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THE INTEGRITY OF MARRIAGE

KAIPONANEA T. MATSUMURA*

ABSTRACT

While the Supreme Court's decision in Obergefell v. Hodges resolved a dispute about access to legal marriage, it also exposed a rift between the Justices about what rights, obligations, and social meanings marriage should entail. The majority opinion described marriage as a "unified whole" comprised of "essential attributes," both legal and extralegal. The dissents, in contrast, were more skeptical about marriage's inherent legal content. Justice Scalia, for instance, characterized marriage as a mere bundle of "civil consequences" attached to "whatever sexual attachments and living arrangements [the law] wishes." This side debate has taken center stage in several recent disputes. In the years following Obergefell, courts, including the United States Supreme Court, have considered whether the First Amendment limits a state's authority to require public accommodations to provide equal access to services related to a wedding celebration, whether the right to marry encompasses the right to be deemed a parent to a child born to one's spouse, and whether states

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can withhold valuable employment benefits from married same-sex couples. And numerous state legislatures have considered proposals to get states “out of the marriage business.” All of these disputes ultimately question how the positive law of marriage should be constituted and whether marriage is indeed a unified or integrated whole.

Some scholars have analyzed these questions from a historical or functional perspective. This Article starts from a different point. It accepts Obergefell’s invitation to think of marriage as an institution that can be more or less “unified” or “integrated.” Along these lines, it proposes a new framework for analyzing questions about the positive law of marriage: the continuum of integration and disintegration. This continuum has two interrelated dimensions. The first involves the rights and duties that the law imposes upon spouses. The second involves the uniformity of those legal rules across jurisdictions. Marriage becomes more integrated when rights and social norms mutually reinforce each other, and less integrated when rights and norms conflict. The package of rights and norms becomes more integrated when it is uniform across jurisdictions, and less integrated when jurisdictional differences prevent marriage from acquiring a singular meaning. This integration framework has two benefits. First, by focusing attention on the relationship between the functions, laws, and norms of marriage, the integration framework provides a methodology for assessing claims that changes to marriage laws are bringing about marriage’s disintegration, rendering visible whether and how disintegration occurs. Second, it identifies benefits and costs of integration, demonstrating the extent to which marriage relies on effectively communicating information about its content but noting the downsides of centralization and state control. This integration framework enables a more principled analysis of efforts targeted at reforming marriage laws and recognizing nonmarital relationships.

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INTRODUCTION

In addition to castigating the Court's central holding that the Fourteenth Amendment requires states to allow same-sex couples to marry, the dissenters in *Obergefell v. Hodges* unleashed a surprising broadside on the bundle of state and federal laws that constitute the positive law of marriage.¹ Consider the following statement by Justice Scalia: "The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences.... Those civil consequences ... can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws."² Or this statement by Justice Thomas:

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would *not* have included a right to governmental recognition and benefits. Instead, it would have included a right to ... mak[e] vows, hold[] religious ceremonies celebrating those vows, rais[e] children, and otherwise enjoy[] the society of one's spouse—*without governmental interference*.³

To these Justices, the positive law of marriage could be anything or nothing at all.

These statements challenge the assumption that marriage should be what Justice Kennedy's majority opinion in *Obergefell* called a "unified whole," the inchoate notion that marriage should naturally encompass a core set of rights and duties—both "symbolic" and "material"—related to "establish[ing] a home and bring[ing] up

1. Laws turning on marital status—what I refer to as the "positive law of marriage"—include rights and obligations pertaining to "taxation; inheritance and property ... evidence; hospital access; medical decisionmaking authority; adoption ...; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; ... child custody, support, and visitation," and more. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015). Over one thousand federal laws and regulations turn on marital status, *United States v. Windsor*, 570 U.S. 744, 752 (2013), as do countless state and municipal laws and regulations. See, e.g., *Obergefell*, 135 S. Ct. at 2594-95.

2. *Obergefell*, 135 S. Ct. at 2626-27 (Scalia, J., dissenting).

3. *Id.* at 2636 (Thomas, J., dissenting) (emphasis added).

children.”⁴ Under Justice Kennedy’s view, the positive law sets marriage apart as “a two-person union unlike any other in its importance to the committed individuals,”⁵ providing “permanency and stability” to the marital family,⁶ and enabling family members “to understand the integrity and closeness of their own family and its concord with other families.”⁷ In Justice Kennedy’s telling, changes to the positive law of marriage have only served to move marriage closer to its platonic ideal.⁸

This debate between the *Obergefell* Justices over whether marriage has a necessary or ideal legal content is actively playing out in state courts. For example, recent decisions have challenged the connection between marriage and parentage. States have traditionally assigned parental rights to husbands because of the marital relationship.⁹ In *Michael H. v. Gerald D.*, the Supreme Court upheld a presumption of paternity statute over a challenge by a man with a 98 percent probability of being the child’s biological father.¹⁰ The Court noted that “given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and ... the integrity of the family should not be impugned.”¹¹ In a conflict between biology and marriage, “our traditions have protected the marital family.”¹² The Arkansas Supreme Court recently took a different approach, upholding the state’s refusal to name married, female, nonbirth mothers as a legal parents on their children’s birth certificates.¹³ The court held that the marital presumption statute was not actually about “the marital relationship of husband and wife,” but rather “the relationship of the biological mother and

4. See *id.* at 2600-01 (majority opinion) (citations and quotation marks omitted); see also Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—or Not at All?*, 34 FAM. L.Q. 271, 275 (2000) (arguing that marriage was, until recently, “a unitary—‘one size fits all’—concept”).

5. *Obergefell*, 135 S. Ct. at 2599.

6. *Id.* at 2600.

7. *Id.* (quoting *United States v. Windsor*, 570 U.S. 744, 772 (2013)).

8. See *id.* at 2596 (noting that changes to the law have “strengthened, not weakened, the institution of marriage,” reflecting “new dimensions of freedom”).

9. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) (plurality opinion).

10. *Id.* at 113-14, 131-35.

11. *Id.* at 119-20 (citation and quotation marks omitted).

12. *Id.* at 124.

13. *Smith v. Pavan*, 505 S.W.3d 169, 172-73 (Ark. 2016), *rev’d*, 137 S. Ct. 2075 (2017) (per curiam).

the biological father to the child.”¹⁴ The court accepted the State’s argument that the “overarching purpose” of the statutory presumption was to maintain accurate records of “vital events for purposes of public health research and identification of public health trends,” *not* the preservation of the marital family.¹⁵ In a similar dispute, an Arizona appellate court was even more direct.¹⁶ The court dismissed the argument that the purpose of Arizona’s statute was to extend parenthood to children born to married spouses, contending instead that “the purpose of the presumption statute is to assist in determining whether a man is a child’s biological father.”¹⁷ In a sweeping statement, the court declared that “with the exception of adoption, ... parentage in Arizona is determined by biology.”¹⁸ Under this reasoning, a birth mother’s husband would *necessarily* have an inferior claim to an anonymous sperm donor.¹⁹

Both the Arkansas and Arizona decisions were reversed by higher courts.²⁰ But these courts are not alone in questioning the relationship between marriage and other rights traditionally associated with that institution.²¹ For example, the Texas Supreme Court has greenlighted a lawsuit challenging Houston’s provision of health insurance to married same-sex couples, refusing to hold that the right to marry requires the State to “provide the same publicly

14. *Id.*

15. *See id.* at 179.

16. *See* Turner v. Steiner, 398 P.3d 110, 113 (Ariz. Ct. App. 2017), *abrogated by* McLaughlin v. Jones, 401 P.3d 492 (Ariz. 2017) (“A man is presumed to be the father of the child if ... ‘[h]e and the mother of the child were married at any time in the ten months immediately preceding the birth’ [off] the child.” (quoting ARIZ. REV. STAT. ANN. § 25-814 (2019))).

17. *Id.* at 113-14.

18. *Id.* at 114 (emphasis added).

19. *See id.* Although most states have adopted statutes that make a husband the father of a child conceived through the consensual use of donor sperm, Arizona lacks a statute governing sperm donation. Theoretically, a sperm donor could turn around and sue to establish paternity, displacing the husband. *See* ARIZ. REV. STAT. ANN. § 25-814 (2019).

20. Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017) (per curiam); *McLaughlin*, 401 P.3d at 502. Importantly, they were reversed not because of any necessary connection between marriage and parenthood but because they treated married same- and opposite-sex couples differently. *See Pavan*, 137 S. Ct. at 2078; *McLaughlin*, 401 P.3d at 500. The higher courts left open the possibility that states could sever marriage and parenthood as long as they did so evenhandedly. *See, e.g., Pavan*, 137 S. Ct. at 2078-79 (clarifying that *Obergefell* proscribes disparate treatment and concluding that Arkansas had applied its laws unequally).

21. *See, e.g.,* Strickland v. Day, 239 So. 3d 486, 494 (Miss. 2018) (denying parental presumption to an ex-same-sex spouse on appeal to the Mississippi Supreme Court).

funded benefits [such as health care] to all married persons.”²² And various state legislatures have considered bills attempting to take states out of the marriage business altogether.²³

These recent developments may be nothing more than new attempts to discriminate against same-sex couples.²⁴ To be sure, leading up to *Obergefell*, some state courts were transparently motivated by political opposition to same-sex marriage.²⁵ And scholars have documented the presence of anti-gay animus in arguments by same-sex marriage opponents.²⁶ Indeed, Justice Scalia’s claim that “it is not of special importance to me what the law says about marriage”²⁷ beggars belief given that he devoted a page in his *Lawrence v. Texas* dissent to the “fear” that striking down bans on homosexual sodomy would lead to same-sex marriage and the “hope” that it would not.²⁸

22. See *Pidgeon v. Turner*, 538 S.W.3d 73, 78-79, 86-87 (Tex. 2017), *cert. denied*, 138 S. Ct. 505 (2017) (declaring that *Obergefell* did not address or resolve the question of whether Texas’s Defense of Marriage Act precluded the City of Houston from offering taxpayer-funded spousal benefits to same-sex couples).

23. See, e.g., Debbie Elliott, *Same-Sex Marriage Flashpoint: Alabama Considers Quitting the Marriage Business*, NPR (Feb. 27, 2018, 5:00 AM), <https://www.npr.org/2018/02/27/588834254/same-sex-marriage-flashpoint-alabama-considers-getting-out-of-the-marriage-busin> [<https://perma.cc/D6NG-H5CS>] (describing proposed legislation in Alabama to stop issuing marriage licenses).

24. See, e.g., Pavan v. Smith: *Victory*, GLBTQ LEGAL ADVOCATES & DEFS., <https://www.glad.org/cases/pavan-v-smith/> [<https://perma.cc/T5QK-7SPA>] (“[O]pponents of equality have not stopped trying to resist [*Obergefell*], and we have seen attempts across the states to undermine what *Obergefell* so clearly guarantees.”); *Texas Supreme Court Distorts Obergefell to Revive Attacks on Marriages of Same-Sex Couples: Lambda Legal Will Work with Houston Attorneys to Defend Marriage*, LAMBDA LEGAL (June 30, 2017), https://www.lambdalegal.org/news/tx_20170630_pidgeon-decision [<https://perma.cc/2CSB-ZABV>] (calling the Texas Supreme Court decision a “naked attempt” to relegate LGBT people to “second-class status”).

25. See, e.g., Billy Corriher & Eric Lesh, Opinion, *Marriage Equality Cases Languish Before Elected Judges*, L.A. TIMES (June 1, 2015, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-corriher-lesh-gay-marriage-lawsuits-20150601-story.html> [<https://perma.cc/64FK-WZP5>].

26. See, e.g., Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1176 (2012) (concluding that anti-marriage arguments were largely motivated by homophobia rather than legal policy).

27. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

28. 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting). For an illuminating analysis of the emotions motivating the dissenting Justices in *Obergefell*, see Marc Spindelman, *Obergefell’s Dreams*, 77 OHIO ST. L.J. 1039, 1074-76 (2016).

But whether these developments are mere pretext for discrimination, they raise a deeper question concerning the legal incidents that should comprise the positive law of marriage. One might attempt to answer that question in several different ways. So, for example, scholars have asked whether the Constitution requires the states to provide a core set of marital rights. Some have taken a historical approach to that question, looking to the rights that constituted the positive law of marriage at the time of the nation's founding.²⁹ Others have made normative constitutional arguments based on philosophical commitments³⁰ or positivist accounts.³¹ And going beyond questions about marriage law's constitutional floor, innumerable scholars have critiqued various aspects of marriage law for being inefficient, incoherent, discriminatory, or otherwise problematic.

I respond to the question from a different angle. Starting from the premise that marriage law consists of a bundle of legal incidents, the contents of which have continuously changed over time, I ask what the process of combining or breaking apart reveals about what should go in that bundle. Numerous courts have used concepts such as integrity and unity to describe marriage,³² assuming that various legal incidents belong together.³³ Although marital integrity, to this point, has been mostly an empty vessel, the concept of integrity—the “state of being complete or undivided”³⁴—is a useful framework through which to evaluate changes to marriage laws.

29. See, e.g., Michael Boucai, *Before Loving: The Origins of the Right to Marry*, UTAH L. REV. (forthcoming 2019) (canvassing early judicial decisions, treatises, and other secondary sources to collect and distill the core rights associated with marriage from the founding through the mid-twentieth century).

30. See, e.g., Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1741 (2016) (arguing that the positive right to marry must match individual freedom to share one's life with another person with rules that protect the partners' equal liberty, which in turn requires rules governing entrance, exit, and property distribution).

31. See, e.g., Pamela S. Karlan, *Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?*, 98 CALIF. L. REV. 697, 705-07 (2010) (arguing that the longstanding regulation of marriage can “harden[]” into a liberty interest that states can no longer abandon).

32. See, e.g., *Obergefell*, 135 S. Ct. at 2600 (referring to marriage as a “unified whole”); *Estin v. Estin*, 334 U.S. 541, 546 (1948) (referring to the “integrity of the marriage relation”).

33. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (suggesting that the marital regime of coverture was “founded in the divine ordinance”).

34. *Integrity*, MERRIAM-WEBSTER (11th ed. 2003).

The meaning of integration becomes clear when analyzing the mechanisms by which the positive law of marriage disintegrates.³⁵ Marriage can integrate or disintegrate along two dimensions. The first involves marriage's rights and duties. Borrowing from Thomas Grey's suggestion that legal categories disintegrate when their conceptual, legal, and popular meanings diverge,³⁶ marriage becomes more integrated when legal rights and social norms work together to promote marriage's functions. It disintegrates when marriage laws undermine each other or the social norms on which they depend.³⁷ The second dimension concerns the sources of marriage law, namely the states and federal government.³⁸ Marriage law becomes more integrated when the package of rights is consistent across jurisdictions.³⁹ It disintegrates when different definitions and rules interfere with its singular meaning.⁴⁰ Inconsistencies between state and federal definitions of marriage can result in people being simultaneously married and unmarried, interfering with the experience of marriage as an "integrated whole."⁴¹ Perfectly integrated—complete and undivided—marriage would coherently

35. See *Disintegrate*, MERRIAM-WEBSTER, *supra* note 34 (defining "disintegrate" as "to break or decompose into constituent elements, parts, or small particles").

36. See Thomas C. Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69, 74-75 (J. Roland Pennock & John W. Chapman eds., 1980).

37. See *id.*

38. See Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 12-13 (2010).

39. See *id.* at 44-45.

40. See *id.* Halley observes that marriage becomes more status-like the more it is integrated. *Id.* Although she does not define integration, she provides an example:

Perhaps the high water mark of integration is ... [one] in which the relationships between marriages become the web for weaving a fully integrated and stabilized "social": in such a world, all marriages would be marriage all the time and everywhere, and all social life would be linked in some tight way to the marriages and to marriage.

Id. at 45. Halley conceives of integration as a phenomenon that extends beyond the legal institution of marriage to the ordering of society—channeling most people into marriage and filtering experience through the lenses of marriage and nonmarriage. See *id.* at 46-47. In contrast, I use the concept to describe the organization of marriage as marriage, that is, how to appropriately structure marriage to achieve its ends. Moreover, Halley's definition takes for granted that marriage is whatever rights are currently bundled into that status. See *id.* at 5. In contrast, I argue that the selection of rights that flow from marriage is also central to the concept of integration.

41. *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (noting that the failure of states to grant full faith and credit to each other's divorce decrees would cause people to be married in one state but not in the next, preventing these statuses from being an "integrated whole").

implement a set of agreed upon functions uniformly across jurisdictions.

This framework provides the vocabulary to assess changes to marriage laws—such as disaggregating marriage from parentage or employment benefits. Although scholars have offered piecemeal justifications for linking marriage to rights such as parenthood⁴² or delinking it from rights such as immigration benefits or federal tax consequences,⁴³ few have analyzed how those proposals would impact marriage law more broadly.⁴⁴ Moreover, although scholars have studied the inconsistencies between state and federal definitions of marriage,⁴⁵ they have not analyzed the relationship between those differences and the optimal bundling of marriage laws.

Part I of this Article uses the disagreement between the *Obergefell* Justices over the inherent legal content of marriage to highlight deep uncertainties about the very relationship between law and marriage. It shows that scholars have attempted to answer questions about the nature of marriage through two binaries—status versus contract and positive rights versus negative rights—and explains why those two binaries fail to provide tools to assess the positive law of marriage. It then shows why an integration framework could better answer those questions.

42. See, e.g., Margaret F. Brinig, *A Case for Integrated Parenthood*, in WHAT IS PARENTHOOD?: CONTEMPORARY DEBATES ABOUT THE FAMILY 147 (Linda C. McClain & Daniel Cere eds., 2013); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 517 (1983).

43. See, e.g., Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 31-37 (2012) (discussing the delinking of marriage from immigration benefits); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 64-65 (1993) (discussing the problems with linking marriage with joint income tax returns).

44. Several scholars have explored the consequences of abolishing, and therefore completely disintegrating, the category of legal marriage. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228-30 (1995); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 5 (2008). These proposals unsurprisingly focus little on the problem of properly constituting marriage's positive law.

45. See, e.g., Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 269-71 (2009) (discussing how family law is no longer viewed solely as the province of state governments); Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 788-93 (2015) (arguing that family law is not inherently local, but that the federal government has long been involved in defining "family status").

Part II begins the project of defining integration and disintegration. It identifies the first axis of integration, rights and norms. The states and federal government have populated the positive law of marriage with thousands of laws that turn on marital status.⁴⁶ Many of those laws, explicitly or implicitly, depend on social norms, and coexist with those norms in various degrees of harmony. Marriage becomes more integrated when the laws regulating marriage work to promote the same purposes; it disintegrates when changes bring about conflict. The same can be said for laws and the social norms on which they depend. Disintegration can be direct, such as when a new rule or rationale contradicts an established goal. The turn away from the marital presumption to a parentage rule based on biology provides one example, assuming a function of marriage is to promote the nuclear family.⁴⁷ More commonly, laws and social norms are severed indirectly. For example, Supreme Court decisions striking down statutes disfavoring illegitimate children did not directly impact the parental rights of spouses.⁴⁸ Yet they eased the consequences of having children outside of marriage,⁴⁹ challenging the previously necessary connections between marriage, sex, and parentage.

Part III identifies the second axis of integration, uniformity of marriage laws across jurisdictions. Marriage laws spring from different sources. The federal government generally relies on state definitions of marriage but does not always do so.⁵⁰ A particularly egregious example of divergence occurred under the Defense of Marriage Act (DOMA), when a couple could be treated as married under state law but receive none of the thousands of legal rights and obligations afforded to married couples under federal law.⁵¹ DOMA is gone, but the federal government continues to rely on its own definitions of marriage for various purposes, such as the awarding of immigration or Supplemental Security Income (SSI) benefits.⁵²

46. See *supra* note 1.

47. See *supra* notes 13-19 and accompanying text.

48. See Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2307-08 (2015).

49. See *id.* at 2299, 2303, 2307-08.

50. But see Joslin, *supra* note 45, at 789 (explaining that some argue states have the exclusive right to define marital status).

51. See *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

52. See, e.g., Abrams, *supra* note 43, at 31-37 (providing examples of definitions of

Disintegration can also occur when the incidents of marriage differ between states, either because of different eligibility requirements—for example, regarding first cousin marriages⁵³—or because of differently defined legal obligations—for example, interspousal tort immunity.⁵⁴ Because of these differences, a marriage might flicker on and off and the legal duties between the spouses might change as a couple drives from state to state.

Having identified the mechanisms of integration and disintegration, Part IV provides a normative framework for assessing their benefits and drawbacks. Integration promotes the consistent application of laws. Consistency brings about predictability and stability. It also reduces the information costs associated with those functions by imposing a *numerus clausus* of marriage, limiting the number of standard forms to clarify entitlements and reduce information costs.⁵⁵ This makes it easier for people to understand the legal consequences of a choice to marry.⁵⁶ But these beneficial aspects of integration must be weighed against the risks: namely, the imposition of majoritarian preferences and the concomitant contraction of private choice.⁵⁷

Focusing on the question of integration casts marriage in a new light, revealing new contours. Part V identifies two examples, one involving marriage laws, and one outside of it. The first discusses whether to extend the marital presumption to same-sex couples or to abandon it in favor of other routes to legal parenthood. The second discusses whether states should recognize nonmarital relationships. In both instances, the lens of integration reveals a different set of considerations on both sides of the debate than are

marriage from immigration law).

53. See, e.g., *Cook v. Cook*, 104 P.3d 857, 858-59 (Ariz. Ct. App. 2005).

54. See Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 359, 435 (1989) (explaining that interspousal tort immunity now only exists in a minority of states).

55. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4-9 (2000). Although family law scholars have explored the importance of social norms in governing intimate conduct, see *infra* notes 125-43 and accompanying text, they have not explored the extent to which a plurality of relationship forms could affect the efficient functioning of these norms.

56. See Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2026-30 (2017).

57. Cf. Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1542 (2016) (emphasizing the importance of being able to choose not to marry, as well as to marry).

typically raised, expanding the discussion of how they should be resolved.

I. CONSTITUTING MARRIAGE

Courts have frequently assumed that marriage has an inherent legal content. This has been true even in the face of significant changes to the positive law of marriage. As numerous scholars have observed, at the time of our nation's founding, marriage depended upon—and indeed produced—gender differentiation.⁵⁸ The regime of coverture, tort, contract, property, and criminal law collectively reinforced the wife's inferior legal status by denying the wife's separate legal existence and concentrating legal decision-making authority in the husband.⁵⁹ Many of the changes to the law of marriage in the late nineteenth and twentieth centuries have been in furtherance of dismantling coverture.⁶⁰ Yet throughout, courts have continued to speak of marriage laws as a singular thing.⁶¹

In 1872, Myra Bradwell, a married woman, challenged the Illinois Supreme Court's denial of her petition for admission to the state bar.⁶² The United States Supreme Court was unsympathetic to her case.⁶³ In a now infamous pronouncement, Justice Bradley stated that “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.”⁶⁴ Marriage was central to his opinion.⁶⁵ Justice Bradley argued that the “constitution of the family organization”—marriage—was “founded in the

58. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 3 (2000) (“Molding individuals’ self-understanding, opportunities, and constraints, marriage uniquely and powerfully influences the way differences between the sexes are conveyed and symbolized.... The whole system of attribution and meaning that we call *gender* relies on and to a great extent derives from the structuring provided by marriage.”).

59. See Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 *YALE L.J.* 1073, 1082 (1994); Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman’s Separate Estate*, 26 *YALE J.L. & FEMINISM* 165, 167 (2014).

60. See Tait, *supra* note 59, at 167, 211-14.

61. See *infra* notes 68-71 and accompanying text.

62. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 131-33 (1873).

63. See *id.* at 139.

64. *Id.* at 141 (Bradley, J., concurring).

65. See *id.* at 140-42.

divine ordinance, as well as in the nature of things.”⁶⁶ This “natural” and “fixed” meaning of marriage could not accommodate a married woman “adopting a distinct and independent career from that of her husband.”⁶⁷

This assumption that marriage has a core legal meaning echoes through the centuries. It arose in *Estin v. Estin*, when the Court said, “Marital status involves the *regularity* and *integrity* of the marital relation. It affects the legitimacy of the offspring of marriage. It is the basis of criminal laws.”⁶⁸ And again in *Griswold v. Connecticut*, when the Court declared, “Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”⁶⁹ And most recently in *Obergefell v. Hodges*, when the Court identified “*essential* attributes of [the right to marry] based in history, tradition, and other constitutional liberties *inherent* in this intimate bond.”⁷⁰ Indeed, the *Obergefell* majority opinion assumed that same-sex marriage opponents and advocates agreed in most respects on the meaning of this “timeless institution,” with gender differentiation being the one sticking point.⁷¹

These pronouncements about marriage’s essential attributes were suspect the moment they were uttered. For instance, by the time of *Bradwell v. Illinois*, some states had begun to extend property rights to married women.⁷² Justice Bradley made his claims about the marriage being “founded in the divine ordinance” and “nature of things” even as he acknowledged “recent modifications of this civil status.”⁷³ Moreover, he relied on the disabling effects of coverture on a married woman lawyer’s ability to enter into binding legal agreements with her clients to justify the outcome of the case, even as he recognized that not all women were married and therefore

66. *Id.* at 141.

67. *Id.*

68. 334 U.S. 541, 546 (1948) (emphasis added).

69. 381 U.S. 479, 486 (1965) (emphasis added).

70. 135 S. Ct. 2584, 2598 (2015) (emphasis added).

71. *Id.* at 2594 (“Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities.”).

72. See Siegel, *supra* note 59, at 1177.

73. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

subject to the same disabilities.⁷⁴ Likewise, the notion in *Griswold* that marriage is a “coming together for better or for worse, hopefully enduring,”⁷⁵ was belied by the widespread availability of divorce, including by the author of the opinion, Justice Douglas, who was by then twice divorced.⁷⁶

It was not until *Obergefell*, however, that the nature of marriage became the subject of open dispute. In Justice Kennedy’s majority opinion, marriage has inherent content, both in terms of expressive rights and material benefits.⁷⁷ Marriage has changed over time⁷⁸ but it has retained certain “essential attributes,”⁷⁹ some of which Justice Kennedy identifies. Marriage is a relationship defined by the partners’ commitment.⁸⁰ It is permanent: “It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”⁸¹ It also anchors the family, part of a “unified whole” of rights including the right to “establish a home and bring up children.”⁸² The importance of marriage makes the decision to marry “among the most intimate that an individual can make,”⁸³ so much so that it “shape[s] an individual’s destiny.”⁸⁴ Marriage involves social recognition and respect—“society pledge[s] to support the couple”⁸⁵ and recognizes their “nobility and dignity.”⁸⁶

For Justice Kennedy, the law is no passive participant in constituting marriage. States have placed marriage at the center of the

74. See *id.*

75. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

76. See David J. Garrow, *The Tragedy of William O. Douglas*, NATION (Mar. 27, 2003), <https://www.thenation.com/article/tragedy-william-o-douglas/> [<https://perma.cc/HY9E-ZK45>].

77. Cf. Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2083-84 (2005) (arguing that marriage “has two characteristics: the expressive legitimacy that comes from the public institution of marriage; and the panoply of material benefits, both economic and non-economic, that the marital relationship confers”).

78. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

79. *Id.* at 2598.

80. *Id.* at 2600 (citing *United States v. Windsor*, 570 U.S. 744, 763-64 (2013)) (noting that a married couple “define themselves by their commitment to each other”).

81. *Id.* (claiming that marriage affords “permanency and stability”); *id.* at 2608 (“[M]arriage embodies a love that may endure *even past death*.” (emphasis added)).

82. *Id.* at 2600 (citation and quotation marks omitted).

83. *Id.* at 2599.

84. *Id.*

85. *Id.* at 2601.

86. *Id.* at 2594; see also *id.* at 2600.

legal and social order by making marital status the key to regulations regarding

taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.⁸⁷

States only have the "general" authority to vary these rights.⁸⁸ That is, because one of marriage's "profound benefits" is to provide a recognizable "legal structure" that allows members to "understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."⁸⁹ This language implies that many of the current legal rules regarding marriage are part and parcel of the fundamental right to marry.

In contrast, three dissenting Justices downplay the role of law in constituting marriage. First, they argue that the right to marry is purely a negative right.⁹⁰ Chief Justice Roberts, joined by Justices Scalia and Thomas, acknowledges that the State has, as a positive matter, enacted laws to channel people into a state-sanctioned sexual relationship.⁹¹ Yet he contends that none of the legal rights serving as an inducement for couples to enter marriages are constitutionally compelled.⁹² He criticizes the plaintiffs for attempting to use the Constitution as a "sword to demand positive entitlements from the State," and suggests that the Constitution cannot confer "public recognition" or "corresponding government benefits."⁹³ As Justice Thomas adds in his separate dissenting opinion, the constitutional right to marry would only come into play if states

87. *Id.* at 2601.

88. *Id.*

89. *Id.* at 2600 (quoting *United States v. Windsor*, 570 U.S. 744, 772 (2013)).

90. *See id.* at 2635 (Thomas, J., dissenting).

91. *Id.* at 2613 (Roberts, C.J., dissenting) ("[B]y bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without.").

92. *See id.*

93. *Id.* at 2620.

interfered with the private acts of “making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one’s spouse.”⁹⁴

Second, the dissenting Justices question the relationship between the legal regulation of marriage and marriage’s “core meaning.”⁹⁵ Like Justice Kennedy, Chief Justice Roberts agrees with the assumption that marriage has a “singular understanding”⁹⁶ or “core meaning,”⁹⁷ albeit one revolving around the procreative union of one man and one woman.⁹⁸ Yet, by denying a relationship between the constitutional right to marry and positive marriage law, he makes clear that the “core meaning” is social as opposed to legal.⁹⁹ Justice Scalia’s remark that “[t]he law can recognize as marriage whatever sexual attachments and living arrangements it wishes,” the consequences of which would be “no more adverse than the effects of many other controversial laws,”¹⁰⁰ emphasizes this point: there is nothing special about the laws regulating marriage.

The integral aspects of legal marriage—once assumed by the courts—are now openly being questioned. Although courts have failed to explain why certain legal incidents make up marriage’s core, scholars have attempted to answer this question by employing two binaries. First, is marriage a status or contract?¹⁰¹ Second, does the right to marry have a positive dimension, or is it merely whatever collection of rights the state deigns to provide?¹⁰² In other words, is the set of laws known as “marriage” constitutionally compelled, or are states free to alter or even abolish it?¹⁰³

94. *Id.* at 2636 (Thomas, J., dissenting); cf. Christopher R. Leslie, *Dissenting from History: The False Narratives of the Obergefell Dissents*, 92 IND. L.J. 1007, 1045-46 (2017) (noting as a historical matter that individuals faced adverse legal consequences for performing or participating in purely religious same-sex wedding ceremonies).

95. *Obergefell*, 135 S. Ct. at 2615 (Roberts, C.J., dissenting).

96. *Id.* at 2613.

97. *Id.* at 2615.

98. *See id.* at 2613.

99. *See id.* at 2613-15.

100. *Id.* at 2626-27 (Scalia, J., dissenting).

101. *See* Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 6 (2011).

102. *See* Sunstein, *supra* note 77, at 2083-84 (“The right to marry, then, comprises a right of access to the expressive and material benefits that the state affords to the institution of marriage.” (emphasis added)).

103. *See id.* In the years leading up to *Obergefell*, several influential scholars concluded that the Due Process Clause protected only negative liberties such as intimacy rather than

The status/contract inquiry focuses on the extent to which individuals can customize the state-provided package of laws accompanying the entrance into marriage. In *Maynard v. Hill*, the Supreme Court endorsed a decidedly status-based view, observing that

whil[e] marriage is often termed by text writers and in decisions of courts [as] a civil contract—generally to indicate that it must be founded upon the agreement of the parties ... it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.¹⁰⁴

a particular set of rights associated with marriage. See Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 60 (1996); Sunstein, *supra* note 77, at 2094 (contending that fundamental rights “do not require affirmative provision by the state”); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1378 (2010). Thus, states might be compelled to offer access to marriage on equal terms to similarly situated couples but they would remain free to eliminate marital rights altogether. See Cain, *supra*, at 52-54 (arguing that “all committed couples should be equally benefited”); Sunstein, *supra* note 77, at 2095-96 (arguing that while the state would not be required to provide an official scheme for recognizing marriages, it would not be able to prevent people from entering into relationships they consider to be marriages); Tebbe & Widiss, *supra*, at 1378 (“[S]tates could almost certainly get out of the marriage business altogether.”). A minority of scholars have argued that the right to marry is a positive one. See Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1202-03 (2004) (arguing that the line of cases culminating in *Turner v. Safley*, which recognized the importance of community and legal support for the partners’ private commitment, show that “the state [cannot] be indifferent toward at least some intimate relationships”); Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 686-88 (2010) (suggesting limits on the state’s power to abolish marriage entirely but expressing skepticism that states must provide material or expressive benefits to married couples); Strauss, *supra* note 30, at 1741-42 (arguing that the law plays a critical role in facilitating shared spousal authority necessary to protect the couple’s equal liberty within an intimate relationship).

104. 125 U.S. 190, 210-11 (1888).

In the last century, however, divorce reform and a partial turn toward marital contracting have given individuals more control over the legal consequences of their marriage, moving it along the spectrum toward contract. The consensus view is that marriage has become more contractual, “[b]ut everyone tacitly agrees that it can never go all the way, because some aspects of marriage are ineradicably different from ordinary contracts.”¹⁰⁵ The question that remains is which aspects of marriage should form that fixed core.¹⁰⁶

Whether marriage has a fixed core also featured prominently in the more recent debate over whether marriage is a negative or positive right. The judicial campaign to constitutionalize same-sex marriage prompted scholars to ask what exactly the right to marry entails. Many prominent scholars conclude that the Due Process Clause protects only negative liberties such as sexual intimacy rather than the combination of laws currently associated with marriage.¹⁰⁷ Thus, states might be compelled to offer same-sex couples access to marriage on equal terms to opposite-sex couples, but they would remain free to eliminate marital rights altogether.¹⁰⁸ Other scholars argue that the Due Process Clause confers a positive right to marry, requiring the state to affirmatively provide core marriage rights.¹⁰⁹ These scholars, however, attempt at most a rough sketch

105. See Halley, *supra* note 38, at 2.

106. States have seemed much more willing to allow spouses to alter the economic-related aspects of the marital relationship than the noneconomic aspects. See Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 123 (1998).

107. See Cain, *supra* note 103, at 30, 38-42 (arguing that “substantive due process is not violated if marriage is abolished”); Sunstein, *supra* note 77, at 2094 (contending that fundamental rights “do not require affirmative provision by the state”); Tebbe & Widiss, *supra* note 103, at 1378 (arguing that there may not be a due process right to civil marriage).

108. See Cain, *supra* note 103, at 40-43; Sunstein, *supra* note 77, at 2095-96 (arguing that while the state would not be required to provide an official scheme for recognizing marriages, it would not be able to prevent people from entering into relationships they consider to be marriages); Tebbe & Widiss, *supra* note 103, at 1378 (“[S]tates could almost certainly get out of the marriage business altogether.”).

109. See Ball, *supra* note 103, at 1202-03 (arguing that the line of cases culminating in *Turner v. Safley*, which recognized the importance of community and legal support for the partners’ private commitment, show that “the state [cannot] be indifferent toward at least some intimate relationships”); Nussbaum, *supra* note 103, at 686-88 (suggesting limits on the state’s power to abolish marriage entirely but expressing skepticism that states must provide material or expressive benefits to married couples); Strauss, *supra* note 30, at 1741-42 (arguing that the law plays a critical role in facilitating shared spousal authority necessary to protect the couple’s equal liberty within an intimate relationship).

of which existing marriage laws comprise the positive right to marry.¹¹⁰

Both binaries, therefore, beg the question how to determine the rights and duties that constitute marriage's positive law. While status and contract are helpful ways for thinking about marriage, the binary does not shed light on what aspects of marriage should be treated as status-like, or beyond the power of individuals to change. Nor, from a positive perspective, does it explain which rights to include in the marital bundle. The positive/negative right debate also provides little guidance regarding the law of marriage. Even if marriage is a negative right, states have seen fit to regulate it.¹¹¹ And if legal marriage has a positive dimension, that fact would only answer questions about the constitutional baseline of rights rather than the optimal bundle.¹¹²

The conflicting *Obergefell* opinions, therefore, illuminate an important question that has escaped sustained attention. The state has, as a positive matter, made marriage the gateway to many different legal rights.¹¹³ Although scholars have questioned piecemeal whether certain rights should turn on marital status¹¹⁴ and have challenged the denial of these rights to unmarried couples,¹¹⁵ they have paid less attention to the normative justifications for bundling rights in a single institution. What rights should accompany the entrance into marriage, and what principles should guide the integration of those rights into the status of marriage?

II. INTEGRITY OF LAWS AND NORMS

As the previous Part demonstrates, there is no consensus, intellectually or historically, about the fundamental purposes or

110. Professor Strauss comes the closest to tackling this challenge. He argues that states must provide formalities indicating the creation of a marriage, Strauss, *supra* note 30, at 1752, a rule against interference in an ongoing marriage, *id.* at 1753-54, and rules creating equitable remedies at divorce, *id.* at 1756-60.

111. See Silbaugh, *supra* note 106, at 113.

112. See generally Strauss, *supra* note 30 (focusing on the existence of a positive right to marry, rather than focusing on the specific bundle of rights included).

113. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

114. See *supra* notes 107-10 and accompanying text.

115. See, e.g., CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 11-12, 95, 222-23 (2010); POLIKOFF, *supra* note 44, at 1123-26.

meaning of marriage. Some scholars argue that marriage has changed over time from a relationship primarily fulfilling economic and political needs to one about love;¹¹⁶ or from a relationship rooted in the gendered nature of things to one based on autonomy and personal fulfillment.¹¹⁷ Others defend the view that its primary purpose is to “unite the biological, social and legal components of parenthood into one lasting bond.”¹¹⁸ The former view of marriage prevailed in *Obergefell*, with the Court rejecting the view that marriage “is by its nature a gender-differentiated union” in favor of egalitarianism and autonomy.¹¹⁹ But resistance to the decision, including from the Court’s second-newest Justice, suggests that the debate rages on.¹²⁰

Consensus around a hierarchy of purposes that marriage should serve would go a long way toward crafting perfectly coherent marriage laws. Hypothetically, we would all agree that the laws should first promote economic interdependency; next enable emotional support; and so on.¹²¹ Without this consensus, the desirability of particular marriage laws will always be the subject of debate. Yet such consensus is not necessary to begin to analyze whether marriage is optimally integrated. That is because integration is fundamentally an inquiry about how well legal rules are serving the claimed purposes marriage should perform. Whatever the purposes,

116. See, e.g., STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE* 5-9 (2005).

117. See, e.g., Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1519 (1994) (charting the progression from marriage laws justified by the natural inferiority of women and children to laws premised on the consensual union of two autonomous individuals); see also Leslie, *supra* note 94, at 1015-17 (arguing that the gendered view of marriage gave way to a more egalitarian view).

118. David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <https://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html> [<https://perma.cc/4NHY-PECG>].

119. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594-96 (2015); see also Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 25-26 (2015) (arguing that the majority opinion unnecessarily chose one meaning or “social front” of marriage over another).

120. See *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (arguing, with regard to same-sex parents being listed on a child’s birth certificate, that “nothing in *Obergefell* indicates that a birth registration regime based on biology ... offends the Constitution”). The retirement of Justice Kennedy leaves *Obergefell* on even shakier ground.

121. This is not to suggest that these ends of marriage policy do not exist in tension. See Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C.L. REV. 1983, 1987 (2018) (identifying an intractable tension between the goals of promoting individual autonomy and privatizing dependency).

they form the baseline for assessing the desirability of changes to marriage laws and whether those changes will promote the integrity of marriage or its opposite. For instance, laws can incentivize wives to join the workforce or to remain in the home;¹²² a law producing the first consequence would be undesirable to a legislator holding the view that marriage should reproduce the “natural” order in which women perform domestic labor and men participate in the workforce. Analyzing integration has the salutary consequence of flushing out one’s hierarchy of purposes, whatever they may be.

Once one articulates marriage’s purposes, it is possible to analyze whether the array of legal rules produces the optimal outcome. This inquiry analyzes the relationship between laws and the social norms upon which the laws depend. This Part provides a framework for understanding the relationship between laws and norms.¹²³ It then demonstrates how specific changes to marriage laws can bring about integration and disintegration.¹²⁴

A. The Relationship Between Laws and Norms

As a relationship regulated loosely by open-ended duties,¹²⁵ marriage is heavily dependent on social norms,¹²⁶ “social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.”¹²⁷ Eric Posner has argued that “[t]he law is always imposed

122. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 473 (1996).

123. See *infra* Part II.A.

124. See *infra* Part II.B.

125. See Strauss, *supra* note 30, at 1741.

126. See ERIC A. POSNER, LAW AND SOCIAL NORMS 68-69 (2000); see also *id.* at 34 (defining “social norms” as “behavioral regularities that occur in equilibrium when people use signals to show that they belong to the good type” of community member); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 928 (2005) (studying social norms in the family context); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1907 (2000) (“Marriage is a status in which a couple, usually through a formal ceremony, agrees to be subject to a complex set of behavioral expectations defining the roles of spouse and parent, expectations that will restrict their freedom and guide their behavior in the relationship.”).

127. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997). Scholars have observed that although these norms are not necessarily spelled out in statutes, they can be communicated by courts at the end of relationships, or when those outside of marriage attempt to benefit from laws governing marriage. See, e.g.,

against a background stream of nonlegal regulation—enforced by gossip, disapproval, ostracism, and violence—which itself produces important collective goods.”¹²⁸

Social norms can give substance to broad legal commandments that would be tricky to legislate with more specificity. Take for instance California’s statutorily imposed spousal “obligations of mutual respect, fidelity, and support.”¹²⁹ Specific commitments may be reflected in norms encouraging spouses to “avoid extramarital sex; to share financial resources, household tasks, time, and private thoughts; to keep family secrets, to support each other in sickness and adversity; to remember anniversaries and birthdays; and to forgive and forget hurt feelings and arguments.”¹³⁰

These norms function in different ways. Some norms police the boundaries of the relationship. Sexual fidelity is enforced by community disapproval of extramarital relationships, which in turn encourages spousal and community oversight.¹³¹ Other norms strengthen the relationship from within by encouraging commitment on both a practical and emotional level. Spouses are expected to subordinate self-interest in favor of the marital unit: the mutual agreement to act cooperatively and stop indulging in selfish impulses elevates the partnership over separate goals.¹³² Moreover, spouses are not only expected to act as partners but to be emotionally intimate.¹³³ Couples who choose to marry commonly believe that love is a prerequisite for a happy life together.¹³⁴ And norms instruct that love

Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 6 (2017) (exploring non-marital couples’ relationship with the law).

128. POSNER, *supra* note 126, at 4.

129. CAL. FAM. CODE § 720 (West 2015).

130. Scott, *supra* note 126, at 1910 n.17; *see also* Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 326 (2004) (arguing that social norms are often embodied in a couple’s marriage vows).

131. *See* Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 563 (2007).

132. *See* Scott, *supra* note 126, at 1909; Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYUL. REV. 79, 122 (“Self-sacrifice, sharing, continuous giving, and continual forgiving are indispensable to any happy marriage.”). Other scholars caution that although altruism is an important part of the meaning of marriage, “constant self-denial[] is anathema to true altruism.” Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 85 (2004).

133. *See* Scott, *supra* note 126, at 1910 n.17.

134. *See* COONTZ, *supra* note 116, at 5; *see also* RENATA GROSSI, LOOKING FOR LOVE IN THE LEGAL DISCOURSE OF MARRIAGE 29 (2014) (“One of the motifs, if not the central motif of marriage in the west in the twenty-first century is romantic love.”); Hamilton, *supra* note 130,

is the most important part of a marriage.¹³⁵ Couples therefore work to enrich their relationship and censure lying or keeping secrets.¹³⁶ Moreover, communication of personal details reinforces the commitment to behave within the boundaries of the marriage by creating vulnerability for each party in the event of relationship breakdown.¹³⁷

Many scholars believe that the law plays a role in strengthening the norms on which it depends.¹³⁸ Richard McAdams has argued that the law may strengthen a norm's enforcement power by expressing the community's adherence to the norm, which happens in two ways: first, by publicizing a social consensus, and second, by providing concrete norms that define compliance with broader, abstract norms.¹³⁹ The existence of the law or the legislative process leading to its enactment educates the community about the societal consensus regarding a particular behavior.¹⁴⁰ The law may also provide specific obligations to give substance to abstract norms. For example, Elizabeth Scott has observed that "parents are subject to an abstract commitment norm encouraging them to educate their children and prepare them to be productive citizens."¹⁴¹ Compulsory school attendance statutes "defined one requirement for complying with the norm" and imposed legal penalties on parents who failed to comply.¹⁴² Scott contends that parents have since "internalized the legal requirement as establishing a baseline of what good parenting require[s]."¹⁴³

at 328 (describing marriage as a public expression of love); Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1304 (2015) (explaining that the recent Western conception of marriage based on love is now pervasive).

135. Frantz & Dagan, *supra* note 132, at 84.

136. See COONTZ, *supra* note 116, at 278.

137. See Scott, *supra* note 126, at 1911.

138. See, e.g., McAdams, *supra* note 127, at 391-92 (arguing that laws "shape or regulate norms"); Scott, *supra* note 126, at 1905 ("Although the relative impact of law and norms in shaping expectations about marital behavior cannot be quantified, it is uncontroversial that the institution of normative marriage is defined in important ways by its legal framework.").

139. McAdams, *supra* note 127, at 399-400; see also Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031 (1996) (noting the (aspirational) use of legal change to "reconstruct existing norms and to change the social meaning of action").

140. See McAdams, *supra* note 127, at 400-03.

141. Scott, *supra* note 126, at 1927.

142. *Id.*

143. *Id.*

Stable norms enable people “to go about their lives without having to question their actions or the actions of others.”¹⁴⁴ But these norms can also become weakened, or deinstitutionalized.¹⁴⁵ Without these norms, “individuals can no longer rely on shared understandings of how to act,” resulting in increased negotiation and conflict.¹⁴⁶

Laws can create or bolster social norms, but they can also deinstitutionalize them, either by contradicting norms or by eliminating legal rules that support them.¹⁴⁷ First, the law can express a message that contradicts a previously established norm, undermining the uniformity of consensus around that norm.¹⁴⁸ Laws making divorce easier may express the view that marriage need not be a lasting commitment, contradicting the social norm that marriage should be a permanent relationship.¹⁴⁹ Second, those changes can eliminate the concrete norms that define compliance with the abstract norm.¹⁵⁰ For example, Scott has argued that divorce reform undermined the norm of marital commitment by eliminating traditional fault grounds—such as adultery—without replacing those concrete rules.¹⁵¹ Without substitute rules, spouses lack guidelines describing “specific behavioral expectations. [F]or example, ... what effort must be expended before declaring that the relationship has truly failed?”¹⁵² Even if the community were still interested in policing the commitment norm, the lack of concrete expectations would pose an obstacle.

Both these types of legal change can undermine the enforcement mechanisms on which the norm depends. McAdams has argued that the enforcement of a norm increases when a secondary consensus develops that “those who expressly approve, or fail to disapprove, of the perpetrators of [the primary norm *themselves*]

144. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 848 (2004).

145. *See id.*

146. *Id.*

147. *See* Scott, *supra* note 126, at 1952 (discussing how no-fault divorce changed norms); *see also supra* notes 47-49 and accompanying text.

148. *See, e.g., supra* notes 13-19 and accompanying text.

149. *See* Scott, *supra* note 126, at 1952. Scholars of the relationship between law and norms have attempted to draw a connection between the law's expressive function and social norms.

150. *See supra* note 139 and accompanying text.

151. *See* Scott, *supra* note 126, at 1952.

152. *Id.*

merit disapproval;”¹⁵³ when, in other words, those who fail to shun are themselves shunned.¹⁵⁴ The erosion of what McAdams calls a “secondary enforcement norm”¹⁵⁵ explains how the rise of divorce coexists with the resilient marital norm of relationship permanence and commitment:¹⁵⁶ people have continued to hold the primary norm while simultaneously failing to police the secondary enforcement norm of shunning their divorced community members.¹⁵⁷ The consequence of legal changes has been to weaken the enforcement mechanisms of such norms. This weakening then dilutes the signal that wedding vows can send about the permanence of the relationship.¹⁵⁸

An important qualification to the foregoing analysis is that social norms are not always uniform, and, even when they are, they do not necessarily control behavior. For instance, norms can vary between subcultures. As Katherine Franke has shown, lesbians and gay men have long formed families outside the traditional marital dyad, showing a willingness to parent children in broader social networks with less expectation of exclusivity or control.¹⁵⁹ And as Martha Nussbaum has shown, even deeply entrenched norms, such as monogamous marriage, do not always control behavior; historically, many individuals dissatisfied with their relationships “simply moved away and started life somewhere else.”¹⁶⁰ Thus, “many if not

153. McAdams, *supra* note 127, at 372.

154. *See id.*

155. *Id.*

156. *See* Stephanie Ellen Byrd, *The Social Construction of Marital Commitment*, 71 J. MARRIAGE & FAM. 318, 325 (2009) (“Marital commitment was conceived of not only as a value-laden status, but also as a status that must be achieved.”); *see supra* note 81 and accompanying text (documenting how people continue to believe that marriage should be a permanent relationship). *See generally* Denise Previti & Paul R. Amato, *Why Stay Married? Rewards, Barriers, and Marital Stability*, 65 J. MARRIAGE & FAM. 561, 566 (2003) (explaining various aspects that contribute to marital cohesion including upholding the norm of marital permanence).

157. *See, e.g., Do You Think Getting a Divorce Is Morally Acceptable, or Morally Wrong?*, STATISTA, <https://www.statista.com/statistics/218524/americans-moral-stance-towards-divorce/> [<https://perma.cc/5QWE-VGLW>] (demonstrating 76 percent of Americans regarded divorce as morally acceptable in 2018); Andrew Dugan, *U.S. Divorce Rate Dips, but Moral Acceptability Hits New High*, GALLUP (July 7, 2017), <http://news.gallup.com/poll/213677/divorce-rate-dips-moral-acceptability-hits-new-high.aspx> [<https://perma.cc/NJG5-2V98>] (demonstrating 73 percent of Americans say divorce is morally acceptable).

158. *See* Scott, *supra* note 126, at 1955.

159. KATHERINE FRANKE, *WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY* 97 (2015).

160. Nussbaum, *supra* note 103, at 675.

most broken marriages were not formally terminated” before remarriage.¹⁶¹ Norms, as well as the laws on the books, may diverge from how people structure their lives.¹⁶² That being said, the basic points here seem uncontroversial, namely, that the law depends upon norms and can impact and be impacted by—even if nonexclusively—the development of those norms.

B. Mechanisms of Legal Integration and Disintegration

Every change to marriage’s positive law—through addition, deletion, or revision—affects the ability of the body of law to achieve its intended purposes. And marriage laws have changed significantly over time. Legal reforms beginning in the late nineteenth century and accelerating in the second half of the twentieth century have largely—but incompletely—shed the vestiges of coverture,¹⁶³ often making laws gender-neutral and sometimes eliminating them altogether.¹⁶⁴ At the same time, states and the federal government have made an increasing number of laws turn on marital status.¹⁶⁵ The legal regulation of marriage is, therefore, as thick as it ever has been.

These legal changes reveal the ways in which marriage law integrates or disintegrates. The most straightforward way that marriage can disintegrate is when the state eliminates a law that serves marriage’s intended purpose or implements a law contradicting it.¹⁶⁶ Similarly, the state could eliminate a law supporting an important social norm, or could implement a law contradicting it.¹⁶⁷ By failing to extend the law as far as it might go, or contradicting other laws

161. *Id.*

162. See Scott, *supra* note 126, at 1966-67 (noting that people may pay lip service to certain norms while preferring to disregard them). For instance, a recent study found that the *Obergefell* decision changed people’s perception of social norms around the acceptability of same-sex marriage, making them more likely to conclude that society favors same-sex marriage, while simultaneously failing to change the participants’ personal attitudes about same-sex marriage or gay people. See Margaret E. Tankard & Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes*, 28 PSYCHOL. SCI. 1334, 1339 (2017).

163. See Dolgin, *supra* note 117, at 1534-35.

164. See, e.g., Tait, *supra* note 59, at 167, 211-14 (discussing dismantling coverture).

165. See *supra* note 1.

166. See *supra* notes 149-52 and accompanying text.

167. See *supra* notes 48-49 and accompanying text.

or norms, these changes would have the effect of making marriage law less internally consistent—less of a unified whole. In contrast, the state could implement a law fully consistent with other laws in achieving marriage's desired ends, making marriage even more complete.

Changes to the law of interspousal immunity provide a good example of the mechanisms of integration and disintegration. At common law, wives were not allowed to bring tort claims against their husbands.¹⁶⁸ Courts reasoned that allowing wives to bring torts such as battery—for conduct such as domestic abuse—would undermine domestic harmony.¹⁶⁹ Most states have since abolished the doctrine of interspousal immunity, allowing such suits to proceed.¹⁷⁰ If one understands marriage as a loving union between two autonomous individuals, this development makes marriage more integrated, treating both spouses as individuals and giving women equal standing within a marriage.¹⁷¹ If, however, one adheres to a gender-differentiated view of marriage that depends on wives being submissive to their husbands,¹⁷² this legal change would have the opposite effect. Between these opposing views, the view that marriage should be an equal partnership is clearly dominant, meaning that, for most people, this change brings about greater integration.¹⁷³

Sometimes, however, legal changes can bring multiple well-accepted goals into conflict. One example is the adoption of rules allowing spouses to contract around marital property laws. Even after the adoption of gender-neutral marital property laws, the law historically forbade spouses from entering into binding contracts regarding their property.¹⁷⁴ Marital property laws were therefore

168. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 64 (2011).

169. See *id.* (citing *Thompson v. Thompson*, 218 U.S. 611, 618 (1910)); see also Leslie, *supra* note 94, at 1016-17.

170. GROSSMAN & FRIEDMAN, *supra* note 168, at 65.

171. See *id.*

172. See Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1120 (2014) (noting that a goal of the doctrine was to keep wives dependent on their husbands).

173. See GROSSMAN & FRIEDMAN, *supra* note 168, at 65 ("The master trend of the law ... has gone to redefine marriage as the coming together of two distinct individuals" who "keep their identities before, during, and after the marriage.").

174. See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital*

mandatory, forcing spouses into a financial partnership. When states adopted rules enforcing premarital and marital agreements, the spouses could contract around those property rules, transforming them into defaults.¹⁷⁵ Now, a couple can marry without creating any marital property or support obligations, effectively severing marriage from its property consequences. Allowing spouses to contract arguably treats them as equal individuals and is consistent with legal developments that have allowed wives to hold property and work outside the home,¹⁷⁶ but it conflicts with the promotion of mutual support and dependency. The more important the goal of imposing support obligations on spouses, the more this legal change represents disintegration instead of integration.¹⁷⁷

The impacts of legal change may operate more or less directly on other marriage laws. The elimination of laws surrounding but not directly regulating marriage can indirectly affect marital rights. The liberalization of divorce laws transformed marriage from a permanent relation¹⁷⁸ to one that the parties could exit by choice.¹⁷⁹ Laws affecting the availability of divorce did not necessarily change legal rules regarding spousal duties, property, and parentage. For instance, before the legalization of no-fault divorce, just as after, spouses in California owned an undivided one-half interest in community property.¹⁸⁰ But making divorce readily available increased the salience of marital property because property division became less of an abstract proposition and more of a reality.¹⁸¹ The same can be said of other marital rights and duties, such as spousal rights

Agreements and How We Think About Marriage, 40 WM. & MARY L. REV. 145, 150 (1998).

175. *See id.* at 151.

176. *Cf.* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 109-10 (2016) (noting that the ability of women to participate in the labor market has undermined the assumption that men must be responsible for women).

177. *Cf.* Stolzenberg, *supra* note 121, at 1994-95 (examining the importance of privatizing dependency to family law policy).

178. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1387 (2000) ("A husband and wife could not simply agree to end their relationship. Marriages terminated at the death of one party or at divorce, which was only available for fault ... and difficult to obtain even then.").

179. *See* Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 298-99 (1987) (noting the new importance of granting divorces based on mutual consent).

180. *Id.* at 293-94.

181. *See id.* at 300-01 (discussing how community property was generally divided equally among divorcing spouses).

against mismanagement of the marital property and support obligations.¹⁸² Evidence of this phenomenon can be seen in the explosion of analyses of the distributional consequences of divorce beginning in the 1970s and 1980s.¹⁸³

Relatedly, legal changes can undermine social norms. One of the leading arguments by opponents of same-sex marriage was that allowing same-sex couples to marry would disintegrate marriage by severing parenthood from marriage. Sexual complementarity was seen as a linchpin of marriage, without which things would fall apart; the center would no longer hold. This argument started from the premise that marriage and parenthood should be integrated because marriage is the natural¹⁸⁴ or optimal environment in which to raise children, and that children experience poorer outcomes when their parents are not married.¹⁸⁵ To redefine marriage as a relationship based on mutual affection between adults instead of an institution centered around the conjugal union of a man and woman would diminish the social pressure on heterosexual couples to have children within marriages or to remain married for their children's benefit, so the argument went.¹⁸⁶ If these social pressures were to evaporate, marriage and parenthood could eventually disintegrate.¹⁸⁷

This argument was premised upon the fear that legalizing same-sex marriage expresses values at odds with traditional marital norms.¹⁸⁸ In addition to the argument that recognizing same-sex marriage would express the view that the purpose of marriage is about emotional closeness rather than conjugality, Lynn Wardle contended that "[t]he negative characteristics of same-sex couples,"

182. See *id.* at 293-94, 305-07 (comparing pre- and post-no-fault divorce developments).

183. See, e.g., LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 365-66 (1985).

184. For an example of a natural law-inflected argument, see Sherif Girgis et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 253-56 (2011) (arguing that marriage facilitates the only "comprehensive" union of man and woman, one marked by sexual complementarity and a "special connection" between married parents and their children).

185. See, e.g., Lynn D. Wardle, *The Disintegration of Families and Children's Right to Their Parents*, 10 AVE MARIA L. REV. 1, 4 (2011).

186. See, e.g., Girgis et al., *supra* note 184, at 253-59; Blankenhorn, *supra* note 118 ("Marriage is the planet's only institution whose core purpose is to unite the biological, social and legal components of parenthood into one lasting bond.").

187. See Girgis et al., *supra* note 184, at 262-63.

188. See *id.*

namely, that their relationships are shorter-lived and often involve infidelity, “will and already are beginning to transform the social expectations of marriage, and of the people who enter into marriage in ways that will make that institution less responsible, less stable, less monogamous, less faithful, and less committed to responsible child-rearing.”¹⁸⁹ Moreover, if marriage were primarily about the adults’ emotional union and not about child-rearing, the law would no longer send as strong a message that children need a married mother and father.¹⁹⁰ The weakening of this message might reduce social pressures for husbands to remain with their wives and children.¹⁹¹

To be clear, these arguments were highly speculative, often piling assumption upon assumption.¹⁹² It would be especially challenging to prove the effects of this disintegration given the tremendous decline in marriage and rise in nonmarital parenting even before most states legalized same-sex marriage.¹⁹³ Nevertheless, they postulate a mechanism of marital disintegration.

* * *

This Part has shown that laws and norms can work harmoniously to promote the desired meanings or purposes of marriage. But legal changes can also bring about disintegration by eliminating valuable rights, affecting the significance of other rights that further accepted purposes, contradicting other laws, or undermining useful

189. Lynn D. Wardle, *A Response to the “Conservative Case” for Same-Sex Marriage: Same-Sex Marriage and “The Tragedy of the Commons,”* 22 BYU J. PUB. L. 441, 460, 465-67 (2008).

190. See Girgis et al., *supra* note 184, at 263.

191. See *id.*

192. To support this argument, Wardle cited studies detailing behaviors of *unmarried* male same-sex couples, some of which were twenty to thirty years old, and none of which purported to link the sexual behaviors they described to changing norms in (primarily heterosexual) marriage. See, e.g., Wardle, *supra* note 189, at 466-67. On the other hand, recent studies appear to confirm that some gay men live in “monogamish” relationships—relationships in which the partners accept a certain amount of sex outside of the primary relationship. See *id.* at 466; see also Edward Stein, *Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond*, 84 UMKC L. REV. 871, 879 (2016). I have not seen research linking these behaviors to changes in heterosexual marriage.

193. See *The Decline of Marriage and Rise of New Families*, PEW RESEARCH CTR. (Nov. 18, 2010), <https://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/> [<https://perma.cc/CJ2S-LNY6>].

norms. To be sure, there may be widespread disagreement about the purposes of marriage; and even when people agree on those purposes, there may be disagreements about which purposes should dominate when they come into conflict. The integration framework does not resolve those conflicts. But the integration framework flushes out those competing purposes, creating a common ground for debate. Whatever the hierarchy of purposes one embraces, the integration framework provides a vocabulary to assess the desirability of legal change.

III. INTEGRITY ACROSS JURISDICTIONS

The multiple sources of marriage law invite a second type of disintegration: that a person might be married in some jurisdictions but not others, resulting in the flickering of her marital status as she crosses state lines.¹⁹⁴ The law governing the legal consequences of marriage has its source at both the state and federal levels.¹⁹⁵ State law governs entrance into marriage, marital property, inheritance, parentage, and divorce, as well as other peripheral rights turning on marital status under the categories of tort, employment, and more.¹⁹⁶ Although marriage is often described as a creature of state law, the notion that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States” has been thoroughly debunked.¹⁹⁷ As Jill Hasday has observed, “federal

194. Although numerous scholars have analyzed federalism issues within the family law context, most have focused on when federal and state governments should legitimately exercise authority under varied circumstances. *See, e.g.*, Estin, *supra* note 45, at 271 (focusing on “the interaction of national and state power in family law”); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1386-87 (1998). I take these exercises of power as I find them, and instead interrogate the extent to which they harmonize, as well as the consequences of discord.

195. Municipalities also make marital status relevant to legal incidents such as employment benefits, but their regulatory powers are limited compared to state and federal governments. *See* Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 294-95 (2013). I set municipalities aside for ease of analysis, but the same considerations that I discuss in this Section would apply to them as well.

196. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 875 n.189 (2004).

197. *Id.* at 874 (quoting numerous Supreme Court decisions repeating this assertion); *see also* Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761, 1859-60 (2005); Hasday, *supra* note

social security law, employee benefit law, immigration law, tax law, Indian law, military law, same-sex marriage law, child support law, adoption law, and family violence and abuse law are also forms of family law.”¹⁹⁸

This Part considers how differences in marriage laws across jurisdictions also affect the experience of marriage as an integrated whole.

A. Sources of Marriage Law

Marriages are simultaneously regulated by both the state in which the couple lives as well as the federal government. In this age of interstate travel—to say nothing of commuter marriages—the legal significance of a marriage can vary as the couple crosses state lines.

The federal government is free to adopt different definitions of marriage for the laws it administers: the Supreme Court has stated that Congress, “in enacting discrete statutes, can make determinations that bear on marital rights and privileges.”¹⁹⁹ The federal government sometimes defines marriage differently than the states.²⁰⁰ Moreover, the legal consequences of marriage can vary *between* states, because states have the sovereign authority to regulate domestic relations within their borders, subject to constitutional limits.²⁰¹ This has led to some variation in entrance requirements, property rights, and exit requirements.²⁰²

Despite the numerous different sources of marriage laws, these laws tend to be relatively consistent. All states make marital status determinations: states issue marriage licenses and exercise jurisdiction over divorce actions. Many federal marriage rights, such as Social Security benefits²⁰³ and federal tax filing status,²⁰⁴ turn on

194, at 1300.

198. Hasday, *supra* note 196, at 875.

199. *United States v. Windsor*, 570 U.S. 744, 764 (2013).

200. *See Joslin*, *supra* note 45, at 798-99, 799 n.98.

201. *Windsor*, 570 U.S. at 767-68.

202. *See Joslin*, *supra* note 45, at 822-23, 822 n.285.

203. *See* 42 U.S.C. § 416(h)(1)(A)(I) (2012) (“An applicant is the wife, husband, widow, or widower ... if the courts of the State in which such insured individual is domiciled ... would find that such applicant and such insured individual were validly married.”).

204. Rev. Rul. 58-66, 1958-1 C.B. 60, 1958 WL 10653.

these state status determinations. This practice ensures a degree of uniform treatment despite the different sources from which marriage laws flow.

Similarly, apparent variations in state law are often mitigated in practice. For example, spouses in community property states have a vested one-half interest in all property acquired during marriage, in contrast to spouses in common law states who generally hold property acquired during marriage in their own names.²⁰⁵ These differences appear substantial: for a nonearning spouse in a single-earning marriage, it would mean holding title to half the income or none.²⁰⁶ Yet, they have little practical impact.²⁰⁷ That is because, at divorce, states in both systems generally apply equitable division principles that identify and divide marital property.²⁰⁸

The relatively high degree of uniformity in the face of different authorities can be traced to several historical developments. First, historian Nancy Cott has argued that the ease of interstate travel—combined with the doctrine of comity, which required states, for the most part, to respect one another's marriage laws—meant that “[n]o state operated in isolation,” resulting in a “recognizably national system.”²⁰⁹ Moreover, “prevailing marriage patterns were seen as evidence of national character.”²¹⁰ State legislatures and judges were influenced by developments in other states, and areas of disagreement—divorce is a notable example—were both rare and papered over in the early days by the fact that communities were spread out and state surveillance was limited.²¹¹ Second, intervention by the federal government also helped to shape state policies. Cott points to the example of the Civil War pension system that, by the end of the nineteenth century, comprised 40 percent of the federal budget, and imposed and policed “a uniform standard of

205. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 628, 632 (1991).

206. *See id.*

207. *See id.* at 631-32, 632 n.38.

208. *See id.* (noting substantial convergence between outcomes in common law and community property jurisdictions); *cf.* Kornhauser, *supra* note 43, at 65 (noting that the IRS implemented the joint return and income-splitting in order to equalize community property and common law states).

209. COTT, *supra* note 58, at 28.

210. *Id.*

211. *See id.* at 28-29.

faithful monogamy” on recipients.²¹² Instances like these, in which the federal government imposed a family definition and policed conduct associated with that definition, contributed to the standardization of state family status rules.²¹³

One more source of authority—if not law—bears mentioning. Historically, and continuing into the present, religious institutions have been an important source of marital norms.²¹⁴ Marriage is an area in which the state and religious entities are officially intertwined.²¹⁵ Formally speaking, religions do not dictate the legal substance of marital obligations.²¹⁶ Nonetheless, states authorize clergy to perform legally binding marriages, and many officially sanctioned marriages occur on religious premises.²¹⁷ The close relationship between church and state increases the likelihood that religions will impact the norms that fill the interstices of marriage laws.²¹⁸

Yet religious understandings of marriage are not monolithic, resulting in the possibility that they too may produce a range of

212. *Id.* at 103-04.

213. See also W. Burlette Carter, *The “Federal Law of Marriage”: Deference, Deviation, and DOMA*, 21 AM. U. J. GENDER SOC. POL’Y & L. 705, 721-52 (2013) (identifying various instances in which the federal government imposed its own marriage definitions on the states); Joslin, *supra* note 45, at 802-14 (analyzing how the federal government has shaped the definition of children and the duties owed to them).

214. See Robin Fretwell Wilson, “*Getting the Government Out of Marriage*” *Post Obergefell: The Ill-Considered Consequences of Transforming the State’s Relationship to Marriage*, 2016 U. ILL. L. REV. 1445, 1458 (noting the relationship between marital norms and values emerging from ecclesiastical canonists and courts). Earlier in U.S. history, the federal government worked with Protestant churches to promote Christian-model monogamy on Native Americans. COTT, *supra* note 58, at 26. “Both political and religious officials assumed that native Americans’ assimilation had to be founded on monogamous marriage, from which would follow the conventional sexual division of labor, property, and inheritance.” *Id.*

215. See Wilson, *supra* note 214, at 1458.

216. See Nussbaum, *supra* note 103, at 699 (explaining that state marriage licenses are what grant “entry into a privileged civic status”).

217. *Id.*

218. See generally *id.* (noting that the marriage ceremony is “not only a religious ritual, but also a public rite of passage”). Many have argued that additional institutions, such as the mass media, have a powerful impact on the social norms regarding marriage. See, e.g., Angela Watercutter, *How Pop Culture Changed the Face of the Same-Sex Marriage Debate*, WIRED, (June 27, 2013, 6:30 AM), <https://www.wired.com/2013/06/pop-culture-same-sex-marriage/> [<https://perma.cc/TZT2-AHJB>]. These institutions undoubtedly affect people’s understandings of marital obligations, but I focus on organized religion here because state laws expressly contemplate the involvement of religious organizations in performing legally significant functions.

norms. Some of these norms will conflict with the law or with each other. For example, despite their legal role, religious officials are exempted from antidiscrimination laws and norms—they can decline to perform interfaith or same-sex weddings.²¹⁹ These decisions send messages that conflict with the state's regulatory aims. On the flip side, religious officials can perform wedding ceremonies that the law will not recognize.²²⁰ For example, the Metropolitan Community Church performed wedding ceremonies for same-sex couples decades before those marriages were legalized.²²¹ The lack of perfect overlap between various churches and the state suggests that religious and legal definitions of marriage can also disintegrate. The extent to which particular religious understandings of marriage overlap with the law can make marriage more integrated in the eyes of the religious adherents.

B. Jurisdictional Disintegration

As discussed above, the rights of marriage flow from different sources. These sources tend to complement each other, resulting in a comprehensive overlay of one set of rights on top of the other. But the overlay can also drift apart, creating incongruity if not outright conflict. This too results in disintegration, the muddying of marriage's boundaries.

1. Federal and State

Some differences in the definition of marriage are inevitable in a federal system of government; as discussed above, states have traditionally had the power to define and regulate marriage, but Congress can establish its own eligibility criteria for laws “that bear

219. See Nussbaum, *supra* note 103, at 699; see also *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

220. See Nussbaum, *supra* note 103, at 669.

221. See James N. Birkitt, Jr., *MCC and Marriage Equality*, METROPOLITAN COMMUNITY CHURCHES, <http://mccchurch.org/overview/history-of-mcc/mcc-and-marriage-equality/> [<https://perma.cc/WQV2-2HW6>] (describing the church's history of performing same-sex wedding ceremonies as early as 1968). Another example is the performance of plural marriage ceremonies by fundamentalist Mormon sects. See, e.g., *State v. Holm*, 137 P.3d 726, 730 & n.1 (Utah 2006) (describing religious wedding ceremonies that join a husband to more than one wife but do not create legally valid marriages).

on marital rights and privileges.”²²² For instance, when a federal statute that assigns a benefit conflicts with state laws turning on state-defined family status, the federal statute will preempt the state law as long as there are “clear and substantial” federal interests at stake.²²³ But the federal government accepts a state’s determination of marriage for an overwhelming number of statutes and provisions that bear on marriage.²²⁴ This consistency generally prevents people from seeing state and federal marriage as different things: it promotes a single meaning of marriage, relieving them from having to worry about the ways in which they are married.

However, for those in liminal relationships—cohabitants, same-sex couples, foreign nationals, first cousins—marriage flickers on and off.²²⁵ The federal government has sometimes required that married couples provide more than evidence of a valid state marriage to claim a federal benefit. To obtain legal status through marriage, “immigrants, and their sponsoring spouses, must produce documentary and testimonial evidence [of conduct indicating] that their marriages are genuine,” such as jointly owning property, living together, commingling financial resources, having children, and generally proving that they live according to the social norms of marriage.²²⁶ The federal government can sometimes require *less* than a valid state-law marriage. The Social Security Administration presumes that cohabiting applicants are married when determining eligibility for means-tested SSI benefits, even if they have not formalized their relationships under state law.²²⁷ The lack of a marriage license will not prevent the federal government from taking a cohabitant’s financial resources into account when determining the applicant’s eligibility.²²⁸ The result of these different

222. See *United States v. Windsor*, 570 U.S. 744, 764 (2013).

223. *Hillman v. Maretta*, 569 U.S. 483, 490-91, 494-95, 497 (2013) (enforcing a federal statute providing for the payment of life insurance proceeds to the named beneficiary over a state statute attempting to redirect those funds to a surviving spouse by citing to Congress’s interest in adopting “a clear and predictable procedure for” identifying beneficiaries).

224. For a fuller discussion of instances in which the federal government relies on state definitions of marriage or provides its own, see *Joslin*, *supra* note 45, at 798-99.

225. See *id.* at 822-23; see also *Halley*, *supra* note 38, at 26.

226. *Abrams*, *supra* note 43, at 32.

227. See *Matsumura*, *supra* note 56, at 2022.

228. See, e.g., *Dutko v. Colvin*, No. 15-CV-10698, 2015 WL 6750792, at *1-2 (E.D. Mich. Nov. 5, 2015) (deeming a cohabiting couple to be married for purposes of calculating eligibility for SSI benefits).

definitions is that marriage disintegrates: the same conduct can lead to opposite conclusions about whether a couple is married.

The law tolerates this disintegration but has also imposed limits when disintegration goes too far. The most visible example of the federal government adopting its own definition of marriage in recent years was section 3 of the DOMA, which defined marriage for the purpose of “any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States” as “only a legal union between one man and one woman.”²²⁹ In contrast to the “limited” federal regulation of marriage in other statutes, DOMA affected over one thousand federal statutes and regulations.²³⁰ As a result, some couples married under state law would qualify for government healthcare benefits, enjoy special protections under the Bankruptcy Code, be eligible for Social Security survivor benefits, or file joint federal income taxes while others would not.²³¹ This, the Supreme Court said in *United States v. Windsor*, would interfere too substantially with the states’ authority to regulate marriage.²³²

2. *Between States*

Unlike the vertical disintegration of marriage along federal and state lines, differences between states have received more attention, although not within the framework of disintegration. As discussed in the previous Part, states have the authority to regulate domestic relations within their borders.²³³ Despite the existence of widespread variations in a range of laws from marriage requirements to marital property, the convergence of legal standards, as well as choice of law and comity doctrines have minimized the practical impact of these variations, leading to a relatively integrated institution across state lines.²³⁴ Traditionally, most states followed the

229. 1 U.S.C. § 7 (1996), *abrogated by* *United States v. Windsor*, 570 U.S. 744 (2013).

230. *Windsor*, 570 U.S. 744 at 765.

231. *See id.* at 772-73. In an article written several years before *Windsor*, Ann Estin hinted that this state of affairs would create “an additional federalism problem,” although she did not define the problem’s parameters. *See* Estin, *supra* note 45, at 311.

232. *Id.* at 768.

233. *See supra* note 201 and accompanying text.

234. *See supra* notes 205-08 and *infra* notes 257, 262 and accompanying text; *see also* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage*

lex loci rule, or “place of celebration,” under which state courts would look to the law of the state in which the marriage was celebrated to determine its validity.²³⁵ The general rule had exceptions, but they were relatively few and far between.²³⁶ As a result, even though state laws differed, the enforceability of a couple’s marriage would not change from state to state.²³⁷ However, disintegration across state lines has sometimes been more significant.

One historic area of disintegration was divorce.²³⁸ Ann Estin has catalogued how differences in the restrictiveness of divorce laws encouraged migratory divorce.²³⁹ Around the turn of the twentieth century, the Supreme Court decided in *Haddock v. Haddock* that a state divorce decree would only be given full faith and credit under certain circumstances.²⁴⁰ When, for example, a state granted a divorce over a husband and wife domiciled within that state, that decree would be entitled to full faith and credit; but if only one spouse was domiciled within the state, the enforceability of the decree would turn on the circumstances under which the spouse became a domiciliary of the state.²⁴¹ In any event, the decree would remain enforceable in the state that issued it.²⁴² As a result, a person could be married in one state and unmarried in another, an outcome Justice Oliver Wendell Holmes criticized as “likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage.”²⁴³

Laws, 84 OR. L. REV. 433, 442 (2005) (describing the period between the striking down of anti-miscegenation laws and the legalization of same-sex marriage as one of “virtually uniform marriage laws”).

235. Grossman, *supra* note 234, at 461. *But see* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1387-90 (2012) (recognizing the complexities underlying the general approach).

236. *See* Grossman, *supra* note 234, at 462-70 (identifying a few categorical exceptions such as polygamous marriages and semi-categorical exceptions such as evasive marriages).

237. To be clear, the current state of domicile could enforce its own marriage laws, not those of the state of celebration, but, as discussed previously, these different legal standards produce relatively consistent outcomes.

238. The adoption of no-fault divorce by every state has minimized the significance of remaining legal variations.

239. *See* Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 384-85 (2007).

240. 201 U.S. 562, 605-06 (1906).

241. *See id.* at 567-72.

242. *See id.* at 605-06.

243. *Id.* at 628 (Holmes, J., dissenting).

This all changed when the Supreme Court reversed *Haddock* in *Williams v. North Carolina*.²⁴⁴ *Williams* involved a couple who traveled to Nevada to divorce their spouses, whom they left back in North Carolina, and then get married.²⁴⁵ After they returned to North Carolina, they were convicted of bigamous cohabitation.²⁴⁶ The Court held that as long as the couple were Nevada domiciliaries at the time the Nevada court issued its divorce decree, that decree must be given full faith and credit.²⁴⁷ The Court emphasized the importance of the Full Faith and Credit Clause in “altering the status of the several states as independent foreign sovereignties by making them *integral* parts of a single nation,”²⁴⁸ and bringing “separate sovereign states into an *integrated whole*.”²⁴⁹ By allowing states to regulate marriages within their borders while simultaneously recognizing divorce decrees issued by sister states, this rule ensured a degree of predictability for individuals traveling from state to state.²⁵⁰

A second example of disintegration involves miscegenation laws. Many states had laws prohibiting interracial marriage but some did not.²⁵¹ States with anti-miscegenation laws would therefore have to decide whether to recognize interracial marriages validly contracted elsewhere in the United States. Andrew Koppelman has shown that with a few exceptions, courts refused to recognize marriages contracted in foreign states for the purpose of evading the state’s marriage restrictions, but were divided when the couples were previous domiciliaries of those foreign states.²⁵² The North Carolina Supreme Court, for example, declared that interracial marriages

244. 317 U.S. 287, 304 (1942).

245. *Id.* at 289-90.

246. *Id.* at 289.

247. *Id.* at 298-99 (“[E]ach state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.”).

248. *Id.* at 301-02 (emphasis added) (citation and quotations omitted).

249. *Id.* at 303 (emphasis added).

250. *See id.*

251. *See Loving v. Virginia*, 388 U.S. 1, 6 & n.5 (1967) (noting that at the time of the decision sixteen states still criminalized interracial marriage while fourteen states had repealed such laws in the previous fifteen years); Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 114 (1996) (noting that forty-one states had laws barring miscegenation).

252. *See Koppelman, supra* note 251, at 116 & n.39.

were “immoral,” “opposed to public policy,” and even “revolting” within the state.²⁵³ But the court noted that, unlike incest and polygamy, “such cannot be said to be the common sentiment of the civilized and Christian world.”²⁵⁴ Although North Carolina would have to tolerate the “bad example of an unnatural and immoral but lawful [where contracted] cohabitation,” the alternative was worse: “there should not be one law in Maine and another in Texas, but ... the same law shall prevail at least throughout the United States.”²⁵⁵ The Tennessee Supreme Court took the opposite view, favoring the sovereign right of the state to reject marriages contravening public policy.²⁵⁶ Uncertainty about the validity of interracial marriages persisted until the Supreme Court’s decision striking down all miscegenation bans in *Loving v. Virginia*.²⁵⁷

The third, and most recent example involves the interstate recognition of same-sex marriages. After Hawaii almost legalized same-sex marriage in 1993,²⁵⁸ some states began to panic about whether they would have to recognize same-sex marriages performed in other states, often passing laws expressing policies against recognition.²⁵⁹ Surprisingly, Congress intervened to *thwart* uniformity between the states, declaring in section 2 of DOMA that no state would be required to recognize same-sex marriages from other states.²⁶⁰ DOMA inevitably led to the precise situation that *Williams v. North Carolina* condemned: that couples’ marriages would flicker on and off as they moved from state to state.²⁶¹ The *Obergefell* Court

253. *State v. Ross*, 76 N.C. 242, 244, 246 (1877).

254. *Id.* at 246.

255. *Id.* at 247.

256. *State v. Bell*, 66 Tenn. 9, 10-11 (1872) (reasoning that to hold otherwise would invite “the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock”).

257. 388 U.S. 1, 12 (1967).

258. See Mark Strasser, *Unity, Sovereignty, and the Interstate Recognition of Marriage*, 102 W. VA. L. REV. 393, 394 (1999).

259. See, e.g., Grossman, *supra* note 234, at 446-51; Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2240-44 (2005).

260. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2000), and 28 U.S.C. § 1738C (2000) *abrogated by* United States v. Windsor, 570 U.S. 744 (2013)).

261. See Grossman, *supra* note 234, at 477-86 (providing examples of this flickering recognition of marriages).

ended this “instability and uncertainty” when it recognized the right of same-sex couples to marry.²⁶²

These examples reveal a pattern. When state marriage laws diverge too far, resulting in significant groups of people uncertain about the legality of their marital status, the Supreme Court has intervened. By constitutionalizing whether states need to recognize each other’s divorce decrees, or whether laws restricting marriage based on race or sex are valid, the Supreme Court has quashed disintegration and promoted integration.²⁶³

IV. EVALUATING INTEGRATION

We have seen that marriage becomes more integrated when laws and norms are internally consistent regarding the purposes of marriage and when those packages of laws and norms are consistent from jurisdiction to jurisdiction. This Part asks, “to what end?” What are the benefits and drawbacks of integration? This Part constructs a normative framework for evaluating the desirability of fully integrated marriage.

A. Benefits of Integration

Most courts have assumed that marriage should be a legally and socially integrated institution rather than a shaggy assemblage of disparate legal rights.²⁶⁴ As mentioned above, the Supreme Court has multiple times spoken of marriage as a “unified” or “integrated” whole without defining those concepts.²⁶⁵ Likewise, in his influential

262. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015) (“Even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse’s hospitalization while across state lines.”).

263. By ruling that the Fourteenth Amendment protects the right of same-sex couples to marry in every state, the *Obergefell* Court obviated the question whether the Full Faith and Credit Clause would require states to recognize lawful marriages notwithstanding state laws articulating public policies against same-sex marriage. *Id.* For context, see Steve Sanders, *Is the Full Faith and Credit Clause Still “Irrelevant” to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 IND. L.J. 95, 102-03, 108 (2014), describing the “conventional wisdom” that the Full Faith and Credit Clause would not invalidate state laws articulating a policy against recognizing same-sex marriages, and identifying some scholars taking the contrary view.

264. See *supra* Part I.

265. See, e.g., *Obergefell*, 135 S. Ct. at 2600; *Williams v. North Carolina*, 317 U.S. 287, 303

nineteenth century family law treatise, Joel Prentiss Bishop declared,

[F]or the peace of the world, for the prosperity of its respective communities, for the well-being of families, for virtue in social life, for good morals, for religion, for everything held dear by the race of man in common, it is necessary there should be one universal rule whereby to determine whether parties are to be regarded as married or not.²⁶⁶

This Section identifies the salutary features of integration omitted by these sweeping and conclusory statements.

1. Consistency and Related Values

Integration brings about consistency, which helps to promote other important values such as fairness, equality, and communitarianism. Consistency also enables people to make valuable investments in their life projects.

When the rules of marriage are internally coherent and have a consistent meaning across jurisdictions, they promote fairness and equal treatment. Courts and scholars have emphasized the role uniform family status rules can play in protecting individual liberties and promoting “fairness and equality.”²⁶⁷ In considering DOMA’s federal definition of marriage, the *Windsor* Court was particularly troubled by the effect of leaving same-sex couples married for purposes of state but not federal law, thus creating two classes of marriages within each state.²⁶⁸ To be sure, the effects of this inconsistency were felt most acutely by same-sex spouses, who shouldered the uncertainty of being simultaneously married and unmarried, deprived of “the stability and predictability of basic personal relations the State has found it proper to acknowledge and

(1942).

266. JOEL PRENTISS BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION § 856 (1891).

267. Joslin, *supra* note 45, at 817; *see also* Sanders, *supra* note 263, at 110 (noting the ability of uniform marital status to “[p]rotect[] individual rights and liberty against coercive and discriminatory state power”).

268. *See* United States v. Windsor, 570 U.S. 744, 772 (2013).

protect.”²⁶⁹ But, more broadly, this situation violated “the long-established precept that the incidents, benefits, and obligations of marriage *are uniform for all married couples* within each State.”²⁷⁰ To the Court, uniformity was not merely an abstract goal.²⁷¹ The Court emphasized the importance to families of being able to see their relationships reflected in the state’s broader institutions—to understand their “concord with other families in their community and in their daily lives.”²⁷²

The *Windsor* Court made clear that this “concord” was not the exclusive concern of same-sex families.²⁷³ Marriage would surely help same-sex couples to see themselves reflected in the eyes of their community.²⁷⁴ But it would also allow opposite-sex couples to understand the significance of their marriage through the inclusion of same-sex couples.²⁷⁵ That inclusion revealed “the community’s considered perspective on the ... institution of marriage” and “the meaning of equality.”²⁷⁶ Judges and scholars have accused this portion of the *Windsor* opinion of raising a jumbled federalism argument. Justice Scalia, for example, called it “rootless,” and noted that readers might be “fool[ed] ... into thinking that this is a federalism opinion” although the opinion “formally disclaimed reliance upon principles of federalism.”²⁷⁷ But seen through the lens of integration, this part of the opinion snaps into focus. Rather than articulating a federalism argument, *Windsor* was articulating an integrity principle.

Consistency also enables spouses to pursue their life goals. As Courtney Joslin has observed, “[F]or many, getting married provides a sense of permanence and emotional security.”²⁷⁸ The Supreme Court in *Williams v. North Carolina* called the possibility that one

269. *Id.*

270. *Id.* at 768 (emphasis added) (noting that although certain eligibility rules for marriage vary between the states, they “are in every event *consistent within each State*” (emphasis added)).

271. *See id.*

272. *Id.* at 772.

273. *Id.*

274. *See id.*

275. *See id.*

276. *Id.* at 769.

277. *Id.* at 791-92 (Scalia, J., dissenting).

278. Joslin, *supra* note 45, at 822; *see also* Matsumura, *supra* note 57, at 1535 (arguing that marriage “promotes stability”).

could be “lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina the most perplexing and distressing complication in the domestic relations of many citizens in the different States.”²⁷⁹ Uncertainty might take an emotional toll but can also have practical impacts. One court considering the validity of same-sex marriages lawfully entered under uncertain legal circumstances observed that nonrecognition could place families “in a state of legal limbo,” “caus[ing] harm each day that the marriage is not recognized.”²⁸⁰ Another court said that “[i]n terms of the personal ordering and orderliness of one’s most fundamental affairs, nothing would be more destructive of ‘ordered liberty.’”²⁸¹ The courts identified a whole range of decisions, from child-rearing to estate planning, that would remain unsettled without certainty about legal status.²⁸² “[A] function of the right to marry is not only to protect settled expectations, but actually to *settle* the expectations of the couple and others on an ongoing basis.”²⁸³ When legal differences cause a marriage to flicker on and off, they interfere with this critical function.²⁸⁴

2. *Information and Expectations*

By standardizing and harmonizing marriage law, integration also simplifies the task of conveying the legal consequences of marriage, settling the expectations of the spouses and third parties and communicating the state’s message about marriage’s ideal content. In an influential article, Thomas Merrill and Henry Smith argue that property rights must track a limited number of standard forms to reduce the costs of processing information about those rights.²⁸⁵

279. 317 U.S. 287, 299 (1942) (citation and quotation marks omitted). The Court seemed particularly concerned about the significance of the consequences of this inconsistency—in this case, criminal prosecution, and in others, illegitimacy. *See id.* at 299-300.

280. *Evans v. Utah*, 21 F. Supp. 3d 1192, 1210 (D. Utah 2014).

281. *Caspar v. Snyder*, 77 F. Supp. 3d 616, 629 (E.D. Mich. 2015).

282. *See* Matsumura, *supra* note 57, at 1534-39.

283. *Id.* at 1539.

284. *See, e.g., id.* at 1538 (discussing how California’s Proposition 8 would have invalidated months of same-sex marriages and disrupted peoples’ lives).

285. *See* Merrill & Smith, *supra* note 55, at 3-8.

They name this phenomenon “the *numerus clausus*—the number is closed.”²⁸⁶ Merrill and Smith contend that property rights are

restricted to a limited number of standardized forms.... [due to] the in rem nature of property rights: When property rights are created, third parties must expend time and resources to determine the attributes of these rights, both to avoid violating them and to acquire them from present holders. The existence of unusual property rights increases the cost of processing information about all property rights.... Standardization of property rights reduces these measurement costs.²⁸⁷

These measurement costs are not the only costs that affect optimal standardization of property rights.²⁸⁸ Merrill and Smith note that standardization can impose “frustration costs” when they interfere with otherwise legitimate exercises of autonomy.²⁸⁹ Optimal standardization also considers administrative costs—costs related to the distribution and enforcement of rights.²⁹⁰ Considering this optimization challenge, Nestor Davidson has observed that although standardization might interfere with an individual’s autonomy interests,²⁹¹ such interference “represents inevitable tradeoffs between those choices and the effects those choices have on others.”²⁹²

According to Merrill and Smith, the standardization of forms goes hand-in-glove with the in rem nature of property rights—rights that are binding against all the world.²⁹³ If property forms were to proliferate, they would impose an increasing burden on third parties to gather information in order to avoid violating those novel property

286. *Id.* at 4.

287. *Id.* at 8; see also Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 777 (2001) (“[F]ree customization of property forms would create an information-cost externality.”).

288. Merrill & Smith, *supra* note 55, at 35.

289. *Id.* (downplaying these frustration costs because of the ability to tailor more complicated relationships through the combination of standardized forms).

290. *Id.* at 38; see also Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1653 (2008) (“[T]he forms of property are primarily tools to assist legal actors—courts, legislatures, and other formal sources of legal recognition—in their regulatory role.”).

291. See Davidson, *supra* note 290, at 1620 (noting the importance of property to individual identity).

292. *Id.* at 1602.

293. Merrill & Smith, *supra* note 287, at 777.

rights.²⁹⁴ The classic features of in rem rights—that they (1) “apply to a large and indefinite class of dutyholders;” (2) “attach to persons only insofar as they own particular ‘things’ and not otherwise”; (3) are both held by, and owed to, a “large and indefinite class”; and (4) “are always duties of abstention rather than performance”²⁹⁵—resolve rights disputes at “relatively low cost.”²⁹⁶ The relative simplicity of the duty of abstention (“keep off”), as compared to obligations to perform in a particular manner, vastly reduces information costs.²⁹⁷

Merrill and Smith’s theory has been subject to critique, both by those who question whether the information cost thesis is accurate as a descriptive matter,²⁹⁸ and those who argue that the phenomenon of limiting property forms can be better explained by other needs. Henry Hansmann and Reinier Kraakman have argued, for instance, that the limitation in forms addresses the need for third parties to obtain notice of rights that run with a particular asset by making it easier to verify the ownership of rights offered for conveyance.²⁹⁹ Hanoch Dagan has argued that the best justification for standardization is that it consolidates the expectations of the owners themselves and expresses the ideal forms of their underlying relationship.³⁰⁰

Resolving these disputes goes beyond the needs of the present context. These different accounts all agree that the *numerus clausus* facilitates the acquisition of important information even if they disagree on the paramount purpose for which that information is used.

Thus far, scholars studying the intersection of family structure and informational issues have largely focused on the problem of signaling commitment to spouses and potential spouses. Elizabeth

294. *Id.*

295. *Id.* at 789.

296. *Id.* at 793.

297. *See id.* at 797.

298. *See, e.g.,* Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 380-82 (2002).

299. *See id.* at 374.

300. Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1567 (2004); *see also id.* at 1570 (“The forms of property matter—they should matter—because these configurations of property rights constitute property institutions that facilitate various categories of human interaction and thus promote important human values.”).

Scott has argued that the commitment norms of marriage enable potential spouses to signal to each other that they are willing to make a reciprocal commitment through their choice to marry.³⁰¹ Other scholars have similarly studied marriage as a signal of commitment or constraint.³⁰² Certainly, the integration of marriage can affect the ability of potential spouses to signal availability and commitment: if multiple kinds of marriage existed, verification would require more complicated investigation.³⁰³

More significant, but less explored, is the fact that marriage satisfies additional types of informational needs: (1) it provides notice to the spouses of the legal duties that they owe to the state, third parties, and each other; (2) it identifies spouses as married to each other and themselves; and (3) it identifies a couple as married to the state and third parties, which facilitates the enforcement of laws and norms. Integration affects all of these informational needs.

First, as demonstrated above, marriage is accompanied by a host of legal rights and duties, some of which are mandatory and others of which can be altered by private agreement.³⁰⁴ Scholars have expressed skepticism that couples can know even a fraction of the legal rules that govern the marital relationship.³⁰⁵ Yet a passing knowledge of the rights and duties of marriage would seem

301. See Scott, *supra* note 126, at 1955; see also Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1255-56 (1998); Michael J. Trebilcock, *Marriage as a Signal*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 245, 250 (F.H. Buckley ed., 1999).

302. See POSNER, *supra* note 126, at 70-73 (noting how marriage can secure investments by the other party and deter cheating); William Bishop, *'Is He Married?': Marriage as Information*, 34 U. TORONTO L.J. 245, 246 (1984) (characterizing the marriage contract as "a guarantee of a return on investment").

303. Bishop, *supra* note 302, at 254 ("Verification [of marital availability] would undoubtedly be more difficult if the questioner had to ask about type A, type B, or type C marriages.").

304. See *supra* notes 1, 4, 113-15 and accompanying text.

305. See Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J.L. REFORM 217, 221-22 (1990) (discussing how marriage is one of the few areas where there has been a movement towards greater disclosure of the law); Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 440-41, 445 (1993) (finding that marriage-license applicants surveyed had "largely incorrect perceptions of the legal terms of the marriage contract as embodied in divorce statutes"); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 370-72 (asserting that variations in state laws establishing obligations between spouses means couples generally remain unaware of the specific legal obligations attendant to marriage).

necessary to promote social policies and protect the expectations of people in marital relationships. Although some scholars have analyzed the desirability of educating spouses about key marriage laws,³⁰⁶ and at least one state, Louisiana, requires officers to “deliver to each prospective spouse ... a printed summary of the then current matrimonial regime laws,”³⁰⁷ scholars who have pondered the issue have generally fallen back on social norms to provide adequate knowledge of baseline marital commitments.³⁰⁸ Without actual knowledge of marriage’s substantive terms, it is social norms that define marital behavior and allow a person to live his life without having to constantly question his actions or the actions of others.³⁰⁹ For the most part, the law does not intervene in people’s marriages, relying instead on these norms to guide spouses’ conduct.³¹⁰ Thus, the less standardized the rights and norms associated with marriage, the less effective marriage will be in broadcasting the legal consequences of the relationship. The more marriage is constant in meaning over time, the more that meaning will govern conduct and people can rely on that meaning to structure their affairs.³¹¹ If a goal of marriage is to provide knowledge of the default rules that govern the marital relationship, the least costly option would seem best.³¹²

Although many of the rights running between the marital couple and the state cannot be altered by private agreement—for instance, Social Security eligibility or tax filing status—spouses can contract around default property obligations.³¹³ This raises the possibility that the relationship will be governed by a combination of state-provided rules and contractual, in personam obligations. If the spouses are aware of the rules they are altering and the advantages

306. See Baker, *supra* note 305, at 223.

307. LA. STAT. ANN. § 9:237 (2014).

308. See, e.g., Carbone & Cahn, *supra* note 176 (noting that the institutionalized expectations of marriage are well-understood and deliberately chosen by those who marry); Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1042-43 (2018).

309. See Cherlin, *supra* note 144, at 848.

310. See Scott, *supra* note 126, at 1907-12.

311. Ayelet Blecher-Prigat has made a similar argument in the context of parentage. See Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J. L. & GENDER 119, 134 (2018) (focusing on the ability of the law to express the rights and duties that accompany parenthood).

312. See *supra* notes 55-56 and accompanying text.

313. See Bix, *supra* note 174, at 158.

those rules would provide,³¹⁴ then the creation of personalized duties running between the spouses will be both efficient and proper; after all, they are in the best position to know and enforce those specific obligations.³¹⁵ But scholars have expressed skepticism that the spouses understand the rights they are trading away.³¹⁶ Further, the in personam obligations could never fully supplant the package of marital rights.³¹⁷ Even within this context, therefore, the legal system has an interest in promoting a clear understanding of default legal rules.

Second, spouses need to know that they are married. Although the idea that a person might not realize she is married seems far-fetched, common law marriage can result in the partners being treated as legally married or partnered without their knowledge or against their wishes.³¹⁸ As one court put it:

Some persons may mistakenly believe they are common law spouses if they have lived with another for an extended period of time Others may assume that they can never be deemed married unless they have gone through the statutory formalities.... [T]hey may discover too late that they have foregone rights or undertaken responsibilities contrary to their intentions.³¹⁹

Moreover, as discussed above, differences in state and federal definitions of marriage can result in couples being married for some purposes but not others.³²⁰ Just as for states and third parties, these problems would be obviated by a single, unambiguous legal status.

314. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979) (noting that divorcing couples bargain in the shadow of legal rules governing alimony, custody, etc., that provide the spouses with "bargaining chips" that will affect the outcome of their negotiations).

315. See Merrill & Smith, *supra* note 287, at 837.

316. See Bix, *supra* note 174, at 195.

317. See, e.g., *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 19-20 (Ct. App. 1993) (preventing spouses from altering nondelegable duties of support through private agreement).

318. See, e.g., *Matsumura*, *supra* note 56, at 2060-63 (collecting examples in which marital status was uncertain).

319. *PNC Bank Corp. v. Workers' Comp. Appeal Bd.*, 831 A.2d 1269, 1280-81 (Pa. Commw. Ct. 2003).

320. See *supra* notes 40-41 and accompanying text.

Third, and relatedly, states and third parties seeking to regulate intimate relationships face an identification problem.³²¹ Relationships that look the same to an outside observer may or may not be legal marriages: couples may live together, perform stereotypical divisions of labor, and even adopt the same surname without formalizing their relationships.³²² Historically, the doctrine of common law marriage responded to this concern, wrapping cohabiting couples in the mantle of marriage to avoid the stains of immorality and illegitimacy.³²³ In this capacity, it functioned to channel illicit relationships into the single form of marriage.³²⁴ Now that cohabitation is legal, states struggle to identify relationships entitled to legal protection and to determine the legal consequences that should flow from them.³²⁵ The dominant approach has been to protect partners by recognizing the enforceability of private agreements between them³²⁶—the opposite of a *numerus clausus*.

The recognition of prenuptial agreements also creates challenges in the opposite direction: couples may be formally married under state law and appear that way to the state, yet, they may have agreed not to create marital property or to provide each other financial support upon divorce.³²⁷ Relying on formal status as a proxy for economic unity, the government may provide the couple benefits such as income-splitting on a joint tax return³²⁸ when in fact the higher-earning spouse is retaining all of the property in her own name. The higher-earning spouse potentially pays less tax than

321. See Matsumura, *supra* note 56, at 2035.

322. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (en banc) (involving a claimed agreement by a nonmarital couple to live together, hold themselves out to the public as husband and wife, and exchange career opportunities for domestic services); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1205 (Ill. 1979) (involving Victoria Hewitt's claim that she and Robert Hewitt lived in a marriage-like relationship in which she raised the couple's children and advanced his career).

323. See Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 964 (2000).

324. See *id.*

325. See Matsumura, *supra* note 308, at 1021-25.

326. See *id.* at 1020-21.

327. See, e.g., UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT §§ 2(4)-2(5) (NAT'L CONFERENCE OF COMM'RS ON STATE LAWS 2012) (allowing spouses to bargain away rights to spousal support, and rights to property).

328. See Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1417 (1975) ("Once enacted ... income splitting for married couples came to be seen as a tax allowance for family responsibilities.").

a comparable-earning single filer, and gets to retain the full value of the savings.³²⁹ Meanwhile, the purpose of that particular tax treatment is thwarted.³³⁰ Likewise, a third party relying on the existence of the marriage in determining their dealings with the couple—for example, a well-known painter who accepts a commission to produce a valuable work—may rely on the resources of both spouses rather than the individual who directly bargained for the work.³³¹ In fact, the obligation might flow to one spouse without substantial assets.³³² Without a legal mechanism for forcing the disclosure of the terms of the spouses' agreement, third parties cannot know about the spouses' respective property rights. Even with such a mechanism, measurement costs would be externalized to third parties.

Increased measurement costs also affect the community enforcement of social norms. As discussed at length above, the effectiveness of both behavioral norms and enforcement norms depends on their clarity.³³³ As Eric Posner has observed, “the existence of multiple or idiosyncratic relationships might be so confusing to the members of the community that community enforcement [of norms] becomes impossible.”³³⁴ For example, Posner notes that an extramarital affair counts as “opportunism in a traditional household.”³³⁵ Spouses might privately agree to allow such affairs but “members of the community cannot be expected to know enough about [the] marriage agreement” to police it: “They need a standard form marriage against which to measure [all others], so that they know what counts as opportunism.”³³⁶ Like property, the definition of marriage signals something about that particular relationship “to the rest of the world.”³³⁷ Integration of marriage into a single, formal status would simplify the task of identification.

329. *See id.*

330. *See id.*

331. *See* Bishop, *supra* note 302, at 259.

332. *See id.* (suggesting a few instances in which third parties might wish to discriminate based on marital status, such as if banks deem married individuals to be more creditworthy and rely on proof of marriage when deciding whether to extend credit).

333. *See supra* Part II.A.

334. POSNER, *supra* note 126, at 79.

335. *Id.*

336. *Id.* at 80.

337. Bishop, *supra* note 302, at 258.

B. Costs of Integration

Integration also has its costs. Standardization comes at the expense of individual autonomy.³³⁸ Scholars have argued at length that the choices to marry or not to marry, as well as the choice to remain married, are protected precisely because they enable self-definition.³³⁹ Taken to its extreme, integration would result in a single package of rights consistent across jurisdictions.³⁴⁰ Marriage would be a take-it-or-leave-it whole. In contrast to the current state of the law, which allows some customization of rights,³⁴¹ such an approach would narrow the range of choices, constricting couples' freedom to structure their relationships as they see fit.³⁴²

To an extent, the conflict between standardization and autonomy is overstated. Regardless of whether they wish to structure their lives around marriage or be governed by it, couples understand their choices through the lens of marriage.³⁴³ If marriage lost its singular meaning, the choice to, or not to, marry would be less of a "momentous act[] of self-definition."³⁴⁴ The clarity of options can facilitate that choice. Moreover, couples would remain free, in private, to behave as they see fit. Standardization would simply perpetuate the historical division between public and private spheres, with the

338. See Davidson, *supra* note 290, at 1622 (noting this tension within the realm of property law).

339. See, e.g., Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 467 (2017); Matsumura, *supra* note 57, at 1530-34; Strauss, *supra* note 30, at 1723.

340. See *supra* notes 39-40 and accompanying text.

341. All states allow marital agreements under certain circumstances. See, e.g., Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 13-14 (2014) (noting the trend toward greater enforceability); Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249, 264 (2010) (noting that all states allow prenuptial agreements in some form).

342. See HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 68-70 (2017) (arguing that self-authorship requires a range of viable options); see also Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 405 (2017) (noting that the restriction of legal options can result in exclusion for those whose identities (or preferences) are not recognized).

343. See Matsumura, *supra* note 57, at 1538-39.

344. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003)). But see Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 4, 4-15 (2019) (arguing that many cohabitants are not making a conscious choice not to marry).

spouses' idiosyncratic performances falling on the private side.³⁴⁵ Additionally, individuals would have the ultimate choice whether to marry in the first place.

That said, it would be difficult not to see the contraction of individual freedom to choose the legal consequences of one's intimate conduct as a threat to autonomy. Beyond restricting the options from which to choose, the concentration of authority in a singular institution would inherently reflect the preferences of those in power.³⁴⁶ The privileging of some norms and values would come at the expense of others, resulting in practical and expressive harms. Disintegration permits the development of a plurality of norms that might better accommodate some people's needs, lead to the recognition of previously neglected relationships of value—such as same-sex partnerships—and disrupt hierarchies.³⁴⁷

The rationale of integration also threatens the proliferation of a plurality of marriage-like forms.³⁴⁸ Marriage can be completely integrated irrespective of alternate statuses if its rules are internally coherent and consistent across jurisdictions.³⁴⁹ The presence of something like civil unions should not impact the integrity of marriage as I have defined it. But if, as I argue, a fundamental benefit of integration is informational, competing forms may crowd the field, leaving marriage less able to communicate its content. This possibility explains why at least some states have resisted

345. Cf. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772-73 (2005) (noting the power formal marriage confers on spouses to structure their private affairs as they see fit).

346. See FRANKE, *supra* note 159, at 12-13 (“[T]he implicit whiteness of normative homosexuality has delivered a racial endowment to the same-sex marriage movement that has most certainly helped the cause of marriage equality, but sometimes at the expense of the rights and interests of both normative and non-normative families of color.”); Katyal, *supra* note 342, at 411-12 (noting that the consequence of granting the state monopoly power in assigning one's sex is to create a hierarchy of privilege that benefits some and burdens others).

347. See Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 344-58 (2015) (demonstrating how same-sex couples used contract law to develop collaborative networks, paving the way to formal recognition of their relationships).

348. No states continue to criminalize cohabitation. Most states allow cohabiting couples to create legally enforceable obligations. See, e.g., Margaret Ryznar & Anna Stepien-Sporek, *Cohabitation Worldwide Today*, 35 GA. ST. U.L. REV. 299, 303 (2019). And a minority of states have created formal, alternative legal statuses for couples. See, e.g., COL. REV. STAT. ANN. § 15-22-104 (West 2013) (indicating that marriage is not required to acquire designated beneficiary status); 750 ILL. COMP. STAT. ANN. 75/20 (West 2011) (civil unions).

349. See *supra* notes 39-40 and accompanying text.

extending marriage-like rights to people in nonmarital relationships.³⁵⁰ The purported need to have marriage speak clearly has justified the refusal to recognize relationships even when it would otherwise be equitable to do so.³⁵¹

V. INSIGHTS FROM INTEGRATION

The previous Parts have subjected integration and disintegration to a searching inquiry and provided a framework for considering integration's benefits and pitfalls. What might this comprehensive account say about contemporary disputes over marriage? Examples abound, and this Part considers two, one within marriage law and one outside of it: the future of marital presumption statutes and the recognition of alternate nonmarital relationship statuses.

A. Marriage and Parenthood

Changes to the positive law of marriage are constantly being proposed, lauded, and criticized. The integration framework uncovers the foundational purposes of marriage on which critiques are based, enables courts and policymakers to debate the validity of those purposes, and assesses the legal changes in light of those purposes.

This Article opened by claiming that two cases, *Smith v. Pavan* and *Turner v. Steiner*, although perhaps unexceptional within the context of the fight over LGBT equality, were actually stunning examples of marital disintegration.³⁵² The intervening analysis shows why this is so. In *Pavan*, the Arkansas Department of Health refused to list a birth mother's wife on the child's birth certificate despite the fact that the child was conceived during the marriage.³⁵³ Arkansas had adopted a rebuttable presumption that "[i]f the

350. See, e.g., *Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988) (en banc) (noting the importance of exclusivity in promoting marriage); *Charron v. Amaral*, 889 N.E.2d 946, 950 (Mass. 2008).

351. See, e.g., *Charron*, 889 N.E.2d at 951 (denying a nonmarital same-sex partner standing to sue for loss of consortium on the grounds that the partners were not married at the time of injury, even though the partners took many steps to establish the seriousness of the relationship and were denied the legal right to marry).

352. See *supra* notes 13-19 and accompanying text.

353. *Smith v. Pavan*, 505 S.W.3d 169, 172 (Ark. 2016), *rev'd*, 137 S. Ct. 2075 (2017) (per curiam).

mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child.”³⁵⁴ Despite the sex-specific language, the statute seems to impose parental rights on the nongestational spouse on the basis of marriage.³⁵⁵ But the court reasoned that the purpose of the presumption was *not* to protect the integrity of the marital family.³⁵⁶ The use of the term “father,” the court found, revealed a focus “on the relationship of the biological mother and the biological father to the child.”³⁵⁷ The state contended that birth certificates primarily allowed the state to compile vital statistics for public health research purposes, enabling people to identify “personal health issues and genetic conditions.”³⁵⁸ The plaintiffs countered that birth certificates play a crucial role in applying for important benefits, such as employment-related benefits, survivors’ benefits, and inheritance rights.³⁵⁹ But the Arkansas Supreme Court brushed this argument aside, insisting that birth certificates and parental rights are two different things.³⁶⁰

In *Turner v. Steiner*, a birth mother claimed that because her wife neither gave birth to nor adopted a child conceived through artificial insemination and born during their marriage, the wife lacked standing to request parental rights during the dissolution of their marriage.³⁶¹ The court refused the nonbirth mother’s request to apply the marital presumption statute in a gender-neutral way, reasoning that “the purpose of the presumption statute is to assist in determining whether a man is a child’s biological father, ... not to broadly establish a term or condition associated with marriage.”³⁶² The court went further: “with the exception of adoption, ... parentage in Arizona is determined by biology.”³⁶³

354. *Id.* at 175 (quoting ARK. CODE ANN. § 20-18-401(f)(1) (2018)).

355. *See id.*

356. *Id.* at 178.

357. *Id.*

358. *Id.* at 179.

359. *Id.* at 180.

360. *Id.*

361. *Turner v. Steiner*, 398 P.3d 110, 112 (Ariz. Ct. App. 2017), *abrogated by* McLaughlin v. Jones, 401 P.3d 492 (Ariz. 2017). The statute at issue in *Turner* had to do with parentage rather than birth certificates, and, in contrast to Arkansas, Arizona lacks a statute governing sperm donation. *See id.* at 113.

362. *Id.* at 114.

363. *Id.*

Let us pause for a moment to see these cases for what they are: judicial pronouncements that parenthood and marriage *are inherently separate*. These cases proclaim that parenthood is about biology, not marriage. Recall the argument against same-sex marriage that redefining marriage as an emotional union between two adults would unravel the norm that marriage is about children—indirect disintegration.³⁶⁴ The Arkansas and Arizona cases accomplish directly what same-sex marriage opponents feared would occur indirectly: the severing of marriage and parenthood. They depart from the deeply rooted principle of family integrity memorialized in *Michael H. v. Gerald D.*, in which the Supreme Court noted that a traditional purpose of the presumption was to protect the marital family from claims by potential genetic parents that would disrupt the marital family.³⁶⁵ The *Michael H.* Court recognized that the putative father's genetic connection might provide an opportunity to form a meaningful relationship with the child.³⁶⁶ But to allow “inquiries into the child's paternity ... would be destructive of family integrity and privacy.”³⁶⁷

One might counter that the U.S. Supreme Court reversed the Arkansas Supreme Court, thereby restoring the connection between marriage and parentage. But that is not what the Court did. In *Pavan v. Smith*, the Court summarily reversed, but it did so because the facts indicated that Arkansas had “chosen to make its birth certificates more than a mere marker of biological relationships,” for example, by naming the husband of a woman who conceives a child through anonymous sperm donation.³⁶⁸ It was this unequal treatment that violated *Obergefell*'s command not to deny same-sex couples access “to the ‘constellation of benefits that the Stat[e] ha[s]

364. See Girgis et al., *supra* note 184, at 260-61.

365. See *Michael H. v. Gerald D.*, 491 U.S. 110, 123-25 (1989). Part of this historical resistance to recognizing the claims of biological fathers over husbands can be explained by the harsh consequences stemming from illegitimacy. See *id.* at 125.

366. *Id.* at 128-29 (citing *Lehr v. Robertson*, 463 U.S. 248, 262-65 (1983)).

367. *Id.* at 120.

368. *Pavan v. Smith*, 137 S. Ct. 2075, 2078-79 (2017) (per curiam). In such a case, the husband would be listed as the father on the birth certificate notwithstanding the lack of a biological relationship. See *id.* at 2078.

linked to marriage.”³⁶⁹ The Court expressed no opinion on the state’s power to sever marriage and parenthood.³⁷⁰

Reframing this debate through the integration framework produces several insights. First, it reveals the agreement between same-sex marriage advocates and opponents about the relevant purpose of marriage in relation to this dispute: to raise children within the stable adult relationship that marriage theoretically creates. With that purpose as the baseline, tension between efforts to prevent same-sex couples from accessing the same parental rights as opposite-sex couples and any professed desire to protect the integrity of marriage becomes clear. Even if recognizing same-sex marriage “teaches that marriage is more about the desires of adults than about the needs—or rights—of children,”³⁷¹ which might indirectly change the way people generally think about the relationship between marriage and gender-differentiated parenting, opposing the extension of the marital presumption to same-sex couples only accelerates the problem. Courts saying that parenthood is based on biology, not marriage, do not restore the link between marriage and parentage. Moreover, elevating the importance of a biological connection between parent and child stigmatizes adoptive families.³⁷² To the extent that efforts to weaken the marital presumption are the residue of opposition to same-sex marriage, they hoist marriage equality opponents upon their own petard.

369. *Id.* at 2078 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)) (alterations in original).

370. The touchstone of the Court’s *Pavan* opinion was equal treatment, not any particular view about the rights of marriage. *See id.* at 2076 (quoting *Obergefell*, 135 S. Ct. at 2605) (noting the importance of offering marriage to same-sex couples “on the same terms and conditions as opposite-sex couples”). Although all states have marital presumption statutes, those statutes have differed in how easily the presumption may be rebutted, with some states making biological evidence virtually conclusive and others limiting the grounds. *See* June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 665-67 (2016).

371. Ryan T. Anderson, *Marriage, the Court, and the Future*, 40 HARV. J.L. & PUB. POL’Y 361, 399 (2017).

372. *See* Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1070 (noting that the emphasis on biology comes at the expense of other forms of kinship). The argument against disintegrating marriage and parenthood initially did not depend on biological ties or elevate biological parenthood over adoption. For example, Lynn Wardle, a longtime critic of same-sex marriage, argued that the “marital union” of a child’s “biological or adoptive mother and father is the greatest predictor” of positive outcomes for children. Wardle, *supra* note 185, at 4 (emphasis added).

Opponents' efforts would be better spent *strengthening* the marital presumption to the exclusion of nonmarital parentage.³⁷³

Second, and conversely, if marriage does not consistently confer parental rights as it once did, the disaggregation of marriage and parenthood might provide opportunities for the redefinition of parenthood around values such as biology, intentionality, or functional parenting.³⁷⁴ This is arguably what has already begun to occur. Forty percent of all births in this country are to unmarried women;³⁷⁵ in other words, marriage is already doing less work to establish parenthood and may soon do so only in a minority of cases. By assigning maternal status to the birth mother and allowing biologically related men to rebut marital presumption statutes, the biological basis for parentage already rivals, and has arguably supplanted, marriage.³⁷⁶ But biology imposes its own burdens. Biology can trump social or functional claims to parenthood: those who raise and care for children to whom they are not biologically related may find their parental interests unprotected.³⁷⁷ Individuals without biological ties to their intended children—such as same-sex partners who did not contribute genetic material—may have to adopt their children to protect their parent-child relationship.³⁷⁸ In response to this situation, scholars have pressed for greater recognition of functional or social bases for parentage.³⁷⁹

373. To be clear, this is not an approach I personally favor.

374. See Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2266-67 (2017) (contextualizing the marital, biological, and social grounds for determining parentage).

375. See *Unmarried Childbearing*, CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STAT., <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> [<https://perma.cc/3A6U-KGHF>].

376. See NeJaime, *supra* note 374, at 2275-78.

377. See, e.g., *In re T.J.S.*, 16 A.3d 386, 388-89, 398 (N.J. Super. Ct. App. Div. 2011) (holding that a nonbiologically related woman could not establish parenthood through intent); *L.P. v. L.F.*, 338 P.3d 908, 910, 921 (Wyo. 2014) (holding that a genetically unrelated man who lived with a mother and child for approximately two years could not establish a parental relationship); see also Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 881-82 (1984).

378. See NeJaime, *supra* note 374, at 2312-14; Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 206 (2009).

379. See NeJaime, *supra* note 374, at 2333; see also Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J.F. 589, 592 (2018) (explaining how the newly revised Uniform Parentage Act provides greater recognition of nonbiological parents).

Although the refusal to recognize marital same-sex parents would burden same-sex couples in the short term, the situation could lead to greater recognition of nonbiological parental rights in the long term. Here's how: the breakdown of a marital relationship involving children produces intertwined questions of custody and support. The biological parent might resist sharing custody with her ex-spouse, but both she and the state will face the competing desire to provide the child with a second source of financial support.³⁸⁰ Because courts often treat custody and support as intertwined, the compelling interest in providing children with two sources of financial support³⁸¹ could create pressure to recognize nonbiological spouses as parents based on their caregiving or affiliation.³⁸² For advocates of functional parentage, the disintegration of the marital presumption could have a surprising silver lining.³⁸³

B. Relationship Pluralism

Integration also sheds light on the issue of nonmarital relationship recognition. The question whether and how to recognize a plurality of relationship statuses has occupied family law scholars in recent years.³⁸⁴ A few scholars have advocated authorizing multiple forms of legal marriage.³⁸⁵ Scholars have supported the expansion

380. See, e.g., *Turner v. Steiner*, 398 P.3d 110, 112 (Ariz. Ct. App. 2017), *abrogated by* *McLaughlin v. Jones*, 401 P.3d 492 (Ariz. 2017) (biological mother opposes ex-wife's request for custody but asks the court to award child support).

381. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 882 (2000) (arguing that the most important policy goal underlying parentage "has been ensuring that children have at least one, and preferably two, legal parents who are responsible for their care and support").

382. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005) (imposing support obligations on a nonbirth mother based on her participation in the decision to have, and raise, the couple's children).

383. See generally Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016) (demonstrating how exclusion of same-sex families from formal legal recognition led to the recognition of novel kinship forms).

384. See William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1884 (2012) (surveying various contributions).

385. See Teri Dobbins Baxter, *Marriage on Our Own Terms*, 41 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (2017) (arguing that states should offer multiple forms of marriage when couples apply for licenses); Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 464-65 (1998) (arguing for the ability of couples to legally define their own marriages); Barbara Stark, *Marriage Proposals: From*

of status alternatives to marriage, such as civil unions, domestic partnerships, and designated beneficiaries;³⁸⁶ considered whether to expand familial rights to relationships outside the traditional sexual dyad;³⁸⁷ proposed the conscription of cohabitants into legally recognized statuses;³⁸⁸ and advocated for greater recognition of agreements between intimate partners.³⁸⁹ When the impact of these proposals on marriage has been considered at all, scholars have focused on the propensity of alternate statuses to compete with marriage.³⁹⁰ The goal for some, like Nancy Polikoff, has been to “knock marriage off its perch,” or at least “mak[e] [it] matter less.”³⁹¹

This Article’s study of disintegration suggests that a proliferation of marriage forms or alternate statuses could undermine marriage in other ways. Proposals to recognize alternatives to marriage have not contended with the questions that integration poses regarding information costs, and the impacts of those costs on both autonomy and relationship stability.

As discussed above, the legal system depends on social norms to both convey the content of marital obligations and to police its

One-Size-Fits-All to Postmodern Marriage Law, 89 CALIF. L. REV. 1479, 1490-91 (2001) (advocating that spouses have the power to create personalized marriage law).

386. See, e.g., John G. Culhane, *After Marriage Equality, What’s Next for Relationship Recognition?*, 60 S.D. L. REV. 373, 382-85 (2015) (supporting the Designated Beneficiary Agreement Act); Murray, *supra* note 195, at 300-05 (praising efforts to innovate with status alternatives like municipal and state domestic partnerships).

387. See, e.g., POLIKOFF, *supra* note 44, at 123-45 (arguing for “valuing all families”); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 191-93 (2007) (considering what it would mean for the law to recognize friendship).

388. See, e.g., BOWMAN, *supra* note 115, at 6-8 (proposing imposing marital property obligations on long-term cohabitants); Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 216 (2016) (proposing to treat long-term cohabitants as married for all purposes).

389. See, e.g., Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 576, 578-79 (2013) (proposing “registered contractual relationships” as a legal-status alternative to marriage in which couples sign a contract defining their rights and obligations to each other); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 159 (2013).

390. See, e.g., Eskridge, *supra* note 384, at 1959 (speculating that alternate statuses might contribute to the decline of marriage by being more attractive options).

391. POLIKOFF, *supra* note 44, at 90 (advocating that we “knock marriage off its perch”); *id.* at 151 (wanting to “mak[e] marriage matter less”); see also ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* 5 (2012) (providing a comprehensive critique of the inequities of marriage and advocating for “minimal marriage”).

enforcement.³⁹² If an alternate status expresses a value that directly contradicts a marital norm—for example, if it provides legal recognition for polyamorous relationships, thereby challenging the marital norm of sexual exclusivity—it might send a message that the law does not value the norm.³⁹³ Other examples are easy to imagine. If states wish to convey the importance of mutual financial interdependency, the recognition of domestic partnerships that do not involve the creation of shared property could undermine the connection between relationships and property obligations.³⁹⁴ The same could go for statuses that provide for easy exits from formal relationships.³⁹⁵

Thus far, formal statuses such as domestic partnerships and civil unions have taken the form of marriage-by-another-name or marriage-lite, and for the most part have not articulated norms that contradict marital norms.³⁹⁶ A more significant threat to primary marital norms comes from the regulation of relationships like cohabitation. As I have detailed in other work, cohabiting relationships are tremendously diverse and vary in terms of partners' subjective feelings of permanency, intimacy, and commitment.³⁹⁷ Proposals to regulate cohabiting relationships, such as the American Law Institute's Principles of the Law of Family Dissolution, would treat cohabiting relationships of a certain duration like marriages for the purposes of property distribution and support obligations.³⁹⁸ Treating these relationships like marriages, even though they do not necessarily embody the same commitment norms, could dilute the strength of those marital norms.

A pluralistic approach is even more likely to threaten secondary enforcement norms—the norms that enable the community to

392. See *supra* Part II.A.

393. See *supra* notes 153-58 and accompanying text (discussing the expressive function of the law and its ability to influence norms).

394. Several populous municipalities have allowed people to register for domestic partnerships notwithstanding that those partnerships could not create joint property obligations. See Murray, *supra* note 195, at 300.

395. See, e.g., CAL. FAM. CODE § 299(a) (West 2011) (providing streamlined dissolution procedures).

396. See Murray, *supra* note 195, at 296.

397. See Matsumura, *supra* note 308, at 1025-26.

398. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (AM. LAW INST. 2002).

police, and to recognize who is policing, primary norms.³⁹⁹ If it is difficult to tell who is married, in a formal union with a different set of legal consequences, or a designated beneficiary relationship with yet another set of obligations, it would not be immediately apparent whether the couple is transgressing marital norms. The task becomes even more complicated if parties can alter their duties by private agreement. As Eric Posner observed, if spouses are able to privately agree to countenance extramarital sex, then it would be prohibitively costly for the community to police the norm of fidelity: the relevant source of information, the private agreement, would be in the hands of the couple and unlikely to be divulged.⁴⁰⁰

Expanding the number of relationship forms can also impose information-gathering costs that affect the administrability of laws turning on relationship status. Some formal statuses rely on registries that enable the state to determine eligibility for a single package of state-provided benefits, so verification is not too costly.⁴⁰¹ In California, for example, registered domestic partners are entitled to all of the rights and responsibilities of marriage at the statewide level, but none at the federal level.⁴⁰² But other statuses might enable registrants to pick and choose the legal consequences of their relationship, requiring more effort to determine what rights flow from their status.⁴⁰³ In Colorado, for example, parties can execute and record a designated beneficiary agreement that allows each partner to grant or withhold sixteen categories of rights, including employer-provided benefits, hospital visitation, medical decision making, and intestate succession.⁴⁰⁴ The number of options creates hundreds of possible variations, requiring the state and third parties to study the registered agreement to determine its significance,

399. See McAdams, *supra* note 127, at 372; see also *supra* notes 132-35 and accompanying text.

400. See POSNER, *supra* note 126, at 79-80.

401. See, e.g., CAL. FAM. CODE § 297.5 (West 2007) (creating an official registration system for domestic partnerships that convey all of the rights and responsibilities of marriage at the state level).

402. See *id.*

403. See, e.g., Colorado Designated Beneficiary Agreement Act, COLO. REV. STAT. ANN. §§ 15-22-101 to -112 (West 2009).

404. *Id.* § 15-22-106.

and requiring the parties themselves to remember the varied legal consequences of their beneficiary agreement.⁴⁰⁵

Legal recognition of cohabitant rights creates an even greater challenge. Whether the regulation takes the form of contract, as in *Marvin v. Marvin*,⁴⁰⁶ or status, as Washington courts have recognized,⁴⁰⁷ the couple's legal relationship is not established until adjudicated by a court. Both approaches are fact-intensive and indeterminate.⁴⁰⁸ As a result, the government and third parties, *and even the partners themselves*, do not know the legal consequences of their relationship until it is subject to a legal dispute.⁴⁰⁹ The absence of norms governing informal relationships means that the partners themselves cannot—unlike married people—rely on an institution with well-developed norms to inform them of their legal rights and duties.

This last insight reveals a heretofore underexplored consequence of disintegration: if parties can no longer easily understand the laws and norms that govern them, how will that impact individual autonomy? Certainly, the highly integrated system of coverture, with its concomitant criminalization of extramarital intimacy,⁴¹⁰ restricted the ability to make self-defining choices about intimate relationships. It is hard not to view cases dismantling restrictions on sex, contraception, and marital partners as promoting greater individual freedom.⁴¹¹ Yet too much deregulation poses a challenge of its own: people need clear options to make self-defining choices.⁴¹²

405. See *id.* Further complicating matters, the statute will not enforce parts of the registered agreement that conflict with “a superseding legal document.” *Id.* § 15-22-105(2).

406. See 557 P.2d 106, 110 (Cal. 1976) (en banc) (recognizing contracts—including palimony—between cohabitants).

407. See *Connell v. Francisco*, 898 P.2d 831, 836 (Wash. 1995) (en banc) (holding that couples in “a meretricious relationship” can create marriage-like property obligations).

408. See Matsumura, *supra* note 308, at 1040-42.

409. See *id.*

410. See *supra* note 59 and accompanying text.

411. See Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1216-25 (2016) (identifying Supreme Court decisions comprising a “jurisprudence of nonmarriage”).

412. See DAGAN & HELLER, *supra* note 342, at 70 (“What is particularly significant to choice, and thus to autonomy, is the multiplicity of alternatives *within* any given sphere.”); see also *supra* notes 339, 343-44 and accompanying text. If the goal is to match legal rules to the relevant conduct, the unbundling of legal rights is a necessary first step. That said, the functional approach would also seemingly depend on relatively intelligible norms to match conduct to consequence.

The number of rights and obligations that could possibly turn on relationship status is in the thousands.⁴¹³ People simply cannot understand, develop a preference for, and (where applicable) negotiate all of these obligations.⁴¹⁴ Without certainty as to these obligations—heretofore enforced somewhat passably by social norms—relationships would also lack stability. Autonomy may require a plurality of choices, but not necessarily an infinite variety.

These concerns need not be dispositive. I favor the proliferation of legal alternatives to marriage notwithstanding these concerns.⁴¹⁵ But proposals to expand the regulation of intimate relationships cannot ignore them. From the perspective of both administrability and autonomy, the success of a relationship regulation regime premised on a plurality of statuses cannot simply overthrow marriage. In fact, success might depend on quite the opposite: *optimally* integrated marriage paired with an optimal number of alternatives with the optimal degree of variance.⁴¹⁶ The full articulation of this optimization is beyond the scope of this Article, but the foregoing analysis suggests that forms should be distinct enough that they do not cause confusion, and simple enough that—similar to in rem rights as described by Merrill and Smith⁴¹⁷—they can project their consequences to the partners, state, and third parties. Consistent with the recommendations of some scholars, this approach might leave little room for active regulation of informal relationships, favoring a contractual approach.⁴¹⁸

413. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (citing *United States v. Windsor*, 570 U.S. 744, 752 (2013)) (noting that over a thousand provisions of federal law turn on marital status).

414. See DAGAN & HELLER, *supra* note 342, at 128 (noting problems with cognitive overload in the face of too many options).

415. I also favor the preservation of a space outside of marriage for couples who want to escape the law's regulation. See Matsumura, *supra* note 308, at 1013-14 (arguing that the law should not regulate intimate conduct in the absence of the parties' consent); cf. Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 582-84 (2016) (arguing that *Lawrence v. Texas* created an "interstitial space" in the marriage-crime binary for licit, unregulated sexual conduct).

416. See DAGAN & HELLER, *supra* note 342, at 106.

417. See *supra* notes 293-97 and accompanying text.

418. See Carbone & Cahn, *supra* note 176, at 95-96, 112 (noting that cohabiting couples do not marry for a reason, and suggesting that their responsibilities regarding property be confined to those they agreed to and those justified by the way they conducted themselves).

Focusing on integration and disintegration also opens new avenues for thinking about intimate contracting. Courts are much more likely to enforce agreements between partners and spouses regarding money or property than they are when the terms are nonmonetary.⁴¹⁹ The refusal to enforce nonmonetary terms reflects and reinforces traditional views about sexuality and gender roles.⁴²⁰ Concerns about information costs actually suggest that the opposite should be true. Third parties and the state have little legitimate interest in the performance of intimate duties⁴²¹—regarding, for instance, how much and when spouses should have sex⁴²²—and the parties are in the best position to monitor the performance of particularized commitments regarding sex and intimacy. The state and third parties are much more likely to care about whether the partners are an interdependent financial unit,⁴²³ but are ill-equipped to discover the partners' private financial arrangements. The integration framework provides a justification for limiting such terms, or making them the subject of mandatory disclosure.

CONCLUSION

Two debates about the nature of marriage have occupied scholars for years. First, where does marriage fall on the continuum of status and contract?⁴²⁴ Second, does marriage have a positive dimension, or is it merely whatever collection of rights the state deigns to provide? In other words, are states constitutionally compelled to provide a particular set of laws known as “marriage,” or are they free to alter or even abolish it?⁴²⁵

This Article identifies a third way of thinking about the nature of marriage. It focuses on the inevitable changes to the positive law of marriage and argues that those changes can make marriage more or less integrated, both in terms of rights and norms and across

419. See Silbaugh, *supra* note 106, at 66-67.

420. See Matsumura, *supra* note 389, at 190-95.

421. *Lawrence v. Texas* teaches that the state has little business regulating the private, consensual, nonharmful intimate conduct of adults. See 539 U.S. 558, 578 (2003).

422. See, e.g., *Favrot v. Barnes*, 332 So. 2d 873, 875 (La. Ct. App. 1976) (involving an agreement limiting sex to once a week).

423. See *supra* notes 328-32 and accompanying text.

424. See Halley, *supra* note 38, at 6.

425. See *supra* note 103 and accompanying text.

source. It also identifies benefits and costs of integration, demonstrating the extent to which marriage relies on effectively communicating information about its content but noting the downsides of centralization and state control. This integration framework not only clarifies the terms by which legal change should be assessed, but enables a more principled analysis of efforts targeted at reforming marriage laws and recognizing nonmarital relationships.