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## Variety in U.S. Kinship Practices, Substantive Due Process Analysis and the Right to Marry

C. Quince Hopkins\*

### I. INTRODUCTION

When attending the Supreme Court oral argument in *State v. Lawrence*,<sup>1</sup> one could not help but think about the lawyers who argued, the Justices who listened, and the parties and people affected by *Loving v. Virginia*<sup>2</sup> and *Bowers v. Hardwick*.<sup>3</sup> It could be argued that the Lovings succeeded, while Mr. Hardwick did not, in part because the Lovings made a deep emotional and psychological appeal, one grounded in fairness, but as importantly, one grounded in a form of cognitive dissonance theory. That is, if one reads the brief filed on behalf of the Lovings, one finds an implicit argument that to declare the Virginia law constitutional would be to side with, validate, and support racism.<sup>4</sup> Hardwick's lawyers, by contrast, focused on purely legalistic arguments without making the moral and emotional claim, as well as framing their argument as a rights issue and equating a validation of the Georgia statute with discrimination. Perhaps that was strategically necessary for success when *Hardwick* was briefed and argued.<sup>5</sup> As evidenced by the

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\* Assistant Professor, Washington and Lee University School of Law. The assistance of the Frances Lewis Law Center, Washington and Lee University is gratefully acknowledged. I would like to thank William N. Eskridge, Jr., David Chambers, Martha Ertman, and participants at the J. Reuben Clark Brigham Young University Symposium, *The Future of Same-Sex Marriage*, on August 29, 2003 for their helpful comments.

1. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

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

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

4. See generally, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES (Philip B. Kurland & Gerhard Casper eds., 1975).

5. This particular point was first brought to my attention by a student paper written for a seminar I teach on Gender, Sexuality and Law. See Andrea Coleman, *Cognitive Dissonance Theory: A Case Study of Loving v. Virginia and Bowers v. Hardwick* (2003) (manuscript on file with the author).

significant limitation and repeal of many state sodomy laws during the nearly 20 years between *Hardwick* and *Lawrence*, however, the cultural and social milieu perhaps enabled the attorneys for Garner and Lawrence to argue their claim more directly as a matter of human rights. This human rights claim is explicit in the Garner/Lawrence briefs, which clearly link the criminalization of private, intimate same-sex conduct between consenting adults to the panoply of rights, such as the right to intimate association and marriage, that are associated with and necessary to human flourishing as so eloquently described by Martha Nussbaum.<sup>6</sup> At oral argument, counsel for Mr. Lawrence and Mr. Garner eloquently addressed the law, but again made the argument that the issue was one of basic human rights, a point picked up on and embraced by Justice Souter, who joined the majority opinion of the case.<sup>7</sup> Texas' brief and oral argument, by contrast, not only lacked legal coherence,<sup>8</sup> the brief and counsel's argument also exhibited emotional sterility.<sup>9</sup> The same cannot be said about most arguments for or against same-sex marriage. Most arguments tend to be emotional and unevenly balanced.<sup>10</sup> What is needed is some intellectually stable ground in an area where both sides of the

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6. See MARTHA C. NUSSBAM, *SEX AND SOCIAL JUSTICE* (1999).

7. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). See Brief filed on Behalf of Lawrence and Geddes, (arguing that the issue is one of human rights).

8. That Texas also failed to make solid legal arguments was evidenced both by comments from the Justices, and news commentary following the arguments. Justice Scalia, for instance, felt compelled to make the arguments for Texas when Texas' legal counsel seemed to founder.

9. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). See Brief filed on Behalf of State of Texas.

10. Debates over marriage status exhibit the greatest polarization. In this symposium, for instance, the majority of participants argued that marriage status should be reserved only for opposite sex couples, without exception, typically referring to religious and natural law arguments in support for that position. See, e.g., George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. [REDACTED] (2004); Richard Wilkins, *Constitutional Status of Marriage*; and Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. PUB. L. [REDACTED] (2004) (all papers presented at this Symposium). By contrast, those who support expansion of marriage status to other intimate adult relationships, suggest that restriction of marital status to just adult intimate relationships between biologically born males and biologically born females is at worst, nonsensical. See Terry Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. PUB. L. [REDACTED] (2004) (paper presented at this Symposium). By contrast, recognition of other sorts of legal status besides marriage, and/or conferral of legal benefits on same-sex couples, occasionally finds points of agreement. For instance, in response to the descriptions of important kinship relations I describe herein, my co-panelist Richard Wilkins agreed that legal recognition of other sorts of kin relationships might make some sense. However, Professor Wilkins continued to insist that marriage itself should still be reserved to opposite sex couples, as well as be the only legally recognized locale for sexual intimacy. His latter proposed restriction, that sexual intimacy be reserved to married couples (i.e., only opposite sex couples), not surprisingly gained no consensus between otherwise opposed discussants at this Symposium.

debate state the question as one of identity and at times, even of survival.<sup>11</sup>

This article focuses on the Supreme Court's definitions of family in the kinship cases, those cases that deal with various aspects of intimate human relationships including procreation-related issues, sexual intimacy, or otherwise. Additionally, kinship cases deal with relationships between adults and children, such as parental rights concerning education of one's children, unmarried fathers' rights vis-à-vis their children, or foster parents' rights concerning foster or potential adoptive children. A final set of kinship cases deal with other kin ties, such as between grandparents and children.<sup>12</sup> This article also focuses on exploring sociologists' and cultural anthropologists' documentation of competing descriptions of kinship practices and beliefs in the U.S., and contrasts them with the picture drawn by the Court and in congressional and state legislation regulating families.<sup>13</sup> Not only are Americans' kinship practices and beliefs varied and complex, they also suggest that views on and practices related to marriage itself are similarly complex, sometimes forming the central organizing relationship in a family, and sometimes not. This analysis reveals that the rhetoric in the Court's substantive due process kinship opinions about the historical centrality of

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11. It is primarily those who argue against same-sex marriage who pitch it as a matter of survival; that allowing same-sex marriage will destroy the institution of marriage altogether. The issue of survival is, of course, ultimately an empirical one. The power of such a claim, however, is that waiting to see whether or not it is accurate (that the institution of marriage will crumble with its inclusion of same-sex couples) means that it may be too late once those making this argument are proven right. Those arguing for expansion of marriage to same-sex couples occasionally discuss it as a survival issue, but more often focus primarily on it as a question of identity, human rights and respect. With respect to whether same-sex couples will continue to form (albeit a circumscribed existence) absent legal recognition of and protection for same-sex relationships, the evidence in some sense is already in – same-sex couples have been formed and existed with varying degrees of stability throughout the ages, just as opposite sex couples have. See, e.g., JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994); HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST (M. Duberman, M. Vicinus & G. Chauncey, Jr. eds., 1989). Identity, respect, and human rights claims, however, aim at the fact that gay, lesbian, bisexual and transgendered peoples' full existence and identity are limited due to the lack of legal recognition of same-sex relationships.

12. See C. Quince Hopkins, *Lessons from Cultural Anthropology: The Supreme Court's Kinship Cases Revisited* (manuscript on file with the author).

13. *Id.* My scholarship takes inspiration from William Eskridge's thoughtful probing of the historical meanings of sodomy regulation. See William Eskridge, *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631 (1999) (critiquing the Court's historical research in *Bowers*). Eskridge's work on this issue is cited by both the majority and dissent in *Lawrence*, with both citing it in support of its position in the case. See *Lawrence*, 123 S. Ct. at 2475-84 (majority's discussion), and at 2488-98 (dissent's discussion). See also, Anna Goldstein, Note, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L. J. 1073 (1988) (same); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809 (1997) (outlining the court's long standing tradition of selectively reading history in order to produce the desired result); John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 CHI. L. REV. 502 (1964) (focusing on the use of history to determine original intent).

marriage as a basis for other family related rights should be interrogated if and when the Court is faced with the question of same-sex marriage.

## II. THE SUPREME COURT'S KINSHIP DOCTRINE

Many of the Supreme Court's family or kinship cases rest on substantive Due Process and fundamental rights analyses to reach conclusions about which family-related relationships, structures, and conduct are accorded Constitutional protection.<sup>14</sup> The Court has announced various rules for determining what does and does not constitute a fundamental right triggering protection, and scholars like David Meyer and others have done their best to make coherent what continues to remain a somewhat muddy doctrinal swamp.<sup>15</sup> One standard characterization of the doctrinal swamp is that only those practices that are rooted in our nation's traditions or implicit in concepts of ordered liberty warrant protection.

Two related aspects at work within doctrinal swamp are exposing the complexity of historic practices and meanings related to families, and exploring the notion that "ordered liberty" means something more than that we are socially (and thus legally) cemented in the historic social practices. This article focus on the first, the complexity of kinship practices as they are described by cultural anthropologists and sociologists. The second issue is addressed in another article.<sup>16</sup>

The purpose of this article is to problematize the dicta about marriage as the core human relationship that appears in the Court's kinship cases, beginning with *Reynolds v. United States*,<sup>17</sup> in which the Court upheld bans on Mormon polygamy in the face of free-exercise of religion claims.<sup>18</sup> The broad-sweeping *Reynolds* rhetoric about the centrality of marriage to all social and political intercourse continues to reverberate through most of its family law cases since *Reynolds* was

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14. See Hopkins, *supra* note 12. See also, Meyer v. Nebraska, 262 U.S. 390 (1923); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry is protected under the due process clause of the 14<sup>th</sup> Amendment); Michael H. v. Gerald D., 491 U.S. 110, 131-32 (1989) (fundamental right to parent under the 14<sup>th</sup> Amendment overridden by state's interest in protecting intact marriages). Some of the Court's other kinship cases rest more squarely on equal protection analysis. *Loving*, for instance, could be argued was really a race-based equal protection claim. See Hopkins, *supra* note 12.

15. See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 629 (3d ed. 1999) (The concept of fundamental rights remains vague today).

16. See Hopkins, *supra* note 12.

17. *Reynolds v. United States*, 98 U.S. 145 (1878).

18. *Id.*

decided.<sup>19</sup> The aim is not (necessarily) to destabilize marriage itself, but rather, to resituate it within a broader framework of kinship relationships as actually practiced in a variety of cultural groups in the United States.

### III. VARIETIES IN KINSHIP PRACTICES OF DIFFERENT CULTURAL GROUPS IN THE UNITED STATES

The particular historical and anthropological studies addressed in this article focus on several different cultural or ethnic sub-groups of Americans: 1) white urban middle-class Americans;<sup>20</sup> 2) Japanese-Americans;<sup>21</sup> 3) Greek-Americans;<sup>22</sup> 4) the Navajo;<sup>23</sup> and 5) low-income urban and rural African-American communities.<sup>24</sup> Additionally, Lorri Glover's study of 19<sup>th</sup> century South Carolinian slave-holding gentry family structures will be discussed.<sup>25</sup>

Analysis of these accounts reveals a rich array of kinship practices, beliefs, and social meanings of those practices, which brings into question the Court's determination of tradition, and thus protected family structures. Although traditional heterosexual marriage is present in kinship practices and beliefs of all of these cultural groups, marriage does not always play the primary and central role in Americans' kinship structures that the Court states that it does in its kinship cases.<sup>26</sup> Marriage in fact is often on a par with, sometimes secondary to, or occasionally even peripheral to other kin ties – whether they be mother/child (e.g., in the Navajo tradition), or sibling ties (e.g., in the traditions of South Carolina gentry). This suggests that if there is to be any Constitutional protection of kinship ties based specifically on historical and traditional practices, it needs to sweep more broadly than it does currently.<sup>27</sup> It is thus important to incorporate these kinds of studies into our understanding of protected marital structures.

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19. See Hopkins, *supra* note 12. The Reynolds rhetoric referred to here appears in *Reynolds*, 98 U.S. at 164-65.

20. See *infra* note 35 and accompanying text discussing the work of David Schneider.

21. See *infra* note 31 and accompanying text discussing the work of anthropologist Sylvia Yanagisako.

22. See *infra* note 36 and accompanying text discussing the work of Phyllis Chock.

23. See *infra* note 52 and accompanying text discussing the work of Gary Witherspoon.

24. See *infra* note 62 and accompanying text discussing the work of Carol Stack.

25. These studies call into question Professor Adolphe's claim to a monolithic anthropological picture, and thus justification for denying same-sex marriages. See Jane Adolphe, *The Case Against Same-Sex Marriage in Canada: Law and Policy Considerations*, 18 *BYU J. PUB. L.* (2004) (paper presented at this Symposium).

26. See *Reynolds v. United States*, 98 U.S. 145 (1878); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

27. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (excluding from Constitutional protection a father's biological and social relationship to his child, where the child was born to a woman while she was married to another man.)

*A. Study Selection Criteria*

A number of the particular studies addressed herein were chosen because they begin with, and subsequently draw upon the work and intellectual tradition of David Schneider, a pioneer of the anthropological study of American kinship practices in non-Native American cultural groups. Schneider not only studied the external practices, but also the *meanings* ascribed to the kinship practices of those he studied.<sup>28</sup> William Eskridge, and others, take a similar more probing look at the meanings behind overt legal regulation of human sexual conduct.<sup>29</sup> This more nuanced understanding is picked up by Justice Kennedy, writing for the majority in *Lawrence*.<sup>30</sup> Some of these studies also distinguish between the sociological and demographics of kinship, while others – such as Yanagisako’s work on Japanese-American kinship – insist that these two categories cannot be meaningfully separated.<sup>31</sup> To the extent that they are analytically if not practically severable, the former sociological/demographic depiction of kinship consists of recounting *actual* kinship practices – in other words, how people in the world “cope with the facts of human reproduction.”<sup>32</sup> The latter cultural systems of kinship is, in a sense, a *normative* construct insofar as it focuses on those aspects of kinship that seem to matter to those in the studies, and the meanings that they ascribe to those aspects regardless of whether or not these aspects of kinship are reflected in how the study subjects live their own lives.<sup>33</sup> The sociological/demographics of kinship most directly

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28. See SCHNEIDER, *infra* note 35. William Eskridge and others, take a similar approach in evaluating the legal regulation of sodomy. See, e.g., Eskridge, *supra* note 13. David Chambers, in his presentation for this Symposium, urges that we consider this kind of evidence when we talk about what *is* and what *is not*, when making claims related to the debate over same-sex marriage.

29. See, e.g., Eskridge, *Hardwick and Historiography*, *supra* note 13.

30. See *Lawrence v. Texas*, 123 S. Ct 2472, 2475-84 (2003).

31. SYLVIA JUNKO YANAGISAKO, TRANSFORMING THE PAST: TRADITION AND KINSHIP AMONG JAPANESE AMERICANS 13-17 (1985) (describing and critiquing Schneider’s insistence on focusing on cultural kinship to the exclusion of social kinship). In an earlier iteration of her thesis, Yanagisako starts from the perspective of Schneider’s bifurcation of these two categories, but then uses her study to show the problems with such an approach. See Sylvia Junko Yanagisako, *Variance in American Kinship: Implications for Cultural Analysis*, 5(1) AMERICAN ETHNOLOGIST 15, 16 (Feb. 1978). In her subsequent book-length description of her research, Yanagisako is explicit that her research includes both normative statements and descriptive accounts of her study subject’s actions in both the past and in the present. See also, Janet Dolgin, *Choice, Tradition and the New Genetics: The Fragmentation of the Ideology of the Family*, 32 CONN. L. REV. 523, n.113 (describing Schneider as focusing on “the culture of American families and not their demography.”) My term “social kinship” would refer to demographics – and actual kinship practices. According to Dolgin, Schneider was “concerned with the symbols that defined families and with the family as a symbol. He did not suggest that actual families necessarily conformed to that model.” *Id.*, citing SCHNEIDER, *infra* note 35 at 1-6.

32. YANAGISAKO, TRANSFORMING THE PAST, *supra* note 31 at 15.

33. *Id.* at 15-16. See also, Dolgin, *supra* note 31 at n.113.

confronts the Court's statements that marriage in particular forms the central relation in U.S. kinship practices and thus forms the focus of analysis.<sup>34</sup> The latter, cultural kinship, dovetails more nearly with some members of the Court's implicit claim that statutory enactments reflect majoritarian beliefs about *what* regulation of *which* family and kinship relations should look like.

*B. The Studies: Kinship in the U.S.*

The following studies were chosen because they comply with the rubric set forth in Section A. In addition, a wide variety of social and ethnic groups were chosen to highlight the different relationships emphasized in each grouping; that is, emphasize that this study is not just based on one analysis of a single group, but rather, a variety of groups.

*1. White, urban, middle-class Americans*

David Schneider initiated the investigation of American kinship practices beginning in the late 1960s. The informants in his primary study were white, urban, middle-class Americans residing in the Midwestern United States.<sup>35</sup> Schneider came to several conclusions in his research. First, as discussed above, Schneider noted the distinction between social and cultural kinship systems.<sup>36</sup> Second, Schneider found, among the group he studied, that *blood* served as a symbol of shared biogenetic substance.<sup>37</sup> Third, as discussed above, Schneider identified as a central notion of American kinship concepts, something he termed "diffuse enduring solidarity."<sup>38</sup> Fourth and finally, Schneider concluded from his research that marriage and reproduction form the core of American kinship.<sup>39</sup>

Twelve years after he published his study, however, his own doctoral students challenged his conclusion that his informant group characterized all American kinship practices.<sup>40</sup> Schneider agreed that the conclusion of

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34. See, e.g., cases in *supra* note 26.

35. See DAVID SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* (1968, 1980).

36. See generally, ROBERT PARKIN, *KINSHIP: AN INTRODUCTION TO THE BASIC CONCEPTS* (1997).

37. SCHNEIDER, *supra* note 35.

38. *Id.*

39. *Id.* See also my critique of one legal academic's adoption of this earlier broad conclusion of David Schneider's without reference to Schneider's subsequent caveat. Q. Hopkins, *supra* note 12 at n.15 and accompanying text, referencing David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 810 (1999) and discussing Meyer's reference to Schneider in support of the idea that social norms map onto legal norms, but without Schneider's subsequent caveat about its restriction to the group studied.

40. See SCHNEIDER, *supra* note 35 at 121-22.

his earlier research on the centrality of marriage and reproduction to American kinship practices and beliefs could not necessarily be extrapolated from the subjects of his study white, urban, middle-class Americans to other cultural groups in the United States.<sup>41</sup> The remainder of the studies discussed herein expand on Schneider's original study of U.S. kinship to other cultural groups in the U.S.

## 2. Japanese American kinship

Sylvia Yanigasaki, also a Schneider protégé,<sup>42</sup> drew upon his work in her research on Japanese Americans' kinship structures.<sup>43</sup> In her work, Yanigasaki finds that the kinship ties in Japanese-American families are particularly broad. For instance, one's *sibling's* in-laws are considered family, despite the complete lack of actual blood or affinal tie, as are one's sibling's spouse's siblings (otherwise known as one's consanguine's affine's consanguines).<sup>44</sup> Further, in looking at the practice of *koden* (the exchange of mortuary offerings), Yanigasaki found that friends and acquaintances not related by blood or marriage, even in the most attenuated form, take on aspects of kin relations through the system of *koden* obligation.<sup>45</sup> The Japanese-American concept of family, therefore, exists beyond even what the Court recognized as important familial ties in both *Moore v. City of East Cleveland*<sup>46</sup> and recently in *Troxel v. Granville*,<sup>47</sup> arguably the Court's most generous case in terms of an expansive definition of family. This Japanese-American conception of kinship further separates notions of kinship from purely biological or affinal ties.<sup>48</sup>

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41. *Id.* As Schneider puts it: "[He] did make some very bad mistakes" in this central assumption. Schneider notes that anthropological studies that he conducted since his first study demonstrate that the meaning of "family" is different for different class groups in the United States. *Id.* at 122. For instance, the notion of co-residence as a critical symbol or marker of family is significantly lower in lower class families than for middle class families. *Id.* He also notes that Sylvia Yanigasaki and Phyllis Chock's work on immigrant communities, discussed in this article, further demonstrate the fallacy of his conclusion that ethnicity "does not matter." *Id.*

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

43. See YANIGASAKO, TRANSFORMING THE PAST, *supra* note 31 at 13-20 (1985).

44. Yanigasaki, *Variance in American Kinship*, *supra* note 31 at 17.

45. *Id.* at 18-21.

46. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

47. *Troxel v. Granville*, 530 U.S. 57 (2000) (in effect extending recognition of the grandparent-grandchild connection as a family tie protected under the Constitution).

48. Yanigasaki, *Variance in American Kinship*, *supra* note 31 at 17.

### 3. *Greek-American spiritual kinship*

Phyllis Chock also works in the tradition of David Schneider, investigating the kinship practices of Greek-Americans.<sup>49</sup> Chock finds that the spiritual bonds that develop in Greek-American cultural groups can rank as important as biological and marital ties, and that they take on qualities typically reserved to kin ties.<sup>50</sup> For instance, a sexual relationship between those whose bond was spiritual, such as between a godparent and a godchild, is considered taboo just as an incestuous relationship between parent and child, or between siblings, would be taboo in a traditional kin relationship.<sup>51</sup> To the extent that spiritual kinship of this variety reflects varieties such as incest prohibitions typically restricted to blood and affinal ties that are symbolic of these more traditional of kinship, Chock's findings continue to force us to broaden our notions of kin ties.

### 4. *The Navajo*

Gary Witherspoon, a Schneider protégé, directed his attention to the kinship practices of the Navajo. Although the Navajo are one of the most studied of cultural groups in the United States, Witherspoon's work applied a Schneiderian approach, looking at current social kinship practices and the meanings ascribed to those practices by his Navajo informants.<sup>52</sup> What Witherspoon revealed in his research was that within Navajo kinship beliefs and practices, the primary kin tie is that between mother and child, rather than the one between spouses.<sup>53</sup> Marriage – defined as cohabitation and sexual intercourse – is significant, but it is considered a “weak and insecure” relationship in contrast with the

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49. See, e.g., SCHNEIDER, *supra* note 35 at 122.

50. Phyllis Pease Chock, *Time, Nature, and Spirit: A Symbolic Analysis of Greek-American Spiritual Kinship*, 1(1) AMERICAN ETHNOLOGIST 33 (Feb. 1974). See generally, Parkin, *supra* note 36 at 124-25 (describing the differences between pseudo-kinship, ritual or spiritual kinship, and fictive kinship).

51. See Chock, *Time, Nature, and Spirit*, *supra* note 50 at 41.

52. See GARY WITHERSPOON, *NAVAJO KINSHIP AND MARRIAGE* (1975). The term “informant” refers to those among the cultural group with whom an anthropologist directly collects data. Although not Navajo himself, Witherspoon married a Navajo woman, and lived on the Navajo Reservation; this rendered him less of an outsider which facilitated his research. For this reason, his research on Navajo kinship is one of the few studies to actually be cited with approval by the Navajo Supreme Court. See Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379, 395 n.91 and accompanying text (1993) (noting the Navajo court's historical distrust of studies of Navajos conducted by non-Navajos, but citing to Witherspoon's determination that a child traditionally is placed with the mother upon divorce).

53. WITHERSPOON, *supra* note 52 at 21, 30-31.

“strong and secure mother-child relationship.”<sup>54</sup> Further, to the extent marriage is particularly significant, it is because it establishes a tie between father and child.<sup>55</sup> That is, a father’s kin relationship runs *through* the child’s mother, and attaches to the father by virtue of the father’s marriage *to* the mother, rather than flowing directly from father to child. Should the marriage end,<sup>56</sup> the father’s kinship relationship to his child is severed as well.<sup>57</sup>

This kind of kinship structure, would, in one view, accord with the Supreme Court’s holding in *Michael H. v. Gerald D.*,<sup>58</sup> in which the Court determined that when a child is born to a woman during her marriage to a man not the child’s father, the non-marital but biological father’s relationship to his biological child is preempted by the marital relationship between the marital but non-biological father and the child’s biological mother.<sup>59</sup> In this way, the father of the child in *Michael H.* is the person who is married to her mother; this characterization in turn reflects a valuation of marriage over other ties such as biological ones.

Interestingly, the Navajo Supreme Court, when faced with a custodial claim by a non-Navajo Native American mother against a Navajo father, sidestepped its own kinship tradition of preference for mother/child bond and of fathers losing kin ties to their children upon divorce, by asserting a different cultural kinship tradition that the Court determined overrode it.<sup>60</sup> This different tradition was one which recognized a child’s ties to the full tribal community. Awarding custody of the child to the non-Navajo mother would thus sever these traditionally recognized kinship ties between child and community, a result the Navajo Supreme Court would not countenance.<sup>61</sup>

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54. *Id.* at 28.

55. *Id.* at 34-35.

56. Witherspoon notes the traditional Navajo method of divorcing is for the wife to place the husband’s personal belongings on the doorstep of their dwelling. Witherspoon, *supra* note 52. Contemporary Navajo divorce practices in tribal court are similar to, although not identical with, Anglo divorce practice.

57. WITHERSPOON, *supra* note 52 at 30-31. (“[I]t is the marriage of the father to the mother which ties the father to his children. When the marriage is dissolved, the father-child relationship is behaviorally and functionally dissolved, or almost so.”)

58. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

59. *Id.* at 131-32.

60. *Goldtooth v. Goldtooth*, 3 Navajo Rptr. 223 (Window Rock D. Ct. 1982). *See also*, Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 611-613 (2000) (discussing *Goldtooth*).

61. Atwood, *supra* note 60.

*5. African-American kinship*

Anthropologist Carol Stack investigates present-day rural and urban African-Americans' kinship networks in her work.<sup>62</sup> Unlike other researchers, Stack's particular focus is on a particular socio-economic group within the larger cultural group of African-Americans. Within the group she studied, lower-income African-Americans, Stack identifies extended care-giving networks for children that are sometimes, but not always linked by biological, genetic, or marital ties. In other words, if one looks at the Court's conception of parent-child rights flowing from the baseline institution of marriage such as in *Michael H. v. Gerald D.*, Stack's research demonstrates that these bonds between children and extended family in lower-income African-Americans in practice have little if anything to do with some pre-existing marital tie. By placing marriage at the center of family-related rights, as the Court has done, it insures displacement of these particular kinship care networks outside the scope of Constitutional protection.

Stack's finding on this point has been replicated by others, notably Herbert Gutman, who describes conceptions of quasi-and non-kin social obligations where children (including fictive ones) are cared for by a network of surrogate caregivers of friends and extended family members.<sup>63</sup> Not only would the bulk of the Court's kinship cases not recognize these extended kin and kin-like ties, neither would some Acts of Congress such as the Family and Medical Leave Act ("FMLA");<sup>64</sup> the FMLA would deny benefits and protection for these types of family structures, and thus favors their white counterparts, who are more likely to use affinal and biological relatives as caregivers.<sup>65</sup> Stack also reveals that co-residence is not necessarily a marker of family ties within low-income African-American cultural groups. Instruments such as the United States Census, would thus exclude from its results a large number of functioning rural and urban poor African-American families as not falling within its narrow definition of family.

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62. CAROL B. STACK, *ALL OUR KIN: STRUGGLES FOR SURVIVAL IN A BLACK COMMUNITY* (1975).

63. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997) (analyzing Herbert Gutman's research).

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

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

Finally, Stack's research exposes several additional particular kinship elements of her African-American informants' group. First, Stack notes a distinction between social fathers and genitor fathers, perhaps a practice consistent with *Michael H. v. Gerald D.* just as Navajo kinship practices might be. Also, Stack identifies a kinship practice in this cultural group where a father's tie to his natal family is particularly strong, sometimes enough to override his tie to his biological children. This particular strength of natal family ties might yield a different focus if adopted by the Court; that is, a focus on a child's powerful tie to his or her natal family may somewhat undercut the notion that the marital bond is paramount. It also would suggest a clearer protection for children's rights (as opposed to children's rights as derivative of parents' rights), and thus a broader protection for a child's ties to multiple kin units. This latter conception would contradict the holding in *Michael H.*, that a child could have more than one father. Finally, Stack's research suggests that a mother's tie may sometimes be stronger to her latter born children than to her first born;<sup>66</sup> in this structure of kin ties, an aunt or grandparent might take on a social parent role more often, and thus might suggest a sufficiently strong traditional practice that it should warrant 14<sup>th</sup> Amendment protection.<sup>67</sup>

#### 6. Kinship bonds of early South Carolina gentry

Although the prior anthropological studies focus on modern day kinship practices, it is also the case that historical practices are more complex than the Court's cases would suggest. The recent historical research by Lorri Glover on the kinship bonds of early South Carolina slaveholding gentry during the century and a half prior to the ratification of the Fourteenth Amendment presents one example of a more nuanced description of historical kinship ties a different understanding of kinship ties than that discussed by the Court, one where marriage and parent-child relations do not necessarily form the core kin tie.

In her research, Glover finds that brothers, sisters and the extended family formed the foundation on which South Carolina gentry built their emotional and social (and economic) worlds.<sup>68</sup> As described by the publisher,

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66. See, e.g., STACK, *supra* note 62 at 46-49.

67. See STACK, *supra* note 62. Again, these variations in kinship practice also suggest possible disparate treatment under Congressional acts such as the Family and Medical Leave Act or the United States Census.

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

Adopting a cooperative, interdependent attitude, and paying little attention to [otherwise then prevalent] gendered notions of power, siblings served one another as surrogate parents, mentors, friends, confidants, and life-long allies. “Elite women and men” simultaneously used those sibling ties to advance their interests at the expense of unrelated rivals.<sup>69</sup>

Under this account, marriage ties existed, but they operate almost like wallpaper. Marriage ties are in the background of, but not central to the lives of these people. It was a similar situation with parent-child ties: they existed, but ultimately the sibling bond overrode the inter-generational bond in importance.

Glover’s research on early South Carolina gentry thus challenges deeply held assumptions about United States families, at least white, propertied families, in the eighteenth century. In particular, her work undercuts the Supreme Court’s often-repeated tenet that marriage historically and traditionally formed the central and *fundamental* core of family structure in the United States. On the other hand, Glover’s research does suggest that the genetic tie between siblings does play a central role in the lives of early slaveholding South Carolinians. Her research thus further suggests that protection of those sibling bonds, such as in a case that might present questions of a child’s interest in sibling adoption or in a split custody case might be something the Court should see as justified based on historical practices standing separate and apart from a marital relationship. That is, if the Court does rely on history and tradition to support such an expansion of Constitutional protection to some family ties, her research suggest it could do so even if it abandons marriage as the central construct upon which all family-related rights rest.

#### IV. CONCLUSION

These accounts reveal a rich array of kinship practices, beliefs, and social meanings of those practices. Therefore, the Court’s determination of tradition, and thus the parameters of protected family structures is very problematic. Although traditional heterosexual marriage is present in kinship practices and beliefs of all of these cultural groups, marriage does not necessarily always play the deep, primary, and central role in *all* Americans’ kinship structures as the Court suggests in its kinship cases.

Marriage in fact is sometimes on a co-equal footing and at other times even a secondary footing to other kinship bonds – whether they be

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69. *Id.* (cover jacket)

mother/child (e.g., in the Navajo tradition), or spiritual ties (e.g., in the Greek-American tradition), or sibling ties (e.g., in the traditions of South Carolina gentry). This suggests that if the Court's Constitutional substantive due process protection of kinship ties more generally is to be based on historical and traditional practices, it needs to move away from its grounding in the marital tie, but it also needs to sweep more broadly than it does currently. It is thus important to incorporate these kinds of studies into our understanding of protected kinship structures more generally. And, to the extent that marriage itself need not undergird other family-related Constitutional rights this further enables us to analyze it as a separate and independent right worthy of considering on its own Constitutional merits, without the deeper fear of dissolving the plethora of rights that the Court has to date found only derivative of that basic right.

Further, however, these studies suggest that our measurement of the right to marry standing on its own needs to take into consideration the complexity of the meaning of marriage not only in different cultural groups but also the complexity of its meaning within any particular cultural group, including within the majority culture; further, such an assessment must take into account the extent to which its meaning might change over time. *State v. Lawrence* puts this last issue front and center. In *Lawrence*, the court was obviously faced with the question of whether over a decade of statutory and social change were sufficient to warrant overturning its prior privacy decision in *Bowers v. Hardwick*. The *Lawrence* court determined that it was. But further, the *Lawrence* majority revisited and rejected the prior description in *Bowers* of what were historical legal practices with respect to regulation of sodomy. *Lawrence* may also open the door (as Scalia in dissent notes) for expanding the right to government recognition of non-heterosexual adult intimate relationships. The *Lawrence* Court's more careful review of the deeper meaning and import of earlier juridical and legislative pronouncements on sodomy regulation, which necessitated overruling *Bowers v. Hardwick*, suggests a court that is more willing to do more than superficially evaluate regulation of adult intimate relationships when it reviews the issue of government recognition and the social meaning of adult intimate relationships in the context of the same-sex marriage debate.

Whether one draws the line on the requisite longevity (50 years or 200) and robustness (consistent representation of the tradition in legal or social norms) of the particular tradition at issue as long or short, there of course arises a need for an analytical framework to cabin the Court's determination of tradition's demands. Since the question of tradition

(whether recent or ancient) and thus the substantive due process rubric is primarily descriptive and empirical rather than normative, the Court should look, at least in part, to descriptive accounts of kinship practices, and the beliefs or social meaning of those practices. Cultural anthropologists, sociologists, and historians, provide some of these descriptive accounts. The picture they reveal is much more rich than statutory enactments and the Court's decisions imply, both in terms of actual kinship practices and in the meanings of those kinship relations to Americans. The rhetoric in the Court's substantive due process kinship opinions about the historical centrality of marriage as a basis for other family related rights should be interrogated if and when the Court is faced with the question of same-sex marriage.<sup>70</sup>

Finally, however, what might this broader sweep look like? If Greek-American culture gives precedence to spiritual ties, does that suggest that, for Greek-Americans only, governments should be compelled to give to a person's spiritual family members analogous privileges to those extended to spouses? Or, more broadly, not just to Greek-Americans, but to all Americans, should governments be compelled to give protections to any person who has a spiritual tie to another person comparable to the tie that a Greek-American might have?

One possible preliminary step is to focus on marriage itself. For the vast majority of Americans, both gay and straight, it seems fair to say that marriage is indeed special. Protecting the ability to marry the person you love merits constitutional protection because it falls within the notion of liberty – or, as Nussbaum would phrase it, human flourishing. In addition, however, what the foregoing inquiry shows, if nothing else, is that some other sorts of relationships are also extremely important to many groups and our legislatures – if not the Courts – need to be more sensitive to that fact.

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70. The more extreme outcome of that analysis could be overturning *Loving* and *Zablocki*, and perhaps all of its substantive due process cases on parenting and contraception including but not limited to *Michael H. v. Gerald D.* and *Griswold v. Connecticut*. Even Kennedy won't go that far, I propose. The question, then, is what can/should the Court do with same-sex marriage, if the history and tradition of traditional marriage is not so plain? Rehnquist for the majority in *Washington v. Glucksberg*, 521 U.S. 702 (1997) (looking to Canadian practices on physician assisted suicide) and Kennedy for the majority in *Lawrence* (looking to the European Court of Human Rights on the issue of sodomy) both cite to other countries' practices and holdings in reaching their decisions might suggest that the Court is moving towards a recognition that we live in a global society and that the future is not provinciality.