reynolds*. What is troubling, however, is that absent any documentation for the factual claim, the Court's statement suggests subjective "fact-finding" on the part of the Court.

Second, when the Court focused its temporal and geographical gaze on the United States at the time the First Amendment was ratified, it noted that most states in the Union had passed anti-polygamy statutes prior to ratification. The Court therefore concluded that the First Amendment was not intended to protect polygamy, even if under religious auspices.[59] Subsequent cases—most notably *Lawrence v. Texas*[60]—clearly demonstrate the frailty of factual claims based either on the kind of subjective basis noted in the preceding paragraph or wide-sweeping claims about historical practices in intimate relationships where those claims are based on superficial analyses of statutory pronouncements.

The Court did not stop there, but added an important flourish, arguably dicta in *Reynolds* itself, but in hindsight one that was relevant to the Court's ultimate development of privacy doctrine in the mid-1900s. In reaching its decision, the *Reynolds* Court specifically characterized marriage as:

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57 *Reynolds*, 98 U.S. at 164 (upholding a conviction for bigamy).

58 *See* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, VOL. 8.

59 *Id.*

60 539 U.S. 558 (2003).

> . . .this most important feature of social life. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.[61]

It is this language, placing marriage at the apex of civilization, which is reproduced (albeit often without citation to *Reynolds* itself) in many of the Court's family law cases from this point forward.

Further, however, the Court's reference to and disparagement of polygamous *practice*—and I emphasize *practices* here as opposed to *laws*——of "Asiatic and African people" exhibits not only what now is seen as a provincial and bigoted sentiment, but more importantly, it reflects the Court's dismissiveness of the existence of "African and Asiatic people" then *living* in the United States. For African people, this was almost exclusively a result of enslavement rather than choice. While the Court may well have been able to rationally justify circumscribing legal protections to those family structures protected in the countries upon which the American legal system drew its structure and doctrine and thus justify its patent blindness to the existence to those not of that ancestral derivation, this is not how the Court justified its narrow focus. It justified the focus by rhetorical fiat.

Ten years after *Reynolds* was decided, the Court again waxed poetic on the position of marriage in U.S. kinship structures. In *Maynard v. Hill,*[62] the Court's dicta[63] echoed *Reynolds'* rhetoric when the court decided that a state legislature had the power to regulate divorce. Bracketing its analysis of the legislature's power, based in part on the historical practice in England and the colonies allowing such control, the Court stated:

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution . . . is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[64]

Later in the opinion, the Court continued in this vein, describing marriage as "a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest

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61 *Reynolds,* 98 U.S. at 165.

62 Mayard v. Hill, 125 U.S. 190 (1888).

63 I refer to this language as dicta, because the case was primarly a seperation of powers case.

64 Maynard v. Hill, 125 U.S. 190, 205, 211 (1888). *Griswold* also uses similarly florid language.

tie of social life, and the true basis of human progress."[65] Again, as was true in *Reynolds*, the *Maynard* court cited to no evidence supporting what is essentially an empirical claim. The only citation by the Court is to two earlier state law cases that similarly cite to no supporting evidence.[66] In these opinions, the Justices created a fragile but ultimately powerful base upon which many of its kinship cases would build.

b. 20th Century Kinship Quasi-Rhetoric Cases: Linking Reproduction to Marriage in *Skinner* and *Griswold*

While *Reynolds* and *Maynard* stand as examples of kinship rhetoric or dicta, two twentieth century cases bridge the gap between rhetoric about the importance of marriage and substantive rights determinations. In *Skinner v. Oklahoma*[67] and *Griswold v. Connecticut*,[68] the Court confronted constitutional claims related to reproductive decision-making. In the course of addressing those claims, discussed below, the Court explicitly linked otherwise freestanding rights claims to a broader claim about the social centrality of marriage, despite the fact that the Court had yet to hold that marriage itself was a Constitutionally protected right.[69]

Skinner, decided in the early 1940s, constituted one of the notable exceptions to the Court's otherwise hands-off approach to families prior to the 1960s.[70] In *Skinner*, the Court struck down a statute that allowed the forced sterilization of a person convicted of a crime. The *Skinner* Court rejected the eugenics approach previously espoused by Justice Holmes in *Buck v. Bell*,[71] who, when writing for the majority upholding forced sterilization, spoke the now infamous words "[t]hree generations

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65 *Id.* at 211–12.

66 *Id.* at 190, 205, 211 (1888), *citing* Adams v. Palmer, 51 Me. 481, 483 (1863) *and* Maguire v. Maguire, 37 Ky. 181 (1838). These cases in turn cite to older cases that merely repeat the same error.

67 316 U.S. 535 (1942).

68 381 U.S. 479 (1965).

69 It was not until two years after *Griswold* was decided, that the Court found an arguably qualified fundamental right to marry in *Loving v. Virginia*, 388 U.S. 1 (1967), discussed *infra* at notes 154-168 and accompanying text.

70 Other family rights cases decided during the first half of the century revolved primarily around parenting rights, including *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to control child's upbringing and education); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (also dealing with upbringing and education); and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (upholding a state law forbidding "street preaching by children"). See discussion of parenting rights *infra* at Part II.A.2.a. That the Court took on and challenged the practice of eugenics in *Skinner* during the time that the Nazis were engaging in the practice is perhaps coincidental, but nonetheless notable.

71 *Buck*, 274 U.S. 200 (1927). Buck v. Bell—a terse opinion—cited to neither history nor science in reaching its conclusion. Rather, it simply analyzed the statute in question and deferred to the State legislature's findings as to its necessity, and the State's interpretation of it to allow forced sterilization.

of imbeciles are enough."[72] In *Skinner*, the Court emphasized the importance of procreation, stating that, "[w]e are dealing here with legislation which involves one of the basic civil rights of man."[73] Possibly to qualify a holding that otherwise would have stood for the proposition that procreation itself was a fundamental right, standing on its own, the Court added: "[m]arriage and procreation are fundamental to the very existence and survival of the race."[74] In this way, then, the *Skinner* court tied procreative rights directly to the formal institution of marriage—albeit implicitly rather than explicitly, something that would echo in its subsequent decisions in *Griswold* and later in *Michael H. v. Gerald D.*[75] Again, just as was the case in *Reynolds* and *Maynard*, the Court cited to no authority for the point, but appears to have seen it as something so clear that it could—in effect—take judicial notice of it.

The tie between marriage and procreative rights was made more explicit in *Griswold*,[76] best known for establishing the Constitutional right to privacy.[77] In *Griswold*, the Court's plurality opinion held that a Connecticut law forbidding the use of contraceptives unconstitutionally intruded upon the right of *marital* privacy and the Constitution's protection against government invasion of the "sanctity of home" and "privacies of life." In reaching its decision, the Court—again without citation—opined that marriage is "intimate to the degree of being sacred" and "an association that promotes a way of life."[78] Thus, in *Griswold*, the Court again emphasized its valuation of marriage in expanding the reach of the Fourteenth Amendment and accorded Constitutional protection for conduct *within* marriage. Like *Skinner*, this ruling was issued in a world where the Court *still* had yet to hold that there was Constitutional protection *for the marriage itself.* The Court's descriptive project concerning families yielded this concrete result: this newly described right to contraception flow from status, where that status yet remained a legal chimera.

I do not include *Griswold* here, in the discussion of dicta or rhetoric, to suggest that the importance-of-marriage language in this decision was

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72 *Id.* at 207.

73 *Skinner*, 316 U.S. at 541.

74 *Id.*

75 *Michael H.*, 491 U.S. at 110 (1989). On a simpler level, however, *Skinner* forms the background for the Court's procreative decision-making cases that form the core of its privacy doctrine.

76 381 U.S. 479 (1965).

77 *See* Martha Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 n.16 and accompanying text (1991) (arguing that *Griswold* forms the core of privacy doctrine).

78 *Griswold*, 381 U.S. at 486.

mere dicta when it was decided.[79] However, the Court has since determined, in *Eisenstadt v. Baird*, discussed further below,[80] that the right to contraception inheres not in the marital relationship, but in the individual. Because of the Court's decision in *Eisenstadt*, the marriage-as-central language in *Griswold* now must be understood as not at all intrinsic to the right to contraception itself. Nonetheless, law review articles, appellate briefs, and the Supreme Court opinions since *Eisenstadt* continue to quote lines from *Griwsold* which have become, in essence if not in actuality, dicta rather than critical to determination of the right at issue in the case.

Reynolds, Skinner, and *Griswold,* and more indirectly, *Maynard*, all stand for the idea that marriage is the primary intimate relationship, upon which all other relationships and structures—be they familial, social, or political—rely and build. Additionally, these cases collectively stand for the notion that marriage is the fundamental and pre-existing core for other Constitutional protections (or lack thereof) for family structures (excluding polygamous marriages) and kinship-related functions (e.g. procreation).

The rhetoric outlining these broad claims is picked up and reiterated in many (but not all) of the Court's subsequent kinship cases, particularly (but not exclusively) those dealing with protections for adult intimate relationships as discussed in the next section. Further, however, as the foregoing discussion demonstrates, factual backing for these claims is not made clear in the cases which pronounced them, although subsequent cases did attempt to fill in this gap a little. As discussed in Part III, however, anthropologists have long agreed that marriage or marriage-like ties quite often are substantially less important to members of different cultural groups in the United States than other sorts of kin ties, whether they be parent-child, or sibling ties.[81]

2. *Substantive Due Process and the Doctrinal Demand for Historical Analysis: "Parent"/"Child" Rights, and Adult Intimate Relationship Rights*

In addition to adult intimate relationships as a category of family ties (whether they be monogamous heterosexual marital relationships, or some other form), the Court has grappled with the scope of protection for kin- or kin-like ties between adults and children. Early cases focused on

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79 For Justice Harlan, it was essentially as a precondition to the existence of the Constitutional privacy interest. *See* Poe v. Ullman, 367 U.S. 497, 541 (Harlan, J., concurring); *Griswold*, 381 U.S. at 484 (Harlan, J., concurring)

80 See *infra* at notes 201-203 and accompanying text (discussing Eisenstadt v. Baird).

81 *See infra* Part III (discussing anthropological studies).

situations involving nuclear biological families. Later cases deal with the complexities of other family forms.

Some forty years after the Court initially dealt with the interface between families and the Constitution in *Reynolds* and *Maynard* it directly addressed the scope of Constitutional protection for families and family structure in a pair of cases addressing one aspect of the relationship between parents and children: education. This time the Court faced the issue within the context of Fourteenth Amendment's substantive due process protection, which triggered a doctrinal evaluation of historical practices.

On its face, the Fourteenth Amendment protects life, liberty and property against government incursion.[82] In a simplistic way, what constitutes a protected liberty interest is that which falls within the scope of what the Court dubs "substantive due process."[83] Wary of the *Lochnerian*[84] slippery slope should the Court outline the scope of substantive due process without any objective framework for guidance,[85] the Court has suggested that "[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'"[86]

If, however, as demonstrated in this and the following Parts, history tells several different and competing tales about American kinship practices, then the cabining guidance yearned for by the Court in its substantive due process jurisprudence, and which at least some Justices imagine subsists in historical analysis, may in fact be more amorphous and malleable than it is determinate and constraining.[87] Moreover, this may represent an inescapable problem.[88] As Peggy Cooper Davis puts it:

> Doctrinal stories inevitably reflect perspective. They take *selectively* from history and culture. This is only natural. History and culture cannot be captured in all their richness and complexity. It is necessary to summarize. It is necessary to put some things in the foreground, to put some in the background, and to ignore

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82 U. S. CONST. AMEND. XIV, §1.

83 *See Moore*, 431 U.S. at 502–03.

84 *See* Lochner v. New York, 198 U.S. 45 (1905).

85 *Id.* at 502 n.9.

86 *Id.* at 503 (quoting *Griswold*, 381 U.S. at 501).

87 As discussed further, *infra* at footnotes 145-150 and accompanying text, some members of the Court have noted this exact point, that substantive due process analysis and determination of which traditions are important is inherently subjective. Justice Brennan, in particular, has directly challenged Justice Scalia's belief that historical analysis provides the yearned-for constraint. *See Michael H.*, 491 U.S. at 114 (1989) (Brennan, J., dissenting).

88 *See, e.g.*, Spitko, *supra* note 13, at 1352–53 (discussing the problems with analysis of history in substantive due process cases).

> others. It follows that when judges draw upon history or culture, they necessarily draw upon partial accounts, accounts that accentuate certain historical or cultural forces and minimize or ignore others. The Supreme Court's doctrine of family liberty is no exception.[89]

While I may disagree with Professor Davis' conclusion that this partial story is inevitable, she and I do agree (as do others)[90] that the Supreme Court's jurisprudence at best does not present a complete picture of American kinship practices and beliefs, and at worst presents an inaccurate picture.[91]

a. The Scope of Protection for "Parent"/"Child" Relationships

(1) The Early Cases: The Parent-Child Relationship and the Right of Parents to Control the Upbringing of their Children

In a pair of education-related decisions decided in the 1920s, *Meyer v. Nebraska*[92] and *Pierce v. Society of Sisters*,[93] the Court began to elaborate upon substantive due process protection for family relationships in establishing that parents have a liberty interest under the Fourteenth Amendment in parenting their children.[94] In *Meyer*, the Court held that the right to study the German language in a private school was a protected liberty interest.[95] "Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also . . . the right . . . to marry, estab-

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89 DAVIS, *supra* note 55, at 6.

90 *See, e.g.*, Lucian E. Dervan, *Selective Conceptions of Federalism: The Selective Use of History in the Supreme Court's States' Rights Opinions*, 50 EMORY L.J. 1295 (2001); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

91 It may also be the case that the historical approach reflects what Justice Hugo Black called illegitimate "natural law due process philosophy." *See Griswold*, 381 U.S. at 516 (Black, J., dissenting). *Cf.* DAVIS, *supra* note 55, at 7–8 (arguing that the struggle over the definition of family reflects a deeper struggle over communitarianism versus individualism).

92 262 U.S. at 399 (1923) (describing the right to bring up children as fundamental; stating also, in dicta, that the rights to work and marry are also fundamental).

93 268 U.S. 510 (1925).

94 The right to control the education of one's children is further expounded by the Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Although *Pierce* and *Meyer* are the important turning point in the Court's development of substantive due process protection for families, earlier cases arose at least as early as 1888. *See* NOWAK & ROTUNDA, *supra* note 34, at 576–77, 583. *See generally* Edward Corwin, *Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 380–84 (1911). The watershed for substantive due process was the controversial decision in *Lochner v. New York*, 198 U.S. 45 (1905). Just three years after *Lochner*, the Court decided *Muller v. Oregon*, 208 U.S. 412 (1908), in which Louis Brandeis presented his now famous "Brandeis-brief," the first time a Supreme Court brief included social science and other non-legal information for consideration by the Court. *See* NOWAK & ROTUNDA, *supra* note 34, at 588; *supra* note 31.

95 *Meyer*, 262 U.S. at 390 (1923).

lish a home and bring up children . . . ."[96] Presaging the use of legislative enactments to cabin substantive due process doctrine, the *Meyer* Court cites to the Ordinance of 1787 in support for its claim that: "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."[97] This reference to history is implicitly if not explicitly linked to a determination of a protected interest under the Due Process Clause of parenting and educating one's children.[98]

Citing *Meyer*, two years later the Court similarly held in *Pierce* that parents have a liberty interest in the upbringing and education of their children and that legislation mandating that children attend public school unconstitutionally interfered with this right.[99] According to the Court, "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[100] The *Pierce* decision did not engage in historical analysis or comment, but instead rested its decision squarely on the holding in *Meyer* with little additional discussion.

With respect to the Court's working out of Constitutional protections for various kinship relationships, *Meyer* and *Pierce* thus arguably stand for the proposition that (biological) parents' control over their (biological) children, in many, if not most, circumstances,[101] is superior to states' interest in those same children. As discussed in Part III, this particular privileging of the parental relationship is not necessarily reflected equally in all cultural groups in the United States.[102] We will revisit the right to parent in the context of the Court's troubling unmarried fathers'

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96 *Id.* at 399.

97 *Id.*

98 As Professor Dorothy Brown has noted, it also may constitute an inaccurate statement of history, insofar as public education was neither originally free nor required. Personal communication with Dorothy Brown, October 2003.

99 *Pierce*, 268 U.S. at 534–35 (statute mandating that all children attend public school interferes with parents' liberty interest in parenting and directing the education of their children).

100 *Pierce*, 268 U.S. at 535. *See also* E. Gary Spitko, *Creatures of the State: Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1182–83 (2000) (discussing the Court's holding in *Pierce*). Note that this language—"those who nurture"—does not apply just to biological parents, but also to caregivers more generally.

101 The child protection (originally referred to as the "child savers") movement during the 1970s and 1980s undercut this notion significantly. During this time, Congress began passing child protection legislation aimed at intervening into families where children were being abused or neglected. *See, e.g.*, Child Abuse Prevention and Treatment Act, 42 U.S.C.A. § 5102 (2003).

102 See discussion of the Navajo, *infra* at Part III(A)(2)(a), and particularly the Navajo Supreme Court's decision involving custody litigation between a Navajo father and Indian non-Navajo mother, *infra* at footnote 271.

rights decisions, which implicate both the right to parent and the concept of the "marital family."

(2) *What Is a Parent and What Does a Parent Do?: The Right to Parent Revisited (and Constrained) in the Court's Unmarried Father's Rights Cases*

With the arrival of the 1960s, the Court finally engaged the question of the Constitution's protection of kinship rights and relationships in earnest, this time under a combination of equal protection analysis, substantive due process doctrine, and under the more general rubric of privacy. The Court's family-related cases during this period focused primarily on three subjects: marriage,[103] unmarried fathers' rights,[104] and reproductive rights.[105]

In *Stanley v. Illinois*,[106] the Court issued the first of three critical decisions in deciding the scope of Constitutional protection for one group of family members previously granted only meager protection: unmarried fathers.[107] The Court held in *Stanley* that by denying an unmarried father a hearing on his fitness as a parent prior to institution of adoption proceedings, yet extending it to married parents whose custody is challenged, the state denied him equal protection guaranteed by the Fourteenth Amendment.[108] The Equal Protection rubric did not require the Court to engage in historical analysis, although in reaching its decision, the *Stanley* Court did reiterate language from prior substantive due process decisions that "emphasized the importance of the family" and "the integrity of the family unit."[109]

More importantly, however, by extending Constitutional protection to a parent not within the confines of a traditional marital family, the Court took a step toward expanding its previously constrained notion of American kinship, pointing out that the law has not "refused to recognize those family relationships unlegitimized by a marriage ceremony.[110] As the Court noted, albeit consistently without citation to empirical support,

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103 *Loving*, 388 U.S. at 1 (1967); *Zablocki*, 434 U.S. at 374 (1978).

104 *See e.g., Michael H.*, 491 U.S. at 110 (1989).

105 *See e.g., Griswold*, 381 U.S. at 479 (1965)(right of married persons to have access to contraceptives); Carey v. Population Services, 431 U.S. 678 (1978) (right of minors to access contraception); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (requirements of spousal consent and parental consent for minors to abortion unconstitutional). *See also* Fineman, *supra* notes 77 and 17 and accompanying text (1991) (discussing how privacy doctrine focuses on reproductive rights).

106 405 U.S. 645 (1972).

107 In its unmarried fathers' rights cases, the Court clearly is engaged in distinguishing divorced fathers from those who were never married to the mothers of their children.

108 *Id.* at 658 (Illinois statute is contrary to the Equal Protection Clause).

109 *Id.* at 651 (citing *Meyer, Skinner, Griswold,* and *Prince*).

110 *Id.* at 651.

the "familial bonds [in non-marital families are] just as warm, enduring, and important as those arising within a more formally organized family unit."[111] In *Stanley,* then, we see the Court referencing and adding to legal recognition of family structures falling outside the narrow confines of the marital nuclear family, but also continuing to make generalized statements about the function of families, this time more sociological and psychological, albeit in a more expansive or inclusive way than it had done previously.

Based on its holding in *Stanley*, one might have expected the Court to hold differently in what was the next of the trio of unmarried fathers' rights cases a decade later.[112] In *Lehr v Robertson*,[113] the Court held that where a putative father had not established a substantial relationship with his child,[114] failure to give him notice of the pending adoption of that child did not violate either his due process or equal protection rights.[115] Referencing the comments of the *dissenting* justices in its recently decided case, *Caban v. Mohammed,*[116] the *Lehr* Court distinguished between what it termed a "mere biological link" and an "actual relationship of parental responsibility."[117] Quoting Justice Stewart's dissent in *Caban*, the *Lehr* Court confirmed that in its eyes, "[p]arental rights do not spring full blown from the biological connection between parent and child. They require relationships more enduring."[118] Notably, Justice Stewart's *Caban* dissent focused on the substantive due process claim in that case, which triggered his suggestion about the importance of a right

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111 *Id.* at 652.

112 The Court ruled similarly in *Caban v. Mohammed*, 441 U.S. 380 (1979) (invalidating a New York statute that allowed children to be adopted without the natural father's consent, but not without mother's consent, where unmarried father had lived with his children and their mother for several years because the statute violated the Equal Protection Clause). The lower court in *Lehr* had ruled that *Caban* was inapplicable since it was not decided until after the adoption order was entered. *See Lehr*, 463 U.S. at n.7. *Cf.* Quilloin v. Walcott, 434 U.S. 246 (1978) (denying putative father's claim where he had failed to petition for legitimation for 11 years and he was afforded a hearing to contest the adoption and determination was made based on the best interests of the child. Equal protection not violated where divorced father was treated differently than unmarried father).

113 463 U.S. 248 (1982).

114 The dissent in *Lehr* paints a dramatically different picture of the biological father's efforts to parent, suggesting that his failure to parent was due to the mother's hiding the child from him so as to frustrate his efforts. *See Lehr*, 463 U.S. at 268–69 (White, J., dissenting).

115 *Id.* at 266–67. Even though the state knew of the father's whereabouts, the fact that the father did not technically comply with the statute's requirements of filling out a postcard for the putative father registry was fatal.

116 *Id.* at 259–60 (citing Caban v. Mohammed, 441 U.S. at 397). *Caban* established that unmarried mothers and fathers stood on an equal footing with respect to a right to oppose the adoption of their biological child. *Caban*, 441 U.S. at 380 (1979)

117 *Lehr,* 463 U.S. 248.

118 *Id.* at 260. On the use of dissents as support in subsequent cases, see Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781 (2000).

being grounded on tradition.[119] By contrast, the *Caban* majority had explicitly avoided the discussion of liberty interests and therefore historical analysis, by resting its holding on Equal Protection analysis.[120] According to the *Lehr* court, where an unwed father actually steps forward and demonstrates a "full commitment to the responsibilities of parenthood" responsibilities in the form of contributing to the rearing of the child, "at that point it may be said that he '[acts] as a father toward his children.'"[121] Thus, in *Lehr* we see the Court actively delineating who is and who is not a parent to a child, defined by what that "potential" or theoretical parent does or does not *do* and whether that behavior is in accord with the Court's definition of what a "true" parent is and does.[122]

In one view, the *Lehr* Court appears to be tightening the boundaries of who is and is not a family member. At the same time, however, the Court also shifts those same boundaries in a way that has a loosening effect. That is, by focusing on the function (engaging in parent-like behavior),[123] rather than the form (i.e., the mere "biological link"), the *Lehr* Court thereby creates a moment—an opportunity—for non-biological de facto parents to assert parental rights to children.[124] This latter conception which focuses on actual kinship-related behavior of people, rather than formalistic structure, is directly in line with the approach suggested in this Article, a view that is also supported by cultural anthropologists' studies of kinship practices in the United States.

The *Lehr* dissent disagreed with the majority on this central point, and argued that the simple existence of the biological relationship was

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119 *Caban*, 441 U.S. at 308 (Stewart, J. dissenting).

120 *Id.* at n.16.

121 *Lehr*, 463 U.S. at 261 (citing *Caban*, 441 U.S. at 389 n.7 and discussing a demonstration by unmarried father to the full commitment to parenting required, reasoning that parental rights develop from an ongoing parent-child relationship, not from a mere biological link).

122 Interestingly, the majority explicitly states that, "[t]he. . .actions of judges neither create nor sever genetic bonds," while it ignores the fact that its ruling effectively severs that bond—or at least what that bond stands for: a parent-child link. It also ignores that it is ultimately also concurrently creating *legal* bonds in its ruling. *Id.* at 261. *See also* Janet Dolgin, *Choice, Tradition and the New Genetics: The Fragmentation of the Ideology of the Family*, 32 CONN. L. REV. 523, 542 (2000) (discussing Schneider's finding that "blood relatives share biogenetic substance" and that this substance "is a symbol of unity, of oneness, and this is symbolically interchangeable with the symbol of love.").

123 The Court also focuses on what families *do*, rather than their *form*, when it cites language from *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), on what is important about family relationships more generally: "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in '[promoting] a way of life' through the instruction of children . . . as well as from the fact of blood relationship." *Lehr*, 463 U.S. at 261 (quoting *Smith*, 431 U.S. at 844 (*quoting Yoder*, 406 U.S. at 231–33).

124 It also theoretically opens the door for challenges by defacto parents to less-than-ideal parenting conduct by biological fathers *and* mothers, thus raising the bar on biological parents to beef up their actual parenting behavior.

sufficient to constitute parental status. Valorizing the biological relationship as central (as opposed to the majority's determination that it merely created an *opportunity* to develop a parenting relationship), the dissent argued that a "'mere biological relationship' is not as unimportant in determining the nature of liberty interests as the majority suggest[ed] . . . . [since t]he usual understanding of family implies biological relationships."[125]

The majority and dissent in *Lehr* thus disagree on the centrality of biology to the parent-child connection and consequently, on the scope of the unmarried father's protected liberty interest. Both opinions bolster these arguments with similar factual claims about the ordinary person's understanding of family: when one engages in parenting types of behavior "*it may be said* that" one is a parent (in the case of the majority), and biological connection as inherent to the "usual understanding of families" (in the case of the dissent). These two positions—*form* as primary versus *function* as primary—come head to head in the Court's final unmarried fathers rights case: *Michael H. v. Gerald. D.*

In *Michael H.*, one of its more troubling family law decisions,[126] the Court continued the trend begun in *Lehr* of denying unmarried fathers' rights to parent their children, this time not in response to an equal protection claim, but to a substantive due process claim.[127] In so doing, however, the Court backed away from the functionalist approach it had taken in *Lehr* and reverted to a formalist approach, although this time focusing *not* on the formal biological link between father and child, but instead grounding parental rights on the formal structure of the family as a whole.[128]

In *Michael H.*,[129] the undisputed[130] biological unmarried father (Michael H.) conceived a child (Victoria) with Carole D., who was married to Gerald D. at the time of conception and throughout the litigation.[131] From the time of her birth until the time Carole finally reconciled with her husband, Michael actively parented Victoria, living with her and

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125 *Lehr*, 463 U.S. at 271–72 (arguing that a biological connection is a Constitutionally protected interest in and of itself that exists regardless of how well-developed the relationship is between a parent and child, and arguing that most decisions have stressed the importance of this "biological connection" in defining "family").

126 *See* Meyer, *supra* note 15, at 761–62 (discussing the Court's decision in *Lehr*).

127 *See Michael H.*, 491 U.S. at 121.

128 *See id.* at n.4 and accompanying text. *Cf.* at 145–46 (Brennan, J., dissenting). Despite his primary emphasis on the relationship created at law—the marital one—Scalia engages in an odd reversion to biological rhetoric, seeming to invoke a natural law framework at one point: "California law, like nature itself, makes no provision for dual fatherhood." *Id.* at 118. Law and nature are seen as aligned, and, in this case, aligned against social and actual practice.

129 *Id.* at 100.

130 *Id.* at 160 (White, J., dissenting).

131 *Id.* at 115.

her mother at various points, providing financial support, and affirmatively holding her "out as his own" child.[132] Michael plainly satisfied the combined biological and active-parent requirements of *Lehr*.[133] Victoria also asserted an interest in continued visitation with her father. Because of a state law presumption of paternity in the marital father where a child was born into an intact marriage, the trial court dismissed Michael's petition for visitation.

Justice Scalia, writing for a plurality, agreed. The plurality found that Michael failed to prove that his "liberty interest" in parenting Victoria was one so "deeply embedded within [society's] traditions" as to be a fundamental right worthy of substantive due process protection. The plurality characterized Michael's interest as that of an adulterous parent.[134] Having thus categorized him that way, the plurality spends part of its analysis on the historical basis for the presumption of paternity itself. This analysis draws upon what Justice Scalia terms "older sources"[135]—legal treatises and commentaries by scholars such as Nicholas' in 1836 or Blackstone's Commentaries in 1826, but also including more recent texts from the mid-1900s.[136] In so doing, Justice Scalia suggests that this historical support for the presumption hints at historical *dis*respect for the claim of a biological father in Michael's position. To the extent that "embedded in tradition" means embedded in legal tradition, as opposed to social or cultural tradition, perhaps Blackstone's views should matter. However, as the dissent notes, Scalia fails to interrogate whether the rationales asserted in these older treatises for the presumption—such as to protect inheritance and succession—have continued validity today.[137] He relied upon these treatises' mere existence to support his conclusion that Michael had no liberty interest.[138] Again, as the dissent notes, this also begs the question of whether, with the advent of DNA testing, some of the asserted rationales such as preserving the "tranquility of States and families" still carry the same weight today.

In addition, Justice Scalia interpolated from the Court's earlier unmarried fathers' rights cases—*Stanley*, *Quilloin*, *Caban*, and *Lehr*—that they in fact rested upon "the historic respect—indeed, sanctity would not

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132 *Id.* at 113–15, 143–44 (Brennan, J., concurring). The formal ruling asserted the constitutionality of a state statute that created a presumption that a child born into marriage is child of marriage, regardless of actual genetic parentage. In passing, the Court also held that the child did not have a due process right to maintain filial relationship with both "fathers" despite that child's request to do so.

133 Even Justice Scalia agreed on this point. *See Michael H.*, 491 U.S. at 123.

134 *Id.* at 120.

135 *Id.* at 125.

136 *Id.*

137 *Michael H.*, 491 U.S. at 140 (Brennan, J. dissenting).

138 *See, e.g.*, Storrow, *supra* note 34, at 594–604.

be too strong a term—traditionally accorded to relationships that develop within" what he neatly dubs "the unitary family"[139] and thus not on the notion that parenting, in and of itself, was "deeply embedded" in tradition.[140] A unitary family, Scalia tells us, is "typified, *of course*, by the marital family, but also includes the *household* of unmarried parents and their children."[141] Focusing on the requirement of co-residence and dipping his toe back into functionalist mode, Justice Scalia notes that *Stanley* involved an actively engaged, if non-marital, father who also co-resided with his children and their mother for 18 years.[142] Co-residence as definitive of "family," we learn from the cultural anthropologists' studies, is far from universal in the United States. Not only do increasing numbers of post-divorce families exist under more than one roof, but in some cultural groups in the U.S., co-residence is irrelevant unlike other defining aspects of family.

By contrast, Justice Stevens in concurrence noted that enduring family relationships may develop in unconventional settings, drawing this conclusion from *Stanley* and *Lehr*.[143] Justice Stevens preferred to not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist.[144]

Justice Brennan in dissent agreed with this aspect of Stevens' concurrence, but additionally agreed with a concern expressed by Justice O'Connor's concurrence when he noted that the plurality opinion's exclusively historical analysis was a "departure from our prior cases and from sound constitutional decision-making."[145] According to Brennan, the "plurality pretends that tradition places a discernible border around the Constitution."[146] To the contrary, he argued, tradition is a malleable concept. He did not reject the notion of investigating tradition in terms of its guidance for the Court, but, he argued, Blackstone and others should not form the limits of that investigation. He also argued that the historical tradition underlying the right investigated is not that of "an

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139 *Michael H.*, 491 U.S. at 123.

140 Justice Brennan, in dissent, criticizes Justice Scalia's insistence on focusing exclusively on history to the exclusion of consideration of whether the interest was implicit in concepts of ordered liberty. *Id.* at 117. The "implicit in concepts of ordered liberty" language derives from the Court's decision in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

141 *Michael H.*, 491 U.S. at. n.3.

142 *Id.* at 123. Justice Brennan, in dissent, challenged Justice Scalia on this point, albeit in a different way and for a different purpose. Justice Brennan exposes the supposed expansion of protection from marital families to co-residing non-marital—but otherwise mirroring a marital family—families as mere lip-service. *Id.* at 143–45. Instead, according to Justice Brennan, the plurality opinion truly does place marriage as the crux of parental rights determinations.

143 *Michael H.*, 491 U.S. at 133 (Stevens, J. concurring).

144 *See id.* at 133 (Stevens, J., concurring).

145 *Id.* at 137 (Brennan, J., dissenting).

146 *Id.*

adulterous parent" but of parenthood more generally.[147] Rejecting the majority's suggestion that the Court's prior cases supported its "cramped vision of the family,"[148] Brennan provides a competing interpolation of the court's prior cases such as *Eisenstadt, Griswold* and *Stanley*, which he suggested support the view of parenthood as a liberty interest protected by the Constitution. Ultimately, suggesting that the world envisioned by the plurality was one of "make-believe" insofar as its conclusion that Michael H. was *not* Victoria's father despite DNA tests that confirmed that he was, the dissent concluded by lambasting the plurality's view that it is "tradition that alone supplies the details of the liberty that the Constitution protects."

In one view, *Michael H.* might represent a loosening of the biological leash for adult/child kinship ties. That is, in *Michael H.* the Court can be said to privilege a mere social parent[149] (a stepfather) over a biological (although also social) father. A different reading of that case, however, makes plain that the Supreme Court was not in fact privileging a social parental relationship, but instead, promoting the marriage relationship over a genetic parental one.[150]

b. Intimate Relationships Between Adults: The Fundamental Right to Marry and to Private, Consensual Sexual Intimacy

In addition to circumscribing unmarried fathers' rights to parent their children during the latter half of the 20th century, the Court also addressed the scope of Constitutional protection for adult relationships. Straddling the Equal Protection and Due Process clauses of the Fourteenth Amendment, these decisions focused on the right to marry and the right to private consensual sexual intimacy.[151] As is true with the unmarried fathers' rights and later parenting cases, these cases reveal a Court struggling to come to terms with a variety of family forms.

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147 *Id.* at 139.

148 *Id.* at 157.

149 In anthropology, the terms *pater* and *mater* indicate social parents, while *genitor* and *genetrix* indicate biological parents. PARKIN, *supra* note 6, at 14.

150 One might view the Court's work in *Michael H.*, then, almost as a sort of social engineering. The idea that marriage itself *creates* filiation (a parent-child relationship) is consistent with Navajo kinship tradition. *See infra* notes 269–271 and accompanying text.

151 As is true in many of its kinship cases, in its right to marry cases the Court seems, at some points, to ground its decision on one Constitutional provision or doctrine and, at different moments, on another provision.

(1) Formal Legal Recognition of Adult Intimate Relationships: The Right to Marry

Prior to the 1960s, and despite its strong rhetoric in *Reynolds*[152] and *Maynard v. Hill*[153] about the importance of marriage to civilization, the Court had yet to rule that marriage itself was a fundamental right deserving of protection under the Constitution. It was in *Loving v. Virginia*[154] that the Court arguably established marriage as a fundamental right.[155] In *Loving*, the Court held that Virginia's anti-miscegenation statute violated both the Equal Protection and Due Process clauses of the Fourteenth Amendment. In its analysis of the State's Equal Protection Argument, the Court flatly rejected the State's purported purpose—to "preserve racial integrity of its citizens, to prevent corruption of blood, a mongrel breed of citizens, and the obliteration of racial pride." In counter-point to the troubling language of the 1880s polygamy case of *Reynolds v. U.S.*,[156] the Court held that distinctions based on ancestry are "*odious* to a free people . . . founded upon the doctrine of equality."[157] A race-based classification, such as an anti-miscegenation statute, thus categorically violates the Equal Protection Clause of the Fourteenth Amendment.[158]

The Court went further, however, and briefly addressed the case under the Fourteenth Amendment's Due Process Clause. The Court held that "[t]hese statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by

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152 Reynolds v. U.S., 98 U.S. 145 (1878). *See also* discussion of *Reynolds, supra* at notes 55–62 and accompanying text.

153 Maynard v. Hill, 125 U.S. 190 (1888). *See also* discussion of *Maynard, supra* at notes 62–66 and accompanying text.

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

155 I say "arguably" because it is also possible to argue that *Loving* actually turns on suspect class—race. Commentators, such as Pamela Karlan, for instance, suggest that the *Loving* opinion relies upon an interweaving of both the Equal Protection and Due Process clauses. *See* Pamela Karlan, *Loving Lawrence*, *supra* note 53, at 1–2. A similar argument can be made with respect to the Court's next marriage decision, *Zablocki v. Redhail*, 434 U.S. 374 (1978), discussed below, that the result in that case turned on the fact that the statute treated the poor differently than the non-poor, as discussed in this section. *Zablocki* also used language that sounded like fundamental rights language with respect to marriage, but did not directly say that the Court's immediately preceding marriage case—*Loving*—established marriage as a fundamental right. Subsequent cases, however, tend to refer to *Loving* as having established marriage as a fundamental right independent of the race-based classification at play in the case.

156 *See* discussion, *supra* notes 55–62 and accompanying text.

157 *Loving*, 388 U.S. at 11. As discussed in the subsequent section, the depth to which slavery intruded into marriages was substantial.

158 *Id.* at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." In terms of the Court's historical discussion, at the time *Loving* was decided, there were 16 states which prohibited and punished marriages on the basis of racial classifications.[159] At least with respect to those states that still had anti-miscegenation statutes, one could argue that the tradition of penalizing inter-racial marriage was of somewhat long-standing historical pedigree. According to the Court, "penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period."[160] Thus, one interpretation of *Loving*, is that the Court overturned the statute despite both possible historical practices in accordance with its mandate,[161] and even then current practices and laws mirroring anti-miscegenation practices.[162] On the other hand, thirty-four states never enacted, or else had repealed their anti-miscegenation statutes at the time the Court decided *Loving*.[163] If the Court's role is to rope in the minority of states who insist on abiding by historical traditions now rejected by a substantial majority of other states,[164] then *Loving* stands for the proposition not that the Court will counter majoritarian values, but that it will look at the nation as a whole, in determining majority versus minority opinions on fundamental rights issues. Arguably, this same approach was at work in the Court's *Lawrence v. Texas* decision striking down sodomy laws and overruling *Bowers v. Hardwick*.

Loving arguably establishes the right to marry as fundamental. However, an alternative interpretation of *Loving* would recharacterize it as primarily an Equal Protection case, and contend that the Court's separate Due Process Clause analysis (finding that marriage is a liberty inter-

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159 *Id.* at 6.

160 *Id.*

161 *Id.* ("Virginia is now one of 16 states which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period."). Note that Justice Scalia in *Michael H.* rejected the notion that any of the Court's prior cases had recognized a long-standing tradition and then rejected it. *Michael H.*, 491 U.S. at n.6.

162 *See e.g.*, *Casey*, 505 U.S. at 847–48 (discussing *Loving*: "Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause.").

163 *Loving*, 388 U.S. at 6. Beyond the simple numbers of states who had such laws on the books or had repealed such laws, it is important to keep in mind that there nonetheless may still have been at work de facto, if not de jure, anti-miscegenation "laws." That is, it is not much of a stretch to imagine that even in states who did not have or who had repealed their anti-miscegenation statutes, inter-racial couples might have reasonably chosen not to marry because of fear of violence should they attempt to do so. In that case, a particular state would not have the need to enact a law preventing it, if prevention of inter-racial marriages was its central goal. Personal communication with Dorothy Brown, October 2003.

164 *See* William Eskridge, Jr., Keynote Address, Brigham Young University Symposium on The Future of Same-Sex Marriage Claims (August 29, 2003).

est) cannot stand on its own without reference to the race-based statute at issue.[165] The Court's own opinion suggests this might be the case, when it explains its Due Process holding:

> To deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. . . . The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination.[166]

As this passage from *Loving* suggests, one possible interpretation of the decision is that race-based statutes may be *sui generis* in this regard: that in its Due Process analysis of race-based statutes that impinge on an arguable liberty interest, prior and current practices and regulations related to that asserted liberty interest cannot guide or constrain the Court's decision concerning them.

There is obviously a strong argument that race does indeed play a unique role in Constitutional jurisprudence in the United States, such that no other classification, be it gender, national origin, sexual orientation, or other category warrants or should receive comparable Constitutional protection. The Court's own language, however, in its subsequent substantive due process cases, and ultimately in its 2003 decision in *Lawrence*[167] overturning *Bowers,*[168] suggests that other restrictions fall within the same conceptual borders as the one at issue in *Loving*. These cases are discussed at length below.

The Court's second right-to-marry case, *Zablocki v. Redhail,*[169] decided over ten years after *Loving*, does take the fundamental right to marry outside of a race-based context, although possibly leaving the right still constrained by poverty-based parameters. In *Zablocki,* the Court held that a state statute that requires court approval in order to marry when the applicant is a non-custodial parent owing a support obligation to his or her child violates the Due Process, and possibly Equal Protection, clauses of the Fourteenth Amendment. Under Wisconsin's statutory scheme, economic status determined eligibility to enter into lawful marriage.[170] Again echoing (and at times quoting) the flowery dicta of

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165 Karlan, *supra* note 53.

166 *Loving*, 388 U.S. at 12.

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

168 478 U.S. 186 (1996).

169 *Zablocki,* 434 U.S. at 374 (1978).

170 *Id.* at 382. Although it asserted it was analyzing the case under both the Equal Protection and Due Process clauses, the majority don't seem to fully engage the equal protection

its earliest family cases of *Reynolds* and *Maynard v. Hill* and its later decisions in *Loving* and *Griswold*, among others, the Court held that:

> ". . . the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness . . . [it is] fundamental to our very existence and survival . . . the most important relation in life . . . the foundation of family and society, without which there would be neither civilization nor progress . . . fundamental to survival of the race . . . a right of privacy older than the Bill of Rights . . . [and] intimate to the degree of being sacred."[171]

Citing to its earlier substantive due process cases, the Court found that the decision to marry is on the same level with other matters of family life that it had previously held were protected liberty interests, such as procreation, childbirth, child rearing, and family relationships.[172] In so doing, the Court appears to have expanded the right to marry into a protected liberty interest in a context other than where an invidious classification scheme exists, be it race-based or otherwise.

Notably, however, Justice Stevens' concurrence argued that the statute's classification scheme, which protected the wealthy while punishing the poor, was an invidiously discriminatory classification.[173] It is this notion—that a restriction on the right to marry which applies to one group but not another—which undergirds the earlier suggestion that *Zablocki*, like *Loving*, stands for the proposition that the right to marry is a protected liberty interest, but only state interference that employs a method that allocates that right differently with respect to some groups than to others is unconstitutional.

Taking the *Loving* and *Zablocki* decisions together, then, one interpretation is that the right to marry does not stand on the same footing as liberty interests found by the Court in some of its other substantive due process decisions, such as procreation[174] or parental control of upbringing of children.[175] Nonetheless, the language employed in both the *Loving* and *Zablocki* cases reifies marriage, holding it up as the central driving force (natural, legal and social) for civilization and the continuation of the species (at least of humankind in the United States). This

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argument, but instead, rested its decision on the Due Process Clause. Only the concurrence seems to have fully accepted the Equal Protection argument asserted by Mr. Redhail.

171 *Id.* at 383–84 (quoting Griswold v. Connecticut, 381 U.S. 479 (1965).

172 *Zablocki*, 434 U.S. at 384-386 (citing *Loving v. Virginia, Skinner v. Oklahoma, Eisenstadt v. Baird, Prince v. Massachusettes, Pierce v. Society of Sisters* and *Meyer v. Nebraska*).

173 *Id.* at 404 (Stevens, J. concurring).

174 *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

175 *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

valorization of marriage in these and the 19th century cases discussed earlier, while perhaps commendable, is somewhat at odds with some of the studies discussed in Part III.[176]

(2) The Legal Regulation of Adult Private Consensual Sexual Intimacy

While reproductive rights are now understood as individual rights, the Court's early privacy cases emphasized the right as a relational one, inhering particularly in the marital relationship.[177] In the Court's early kinship cases of *Reynolds* and *Maynard*, as well as in its *Griswold* privacy case, and finally in *Michael H.*, one uncovers the Court's particular preference for a nuclear family structure, at times referred to as the "unitary family,"[178] consisting of husband/father, wife/mother, and some collection of biological or adopted children (whether actual or potential).[179] Further, the particular link between state-sanctioned marriage and Constitutional protection for families (those consisting of something more than, or other than, simply a marital couple) most clearly emerges in these cases which demonstrate the Court's privileging marital families over non-marital ones. Both of these often-discussed aspects of the Court's privacy cases[180] find their counterpoint in a handful of the Court's cases, discussed below, and in the studies of American kinship discussed in Part III.

(3) Moving Beyond Biology, Marital Status, or Both

In a series of cases addressing kinship ties other than those between spouses or biological parents and their biological children, the Court has adopted a more expansive definition of family. In some instances, the Court has done so in dicta while ultimately sublimating the expanded family to the biological one. In others, the Court in fact has granted the protection to the non-biological or marital family. In a third set of cases, the Court expanded its notion of kinship ties, when it addressed Constitutional questions surrounding adult intimate relationships.

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176 *See infra* notes 237-334 and accompanying text.

177 *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (grounding the right to access contraception in the marital relationship); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to contraception inheres in the individual); Fineman, *supra* note 33, at 966–67, nn.31–32 and accompanying text (discussing the shift from privacy as a relational right to an individual right and citing to authors discussing same).

178 *Michael H.*, 491 U.S. at 124 n.3.

179 Harlan's *Poe* dissent and his concurring opinion in *Griswold* plainly condition protection on the marital relationship.

180 For articles discussing the Supreme Court's narrow definition of family, see sources discussed *supra* at note 33.

a. Expanding and Contracting Rights between Adult Family Members and Children

The Court faced questions about parent/child relationships in 1977 in the context of a non-nuclear, non-marital family—this time in the form of a foster family—in *Smith v. Organization of Foster Families for Equality and Reform.*[181] In *Smith*, a class of foster parents challenged New York's procedures for removing foster children from their homes. The foster parents argued that they had a protected liberty interest entitling them to a hearing before removal. In support of this claim, the foster parents pointed to the psychological bonds established between foster parents and foster children,[182] and, relying upon the "psychological parent" theory developed by Anna Freud and her colleagues,[183] argued that these bonds established the foster family as a "psychological family . . . [and] that family . . . has a [protected 14th Amendment] 'liberty interest' in its survival as a family."[184]

In *Smith*, the Court addressed directly the definition of family and specifically the connection between biological ties and kin ties.[185] The Court phrased the question before it as follows: "[I]s the relation of foster parent to foster child sufficiently akin to the concept of 'family' recognized in our precedents to merit similar protection?"[186] In addressing this question, the Court noted that children in foster placements often lose contact with biological parents when placed in foster care, and that they "often develop deep emotional ties with their foster parents."[187] The Court further noted that although "the usual understanding of 'family' implies biological relationships,[188] . . . biological relationships are not [the] exclusive determination of the existence of a family."[189] The Court also explained that "the importance of the familial relationship, to the individuals involved and to the society, stems from the *emotional attachments* that derive from the intimacy of daily association as well as from the fact of blood relationship."[190] As the Court admits, "[n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the

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181 431 U.S. 816 (1997).

182 *See id.* at 835–37.

183 *Id.* at 839 (citing JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979)).

184 *Id.*

185 *Id.* at 843.

186 *Id.* at 842.

187 *Id.* at 836.

188 *Id.* 843 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

189 *Smith*, 431 U.S. at 843.

190 *Id.* at 844 (citing Wisconsin v. Yoder, 406 U.S. 205, 231–33 (1972)).

absence of a blood relationship."[191] Clearly, adopted children and their parents, at a minimum, require such an acknowledgement.

Thus, although ultimately the *Smith* Court concluded that foster parents' state-created contractual rights[192] lose out to the conflicting liberty interests of biological parents, we see the Court flirting with a broader notion of family. In so doing, the Court noted the possibility of children developing deep ties with non-biological families (foster families) comparable to those in biological families, and further that foster families can serve the same role as biological families in terms of socializing functions. This focus on the functions rather than forms of families encompasses a more expansive notion of family, similar to that adopted in *Moore v. City of East Cleveland,*[193] decided the same year as *Smith.*[194]

In *Moore,* the Court adopted what is arguably its broadest definition of family when it held that a zoning ordinance could not restrict cohabitation between grandparents and other relatives. The Court stated its rationale for this broader conception of family as follows:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition . . . . Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.[195]

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191 *Id.*

192 *Id.* at 845–46.

193 Moore v. City of East Cleveland, 431 U.S. 494 (1977). The dissent in *Bowers* noted that the Court should heed the warning of *Moore* and look at why certain rights associated with the family have been accorded shelter, and then to protect those rights not because they tend to directly or materially contribute to the general public welfare, but because, they form so central a part of an individual's life. We protect the decision whether to marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Bowers,* 478 U.S. at 205 (Blackmun, J., dissenting) (quoting *Griswold v. Connecticut*).

194 *Moore* actually was decided prior to *Smith* and is cited in the *Smith* decision itself.

195 *Moore,* 431 U.S. at 504–05. *Cf.* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). *See* Smith v. O.F.F.E.R., 431 U.S. at 843 n.49 (citing *Prince,* 321 U.S. at 159) ("The scope of these rights extends beyond natural parents. The "parent" in *Prince* itself, for example, was the child's aunt and legal custodian.").

While the Court reached this unusual result, granting Constitutional protection to a non-nuclear family, it simultaneously reaffirmed its prior decisions that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[196] Thus, despite an apparent broadening of family definition, the Court made clear that it still adhered to a central definition of family as rooted in biology (blood), adoption, or marriage.[197] However, in reaching its decision, the Court focused again on the functions rather than forms of families, emphasizing economics, "mutual sustenance," and maintaining a "secure home life."[198]

The Court's most recent iteration of Constitutional protections of adult/child family relationships involved children's ties to grandparents and tested the reach of *Lehr* and *Michael H.* in the context of children's ties to their grandparents. In *Troxel v. Granville,*[199] the Court held that a Washington statute that allowed a family court to order visitation rights for "any person" if "visitation serves the best interest of child" violated a mother's substantive due process right to make decisions concerning the care, custody and control of her children. Citing to its prior decisions on parental decision-making authority and autonomy, the *Troxel* court held that the primary role of parents was established as an "enduring American tradition" reflecting "western civilization concepts of the family as a unit with broad parental authority over minor children."

On the other hand, the *Troxel* court did not hold that nonparental visitation statutes violate the Due Process Clause of the Fourteenth Amendment per se, noting that all 50 states have statutes that provide for grandparent visitation. Thus, the Court appears influenced by social practices, at least as they are embodied in current statutes in every state. Further, in *Troxel,* Court was aware of demographic changes of the past century, when it stated that these changes make it difficult to speak of the "average" family and noted that nonparent visitation statutes recognize the changing realities of family.[200]

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196 *Moore*, 431 U.S. at 503.

197 *Id.* at 498 (citing Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)). Meyer, *supra* note 15, at 808, 809 (noting the Court's adherence to the blood, adoption, or marriage definition of family).

198 *Moore*, 431 U.S. at 505.

199 530 U.S. 57 (2000).

200 The dissent, by contrast, would have held the parent's rights are never absolute, but tied to presence of embodiment of family, cautioning that the infinite variety of family relationships of ever-changing society counsel against creation of constitutional rule that treats a biological parent's liberty interest as a right that may be exercised arbitrarily. The Fourteenth Amendment's Due Process Clause, the dissent concluded, leaves room for states to consider impact on child of possibly arbitrary parental decisions. The dissent would have held that the right of parents to direct upbringing of their children is "unalienable." The dissent expressed the concern that the majority was ushering in a new regime of judicially & federally prescribed family law. The dissent's principal concern was that the holding reflected an assumption that

b. Beyond Marriage: Recognition of Non-Marital Adult Relationships

So far, we have been exploring what this Article refers to as the Court's "kinship" cases. There is also another small group of cases that do not strictly fall into that category, but that demonstrate the Court's recognition of and extension of Constitutional protection to some aspects of non-marital adult intimate relationships. These cases arguably support the idea that the Court could (and sometimes does) focus on the functions of relationships rather than their form or structure. For instance, in one of its few cases protecting non-marital relationships, the Court in *Eisenstadt v. Baird*,[201] faced with the issue of unmarried versus married people obtaining contraceptives, held that a Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancy but prohibiting single persons from obtaining them for that purpose, violated the Fourteenth Amendment's Equal Protection Clause. The Court held that with respect to contraceptives, the rights of unmarried persons equaled those of married people.[202] Citing *Stanley,* the Court held that the right of privacy includes the right of the individual, married or not, to be free from unwarranted government intrusion into matters so fundamental as the decision to bear or beget a child.[203]

In *Lawrence v. Texas*,[204] the Court was faced with the question of whether over a decade of statutory and social change was sufficient to warrant overturning the handful of remaining criminal sodomy statutes proscribing consensual adult sexual conduct, as well as its prior privacy decision in *Bowers v. Hardwick* which had upheld them. The *Lawrence* court determined that it was. But further, the *Lawrence* majority revisited and rejected the prior description in *Bowers* of what *were* historical legal practices with respect to regulation of sodomy. *Lawrence* may also open the door (as Scalia noted in dissent) for expanding the right to government recognition of non-heterosexual adult intimate relationships. The *Lawrence* court's more careful review of the deeper meaning and import of earlier juridical and legislative pronouncements on sodomy regulation which necessitated overruling *Bowers v. Hardwick* suggests a court that is more willing to do more than superficially evaluate regula-

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parent(s) who resist visitation are a child's primary caregivers and that third parties have no legitimate and established relationship with the child. Historically, the dissent notes, grandparents had no legal rights of visitation. Court-ordered visitation is a 20th century phenomenon, and the obligation to visit grandparents is moral, not legal, according to the dissent.

201 405 U.S. 438 (1972).

202 *Id.* at 447. The Court rejected the State's purported purpose for the statute. The state claimed this was a health measure, but the Court found that the real purpose to discourage premarital sex. *Id* at 452.

203 *Id.* at 453.

204 539 U.S. 558 (2003).

tion of adult intimate relationships when it reviews the issue of government recognition and the social meaning of adult intimate relationships in the context of the same-sex marriage debate.

3. *Conclusions: The Blood, Marriage, and Legal Adoption Triumvirate Lingers?*

As can be seen from the foregoing, on only the rarest of occasions does the Supreme Court move away from the trio of definitional parameters of kinship: consanguinity (blood ties), marriage, and adoption. In *Eisenstadt v. Baird*, the Court protects non-marital couples' right to contraception. In *Smith v. O.F.F.E.R.*, the Court makes passing reference to the bonds that non-biological foster families can establish. And at first glance, the Court's *Moore v. City of East Cleveland* decision protecting non-nuclear families' rights in the housing context might appear to take a less constricted view of family than the other decisions discussed above. Even in this apparently more broad-minded decision, the Court holds fast to the rubric that only blood, marriage and adoption establish family ties.[205] In contrast, the Court's regulation of adult non-marital intimate relationships in *Eisenstadt* and *Lawrence* reveals a court willing to expand its notion of Constitutional protection of conduct within intimate adult relationships that do not fit within the blood, marriage and adoption triangle.

Some of the most puzzling of the Court's family cases—the point at which the bite of *Reynolds* holding that marriage is the cornerstone of society ultimately cuts most deep—are cases discussed above dealing with unmarried fathers' rights. At its simplest level, the Court ultimately holds in *Michael H.* that marriage trumps any biological or genetic connection between parent and child.

Several different conclusions can be drawn from the foregoing review. First, analysis of these cases reveals a consistent tendency by the Court to employ conclusory statements—albeit perhaps sometimes accurate statements—about what is and is not part of our Nation's tradition and history.[206] Resort to history to define the scope of a Constitutional right is certainly neither necessarily unprincipled nor unprecedented.[207]

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205 *See Moore*, 431 U.S. at 498.

206 *See infra* Part II(A)(1) (discussing conclusory statements in the Court's kinship opinions).

207 As discussed herein, the Court's substantive due process doctrine includes an historical component. *See infra* notes 11-12 and accompanying text. In addition, the Court's evaluation of a number of other Constitutional protections includes historical analysis, whether of prior legal doctrine and legislation or of cultural and social practices. For instance, the Court has looked to history in matters ranging from Indian sovereignty, see *Duro v. Reina*, 495 U.S. 676, 691, 695 (1990) (discussing a sixty-year trend towards Indian self-determination and its impact on the passage of the Indian Reorganization Act); the history of parades in *Hurley v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston, Inc.*, 515 U.S. 557, 568, 569

However, the more careful historical, anthropological, and sociological studies of kinship practices discussed in the subsequent section suggest that neither historical nor present-day American kinship practices are so easily described.[208] The point here is not that sociology or cultural anthropology is necessarily the best approach for the Court or even that the Court is adequately equipped to evaluate this research, but rather that these disciplines problematize the Court's broad-brush statements in its kinship cases about the nature of American families. Determining what is or is not "deeply rooted in our Nation's history and tradition" or what rights are "implicit in concepts of ordered liberty"[209] when it comes to families, might yield different conclusions depending on the sources consulted.[210]

Second, the conclusions reached by the Court in its kinship cases often (but do not always) constitute a reification of historical practices over current kinship practices.[211] To the extent that the Court has established a general doctrinal rule for limiting the scope of substantive due process to historical practices, it obviously yields this result.[212]

(1995) (describing parades as "[p]ublic dramas of social relations" and modes of expression, especially in cases involving protest marches); history of the Census in *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 322-324, 336, 341 (1999) (discussing the decennial census "undercount" and the measures taken to correct it). Resort to other disciplines is not limited to history. The Court's inter-disciplinary research includes, *inter alia*, psychiatry in *Washington v. Harper*, 494 U.S. 210, 222, 223, 227, 231, 234 (1990) (referring to psychiatric articles in discussing the necessity for a hearing prior to the administration of psychiatric drugs to a mentally ill prisoner), and again in *Lee v. Weisman*, 112 S. Ct. 2649, 2659 (1992) (citing to three psychological journals to support its decision that high school students who dissent from religious exercises would suffer if forced to pray), and geology in *Amoco Production Co., Inc. v. Southern Ute Indian Tribe*, 526 U.S. 865, 871–73, 875–76 (1999) (discussing geological studies). See also, the now oft-discussed *Daubert v. Merrill Dow Pharmeceuticals, Inc.*, 509 U.S. 579, 593–594 (1993) (discussing standards for expert testimony), and Conley & Peterson, *supra* note 31, at 1183 (describing the FJC's manual in response to *Daubert*).

208 See Part III(A)(2)(d) (discussing early South Carolina gentry); Part III(A)(2)(c) (describing African American slaves' kinship practices).

209 *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

210 *See* JOHN L. GADDIS, THE LANDSCAPE OF HISTORY 1–3. Gaddis alludes initially to "history" as portrayed by historians, as a foggy landscape, inherently prone to indeterminacy. Some would argue that this assumes an intellectual honesty on the part of the Court, that is, "that [the Court] would care if 'tradition' could be more carefully constructed." Personal communication with Ron Krotoszynski, September 2004. As Professor Krotoszynski points out, "the results may drive the reasons, rather than the other way around." *Id.* The Justices themselves disagree about whether statutory pronouncements should form the measure of historical practices. Justice Scalia, in *Michael H.* endorses the legislative designation, while Justice Brennan, dissenting in the same case, endorses a less "pinched" approach. *Michael H.*, 491 U.S. at 125–26, 145.

211 One might characterize the Court's decision in *Michael H.* as such a case, given the more recent development of DNA testing as being undercut by the Court's reference to historical protection of intact marriages.

212 See introduction to this section discussing the Court's use of history to limit the scope of substantive due process.

In two cases, however, *Loving* and *Lawrence*, the Court was faced with the unique situation of a minority of states that rejected protection for relationships that have a more complex social history and history of legal regulation. In *Loving,* the Court specifically noted that the anti-miscegenation statutes at issue had deep roots going back to the colonial period.[213] At the time it decided *Loving,* however, the Court noted that only sixteen states had anti-miscegenation statutes on the books, and that fifteen years earlier, a total of thirty states had such provisions.[214] Simi-

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213 *Loving v. Virginia,* 388 U.S. 1, 6 n.5 (anti-miscegenation laws "arose as an incident to slavery and have been common in Virginia since the colonial period").

214 *Id.* at n.5. The Court does not characterize this minority of states' views as a *shift* in social norms, because that was in fact not the case, at least within the states that still had anti-miscegenation statutes. By contrast, in *Lawrence,* the Court faced an actual change in social practices and beliefs as reflected in statutes concerning sodomy. In its earlier sodomy decision, *Bowers*, the Court noted that a majority of states had anti-sodomy statutes. 478 U.S. 186, 192–93. However, within the next ten years, most states repealed their statutes criminalizing sodomy, such that when the Court next addressed the question of the constitutionality of Texas' sodomy statute, only 13 states continued to have such prohibitions. See *State v. Lawrence*, 539 U.S.558, 123 S. Ct. 2472, 2474 (2003), and Brief Supporting Petition for Certiorari on behalf of the defendants, at 9–10 and 23–26.

Even if the Supreme Court was right in its historical analysis in these cases, we have experienced several cultural and scientific changes since that time. For instance, the process of legally determining paternity has radically altered over the past few decades, moving from non-scientific trials in which juries must determine witness credibility as to sexual conduct that might (or might not) have yielded offspring, to a purely scientific approach in the form of DNA testing. Even the dissent in *Michael H.* noted this fact. *Michael H.*, 491 U.S. at 156 (Brennan, J. dissenting). The phenomenon of relying on factors other than science to prove procreative potential is not, unfortunately, without current support. As recently as 2003, a prominent candidate being considered for a federal judgeship opined, in response to the plea that abortion should be kept available for victims of rape, that conception from rape is an extremely rare occurrence. His claim is unsupported by science, which clearly demonstrates that the rate of conception from rape and consensual sexual intercourse are virtually identical. Recently, the importance and sway of DNA testing has arisen in cases where fathers have found out that the children they have raised are not their biological offspring. In one of such cases, a Texas court ruled in a way that at best can be described as ambivalent; in that case, the Texas court took custody away from and denied visitation with the "father" while at the same time it mandated he continue to financially support the children. *See* Tamar Lewin, *In Genetic Testing for Paternity, Law Often Lags Behind Science,"* N.Y. TIMES, Mar. 11, 2001 at A1. These cases necessarily of course now come to the courts in part because of the advent of DNA testing. But for the holding in *Michael H.*, DNA testing would arguably give a genetic parent increased status over a social parent.

In considering the role of DNA testing in legal definitions of kinship, however, we must keep in mind that resort to DNA testing to determine the scope of protected relationships reflects a culturally contingent choice. As anthropologist Robert Parkin explains, reliance on science in the form of DNA tests itself reflects a culturally specific valuation of science, whereas in other cultures, "different attitudes may prevail, and there may be no interest in . . . scientific proof at all, so that kinship becomes even more evidently a matter of social definition, of belief." PARKIN, *supra* note 6, at 5–6. Ultimately, according to Parkin, "paternity, and kinship generally, remain matters of purely *social* definition." PARKIN, *supra* note 6, at 6. For instance, in some cultures, the role of the divine in the production of offspring is seen as akin to that of a biological parent, such that a child would have either three physical parents, or a mother and a divine parent. *See e.g. id.* at 14. This is not necessarily anomalous or even that exotic: surrogacy arrangements yield more than two biological (if not genetic) parents. And further, recent

larly, in *Lawrence,* the Court addressed the rapid transformation of legal regulation of sodomy in the preceding decade and a half. In both *Loving* and *Lawrence,* the Court declined to uphold historical practices evidenced in the state statutes at issue, and instead, used its authority to bring Virginia and Texas into line with the majority of other states' enactments. *Loving* and *Lawrence*, thus, in one sense can be seen as normative rather than merely descriptive and reproductive of historical practices. Further, in both *Loving* and *Lawrence*, we witness the Court rejecting current practices reflected in some state statutes and adopting more modern and broadly accepted social practices and beliefs. Relying upon this particular approach—that the Court will corral outlier states once state statutory trends are sufficiently demonstrated—has an important limitation: majority populations and practices must depend upon majoritarian good will to achieve substantive due process protection. It is my suggestion that in the context of determining the scope of protected kinship structures, nuanced studies of both historical practices and substantial changes to those practices over time such as those of contemporary historians, sociologists, and cultural anthropologists discussed in the following section, suggests a richness in American kinship practices not revealed in most of the Court's kinship cases discussed above.

III. VARIETY IN KINSHIP PRACTICES IN THE UNITED STATES

This Part presents a collection of studies by cultural anthropologists, sociologists, and historians of American kinship. Because questions about the nature of family relations form the core of anthropological kinship studies and of anthropology more generally,[215] this Part begins with a brief discussion of anthropologists' understanding of kinship. It then proceeds to describe the studies themselves to demonstrate the great variety of kinship patterns and beliefs in the United States; some of these reveal a displacement of marriage from the center of some kin networks while others do not. In the remainder of this section, the actual studies are described and analyzed. This is not intended as a comprehensive review of all sociological or anthropological studies of families in the United States.[216] The studies discussed in this section represent a wide

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scientific developments such as cloning or tri-gametic in vitro fertilization hint at the possibility of a child having two mothers, two fathers, and even greater than or fewer than two *genetic* parents. *See* Kyle Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization,* 7 AM. U. J. GENDER, SOC. POL'Y & LAW 431 (1999). Thus, biological and even genetic parentage may differ from one cultural context to another both extraterritorially and within the United States itself. *See* PARKIN, *supra* note 6, at 14.

215 *See supra* Introductory paragraph to Part II.

216 Phyllis Chock, a cultural anthropologist who investigates the kinship practices of Greek-Americans, works in the tradition of David Schneider. *See, e.g.*, Schneider, *supra* note

variety of cultural groups to demonstrate the wide variety of kinship practices in the United States. They also highlight the different relationships that are emphasized in each cultural group. In addition, two of the studies—namely that of the Navajo and of Japanese-Americans—were chosen because they begin with, and subsequently draw upon the work and intellectual tradition of the "genitor and social father"[217] of American kinship studies, David Schneider. This section, in part analyzes these studies for their potential impact on the Court's kinship decisions described in the previous section. As this section demonstrates, in some cases, these studies might support the conclusions reached by the Court, and in others, they would suggest a different result could have been reached.

A. ANTHROPOLOGY'S THEORETICAL FRAMEWORK AND ITS RELEVANCE TO THE COURT'S STRUGGLE OVER FAMILY DEFINITION

According to anthropologists, kinship is "a system of rights and responsibilities between particular categories of people."[218] The basic concept of kinship refers not only to biological or legal connections between people but also to "particular positions in a network of relationships."[219] Beyond this basic definition, however, there are actually two divergent strands of thought within anthropology as to the content of the term "kin-

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15, at 122; Chock finds that the spiritual bonds that develop in Greek-American cultural groups can rank as important as biological and marital ties, and that they take on qualities typically reserved to kin ties. *See* Phyllis Pease Chock, *Time, Nature, and Spirit: A Symbolic Analysis of Greek-American Spiritual Kinship*, 1(1) AMERICAN ETHNOLOGIST 33 (Feb. 1974). *See also generally* ROBERT PARKIN, KINSHIP: AN INTRODUCTION TO BASIC CONCEPTS 124–25 (1997) (describing the differences between pseudo-kinship, ritual or spiritual kinship, and fictive kinship.). For instance, a sexual relationship between those whose bond was spiritual, such as between a godparent and a godchild, is considered taboo just as an incestuous relationship between parent and child, or between siblings, would be taboo in a traditional kin relationship. *See* Chock, *supra* at 33. To the extent that spiritual kinship of this variety reflects practices such as incest, prohibitions typically restricted to blood and affinial ties that are symbolic of these more traditional varieties of kinship, Shock's findings continue to force us to broaden our notions of kin ties.

217 *See* SCHNEIDER, *supra* note 15. William Eskridge and others take a similar approach in evaluating the legal regulation of sodomy. *See, e.g.*, Eskridge, *supra* note 9. David Chambers, in his presentation for a 2003 Brigham Young Symposium on the Future of Same-Sex Marriage, urged that we consider this kind of evidence when we talk about what *is* and what *is not*, when making claims related to the debate over same-sex marriage. I refer to Schneider as the genitor father due to his seminal study of white urban American kinship. I refer to him as a social father due to his mentorship of the many cultural anthropologists who have expanded our knowledge of American kinship practices. For a discussion of the distinction between a genitor and a social father, see *infra* notes 319-320 and accompanying text.

218 Anita Ilta Garey & Karen V. Hansen, *Analyzing Families with a Feminist Sociological Imagination*, FAMILIES IN THE U.S. (2001). *See also* PARKIN, *supra* note 216 (describing the concept of kinship); note 6 and accompanying text.

219 Garey & Hansen, *supra* note 218, at xviii.

ship." In anthropological circles, kinship is viewed through either a biological or a cultural lens. Biology or genealogy-focused anthropologists link kinship to the biological facts of copulation and reproduction. Under this orientation, kinship is present in all human societies, meaning that societies "all impose some privileged cultural order over the biological universals of sexual relations and continuous human reproduction through birth."[220] A biology-focused anthropologist thus emphasizes genealogy, parent/child relationships (filiation and descent),[221] and sexual conduct in different cultural contexts. By contrast, social or cultural anthropology focuses on the particular social or cultural meanings or interpretations of these "biological universals" as they vary across cultures.[222] For instance, in different cultural contexts, consanguinity and/or sexual relations, in turn, might or might not be coterminous with marriage-like (affinial) bonds,[223] and might or might not coincide with coresidence.[224]

Additionally, anthropological studies sometimes also distinguish between "social [or demographic] systems of kinship" and "cultural systems of kinship, while others—such as Yanagisako's on Japanese-American kinship—insist that these two categories cannot be meaningfully separated."[225] To the extent that they are analytically if not practically severable, the former sociological/ demographic depiction of

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220 PARKIN, *supra* note 216, at 3.

221 *See id.* at 14–15. Filiation is not to be confused with "affiliation." Filiation specifically refers to the parent/child relationship, while "affiliation" refers to the relationship between one person and the whole of a descent line. *Id.* at 16. Different cultures may approach descent differently, emphasizing some links and not others or focusing on maternal rather than paternal links (thus emphasizing one at the expense of the other), or even, may ignore descent altogether. *Id.* at 15. Some societies lump these lines into "descent groups" such as clans. *Id.* at 17.

222 *Id.* at 3. *See generally* Garey & Hansen, *supra* note 218, at xviii-xix (discussing biological and affinial kinship links).

223 PARKIN, *supra* note 216 (stating that blood-ties and sexual relations do not necessarily coexist with affinial bonds).

224 *See, e.g.* Parkin, *supra* note 216 at 19, 25–26 and Chapter 3 (explaining that coresidence does not necessarily coexist with consanguinity or affinity).

225 SYLVIA JUNKO YANAGISAKO, TRANSFORMING THE PAST: TRADITION AND KINSHIP AMONG JAPANESE AMERICANS 13–17 (1985) (describing and critiquing Schneider's insistence on focusing on cultural kinship to the exclusion of social kinship). In an earlier iteration of her thesis, Yanagisako starts from the perspective of Schneider's bifurcation of these two categories, but then uses her study to show the problems with such an approach. See Sylvia Junko Yanagisako, *Variance in American Kinship: Implications for Cultural Analysis*, 5(1) AMERICAN ETHNOLOGIST 15, 16 (Feb, 1978). In her subsequent book-length description of her research, Yanagisako is explicit that her research includes both normative statements and descriptive accounts of her study subject's actions in both the past and the present. YANAGISAKO, TRANSFORMING THE PAST, *supra* at 17. *See also, e.g.*, Janet Dolgin, *Choice, Tradition and the New Genetics: The Fragmentation of the Ideology of the Family*, 32 CONN. L. REV. 523, n.113 (2000) (describing Schneider as focusing on "the culture of American families and not their demography"). My term "social kinship" would refer to demographics and actual kinship practices. According to Dolgin, Schneider was "concerned with the sym-

kinship consists of recounting *actual* kinship practices—in other words, how people in the world "cope with the facts of human reproduction."[226] The latter cultural systems of kinship is, in a sense, a *normative* construct insofar as it focuses on those aspects of kinship that seem to matter to the study subjects.[227]

More particularly, the *cultural analysis* of kinship involves deducing the cultural *meanings* of various kinship practices, regardless of whether or not these aspects of kinship are reflected in how the study subjects live their own lives.[228] The sociological/demographics of kinship most directly confronts the Court's statements that marriage in particular forms the central relation in U.S. kinship practices and thus forms the focus of Constitutional analysis.[229] The latter, cultural kinship, dovetails more closely with some members of the Court's position that statutory enactments are the best measure of Constitutional protection since they reflect majoritarian beliefs about what family and kinship relations are important, and more particularly, what they normatively *should* look like regardless of whether the prescriptive picture matches the actual descriptive one. Both social and cultural kinship are thus relevant to the Court's statements that marriage in particular forms the central relation in U.S. kinship practices, to the extent those statements are intended to describe both actual practice, and beliefs about kinship whether or not those beliefs are reflected in actual practice.[230]

B. THE ANTHROPOLOGICAL STUDIES

This section begins with a discussion of Schneider's original study of white urban middle-class Americans[231] and his subsequent expansion of that study to different socio-economic groups.[232] This section then proceeds to evaluate the anthropological studies that built upon Schneider's work: 1) Witherspoon's study of Navajo kinship[233] and 2) Yanagisako's study of Japanese American kinship.[234] Yanagisako's study is given more extensive treatment than the others, since she not

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bols that defined families and with the family as a symbol. He did not suggest that actual families necessarily conformed to that model." *Id.* (citing SCHNEIDER, *supra* note 15, at 1–6).

226 YANAGISAKO, TRANSFORMING THE PAST, *supra* note 225, at 15.

227 *See* YANAGISAKO, TRANSFORMING THE PAST, *supra* note 225, at 15–16; Dolgin, *supra* note 225, at n.113.

228 *See* YANAGISAKO, TRANSFORMING THE PAST, *supra* note 225, at 19–20.

229 *Reynolds, Maynard,* and *Griswold* of course come to mind.

230 *See* Dolgin, *supra* note 225, at n.113 (discussing David Schneider's work as other than demographic).

231 *See infra* at Part III(A)(1) (discussing the work of David Schneider).

232 *See infra* (discussing the expansion of his study to lower income white Americans).

233 *See infra* at Part III(A)(2)(a) (discussing the work of Gary Witherspoon).

234 *See infra* at Part III(A)(2)(b) (discussing the work of anthropologist Sylvia Yanagisako).

only captures the impact of the "moment" of immigration on family structures, but also the change in kinship patterns from first to second generation immigrants. This section then discusses the work of sociologist Carol Stack on low-income urban and rural African-American communities, supplemented by a discussion of Peggy Cooper Davis' explication of the impact of slavery on present-day African-American families.[235] As an additional comparison, and for its particular insights on historical kinship practices of one group of white Americans, this section briefly discusses Lorri Glover's recent study of 19th century South Carolinian elites' family structures.[236]

The purpose of evaluating these studies is not to suggest that the Court's decisions should turn upon the cultural or racial background of particular litigants. Rather, engaging these studies demonstrates several key points. First, these studies bring into question the universal accuracy of the Court's insistence in both dicta and in its substantive support for some of its decisions that marriage forms the central fundamental relationship of families in the United States. Second, these studies lend credence to Justice Brennan's claim that Justice Scalia's vision of family in *Michael H.* is "cramped." Third, as discussed in the preceding section, there are questions as to the source of the Court's dicta and substantive empirical claim as to the centrality of marriage in kinship practices in the United States; the studies which contradict that empirical claim lend further support to the idea that the Justices are relying on their own sense of what are traditional kinship practices and beliefs.

1. *White Urban, Middle-Class and Lower Income Americans' Kinship*

For a significant period, "Western" anthropologists tended to study only "non-Western"[237] societies' kinship structures. In the late 1960s, David Schneider aimed the anthropological spyglass closer to home, and

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235 *See infra* at Part III(A)(2)(c) (discussing the work of Carol Stack).

236 These studies call into question Professor Adolphe's claim to a monolithic anthropological picture, and thus her justification for denying same-sex marriages. *See* Jane Adolphe, *The Case Against "Same-Sexed" Marriage in Canada: Legal and Policy Considerations*, paper presented at B.Y.U. Symposium on the Future of Same-Sex Marriage Claims, Aug. 29, 2003.

237 For a critique of the categories "East" and "West" and "Oriental" as opposed to "Occidental," see Laura Nader, *Orientalism, Occidentalism and the Control of Women*, CULTURAL DYNAMICS 2:3, 323–355 (1989). *See also* Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West"*, 1997 UTAH L. REV. 287 (1997) (examining the distinctions in criminal law in Eastern and Western societies on defenses to spousal murder); Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002); James G. Carrier, *Occidentalism: The World Turned Upside Down*, AMERICAN ETHNOLOGIST 19:2, 195–218 (1992) (discussing how anthropologists themselves have Occidentalized the West).

studied American, non-Native kinship structures.[238] Developing the notion discussed above of a cultural analysis of kinship, Schneider interrogated the *meanings* of various kinship components to those in the group he studied,[239] ultimately rejecting the idea, embodied in biology/genealogy-focused kinship studies, that kinship was a cultural universal grounded in reproduction (i.e., production of offspring and, relatedly, consanguineal ties) and in reproductive copulation (i.e., sexual relations for the purpose of reproduction and, relatedly, affinial ties).[240] Anthropological field work on American kinship practices following Schneider's original study exposes the complexity and cultural variation in kinship structures and practices. It is this variation in kinship structures that sits outside the margins of most of the Court's kinship cases. In the Supreme Court, the standard (if not universal)[241] account of kin relation-

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238 Schneider's focus was non-Native. Studies of the Navajo and other Native American kinship practices had been undertaken by others prior to this time.

239 *See* C. Quince Hopkins, *Variety in U.S. Kinship Practice: Substantive Due Process Analysis and the Right to Marry*, 18 B.Y.U. PUB. L. REV. __ (2004) (forthcoming).

240 *See* Dwight W. Read, *What is Kinship?* in THE CULTURAL ANALYSIS OF KINSHIP: THE LEGACY OF DAVID M. SCHNEIDER 78, 78–80 (Richard Feinberg & Martin Ottenheimer, eds. 2001). Drawing on Schneider's work, Dwight W. Read argues that the only way to understand kinship as anything other than a culturally specific and relative set of practices is to abstract it from the static "genealogical grid" and reconceptualize it as "terminological space." *Id.* at 81. That is, we must look at the "set of kin terms" employed by any particular cultural group as structured system of symbols, *id.* at 80–81, and the features of these "terminological structures" "are explicable through the logic governing their generation as abstract structures without reference to a genealogical grid." *Id.* at 81. Read does not reject the importance of the genealogical grid whole cloth, but rather argues that "the genealogical and terminological spaces are co-existing conceptual structures with overlap arising through application of the symbols from these two conceptual structures to the same domain of persons." *Id.* at 81. Read suggests that the "linkage between the terminological space and a genealogical grid is elucidated by analytically mapping the terminological space onto the genealogical grid," which in turn, "determines for each of the abstract symbols in the terminological structure its definition as a class of associated kin types." *Id.* at 81. Although I discuss these ideas further in subsequent sections, it is not necessary to delve into these more nuanced ideas about kinship as a set of symbols rather than practices and the *concept* of kinship as one abstracted from various *conceptions* of kinship as reflected in these symbols, in order to see the more straightforward critique suggested by the basic field work of both biology-focused and cultural anthropologists over the past few decades. It is thus important to understand that this critique and the subsequent reemergence of kinship studies in the late 1990s interface with recognition that the approach that the Court has taken to family and intimate relations protections is not just inconsistent with the nuances of then-existing anthropological research and understanding of kinship (both within the U.S. and elsewhere), but also that anthropologists' understanding has been radically altered by subsequent developments in that academic discipline.

241 One possible exception, discussed herein at Part II, is the Supreme Court's privileging a non-biological father—a step-parent—over a biological one in *Michael H.* 491 U.S. 110 (1989). Note, however, that Gerald D. (the non-biological father) receives protection because of his marital relationship with the child's mother, and not because of his own direct (albeit step-) relationship with the child. 491 U.S. at 119–20, 123 (discussing marital relation as important to protect).

ships is that "blood,"[242] marriage, and court-sanctioned adoption ties matter in terms of legal protection and oversight, while other links between people are something *other than* kinship, and so deserve little if any legal protection.[243] Thus, for instance, while biological, physiological or genetic parents receive extensive protection in the law, "social parents" rarely do.[244]

The subjects of Schneider's original study were white, urban, middle-class Americans residing in the Midwestern United States.[245] In addition to noting the distinction between social and cultural kinship systems,[246] Schneider came to several conclusions in his research. First, Schneider emphasized that kinship systems were not just a set of cultural practices, but more importantly, that those practices operate as a system

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242 In Schneiderian terms, "blood" is not in fact the real connector; rather, it stands in as a symbol of something else—a kinship tie. *See infra* note 248 and accompanying text (discussing Schneider's conception of blood as a symbol of kin ties); *see also* Dolgin, *supra* note 225, at 542.

243 *See Moore,* 431 U.S. at 498; *infra* at Part III (discussing scope of legal protection of kinship relations). *See also* Meyer, *Family Ties, supra* note 15, at 809.

244 For a discussion of social versus genetic parents, see PARKIN, *supra* note 6, at 5–6. This is the problem present in second parent adoptions by gays and lesbians, or just in ordinary custody cases between separating gay or lesbian couples. *Cf.* Troxel v. Granville, 530 U.S. 57 (2000). However, a question remains: do blood ties flow *through* a generation? See *infra* at Part II discussing these cases. Ironically, this legalistic and formalistic approach to kin structures, although originally (at least subliminally) informed by anthropologists' ideas of kinship, ultimately triggered a nearly eviscerating critique of kinship studies in the field of anthropology. *See* Linda Stone, *Introduction: Theoretical Implications of New Directions in Anthropological Kinship*, in NEW DIRECTIONS IN ANTHROPOLOGICAL KINSHIP 1–2 (Linda Stone, ed. 2001). Culminating with the work of feminist and queer theorists in the 1980s and early 1990s, traditional kinship studies faced radical, post-modern, and feminist critiques. *See* PARKIN, *supra* note 6, at ix (deconstruction of kinship notions exposing them as primarily culturally contingent, gendered, and ultimately phenomenologically non-existent). As a result of this critique, some anthropologists viewed kinship as a viable area of study as essentially dead. Interview with Sascha Goluboff, October 1999. These criticisms included arguments that traditional kinship studies' focus on marital and blood relations was Euro-centric in nature rather than universal, was masculinist in that women focus on different aspects of social relations other than merely sex and reproduction, and that it was an empty set for radical, feminist and post-modern critiques—e.g., Schneider and Yanagisako. This post-modern movement in kinship studies continues to develop in the areas of queer theory. *See, e.g.*, Judith Butler, ANTIGONE'S CLAIM: KINSHIP BETWEEN LIFE AND DEATH (2000); Linda Stone, *Preface* to NEW DIRECTIONS IN ANTHROPOLOGICAL KINSHIP ix, (suggesting one of the new directions has "to do with debates over the relationship between biology and culture in kinship studies"). This movement is further energized by the advent of new and improved reproductive and gender reassignment technologies. *See, e.g.*, EDWARDS ET AL., *supra* note 6, at ix. In addition, however, by the second half of the 1990s, a definite revival of more traditional kinship studies was clearly underway, albeit substantially strengthened, deepened, and more nuanced as a result of that critique. PARKIN, *supra* note 6, at ix-x. This kinship studies revival perhaps in part resulted from the deconstruction itself and the primarily Gay Lesbian Bisexual Transgendered movement for recognition of alternative family structures and the development of new technologies of procreation.

245 *See* DAVID SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT (1968).

246 *See* introductory discussion infra at Part III.

of symbols and need to be understood as such.[247] Based on the group he studied, he determined that in American kinship, blood served as a *symbol*—a symbol of shared bio-genetic substance:

> The biological elements in the definition of kinship have the quality of symbols. That blood relatives share biogenetic substance is a symbol of unity, of oneness, and this is symbolically interchangeable with the symbol of love. . . .[B]iological unity is the symbol for all other kinds of unity including, most importantly, that of relationships of enduring diffuse solidarity.[248]

Second, Schneider identified as a central notion of American kinship, this just cited concept of "enduring diffuse solidarity."[249] In coining this phrase, Schneider more helpfully explained that this was "sociological jargon for what Americans most usually refer to as 'love.'"[250] Finally, Schneider initially concluded from his research that marriage and reproduction, as expressed in the symbols of blood and reproductive sexual intimacy, form the core of American kinship—of 'enduring, diffuse solidarity."[251]

Twelve years after he published his study, however, his own research, as well as that of a number his doctoral students challenged his conclusion that his informant group—that is, the subjects of his study—characterized all American kinship practices.[252] In his 1980 coda to *American Kinship*, Schneider acknowledged that one could not necessa-

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247 Although the idea that cultural practices operate on a symbolic level was not new to anthropology, it was typically limited to the realms of religion, myth, and comparable areas. It was not until Schneider that this idea was extended to kinship systems. YANAGISAKO, TRANSFORMING THE PAST, *supra* note 225, at 13–14. Schneider emphasized the "culture of American families [rather than] their demography." His primary concern was "with the symbols that defined families" rather than concluding that "actual families necessarily conformed to that model." Dolgin, *supra* note 225, at n.113.

248 SCHNEIDER, *supra* note 245, at 107.

249 *Id.* at 52–53. The term "diffuse" refers to the fact that it "is not narrowly confined to a specific goal or a specific kind of behavior." By "enduring," Schneider means that "two members of the family cannot be indifferent to one another, and since their cooperation does not a have a specific goal or a specific limited time in mind, it is 'enduring.'" *Id.* "Solidarity" means that "the relationship is supportive, helpful, and cooperative; it rests on trust and the other can be trusted." *Id.*

250 *See* Dolgin, *supra* note 225, at n.114 (citing SCHNEIDER, AMERICAN KINSHIP, *supra* note 245, at 50.

251 SCHNEIDER, *supra* note 245, at 50. Also see my critique of one legal academic's adoption of this earlier broad conclusion of David Schneider's without reference to Schneider's subsequent caveat. Q. Hopkins, *supra* note 239, at n.15 and accompanying text, referencing David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 810 (1999) (discussing David Meyer's reference to Schneider in support of the idea that social norms map onto legal norms, but without Schneider's subsequent caveat about its restriction to the group studied).

252 SCHNEIDER, *supra* note 245, at Chapter 7: Twelve Years Later, particularly at 121–22.

rily extrapolate the conclusion of his earlier research on the centrality of marriage and reproduction to American kinship practices and beliefs from the subjects of his study—a homogenous white, urban, middle-class American group—to other cultural groups even *within* the United States.[253] As Schneider admitted, "[he] did make some very bad mistakes" in this central assumption of his first study.

Schneider explained that his own subsequent anthropological studies since his first study demonstrated that the meaning of "family" is different for different class groups in the United States.[254] For instance, his later studies revealed that the notion of co-residence as a critical symbol or marker of "family" is significantly lower in lower class families than for middle class families, something echoed in Carol Stack's sociological study of lower income African-Americans.[255] This particular distinction directly brings into question Justice Scalia's emphasis in *Michael H.* on "the household" which characterizes the "unitary family."[256]

In this mea culpa, Schneider also noted that Sylvia Yanagisako and others' work on immigrant communities further demonstrated the fallacy of his original conclusion that ethnicity "does not matter."[257] The next section thus first takes on two of the anthropological studies that expand Schneider's original studies of white Americans' kinship systems to the kinship systems of other cultural groups in the United States, one an indigenous cultural group, and the second an immigrant cultural group. The remainder of the studies discussed further expand our body of information about American kinship.

2. *Post-Schneider U.S. Kinship Studies*

Anthropological kinship studies since David Schneider's seminal work have expanded upon his findings in two significant ways, one critical and analytical, and the other substantive and descriptive. The analytical addition was Yanagisako's theoretical and methodological critique of Schneider's separation of cultural from social kinship discussed at the start of Part III.[258] The substantive addition was of course their expansion of the body of available descriptive accounts of kinship practices in various "ethnic groups, social classes, and regions in the United States."[259] The anthropologists who engaged in this task of exploring the kinship practices of other cultural groups in the United States revealed in

253 SCHNEIDER, *supra* note 245, at 121–23.
254 *Id.* at 122.
255 *Id.*
256 *See Michael H.*, 491 U.S. at n.3.
257 SCHNEIDER, *supra* note 245, at 122.
258 *See* discussion infra at the beginning of Part III.
259 YANAGISAKO, TRANSFORMING THE PAST, *supra* note 225, at 10–11.

their studies a number of interesting divergences in kinship beliefs and practices between these different groups.[260] Sociologists such as Carol Stack added to this body of information on U.S. families, although not working directly within the Schneider tradition. The growing body of historical research such as Lorri Glover's represents, also expands upon Schneider's work, albeit indirectly, on the *meanings* of various kin-ties in *historical* kinship practices in the United States.[261]

a. Navajo Kinship

Gary Witherspoon, a Schneider protégé, picked up the study of American kinship, directing his attention to the kinship practices of the Navajo. The Navajo are, in fact, one of the most studied cultural groups in the United States, but Witherspoon's research employed Schneider's method of a symbolic analysis of kinship, interrogating the meanings of Navajo kinship practices.[262] Unlike Yanagisako's research on Japanese Americans, however, Witherspoon also thus stuck more closely to Schneider's study of cultural kinship to the exclusion of social kinship. Therefore, although his study reveals the normative framework of Navajo kinship—often derived from interpretations of Navajo myths—it does not reveal actual kinship practices, much less whether these two are in accord with each other. Finally, this focus on belief systems rather than actual practices necessarily excludes a dissection of the impact of formal and informal U.S. government policy on Navajo family structure today. European colonization, forced migration and internment of the

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260 Recall that Schneider himself focused more on the first (belief systems)—at least as a belief system can be characterized as the same as meanings of symbols. In addition to refocusing the anthropological microscope onto other American sub-cultures, several subsequent American anthropologists used Schneider's analytical emphasis on the "symbolic and meaningful structures underlying the normative and behavioral systems of kinship," see YANAGISAKO, TRANSFORMING THE PAST, *supra* note 225, at 14, to analyze not static kinship structures, but how kinship structures, practices and meanings *change* over time. Some of these studies employ a true Schneiderian symbolic analysis of their subjects' kinship systems, while others do not, but rather focus on the practices themselves. *See* YANAGISAKO, TRANFORMING THE PAST, *supra* note 225, at 14 n.14. Sylvia Yanagisako's study of three generations of Japanese Americans in Seattle, discussed in the final section, represents the genre of those employing his symbolic kinship study.

261 *See, e.g.*, LORRI GLOVER, ALL OUR RELATIONS: BLOOD TIES AND EMOTIONAL BONDS AMONG THE EARLY SOUTH CAROLINA GENTRY (2000) (discussed herein at Part III(A)(2)(d)).

262 *See* GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE (1975). Although not Navajo himself, Witherspoon married a Navajo woman and lived on the Navajo Reservation. This rendered him less of an outsider which facilitated his research. For this reason, his research on Navajo kinship is one of the few studies to actually be cited with approval by the Navajo Supreme Court. *See* Daniel L. Lowery, *Developing A Tribal Common Law Jurisprudence: The Navaho Experience*, 1969–1992, 18 AM. INDIAN L. REV. 379, n.91 and accompanying text (1993) (noting the Navajo court's historically distrust of studies of Navajos conducted by non-Navajos, but citing to Witherspoon's determination that a child traditionally is placed with the mother upon divorce).

Navajo people in 1864, mandatory placement of Navajo children in boarding schools, and the pervasive practice of removing Navajo children for adoption into white homes, undoubtedly had a significant impact on Navajo family structure.[263]

What Witherspoon did reveal in his research was that within Navajo kinship beliefs, the primary kin tie is that between mother and child, rather than the one between spouses.[264] Marriage, defined as cohabitation and sexual intercourse, is significant, but it is considered a "weak and insecure" relationship in contrast with the "strong and secure mother-child relationship."[265] Further, one aspect of marriage that is particularly significant that it establishes a tie between father and child.[266] That is, a father's kin relationship runs *through* the child's mother and attaches to the father by virtue of the father's marriage *to* the mother, rather than flowing directly from father to child. Should the marriage end,[267] the father's kinship relationship to his child is severed as well.[268]

To the extent that one might translate Navajo kinship beliefs to other contexts (again, not the primary thrust of this analysis) this kind of kinship structure, would, in one view, accord with the Supreme Court's holding in *Michael H. v. Gerald D.*[269] That is, the *Michael H.* plurality determined that when a child is born to a woman during her marriage to a man not the child's father, the non-marital but biological father's relationship to his biological child is preempted by the marital relationship between the marital but non-biological father and the child's biological mother.[270] In this way, the "father" of the child in *Michael H.* is the person who is married to her mother.[271]

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263 On all but the issue of adoption practices, see Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. Rev. 1, 17-20 (1999) (describing these events and their impact on Navajo family structure, particularly U.S. policies that centered male authority in the family in contrast with traditional Navajo social systems). For a discussion of adoption, see generally, Rebecca L. Miles, Bootless Cries: Asking a Federal Court to Re-Examine a State Court's Application of ICWA Under 25 U.S.C. § 1914 (unpublished manuscript) (on file with the author).

264 WITHERSPOON, *supra* note 262, at 21, and 30–31.

265 *Id.* at 28.

266 *Id.* at Chapter 5, *Father and Child*, particularly at 34–35.

267 Witherspoon notes the traditional Navajo method of divorcing is for the wife to place the husband's personal belongings on the doorstep of their dwelling. *Id.* at 75. Contemporary Navajo divorce practices in tribal court are similar to, although not identical with, Anglo divorce practice.

268 *Id.* at 30–31 ("[I]t is the marriage of the father to the mother which ties the father to his children. When the marriage is dissolved, the father-child relationship is behaviorally and functionally dissolved, or almost so.").

269 491 U.S. 110 (1989).

270 *Id.* at 129.

271 Interestingly, the Navajo Supreme Court, when faced with a custodial claim by a non-Navajo Native American mother against a Navajo father, sidestepped its own kinship tradition

b. Japanese American Kinship

Sylvia Yanagisako, also a Schneider protegee,[272] drew upon his work in her research on Japanese Americans' kinship structures.[273] For purposes of our discussion, two aspects of her findings are particularly critical, the first related to the scope of who her study subjects view as kin and the second being her major contribution to the field of kinship studies: the process of kinship change.

First, Yanagisako found that the kinship ties in Japanese American families are particularly broad. For instance, one's *sibling's* in-laws are considered family, despite the complete lack of actual blood or affinial tie, as are one's sibling's spouse's siblings (otherwise known as one's consanguine's affine's consanguines).[274] Further, in looking at the practice of *koden* (the exchange of mortuary offerings), Yanagisako found that friends and acquaintances not related by blood or marriage, even in the most attenuated form, take on aspects of kin relations through the system of *koden* obligation.[275] The Japanese American conception of family, therefore, exists beyond even what the Court recognized as important familial ties in both *Moore v. City of East Cleveland*[276] and recently in *Troxel v. Granville*.[277] This conception of kinship further separates notions of kinship from purely biological or affinial ties.[278] Again, the point is not that Japanese American kinship norms specifically should guide the Court, or that the cultural or racial background of the parties should drive the result in a particular case. Rather, these cultural kinship practices suggest that the Court's move in *Moore* away from narrow definitions of family finds some justification in actual kinship practices of some cultural groups in the United States.

The second critical addition from Yanagisako's research for the critique of the Court's rooting of Constitutional protection in historical tradition is a picture of kinship change over time, not just from generation

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of preference for mother/child bond and of fathers losing kin ties to their children upon divorce, by asserting a different "cultural kinship" tradition that the Court determined overrode it. This different tradition was one which recognized a child's ties to the full tribal community. Awarding custody of the child to the non-Navajo mother would thus sever these traditionally recognized kinship ties between child and community, a result the Navajo Supreme Court would not countenance. *See* Atwood, *supra* note 233, at 611–12.

272 *See, e.g.*, NATURALIZING POWER: ESSAYS IN FEMINIST CULTURAL ANALYSIS (IX) (1995).

273 *See* YANAGISAKO, TRANSFORMING THE PAST, *supra* note 225, at 13–20.

274 *See* Yanagisako, *Variance in American Kinship*, *supra* note 225, at 17.

275 *Id.* at 18–21.

276 431 U.S. 494 (1977).

277 530 U.S. 57 (2000).

278 *See* discussion of Yanagisako, *Variance in American Kinship*, *supra* note 225, at 17 (describing the application of the term "relative" to those not in fact related by biology or affinity).

to generation, but also within one generation.[279] This aspect of her research is particularly useful since it largely (although not entirely) focuses on the changing practices and beliefs about marriage itself within cultural groups.

Yanagisako's research focuses on first generation (Issei) and second generation (Nisei) Japanese Americans. The Issei in her study present a set of factors that likely were part of a number of first generation American cultural groups, whether they immigrated in the 1700s or at the turn of the 20th century, as had the Issei. Most early Japanese Americans were men who "planned to return home" and thus maintained close kin ties to those who either came with them but returned to Japan, or who had remained in their natal country.[280] Issei marriages, thus, "were from the beginning embedded in families that crossed national boundaries," and family in their natal countries retained significant involvement in the arrangement and oversight of those marriages as was typical of non-emigrant Japanese marriages generally.[281]

The dynamics of Issei marriages derived in part from the Japanese system of primogeniture. The position a man or woman occupied in the sibling hierarchy thus affected the nature of their marriage in terms of input into who they could marry, where they would live, and what the internal power dynamic in the relationship might be.[282] In families where the only child was a daughter, for instance, the family might arrange for her to marry a suitable man and then adopt that man as the successor to the family fortune. He, in turn, would take his wife's family name as his own and join her family's household (i.e., live uxorilocally).[283] Women who married first-born sons, by contrast, would join their husband's family's household (i.e., live virilocally).[284] The notion of "joining" the proper household of course was significantly complicated when dealing with cross-national families. This supports the view of the plurality in *Michael H.* that inheritance rules often undergird rules about marriage (or in that case, a presumption about legitimacy). On the other hand, as the particular system of inheritance shifts (or family economy in general shifts) as it does with second generation Japanese Americans, the kinship and marriage models shift as well.

The Nisei, the children of the Issei, faced a different set of cultural factors and political events that impacted their practice and understanding of marriage. As a broad-brush matter, the two generations differed in

279 YANAGISAKO, TRANSFORMING THE PAST, *supra* note 225, at 63.

280 *Id.* at 27–29.

281 *Id.* at 29–30.

282 *Id.* at 35–41, 48–62.

283 *Id.* at 36 and n.5.

284 *Id.* at 39.

terms of 1) mean age of marriage—the Nisei tended to marry later; 2) ultimate family size—Nisei families tended to be smaller; 3) educational level—the Nisei tended to have more formal education; and 4) their spouses occupations—the Issei were predominantly self-employed entrepreneurs while the Nisei tended to be salaried employees.[285]

Beyond these generalizations, Yanagisako further broke out the Nisei into four discrete "cohorts" that demonstrated intra-generational differences with respect to the practice and meaning of marriage. A "cohort" is an "aggregate of individuals . . . who experience the same event within the same time interval."[286] In Yanagisako's study, the relevant historical periods and events for the Nisei were the pre-World War II period (1926-1940), the War period (1941-1945), the resettlement period (1946-1955), and the post-resettlement period (1956-1970).[287]

Pre-war Nisei marriages were impacted by continuing control of economic resources by their parents, who, as a result, continued to control marriage itself.[288] By the end of the prewar era, however, marriages increasingly were "the result of Nisei-initiated courtship."[289] That said, dating outside of the Japanese American community was considered unacceptable.[290] Thus, the shift from traditional Japanese marriage to the white American model (as defined by the Issei and Nisei) was affected not by marriages to non-Japanese, but by other factors.

The advent of World War II, the bombing of Pearl Harbor, and the internment of Japanese Americans in prison camps beginning in 1942 "altered irrevocably the community and its familial structure."[291] The Issei were deprived of their businesses and thereby of one form of control over the marriages of their children. With no property to inherit, the system of primogeniture no longer played the controlling role that it had for Issei marriages.[292] As was true with relocation of the Navajo, U.S. government policies served to disrupt the Issei's political leadership and supplant it with Nisei autonomy.[293] This shift in control and the internment process itself, which exposed the Nisei to a larger pool of potential spouses, corresponded with an increase in Nisei marriages during this period.[294] Shortly after the war ended, and during the resettlement period, marriages to non-Japanese spouses also began to increase.[295]

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285 *Id.* at 63–64.
286 *Id.* at 66.
287 *Id.* at 67–82.
288 *Id.* at 67–69.
289 *Id.* at 69.
290 *Id.* at 70.
291 *Id.* at 73.
292 *Id.*
293 *Id.*
294 *Id.* at 74.
295 *Id.* at 76.

During the post-resettlement period, with the Nisei firmly ensconced in positions of social power, the Japanese American community "took on the familistic tenor that pervaded American Society in general . . . ."[296] At the same time, for younger Nisei who were just reaching marrying age, parental involvement in marriage arrangement and wedding plans resurged. This resurgence enhanced the tie between younger Nisei and their Issei parents than was the case between older Nisei and their parents.[297] Despite these variations, Yanagisako notes that the Nisei nonetheless cohere as a generation by virtue of the fact that the four cohorts converged into common patterns after the passage of years, including shared normative and cultural systems.[298]

The advent of World War II and related events correlated with a major shift in the circumstances of marriage between the generations:

> From Issei to Nisei . . . much more changed than the way in which spouses were selected. That Nisei husbands and wives no longer worked together in family businesses. . .this, in social import if not emotional drama, equaled the shift from arranged marriage to romantic marriage. The employment patterns of wives over time, the conjugal division of labor. . ., and the power relations of husbands and wives all differentiate the Nisei from their parents.

Yanagisako notes several key important differences in the *cultural meaning* of marriage as a social institution to the Issei as opposed to the Nisei. In general, the shift from the Issei to post-resettlement Nisei comprised the distinct move away from traditional Japanese marriage norms grounded in notions of duty towards what both generations characterize as the white American marriage model grounded in notions of romantic love noted in the foregoing quote.[299] For the Issei, marriage was fundamentally an institution of *giri* or duty, "enmeshed within a web of obligations and responsibilities to kin and community and love was relatively less important."[300] For Issei women, in fact, the death of their spouse was "associated with release from life's greatest burdens."[301]

Nisei marriages, by contrast, moved closer to romantic and egalitarian marriages, although the Nisei emphatically view them as a distinctly unique hybrid—as Japanese American rather than purely Japanese or

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296 *Id.* at 79.

297 *Id.* at 80.

298 *Id.* at 87.

299 *Id.* at 121–22, 105 n.2, 107 n.3.

300 *Id.* at 96.

301 *Id.* at 97.

purely American.[302] The Nisei view their marriages as a balance between "the all-too-whimsical and dangerously unstable American marriage and the emotionally ungratifying and often burdensome Japanese marriage."[303] Nisei relationships thus aim to incorporate love and affection, but also maintain the traditional Japanese notions of duty, commitment, and self-discipline.[304] These differences in meaning of marriage demonstrate the importance of avoiding simplistic statements about what marriage is or does within any given cultural group such as the Court espouses in *Reynolds, Maynard, Griswold*, and some of its parental rights cases.

One further critical difference between the Issei and the Nisei sheds light on the Court's parent-child and adult intimate relationships cases and it relates to the differential emphasis that each generation places on particular relationships within their kinship network. That is, the Nisei at first appear to emphasize the priority of the conjugal relationship over the parent-child relationship, and a type of marriage that is "the most intimate, solidary, and enduring bond in a person's life."[305] To the Nisei, their parents' type of marriage, with its "Japanese" hierarchy of relationships placed an unhealthy priority on the parent-child relationship.[306] Thus, at first take, for the Nisei, the married couple appears to be the "core of the family."[307] For the Nisei, "the love and unity manifested in their relationship are what shape the other relationships in the family. It is indeed the determining relationship, the one that "makes the family."[308] Yanagisako notes, however, that the Nisei's views are actually "more complex and ambivalent than these responses might seem to indicate."[309] In fact, when Nisei focus upon the marriages of their own children (the Sensei), they are "often critical of what they perceive to be an inordinate emphasis on the conjugal bond to the detriment of the parent-child bond. Thus, for second generation Japanese Americans, there exists a tension between the family relationships that vie for primacy in their kinship structure.

This study of Japanese American kinship reveals several key points related to the Court's analysis of protected kinship structures. First, Yanagisako's research on the Issei demonstrates an immediate impact from immigration itself on kinship structures. This suggests that reliance

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302 *Id.* at 107.

303 *Id.* at 108.

304 *Id.* at 108–09.

305 *Id.* at 109–10. In Yanagisako's view, this places them squarely in their category of "American marriage."

306 *Id.* at 109–10.

307 *Id.* at 110.

308 *Id.* at 110.

309 *Id.* at 111.

by the Supreme Court on the practices and legal protections of kinship structures to determine history and tradition should perhaps be limited to post-immigration "tradition." As a country made up of almost entirely immigrant populations, this significantly problematizes Justice Scalia's particular valuation of early English legal theoreticians in determining kinship traditions for the bulk of U.S. families. For the remainder (Native Americans), it of course goes without saying that English kinship protections would be irrelevant to how they structured their families prior to colonization.

Second, the differences Yanagisako uncovers between first and second generation immigrant communities tell us that the meanings of particular cultural kinship practices such as marriage do change over time, both from generation to generation and within a given generation. If kinship practices and beliefs change, then tying Constitutional protection to historical kinship practices seems nonsensical.

Third, the complexities of meanings attributed to particular cultural practices by any given cultural group (in this case the Nisei's views of marriage) suggest that legislative enactments might well not be an accurate or even the best measure of normative views of kinship. That is, legislative enactments by nature tend to gloss over subtle differences of the sort Yanagisako's study reveals in the Nisei conception of marriage as both a blend of historical notions of duty and modern notions of romantic love, and as centering marriage and then de-centering it by reinstating the importance of the parent-child bond.

c. African-American Kinship

Sociologist Carol Stack investigates present-day rural and urban African-Americans' kinship networks in her work. Unlike other researchers, Stack's particular focus is on a particular socio-economic group within the larger cultural group of African-Americans.[310]

Within the group she studied—lower-income African-Americans—Stack identifies extended care-giving networks for children that are sometimes, but not always linked by biological, genetic, or marital ties.[311] Particularly from the perspective of the children, Stack noted that "there may be a number of women who act as "mothers" toward them."[312] Similarly, "[a] woman who intermittently raises a sister's or a niece's or a cousin's child regards their offspring as much her grandchildren as children born to her own son and daughter."[313] Others have repli-

310 CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (1975).

311 *Id.* at 62–89.

312 *Id.* at 63.

313 *Id.*

cated Stack's finding on this point—notably Herbert Gutman, who describes conceptions of quasi-and non-kin social obligations where children (including fictive—i.e., non-biological or adopted—ones) are cared for by a network of surrogate caregivers of friends and extended family members.[314]

To a certain extent, these patterns of caregiving and subsequent acknowledgement of the kinship ties that derive from that caregiving dovetail with the *Lehr* Court's emphasis that parent-like behavior was relevant in determining Constitutional protection. If one looks at the plurality's holding in *Michael H. v. Gerald D.*, however, and its conception of parent-child rights flowing *from* the baseline institution of marriage, Stack's research directly conflicts with that holding. Stack demonstrates that these bonds between children and extended family in lower-income African-Americans in practice have little if anything to do with some pre-existing marital tie. By placing marriage at the center of family-related rights, as the Court does in *Michael H.*, it insures displacement of these particular kinship care networks outside the scope of Constitutional protection. These extended care-giving networks also suggest a revisiting of the Court's cases in the foster care setting, most notably *Smith v. O.F.F.E.R.*, that ultimately privilege blood connections over fostering ones. By contrast, her research supports the Court's holding in *Moore v. City of East Cleveland* that extended protection to a family that appears to have more closely resembled the care-giving structure that exists in Stack's study. Finally, not only would the bulk of the Court's kinship cases not recognize these extended kin and kin-like ties, neither would some acts of Congress, such as the Family and Medical Leave Act (FMLA).[315] The FMLA would deny benefits and protection for these types of family structures, and thus grossly favor their white counterparts—lower income whites, who are more likely to use affinial and biological relatives as caregivers.[316]

Replicating Schneider's revelation that socio-economic status matters to kinship practices, Stack also reveals that co-residence is not necessarily a marker of family ties within low-income African-American cultural groups.[317] As discussed in connection with Schneider's work, Justice Scalia's reference in *Michael H.* to the "household" of "unitary

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314 DAVIS, *supra* note 55, at 92 (citing Herbert Gutman).

315 Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2000).

316 Orlando Patterson, in RITUALS OF BLOOD, notes that this phenomenon today directly results from the profound impact of slavery on present-day African-American families, and, in particular, impacts African-American men's role in families. ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES (1998). Is the fact that family structure in present-day African-American families is a remaining construct of slavery a reason to discount its legitimacy or factual existence today? Certainly the answer must be no.

317 Stack, *supra* note 310, 62–67, 115–17.

families," Stack's research confirms the socio-economic specificity of such an emphasis on co-residence. In addition, instruments such as the United States Census, would thus exclude from its results a large number of functioning rural and urban poor African-American families as not falling within its narrow definition of family.[318]

Finally, Stack's research exposes several additional particular kinship elements of her African-American informants' group. First, Stack notes distinctions between types of fathers. Her study subjects distinguish between 1) the "genitor" father who biologically fathered the child; 2) the "pater" or "essential kin," typically referred to as "daddy"—the man who in fact raises the child; and 3) the "jural" or "socially recognized genitor father" who would be a father that not only sired the child but who also has played some additional role beyond just the act of conception.[319] These kinds of distinctions map somewhat roughly onto the social versus legal parent ideas at play in the Court's unmarried fathers' rights cases. Michael H., for instance, would likely be a "socially recognized genitor father," at least until the plurality got hold of him, whereas the father in *Lehr v. Robertson* would be a genitor rather than a jural father. These complex ideas of multiple types of fathers, just as is true with children's sense of multiple mothers, further problematize Justice Scalia's claim that "California law, like nature itself makes no provision for dual fatherhood."[320]

Stack also identifies a kinship practice in this cultural group where a father's tie to his natal family is particularly strong, sometimes enough to override his tie to his biological children. This particular strength of natal family ties would yield a different focus if the Court adopted it. That is, a focus on a child's powerful tie to his or her natal family undercuts the notion that the marital bond is paramount. It also would suggest a clearer protection for children's rights (as opposed to children's rights as derivative of parents' rights), and thus a broader protection for a child's ties to multiple kin units. This latter conception would also again contradict the holding in *Michael H.*, that a child could have more than one "father." Finally, Stack's research reveals that a mother's tie is sometimes stronger to her latter-born children than to her first-born.[321] In this structure of kin ties, an aunt or grandparent often takes on a social parent role.[322] The regularity of this practice thus might suggest a sufficiently

318 *See* discussion of the U.S. Census and the FMLA in the Conclusion, *infra* at 497.

319 *Id.* at 45 and n.1.

320 *Michael H.*, 491 U.S. at 118.

321 *See, e.g.*, STACK, *supra* note 5, at 46–49.

322 *Id.*

strong traditional practice that it should warrant Fourteenth Amendment protection.[323]

Any discussion of present-day African-American kinship must take account of the impact of slavery and its legacy on these kinship practices and meanings.[324] Peggy Cooper Davis, in her thoughtful and revealing text, Neglected Stories: The Constitution and Family Values,[325] presents a number of stories of kinship ties, primarily parent-child and husband-wife, that enslaved men, women, and children established *despite* slavery and legal bans on those ties. The people she describes *function* as families and create *de facto* spousal relationships.[326] Husbands and wives maintain lifelong commitments to each other even after they have been "trafficked" away from each other by the enslavers.[327] Davis also describes a second way some men and women dealt with separation because of sale by adopting a form of polyandry or polygamy. These separated spouses recognized that they were possibly never going to see each other again, so "marrying" a second spouse would take place, although not with a simultaneous repudiation of the first "marriage."[328] Davis' point, in large part, is that we need to take account of these multiple and different stories of slave kin ties and practices. In particular, however, her work suggests that the Court's, particularly Justice Scalia's, emphasis on legal proscriptions and permissions is misguided.

Further, Davis exposes how the *meaning* of marriage was significantly different for enslaved people than those who enslaved them. That is, marriage to enslaved African-Americans was a symbol of something much more than just a lifelong commitment to another person. In anti-slavery rhetoric, people viewed marriage as a symbol of freedom, citizenship, and humanity.[329] These historical accounts and meanings un-

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323 Again, these variations in kinship practice also suggest possible disparate treatment under Congressional acts such as the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*, or the United States Census.

324 For other discussions of the impact of slavery on African-American kinship, see, e.g., L. GLOVER, *supra* note 261, at Introduction; Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J. L. & HUMAN. 251 (1999); Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999); PATTERSON, supra note 316; Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1299–1300, 1324–43 (1998).

325 DAVIS, *supra* note 55 (arguing slave and anti-slavery narratives suggest another way of looking at family rights protections.).

326 *Id.* at 132.

327 *Id.* at 37.

328 Davis suggests that this is possibly an extension of African polygamy and not merely a construct resulting from the institution of slavery. *Id.* at 62–63.

329 *Id.* at 35. Note that elements of the post-slavery pro-marriage debate smacked loudly of racism: marriage (and parenting) were talked of as *rights* on the one hand, but also, talked of as a way of controlling or "civilizing" newly freed blacks, by avoiding the situation of newly freed slave women and children from becoming public charges. *Id.* at 39–40. *See also* A. Davis, *supra* note 324. This debate presaged racist overtones of later welfare debates and

doubtedly reverberate in the accounts of present-day African-American kinship practices.[330]

Finally, that the conclusion of the Court in *Reynolds*, still so close to and infected by the system of slavery, which had been formally (if not actually) dismantled by the Emancipation Proclamation just fifteen years earlier,[331] continues to reverberate in its kinship cases today is troubling at best. In addition, however, if the test of protected kinship practices is whether they are part of the historical fabric of our Nation, we should at this point be intellectually able to revisit the *Reynolds'* Court's conclusion as to the factual realities of marital relationships at the time that case was decided, and thus all of the cases decided since that time that have relied upon the *Reynolds* dicta, at least insofar as recognizing possible different kinship practices *then* taking place. In addition, in our assessment of the validity of *Reynolds*, it would also be consistent with reanalysis of both then-existing kinship practices that the Court take account of the devastating impact that slavery itself has had on African-American kinship relations. As (if not more) important, however, is that, in assessing variances between some present day African-American kinship structures and those of Anglo, middle-class, urban and suburban Americans, the Court should be extremely hesitant to conclude that the latter takes precedence over the former without regard for the fact that some present day African-Americans' kinship relationships cannot be neatly excised from and examined in isolation from the institution of slavery and its legacy.[332]

d. Kinship Bonds of Early South Carolinian Gentry

Although the prior anthropological and sociological studies focus on modern day kinship practices, it is also the case that historical practices are more complex than the Court's cases would suggest, as evidenced by the foregoing discussion of slave-marriages and other kinship ties between enslaved African-Americans. The recent historical research of Lorri Glover on the kinship bonds of early South Carolina slaveholding gentry during the century and a half prior to the ratification of the Fourteenth Amendment presents another example of a more nuanced description of historical kinship ties—an understanding of kinship ties different

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debates about tax policy and law. *See* Dorothy A. Brown, *Racial Equality in the Twenty-First Century, What's Tax Policy Got to Do With It?* 21 U. ARK. LITTLE ROCK. L. REV. 759 (1999).

330 *See generally,* PATTERSON, *supra* note 316.

331 *See* NEW YORK PUBLIC LIBRARY DESK REFERENCE 814 (2d ed., 1993).

332 *See generally* DAVIS, NEGLECTED STORIES, *supra* note 55; *see also* ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES (1998). And see discussion of Carol Stack's present day studies of African-American kinship structures, *infra* at Part III(A)(2)(c). Of course, the "easy" or at least transparent answer might be that under current doctrine only white, Protestant families get to define tradition.

from that discussed by the Court, and one where marriage and parent-child relations do not necessarily form the core kin tie.

In her research, Glover finds that brothers, sisters and the extended family formed the foundation on which South Carolina gentry built their emotional, social, and economic worlds.[333] As Glovers editors describe it, "adopting a cooperative, interdependent attitude, and paying little attention to [otherwise then prevalent] gendered notions of power, siblings served one another as surrogate parents, mentors, friends, confidants, and life-long allies. 'Elite women and men' simultaneously used those sibling ties to advance their interests at the expense of unrelated rivals."[334] Marriage ties existed, to be sure, but they operated almost as wallpaper—they were in the background, but were not central to the lives of these people. It was a similar situation with parent-child ties: they existed, but ultimately, the sibling bond overrode the inter-generational bond in importance.

Glover's research on early South Carolina gentry thus challenges deeply held assumptions about United States families, at least white, propertied families, in the eighteenth century. In particular, her work undercuts the Supreme Court's often-repeated tenet that marriage historically and traditionally formed the central and *fundamental* core of family structure in the Untied States. That is, to the extent that the Court's rationale for privileging the kinship norms of white Americans as they were practiced at the time the Fourteenth Amendment was ratified, Glover's research suggests that the Court's assumptions of what those norms and practices *were* may well not be empirically sound. On the other hand, Glover's research does suggest that the genetic tie between siblings does play a central role in the lives of early slaveholding South Carolinians. Her research thus further suggests that protection of those sibling bonds, such as in a case that might present questions of a child's interest in sibling adoption or in a split custody case might be something the Court should see as justified based on historical practices standing separate and apart from a marital relationship. That is, if the Court does rely on history and tradition to support such an expansion of Constitutional protection to some family ties, her research suggest it could do so even if it abandons marriage as the central construct upon which all family-related rights rest.

C. GENERAL CONCLUSIONS FROM THE STUDIES

These anthropological studies suggest that the Court's focus on historical Anglo kinship practices is too narrow to adequately delineate an ap-

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333 *See generally,* GLOVER, *supra* note 2.

334 GLOVER, *supra* note 228, cover jacket summary.

propriate set of Constitutional borders for legal protections of kinship relations. Analysis of these accounts reveals a rich array of kinship practices, beliefs, and social meanings of those practices. This rich array demonstrates a central problem with the Court's determination of tradition and its conclusions about the parameters of protected family structures. Although traditional heterosexual marriage is present in kinship practices and beliefs of all of these cultural groups, marriage does not necessarily always play the primary and central role in Americans' kinship structures as the Court sometimes states that it does in its kinship cases. The marriage tie is sometimes subordinate or peripheral to other bonds—whether mother/child (as in the Navajo tradition), or sibling ties (as with South Carolina gentry), or the more generic parent/child tie suggested by Issei kinship structures. This suggests that if there is to be any Constitutional protection of kinship ties based on historical and traditional practices, it needs to sweep more broadly than it does currently. It is thus important to incorporate these kinds of studies into our understanding of protected marital and non-marital kinship structures, in order that the protections are crafted in a way that maps onto actual kinship practices.

CONCLUSION

The image that emerges from the studies discussed here is a multifaceted picture of cultural diversity in U.S. kinship practices, as well as one of cultural forms that can and do change both in practice and in meaning over time. Not only does this fleshed-out understanding of U.S. kinship diverge from the narrow confines of statutory enactments, more importantly, it demonstrates the problem with the Court's present determination of tradition, and consequently, its determination of which are protected, as opposed to, unprotected, family structures. The Court's static image of U.S. families simply does not account for the reality of kinship practices. Further, Lorri Glover's study of Southern white gentry suggests that even the Court's vision of the historical U.S. family as primarily marital, heterosexual, patriarchal, and nuclear is perhaps just that—a vision. At a minimum, Glover's study demonstrates that it was not the universal practice the Court professes it to be.

The purpose of evaluating these studies is not to suggest that the Court should be required to ascertain the cultural or racial background of the particular litigants in its kinship cases and then search out anthropological or sociological studies of that kinship group in order to reach an appropriate decision. The suggestion, in other words, is not that the Court's decisions should necessarily turn upon the cultural or racial background of particular litigants. Rather, engaging these studies demonstrates several key points.

First, these studies demonstrate the basic inaccuracy of the Court's insistence in both dicta and in its substantive support for some of its decisions that marriage forms the central fundamental relationship of families in the United States. Second, these studies lend credence to Justice Brennan's claim that Justice Scalia's vision of family in *Michael H.* is "cramped." Third, to the extent that the Court has insisted on focusing on the marital relationship or "unitary family" as the source of other, derivative rights such as the parent-child relationship or parenting rights more generally, these studies suggest that the variety of kinship practices and beliefs would support de-coupling these derivative rights from the existence or non-existence of a marital bond.

Fourth and finally, to the extent that the Court's focus on the marital family is indeed cramped, these studies raise questions about the source of the Court's dicta and substantive empirical claims as to the centrality of marriage in kinship practices in the United States. From the review of the Court's cases in the prior section, the Justices—most notably the full Court in *Reynolds* and Justice Scalia in *Michael H.*—do not appear to consult or cite to empirical data in making their factual claims.

Had the Court had available or considered a study such as Schneider's study of white, urban, middle-class American families, it would at least have been able to support its empirical claim about the centrality of marriage with actual empirical evidence. Given the narrow group focus of Schneider's study, however, the Court would then have to face head-on why the norms and practices of that particular cultural group should be entitled to protection while others should not, something it has yet to justify in any of its cases that privilege these norms that happen to be those of white middle-class Americans. Perhaps the answer to that charge is simple: white, middle-class Americans still constitute the majority, and privileging those norms and practices is consistent with the concept of giving Constitutional protection to practices rooted in tradition. To the extent that Justice Scalia, in particular, focuses his substantive due process analysis of tradition on legislative enactments—i.e., majority rule—privileging the actual practices of the majority would at least be consistent.

That begs the deeper question, however, about why it is that majority rules (meaning statutes or social norms) should drive interpretation of the Bill of Rights—a decidedly counter-majoritarian document. To the extent that substantive due process rests on notions of fundamental rights rooted in ordered liberty, however, the Court could instead extend protection to those practices that promote what Martha Nussbaum refers to as "human flourishing."[335] Focusing on the functions served by various

335 Martha Nussbaum, SEX AND SOCIAL JUSTICE (1999).

kin-ties and practices rather than on their formal form or status, would support such an approach. As these studies demonstrate, the ways in which different cultural groups in the United States choose to satisfy those functions varies widely. Focusing on the basic functions of love, support, and protection—"diffuse, enduring solidarity"—that underlie human kinship ties would be consistent with the counter-majoritarian values of the Bill of Rights and would loosen the cramped box into which the Court has stuffed family-related rights to date.

The point of looking at these studies is not to claim that cultural anthropology or sociology or some other disciplinary body of work is necessarily the only or even best source of data for the Court in its kinship cases. However, since the question of tradition (and thus the substantive due process rubric more generally) is primarily descriptive rather than normative, it is arguable that the Court should look not just to historical, juridical, and legislative pronouncements to determine the scope of tradition, but also and perhaps originally, to these more nuanced descriptive accounts of actual kinship practices, as well as to the functions served by those practices.

If the Court does shift from an emphasis on legal regulation to actual practices (of course with a more fleshed out understanding of those practices), there, of course, arises a need for an analytical framework to cabin the Court's analysis of Constitutional protection for families.[336] It is possible that the analytical approach used by cultural anthropologists—focusing not just on social or cultural practices, but also on the meanings of and functions served by those practices—might provide a method of cabining the Court's substantive due process doctrine, while at the same time providing for expanded protection for non-marital and non-nuclear families.[337]

To reach that conclusion, however, further investigation is required on two fronts. As a preliminary matter, analysis of whether institutional competence to investigate these kinds of studies rests more with the Con-

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336 The contrary argument is that the only way to contain the Court's discretion is by insisting that it need concern itself only with the superficial—i.e., the legal regulation—of practices, regardless of the symbolic meaning of both those practices that are regulated as well as those that are not. This is the approach preferred by Justice Scalia in *Michael H.* and Justice Rehnquist in *Washington v. Glucksberg*, 521 U.S. 640 (1997). At times, the Court *does* engage the purposes and meaning of particular kinship practices such as parenting and marriage.

337 Further, extending the analysis to this deeper level would enable the Court to understand how kinship practices that appear to differ from cultural group to cultural group might in fact substantively be the same, thus warranting the same legal treatment. In other words, should the Court be faced with a minority group practice—one that the majority still saw fit to deny legal protection to (thus not rising to the level of a changing trend, such as was the case in *Loving* and *Lawrence*)—it could look to the functions served by that practice and determine if they comported with the functions attributed to the kinship practices of the majority.

gress or with the Court would need to be undertaken.[338] Second, assuming the Court is an appropriate forum for consideration of sociological or anthropological studies, a thorough investigation of whether cultural anthropology, sociology or some other disciplinary perspective or approach would be the most appropriate one for the Court to consult in determining the scope of Constitutional protection for kinship relationships.

Consideration of the studies discussed in this Article exposes the Court's claims about the nature of families in the U.S. as incomplete at best. Even if the Court remains at a superficial level of evaluation and understanding of kinship focusing upon statutory enactments, one need only look at the variety of family structures revealed even using the United States Census' narrow definition of family.[339] This data, at a

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338 Some social science research *has* gotten the Supreme Court's attention from time to time (albeit in a very limited fashion and highly sporadically). *See, e.g.*, Brown v. Board of Education, 394 U.S. 294, n.11. The advent of the Brandeis Brief represents a specific moment and method of bringing social science evidence to the Court's attention. *See generally* sources cited *supra* note 31.

339 The United States Census, which determines not just voting rights, but forms the basis for a number of fiscal decisions for federally funded benefits programs, uses a constrained definition of family, limiting families to those who both legally or biologically adopted, but also those who co-reside. *See* http://www.census.gov.population/www/cps/cpsdef.html (last visited July 2003) (defining a family as "a group of two or more people who reside together and related by birth, marriage, or adoption"); *see also* KEN BRYSON & LYNNE M. CASPER, in CURRENT POPULATION REPORTS/POPULATION CHARACTERISTICS (U.S. Dept. Of Commerce, Economics and Statistics Administration ed., 1998).

The Census is not the only place where the Congress employs a narrow definition of family. The Family and Medical Leave Act uses similarly constrained concepts of families. Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act,* 10 COLUM. J. GENDER & L. 77, 110 (2000). "Unlike the ADA, which extends protection to persons who have a 'relationship' with a person with a disability, the FMLA requires a 'recognized familial relationship' in order for benefits to be extended." *Id.* The FMLA entitles an eligible employee to take up to 12 work weeks of unpaid leave annually for the onset of a serious health condition of only a spouse, child or parent. *See* Nevada Department of Human Resources v. Hibbs, 123 S.Ct. 1972 (2003); *see also* Bornstein, *supra* at 84, 110-11 (noting that these limited relationship categories have been strictly construed). Though the FMLA does provide coverage for one who stands *in loco parentis* to the child, this provision is aimed at the situation where one single person is responsible for the ongoing care of the child, and thus excludes situations where a child has multiple caregivers, or caregivers who are not legally or genetically related to the child. *See* Bornstein, *supra*, at 111. Definitions of "parent" and "spouse" are similarly restrictive. *Id.* at 111, 112–13. Further, care of one's in-laws is not covered by the Act, nor is care for "relatives in extended or non-traditional families," including "relatives such as aunts, uncles, nieces, or nephews or biologically or legally unrelated family members with whom they live. *Id.* at 111. Even grandparents are excluded by the Act as both caregivers and as family members who might need caretaking by the eligible employee. *Id.* at 112. "[B]y excluding particular groups of individuals and family arrangements, the FMLA circumscribes the boundaries of appropriate family and gender roles, preserving a vision of family that is presumptively nuclear, heterosexual, middle-class, and male headed. . . ." *Id.* at 104. The definition of who constitutes an eligible employee and who constitutes a family member for whom the eligible employee is entitled to take leave to care for (a parent, child, or spouse) thus denies the FMLA benefit to those whose kinship and care-giving arrangements incorporate a broader

minimum suggests that American kinship formations often now vary widely from the traditional patriarchal nuclear family, and perhaps evidence an expanding cultural variation in kinship in the United States.[340] A single cultural norm might be applicable for a homogeneous culture, but not for one that is as originally and continuingly heterogeneous as is the United States.[341] These changing demographics challenge us, and the Court, to decide whether the true tradition and history and values of our country are to allow space for multiple beliefs and practices, or rather, that conformation to a single, static, monolithic model of kinship behavior and belief best represents our tradition.

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network of support, such as some urban African-American or recent immigrant communities. *Id.* at 111–12. See also discussion of variations in kinship care giving at infra Part III.

340 *See* tables of populations and rankings from the 2000 U.S. Census, available at http://uscensus.gov (last visited Aug 2003). The 2000 census information exhibits no differentiation between different sub-cultural groups of Latinos of different cultural roots, nor among blacks similarly with diverse cultural and historical backgrounds. Check: they are included in the "Other"category.

341 *See* Meyer, *Self-Definition*, *supra* note 27, at 791–94 (discussing the emerging family demonstrated by the new Census and questioning whether these changes should drive policy change in terms of protecting family structures); *Introduction: Nuclear Non-Proliferation*, 116 Harv. L. Rev. 1999, 2001-2002 (2003) (describing the "empirical splendor" of the new Census' picture of American family).