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The Family's Constitution

Douglas NeJaime

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Many of the leading constitutional issues of our day implicate family law matters.[1] Modern substantive due process is replete with questions of family law. *Griswold v. Connecticut*,[2] *Eisenstadt v. Baird*,[3] *Roe v. Wade*,[4] *Planned Parenthood v. Casey*,[5] and *Lawrence v. Texas*[6] raise issues of family formation, intimate relationships, and reproductive decision making. *Loving v. Virginia*,[7] *Zablocki v. Redhail*,[8] and *Turner v. Safley*[9] address the contours of marriage. *Moore v. City of East Cleveland*[10] protects the extended family. *Stanley v. Illinois*,[11] *Lehr v. Robertson*,[12] and *Michael H. v. Gerald D.*[13] consider the rights of unmarried fathers. *Troxel v. Granville*[14] protects a parent's childrearing decisions. Modern equal protection law, too, features a significant number of family law issues. A string of cases beginning in the late 1960s extends rights to nonmarital parent-child relationships.[15] Leading

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1. *See* JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 40 (2014); David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 571 (2008).
2. Griswold v. Connecticut, 381 U.S. 479 (1965).
3. Eisenstadt v. Baird, 405 U.S. 438 (1972).
4. Roe v. Wade, 410 U.S. 113 (1973).
5. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).
6. Lawrence v. Texas, 539 U.S. 558 (2003).
7. Loving v. Virginia, 388 U.S. 1 (1967).
8. Zablocki v. Redhail, 434 U.S. 374 (1978).
9. Turner v. Safley, 482 U.S. 78 (1987).
10. Moore v. City of E. Cleveland, 431 U.S. 494 (1977).
11. Stanley v. Illinois, 405 U.S. 645 (1972).
12. Lehr v. Robertson, 463 U.S. 248 (1983).
13. Michael H. v. Gerald D., 491 U.S. 110 (1989).
14. Troxel v. Granville, 530 U.S. 57 (2000).
15. *See, e.g.*, Clark v. Jeter, 486 U.S. 456 (1988); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

sex equality decisions dating back to the 1970s render rights and responsibilities regarding marriage and childrearing formally gender neutral.[16] Most recently, decisions on the rights of same-sex couples to marry—namely, *United States v. Windsor*[17] and *Obergefell v. Hodges*[18]—recognize the families formed by gays and lesbians on grounds of equal protection and due process.

These cases are thought to represent a relatively straightforward account of the relationship between family law and constitutional law.[19] On this account, family law is generally perceived as a body of state law.[20] Legislatures pass statutes that define and regulate relationships between adults as well as parents and children.[21] Courts resolve specific disputes by interpreting and applying these statutes, as well as through common law and equitable principles that have traditionally governed family law. (In resolving questions of family law, state courts seldom turn to constitutional doctrine—whether state or federal.[22]) Through this lens, domestic relations implicate matters of local concern; federal courts give states wide latitude to regulate the family, and thus only rarely do family law questions enter federal courts.[23] When they do, courts attempt to leave

16. *See, e.g.*, Califano v. Westcott, 443 U.S. 76 (1979); Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7 (1975).

17. United States v. Windsor, 133 S. Ct. 2675 (2013).

18. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

19. In this Article, I am primarily concerned with federal, not state, constitutional law. To be sure, there is an extensive body of state constitutional law on questions of family rights and recognition. The relationship between state constitutional resolution of family law questions and subsequent federal constitutional resolution of similar questions is worthy of its own scholarly treatment.

20. *See* De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) ("[T]here is no federal law of domestic relations, which is primarily a matter of state concern.").

21. This emphasis also ties to family law's scope, which rests on the continued influence of the family/market distinction. For a brilliant genealogical account of how family law came to be preoccupied with "the formation of [marital and parental] relationships," rather than with "distributional consequences," see Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 5–6 (2011); *see also* Janet Halley, *What Is Family Law?: A Genealogy Part* II, 23 YALE J.L. & HUMAN. 189 (2011).

22. Of course, courts avoid constitutional questions as a general matter when cases can be resolved on other grounds. On the justifications for and criticisms of the avoidance canon, see Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184–89.

23. See, for instance, the domestic relations exception to federal diversity jurisdiction. *See* Ankenbrandt v. Richards, 504 U.S. 689 (1992); Barber v. Barber, 62 U.S. (21 How.) 582 (1859). For an insightful analysis and critique, see Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994). On some of the historical and intellectual foundations of family law's local character, see Halley, *What Is Family Law?: A Genealogy Part I*, *supra* note 21, at 48–52 (tracing how the notion of

ample room for state regulation.[24] Nonetheless, federal courts may eventually apply federal constitutional law in ways that invalidate forms of family regulation in many states.[25] On this view, constitutional principles—primarily equal protection and due process—operate to discipline and reorient state family law, and family law responds by reforming itself in line with constitutional mandates.[26]

This conventional account is inaccurate along a number of dimensions, some of which family law scholars have explored.[27] I focus here on how this account distorts the interaction between family law and constitutional law. On the conventional understanding, family law and constitutional law exist in relatively separate spheres,[28] but occasionally meet when constitutional law, exercising power in a top-down way, dictates new directions for family regulation.[29] This account fails to capture the dialogic relationship between family law and constitutional law. It fails to see that family law and constitutional law often occupy the same

marriage as status, and relatedly as outside the scope of the federal Constitution's Contracts Clause, enabled deference to local control over marriage and divorce).

24. In *Troxel*, for instance, the Court struck down the Washington third-party visitation statute only as applied to the case before it, thus leaving to the states resolution of the contours of custody and visitation. *See* Troxel v. Granville, 530 U.S. 57 (2000). In *Troxel*'s wake, statutory reform and litigation at the state level over grandparent visitation proliferated.

25. For instance, when the Court protected the rights of unmarried fathers as a matter of due process and the rights of nonmarital children as a matter of equal protection, it pushed states to significantly reform their approaches to parent-child relationships.

26. *See, e.g.*, *Developments in the Law, The Constitution and the Family*, 93 HARV. L. REV. 1156, 1159 (1980) ("Government policy toward the family has traditionally been regarded as presenting local rather than national questions. . . . But the states' power to legislate and administer family law has never been exempt from constitutional limitations. Restricting state power within constitutional bounds is an appropriate task for the federal judiciary, and carrying out this duty 'does not make of [the Supreme] Court a court of probate and divorce.' The Court has properly insisted that state intervention respect fundamental human rights.") (quoting Williams v. North Carolina, 325 U.S. 226, 233 (1945)).

27. For example, Jill Hasday has extensively and persuasively shown the pervasiveness of *federal* family law. *See* HASDAY, *supra* note 1, at 17–66.

28. I use the term "separate spheres" deliberately, given that family law's localism historically served to authorize and insulate a gender-hierarchical system. *See* Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2199 (1993); Emily J. Sack, *The Burial of Family Law*, 61 SMU L. REV. 459, 468 (2008); Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 948, 1036 (2002).

29. *But see* Meyer, *supra* note 1, at 568–69 (arguing that more recent constitutional adjudication in family law conflicts reflects a more restrained approach, essentially "pushing the courts to balance the contending interests more evenly case-by-case").

space, contribute to understandings of the same issues, and interact in mutually constitutive ways. Further, the conventional account fails to appreciate the ways in which family law exerts influence over constitutional law; family law shapes the terrain on which constitutional adjudication occurs, structures constitutional conflict, and orients constitutional reasoning.

To many scholars of family law, this claim may seem obvious. Indeed, there is a rich family law literature challenging the conventional narrative that family law and federal law are, and should be, separate. Scholars have shown that, contrary to common assumptions, family law is not simply a matter of local control and is not outside the scope of federal oversight.[30] Rather, specific bodies of federal law should be considered family law. By including constitutional oversight as a component of federal family law,[31] this literature convincingly challenges the instinct of courts and commentators to view (state) family law and (federal) constitutional law as distinct.

Nonetheless, this body of scholarship is more concerned with federalism, and thus levels of government rather than bodies of law. In contrast, this Article's central concern relates to doctrinal, rather than governmental, boundaries. In particular, it focuses on family law—and specifically a body of case law and statutes regulating family relationships—and constitutional law—and primarily questions of equality and liberty. Indeed, while my analysis draws on the interaction between regulation of the family and *federal* constitutional law, similar observations may be made about family law and *state* constitutional decisions.

Even as this Article attends to a dynamic that has yet to be explicitly elaborated, it joins existing family law scholarship that challenges conventional narratives about family law's place in the legal order. My claim about the dialogic relationship between family law and constitutional law runs against tendencies that continue to dominate the treatment of family law and constitutional law.[32] Identifying and unpacking this dialogic

30. *See* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1997); Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787 (2015); Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175 (2000).

31. *See* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 870–83 (2004); Joslin, *supra* note 30, at 787.

32. *See* HASDAY, *supra* note 1, at 222 (noting the failure "to understand family law's relationship to the rest of the law"); Courtney G. Joslin, *Marriage Equality and Its Relationship to Family Law*, 129 HARV. L. REV. F. 197, 206–07 (2017).

relationship is critical to appreciating the reach of family law, as well as the role of constitutional review in regulation of the family.[33] It suggests that, with respect to divisive conflicts over the family, existing accounts both *underestimate* the power of state family law developments and *overestimate* the power of federal courts applying federal constitutional law.

This Article captures the dialogic relationship between family law and constitutional law by drawing on my earlier work on the relationship between LGBT legal mobilization and the resolution of claims to marital and parental recognition.[34] Marriage and parenthood are central institutions in family law and receive protection as a matter of constitutional law. Contestation in family law over the meaning of marriage and parenthood has shaped understandings of these institutions for purposes of constitutional doctrine. And constitutional doctrine has in turn shaped family law disputes over the contours of marital and parental recognition.

First, this Article examines family law reform aimed at nonmarital relationship and parental recognition for gays and lesbians. These family law developments contributed to new understandings of marriage and parenthood, as well as same-sex couples' status within each. Constitutional claims to marriage equality gained traction after family law work altered the meaning and reach of marriage and parenthood, and positioned same-sex-couple-headed families as similarly situated to different-sex-couple-headed families for purposes of relationship and parental recognition.

Accordingly, this Article then relates earlier family law reform to eventual constitutional adjudication of same-sex couples' claims to marry. Federal courts considered whether same-sex couples merited inclusion in marriage in ways that were shaped by family law struggles over the romantic and parental relationships of gays and lesbians. Meanings forged in family law conflict structured how federal courts understood the purposes

33. Professor Courtney Joslin makes this point in responding to my work on the relationship between parentage law and marriage equality, noting that *Marriage Equality and the New Parenthood* "reminds us of some of the critical legal insights that can be lost when we fail to see legal questions as family law questions or through the lens of the family." *See* Joslin, *supra* note 32, at 207.

34. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014).

and boundaries of marriage and parenthood as a matter of constitutional doctrine.

Appreciating the historical trajectory of same-sex marriage—and specifically situating same-sex marriage within broader conflicts over the family—enables us to see how marriage equality relates to a more capacious set of questions about family formation and recognition that lawmakers and judges will continue to confront.[35] After exploring the impact of family law developments on constitutional decisions, this Article returns to family law. Rather than resolve family law questions, constitutional adjudication reshapes aspects of state family law, not only in a clear top-down manner but in more subtle ways. The inclusion of same-sex couples in marriage altered the meaning of marital parenthood by mainstreaming concepts of intentional and functional parenthood while rendering biological and gendered approaches to parenthood less dominant. With such inclusion occurring on constitutional terms, advocates for parental recognition have gained new and powerful arguments for reform of parentage law. Understanding marriage equality's family law antecedents relates the constitutional embrace of same-sex marriage to parental recognition, making visible parenthood's centrality to the equal status of gays and lesbians.

Finally, this Article briefly contemplates the future interaction between family law and constitutional law, specifically with respect to parenthood. In the wake of marriage equality, shifts in the law of parental recognition have been expressed in constitutional terms. For married lesbian couples, constitutional protection for the nonbiological mother's parent-child relationship has generally sounded in the register of equality. Due process protection for parental rights, in contrast, remains tethered to the biological connection between parent and child, even as family law has increasingly embraced concepts of parenthood that transcend biological relationships. Accordingly, this Article briefly contemplates how, if at all, family law shifts in

35. This perspective resonates with Reva Siegel's approach to reading the constitutional guarantees of sex equality in light of struggles over women's suffrage that culminated in the Nineteenth Amendment and its repudiation of gender-based family roles that facilitated and justified women's exclusion from full democratic citizenship. *See* Siegel, *supra* note 28. Siegel's work illustrates the importance of orienting constitutional sex equality to earlier conflicts over the family.

the meaning of parenthood might reverberate in constitutional conflict over parental rights.

The examples of the dialogic relationship between family law and constitutional law presented here are meant to be illustrative and not exhaustive. They are limited to one context—LGBT family recognition—and focus on developments from a single jurisdiction—California. This Article's larger purpose is to initiate a dialogue about family law and constitutional law—to challenge the conventional divide between family law and constitutional law, to open up questions about the concrete interaction between the two, and to begin the work of theorizing the relationship between them. In that spirit, this Article concludes by briefly suggesting how the account of family law and constitutional law articulated here might shed light on debates regarding law and social change.

I. FAMILY LAW'S CONSTITUTIVE ROLE

This Part shows how the development of state family law both relied on constitutional equality commitments and in turn contributed to evolving understandings of those commitments. Beginning in the 1980s, as both the HIV/AIDS crisis and the lesbian baby boom began, LGBT advocates fought for the rights of families created by gays and lesbians. Claims to family recognition are evident in both statutory reform and litigation, and these claims are observable in work relating to both adult relationship recognition and parental recognition. Advocates portrayed same-sex-couple-headed families as like different-sex-couple-headed families, and framed the extension of nonmarital rights and recognition to same-sex couples as an equality measure. The specific ways in which same-sex-couple-headed families were painted as like different-sex-couple-headed families contributed to understandings of marriage and parenthood that would ultimately shape constitutional approaches to same-sex marriage.

A. RELATIONSHIP RECOGNITION: ARTICULATING EQUALITY AND APPROXIMATING MARRIAGE

With same-sex couples excluded from marriage, LGBT activists engineered the concept of domestic partnership as a partial remedy for the discrimination faced by gays and lesbians. Same-sex couples were depicted by advocates as like different-sex couples, even though they were excluded from marriage. Through

this lens, same-sex couples lived marriage-like lives, and thus their claims to nonmarital recognition sounded in equality. Because domestic partnership represented, at least in part, a response to same-sex couples' exclusion from marriage, and because LGBT advocates needed to persuade others who prioritized marriage as a model of family recognition, it made sense to approach domestic partnership as approximating the qualities of marriage and accommodating marriage-like relationships.[36]

Efforts to achieve domestic partnership at the local level leveraged newly won antidiscrimination mandates. In 1978, both San Francisco and Berkeley enacted ordinances that prohibited sexual orientation discrimination in employment, housing, and public accommodations.[37] The following year, in response to Berkeley's ordinance, a leading LGBT activist urged the city to provide healthcare coverage to same-sex partners of municipal employees.[38] It was unfair, he argued, to use marriage as the sole eligibility criterion for benefits, and so suggested that the city create a "domestic partnership" designation to repair the problem.[39] In nearby San Francisco, an openly gay elected official also proposed a domestic partnership system in the wake of sexual orientation nondiscrimination protections.[40]

Even as early domestic partnership proposals included both same-sex and different-sex couples, LGBT advocates drew distinctions between the two in ways that emphasized the harms that same-sex couples in particular experienced as a result of their exclusion from marriage. In San Francisco, for instance, activists noted that different-sex couples' "*temporary*, *voluntary* exclusion when they do not choose to marry is *not* equal to [same-sex

36. The brief account presented here draws on my comprehensive examination of the history of nonmarital relationship recognition in California. *See* NeJaime, *Before Marriage*, *supra* note 34. While the examples are taken from that article, I provide citations here to the primary sources.

37. Les Ledbetter, *Bill on Homosexual Rights Advances in San Francisco*, N.Y. TIMES, Mar. 22, 1978, at A21; Berkeley City Code §13.28.010 et seq. *See also Berkeley Council Approves Strong Gay Rights Law*, L.A. TIMES, Oct. 12, 1978, at B28.

38. *See* Leland Traiman, *A Brief History of Domestic Partnerships*, 15 GAY & LESBIAN REV. 23, 23 (2008).

39. *See id*.

40. *See* Wallace Turner, *Couple Law Asked for San Francisco*, N.Y. TIMES, Nov. 28, 1982, at A1; An Ordinance To Create a Record of Domestic Partnerships, Draft at 1 (1982) (from the files of Matt Coles) (on file with author).

couples'] *permanent*, *involuntary*, and *categorical* exclusion."[41] On this view, the domestic partnership policy was critical not simply to extend benefits to more relationships but rather to partially compensate for the unequal treatment of same-sex couples vis-à-vis marriage.

While San Francisco Mayor Dianne Feinstein vetoed the ordinance passed by the Board of Supervisors,[42] lesbian and gay activists in Berkeley took their grievances to the city's Human Relations and Welfare Commission (HRWC). They argued that the use of marriage as the eligibility criterion for employee benefits "has a discriminatory effect against lesbians and gay men."[43] When HRWC later held hearings on the issue, LGBT activists expressed support for a domestic partnership policy as a remedy to "discrimination on the basis of sexual orientation."[44] Same-sex couples, they demanded, should "receive [their] fair share and not be excluded from 'spousal benefits.'"[45] Importantly, the domestic partnership demand did not explicitly challenge the link between marriage and family-based benefits, but instead suggested that same-sex couples deserved those benefits and yet were ineligible to marry.

When HRWC later recommended that the city adopt a domestic partnership policy,[46] it focused on how exclusionary marriage laws specifically injured same-sex couples: "All unmarried opposite-gender couples are *able* to move voluntarily across the 'marriage barrier,'" but "[a]ll same-gender couples are *unable* to move across the 'marriage barrier'—forever and regardless of their will."[47] In this way, HRWC framed a domestic partnership policy that would ultimately cover both same-sex and different-sex couples primarily as an equality measure for same-sex couples. Indeed, HRWC did not purport to seek a "*generally better*" system of benefits distribution, but, given that it was responding "to a particular set of complaints" from "members of

41. Points To Remember When Countering Opposition or Criticism, in personal notes of Matt Coles (1982) (on file with author).

42. David Morris, *SF Mayor Vetoes Domestic Partners Bill*, 10 GAY COMM'Y NEWS 1 (1982).

43. Memorandum from Human Relations and Welfare Commission, to Hon. Mayor and Members of the City Council 1 (July 17, 1984) (on file with author).

44. *Id*. at 4–6.

45. *Id*.

46. *See id*. at 20.

47. *Id.* at 9.

the lesbian/gay community," sought "to make the benefits program *specifically more equal*."[48]

In staking out the equal status of same-sex couples (ineligible to marry) with respect to different-sex couples (eligible to marry), HRWC urged a domestic partnership regime that "approximate[d] the current marriage criterion."[49] Domestic partnership, it recommended, should be defined to include two people "not related by blood closer than would bar marriage" who "reside[] together and share the common necessities of life" and are "responsible for [each other's] common welfare."[50] This policy mirrored the earlier San Francisco proposal, which defined domestic partners as "[t]wo individuals":

> (a) "not related by blood,"
>
> (b) "[n]either is married, nor are they related by marriage,"
>
> (c) who "share the common necessaries of life,"
>
> (d) "declare that they are each other's principal domestic partner," and
>
> (e) "[n]either has, within the last six months[,] declared to any City department that he or she has a different domestic partner."[51]

While efforts in San Francisco at that point had failed, Berkeley officials adopted HRWC's proposed domestic partnership policy in 1984. Framed as an equality measure for same-sex couples, the policy nonetheless applied to unmarried city employees in either a same-sex or different-sex relationship.

As the efforts from Berkeley and San Francisco illustrate, the earliest domestic partnership protections were framed in large part as sexual orientation equality measures, even when they included different-sex couples otherwise eligible to marry. The government extended family-based protections to same-sex couples as a partial remedy for lesbian and gay exclusion from

48. *Id*. at 18.

49. *Id*.

50. *Id*. at 20.

51. Domestic Partnerships, Amending San Francisco Administrative Code by Adding Chapter 45 Thereto, Establishing Domestic Partnerships and Requiring Boards, Commissions and Departments of the City and County of San Francisco To Afford to Domestic Partners the Same Rights and Privileges as Spouses at 1 (1982) (on file with author).

marriage. Because same-sex couples acted like married couples, LGBT advocates suggested, they merited recognition that approximated marriage.

In articulating the ways in which same-sex couples were like married couples, LGBT activists also articulated shared understandings of marriage. Advocates' sameness arguments did not simply assimilate gays and lesbians to dominant norms and shore up the centrality of marriage. Instead, with same-sex couples in view, marriage's focus shifted from gender differentiation and procreation to romantic affiliation and financial and emotional interdependence. In portraying same-sex couples as marriage-like to secure nonmarital recognition, LGBT activists contributed to an understanding of same-sex couples as deserving of marriage and an understanding of marriage as consistent with same-sex-couple-headed families.

B. PARENTAL RECOGNITION: SHIFTING MEANINGS OF PARENTHOOD AND SEXUAL ORIENTATION EQUALITY

Just as LGBT advocates worked in the space outside marriage to both stake out the equal status of same-sex relationships and secure rights for same-sex couples, they also worked in the space outside marriage to assert claims to family equality and attain parental recognition for same-sex parents.[52] Claims to parental recognition under the Uniform Parentage Act (UPA) illustrate.

The 1973 UPA, which provided a statutory scheme to recognize parent-child relationships, followed constitutional decisions rejecting discrimination against nonmarital children and recognizing the parental rights of unmarried fathers.[53] Many states, including California, adopted the UPA with modifications. While the UPA clearly did not contemplate the families formed by same-sex couples, by the late 1990s, LGBT advocates in California began to assert claims to parental recognition under the UPA.[54]

52. Again, the brief account presented here draws on my comprehensive examination of the history of nonmarital parental recognition in California. *See* NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 34. While the examples are taken from that article, I provide citations here to the primary sources.

53. *See id.* at 1194–95.

54. *See id.* at 1212–29.

For marital families, legislatures adopting the UPA, and courts applying its provisions, had increasingly used concepts of *intent* and *function* to protect parent-child relationships, often for parents who lacked biological ties to their children.[55] The UPA regulated donor insemination by providing that the husband of a woman who gives birth to a child conceived with donor sperm shall "be treated in law as if he were the natural father."[56] Marriage to the mother provided evidence of his intent to parent.

Principles of intent eventually began to shape determinations of motherhood as well. In *Johnson v. Calvert*, a case involving gestational surrogacy, the California Supreme Court applied the UPA to recognize the intended mother and her husband, who were also the child's genetic parents, as the child's legal parents—over the objection of the gestational surrogate.[57] Later, the California Court of Appeal extended the logic of both *Johnson* and the donor-insemination statute to a woman who had neither a gestational nor genetic connection to her child. In *Marriage of Buzzanca*, the court recognized as parents a divorcing husband and wife who had engaged a gestational surrogate to carry a child conceived with donor egg and sperm.[58] Guided by the UPA's regulation of donor insemination, the court recognized the married parents based not on biological connections but on intentional relationships.

To leverage these developments in ways that reached same-sex couples, who were still excluded from marriage, LGBT advocates argued that recognition of nonbiological parents should extend to nonmarital families. To do so, they portrayed same-sex couples' nonmarital families as sufficiently marriage-like to merit similar forms of parental recognition, even as they argued against marriage as a dividing line for parentage.

Consider an early, important victory before the California Board of Equalization—an unlikely venue for family law reform.[59] Helmi Hisserich claimed as her dependent the child whom she and her registered domestic partner, Tori Patterson, were raising. Lawyers at the National Center for Lesbian Rights (NCLR) argued that Hisserich, the nonbiological parent, was the parent

55. *See id.* at 1195–96, 1208–12.
56. UNIF. PARENTAGE ACT § 5(a) (amended 2002) (UNIF. LAW COMM'N 1973).
57. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
58. Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).
59. Hisserich, Case No. 99A-0341, 2000 WL 1880484 (Cal. St. Bd. Eq. Nov. 1, 2000).

based on the "doctrine of intentional parenthood" embraced in *Johnson* and *Buzzanca*.[60] In its 2000 decision, the Board of Equalization accepted this argument:

> Appellant and her domestic partner, unable to marry under California law, registered as domestic partners with the city, county, and state in which they lived; they maintained a committed relationship for a substantial period of time prior to the decision to have a child; they decided to have a child together with the specific intent to rear the child together; they voluntarily and knowingly consented to the artificial insemination of Ms. Patterson with a licensed California sperm bank under the direction of a licensed California physician; appellant further exhibited her intent to be Madeline's parent by initiating adoption proceedings following Madeline's birth; and they lived together, conducted themselves, and held themselves out to the community as a family following the birth of Madeline.[61]

The relationship between Hisserich and Patterson, which as a strictly legal matter was irrelevant to the parent-child relationship, furnished evidence of the couple's intent to co-parent. Moreover, the fact that Hisserich and Patterson were "unable to marry under California law" appeared relevant to the Board's approach to their family. Their marriage-like but legally nonmarital relationship, as well as their joint decision to have and raise a child within that relationship, brought them within the intent-based concepts articulated in *Johnson* and *Buzzanca*, which had involved married couples. Indeed, the board deemed it "essential to [its] conclusion that appellant and Ms. Patterson . . . are an unmarried couple *who maintained a committed relationship*[.]"[62] In depicting Hisserich and Patterson as sufficiently marriage-like to merit treatment analogous to married parents, the Board advanced, at least implicitly, a particular view of marriage, and marital parenting specifically; married couples, just like Hisserich and Patterson, formed intimate, committed relationships and then jointly decided to bring children into their families and to raise those children together. Biological procreation and gender-differentiated parenting seemed immaterial to this model of marital parenting.

60. *Id*. at *2.
61. *Id*. at *4.
62. *Id*. at *5 (emphasis added).

By 2005, the California Supreme Court took up the question of recognition of nonbiological lesbian co-parents. By that point, not only had the California courts and legislature recognized nonbiological parents in the context of marriage, but they had also recognized nonbiological mothers and fathers outside of marriage.[63] The UPA provided that a man who "receives the child into his home and openly holds out the child as his natural child" is presumed to be the child's legal father.[64] In its 2002 *Nicholas H.* decision, the California Supreme Court held that an unmarried father could hold a child out as his "natural" child, and thus satisfy the relevant presumption of paternity, even if he acknowledged from the start that the child was not his biological child.[65] Soon after *Nicholas H.*, the California Court of Appeal, in *Karen C.*, recognized a woman as a mother even though she was not the child's biological mother, based on the fact that she held the child out as her own.[66] The case, which arose outside the context of same-sex parenting, tested the reach of the UPA's gender-neutrality directive, which provided that "[i]nsofar as practicable, the provisions . . . applicable to the father and child relationship apply" to the mother and child relationship.[67]

The recognition of nonbiological parents in same-sex couples now posed a question of equality. Of course, nonrecognition of same-sex parents undermined key objectives of the family law system; government officials eager to privatize dependency sought to find parents who could provide not only emotional but financial support to children.[68] But nonrecognition of same-sex parents also conflicted with emergent equality principles. If other nonbiological parents, including both women and men in both marital and nonmarital families, obtained legal recognition, the exclusion of same-sex-couple-headed families appeared not only unfair but unconstitutional.

In *Elisa B. v. Superior Court of El Dorado County*, the nonbiological lesbian co-parent, Elisa, sought to avoid parental

63. *See* NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 34, at 1216–18.

64. UNIF. PARENTAGE ACT § 4(a)(4) (amended 2002) (UNIF. LAW COMM'N 1973).

65. *In re* Nicholas H., 120 Cal. Rptr. 2d 146 (Cal. 2002).

66. *In re* Karen C., 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002).

67. UNIF. PARENTAGE ACT § 21 (amended 2002) (UNIF. LAW COMM'N 1973).

68. *See* Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985, 2008–09 (2015).

obligations to children born to her partner, Emily.[69] Representing Emily, the biological mother asserting that her former partner was also a legal parent, lawyers at NCLR emphasized the equality commitments animating the UPA and linked those commitments to constitutional principles. Refusing to find Elisa to be a legal parent, they argued, "is inconsistent with the UPA's goal of providing equality for nonmarital children and with the equal protection guarantees of the California and federal constitutions."[70] The claim to parental recognition now constituted a claim to equality, articulated in terms of not only family law but also constitutional law:

> [U]nder any form of equal protection analysis, an interpretation of California's parentage laws that denies legal recognition of Elisa's and Ry and Kaia's parent-child relationships would be unconstitutional. It is patently irrational to recognize as legal parents: (1) a wife who consents to the insemination of a gestational surrogate by her husband, as in *Johnson;* (2) a wife and a husband who consent to the insemination of a gestational surrogate using a donated egg and donated sperm, as in *Buzzanca;* (3) a man who holds himself out as a child's father, but is neither married to the child's mother nor biologically related to child, as in *Nicholas H.;* and (4) a woman who holds herself out as a child's mother, but is neither married to the child's father nor biologically related to the child, as in *Karen C.,* but to deny legal parentage to a lesbian who consented to her partner's artificial insemination with the intention of parenting the resulting children and who subsequently assumed parental responsibility for the children and held herself out as their parent to the world.[71]

Constitutional equality principles, the attorneys argued, should animate interpretation and application of the UPA in light of a string of family law decisions extending parental recognition on grounds of intent and function.

69. Consolidated Answer Brief on the Merits, Elisa B. v. Super. Ct. of El Dorado Cty., 117 P.3d 660 (Cal. 2005). Elisa and Emily had three children together; Elisa was the biological mother of one, and Emily was the biological mother of the other two. The women were raising all three children together as their children. After the relationship dissolved, Elisa disclaimed any responsibility for the two children biologically related to Emily, seeking to preserve only her relationship to the child to whom she was biologically related.

70. Opening Brief of Real Party in Interest Emily B., at 14, Elisa B. v. El Dorado Cty. Super. Ct., 117 P.3d 660 (Cal. 2005).

71. *Id*. at 38.

The marriage-like family formation of Elisa and Emily buttressed the equality claim to parental recognition. If Elisa and Emily, excluded from marriage, acted like married couples who form families with children, denying legal recognition to their parental relationships seemed not only unfair but illogical. Accordingly, NCLR lawyers drew attention to the planned, functional family formed by Elisa and Emily. The opening paragraph of facts explained: "Elisa and Emily were in a committed relationship for more than six years. They had a commitment ceremony, exchanged rings, and pooled their finances. In 1995, Elisa and Emily decided to have children together."[72] Like Hisserich and Patterson in NCLR's earlier case, Elisa and Emily had a marriage-like relationship. They evidenced emotional and economic interdependence in ways that recalled the framing of same-sex relationships in earlier domestic partnership efforts. Their decision to have children followed from their creation of a marriage-like family unit, which itself provided evidence of their intent to parent together and demonstrated parental conduct. Again, on this view, marriage featured committed intimate relationships and joint efforts to have and raise children; sexual procreation, gender differentiation, and biological parenting had fallen out of view.

The California Supreme Court, relying heavily on *Nicholas H.*, recognized Elisa, the nonbiological co-parent, as a legal parent under the UPA's "holding out" provision.[73] Appealing to central concerns of family law—"the state's interest in the welfare of the child and the integrity of the family"[74]—the court embraced a notion of social, rather than biological, parenthood for both different-sex and same-sex parenting in both marital and nonmarital contexts. Even though the constitutional claims that NCLR pressed in making the case for recognition did not feature in the decision itself, the result furthered commitments to equality by affording recognition to parents in same-sex couples. Same-sex couples had been deemed appropriate subjects for parental recognition, even as they remained excluded from marriage.

Over the course of the late twentieth and early twenty-first centuries, family law work by LGBT advocates had accomplished much. Even as recognition of the romantic and parental bonds

72. *Id.* at 7.
73. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).
74. *Id.* at 668.

formed by gays and lesbians advanced family law priorities, such as privatizing dependency and promoting children's welfare, such recognition also staked out the family as a critical site of LGBT equality. Furthermore, it set up claims to marital recognition by, on one hand, framing same-sex couples as sufficiently marriage-like to merit inclusion and, on the other hand, contributing to understandings of marriage that mapped onto the lives of same-sex couples. In this sense, LGBT advocacy was driven by assimilationist impulses and, at the same time, more transformative instincts. In fact, as I show in other work, assimilationist claims—that is, that same-sex couples are like married different-sex couples—subtly forced law to reckon with and accommodate distinctive features of families formed by same-sex couples.[75]

II. CONSTITUTING MARRIAGE

This Part turns to the acceptance of same-sex couples' claims to marriage as a matter of federal constitutional law. It shows how family law developments relating to nonmarital rights and recognition structured understandings of the connection between constitutionally protected liberties—like marriage and parenthood—and sexual orientation equality. If marriage were defined by mutual commitment, romantic affiliation, and emotional and economic interdependence, same-sex couples could make persuasive claims to inclusion. If marital parenting were defined by intentional and functional parent-child bonds, rather than by biological procreation and gender-differentiated parenting, same-sex couples could convincingly argue for inclusion.

A. MARRIAGE EQUALITY AND CONSTITUTIONAL LAW

Claims to marriage equality both predated and followed from LGBT advocacy seeking nonmarital rights and recognition for families formed by gays and lesbians. Litigation for same-sex marriage emerged in the U.S. in the 1970s, but was met with uniform rejection.[76] The modern marriage equality movement

75. *See* Douglas NeJaime, *Differentiating Assimilation*, STUDIES IN LAW, POLITICS, AND SOCIETY (forthcoming 2018) (draft on file with author).

76. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

traces its origins to litigation in Hawaii in the early 1990s,[77] following a period of LGBT advocacy focused on nonmarital recognition. For many years after the Hawaii litigation, marriage claims moved forward primarily at the state level, under state constitutional law.[78] It was not until the late 2000s that federal courts became important actors in same-sex marriage litigation.[79] Eventually, in 2013, the U.S. Supreme Court, with decisions in *Windsor* and *Hollingsworth v. Perry*,[80] intervened in the marriage fight. In *Windsor*, the Court opened the way to federal recognition of same-sex couples' marriages,[81] and in *Hollingsworth*, it let stand a federal district court ruling extending marriage to same-sex couples in California.[82] In the wake of these decisions, federal courts, one after another, struck down state bans on same-sex marriage, leading ultimately to the Court's recognition of same-sex couples' nationwide right to marry in *Obergefell v. Hodges* in 2015.[83] *Windsor* and *Obergefell*, and the federal decisions between them, were framed around constitutional principles of equality and liberty. After all, it was a claim to marriage—a fundamental right—and equality—a constitutional guarantee—that was being adjudicated.

This focus on the constitutional norms animating the marriage claim locates marriage equality within a trajectory of decisions protecting the constitutional rights of gays and lesbians. Indeed, the *Obergefell* Court invoked not only the Supreme Court's equal protection reasoning in *Windsor*, but also its earlier decisions in *Romer v. Evans*,[84] which struck down Colorado's Amendment 2, and *Lawrence*,[85] which struck down Texas's "homosexual conduct" law. The Court framed the question of same-sex marriage as emerging out of these constitutional developments on the rights of gays and lesbians. After addressing

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

78. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1248–50 (2010).

79. *See* William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 281–82 (2013).

80. United States v. Windsor, 133 S. Ct. 2675 (2013); Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

81. 133 S. Ct. 2675.

82. 133 S. Ct. 2652.

83. Obergefell v. Hodges, 133 S. Ct. 2584 (2015).

84. Romer v. Evans, 478 U.S. 186 (1986).

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

the trajectory from *Bowers v. Hardwick*,[86] which rejected a constitutional challenge to anti-sodomy laws, to *Romer* and *Lawrence*, the Court declared: "Against this background, the legal question of same-sex marriage arose."[87]

The constitutional focus also situates the marriage claim within a line of precedents on the constitutional status of marriage. The *Obergefell* Court turned to cases outside the LGBT context, from *Griswold* and *Loving* to *Zablocki* and *Turner*, to buttress its reasoning about same-sex marriage.[88] Marriage equality, in other words, became part of an important constitutional tradition.

This constitutional framing of the marriage claim obscures the role of family law. Indeed, nowhere did the *Obergefell* Court discuss the history of domestic partnership and the municipal fights over the recognition of same-sex relationships beginning in the 1980s. Yet, as we have seen, the claims to marriage followed from years of LGBT advocacy seeking equal treatment for the families formed by lesbians and gay men. Perhaps because earlier family law work did not generally speak in the register of fundamental rights or equal protection, there has been little attempt to connect it explicitly to subsequent claims to marriage equality.[89] In fact, to the extent scholars have related the two, the tendency has been to see them as motivated by different concerns, pushing different goals, and ultimately moving in different directions. Through this lens, LGBT family law work over the past several decades was driven by objectives traditionally rooted in family law—such as the welfare of children and support for diverse family arrangements. Marriage equality, on the other hand, has been seen as prioritizing formal equality and civil rights over family law efforts to support a range of dependency relationships.[90] This perspective tends to affirm the impulse to place the marriage equality claim outside the trajectory of family law work occurring at the state level.[91]

86. Bowers v. Hardwick, 517 U.S. 620 (1996).

87. *Obergefell*, 135 S. Ct. at 2596.

88. *Id.* at 2598–99.

89. *See* Joslin, *supra* note 32, at 199.

90. For leading accounts, see NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE (2008); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387 (2012).

91. *See* NeJaime, *Before Marriage*, *supra* note 34, at 165.

The claim to equal recognition of the families formed by same-sex couples—a claim articulated eventually through marriage equality advocacy—was forged in the domain of family law *before* marriage occupied its central role in LGBT advocacy and in the space *outside* of formal marriage. That earlier work spoke the language of family law but did so in ways that reflected constitutional norms of equality and liberty. And it constructed a model of family—including both marriage and parenthood—that ultimately supported the constitutional claim to marriage equality. This is not to say that LGBT work in family law deliberately set up claims to marriage; indeed, marriage was not a priority for advocates working in family law in the 1980s and early 1990s, and many of these advocates supported a family diversity agenda that decentered marriage.[92] Yet, as I have shown in other work, even those advocates contesting the centrality of marriage found that marriage anchored their efforts; simply to achieve nonmarital rights, they often cast same-sex couples in marriage-like terms to persuade both government actors and potential allies.[93] As the discussion that follows shows, once marriage claims proliferated, earlier family law work—including work animated by the drive to make marriage less important—shaped both the framing of marriage claims and the terms on which marriage claims were contested.[94]

B. MARRIAGE EQUALITY'S FAMILY LAW ROOTS

The fight over marriage equality recapitulated battles waged on the terrain of family law. Commentators have largely failed to notice this dynamic, continuing to view family law outside the lens of national, constitutional, civil rights law. When we put family law into focus, we see that decisions on marriage equality culminating with *Obergefell* were expressed in the register of constitutional law, yet held within them family law insights produced by many years of LGBT advocacy. Again, understandings of both the adult relationship and the parent-child relationship illustrate this dynamic. These understandings should

92. *See id.* at 104–12.

93. *See id.* at 161–62.

94. Of course, the LGBT movement was hardly the first to shape the meaning of marriage. Both civil rights advocates and feminist activists contributed to new understandings of marriage.

orient marriage equality to claims of family rights and recognition arising today.

Key elements of nonmarital relationship recognition are observable in subsequent approaches to marriage claims—with respect both to how courts conceptualized marriage and to whether they viewed same-sex couples as similarly situated to different-sex couples for purposes of marriage.[95] Consider the federal district court's opinion in *Perry v. Schwarzenegger*, the challenge to California's Proposition 8. Determining that California's ban on same-sex marriage violated federal constitutional guarantees of equal protection and due process, the court declared:

> Marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents.[96]

The court's language mirrored the attributes of domestic partnership from its origins in Berkeley and San Francisco.

The district court's decision became the governing decision in the case, after the Supreme Court's ruling in *Hollingsworth*. But before that, the Ninth Circuit affirmed the district court on narrower grounds. In doing so, it articulated the attributes of marriage in terms that reflected meanings forged in battles for domestic partnership. "[B]ecause we acknowledge the financial interdependence of those who have entered into an 'enduring' relationship," the court explained, "[w]e allow spouses but not siblings or roommates to file taxes jointly."[97] For the *Perry* courts, intimate adult commitment and emotional and economic interdependence—not gender differentiation and procreation—defined marriage, just as those concepts had defined domestic partnership.[98]

95. *See id.* at 165–71.

96. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

97. Perry v. Brown, 671 F.3d 1052, 1078 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

98. For a similar framing by LGBT advocates themselves, see Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to the Motions to Dismiss of Defendants Christopher Rich and State of Idaho, at 6, Latta v. Otter (D. Id. 2014) ("The legal institution of marriage under Idaho law is a contractual relationship

The focus on intimate adult affiliation and mutual emotional and financial support is also evident in *Obergefell*. There the Court described marriage as an "enduring bond, [in which] two persons together can find other freedoms, such as expression, intimacy, and spirituality."[99] In explaining why marriage is fundamental for constitutional purposes, the Court first focused on adult partnership, declaring that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[100]

The *Obergefell* Court emphasized not only the emotional but material dimensions of marriage—underscoring marriage's distributive function. Marriage, the Court recognized, is "the basis for an expanding list of governmental rights, benefits, and responsibilities."[101] Domestic partnership efforts, which sought to extend benefits like health insurance coverage to same-sex couples excluded from marriage, underwrote this model of marital recognition. Advocates established the relevance of material benefits to the lives of same-sex couples not only in marriage work that began in the early 1990s but also in work on behalf of *unmarried* same-sex couples that began in the early 1980s. As the domestic partnership regime had clearly evidenced, same-sex couples needed and wanted the material rights and benefits attached to marriage just as much as their different-sex counterparts. As the *Obergefell* Court concluded: "There is no difference between same- and opposite-sex couples with respect to this principle."[102] While the Court mustered constitutional precedents, like *Griswold*, *Loving*, and *Turner*, to support its assertions about marriage's tangible and intangible attributes, the understanding of marriage that emerges from *Obergefell* also reflects years of LGBT advocacy on behalf of nonmarital recognition.

From the Court's perspective, marriage is not primarily defined by procreation and childrearing. In fact, the Court made clear that the right to marry is no "less meaningful for those who do not or cannot have children. An ability, desire, or promise to

embodying a couple's desire to commit themselves publicly to one another, and to undertake legal duties to care for and protect each other and any children they may have, as they move through life together as a family.").

99. Obergefell v. Hodges, 133 S. Ct. 2584, 2599 (2015).

100. *Id.*

101. *Id.* at 2601.

102. *Id.*

procreate is not and has not been a prerequisite for a valid marriage."[103] Strikingly, though, the constitutional case for marriage focused on children even as it distanced marriage from procreation. This too reflected developments pushed by earlier LGBT advocacy in family law. Parenting efforts simultaneously supported both adult-centered and child-centered approaches to the constitutional claim to marriage. The recognition of lesbian and gay parents outside of marriage discredited justifications for the exclusion of same-sex couples from marriage at the same time that it rendered same-sex couples suitable subjects for a child-centered model of marriage.

On one hand, the marriage claim leveraged the separation of marriage and parenting, as well as the vindication of nonmarital parenting, in earlier family law work. In California, as the *Perry* district court concluded, defending a marriage ban based on childrearing seemed irrational when the state "treated same-sex parents identically to opposite-sex parents."[104] More broadly, the state's embrace of lesbian and gay parenting constituted part of a broader trend loosening marriage's grip on parenting. As the Ninth Circuit explained, California's "laws governing parenting . . . are distinct from its laws governing marriage."[105] The robust recognition of nonmarital parenting, advanced by LGBT advocates, made child-based justifications for restrictive marriage laws appear illogical. Parenting did not depend on marriage, and, as the *Obergefell* Court reasoned, marriage did not depend on parenting.[106]

On the other hand—and somewhat paradoxically—earlier work on behalf of unmarried same-sex parents contributed to evolving understandings of parenthood, including marital parenthood, that supported same-sex couples' inclusion in marriage.[107] Opponents of same-sex marriage argued that marriage should promote "optimal childrearing," in which

103. *Id.*

104. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1000 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

105. Perry v. Brown, 671 F.3d 1052, 1078 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

106. 135 S. Ct. at 2601.

107. *See* NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 34, at 1236–40.

mothers and fathers raise their biological children together.[108] This view of marriage prioritizes procreative sex and dual-gender childrearing—attributes that do not align with the families formed by same-sex couples. In response, LGBT advocates did not simply reject the importance of childrearing to marriage, but instead advanced an understanding of parenting—one forged in earlier family law conflicts—in which same-sex and different-sex couples are similarly situated. Same-sex couples, like different-sex couples, deliberately form families in which they decide to have and raise children.[109] This, advocates argued, is an approach to parenthood embedded in contemporary understandings of marriage.

Courts found this logic persuasive. Consider again the reasoning of the federal district court that struck down California's Proposition 8. "California law," the court explained, "permits and encourages gays and lesbians to become parents through adoption . . . or assistive reproductive technology."[110] Even more explicitly, the Ninth Circuit emphasized that, "in California, the parentage statutes place a premium on the 'social relationship,' not the 'biological relationship,' between a parent and a child."[111] Intentional and functional principles of parenthood—principles elaborated through earlier LGBT advocacy on behalf of unmarried lesbian and gay parents—furnished the logic for a view of parenthood that spanned both marital and nonmarital families and included both same-sex and different-sex couples.

The connection between same-sex parenting and marital parenting also appears in *Obergefell*, not merely in the Court's description of the petitioners but also in its constitutional reasoning. Even as the Court explained that marriage is fundamental because it "supports a two-person union," the Court acknowledged that marriage's fundamental character relates in

108. *See, e.g.,* Amici Curiae Brief of Robert P. George et al. in Support of Hollingsworth and Bipartisan Legal Advisory Grp. Addressing the Merits and Supporting Reversal, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (Nos. 12-144, 12-307), 2013 WL 390984.

109. *See* NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 34, at 1237.

110. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1000 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

111. Perry v. Brown, 671 F.3d 1052, 1078 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

part to its role in "safeguard[ing] children and families."[112] Marriage, the Court explained, "affords the permanency and stability important to children's best interests."[113] Indeed, in an implicit nod to family law reform, the Court acknowledged that "[m]ost states have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents."[114] Endorsing an approach to marital parenthood that turns on neither biology nor gender, the Court viewed same-sex and different-sex couples as similarly situated.[115] Ultimately, the model of marital parenthood advanced by the marriage equality claim looks much like the model of social parenthood that gradually accommodated lesbian and gay parents outside of marriage.

III. CONSTITUTING PARENTHOOD

As this Part shows, just as family law developments reverberated in constitutional reasoning about marriage equality, the constitutional acceptance of marriage equality reverberates, for better and for worse, in a new generation of family law conflicts.[116] The discussion that follows illustrates this dynamic by drawing on developments in the law of parental recognition in marriage equality's wake. Contemplating future implications of the mutually constitutive relationship between family law and constitutional law, this Part then imagines how family law reform of parental recognition may one day reshape constitutional approaches to parenthood.

112. Obergefell v. Hodges, 133 S. Ct. 2584, 2600 (2015).

113. *Id.*

114. *Id.*

115. *See id.* at 2599 (explaining that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples").

116. I focus here on liberalization in the law of parental recognition, but the constitutionalization of marriage equality may also serve as a regressive force in family law, with respect to not only parental recognition but also adult relationship recognition. *See, e.g.*, Blumenthal v. Brewer, 2016 IL 118781 (Ill. 2016) (relying on *Obergefell* in denying marriage-like rights to unmarried same-sex couple that dissolved their relationship after more than two decades). For the leading scholarly treatment of this dynamic, see Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016). For a powerful argument that *Obergefell* may open constitutional paths to nonmarital rights, see Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017).

A. MARRIAGE EQUALITY AND PARENTAL RECOGNITION

The model of family that justifies same-sex couples' inclusion in marriage is one that marginalizes gender differentiation and biological procreation and instead embraces chosen and functional families. Now, with same-sex marriage, we are seeing a more wide-scale incorporation of a model of parenting based on conduct and intent—over a biological, gender-differentiated model of parenting.[117]

In earlier nonmarital parenting work, LGBT advocates seized on marriage's capacity to accommodate nonbiological parenthood. Today, advocates leverage marriage equality in ways that push law to more thoroughly accommodate social, nonbiological relationships. Donor-insemination statutes that recognize the husband as the legal father can similarly treat a woman's wife as the "natural," and thus "legal," parent.[118] And courts have increasingly applied the marital presumption—long capable of recognizing husbands as fathers even in the face of contrary biological evidence[119]—to lesbian couples.[120] The parentage statutes, a New York court explained, must be interpreted in a "gender-neutral" manner in light of the onset of marriage equality, such that "the child of either partner in a married same-sex couple will be presumed to be the child of both, even though the child is not genetically linked to both parents."[121]

While the marital presumption always could conceal biological truth, the extent to which it did was often deliberately obscured.[122] Applying the marital presumption to same-sex couples detaches the presumption from biological parenthood in

117. *See* NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 34, at 1241–49.

118. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2295 (2017). Clearly, same-sex parenting is connected to assisted reproductive technologies (ART), and both relate to shifting approaches to parenthood. In other work, I explore how legal regulation of ART exposes tensions between, on one hand, biological and gendered conceptions of parentage and, on the other hand, intentional and functional conceptions of parentage. I link the expansion of intentional and functional approaches to sexual orientation and gender equality. *See generally id.*

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

120. *See* NeJaime, *supra* note 118, at 2295.

121. Wendy G-M. v. Erin G-M., 985 N.Y.S. 2d 845, 860–61 (N.Y. Sup. Ct. 2014). *See also* Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013); Della Corte v. Ramirez, 961 N.E.2d 601 (Mass. App. Ct. 2012).

122. *See* NeJaime, *supra* note 118, at 2277.

more obvious, deliberate, and transparent ways.[123] As Susan Appleton argues, the presumption's application to same-sex couples "highlights the way this long-established doctrine can construct a legal reality even in the face of conflicting biological facts."[124] Now, the presumption rests on the horizontal relationship between the partners and their mutual agreement regarding the parental role vis-à-vis the child.[125] The same idea that, in large part, supported the recognition of lesbian and gay parents in nonmarital families furnishes the logic through which to understand the key provision attaching parental rights inside the marital family. The marital presumption begins to collapse with the intent-based principles applied to married and unmarried parents and the nonbiological reading of the conduct-based "holding out" presumption applied to unmarried parents. The marital presumption, in other words, makes sense because it provides an indication of intent and conduct.

To be meaningful, the marital presumption for lesbian couples must be protected against rebuttal by genetic evidence. The presumption, in other words, must fully own its lack of signification of biological connection. Applied equally in the same-sex and different-sex contexts, this development would render the presumption a more thoroughly social concept across different-sex and same-sex couples.[126] Indeed, it would cut directly against more recent trends toward the use of genetic evidence to disestablish a man's paternity when he discovers that another man is the biological father of his wife's child.[127]

123. *See* NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 34, at 1242 ("With same-sex marriage, the presumption makes sense only because it provides an indication of intent and 'holding out[.]'"); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 230 (2006) ("As applied to same-sex couples, of course, the presumption [of legitimacy] and its variants always diverge from genetic parentage and always produce what might be considered fictional or socially constructed results.").

124. Appleton, *supra* note 123, at 230.

125. *See* Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 718 (2012).

126. Appleton, *supra* note 123, at 291 ("If the law permits rebuttal by genetic evidence, then applying the same principles to lesbian couples provides them and their children precious little. On the other hand, if this approach leads to the conclusion that genetic evidence is irrelevant to the parentage of lesbian couples, then the 'parity goal' indicates that the same principles should apply to traditional couples, making genetic evidence irrelevant to them as well.").

127. *Id*. at 237.

While motherhood continues to represent the primary parent-child relationship, fatherhood is conceptualized as derivative of the mother's relationship.[128] Essentially, the husband is the father because he is married to the mother. In this sense, men's relationships appear more dependent on social relationships yet remain secondary, while women's relationships retain primacy but are rooted more fully in biology.[129] Yet in an age of marriage equality, the policies animating the marital presumption—to identify the parents who intend to have and support the child—appear to apply to both women and men.[130] Accordingly, the presumption could apply regardless of sex, leading not only to recognition of a biological *mother's* husband or wife but also to recognition of a biological *father's* husband or wife—an argument I develop in other work.[131]

Of course, many of these changes do not depend on the *constitutional* resolution of same-sex marriage. What, then, does constitutional law add? The constitutional recognition of same-sex couples' right to marry, on both due process and equal protection grounds, provides powerful new arguments for parental recognition in resistant jurisdictions. *Obergefell* does not settle the conflict over same-sex marriage but instead channels it in new directions.[132] Parentage features prominently in post-*Obergefell* disputes over the consequences of marriage equality.[133] In today's parentage disputes, the marriage equality precedent can be understood in relation to the family law developments that gave rise to it. Marriage equality decisions credited claims to parental recognition originating decades earlier as a family law matter. Appreciating this can lead courts and legislatures to see parenthood as critical to *Obergefell*'s endorsement of the equal status of same-sex couples' families.

128. *See* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 644 (1993) ("fatherhood can only be presumed through a man's relation to the child's mother").

129. *See* NeJaime, *supra* note 118, at 2314–15, 2328–29.

130. *Id*. at 2340.

131. *See id.* at 2339–43.

132. *See* Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. (forthcoming 2017).

133. *See* NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 34, 1243–44.

Consider the federal district court's decision in *Henderson v. Adams*.[134] Even with marriage for same-sex couples, Indiana had not altered gender-specific terms in its parentage provisions. Moreover, its parentage law, unlike the UPA, does not expressly direct that provisions applicable to the father-child relationship apply to the mother-child relationship. The relevant paternity statute provides: "A man is presumed to be a child's biological father if . . . the . . . man and the child's biological mother are or have been married to each other."[135] Even though the statute refers to the "biological father," the state had for years allowed a married woman who gave birth to a child conceived with donor sperm to list her husband on the child's birth certificate. In refusing to provide the same treatment to the wife of a woman who gives birth to a child conceived with donor sperm, the state required the nonbiological mother to adopt the child to become a legal parent.

Indiana defended its position by citing "an important governmental interest in preserving the rights of biological fathers and recording and maintaining accurate records regarding the biological parentage of children born in Indiana."[136] The state attempted to cabin *Obergefell*, asserting that the decision "actually decoupled marriage from parenthood because the right to marry cannot be conditioned on the capacity or commitment to procreate."[137] But the Indiana federal district court instead concluded that *Obergefell* had consequences for the law of parental recognition. Indiana had "created a benefit for married women based on their marriage to a man, which allows them to name their husband on their child's birth certificate even when the husband is not the biological father."[138] "Because of . . . *Obergefell*," the court concluded, "this benefit—which is directly tied to marriage—must now be afforded to women married to women."[139] The parentage statutes, the court determined, unconstitutionally discriminate based on sex and sexual

134. Henderson v. Adams, 209 F. Supp. 3d 1059 (S.D. Ind. 2016).
135. IND. CODE § 31-14-7-1 (2016).
136. *Henderson*, 209 F. Supp. 3d at 1074.
137. *Id.* at 1076.
138. *Id.*
139. *Id.*

orientation.[140] *Obergefell* provided the constitutional basis on which to require a resistant state to extend parental recognition to married lesbian couples who used donor insemination.[141]

Indeed, just as this essay went to print, the Supreme Court explicitly recognized that *Obergefell* requires states to treat same-sex couples like different-sex couples with respect to birth certificates. (Birth certificates do not establish parentage, but are evidence of parentage.) In a *per curiam* order, the Court reversed an Arkansas Supreme Court decision that allowed the state to refuse to issue birth certificates listing the female spouse of a woman who gives birth, even though the state lists the male spouse of a woman who gives birth.[142] "*Obergefell*," the Court declared, "proscribes such disparate treatment."[143] The Court's decision will likely have immediate and significant consequences for the conflicts over parental recognition that have proliferated in *Obergefell*'s wake.

B. PARENTHOOD'S FUTURE?

Like the *Henderson* court, other courts have found that the government's refusal to extend marital parentage presumptions to same-sex couples violates the guarantee of equality announced in *Obergefell*.[144] In contrast to these decisions, though, the *Henderson* court ruled not only on equal protection but also on due process grounds. And its due process reasoning was rooted not in the right to marry, but instead in parental rights. The court concluded that the Indiana parentage statutes interfere with same-sex couples' "exercise of the right to be a parent by denying them any opportunity for a presumption of parenthood which is offered to heterosexual couples."[145] To the extent this cursory reasoning can be read to protect the *nonbiological* parent as a matter of constitutional doctrine, it is exceptional. Parenthood's

140. *Id.* Months later, the court issued an order affirming but clarifying its earlier decision. *See* Henderson v. Adams, Case No. 1:15-cv-00220-TWP-MJD, 2016 WL 7492478 (S.D. Ind. Dec. 30, 2016).

141. Indiana appealed the district court's decision. *See* Brief and Required Short Appendix of Appellant Dr. Jerome Adams, Henderson v. Adams, Case No. 17-1141 (7th Cir. 2017).

142. Pavan v. Smith, 582 U.S. __ (2017).

143. *Id.* (slip op. at 3).

144. *See* Roe v. Patton, Case No. 2:15-cv-00253-DB, 2015 WL 4476734 (D. Utah July 22, 2015).

145. Henderson v. Adams, 209 F. Supp. 3d 1059 (S.D. Ind. 2016).

constitutional status has generally been limited to *biological* parent-child relationships. *Henderson*, then, suggests that the loop between family law and constitutional law might continue in the doctrinal space of parenthood. The elaboration of nonbiological parenthood in the domain of family law, including through shifts generated by marriage equality, might contribute to new understandings of parenthood *as a constitutional matter*.[146]

While constitutional precedents on parental rights date back to the 1920s,[147] the Court's more extensive articulation of constitutional protection for parenthood began in the 1970s with cases on the rights of unmarried fathers.[148] Even as the Court expanded the parameters of parenthood as a constitutional matter, it did so on an understanding that constitutional interests arose out of "natural" parent-child bonds.[149] While this biological premise is at times simply taken for granted, often the Court has been explicit about the relationship between biological parenthood and constitutional rights.[150] (Of course, once an individual becomes a legal parent under state law—through adoption, for instance—that individual possesses constitutionally protected parental rights. But the relevant constitutional cases primarily concern the rights of individuals who have not been adjudicated parents under state law.)

Many developments could have provoked successful challenges to the biological grounding of constitutional parenthood. For instance, claims by foster parents contesting the termination of their foster placements posed questions relating to the constitutional interests of nonbiological parent-child relationships.[151] But the Court resisted, affirming the importance of protecting "natural" parent-child bonds and leaving unsettled

146. *See* NeJaime, *supra* note 118, at 2357–59. There is a danger, of course, that nonbiological parenthood attains constitutional status only when tied to marriage.

147. *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

148. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Lehr v. Robertson, 463 U.S. 248 (1983).

149. *See Stanley*, 405 U.S. 645; *Lehr*, 463 U.S. 248; Caban v. Mohammed 441 U.S. 380 (1979).

150. It is worth noting that in *Prince v. Massachusetts*, a 1944 case involving parental rights, the Court simply assumed that the litigant, who had her own children but was also the legal guardian of her niece, could claim parental authority over that niece. 321 U.S. 158 (1944).

151. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977).

when, if ever, foster parents might have a constitutional liberty interest in the relationships with their foster children.[152]

In contrast to constitutional doctrine, family law, over the past several years, has moved away from an understanding of parenthood limited to biological connection.[153] State family law regimes regularly recognize parents who form nonbiological parent-child bonds without requiring those parents to adopt their children. Indeed, those bonds at times trump competing claims by biological parents.

In some states, the term "natural"—generally used in constitutional discourse to describe biological parents[154]—has shifted. As *Nicholas H.* demonstrates, state courts began to interpret the UPA's "holding out" provision—which turned on holding the child out as one's "natural" child—to recognize a man as a father even when he was not biologically related to the child.[155] Indeed, some courts did so over the objection of the biological father asserting paternity.[156] In other words, biology was no longer viewed as the determinant of nonmarital fatherhood, and instead parental conduct was deemed more critical.[157] In the name of functional parenthood, "natural" came to mean "legal," rather than "biological." By the 2000s, some state appellate courts began to apply the "holding out" presumption of paternity to women. Recall the California Supreme Court's 2005 decision in *Elisa B. v. Superior Court*,[158] which found a

152. *See id*. at 846–47. Again, adoptive parents enjoy constitutionally protected parental rights, but those parents have engaged in formal legal proceedings adjudicating their rights. So, for instance, a stepfather does not attain constitutionally protected parental rights unless and until he adopts the child and thereby supplants the biological father. The Court has not articulated a constitutional parenthood doctrine that expressly includes nonbiological parents who are not adoptive parents.

153. *See* NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 34.

154. *See, e.g.*, *Smith*, 431 U.S. at 845 (distinguishing the "foster family" from the "natural family").

155. *In re* Nicholas H., 46 P.3d 932 (Cal. 2002), as modified (July 17, 2002).

156. *In re* Jesusa V., 85 P.3d 2 (Cal. 2004); Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294 (Cal. Ct. App. 2000).

157. Of course, adoption has long offered a route to nonbiological parenthood. But adoption creates a legal relationship after termination of the biological parents' rights, and adoption continues to be viewed as an exception to normal operation of parentage rules. Here I am dealing with presumptions of parentage that apply regardless of biological connection and even when the biological parent is fit and objects to the competing parentage claim.

158. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005). *See also* Chaterjee v. King, 280 P.3d 283, 285 n.3 (N.M. 2012).

nonbiological mother to be a parent by virtue of the "holding out" presumption.

In disputes involving same-sex parents, advocates argued for the recognition of nonbiological parents not only on family law grounds but also on constitutional grounds. They claimed that statutory and common-law parentage principles should lead to parental recognition, but, to the extent those principles did not yield recognition, the court should deem their application unconstitutional.[159] Most of these constitutional claims were never resolved. Instead, courts recognizing the nonbiological lesbian co-parent did so on statutory or common-law grounds.[160] In some cases, though, courts reached the constitutional questions. Some courts accepted constitutional arguments, reasoning that equal protection required the extension of paternity presumptions to same-sex couples.[161] Other courts rejected constitutional claims, including claims that the nonbiological mother possessed parental rights as a matter of due process.[162] Still, the number of cases resolving the constitutional status of the nonbiological mother's parental rights remains relatively small.

With newfound constitutional support for the families formed by same-sex couples, constitutional claims of nonbiological parents may proliferate. Indeed, not only women but men in same-sex couples may assert such claims.[163] Given that same-sex couples ordinarily include a parent without a biological connection to the child, the constitutional recognition of nonbiological parents is critical to the equal standing of families formed by same-sex couples. The claim to constitutional protection for parental rights appears, just as marriage had been, bound up in the equality of same-sex couples.[164] With shifts in both family law and constitutional law on the status of gays and lesbians, federal courts—guided by *Obergefell*'s dialogic approach

159. *See supra* notes 70-71.

160. *See, e.g., Elisa B.*, 117 P.3d 660.

161. *See, e.g.*, Gartner v. Iowa Dep't of Public Health, 830 N.W.2d 335 (Iowa 2013) (ruling on state constitutional grounds); Shineovich v. Kemp, 214 P.3d 29 (Or. App. 2009) (ruling on state constitutional grounds).

162. *See, e.g.*, Russell v. Pasik, No. 2D14-5540, 2015 WL 5947198, at *3 (Fla. Dist. Ct. App. Oct. 14, 2015).

163. *See* NeJaime, *supra* note 118, at 2358–59.

164. *See id.*

to liberty and equality—might ultimately recognize nonbiological parents as a matter of constitutional due process.[165]

CONCLUSION—REFLECTIONS ON (FAMILY) LAW AND SOCIAL CHANGE

Missing the continuity between earlier family law work and more recent constitutional conflict over same-sex marriage has costs. Scholars, lawyers, and judges may underestimate the impact of family law and overestimate the impact of constitutional law. They may obscure family law's role as a critical site for equality work and elide the influence of family law developments on constitutional understandings of the family. They may expect too much from constitutional law and give undue weight to constitutional resolution.

Better understanding the role that family law plays in subsequent constitutional adjudication might influence a range of academic debates. Consider just one example. Theories of law and social change often focus on federal actors (including primarily federal courts) and federal law (including primarily federal constitutional law).[166] Indeed, U.S. Supreme Court decisions articulating federal constitutional principles remain the primary subjects of analysis.[167] Cases like *Brown v. Board of Education*[168] and *Roe v. Wade*, for instance, feature prominently in debates about when, whether, and how courts should intervene with respect to controversial questions.[169] Of course, given that same-sex marriage was first expressed as a constitutional matter under state law, critiques of judicial intervention (and litigation

165. In future work, I plan to fully explore the relationship between constitutional parental rights and nonbiological parent-child relationships.

166. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008); Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996).

167. Consider work on the backlash thesis, which suggests that favorable court decisions on questions subject to society-wide debate set a movement back by inspiring powerful countermobilization. This work focuses largely on U.S. Supreme Court decisions with respect to contested questions of constitutional law. *See* ROSENBERG, *supra* note 166; Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

168. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

169. *Compare* ROSENBERG, *supra* note 166, *with* Robert Post & Reva Siegel, Essay, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

strategies aimed at such intervention) regularly target state constitutional decisions.[170]

Critics of judicial intervention tend to approach court decisions in a fairly top-down way—as deciding contested issues in ways that may either settle conflict or squelch democratic deliberation and thereby inflame resistance.[171] Some scholars have responded to these critiques by adopting a more bottom-up perspective that views constitutional decisions as growing out of popular mobilization and as reshaping conflict that continues long after the decision.[172] Attention to the family law antecedents of constitutional decisions could productively contribute to this bottom-up account.

One might view judicial resolution of a question like same-sex marriage in light of developments in family law relating to the nonmarital recognition of same-sex-couple-headed families. One might consider how a separate body of law, contested at an earlier moment and in different venues and levels of government, shaped the stakes of subsequent constitutional debate.[173] One might analyze the ultimate constitutional adjudication and its impact along a longer time horizon and as entangled with a broader constellation of issues.

One might also view federal courts and federal constitutional law as less significant. Courts recognizing same-sex couples' right to marry may not have boldly staked out new territory. Instead, they might have merely continued trends that began in family law. Family law reform that primarily involved *unmarried* gays and

170. *See, e.g.*, Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign To Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643 (2009); Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. REV. 431 (2005).

171. *See* Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 879-80 (2013); Douglas NeJaime, *The View From Below: Public Interest Lawyering, Social Change, and Adjudication*, 61 UCLA L. REV. DISC. 182, 193 (2013).

172. For examples of relevant sociolegal work, see Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151 (2009); Michael W. McCann, *How Does Law Matter for Social Movements?*, *in* HOW DOES LAW MATTER? 76, 85 (Bryant G. Garth & Austin Sarat eds., 1998). For examples of relevant legal scholarship, see Post & Siegel, *supra* note 169; Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008); Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135 (2007); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

173. *See* DAVID D. COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 227 (2015).

lesbians and *nonmarital* rights and recognition shaped the terms of debate in subsequent marriage litigation. Federal courts accepting marriage equality claims did so after a series of developments, largely in state family law, that both called into question justifications for excluding same-sex couples from marriage and constituted marriage in ways that could accommodate the families of same-sex couples. From this perspective, power resides less in the domains of constitutional doctrine and federal adjudication and more in the spaces—statutory, judicial, and administrative—conventionally understood as family law.