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Defining the Scope of the Constitutional Right to Marry: More Than Tradition, Less Than Unlimited Autonomy

Donald L. Beschle*

I. INTRODUCTION

Since the recognition of a constitutional right of privacy,¹ the scope of that right has been unclear. Consistently, however, it has been linked in some way to the concept of the family.² At the core of the modern "right of privacy" are at least limited rights to make decisions whether to have children,³ to educate and otherwise raise those children,⁴ and to live together with the members of one's nuclear or extended family.⁵ Thus, it is unsurprising that courts and commentators have formed something of a consensus supporting the existence of a constitutional right to marry.⁶ But

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1 The constitutional right of privacy is generally regarded as having first been enunciated in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Earlier cases spoke of "privacy" as an aspect of other constitutional rights. See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958) (privacy as part of the First Amendment right of association); *Skinner v. Oklahoma*, 316 U.S. 535 (1941) (privacy of reproductive rights as grounds for equal protection strict scrutiny). But *Griswold* elevated the notion of a right of privacy to one which stands on its own.

2 Both the antecedents of *Griswold* and its subsequent developments are discussed *infra* notes 70-122 and accompanying text.

3 See *Skinner*, 316 U.S. 535; *Griswold*, 381 U.S. 479; *Roe v. Wade*, 410 U.S. 113 (1973).

4 See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state statute prohibiting the teaching of foreign languages in primary grades held unconstitutional); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state statute requiring all children to attend public, rather than private, schools held unconstitutional); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (mandatory school attendance law could not be applied to Amish who substitute home education for high school education).

5 See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (zoning ordinance could not prohibit grandmother from living with grandchildren).

6 See, e.g., Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); John D. Ingram, *A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George—Or Mary and Alice at the Same Time?*, 10 J. CONTEMP. L. 33 (1984); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156

this consensus fragments over the question of whether that right is limited to the formation of a traditional, monogamous, heterosexual union, theoretically for life, or whether it also includes legal protection for voluntary arrangements which lack any, or all, of these features.

At this time, most courts lean toward the narrow view protecting traditional marriage,⁷ while most commentators seem to favor the broader view.⁸ But these sources seem to agree generally that the question is one which poses a stark choice between complete government neutrality concerning the nature of the family, on the one hand, and complete constitutional indifference to government intrusion into nontraditional living arrangements, on the other.

Each of these positions is seriously flawed. In order to frame an alternative, however, it is necessary to dissect the concept of a family, the nature of constitutional rights, and the consequences for government of the existence of such a right. When we do so, we will see that none of these is a single, necessarily unitary, idea. Instead, each can be seen as a collection of related concepts, often complementary, but not inevitably linked. The ability to disentangle these "bundles of sticks" can lead to the recognition of alternative approaches to constitutional protection of the family which are more satisfactory than either of the currently articulated options.

Rights have become thoroughly identified with the vindication of the choices of the autonomous individual. Surely that is an important part of the notion of individual rights, but an exclusive focus on personal choice may obscure those instances in which rights against government exist largely to permit individuals to fulfill duties or commitments to others, rather than to act in a

(1980).

7 See *infra* notes 68-132 and accompanying text.

8 In 1990, Thomas Grey surveyed law review commentary on the *Griswold* line of cases and found that, overwhelmingly, commentators read these cases in a way providing support for strong libertarian positions. In Grey's opinion, the commentary went far beyond the actual support given in the cases for such positions. Thomas C. Grey, *Eros, Civilization, and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 98-100 (1980). Since 1980, this trend has generally continued. See *supra* note 6; see also Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988); G. Keith Nedrow, *Polygamy and the Right to Marry: New Life for an Old Lifestyle*, 11 MEM. ST. U. L. REV. 303 (1981); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989). For dissenting academic views, see Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983); Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949 (1992).

completely self-regarding manner. The family, as both a social and legal concept, has evolved in a way which has emphasized its role in satisfying the needs of its individual members. Surely, this is an important part of the concept of family, but it may obscure the extent to which reciprocal duties are also central to the concept. The first two sections of this article will discuss these two points and their significance to the right to marry or to form a legally recognized family. The third part of this article will discuss the proposition that courts are not limited to the options of refusing to recognize an individual right, on the one hand, or striking down every impediment to the exercise of that right, on the other. The emerging notion of "undue burdens" on privacy rights may provide a useful tool for forging an alternative which may accommodate both core individual rights and legitimate expressions of social sentiment.

Finally, the principles discussed in these three sections will be applied to the specific question of the scope of the right to marry. Both of the most commonly articulated positions, that individuals outside of traditional family structures have no such right, and that individuals have the right to complete equality in government treatment of traditional and nontraditional arrangements, will be rejected. Instead, it will be argued that individuals have the right to be free of governmental interference when they seek to obtain many of the core benefits and take on many of the core duties of marriage. But they do not have the right to obtain all of the benefits, or all of the formal recognition, that government confers on preferred family arrangements. Government should be allowed to promote commitment to others, particularly those commitments which span generations, and to prefer family arrangements most likely to further those commitments. Still, even these decisions must be justified by some measure of rational argument, not merely on the assertion of prevailing distaste.

II. RIGHTS, FREEDOM, AND COMMITMENT

Modern western notions of human rights arose more or less simultaneously with the emergence of a consciousness which placed the human individual at the center of philosophical inquiry.⁹ It is, therefore, not surprising that while discussion of rights

9 Thus, Louis Henkin describes the history of human rights in a chapter which, although explicitly referring to earlier sources in natural law theory, is entitled "The First

has branched into a number of competing directions, such as positive and negative rights,¹⁰ and liberty and equality rights,¹¹ all primarily work from a model of the individual asserting a claim against the collective body. Something might qualify as a right by virtue of satisfying the individual's articulated desires.¹² But the welfare of others, and certainly of the community as a whole, does not appear directly relevant to the definition of rights. Even the most tyrannous of governments will define its policies in terms of pursuing the general welfare; thus, to serve as protection against such policies, rights must be centered in individual choice.

Individual choice, however, need not be separate from the welfare of others. At the very least, an individual may exercise individual choice in two ways. A person may choose a course of action to maximize his or her own welfare. On the other hand, a person may choose to fulfill an obligation to another. At first glance, this second type of choice, the choice to fulfill a duty, seems less consistent with the notion of rights than the first, entirely self-regarding, type of choice. If the obligation which the individual chooses to fulfill is one imposed by the state, then it would be disingenuous to speak of this obedience as the exercise of a right.

Where the obligation arises not from the state, but from a commitment to a third party, however, an entirely different picture emerges. An individual's choice to fulfill a duty to a third

Two Hundred Years of an Idea." LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 1-30 (1978). In other words, the Enlightenment inaugurated the "first two hundred years" of the concept. Prior conceptions of natural law may have limited the sovereign's legitimate power, but the Enlightenment caused a serious shift from duty to egoism. The modern concept of rights "is individualistic in the sense that it is a from-the-bottom-up view of morality rather than one from the top down, . . . it generally expresses claims of a part against the whole." J. Roland Pennock, *Rights, Natural Rights, and Human Rights—A General View*, in *HUMAN RIGHTS: NOMOS XIII* 1 (J. Roland Pennock & John W. Chapman eds., 1981).

10 See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118-72 (1969); Jan Narveson, *Human Rights: Which If Any, Are There?*, in *HUMAN RIGHTS: NOMOS XIII*, *supra* note 9, at 175-97.

11 Thus, Robert Nozick weighs in heavily on the side of liberty; he believes that the imposition of taxes in order to redistribute income is unjust. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 171-74 (1974). In contrast, equality is at the heart of the influential work of John Rawls and Bruce Ackerman. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971); BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

12 "Arguments for the value of choice may rely either on the instrumental value of choices or on the intrinsic value. That is, either the value that attaches to choices because having more choices contributes causally to the obtaining of other good things or the value that attaches to having more choices for its own sake." GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 78 (1988).

party, in opposition to the wishes of the state, can easily be seen as the assertion of a right. Indeed, it can be argued that this type of rights claim has a longer history than a right defined solely in terms of the self-regarding choice of the individual. While modern notions of individual rights are largely the product of seventeenth and eighteenth century thought,¹³ the contention that disobedience to the positive law of the state is sometimes justified appears millennia earlier.

The classic western examples, of course, are biblical. And in these examples, it is obvious that the ultimate source of the claim that the state must yield is the individual's sense of duty, not merely the individual's own desire. Prophets and other heroes refuse to obey the commands of foreign rulers when they conflict with God's law;¹⁴ they also call Israel's own rulers to task.¹⁵ The tradition carries over into the New Testament, with its martyrs choosing death over betrayal of God.¹⁶ But such ancient conflicts are not found only in Jewish or Christian sources. Greek tragedy gives us the example of Antigone's defiance of Creon.¹⁷ Duty to the gods and to her brother, not benefit to herself, motivates Antigone's disobedience of the king's command.

One might contend that an individual choice to fulfill a duty is merely an example of one type of personal choice, with no claim to a separate type of analysis. To recognize a distinction between a choice made to fulfill a duty and a choice made to secure a benefit, it might be said, will lead to preferring one type (almost certainly the former) over the other. The ultimate result may be to disparage individual rights not clearly perceived to have their source in duty to others. While this is a possible risk, it need

13 See sources cited *supra* note 9.

14 See, e.g., *Daniel* 3:1-46 (discussing the refusal of Shadrach, Meshach, and Abed-Nego to obey Nebuchadnezzar's command to worship the golden statue).

15 See, e.g., *Isaiah* 1:1-31 (lament over Israel's sinfulness).

16 See, e.g., *Acts* 7:1-60 (recounting the stoning of Stephen); *Acts* 12:1-17 (describing Herod's persecution of the Christians). The Biblical notion of civil disobedience as a duty to God was an important strain in the history of American civil disobedience from colonial days through the civil rights movement. See generally *CIVIL DISOBEDIENCE IN AMERICA: A DOCUMENTARY HISTORY* (David R. Weber ed., 1978).

17 Antigone is willing to face death for burying her brother Polyneices in defiance of her uncle, King Creon, who had forbidden burial as punishment for Polyneices' treason. Creon's adherence to civic duty over the loyalties commanded by the gods and Antigone's contrary choice lead to Antigone's death and Creon's remorse. SOPHOCLES, *Antigone*, in *THE THREE THEBAN PLAYS: ANTIGONE, OEDIPUS THE KING, OEDIPUS AT COLONUS* (Robert Fagles trans., 1982).

not be a consequence of recognizing the distinction.

Surely the recognition of individual rights that need no further justification than their potential to promote an individual's own ends has been enormously positive. But the initial recognition of the right does not itself determine its scope. Much of constitutional law consists not of argument over whether rights exist at all, but rather of their proper scope. In defining the scope of rights, perhaps a "one size fits all" attitude is improper. Each asserted right must be analyzed in light of its origins and function. In making this type of inquiry, focusing on the distinction suggested above between choices to fulfill duties and choices to obtain benefits may be extremely useful.

A number of constitutional rights are clearly designed to protect the individual whether or not his or her choice is entirely self-centered. Perhaps the most obvious examples are the rights of criminal defendants. The right against self-incrimination, the right to counsel, and the right to be free from unreasonable searches clearly do not exist to enable individuals to fulfill duties to others, but rather, quite legitimately, to protect their own interests.¹⁸ Other rights, such as the right of free speech or the right to vote, can be seen as having aspects of both types. One might feel a duty to speak or vote;¹⁹ one might, conversely, do so for self-regarding reasons.²⁰

18 Thus, Leonard Levy believes the Fifth Amendment evolved from reaction to the zealous accusatorial system used to punish heretics in the Middle Ages. The crime itself, of course, was treason against God and dangerous to the community; thus, the accused had the duty to speak truthfully about his own guilt. The right to be free from self-incrimination, then, is grounded in the right to stand apart from others. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 3-42 (2d ed. 1986). Thus, those who adhere to the "Due Process" model of criminal procedure accept the fact that it will result in the actually guilty using rules to, sometimes successfully, evade social responsibility. See, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-73 (1968).

19 The history of the expansion of the First Amendment can be seen as a slow but steady tolerance of the individual who defies duties to God (the heretic and blasphemer), to the public (the rabble-rouser and pornographer), or to specific individuals (one who prints libel). See generally HARRY KALVEN, JR., *A WORTHY TRADITION* (Jamie Kalven ed., 1988). For a history of the debate over the Fifteenth Amendment, the first federal protection for voting rights, see WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND PASSAGE OF THE FIFTEENTH AMENDMENT* (1969).

20 Thus, Alexander Meiklejohn's classic rationale for the protection of free speech as essential to the community's self-government may be contrasted with theories locating its value in self-realization and standing apart from others. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). For an argument that "the romantic tradition that prizes rebellion and dissent" is central to the understanding of the right of free speech, see STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 7 (1990).

Thus, in defining the scope of individual rights, the extent to which one is fulfilling a duty may be of some significance with respect to some rights but not others. One need not accept the position that the First Amendment was primarily concerned with political speech to take that position seriously; it seems, at its core, to contain some aspects of recognition of a right based on a duty—a duty of participation in democratic governance.²¹ But to demand justification of an individual's Fifth Amendment rights in a sense of duty is patently improper. To recognize the possible relevance of duty in defining the scope of one right is not to insist on narrow definitions of rights which are clearly not dependent on a sense of obligation.

The Constitution and the Bill of Rights are products of Enlightenment thought.²² It is not surprising then, to find that most of the rights created by these documents seem, if not entirely focused on the self-regarding individual, at least no more protective of rights based in duty than of rights based in self-fulfillment. Occasionally, though, we may find a right which seems not merely arguably or partially based in the freedom to fulfill a duty, but primarily if not exclusively so.

The most obvious example is the Free Exercise Clause.²³ The story of the religious objector, from the early martyrs, to Luther, to Bonhoeffer, is not one of the individual acting to maximize his

John Thomson, a New York lawyer criticizing the Alien and Sedition Acts in 1801, viewed the freedom of speech as an extension, in a democracy, of parliamentary immunity from prosecution for debate and deliberation on legislation. DONNA L. DICKERSON, *THE COURSE OF TOLERANCE: FREEDOM OF THE PRESS IN NINETEENTH-CENTURY AMERICA* 6-7 (1990). The dual nature of the right as protecting the individual engaged in the duty of governing while also protecting his or her own self-interest is obvious. As regards voting rights, much ink has been spilled in recent years debating the extent to which the constitutional framers hoped or expected that voters would act pursuant to the ideals of "civic republican" virtue as opposed to self-interest. See generally Symposium, *Classical Philosophy and the American Constitutional Order*, 66 CHI-KENT L. REV. 3 (1990).

21 See sources cited *supra* note 20.

22 "Preoccupation with theology gave way to absorption in politics The European scientific and intellectual revolution noted earlier quickly reshaped American views Newton and Locke became the authorities for the changed outlook The notion of rights was transformed by the doctrine that the law of nature was to be found in human experience" WINTON U. SOLBERG, *THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION* lvi-lvii (2d ed. 1990).

23 "Congress shall make no law . . . prohibiting the free exercise [of religion]" U.S. CONST. amend. I. For a thorough and concise discussion of the historical background of the religion clauses, see ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 1-32 (1990).

or her welfare, but rather one of sacrifice of self-interest and the assumption of risk or disadvantage out of a powerful sense of duty.²⁴ Surely, respect for this type of choice, as well as recognition of the cruelty of using state power to coerce betrayal of obligations to an authority beyond government, was a powerful motive for the inclusion of the clause in the Bill of Rights.²⁵

On the surface, the central role of duty in the Free Exercise Clause has not been prominent in recent case law. To probe too deeply in the distinction between "I must" and "I want to" in the context of religion is to risk asking courts to enunciate religious doctrine, which they are not supposed to do,²⁶ or to question the sincerity of the individual, something which, while permissible, is surely not something which courts are eager to do.²⁷ But even a quick glance at Free Exercise Clause cases reveals that, not too far beneath the surface, the more clearly the claimant is heeding the call of duty at the expense of self, the more likely the claim is to succeed.

The high point of free exercise, *Wisconsin v. Yoder*,²⁸ involved a community which denies itself a wide range of comforts and conveniences that are regarded by most as desirable.²⁹ The specific choice made by the Amish which gave rise to *Yoder*, to withdraw their children from the last two years of compulsory free public education,³⁰ would appear to most observers to be the renunciation of a good thing. The Amish, by acting in a way which clearly

24 See sources cited *supra* notes 14-16.

25 See LEVY, *supra* note 18, at 3-42 (discussing the close connection between the rights of criminal defendants and reaction to religious persecution in pre-revolutionary Europe).

26 Courts are neither to determine the truth of religious doctrine, *United States v. Ballard*, 322 U.S. 78, 88 (1944), nor are they to determine theological or doctrinal matters in a way which substitutes their judgment for that of church authorities. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

27 See *Ballard*, 322 U.S. at 85-87 (permitting a court to question the sincerity of a defendant accused of fraudulent activity under the cover of religion, but not the underlying truth of his preaching); see also *United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983) (demonstrating that the government may question a religious leader's assertion that income was used for religious, rather than personal, ends and was therefore exempt from taxation), *cert. denied*, 466 U.S. 971 (1984).

28 406 U.S. 205 (1972).

29 Old Order Amish insulate themselves from modern worldly influence, attempting to live "a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era . . . Amish beliefs require members of the community to make their living by farming or closely related activities" and eschew "self-distinction, competitiveness, worldly success, and social life [outside the community]." *Id.* at 210-11.

30 *Id.* at 207-08.

disadvantages them in secular terms, leave little doubt that they are acting out of a sense of duty. Thus, their claims fit the paradigm of martyrdom (or, at least, sacrifice) and become more sympathetic. Despite Justice Douglas' dissenting concern that the right to sacrifice oneself does not necessarily lead to the right to sacrifice the secular interests of one's children,³¹ the Court held that the state must defer to this countervailing duty.³²

Compare this to classic cases in which free exercise claims have been rejected. Mormons practicing polygamy,³³ Seventh-Day Adventists using children to do fundraising work,³⁴ and Native Americans using peyote in their rituals³⁵ all share a common thread. To the nonbelieving observer, all of these claimants may appear to be seeking some sort of advantage—some sort of benefit which the nonbeliever might wish to obtain. Even if the sincerity of the individual claimant is conceded, the fear of people using the excuse of religious "duty" to demand the right to marry multiple partners, to profit from child labor, or to take illegal drugs surely is not far below the surface of the Court's rejection of these claims. On the other hand, the likelihood that many people will form simple, rural communities and deny themselves modern comforts under the guise of religion in order to obtain the "benefit" of withdrawing their children from high school was small enough to be of little concern.³⁶ Thus, the concept of an individual right that exists in order to permit the individual to fulfill a duty rather than to pursue self-interest seems central to the jurisprudence of the Free Exercise Clause. Explicit recognition of this may lead to the rejection of some claims which might be upheld if the point is

31 *Id.* at 241-49 (Douglas, J., dissenting).

32 *Id.* at 234.

33 *See* *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding prohibition on polygamy).

34 *See* *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding the conviction of a mother who, with her nine-year-old daughter, publically sold religious literature; a Massachusetts statute prohibited the use of children in selling newspapers or magazines).

35 *See* *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not compel states to exempt religious use of peyote from statutes prohibiting drug use).

36 *Cf.* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (permitting Amish to withdraw children from school after eighth grade in conformance with religious belief), *with* *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (prohibiting use of the Free Exercise Clause to exempt children from reading school books which their parents deemed offensive to their religious beliefs), *cert. denied*, 484 U.S. 1066 (1988). In *Mozert*, parents claimed the right to select parts of the public school experience; this seems much more a matter of personal choice than the Amish submission to traditional duty.

obscured, but it may also lead to a more vigorous clause. To lose sight of the importance of duty to the Free Exercise Clause may itself lead to underenforcement, rather than overenforcement, of the Clause. Indeed, this may already have occurred.

The 1990 *Smith* decision³⁷ seriously eroded free exercise protection in cases involving statutes of "general application."³⁸ There is something to be said for the notion that while the religious believer is entitled to protection from special disadvantage,³⁹ the believer should be subject to the same restraints placed on all others. But, as some have noted, this type of "equal treatment" may be extremely unequal below the surface.⁴⁰ Foregoing consumption of wine will mean, to many, no more than the loss of a pleasurable dining experience. But when the same prohibition deprives the individual of access to a sacrament, the impact is of a far greater magnitude. This impact will be further magnified when receiving the sacrament is perceived as not merely a privilege, but as a duty.⁴¹ Similarly, in a broader sense, there may well be a qualitative difference between acceding to a government command

37 494 U.S. 872 (1990).

38 "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

39 Thus, even *Smith* noted that the Free Exercise Clause does not permit government to "impose special disabilities on the basis of religious views or religious status." *Id.* at 877. Where a statute imposed distinctive penalties on religious behavior and was motivated by hostility to the Santeria religion, the Court was unanimous in striking it down even in the wake of *Smith*. *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993).

40 Justice Souter, concurring in *Church of Lukumi*, was critical of the *Smith* formulation on this ground, stating that "formal neutrality" is different than "substantive neutrality." *Church of Lukumi*, 113 S. Ct. at 2241-42 (Souter, J., concurring) (citing Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990)). These criticisms of *Smith* have had an effect in the political arena. President Clinton recently signed into law the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 5 U.S.C. § 504 and 42 U.S.C. §§ 1988, 2000bb to 2000bb-4 (Supp. 1994)). Under Congress's Fourteenth Amendment power to enforce civil rights, the Act declares that the *Yoder* strict scrutiny test is to be applied in Free Exercise cases. This may not reverse the narrow holding of *Smith*; Justice O'Connor applied strict scrutiny in her concurring opinion and nonetheless upheld the statute. *Smith*, 494 U.S. at 891 (O'Connor, J., concurring).

41 The Catholic church has long considered participation in the Eucharist to be the very core of a believer's religious life. See Michael Henschel, *Sunday Assemblies in the Absence of a Priest*, 49 JURIST 607, 619-624 (1989). And canon law does not treat lightly the requirement that wine, not grape juice, be used. See John M. Huels, 47 JURIST 605 (1987) (reviewing PATRICK J. MCSHERRY, *WINE AS A SACRAMENTAL MATTER AND THE USE OF MUSTUM* (1986)).

overriding individual choice of a benefit to oneself and acceding to a command overriding individual choice to fulfill a duty to another.

The relevance of this to the question of family and marriage rights might be questioned. Owing to its unique history and characteristics, the Free Exercise Clause may be *sui generis*; perhaps all other constitutional rights can be fully analyzed without exploring the motivation behind the exercise of each right. But perhaps the distinction between a choice to fulfill a duty and a choice to benefit only oneself may be useful elsewhere. To what extent should the concept of family and the right to form and maintain families be seen as matters of self-regarding choice, and to what extent are they matters of duties beyond the self?

III. FAMILY, MARRIAGE, AND COMMITMENT

Much popular discussion of the family takes as its reference point the twentieth century, middle-class, American family of husband, wife, and children born to those two parents. The observation that millions live in different types of arrangements⁴² does not threaten the status of the two-parent nuclear family as a popular reference point. Call it nostalgia, but most of us would instinctively like to live in something like the idealized 1950s television household, perhaps modified only to make husband and wife more equal and to allow the wife to pursue a career.⁴³

A vast amount of writing has established, however, that the nature of the family and the social conventions surrounding marriage have changed over time, even if we limit our inquiry to the Anglo-American experience. The relevant unit for the concept of family has included not only the nuclear family, but the extended kin group, and an even broader group encompassing one's lineage back and forward over time—the dead and those yet unborn.⁴⁴ Similarly, conceptions of the primary function of the fami-

42 See Nan D. Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1 (1983). Where two spouses are present, one may not be the parent of the children, given the rate of divorce and remarriage. See WILLIAM J. GOODE, *WORLD CHANGES IN DIVORCE PATTERNS* 135-82 (1993). And, of course, it is now common for both parents to work outside the home. See MARY FRANCES BERRY, *THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS, AND THE MYTH OF THE GOOD MOTHER* 1-25 (1993).

43 For a critique of the "Ozzie and Harriet" family model, see STEPHANIE COONTZ, *THE WAY WE NEVER WERE* 23-41 (1992).

44 Thus, Lawrence Stone stresses the importance of careful definition and points out

ly have shifted between economic and emotional.⁴⁵ Family structures have varied from authoritarian and patriarchal to "companionate."⁴⁶ All of this is further complicated by the coexistence of various forms at a single time and disagreement over whether clear trends are apparent. Thus, it is widely believed that the last four hundred years have seen a clear trend from extended to nuclear families, and from the family as primarily an economic unit to the family as a source of emotional satisfaction.⁴⁷ Yet some scholars question this, asserting that the nuclear family was central even centuries ago and that earlier families were not lacking in emotional commitment.⁴⁸

When we look at the more narrow question of how marriages are entered into, again we see a range of approaches taken in Anglo-American society over the centuries. Near total control by parents over marriage choices by their children, an initial choice of partner by a child subject to parental veto, and today's norm of near total control of the choice of one's own marriage partner have each been common.⁴⁹ Legal and social norms regarding the appropriate age of marriage and what degree of consanguinity would act as a barrier to marriage have varied.⁵⁰

the different terms with which "family" may be thought synonymous, including "lineage," "kin," "household," and "marriage." LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800*, at 28-36 (abr. ed. 1979). The relative importance of these various conceptions of family has changed over time. *Id.*

45 Mary Ann Glendon has traced the changes in the extent to which the family (kin or marriage), as opposed to nonfamily relationships such as employment or government programs, has been significant in property and economic matters. In general, she sees a trend in which the noneconomic, "companionate" aspects of marriage have grown, while economic and property questions have tended to shift outside the family. MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 1-8 (1981).

46 Lawrence Stone sees the "open lineage family" of 1450-1630 giving way to the "restricted patriarchal nuclear family" of 1550-1700, which in turn gives way to the "closed domesticated nuclear family" of 1620-1800. STONE, *supra* note 44. The "companionate marriage" gained in ascendancy through the nineteenth and twentieth centuries. GLENDON, *supra* note 45, at 12-46.

47 This is the fundamental conclusion of Lawrence Stone, *supra* note 44, at 407-22. Philippe Aries reaches a similar conclusion; his work is best known for its conclusion that before the nineteenth century, high infant mortality led to the absence of strong parental love for their children: "People could not allow themselves to become too attached to something that was regarded as a probable loss." PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 38 (1962).

48 See, e.g., FERDINAND MOUNT, *THE SUBVERSIVE FAMILY: AN ALTERNATIVE HISTORY OF THE FAMILY* (1992) (arguing that the nuclear family has a very long history and is derived from biology).

49 See STONE, *supra* note 44, at 181-216.

50 See, e.g., FRANCES GIES & JOSEPH GIES, *MARRIAGE AND THE FAMILY IN THE MIDDLE AGES* 83-88 (1987).

The vast diversity of opinion and experience as to what families are, what they do, and who may form them makes it difficult to delineate an acceptable notion of family-based rights. What kind of family is the reference point: the family at the time of the framers, the family over most of American history, the family as it exists today, or the family regarded as ideal by most Americans, regardless of empirical data? The choice of one model will have enormous consequences, not only for what that model excludes, but also what it includes. If the family which one has the right to form is the Anglo-American family of (for example) 1787, it not only means that polygamous or same-sex marriages are outside the scope of protection, but it also may mean that the right of the father to exercise unlimited authority within the family is entitled to constitutional respect.⁵¹ Is the only alternative to reject any notion of an objective norm for the family entitled to protection, maintaining that individuals must be entirely free to construct families in any way they choose and that all choices must be treated equally by government?

The various forms taken by the family caution against easy endorsement of any particular model as uniquely entitled to legal protection, but it would seem to be too much of a concession to abandon any notion of some essential core of family. A rather obvious starting point would be to recognize that a family requires some sort of interpersonal relationship, even if only a dyad. On its face, this would seem to be an innocuous starting point, but it is of some significance. The lone individual cannot be a family.

This may seem obvious, but some years ago, a White House conference on the family was asked to accept the notion of family as including single individuals living alone.⁵² Family, under this view, is a concept indistinguishable from household. In the politi-

51 See Jay Einhorn, *Child Custody in Historical Perspective: A Study of Changing Social Perceptions of Divorce and Child Custody in Anglo-American Law*, 4 BEHAVIORAL SCI. & L. 119, 123-28 (1986); Henry H. Foster & Doris Freed, *Life With Father: 1978*, 11 FAM. L.Q. 321, 325-26 (1978).

52 Of course, for some purposes a single individual is the equivalent of a family. For example, "single family" zoning ordinances permit occupancy by a single individual. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Carroll v. City of Miami Beach*, 198 So.2d 643 (Fla. Dist. Ct. App. 1967). The family also serves as an economic unit. See generally Lee E. Teitelbaum, *Placing the Family in Context*, 22 U.C. DAVIS L. REV. 801, 812-18 (1989). In this respect, a single-person household is the equivalent of a family. For an argument against excluding single people, including those who live alone, from legal protection given to "families," see Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207 (1988).

cal arena, surely it is permissible to argue that government policy should not ignore the welfare of single-person households, but when the task is to frame constitutional rights, including these households as families has the potential to confuse notions which should be distinct.

Obviously, the single individual has a range of constitutionally protected privacy and autonomy rights.⁵³ The birth control cases, particularly those dealing with unmarried people,⁵⁴ firmly establish that among these autonomy rights is the right to avoid forming unwanted family ties. And it seems beyond dispute that the individual who chooses such an option need not justify it in any terms beyond self-interest. Thus, to recognize that the consequences of choosing to enter an interpersonal relationship are different from the consequences of avoiding one is not to deny the existence of autonomy rights which might be exercised solely out of self-interest. It is merely to recognize that the notion of family and the notion of autonomy are, to some extent, distinct.

An interpersonal relationship may be entered into for any mixture of selfish or altruistic reasons, of course. The other individual may be seen entirely as a means to one's selfish ends, and no doubt this may be true in family relationships as well as more casual or transient ones. But the undoubted existence of family relationships formed solely to satisfy selfish desires should not prevent our next analytical step in defining the concept of family. The interpersonal relationship of family is one in which at least the mature members assume commitment to the welfare of those with whom they share the relationship. There is, in other words, a significant degree of altruism, or (if that is too strong a word for a cynical age) at least an understanding of mutuality. One's satisfaction is directly tied to that of another. Even those who fall far short of this altruism in their actual lives at least give lip service to it. Marriage vows, even in an age of frequent divorce, do not speak in the harsh language of contract law where performance is conditioned upon full consideration, but in the language of open-ended duty.

All families are interpersonal relationships, but not all inter-

53 See generally DARIEN A. MCWHIRTER & JON D. BIBLE, *PRIVACY AS A CONSTITUTIONAL RIGHT: SEX, DRUGS AND THE RIGHT TO LIFE* (1992). The subtitle alone suggests the degree to which privacy and autonomy rights are grounded in the individual.

54 See *Belotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Servs.*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

personal relationships are families. While family structures vary over time and place, the norm for recognizing a family invariably seems to include some sort of intergenerational aspect. This does not mean that a unit without children or elders cannot be designated a family.⁵⁵ The intergenerational nature of a particular family may be merely potential. Additionally, a society may include within its concept of family some units without real intergenerational potential.⁵⁶ But these latter cases will not be seen as the norm. The idea of family is closely tied to actual or potential intergenerational concerns. This might mean a sense that the interests of all those currently living, of whatever age, are subordinate to the flourishing of the family lineage over time.⁵⁷ In more recent times and in more familiar places, it will mean a focus on the parent-child relationship.⁵⁸ Family is always a social concept and often a religious concept as well.⁵⁹ It is important to remember that we are primarily concerned with the family as a legal concept. If intergenerational concerns are central to the family as a social concept, they seem even more central to the family as a legal concept. State involvement in defining and regulating families has overwhelmingly touched on intergenerational matters: the transmission of wealth, the duty to care for children,

55 Of course, there always have been childless couples, either by choice or due to other factors. Interestingly enough, statistics going back to the late eighteenth century show that childlessness has not increased since 1870, although the average number of children in a family has decreased. Decreasing birthrates, therefore, are more a matter of fewer large families than more childless families. SAR A. LEVITAN & RICHARD S. BELOUS, *WHAT'S HAPPENING TO THE AMERICAN FAMILY?* 49-56 (1981).

56 The fact that elderly people may marry and that people who cannot have biological children are not prohibited from marrying is frequently cited in legal literature to refute the notion that the essential link between marriage and procreation bars homosexual marriage. See, e.g., Ingram, *supra* note 6, at 46-47; Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RTS. 555, 567 (1993).

57 "It was precisely this relation of the individual to his lineage which provided a man of the upper classes in a traditional society with his identity, without which he was a mere atom floating in a void of social space." STONE, *supra* note 44, at 29. Rules such as primogeniture were aimed at maximizing the welfare of the lineage over time, not merely the welfare of those living in the present.

58 But even the nuclear family with children may be losing ground to the husband-wife relationship. See GLENDON, *supra* note 45, at 13.

59 Authors Frances Gies, Joseph Gies, and Lawrence Stone frequently note the interaction between church norms regarding marriage and social and legal norms. GEIS & GEIS, *supra* note 50; STONE, *supra* note 44. By no means did the state always follow church teaching, but the interplay was significant. For a discussion of the impact of different theological conceptions of marriage upon law, see John Witte, Jr., *The Reformation of Marriage Law in Martin Luther's Germany: Its Significance Then and Now*, 4 J.L. & RELIGION 293 (1986).

the power to discipline children, and related matters.⁶⁰ Indeed, one might wonder if, in a world in which these matters did not involve parents, the law would be particularly interested in the ways in which adults chose to arrange their households. If children were universally conceived and born in a laboratory and raised by the state or by corporate entities, would there be a recognizable body of family law?

When the intergenerational aspect of family is introduced, the central importance of duty in the ideal of the family, even if not invariably in the empirical reality, becomes even more prominent than it was when family was limited to two or more adults. Obviously, this is due to the radical dependence of the infant and small child upon adult care. Much legal attention must be paid to families who ignore their duties and abuse or exploit their children to their own selfish ends.⁶¹ Little if any support could be mustered for the assertion that the right of family privacy protects parents when they consciously abuse or neglect their children.⁶² This further proves that the argument for a notion of family rights is linked to the notion of obligation, not merely self-regarding autonomy. The courts are sympathetic to claims by parents that they have the right to take actions which appear harmful to their children when the parents can demonstrate a sincere belief that they are acting out of duty.⁶³ Thus, the Christian Scientist's claim of a right to prefer prayer to cure his child, even if ultimately rejected,⁶⁴ is taken far more seriously than a parent's claim that medical care would cost money which the parent would rather spend elsewhere.

It is also worth noting that, at least to some degree, the interests of parents in assuming duties to children and the interests of children in assuming duties to elderly or infirm parents are consis-

60 Of course, the state need not be actively involved; it may simply delegate power to one or both parents. See sources cited *supra* note 51; see also GLENDON, *supra* note 45, at 47-97 (discussing the history of the legal duties of family support).

61 See ELIZABETH JANE KEMMER, *VIOLENCE IN THE FAMILY: AN ANNOTATED BIBLIOGRAPHY* (1984) (listing over 1000 articles published from 1960-1982).

62 Of course legal rules have often consciously or unconsciously permitted such abuse. See H.C.J. Olmesdahl, *Paternal Power and Child Abuse: An Historical and Cross-Cultural Study*, in *FAMILY VIOLENCE: AN INTERNATIONAL AND INTERDISCIPLINARY STUDY* 253-68 (John Eekelaar & Sanford Katz eds., 1978).

63 See *supra* notes 28-34 and accompanying text; *Newmark v. Williams*, 588 A.2d 1108 (Del. 1991).

64 See, e.g., *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989).

tent with state interests. If for no other reason, these interests are consistent because if these tasks are not undertaken by individual families, they will fall to the community at large. The interplay between family and community responsibility has been noted by observers in many contexts, including historians who note the relationship between infanticide, illegitimacy, and the availability or absence of publicly supported orphanages.⁶⁵ Mary Ann Glendon has observed that as the ties of family become weaker in twentieth century American law, the ties of employment and state-provided welfare programs become stronger.⁶⁶ The congruence of state interests with individual interests may not be an argument for recognizing those individual interests as rights, since our understanding of rights is that they are asserted against the state.⁶⁷ But this congruence will be worth remembering when we analyze the balancing necessary to determine the scope of family rights.

This brief discussion of the nature of the family is obviously inadequate to explore the variety of forms taken by the family or the range of social and legal responses made by different societies at different times. A huge amount of literature addresses these questions. But our purpose is otherwise. Without denying the variety of approaches to family, can we locate a core? It would appear that we can and that the core can be rather simply stated as a sense of commitment and duty to another or a group of others, transcending duty to the community at large. In its actual manifestations, family will include much self-regarding, even exploitative behavior in many cases, but the ideal is one of caring, and it is this ideal which gives rise to the claim of special constitutional protection for family rights. Individuals have autonomy rights which can be exercised for entirely selfish reasons, with no reference to duty, and this is equally true of individuals who belong to families. But if there are special rights which hinge on the

65 See JACQUES DONZELOT, *THE POLICING OF FAMILIES* 26-32 (1979) (discussing the interrelationship between family and community responsibility in nineteenth century France). The debate over the social effect of a compassionate system of social welfare is by no means unique to twentieth century America.

66 "Family law reflects this movement in that legal ties among family members are becoming attenuated Employment law, on the other hand, reflects the increased importance of the job Similarly, in social welfare law, support claims against government are made a matter of right while . . . family support claims are becoming less so." GLENDON, *supra* note 45, at 7.

67 The hornbook rule requiring "state action" for a violation of constitutional rights is discussed in LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 18-1 to -7 (2d ed. 1988).

existence or potential existence of a family, the notion of duty is crucial.

IV. CONSTITUTIONAL RIGHTS AND FAMILY RELATIONSHIPS

The right to form and maintain a family has evolved over decades in Supreme Court opinions dealing with a range of family-related issues. To a large extent, the centrality of the family to people's lives has been so obvious that little elaboration was necessary. However, the legal consequences of the importance of the family have not been entirely consistent. Ironically, the Court's first affirmation of the importance of marriage had no libertarian connotations at all. In *Maynard v. Hill*,⁶⁸ the Court was asked to assess the validity of divorce legislation passed by the territorial legislature of Oregon under enabling legislation by Congress empowering the territory to act "upon [any] rightful subject of legislation."⁶⁹

To the Supreme Court, the importance of marriage was a reason supporting, not limiting, government involvement:

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, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution⁷⁰ [Marriage] is an institution, in the maintenance of which 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.⁷¹

The first suggestions that the importance of the family relationship might limit government power came in two cases from the 1920s, each involving the education of children. In *Meyer v.*

68 125 U.S. 190 (1888).

69 *Id.* at 203. The divorce legislation was a private bill, dissolving only the marriage of D.S. and Lydia Maynard. *Id.* at 192. During and prior to the nineteenth century, the legislature often granted divorces; general statutes giving courts the power to grant divorces were a nineteenth century innovation. LYNNE C. HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 18-21 (1980).

70 *Maynard*, 125 U.S. at 205.

71 *Id.* at 211.

Nebraska,⁷² the Court struck down a state statute which prohibited the teaching of any modern language other than English and the teaching of any subject in any language other than English until after the eighth grade.⁷³ The brief opinion sets forth an amalgam of freedom of contract, First Amendment and other concerns, and also broadly states that the liberty protected by the Fourteenth Amendment includes "the right of the individual . . . to marry, establish a home and bring up children"⁷⁴ The Court held that prohibiting the teaching of modern languages would interfere with "the power of parents to control the education of their own."⁷⁵ With the same brief reasoning, the Court in *Pierce v. Society of Sisters*⁷⁶ struck down Oregon's attempt to require all children between the ages of eight and sixteen to attend public, rather than private, schools.⁷⁷

In *Skinner v. Oklahoma*,⁷⁸ the brief statements that "the right to have offspring"⁷⁹ is "one of the basic civil rights of man"⁸⁰ and that "[m]arriage and procreation are fundamental to the very existence and survival of the race"⁸¹ justified the application of strict scrutiny under the Equal Protection Clause. The Court struck down a statute requiring sterilization of anyone convicted two or more times of most "felonies involving moral turpitude."⁸²

72 262 U.S. 390 (1923).

73 "No person . . . shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade" *Id.* at 397 (citing NEB. STAT. ch. 249 (1919)).

74 *Id.* at 399.

75 *Id.* at 401. The case may be read as having less to do with family rights than with economic rights; the Court also defends the right of language teachers to practice their profession.

76 268 U.S. 510 (1925).

77 "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

78 316 U.S. 535 (1942).

79 *Id.* at 541.

80 *Id.* at 536.

81 *Id.* at 541.

82 *Id.* at 536. The petitioner had been convicted twice of robbery with firearms and once of stealing chickens. All three convictions predated the enactment of the statute; proceedings were brought to secure sterilization while he was imprisoned for the second armed robbery. The only issue for the jury was whether the sterilization could be performed "without detriment to his general health." *Id.* at 537.

The vigor of at least some of these early cases might have been suspect in light of the decline of strong notions of substantive due process which prevailed from the turn of the century until the late 1930s.⁸³ But the 1960s saw a strong revival of constitutional protection of marriage and the family. Justice Douglas's opinion in *Griswold v. Connecticut*⁸⁴ focused on "notions of privacy surrounding the marriage relationship"⁸⁵ in invalidating state statutes restricting access to contraceptives. "We deal with a right of privacy older than the Bill of Rights Marriage is coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life[,] . . . a harmony in living[,] . . . a bilateral loyalty."⁸⁶

Concurring justices quoted from an earlier opinion by Justice Harlan to advocate protection of marriage, but also to draw a distinction between marriage and other intimate relationships:

Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.⁸⁷

But later, in *Eisenstadt v. Baird*,⁸⁸ the Court overturned a statute which limited access to contraceptives by unmarried persons, holding it to be a violation of the Equal Protection Clause. The Court stressed that freedom from "governmental intrusion" into "the decision whether to bear or beget a child" was an individual right, not one solely linked to marriage.⁸⁹ *Roe v. Wade*⁹⁰ and subsequent cases⁹¹ reaffirmed the primacy of the individual. Rights

83 For a discussion of the rise and fall of substantive due process in the first half of the twentieth century, see EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941).

84 381 U.S. 479 (1965).

85 *Id.* at 486.

86 *Id.*

87 *Id.* at 499 (Goldberg, J., Warren, C.J., and Brennan, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)). Justice Goldberg summed up his concurrence with the statement that "the right of privacy in the marital relation is fundamental and basic" *Id.*

88 405 U.S. 438 (1972).

89 *Id.* at 453. "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." *Id.*

90 410 U.S. 113 (1973).

91 See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (clarifying that parents could not

"relating to marriage, . . . procreation, . . . contraception, . . . family relationships . . . [and] child rearing and education"⁹² were components of a "personal" right of privacy.⁹³

These cases focused primarily on the potential parent-child relationship. Marriage itself was the subject in *Loving v. Virginia*,⁹⁴ in which the Court invalidated a state ban on interracial marriage. The Court first held the statute unconstitutional under the Equal Protection Clause and then briefly added that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."⁹⁵ Thus, the statute also violated the Due Process Clause.⁹⁶

A somewhat more extensive discussion of the scope of the right to marry was set forth in *Zablocki v. Redhail*.⁹⁷ The Court invalidated a Wisconsin statute requiring court approval for the marriage of anyone subject to a court order to provide child support. The statute required a court to determine whether the applicant was in compliance with the support order and whether the applicant's children were or were likely to become "public charges."⁹⁸ The statute was challenged by an unemployed indigent who was unable to make support payments for the child that he had fathered out of wedlock. He had been denied the right to marry a woman with whom he was now expecting another child.⁹⁹ Reviewing cases from *Maynard* to *Roe*, the Court noted that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."¹⁰⁰ Interestingly, the Court suggested that the right to marry might not be primary, but rather derivative of procreation rights:

It is not surprising that the decision to marry has been placed

have an absolute veto over their children's decision to have an abortion); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (striking down provision giving a husband the power to block his wife's abortion).

92 *Roe*, 410 U.S. at 152-53 (citations omitted).

93 *Id.* Contrast Justice Blackmun's formulation of the right of "personal privacy" in *Roe*, *id.* at 152, with Justice Goldberg's interpretation in *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) ("[T]he right of privacy in the marital relation is fundamental and basic . . .") (Goldberg, J., concurring).

94 388 U.S. 1 (1967).

95 *Id.* at 12.

96 *Id.*

97 434 U.S. 374 (1978).

98 *Id.* at 375.

99 *Id.* at 378-79.

100 *Id.* at 384.

on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.¹⁰¹

But the Court added a significant cautionary note:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.¹⁰²

The Court distinguished *Redhail* from the earlier case of *Califano v. Jobst*,¹⁰³ in which the Court upheld provisions of the Social Security Act that terminated benefits to a dependent child when that child married anyone not entitled to such benefits.¹⁰⁴ "The Social Security provisions," wrote the Court in *Redhail*, "placed no direct legal obstacle in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discouraged, let alone made 'practically impossible,' any marriages."¹⁰⁵ The statute in *Redhail*, by contrast, actually prevented marriages and at the same time only indirectly advanced its goal of assuring support of children.¹⁰⁶

101 *Id.* at 386.

102 *Id.*

103 434 U.S. 47 (1977). *Jobst* was argued on the same day as *Redhail*, but the decision preceded *Redhail* by three months.

104 The Act stated:

Every child . . . of an individual entitled to old-age or disability insurance benefits . . . if such child . . . at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability . . . shall be entitled to a child's insurance benefit for each month . . . ending with the month preceding whichever of the following first occurs . . . (D) the month in which such child dies or marries . . .

Id. at 48 n.2 (citing 42 U.S.C. § 402(d)(1) (1970)).

105 *Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978). Thus, "[t]he directness and substantiality of the interference with the freedom to marry distinguish [*Redhail*] from *Califano v. Jobst*." *Id.* (citation omitted).

106

First, with respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without

In *Turner v. Safley*,¹⁰⁷ the Court reaffirmed "that the decision to marry is a fundamental right,"¹⁰⁸ but also that it was not an unlimited right. Specifically, the Court examined a Missouri prison regulation which gave prison officials the power to withhold permission to marry from any inmate unless the inmate could show compelling reasons for permitting the marriage.¹⁰⁹ In practice, permission was generally granted only in cases where the woman was already pregnant.¹¹⁰ The Court held that the regulation was not reasonably related to penological objectives; there were "obvious, easy alternatives . . . that accommodate the right to marry while imposing a *de minimis* burden on the pursuit of security objectives."¹¹¹

In response to the state's threshold argument that the right to marry was inapplicable in the prison environment, the Court, while conceding that incarceration would justify substantial regulation, found that marriage could be of substantial importance to inmates:

First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most

delivering any money at all into the hands of the applicant's prior children Given the possibility that the new spouse will actually better the applicant's financial situation, by contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their ability to satisfy their prior support obligations. And . . . preventing the marriage may only result in the children being born out of wedlock Since the support obligation is the same whether the child is born in or out of wedlock, the net result of preventing the marriage is simply more illegitimate children.

Id. at 389-90.

107 482 U.S. 78 (1987).

108 *Id.* at 95.

109 *Id.* at 82.

110 *Id.*

111 *Id.* at 98. The Court suggested as an alternative the approach of federal prison authorities, codified at 28 C.F.R. § 551.10 (1986), under which marriage by inmates is generally permitted unless the warden finds "a threat to security or order of [the] institution, or to public safety." *Id.* at 98. The standard of review applied by the Court was less than strict scrutiny, despite the existence of a fundamental right, because of a general approach in prisoner's rights cases which gives deference to the judgment of prison authorities. *Id.* at 84-91.

inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other less tangible benefits (e.g., legitimation of children born out of wedlock).¹¹²

Thus, while its scope may be uncertain, it seems well established that there is some sort of constitutionally protected right to marry and to establish a family. This quote from *Turner* is the most comprehensive statement by the Supreme Court of the interests that the right seeks to protect. At the same time, a parallel line of precedent has limited these family rights to units resembling traditional families. Thus, although the full consummation of a marriage is an element to be protected, the Court has found no fundamental right involved when a state prohibits homosexual sodomy.¹¹³ Such activity, unlike heterosexual activity involved in cases such as *Eisenstadt* and *Griswold*, has no procreative significance. This, along with a long history of government disapproval, held the Court, would remove homosexual relationships from the scope of due process protection.¹¹⁴ While zoning restrictions prohibiting extended family members from living together were subjected to strict scrutiny and invalidated,¹¹⁵ no such protection was provided to unrelated groups of more than two adults.¹¹⁶ Family rights, in short, are of a different order than merely "[t]he choice of household companions."¹¹⁷

Even blood relationships, if not traditionally protected by society, may not be afforded protection. In *Caban v. Mohammed*,¹¹⁸ the Court struck down a New York provision that permit-

112 *Id.* at 95-96.

113 *Bowers v. Hardwick*, 478 U.S. 186 (1986).

114 *Id.* at 191-94.

115 *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977). The ordinance contained "an unusual and complicated definitional section that recognizes as a 'family' only a few categories of related individuals." *Id.* at 496. Mrs. Moore lived with an adult son; that son's son; and Mrs. Moore's other grandson, the child of Mrs. Moore's deceased daughter. This unit did not qualify as a "family" under the ordinance.

116 *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The ordinance was challenged by a group of six unrelated college students sharing a house.

117 This was Justice Marshall's characterization of the right asserted in *Belle Terre*. *Id.* at 16 (Marshall, J., dissenting).

118 441 U.S. 380 (1979).

ted unwed mothers, but not unwed fathers, to prevent adoption of their children by withholding consent.¹¹⁹ Caban objected to the adoption of his children by their mother's new husband; this would have terminated Caban's paternal rights and obligations. By finding that the provision of an absolute veto to unwed mothers, but not unwed fathers, was impermissible gender discrimination, the Court strengthened, to some extent, the legal position of biological fathers.¹²⁰

But in *Michael H. v. Gerald D.*,¹²¹ the Court upheld California's statutory presumption that a woman's husband was the father of any child born to her when she and her husband were living together; this presumption could be challenged only in limited circumstances, and even then only by the woman or her husband.¹²² Thus, a man whose blood tests demonstrated that he was almost certainly the child's father was prevented from establishing paternity. The Court rejected the argument that the Due Process Clause protected all biological relationships. Instead, it was held to protect only "traditionally respected relationships,"¹²³ primarily "the marital family" and "the household of unmarried parents and their children," but not the relationship between a biological father and the child of a woman living with her husband.¹²⁴ The dissenters would have found a constitutionally protected interest, one arising not merely from biology, but from

119 "[C]onsent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother, whether adult or infant, of a child born out of wedlock" *Id.* at 385 (citing N.Y. DOM. REL. LAW § 111 (McKinney 1977)).

120 "The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant parental interest in the child Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers [T]his undifferentiated distinction between unwed mothers and unwed fathers . . . does not bear a substantial relationship to the state's asserted interests." *Id.* at 394.

121 491 U.S. 110 (1989).

122 *Id.* at 113.

123 *Id.* at 123 n.3. The earlier cases "rest not upon . . . isolated factors [such as biology or an established parent-child relationship] but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." *Id.* at 123.

124 "Perhaps the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child during [two periods totaling eleven months]." *Id.* at 123 n.3.

biology combined with "sufficient commitment to . . . paternity by way of personal, financial or custodial responsibilities" ¹²⁵

To summarize the current state of Supreme Court precedent, constitutional protection has been extended to the decision whether to bear children and, to a more limited extent, to the right of parents to make decisions concerning their children's upbringing and education. A "right to marry" has been recognized, but that right has thus far been limited to the right to be free of obstacles to entering a traditional marriage. Family and marriage rights have not been extended to require state recognition of nontraditional couples or groups of people as marriages or families. Thus, neither tradition nor an overarching commitment to individual autonomy entirely explains the current state of the law. Tradition would hardly seem to support abortion rights or the right, at least as extended to unmarried persons, to obtain contraceptives. But a strong commitment to individual autonomy surely would call for protection of homosexual relationships and a far different approach to cases such as *Michael H.* It seems likely, of course, that the current state of the law was not intended to vindicate one coherent theory; the status quo is largely the result of the clash of antithetical theories which each command majorities at different times in different cases. But it is also possible that the failure of either the autonomy model or the traditional model to prevail consistently demonstrates that neither is fully adequate to explain the nature and scope of family and marriage rights.

Despite the presence of constitutional questions in these cases, family law issues have long been regarded as primarily within the jurisdiction of state courts.¹²⁶ It is unsurprising, then, that the existence and scope of family rights will largely be litigated in state courts, with state statutes and constitutional provisions as prominent as their federal counterparts. State courts and legisla-

125 *Id.* at 158 (White, J., dissenting).

126

Family law has traditionally been the domain of state government. When the Constitution was written, it was the common understanding that the states, not the federal government, would regulate domestic relations. None of the powers granted the central government was regarded as conferring any authority on Congress to invade a realm that had always been regulated by state law.

EVA R. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY* 27 (1986). Herbert Jacob notes that the radical changes in divorce law during recent decades have been exceptional in that "[n]either national politicians nor Congress played a part in their adoption. No bureaucracy or national interest group promoted them." HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 3 (1988).

tures have taken various approaches to parent-child issues.¹²⁷ For our purposes, the most significant type of inquiry would be the right to establish a recognized parent-child tie apart from biology or traditional marriage. Most, but not all, states have been extremely cautious in allowing a nonbiological or nontraditional parent to be recognized as legally entitled to assert parental rights over the objection or to the detriment of traditional, biological parents.¹²⁸ Where there are no such problems, states are nevertheless still divided over the right of adults to assume, through adoption, the role of parents when those adults are unmarried or involved in nontraditional relationships.¹²⁹

With respect to the marriage relationship, there is something closer to consensus at the state level. Several states have extended certain rights which normally accompany the marriage relationship to nontraditional partners, either by legislation or court decision.¹³⁰ But almost all states have refused to take the full step of recognizing nontraditional relationships as "marriages." With the recent exception of Hawaii,¹³¹ states have refused to apply strict scrutiny to statutes that limit marriage to heterosexual couples.¹³² Bigamy statutes and prohibitions on other forms of polygamy have not been successfully challenged,¹³³ nor have state restrictions on marriages of blood relatives.¹³⁴ Thus, at the state level, the same

127 See generally BERRY, *supra* note 42. For a thorough overview of the parent-child relationship after divorce, see ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992). For a history of state intervention into the parent-child relationship, see JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT* (1991).

128 See Shaista-Parveen Ali, Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009 (1989); Teanna West Neskora, Comment, *The Constitutional Rights of Putative Fathers Recognized in Louisiana's New Children's Code*, 52 LA. L. REV. 1009 (1992); R. Michael Otto, Comment, "Wait 'Til Your Mothers Get Home": Assessing the Rights of Polygamists as Custodial and Adoptive Parents, 1991 UTAH L. REV. 881.

129 See sources cited *supra* note 128; see also Carrie Bashaw, Comment, *Protecting Children in Nontraditional Families: Second Parent Adoptions in Washington*, 13 U. PUGET SOUND L. REV. 321 (1990); Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L. Q. 347 (1991); Note, *Joint Adoption: A Queer Option?*, 15 VT. L. REV. 197 (1990).

130 See Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace*, 51 OHIO ST. L.J. 1067 (1990); Adrienne K. Wilson, Note, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539 (1991); Lisa R. Zimmer, Note, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681 (1990).

131 *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

132 The cases are collected in Peter G. Guthrie, Annotation, *Marriage Between Persons of the Same Sex*, 63 A.L.R.3d 1199 (1975).

133 See, e.g., Penelope W. Saltzman, Note, *Potter v. Murray City: Another Interpretation of Polygamy and the First Amendment*, 1986 UTAH L. REV. 345.

134 See Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus*

general picture prevails regarding marriage and family rights as at the federal level. Neither the autonomy model nor the traditional model fully explains these state decisions, and this is so not only when one compares states, but also often within a single state's law. Once again, this can be seen as merely a matter of each side prevailing in different places at different times, but perhaps there is an underlying coherence to the apparent inconsistency.

The position that the right to marry includes the right to form nontraditional family units which must be given equal legal status to traditional marriages has received little support in the courts. But it has attracted some scholarly support, and if the number of articles published is an accurate measure, this support seems to be growing.¹³⁵ These commentators generally begin from the proposition that since marriage is a fundamental right, any limitation upon it, even one which limits by defining the term, must be subject to strict scrutiny.

Since, almost invariably, defenders of the traditional scope of the family will base their arguments upon the role of the family in procreation and nurturance of children, critics will point to the facts that a nontrivial number of traditional marriages are contracted by people unwilling or unable to procreate and that a nontrivial number of people in nontraditional relationships wish to raise, if not to bear, children.¹³⁶ Thus, the traditional definition of marriage and the family will be found both under-inclusive and over-inclusive, thereby failing to satisfy strict scrutiny.¹³⁷ With procreative concerns put aside, the justifications for marriage must turn to mutual support, a goal which can be reached just as well in nontraditional as in traditional settings. Therefore, this line of argument concludes, prohibitions on homosexual marriage must fall,¹³⁸ and in all likelihood so must prohibitions on polygamy¹³⁹ and at least some forms of incestuous marriages between competent, consenting adults.¹⁴⁰

There has been some response to this position in recent legal

Free to Marry?, 18 FAM. L.Q. 257 (1984).

135 Every one of the commentators cited in notes 128-34, *supra*, favors liberalization of current law. See also *supra* notes 6-8.

136 See, e.g., Damslet, *supra* note 56, at 567; Zimmer, *supra* note 130, at 684-85, 700; Wilson, *supra* note 130, at 544-45.

137 See generally *supra* notes 6, 136.

138 See generally *supra* notes 6, 136.

139 See Saltzman, *supra* note 133; Nedrow, *supra* note 8.

140 See Bratt, *supra* note 134.

scholarship,¹⁴¹ but surprisingly little. While this may be due to such mundane things as the fact that commentators are rarely motivated to write when their fundamental conclusion is that courts are correct, it may also indicate unease with the most obvious alternative to the argument which sees marriage and family as an exercise in autonomy, that is, one which sees the boundaries of these rights to be set by tradition.

Is there another alternative? Is it really necessary to choose between entirely equal constitutional protection for all types of marriage-like relationships and no protection for them at all? If such an alternative exists, it will require a closer examination of the components of marriage as a legal concept and also a closer examination of what it means to afford something protection as a constitutional right.

V. CLARIFYING CONCEPTS: RIGHTS AND MARRIAGE

Nonlawyers, and even lawyers speaking casually, will usually speak of rights questions as if they pose a clear, dichotomous choice. Either a right exists, in which case it stands as an absolute barrier to community interference, or it does not exist, in which case there are no restraints upon the political branches of government. Actual legal rules do not present so simple a picture. Thus, not only are rights granted by statute obviously limited, but ancient common law rights, such as the rights to use one's property or to exclude others from it, have their limits as well.¹⁴² Even the most widely accepted constitutional guarantees do not purport to erect absolute barriers to government action. Instead, they increase the burden placed on government to demonstrate that its actions are necessary.¹⁴³

141 See, e.g., Hafen, *supra* note 8; Maltz, *supra* note 8.

142 Ironically, the pre-nineteenth century era in which the right to property was considered one of "absolute dominion" was also an era in which the requirement that one not use one's property so as to damage another's was most strictly enforced. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 31-35 (1977). For perhaps the single most influential article on modern nuisance law, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Probably the most commonly cited modern case on the limits of a property owner's power to exclude others is *New Jersey v. Shack*, 277 A.2d 369 (N.J. 1971).

143 Cass Sunstein begins his recent book on constitutional analysis with the principle that "[i]n American constitutional law, government must always have a reason for what it does. If it is distributing something to one group rather than to another, or depriving someone of some good or benefit, it must explain itself." CASS SUNSTEIN, *THE PARTIAL*

Traditionally, courts have imposed one of two types of burdens of justification upon government. In most cases, the legislature must only show that a challenged act rationally advances a legitimate goal.¹⁴⁴ For the most part, courts applying this test have defined "rationally" to mean "arguably" or "plausibly." Under such a test, the overwhelming majority of legislation will be valid.¹⁴⁵ In those cases thought to involve protected individual rights, however, courts will demand that the legislature show that the challenged act is "necessary," not merely potentially helpful, to advance a "compelling" public interest.¹⁴⁶ When applied rigorously, this "strict scrutiny" test will invalidate most, and perhaps almost all, legislation.¹⁴⁷

Almost as long as these two tiers of analysis have existed, dissatisfaction has been voiced with these options. Sometimes this dissatisfaction has manifested itself in courts applying the tests with different degrees of rigor in different contexts. Compare, for example, the application of "strict scrutiny" in cases involving discrimination against racial minorities,¹⁴⁸ with the application of "strict scrutiny" in cases involving the free exercise of religion.¹⁴⁹ In the former cases, strict scrutiny, as might be expected, is the

CONSTITUTION 17 (1993). "Above all, the American Constitution was designed to create a deliberative democracy The minimal condition of deliberative democracy is a requirement of reasons for governmental action. We may thus understand the American Constitution as having established, for the first time, a republic of reasons." *Id.* at 19-20.

144 The most important context in which this standard has been enunciated is, of course, that of government economic regulation. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 8-6 to -7 (2d ed. 1988).

145 Thus, as Professor Tribe has noted, the rational basis test has often meant "virtually complete judicial abdication." But he nevertheless notes "it is significant that the Court never wholly abandoned the position that legislatures, at least in their regulatory capacity, must always act in furtherance of public goals transcending the shifting summation of private interests through the political process." *Id.* § 8-7, at 582.

146 As the Supreme Court abandoned heightened scrutiny in economic regulation cases, it served notice that a higher level of scrutiny might well be called for in other contexts. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The modern strict scrutiny test was enunciated in *Korematsu v. United States*, 323 U.S. 214 (1944); ironically, the racially biased statute in that case was upheld.

147 Since *Korematsu*, no statute that explicitly disadvantages racial minorities has been upheld.

148 See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (finding prohibition of cross-racial adoptions unconstitutional despite some evidence that children are subjected to unique stress); *Lee v. Washington*, 390 U.S. 333 (1968) (holding that in the absence of clear evidence of a threat to security, state must desegregate prisons).

149 See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (application of military dress code to prevent wearing of yarmulke upheld); *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (upholding limitations on peripatetic fundraising at a state fair).

practical equivalent of an absolute prohibition on government action; in the latter cases, however, it has often seemed to be nearly as weak a barrier as the rational basis test.¹⁵⁰

Perhaps a more intellectually honest approach than using the terms but blurring the distinction between "strict scrutiny" and "rational basis" has been the open search for alternative approaches. Thus, in several contexts, "intermediate" or "heightened" scrutiny tests have been articulated, purporting to be more rigorous than the rational basis test, but less so than strict scrutiny.¹⁵¹ Taking this one step further, Justice Marshall argued that in equal protection cases, the correct approach was not to choose one of two or three discrete tests. Rather, he suggested a single balancing test which would take into account the government interest involved and the validity of creating a category of citizens with regard to that interest.¹⁵² Intermediate tests or balancing tests seem to describe more accurately much of the Court's work in resolving rights claims, but can also be seen to increase judicial discretion unacceptably, or at the very least, to increase unwisely the uncertainty about the scope of constitutional rights.¹⁵³

Somewhat along these same lines, an apparently new analyti-

150 This consistent record of permitting government regulations to survive Free Exercise challenges led Justice Scalia, writing for the Court, to dispute whether strict scrutiny ever had been adopted as the appropriate test. *Employment Div. v. Smith*, 494 U.S. 872, 882-90 (1990).

151 The most notable application of "intermediate scrutiny" has been in cases of gender discrimination. See *Craig v. Boren*, 429 U.S. 190 (1976); see also *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (federally mandated affirmative action); *SUNY v. Fox*, 492 U.S. 469 (1989) (prohibitions on commercial speech); *Plyer v. Doe*, 457 U.S. 202 (1982) (total deprivation of a benefit to illegal aliens).

152

In my view, when analyzing classifications affecting the receipt of government benefits, a court must consider "the character of the classification in question, the relative importance to individuals in the class discriminated against of the government benefits that they do not receive, and the asserted state interests in support of the classification." By contrast, the Court's rigid, bipolar approach, which purports to apply rational-basis scrutiny unless a suspect classification is involved or the exercise of a fundamental right is impeded, puts legislative classifications impinging upon sensitive issues of a family structure and survival on the same plane as a refusal to let a merchant hawk his wares on a particular street corner. I do not believe the equal protection component of the Due Process clause could become such a blunt instrument.

Lyng v. Castillo, 477 U.S. 635, 644 (1986) (Marshall, J., dissenting) (citation omitted).

153 Justice Scalia has become the most influential critic of the indeterminacy of "balancing" tests. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

cal step has recently emerged in cases considering the broad constitutional right of privacy. Justice O'Connor, in recent abortion cases, has rejected both the contention that any statute impeding individual choice must survive strict scrutiny and the alternative contention that abortion is entitled to recognition only as a liberty interest requiring application of the rational basis test to state attempts to limit it.¹⁵⁴ Instead, she has put forward a framework of analysis in which the initial inquiry is the extent to which the challenged government act interferes with the right. If the government practice constitutes an "undue burden," strict scrutiny is applied; if not, the rational basis test will suffice.¹⁵⁵ This "undue burden" test, adopted by the three authors of the decisive joint opinion in *Planned Parenthood v. Casey*,¹⁵⁶ is now an integral part of at least one subset of constitutional privacy jurisprudence.

In abortion cases, "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."¹⁵⁷ On the other hand, government need not maintain neutrality regarding a woman's choice: "[u]nless it [is an undue burden], a state measure designed to persuade [a woman] to choose childbirth over abortion will be upheld if reasonably related to that goal."¹⁵⁸ Thus, the exercise of the right may be made more inconvenient or less advantageous by a state statute surviving low-level scrutiny.¹⁵⁹ And it seems clear that government may withhold active support and assistance from a right-bearing citizen who exercises a choice disapproved of by the community.¹⁶⁰ Only where government intervenes to impose "a sub-

154 See *Hodgson v. Minnesota*, 497 U.S. 417, 459-60 (1990) (O'Connor, J., concurring); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 530-31 (1989) (O'Connor, J., concurring); *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting); *Akron v. Akron Ctr. for Reproduction Health*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting).

155 See cases cited *supra* note 154.

156 112 S. Ct. 2791 (1992).

157 *Id.* at 2820.

158 *Id.* at 2821.

159 Thus, *Casey* upheld the requirement that a woman seeking an abortion be provided with "truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth," the requirement of a twenty-four hour waiting period between providing the information and the abortion itself, and the requirement that a minor obtain either the consent of a parent or a judicial waiver of that consent. *Id.* at 2800.

160 See *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maier v. Roe*, 432 U.S. 464 (1977).

stantial obstacle" is strict scrutiny appropriate.

The "undue burden" test obviously creates analytical problems. First and most obvious is the lack of a clear standard to determine when an obstacle becomes "substantial."¹⁶¹ But there are at least two responses to this objection. The first is that a large number of terms, in and outside of law, are highly useful despite being unclear at the margins. "Hot" and "cold," "tall" and "short" are valuable descriptive concepts despite the absence of an accepted standard to determine where one begins and the other one ends. The second response is more subtle and more controversial. To the extent that one views the role of courts, especially in constitutional cases, as unilaterally and finally ending doubt about the scope of legislative authority, ambiguity will be seen as a vice.¹⁶² But to the extent that one sees constitutional analysis as a process in which courts and legislative bodies engage in a dialogue, uncertainty may prove to be a virtue.¹⁶³ Commentators have recently maintained that a number of examples demonstrate that a right is secure only when it has gained some level of acceptance from the politically responsive branches of government, even if that acceptance is manifested only by legislative failure to act to negate court decisions.¹⁶⁴ Thus, racial integration, mandated by *Brown v. Board of Education*,¹⁶⁵ was not secure until endorsed by the legislation of the 1960s. Outrage over the Supreme Court's recent decisions extending First Amendment protection to flag-burning was extinguished by Congressional refusal to reverse the decisions by constitutional amendment.¹⁶⁶ Many believe that the right to abortion is

161 *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2866 (Rehnquist, C.J., dissenting in part). For a less restrained attack on the "undue burden" test, see *id.* at 2876-80 (Scalia, J., concurring) (referring to the test as "a jurisprudence of confusion").

162 See, e.g., Scalia, *supra* note 153; ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 793 (1956) ("The job of the Court . . . is to resolve doubts, not create them." (quoting Chief Justice Stone)).

163 Thus, Cass Sunstein believes that the Constitution requires the legislature to provide reasons for its actions. SUNSTEIN, *supra* note 143, at 19-20; see also Scott Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980) (discussing the possible virtues of having a court send a statute back to the legislature for reconsideration of its rationality). This shared, somewhat dialogic power to evaluate the constitutionality of legislation has been incorporated into the Canadian Constitution. See Donald L. Beschle, *Judicial Review and Abortion in Canada: Lesson for the United States in the Wake of Webster v. Reproductive Health Services*, 61 U. COLO. L. REV. 537 (1990).

164 See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (discussing the relative role of courts and legislative bodies in changes in civil rights, women's rights, and other areas of the law).

165 347 U.S. 483 (1954).

166 See Charles Tieffer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in*

now more secure due to political mobilization in the last few years than it was when the right appeared to be solely dependent on the Supreme Court.¹⁶⁷

At the same time, in each of these cases, the Court clearly had a role to play. Had the Court not initially challenged the status quo, the legislature would have little reason to confront the rights question presented. The Court's role, then, need not be limited to either issuing the final word, complete and unambiguous in all respects, or declaring that the Constitution has nothing to say with respect to a particular question. Permitting legislative consideration of the full contours of a right, while at the same time maintaining strong judicial insistence that the core of that right be protected, may increase public acceptance and legitimacy and ultimately result in a wider range of protection.

The second objection to the undue burden test has been articulated not only in the context of the issue of abortion, but also with regard to a wide range of rights claims. The line between placing an obstacle and withholding a benefit is artificial. It assumes as its baseline a present distribution of legal rights and individual resources which itself is largely the consequence of previous government choices, not one created in some nonpolitical or prepolitical fashion.¹⁶⁸ This is, no doubt, a powerful argument. Yet courts have tenaciously maintained the distinction between interference with the exercise of liberty and the refusal to assist in its exercise. Since this objection has been raised so often, it is unlikely that this refusal is entirely due to judicial failure to appreciate the point.

At the very least, the benefit-burden distinction, however

Constitutional Dialogue, 29 HARV. J. ON LEGIS. 357 (1992).

167 'See, e.g., Rachel N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407 (1992). While counselling both litigation and legislation-based strategies, the authors note:

The impending demise of *Roe* has both revitalized the pro-choice movement and led to a critical reassessment of the efficacy of continuing the movement's near two decade reliance on the federal courts [R]eliance on the federal courts and the skills of lawyers will not, in the end, ensure reproductive freedom [P]ublic awareness of the fact that abortion rights are in serious jeopardy has energized the pro-choice movement as well as the electorate.

Id. at 441.

168 Cass Sunstein is highly critical of the attitude that he calls "status quo neutrality," one which "disregards the fact that existing rights, and hence the status quo, are in an important sense a product of law." SUNSTEIN, *supra* note 143, at 4. For Sunstein's critique, see *id.* at 68-92.

philosophically suspect, seems to survive because it reflects a central point which has wide acceptance. Even if we grant the nonneutrality of the status quo, it still strikes most of us as more of an infringement on liberty for government to actively interfere with an individual who is determined to act, despite any disadvantages which the status quo presents, than for government to refuse to adjust the status quo to help an individual.¹⁶⁹ That does not make the failure to help just, nor does it deny that the individual's plight is largely a consequence of a long chain of government acts. It is a question of degree rather than one of the presence or absence of restraint. Since people develop expectations based upon the status quo and since an unanticipated negative shift in the status quo is more jarring than its failure to shift in one's favor, there would seem to be some reason to pay attention to the benefit-burden distinction.

Thus, the first step in reexamining the scope of the right to marry or other family right is to understand that we are not limited to either rejecting the right entirely or accepting the proposition that government is precluded from all action which might affect how the right is exercised. First of all, strict scrutiny need not be applied in a manner which precludes government from ever satisfying its burden, and the rational basis test may be applied with enough skepticism to assure that at least some governmental acts might fail to satisfy it. Even if one wishes to retain the labels "strict scrutiny" and "rational basis" to describe cases in which the result is a foregone conclusion, alternate intermediate tests exist. And, perhaps most important, the concept of "undue burden," now an established part of at least those privacy and autonomy cases dealing with abortion rights, may prove to be of great help in other contexts as well.

Next, we must examine what we mean by "marriage." Like "property," marriage may best be understood not as a single thing, but rather as a "bundle" of things, some more closely related to

169 This instinct is reflected, for example, in the broad outlines of First Amendment law. Prior restraint, i.e., government action which actually serves to bar the dissemination of a message, is classically regarded as more objectionable than subsequent punishment for speech. See MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* § 4.04 (1984). In turn, subsequent punishment is held to a higher standard than government acts which regulate and consequently make speech less convenient. *Id.* §§ 2.04-05. And regulation inconveniencing speech is treated with more suspicion than the failure of government to take positive action to assist potential speakers. *Id.* § 4.09.

law than others. Like property, it may also be true that not all commonly regarded aspects of marriage are equally important to its essence. Most obviously, marriage is a commitment between the parties entering it. In a typical case the commitment will include a number of specific understandings: namely, that the relationship is meant to be long-term, exclusive, and open to the likelihood of procreation. The relationship will include sexual relations, cohabitation, and some degree of resource sharing.¹⁷⁰ Of course, some parties will intend to vary from the typical case in one or more ways, but the typical case is so clearly regarded as the norm that those wishing to modify it will likely feel compelled to specifically agree and set forth just how their relationship will be atypical.¹⁷¹

Marriage, of course, is contractual. In other times and places, the contract might be seen as largely one between families.¹⁷² In contemporary America, the contract is primarily seen as one between two individuals.¹⁷³ Like other contracts, the extent to which a particular arrangement consists of explicit or implicit understandings that the particular case will conform to the norm may vary.¹⁷⁴ But in any event, the contracting parties are the primary actors; the role of government is secondary. The law will, of course, hold the parties to their bargain or at least assess penalties in case of a breach.¹⁷⁵ But if things work out as planned, with

170 See LEVITAN & BELOUS, *supra* note 55, at 10-11; K. Ishwaran, *Introduction to MARRIAGE & DIVORCE IN CANADA* 3-5 (K. Ishwaran ed., 1983).

171 For example, the title of a brief treatise on traditional marriage, prenuptial, and "anuptial" domestic partnership agreements (*The Law of Marriage and Marital Alternatives*) conveys the fact that traditional marriage is thought of as the norm unless the parties adopt an "alternative." WILLIAM J. O'DONNELL & DAVID A. JONES, *THE LAW OF MARRIAGE AND MARITAL ALTERNATIVES* (1982).

172 GIES & GIES, *supra* note 50, at 9-10.

173 This had become the case in both England and America since 1800: "The influence of the parents in the determination of the marriage choices of their children has all but disappeared . . . Love has now become the only respectable and generally admitted motive for mate selection." STONE, *supra* note 44, at 423.

174 Prenuptial contracts altering at least the property law aspects of marriage have a long history.

Beginning in the late sixteenth century in England a woman or her relatives and friends could arrange a contract under which she or her trustee would retain full managerial rights over her separate property . . . Women with separate estates gained protection under the rules of equity, and their husbands lost traditional common law marital rights under which they had access to all their wives' property.

MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 7-8 (1986).

175 Of course, courts have become progressively less likely to hold marriages together, or even to assess blame for the end of a marriage. See generally MARY ANN GLENDON,

mutual understandings being clear and those understandings being carried out, the law need not actively intervene. But law will also set limits on the types of agreements it will enforce. Moreover, it may declare certain types of agreements not only unenforceable, but also illegal.¹⁷⁶ Clearly, the latter type of government activity is a greater intrusion into the liberty of the contracting parties than the former, but the decision not to enforce may also have significance.

To the extent that marriage is a contract, law will inevitably be involved, even if that involvement is only secondary. But to many, the core meaning of marriage goes beyond mere contract. For such persons, marriage is a sacrament.¹⁷⁷ Despite centuries of progressive secularization of the marital relationship, even those who are not members of religions which formally recognize marriage as sacramental tend to infuse the marriage contract with values which transcend those found in other agreements.¹⁷⁸ These values, which are basically a set of commitments going beyond the mutual agreement to carry out the minimal contract obligations, are not a likely field for government involvement. How can government enforce an open-ended commitment or require love?

Yet, intangible as it may be, law seems to play a role here. While the marriage commitment may not be enforceable beyond its contractual elements, societies have adopted ceremonies designed to recognize and honor the commitment. The religious ceremony in which the relationship is blessed and given official approval by the parties' religious community is, of course, the most obvious. But where there is no established or even common national religion, the need for a substitute type of community "blessing" may become evident. Those who find that religious or other types of "blessings" are unavailable may strongly value the legitimacy conferred upon their relationship by some sort of offi-

ABORTION AND DIVORCE IN WESTERN LAW (1987). But this seems to be less a matter of not enforcing the parties' expectations than a recognition of the fact that marriage is less likely to be seen as an irrevocable lifetime commitment.

176 See, e.g., *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. 1968) (holding void and unenforceable a lease attempting to convey premises burdened with substantial housing code violations).

177 This theme is most prominent in Roman Catholic theology. See Geoffrey Robinson, *Unresolved Questions in the Theology of Marriage*, 43 JURIST 69, 97-102 (1983).

178 For a discussion of the interaction of different religious conceptions of marriage with legal approaches to marriage, see Witte, *supra* note 59.

cial government recognition.¹⁷⁹

But if government's role in conferring symbols of legitimacy is somewhat intangible and its role in supervising the contractual elements of marriage only secondary, there remains an aspect of marriage which is utterly dependent on law. This encompasses the wide range of benefits which government confers on those who enter the relationship. The most obvious example is favorable tax treatment, but other rewards and incentives can easily be added to the list.¹⁸⁰ These benefits are clearly not "natural" or "prepolitical" attributes of marriage and they go beyond the mutual benefits which might be achieved by contract or by unilateral decisions about the disposition of property.¹⁸¹ Government is quite clearly the source, not merely the guarantor, of these benefits.

Thus, neither the notion of what it means to violate a right nor the notion of what marriage means is as simple or unitary as it might seem. Having isolated the different aspects of the legal concept of marriage and the different types of burdens which the Constitution places on government when it seeks to act in ways which impact individual rights, we can now suggest an approach to the notions of family and marriage rights which is more nuanced than either of the most commonly articulated alternatives.

VI. FAMILY RIGHTS AND THE RIGHT TO MARRY: SETTING LIMITS

By isolating the several aspects of the legal concept of marriage and by clarifying that different levels of protection may be afforded to different aspects of a right, we can discuss both the right to form a family and the right to marry in a way which recognizes the existence of these rights, yet rejects the position that government may not favor one form of family over another. Several principles assist this discussion. First, the emergence of the concept of "undue burdens" provides a useful analytical tool for ad-

179 Thus, after listing the concrete disadvantages of unmarried couples in the legal system, Claudia Lewis states: "More importantly, [alternatives to marriage] cannot provide the psychological benefits of state-blessed marriage: the enhanced respectability of the loving relationship and its acceptance in the wider community." Lewis, *supra* note 8, at 1795.

180 For a list of legal and economic benefits available to married persons, see Ingram, *supra* note 6, at 36.

181 For a discussion of legal alternatives to marriage and the extent to which they fall short of the full "bundle of rights inherent in marriage," see Zimmer, *supra* note 130, at 688-97.

justing the level of court scrutiny of majoritarian decisions commensurate with the degree to which those decisions interfere with an individual's life. When the state places an undue burden on liberty with respect to family matters, strict scrutiny is appropriate. But when the state merely endorses and rewards one type of individual choice over another without actively interfering with those who choose the disfavored option, the rational basis test suffices.

Second, we should remember that neither strict scrutiny nor the rational basis test need be applied in a way which makes a certain outcome inevitable. While it may not happen very often, sometimes government acts in a narrowly focused way to address an interest which is genuinely compelling. And while it may also not happen very often, sometimes government conduct will not be justified as rationally related to a legitimate purpose.¹⁸² In applying these tests, it is important to recognize that families are usually intergenerational entities. Therefore, we can expect that the protection of vulnerable family members (often, but not always, children) and the community's interest in the welfare of the next generation will be the most commonly asserted government interests.

Finally, in assessing whether an undue burden exists, as well as in applying the appropriate level of scrutiny, we should keep in mind the two types of liberty discussed in Part I: the liberty to act in an entirely self-regarding way and the liberty to override government interests in order to fulfill duties to someone or something recognized as having an equal or higher claim on the individual. The failure to recognize the degree to which family rights are of the latter type, rather than of the former, may explain much of the difficulty in delineating the scope of these rights.

A. Principle I: The Right to Form a Family Should be Analyzed Differently Than the Right to Avoid Family Entanglements

Both the right to marry and form a family and the right to avoid family entanglements through such means as contraception and abortion grew out of the same rather amorphous concept: a right to privacy.¹⁸³ Because of this, it is easy to conclude that the analysis of each of these rights should proceed in exactly the same way, that is, these are not separate rights at all, but merely differ-

182 See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

183 See *supra* notes 68-125 and accompanying text.

ent applications of the single right of privacy.¹⁸⁴ Certainly, the right to form a family and the right to avoid doing so are closely related. Since they both arise out of what is commonly designated the "substantive" part of the Fourteenth Amendment Due Process Clause, they are both subject to the same broad type of analytical inquiry: Does a challenged government act place an undue burden on the right, and, if it does, does it survive strict scrutiny? But in applying strict scrutiny or its alternative, the rational basis test, the distinctive nature of the rights should be taken into account.

The fundamental difference between the right to form a family unit and the right to avoid doing so is that the former is the right to assume an important type of duty. Much like the right of free exercise of religion, at its core the right to form a family, while it no doubt yields significant personal satisfaction and even tangible benefits, is a response to the demands of another, a commitment beyond the self. Just as the Court is skeptical¹⁸⁵ of free exercise claims which appear to be insincere attempts to gain personal advantage, courts must be skeptical of those who assert family rights in an attempt to achieve entirely selfish ends. Thus, the cloak of the family cannot be allowed to shield abusive behavior toward spouse and children.¹⁸⁶ Feminist and other critiques of family privacy are justified in fearing that it may be used to protect exploitation.¹⁸⁷ Such misapplication is possible because of the easy analogy between family rights, which are grounded in concepts of commitment and duty to others, and a range of other rights which are not dependent upon anything beyond individual welfare. When a claim of a family right is not plausibly grounded in the need to fulfill a duty to another, it loses much, if not all,

184 Perhaps this can be traced back to Justice Brandeis, who described privacy as "the right to be left alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Can something so "comprehensive" be usefully analyzed as a single entity at all?

185 See *supra* notes 33-40 and accompanying text.

186 Of course, through much of history, the law has ignored, if not permitted, the abuse of wives and children. See WILLIAM A. STACEY & ANSON D. SHUPE, *THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA* 9-22 (1983). This fact alone should give pause to those who would frame family rights based solely on tradition. Fortunately, family violence is now recognized as a serious social problem. See generally JOHN M. EEKELAAR & SANFORD N. KATZ, *FAMILY VIOLENCE: AN INTERNATIONAL AND INTERDISCIPLINARY STUDY* (1978); KEMMER, *supra* note 61.

187 Cf. Constance Backhouse, "Pure Patriarchy": *Nineteenth-Century Canadian Marriage*, 31 MCGILL L.J. 264 (1986) (explaining that Canadian courts used longstanding common law concepts to resist legislative change from the patriarchal to the companionate model of marriage).

of its reason for being.

The right to avoid family entanglements, on the other hand, can be properly exercised for entirely self-regarding reasons. While it may be possible to imagine particular situations in which the use of birth control, or even abortion, arguably might be seen by a woman as a duty,¹⁸⁸ such a duty is clearly unnecessary to the fundamental nature of the right. Some find this distinction dangerous, in that it might suggest that the right to avoid family entanglements, being less noble than the less self-regarding right to form a family, should be under-enforced.¹⁸⁹ But this suggestion does not follow at all. In fact, given the gravity of the commitment to family, which is respected by the recognition of a right to discharge that commitment, the individual must be given a strong right to avoid commitments of that nature which are not undertaken voluntarily. And coercion to enter a parent-child relationship is as much a mandate for involuntary families as a regime of forced marriage would be. While the analogy is surely imperfect, once again the First Amendment suggests an example. While the Free Exercise Clause respects those who choose to assume religious duties, the Establishment Clause assures that no one will be forced into such a commitment by government.¹⁹⁰ The argument for a strong Free Exercise Clause does not necessarily advocate a weak Establishment Clause. The rights, while no doubt related, are still analytically distinct in crucial ways, and this recognition need not lead to sacrificing either for the other.¹⁹¹

188 See Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 79-85 (1990). Professor West argues that pro-choice advocates should reframe their arguments to focus on the extent to which "the decision to abort is almost invariably made within a web of interlocking, competing, and often irreconcilable responsibilities and commitments." *Id.* at 85.

189 Similarly, commentators on recent attempts to revive communitarian thought in constitutional law are wary of the changes it may pose to hard-won individual rights. See, e.g., Lawrence Friedman, *Commentary on the Conference*, 21 CONN. L. REV. 1013 (1989); James W. Torke, *What Price Belonging? An Essay on Groups, Community and the Constitution*, 24 IND. L. REV. 1, 22-28 (1990) (invoking "the ghost of Robespierre" to develop the view that communitarian thought has its costs).

190 Cf. David Little, *Roger Williams and the Separation of Church and State*, in RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER (1985) (explaining that Roger Williams, a seminal figure in American history on separation of church and state, sought separation not to lead a life free of religion, but to freely pursue the course demanded by his own conscience).

191 Thus, Justices Brennan and Marshall generally took separationist positions in Establishment Clause cases. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (Brennan, Marshall, Blackmun & Stevens, JJ., dissenting). Yet Justices Brennan and Marshall generally took a libertarian position in free exercise cases. See, e.g., *Employment Div. v. Smith*,

Thus, the right to form a family and the right to avoid family entanglements, while related, are two separate concepts. They need not rise or fall together, nor do they present some sort of zero-sum game in which one is strengthened only at the expense of the other. Since the right to avoid family entanglements quite legitimately does not depend upon the willingness to perform a duty to others, but rather may be exercised entirely to promote the self, it will have limited relevance to an analysis of the right to form family relationships. Similarly, our analysis of the right to form family relationships will provide little help in setting the boundaries of the right to avoid such entanglements.

B. Principle II: Undue Burdens on the Right to Form Family Relationships Should Be Subjected to Strict Scrutiny

How, then, do we recognize undue burdens, as distinguished from mere regulation? The first step may be taken directly from the abortion cases.¹⁹² An attempt to criminalize or prohibit an act is clearly an undue burden. At the other extreme, withholding active assistance or community approval clearly is not.¹⁹³ Between these two relatively clear cases fall government actions which make the act more difficult; hence, the question is much less clear. Even so, the relatively clear aspects of the undue burden equation suggest a number of relatively clear conclusions as well as an overall constitutional approach to the right to form a family which will provide somewhat more protection than is currently the case, but less than some might advocate.

If commitment and a sense of duty are at the core of the concept of family, the main focus of inquiry should be on the extent of interference by government with private choices to make such a commitment. Perhaps the most obvious examples here entail the parent-child relationship, since the tangible and legal duties imposed on the parent are so clear and are accompanied by benefits and satisfactions which, while undoubtedly real, are less concrete. For the most part, current law recognizes the choice to have a child, at least through biological means, as a fundamental right.¹⁹⁴ And some cases not dealing directly with procreative

494 U.S. 872, 907 (1990) (Blackmun, Brennan & Marshall, JJ., dissenting).

192 See *supra* notes 154-61 and accompanying text.

193 See *supra* notes 154-61 and accompanying text.

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

rights also seem to recognize the principle. *Redhail*,¹⁹⁵ for example, while normally seen as a case concerning the right to marry, also had some strong overtones of the parent-child relationship as well.

The plaintiff in *Redhail* was seeking to marry a woman with whom he was expecting a child.¹⁹⁶ In other words, he was seeking not only to create a husband-wife relationship, but also to assume immediately the legal and practical burdens of parenthood. While biological paternity would also impose legal obligations upon him, his willingness to formally assume the role of father as well as husband surely made his rights claims more compelling.

If the "undue burdens" approach is accepted, it may require serious rethinking of the way in which courts should address at least some conflicts between biological parents and foster parents,¹⁹⁷ adoptive parents,¹⁹⁸ and perhaps even parents who have contracted for the services of a "surrogate mother."¹⁹⁹ Recent cases indicate great judicial deference to biological ties.²⁰⁰ But if the essence of family is commitment, the claims of nonbiological parents, at least those who have clearly demonstrated assumption of duties of care, are entitled to a strong showing before they are stripped of their status as parents.²⁰¹ Of course, this does not mean that biological parents will always lose those contests. The welfare of the child no doubt provides a compelling interest for government concern, and in some cases the severance of parental ties will be closely enough linked to that end to satisfy strict scrutiny. And certainly in some cases, both biological and nonbiological parents will have an equally demonstrated commitment to the

195 434 U.S. 374 (1978).

196 *Id.* at 379.

197 See generally Carolyn Curtis, *The Psychological Parent Doctrine in Custody Disputes Between Foster Parents and Biological Parents*, 16 COLUM. J.L. & SOC. PROBS. 149 (1980); Vincent S. Nadile, Note, *Promoting the Integrity of Foster Family Relationships: Needed Statutory Protections for Foster Parents*, 62 NOTRE DAME L. REV. 221 (1987).

198 See generally ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993); Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents, Substance or Specter?*, 38 U.C.L.A. L. REV. 917 (1991).

199 See generally Anita L. Allen, *Surrogacy, Slavery and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139 (1990); Colloquy, *Some Reflections on the Baby M. Case*, 76 GEO. L.J. 1793 (1988).

200 See generally sources cited *supra* notes 197-99.

201 Elizabeth Bartholet criticizes the notion that nonbiological parenting relationships are clearly less desirable than biological relationships. BARTHOLET, *supra* note 198, at 164-86.

than biology, as the basis of the parental right.

In examining the marriage commitment, its mutuality may obscure its existence, at least compared to the relatively one-sided parent-child commitment. But mutuality does not negate the real existence of duty, nor does the undoubted fact that many enter the relationship in bad faith or with purely selfish expectations. As is true in contract law, these considerations may lead in individual cases to rejection of a party's claims, but they do not cause the law to, *a priori*, deny the legitimacy of mutual commitment in the notion of contracts in general.

Some aspects of mutual commitment are intangible and, therefore, beyond any potential reach of government. But at least two manifestations of mutual commitment, the decision to share living quarters and the decision to have sexual relations, have long been the subject of government attention. These decisions are surely at the core of any conception of marriage; the former is at the core of any conception of family. These types of decisions are possible regardless of the existence of any particular legal regime. To the extent that anything may be properly so described, they seem to be prepolitical.²⁰² This leads to the conclusion that any government attempt to criminalize the decision to live together, or the decision to have sexual relations in a voluntary noncommercial setting, should be subjected to strict scrutiny. This suggests that the polygamy cases were wrongly decided,²⁰³ as was *Bowers v. Hardwick* insofar as it extended government power to homosexuals living in a relationship and demonstrating genuine commitment to each other.

This alone does not necessarily lead to the conclusion that all sexual partners will be able to invoke strict scrutiny against state interference, but it does not exclude the possibility either. Casual sexual partners may not claim protection as part of the right to form a family. But as pointed out above, their autonomy claims

202 Of course, too ready an acceptance of the notion of rights as natural and prepolitical can easily lead to the sort of "status quo neutrality" criticized by Cass Sunstein. SUNSTEIN, *supra* note 143, at 68-92. Still, those who would extend constitutional protection to alternative family arrangements frequently argue that these arrangements have a very long history, predating even the common law. See, e.g., Nedrow, *supra* note 8, at 305-06 ("The practice of polygamy is as old as man himself."); Damslet, *supra* note 56, at 559 ("Certainly by the time of recorded marriage history, historians find an 'ancient and powerful tradition of same-sex marriage.'").

203 See *supra* note 33. Polygamy as a legal problem is not merely of historical interest. See *Potter v. Murray City*, 585 F. Supp. 1126 (D. Utah 1984), *modified* 760 F.2d 1065 (10th Cir.), *cert. denied*, 474 U.S. 849 (1985).

are not to be conflated with family rights claims, but should be treated separately.²⁰⁴ The right to form a family, by itself, will not establish that *Bowers* was incorrect in its entirety, but it will serve to limit its scope.

The two principal Supreme Court decisions involving the right of government to limit the ability to live together provide holdings that are roughly consistent with the rules suggested by our principles. In *Village of Belle Terre v. Boraas*,²⁰⁵ a zoning ordinance restricting those who could live in "one-family" dwellings to groups containing no more than two unrelated adults was upheld as satisfying the rational basis test.²⁰⁶ The ordinance had been challenged by a group of college students who wished to share a house.²⁰⁷ In *Moore v. City of East Cleveland*,²⁰⁸ the Court applied strict scrutiny and struck down an ordinance which limited the number of blood relatives beyond the "nuclear family" who could share quarters in a single-family zoned district.²⁰⁹ While the *Moore* decision focuses on biology and tradition more than the existence of a long-term commitment between the parties, these decisions do seem to recognize that a transient or short-term relationship entered into primarily out of self-interest is entitled to less respect than an open-ended relationship with strong overtones of mutual duty.²¹⁰

Thus, attempts to criminalize or prohibit voluntary decisions to live together or decisions to have sexual relations by adults who intend to make a personal commitment to each other, roughly comparable to that entailed by traditional marriage, should be subject to strict scrutiny. But liberty has long been seen to include not only the absence of legal restraints, but also some degree of legal respect for private arrangements. In the absence of a strong reason to believe that a contract offends public policy, the state will enforce private arrangements.²¹¹ The same should be true

204 See *supra* notes 42-67 and accompanying text.

205 416 U.S. 1 (1974).

206 *Id.* at 8-10.

207 *Id.* at 2-3.

208 431 U.S. 494 (1977).

209 *Id.* at 498-99.

210 In *Belle Terre*, the Court found it worth noting that the ordinance did permit two unmarried people to constitute a "family." *Belle Terre*, 416 U.S. at 8. This suggests that more scrutiny may have been imposed had the statute attempted to exclude those whose living arrangements demonstrated a greater degree of commitment than that of college roommates.

211 And, of course, a long history of arguments suggest that enforcement of such

when the agreement in question serves to achieve partially the state of reciprocal duties and benefits associated with marriage. Any attempt by the state to void such agreements should bear the burden of satisfying strict scrutiny. Thus, property sharing arrangements, testamentary provisions, powers of attorney, and a wide range of legal relations which automatically accompany marriage are open to those in nontraditional relationships.

For the most part, this principle will not change existing law. Individuals' rights to arrange their own affairs as to their own property are well recognized. But it may have some effect at the fringes of this type of law. For example, guardianship by a long-term partner over an adult who becomes incompetent should not be precluded in favor of guardianship by blood relatives merely because of the existence of a nontraditional relationship.²¹² Where adults seek only to order their own lives, it would be an undue burden to preclude them from doing so.

C. Principle III: The Rational Basis Test is Appropriate for Regulation of Families Which Does Not Place an Undue Burden on the Right to Form Them

Much of what government does with respect to families will not constitute an undue burden on the right to form them. Most important, the decisions to give official recognition, beyond tolerance and noninterference, to a particular type of family and not to others and to provide benefits to encourage one type of family over others do not call for strict scrutiny. As will be discussed below, this does not mean that the decision is per se valid, but it need be justified only as rational.

Thus, when government decides to favor monogamy by limiting the number of spouses who will be recognized as such for purposes of tax exemptions or other government benefits, it raises

agreements is a constitutional right. See Symposium, *Liberty and Justice for All: Protecting Individual Rights Under the Constitution*, 41 RUTGERS L. REV. 753 (1989). For a discussion of the rise of the Contract Clause in the nineteenth century, see James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Right Against the State*, 31 BUFF. L. REV. 381 (1982).

212 *Contra In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. Ct. App. 1986) (upholding the appointment of a father instead of a companion as guardian of a physically and mentally impaired woman), *cert. denied*, 475 U.S. 1085 (1986). For commentary, see Amy L. Brown, *Broadening Anachronistic Notions of "Family" in Proxy Decisionmaking for Unmarried Adults*, 41 HASTINGS L.J. 1029 (1990).

far fewer concerns than when government criminalizes private polygamous arrangements. Likewise, the fact that those who enter traditional marriages receive a number of legal benefits in a sort of "one-stop shopping," while those who do not may achieve such goals only through a less convenient, more cumbersome process of contracts, wills, and other private agreements, does not rise to the level of an undue burden on liberty.

Nor is strict scrutiny appropriate when government merely refuses to bestow its "blessing" on relationships by officially designating them "marriages." Undoubtedly, refusing to extend official recognition as a "marriage" to disfavored living arrangements indicates a lack of strict neutrality on the part of government. But apart from the unique concerns of the Establishment Clause,²¹³ the Constitution places few restrictions on government preference of one way of life over another.²¹⁴ What it does concern itself with is active government interference with the liberty of individuals to go their own way.

A wide range of government acts, then, which serve to limit those who can gain formal recognition as being married or which make it more convenient or more beneficial to choose one form of family over another, will not constitute undue burdens and do not call for strict scrutiny. But that does not mean that they will all be justifiable.

D. Principle IV: Strict Scrutiny Does Not Mean Per Se Illegality; The Rational Basis Test Does Not Mandate Per Se Legality

It must be stressed that the decision of which standard to apply does not end the constitutional inquiry; government may satisfy the strict scrutiny test, and it may fail to satisfy the rational basis test. This is clearly so in theory, but there are also examples of it being true in fact as well. In certain contexts, most notably instances where government adopts a racial classification which disadvantages minorities,²¹⁵ the decision to apply strict

213 "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I. See generally RELIGION AND THE STATE, *supra* note 190.

214 See Donald L. Beschle, *Conditional Spending and the First Amendment: Maintaining the Commitment to Rational Liberal Dialogue*, 57 MO. L. REV. 1117 (1992) (arguing that the type of neutrality called for by the Establishment Clause is not demanded of government on a broad range of value choices).

215 See *supra* notes 146-48 and accompanying text.

scrutiny²¹⁶ has been the equivalent of a decision to invalidate the practice. But in other contexts, this has not been the case. During the 1970s and 1980s the Supreme Court upheld a number of government practices against Free Exercise Clause challenges, in each case after applying strict scrutiny. Of course, in these cases and others in which strict scrutiny was satisfied,²¹⁷ dissenters have complained that the label was used to describe something less stringent,²¹⁸ but the fact remains that some government interests are compelling and some practices are the least restrictive ways of satisfying them. Occasional misapplications do not call for adoption of a per se rule of illegality. And if per se rules are desired, should they not be adopted explicitly?

If it is easy to believe that strict scrutiny actually means per se illegality, it may be even easier to believe that the decision to apply the rational basis test is a decision in favor of per se legality. And the Supreme Court has come closer to endorsing this position than the position that strict scrutiny is invariably fatal. Most recently, in *FCC v. Beach Communications*,²¹⁹ the Court stated:

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." This standard of review is a paradigm of judicial restraint.²²⁰

While this specifically addresses the Equal Protection Clause,

216 See *supra* note 149.

217 See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (upholding affirmative action plan); *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) (same); *United States v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979) (upholding prior restraint on publication of information related to nuclear weapons).

218 See, e.g., *Paradise*, 480 U.S. at 196-97 ("The plurality today purports to apply strict scrutiny, and concludes that the order in this case was narrowly tailored . . . [But] the Court adopts a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny.") (O'Connor, J., dissenting); *Goldman v. Weinberger*, 475 U.S. 503, 528 (1986) ("No test for free exercise claims in the military context is even articulated [in this case], much less applied.") (O'Connor, J., dissenting).

219 113 S. Ct. 2096 (1993).

220 *Id.* at 2101 (citations omitted).

there is little reason to believe that the rational basis test is applied with much more rigor under the Due Process Clause. Still, there are limits. In this same opinion, the Court goes on to affirm its faith in the democratic process "absent some reason to infer antipathy."²²¹ Thus, there are some illegitimate state purposes; simple hostility to a group of citizens is one of them. In *City of Cleburne v. Cleburne Living Center*,²²² without applying strict scrutiny, the Court overturned a zoning restriction insofar as it prevented groups of mentally retarded men and women from occupying a group home. A government act found "to rest on an irrational prejudice" would fail even the rational basis test.²²³

Similarly, the usual deference to legislatures with respect to their motives has been absent in a number of Establishment Clause cases.²²⁴ Here, of course, the Constitution clearly cautions against government acts which are religious, i.e., nonrational, and so the skepticism embodied in these cases is not surprising.²²⁵ But along with *Cleburne* and the plain language of the rational basis test, this suggests that there is some burden on government to do more than assert that its act is supported by the majority of citizens and, therefore, rationally pursues legitimate ends. Some minimal effort must be made to rebut the notion that naked hostility or entirely nonrational reasons are all that underlie the challenged restriction.²²⁶

The reason for judicial reluctance to find that an act of government ever fails to satisfy the rational basis test seems obvious; courts do not wish to return to the era of *Lochner*.²²⁷ Yet *Lochner's* fatal flaws should not obscure two points. First, even Holmes and the three other *Lochner* dissenters conceded that government was required to legislate rationally.²²⁸ Their conception of when that

221 *Id.* (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

222 473 U.S. 432 (1985).

223 *Id.* at 450.

224 For Establishment Clause cases in which the motives of the legislature were sharply questioned, see *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993); *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Wallace v. Jaffree*, 472 U.S. 38 (1985).

225 See *supra* notes 213-14.

226 "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (citations omitted).

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

228 "[I]n determining the question of power to interfere with liberty of contract, the

requirement was satisfied was surely different than that of the majority, but it did not include the total absence of evidence that the act advanced the general welfare.²²⁹ Second, it would seem that the consequence of government failing to meet the rational basis test or, for that matter, strict scrutiny,²³⁰ is not final preclusion of government activity. Rather, it is that government, if it still wishes to act, must produce a greater justification for that action.²³¹ In some cases, this will be impossible, but in others, it will not be.²³² Thus, putting some teeth into the rational basis test need not disempower the political branches. Rather, it may do no more than insist that they act with proper regard for rational argument.

How should all this apply in cases of family rights? The protection of family members from abuse and exploitation will assuredly qualify as a compelling state interest. Recognition of the right to form a family need not, therefore, disempower government from actions narrowly tailored to prevent such abuse. This principle has its most obvious applications within already formed families, but it has some relevance with respect to the right to form families as well. For example, some prohibitions against incestuous marriages (e.g., those involving minors) and requirements of a minimum age for marriage should be seen to satisfy strict scrutiny. But where the parties are mature and there is no evidence of exploitation, it will be much harder for government to establish that the prohibition of cohabitation, sexual relations, or the refusal to respect private arrangements involving the sharing of property or other aspects of life satisfy strict scrutiny.

When government goes beyond merely preventing abuse to create conditions which it believes will promote the welfare of citizens, particularly future generations, it is acting, at the very least, for legitimate reasons. Thus, preferences for particular family

court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished" *Id.* at 69 (Harlan, J., dissenting). Because "[a] reasonable man might think it a proper measure on the score of health," Justice Holmes believed that the statute should be upheld. *Id.* at 76 (Holmes, J., dissenting).

229 Courts should give great deference to legislation, yet at the same time "guard the constitutional rights of the citizen against merely arbitrary power." *Id.* at 74 (Harlan, J., dissenting) (quoting *Atkin v. Kansas*, 191 U.S. 207, 223 (1903)).

230 See *supra* notes 216-18 and accompanying text.

231 See Bice, *supra* note 163.

232 See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

forms, which do not rise to the level of unduly burdening those who choose alternatives, need to be supported by some credible evidence that the favored forms do promote such ends. But here there need be no consensus; as in the views of *Lochner's* dissenters, there need only be evidence to dispel the notion that the government's choice is entirely arbitrary.

It is beyond the scope of this article to attempt to review the social science evidence with respect to the relative advantages of different family forms or to prescribe specific outcomes for the application of the proposed tests in specific cases. But in general, it would seem fair to say that the current state of the evidence is largely mixed.²³³ In light of this, it is likely that most undue burdens will be struck down and that most actions short of undue burdens will be upheld. A few examples may help illustrate this.

First, consider legislative prohibitions on the adoption of children by gay or lesbian parents.²³⁴ As absolute prohibitions on the creation of a family relationship, these would constitute undue burdens and be subject to strict scrutiny. Government would no doubt claim that the prohibitions further the welfare of the child.²³⁵ But under strict scrutiny, government would have the additional burden of clearly demonstrating that such adoptions were more harmful than alternatives. A review of currently available evidence suggests that this burden cannot be met.²³⁶

Second, consider a legislative decision to formally recognize only heterosexual unions as "marriages." This act does not unduly burden the liberty of homosexuals to live as couples, so it would be subject only to the rational basis test. Government would likely argue that it privileges heterosexual marriages because such marriages are far more likely to involve raising children than homosexual marriages. The fit between ends and means is imperfect here; some homosexual unions will devote themselves to raising children, while some heterosexual marriages will not. Under strict

233 See COONTZ, *supra* note 43, at 207-231; RICHARD A. POSNER, SEX AND REASON 187-89 (1992) (social policy encouraging traditional marriages may increase social welfare, but evidence is not conclusive); Nancy Moore Clatworthy, *The Non-Traditional Family and the Child*, 12 CAP. U. L. REV. 345 (1983).

234 See, e.g., FLA. STAT. ch. 63.042(3) (1991), discussed in Camille L. Worsnop, *The Florida Statute Prohibiting Adoption by Homosexuals in View of Seebal v. Farie: Expressly Unconstitutional*, 16 NOVA L. REV. 983 (1992); N.H. REV. STAT. ANN. § 170-B:4 (1987), discussed in Ali, *supra* note 128, at 1026-29.

235 See Ali, *supra* note 128, at 1013-21.

236 *Id.*

scrutiny, therefore, this justification fails, as several commentators have pointed out.²³⁷ But under the rational basis test, it does not. Enough evidence exists to justify a legislative conclusion that by preferring heterosexual over homosexual unions, the state advances the welfare of children under this less restrictive test.

Finally, consider the question of polygamy. The nineteenth century cases upholding the government's power to criminalize polygamy justify such condemnation by referring to the "patriarchal" nature of polygamy.²³⁸ Some historical and sociological evidence exists linking polygamy with gender inequality; it would seem that a rational legislature could disfavor it on those grounds.²³⁹ But the amount of gender inequality in monogamous cultures makes the connection between polygamy and inequality somewhat murky. Thus, the criminalization of the arrangement seems unlikely to survive strict scrutiny.

Most government practices subjected to strict scrutiny will likely fail, while most of those subjected only to the rational basis test will survive. But the fact that these outcomes are not automatic, but rather the consequence of reflection on government's ends and means, is significant. Particularly in an area like family law, where emotional reactions and religious sentiments are so prominent, the reminder that the legislative process must be justified by some degree of rational argument is worth repeating.

E. Principle V: Legislatures Are Free To Provide A Greater Measure of Protection Than That Constitutionally Required

This principle is obviously true, yet often neglected in commentary regarding constitutional rights. By declaring the existence of rights and some degree of protection for them, courts need not

²³⁷ See *supra* notes 136-37 and accompanying text.

²³⁸ See *Davis v. Beason*, 133 U.S. 333, 341 (1890) (describing bigamy and polygamy as "degrad[ing] to women"); *Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("[P]olygamy leads to the patriarchal principle, and . . . when applied to large communities, fetters the people in stationary despotism . . ."). Surely the Court may be criticized for ignoring the extent of patriarchal control over women permitted in nineteenth century monogamous relationships. Still, is it not clear that government may promote more equalitarian family relationships over those that are less so?

²³⁹ Nineteenth century feminists were generally opposed to polygamy. Some attacked it as a threat to monogamy, while others, skeptical or hostile to traditional monogamous marriage, "would occasionally view its evils as merely relative." Carole Weisbrod & Pamela Sheingorn, *Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 828, 841 (1978).

claim for themselves the last word on the scope of these rights. Indeed, too doctrinaire an approach may in the long run erode public support for rights. At the same time, it may convince legislators that they need not concern themselves with rights issues, since that is the province of the courts, but rather that they may respond to any manifestation of majority sentiment.²⁴⁰

By leaving the precise contours of a particular right unclear, courts invite the legislature not only to consider shrinking them, but also to consider expanding them. Racial equality was advanced in the 1950s and 1960s by courts and legislatures together, with legislatures often exceeding the minimum requirements set by courts.²⁴¹ Many contend that the recent retrenchment by the Court concerning abortion rights has ultimately made the right more secure by energizing political support for it.²⁴² In the long run, it is unlikely that any controversial right will be secure absent some degree of popular acceptance, and popular acceptance is unlikely to come from judicial proceedings alone.

Thus, the conclusion that nontraditional marriages need not be recognized as equal to traditional marriages does not establish that they should not be. In light of the discussion in Parts II and III, an argument surely can be made that the community should recognize and reward genuine commitment to others, whether or not manifested in traditional family forms.²⁴³ Advocates of expanding benefits and recognition to nontraditional families would be well advised not to rely exclusively on the language of rights and individualism. Rather, they should explain how their own choices, which strike so many as offensive, actually resemble the commitment to others manifested, at least in theory, in the traditional family. In the context of family, as in the context of religion, an argument which does not speak in terms only of self is likely to be given more respectful consideration.

240 See Abner J. Mikva & Joseph R. Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449 (1971) (discussing Congress's attitude toward constitutional issues presented by pending legislation).

241 See ROSENBERG, *supra* note 164, at 39-173.

242 See Pine & Law, *supra* note 167, at 441.

243 Thus, the arguments of those who consider full recognition of nontraditional forms of marriage to be constitutionally compelled, *supra* notes 6 and 130, surely deserve a hearing on the question of whether legislative bodies should bring about reforms, even if not constitutionally required to do so.

VII. CONCLUSION

Those who deny that the Constitution extends any protection to those who wish to form nontraditional families and those who insist that the Constitution commands strict government neutrality among family structures oversimplify the matter. Much of this confusion may arise from the belief that these are the only available alternatives, with advocacy of one being the inevitable consequence of rejection of the other. But the concept of undue burdens, developed in recent abortion cases, suggests that this is not the case.

Much of the discussion on the right to form families also suffers from the assumption that this right is one that may legitimately be claimed for entirely self-regarding reasons. While this is true of most constitutional rights, the right to form a family, much like the right to free exercise of religion, is intimately caught up in the notion of commitment and duty to another. This explains why family rights cannot be used as a shield permitting spousal or child abuse; where protection is sought for acts which patently violate the commitment which is at the core of the family, there is no reason to respect the claim of right. When an individual seeks to make a commitment to another, even where mutuality assures that the individual will receive something in return, that person has a powerful claim to noninterference by government. Absent some compelling reason, such as the clear presence of exploitation, government prohibition of such arrangements or refusal to respect contractual commitments creating family-like commitments should be invalid.

But the community has always and will likely continue to come to the conclusion that some forms of family are more beneficial to the community, over time, than others. Much of social science is devoted to exploring ways of maximizing the welfare of children; it is unrealistic and unwarranted to demand that government ignore this work. Thus, the Constitution is not violated when the government, on the basis of rational evidence, decides to provide positive incentives, including formal recognition, to certain family forms and not to others.

Under these rules, a significant core of individual liberty is protected, while at the same time the question of what types of families should be encouraged is preserved as a legitimate subject of political discussion. Societies have given different answers at different times to this question. There is much reason to think that

attitudes will continue to change, in light of evidence that nontraditional forms of commitment are better for the community than the option of encouraging no commitment at all from those who reject the norm. But here as elsewhere, not all decisions which might be wise are constitutionally compelled.

