

NATIONAL LGBT BAR ASSOCIATION
MICHAEL GREENBERG WRITING
COMPETITION

What Marriage Law Can Learn from
Citizenship Law (and Vice Versa)

Govind Persad*

I.	INTRODUCTION	103
II.	INTERMEDIATE STATUSES	107
	A. <i>Guest Workers</i>	107
	B. <i>Civil Unions</i>	109
III.	STATUSES AS GATEWAYS.....	110
	A. <i>Spouses with Benefits</i>	110
	B. <i>Citizenship Rights</i>	111
	C. <i>Cosmopolitanism, Rawlsianism, and Status</i>	114
IV.	PLURAL STATUSES	115
	A. <i>Dual Citizenship</i>	115
	B. <i>Polygamous Marriage</i>	119
	C. <i>Human Nature, Plural Relationships, and Two Aristotelian Challenges</i>	122
V.	CONCLUSION	123

I. INTRODUCTION

Legal doctrine juxtaposes citizenship and marriage as paradigm statuses when analyzing questions ranging from fundamental rights¹ to

* © 2013 Govind Persad. J.D./Ph.D. Candidate, Stanford University. I am grateful to Mariano-Florentino Cuellar, Jane Schacter, and students in the History and Future of Citizenship seminar at Stanford Law School for their comments.

1. *Tatro v. Tatro*, 587 A.2d 154, 158 n.7 (Conn. App. Ct. 1991) (“An order to apply for citizenship directs a change in status, not just a change in behavior. Changes of status, such as marriage, divorce, adoption, citizenship, or religious affiliation, usually implicate fundamental personal rights that cannot be the subject of a court order.”) (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978)); Bruce E. Boyden, *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federalist System*, 62 ALA. L. REV. 111, 187 (2010) (asserting that the Constitution protects the “right to travel with fundamental state status determinations intact: legal statuses such as citizenship, parenthood, and marriage”); Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 713 (2006) (describing “marital [and] citizenship” statuses as “life-critical status[es]”).

jurisdiction and finality² to the maintenance of public records.³ Scholarly analyses of each status discuss parallels with the other,⁴ and Justices on the United States Supreme Court⁵ and the International Court of Justice have suggested parallels as well.⁶ Naturalizing citizens have compared naturalization to marriage.⁷ And citizens and spouses each have

2. *Dunham v. Dunham*, 57 Ill. App. 475, 496 (Ill. App. Ct. 1895) (stating for the purposes of in rem jurisdiction, “[t]he marriage state is a condition; a status; so, also, is minority, citizenship, freedom, bondage”); *Borden v. Am. Sur. Co.*, 2 Pa. D. 245, 247 (Pa. Ct. Common Pleas 1893) (similar); RESTATEMENT (SECOND) OF JUDGMENTS § 31 cmt. a (1982) (“‘Status’ includes various forms of continuing legal relations between an individual and society as a whole, such as citizenship, or between an individual and one or more other specific persons, such as marriage and the parent-child relationship. It includes legal relations of indefinite term, such as citizenship or marriage”); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4416 (2d ed. 2002) (“Judgments establishing such matters of personal status as marriage, paternity, or citizenship demand the highest respect.”).

3. INTL. ENCYCLOPAEDIA LAWS FOR FAM. & SUCCESSION L., SLOVENIA, PART I CH. 2 (1999) (describing the legal treatment of “records of personal status such as citizenship, birth, marriage, death”); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 535 (2006) (discussing “records . . . of changes in personal status (such as citizenship, marriage, and adoption)”).

4. See Samuel C. Rickless, *Polygamy and Same-Sex Marriage: A Response to Calhoun*, 42 SAN DIEGO L. REV. 1043, 1045 (2005) (“[O]ne can think of civil marriage as a public status, like citizenship, the nature of which is appropriately determined by the state according to its conception of what conduces to the general welfare.”); Dara E. Purvis, Note, *The Right to Contract: Use of Domestic Partnership as a Strategic Alternative to the Right To Marry Same-Sex Partners*, 28 WOMEN’S RTS. L. REP. 145, 151 (2007) (discussing “religious or civic analogies of marriage as microcosms of the power relationship between God and man, or the State and its citizens”). In the citizenship literature, see Timothy William Waters, *The Blessing of Departure: Acceptable and Unacceptable State Support for Demographic Transformation: The Lieberman Plan to Exchange Populated Territories in Cisjordan*, 2 LAW & ETHICS HUM. RTS. 9, 49-50 (2008) (criticizing the conception of “citizenship as a set of benefits enjoyed by atomized individuals, rather than a collective construct requiring collective acceptance—much like marriage, dancing, or sex”); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1143 n.17 (2008) (“Consideration of the privacy interests implicated by immigration and citizenship status also may inform analysis of privacy interests in analogous forms of identity or status information, such as marital status . . .”).

5. See *Perez v. Brownell*, 356 U.S. 44, 84 (1958) (Douglas, J., dissenting) (“One who is native-born may be a good citizen or a poor one. Whether his actions be criminal or charitable, he remains a citizen for better or for worse, except and unless he voluntarily relinquishes that status.”).

6. See *Nottebohm* (*Liechtenstein v. Guatemala*), 1955 I.C.J. 4, 57 (Apr. 6) (Guggenheim, J., dissenting).

7. E.g., Natalie Williams, *Citizenship “Like a Marriage,”* DAILY TELEGRAPH, Sept. 15, 2005, at 20, available at 2005 WLNR 14502654 (“‘It is like a marriage,’ said [naturalizing citizen Sandra] Stobbia ‘I feel very strongly that it is like signing a contract with a loved one.’”); *Australia’s New Citizens Are Off to a Flying Start*, CAULFIELD GLEN EIRA/PORT PHILIP LEADER, Sept. 15, 2003, available at 2003 WLNR 7870520 (“Chinese-born Li Cunxin, 42, a St Kilda stockbroker, said he woke up at 3am that day because he was so excited about at last becoming a citizen. ‘The commitment is like a marriage. It is not a light decision,’ he said.”).

numerous parallel legal privileges and duties that are different from those of aliens and unmarried persons.⁸

This juxtaposition suggests that citizenship law and marriage law might usefully cross-pollinate. Those attempting to secure for undocumented immigrants some of the privileges reserved to citizens might draw on arguments for granting privileges to same-sex couples that were formerly reserved for heterosexual couples. Polygamy advocates might learn from arguments that multiple citizenship should be recognized.

In this Comment, I focus on three contexts where evolving law and politics make the parallel especially relevant. The first context is *intermediate status*. Some couples—in particular gay and lesbian couples—have been offered permanent statuses, like civil unions, that bear legal privileges but fall short of full marriage equality. In contrast, similar differentiations within citizenship are generally resisted. The history of citizenship may presage the increasing unacceptability of differentiations within status that we now see in the gay marriage context. Meanwhile, the developing history of marriage equality efforts may help present-day citizenship advocates choose legal strategies.

The second context is *status as a gateway to rights*. Some early gay rights advocates unsuccessfully argued that advocates should challenge the primacy of marriage, rather than seek access to the institution.⁹ Advocates attempting to expand the rights of current noncitizens face similar choices: should they seek to give current noncitizens greater access to citizenship, or challenge the reservation of important rights only granted to citizens? Here, I will consider what citizenship advocates might learn from gay marriage advocacy—in particular, whether one can strenuously pursue access to a status while simultaneously advocating for expanded rights for those outside of that status.

8. For privileges and burdens associated with marriage, see Letter from Barry R. Bedrick, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Henry J. Hyde, Chairman, Comm. on the Judiciary, House of Representatives (Jan. 31, 1997), <http://www.gao.gov/archive/1997/og97016.pdf> (noting that there are 1049 federal statutory provisions “in which marital status is a factor”); Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), <http://www.gao.gov/new.items/d04353r.pdf> (updating Bedrick letter and noting 1138 federal statutory provisions in which marital status is a factor). For citizenship, see Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1064 (1994) (“Although aliens’ fundamental personhood is recognized as a constitutional matter, and although alienage is deemed an irrelevant basis of distinction for a host of statutory and common law rights, alienage is still very often treated as an entirely legitimate basis for the denial of rights and benefits in our society in both constitutional and subconstitutional law.”).

9. See *infra* note 31 and accompanying text.

The third and last context is *status as a plural relationship*. Many critics of dual and multiple citizenship argued that allegiance to multiple states was immoral, unadministrable, or both.¹⁰ More recently, polygamous marriage has become a topic of legal and political discourse, first as a foil in anti-gay marriage arguments and later as a political possibility in its own right.¹¹ I will consider whether polygamous marriage advocates can profitably draw on arguments for multiple citizenship, and how multiple-citizenship advocates should responsibly respond to the analogy with polygamy.

Several factors make this project timely. In contrast to my approach, which attempts to consider the citizenship-marriage parallel from both sides, many existing scholarly analyses of the parallel are by theorists of citizenship who examine marriage in order to inform their ideas about citizenship.¹² Furthermore, marriage and citizenship law have both changed substantially in the decade since the parallel was last analyzed. For example, in 2002, no U.S. state performed gay marriages; as of January 2013, nine states and the District of Columbia do.¹³

For reasons of limited time and space, the scope of this Comment focuses on *legal* rather than *political* citizenship.¹⁴ However, legal citizenship frequently intersects with other notions of citizenship; as such, I will sometimes touch, though not linger on, broader questions of political citizenship. For similar reasons, I will focus on United States law rather than attempting an international or comparative analysis, though I will sometimes discuss other nations' legal norms when relevant.

10. See *infra* notes 59-64 and accompanying text.

11. See *infra* notes 30-33 and accompanying text.

12. See, e.g., Peter Schuck, *Plural Citizenships*, in DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE 61 (Randall Hansen & Patrick Weil eds., 2002); Sanford Levinson, *Constituting Communities Through Words that Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1445 (1986); Stanley A. Renshon, *Dual Citizenship + Multiple Loyalties = One America?*, in ONE AMERICA? 232, 244-46 (Stanley A. Renshon ed., 2001). But see David B. Cruz, "Just Don't Call It Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CALIF. L. REV. 925, 977 n.277 (2001) (comparing, though only in a footnote, citizenship and marriage from a gay marriage advocacy perspective).

13. Compare Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 344 n.13 (2002) ("No states currently permit same-sex partners to marry and thirty-five states expressly forbid it."), with *Marriage Equality & Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map_Nov2012.pdf (last updated Nov. 8, 2012).

14. For the distinction between these, see Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 962 (1988).

II. INTERMEDIATE STATUSES

In this Part, I will consider what marriage law and citizenship law can teach one another about the question of “partial” or “second-class” forms of status. In particular, I focus on the placement of “newcomers” into alternative statuses that carry some but not all of the benefits and burdens of citizenship or marriage. In marriage law, some have proposed giving same-sex couples access to domestic partnerships or civil unions, though not to marriage. In citizenship, some have proposed guest worker programs that provide only some of the benefits that citizens enjoy.

A. *Guest Workers*

Guest worker programs, which admit workers but grant them a package of rights clearly inferior to that of citizens, represent a clear example of a differentiated, “partial” status.¹⁵ This may be so particularly if guest workers are present for extended periods with no pathway to citizenship.¹⁶ For instance, a guest worker program that permits immigration, but disallows immigrant reliance on welfare programs for a period of years after immigration, may be more troubling as the period becomes longer.¹⁷ Perhaps in part for this reason, the current legal regime only incorporates small guest worker programs, at least where unskilled workers are concerned. For example, while the Bracero guest worker program in the late 1950s employed over 400,000 Mexican workers per year, a 2010 Congressional Research Service report found that the H-2A and H-2B programs employed only slightly more than 100,000 workers of all nationalities combined.¹⁸

15. MICHAEL WALZER, SPHERES OF JUSTICE 56-61 (1983) (describing the inferiority of guest workers and arguing that these programs are inconsistent with democratic values); Merav Lichtenstein, Note, *An Examination of Guest Worker Immigration Reform Policies in the United States*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 689, 726 n.281 (2007) (“I acknowledge that the creation of a guest-worker program, in effect, institutionalizes a ‘second-class’ status of citizens, at least temporarily, and in no way advocate for this as the ideal solution.”).

16. See Lichtenstein, *supra* note 15, at 723.

17. Michael J. Trebilcock & Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 N.Y.U. L. REV. 234, 283 (2006) (“Longer periods [of differentiation between guest workers and others] would create normatively problematic categories of first- and second-class citizens.”).

18. See ANDORRA BRUNO, CONG. RESEARCH SERV., IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS, CONG. RESEARCH SERVICE 1, 47 (2010), available at <http://www.policyarchive.org/handle/10207/bitstreams/1816.pdf> (describing the comparative size of historically enacted and recently proposed guest worker programs); Alexandra Villarreal O'Rourke, Recent Development, *Embracing Reality: The Guest Worker Program Revisited*, 9 HARV. LATINO L. REV. 179, 180-90 (2006) (describing the history of guest worker programs and mid-2000s proposals to expand these programs).

Refusing to authorize an expanded guest worker program in part because it would subject guest workers to second-class status may disadvantage at least some potential guest workers. Compare the case of minimum wage increases: some argue that while these laws may provide some workers with better wages, they lead to other workers being laid off rather than paid more, and so constitute a net harm to low-wage workers.¹⁹ Similarly, given political realities, refusing to authorize a guest-worker program may result in some who would have been guest workers becoming full citizens, but others not being admitted into the nation at all.²⁰

What we can learn from American citizenship law is that the law has been reluctant to recognize alternative, permanent, “semi-citizenship” statuses that fall far short of citizenship. While permanent residence can be a long-term alternative to citizenship, it—perhaps like an engagement²¹—is envisaged primarily as a trial status on the way to full legal equality, rather than an alternative to citizenship.²² Furthermore, the legal differences between permanent residents and citizens are far fewer than those that would exist between guest workers and citizens.²³ There is a social expectation that people who are in long-term relationships will ultimately seek marriage, and that people who are long-term residents of a nation will similarly seek citizenship.²⁴ Declining to commit to citizenship and declining to commit to marriage are both seen as socially unacceptable.

19. See DAVID NEUMARK & WILLIAM L. WASCHER, *MINIMUM WAGES* 104 (2008) (“[T]he preponderance of evidence supports the view that minimum wages reduce the employment of low-wage workers.”). *But see* Simon Deakin & Frank Wilkinson, *Minimum Wage Legislation*, in *LABOR AND EMPLOYMENT LAW AND ECONOMICS* 150, 155-56 (Kenneth G. Dau-Schmidt, Seth D. Harris & Orly Lobel eds., 2009) (reporting studies arguing that a minimum wage can benefit low-wage workers).

20. See Howard F. Chang, *Guest Workers and Justice in a Second-Best World*, 34 U. DAYTON L. REV. 3, 9 (2008).

21. *Cf.* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 16 n.35 (1990) (“[A]s Robert Post has suggested . . . , an alien who refuses to take advantage of opportunities to naturalize puts the nation in the position of a spurned lover.”).

22. See *id.* at 16 (“Although federal law does not require that resident aliens apply for naturalization, citizenship is clearly the intended end of the immigration process. Given the predominant American view that most foreigners would acquire U.S. citizenship if they could, resident aliens who choose not to naturalize are subject to . . . suspicion.”).

23. See *id.* at 18 (“Outside the immigration context, aliens present in this country—whether or not they are in lawful status—are entitled to most of the constitutional protections afforded U.S. citizens.”).

24. Alberta Member of Parliament Deborah Grey stated: “If this is such a great country and you are proud to be here, then take out citizenship. It’s like getting married, you know: make the commitment.” See, e.g., Allan Thompson, *Falling Through the Cracks*, MONTREAL GAZETTE, July 2, 1994, at B6, available at 1994 WLNR 2985162.

B. *Civil Unions*

Gay rights advocates have increasingly rejected civil unions and domestic partnerships as inadequate substitutes for marriage, often describing them as “second-class citizenship.”²⁵ Courts recognizing a right to same-sex marriage have recently agreed.²⁶ These arguments often appeal to the symbolic and informal social value of being able to call oneself “married” when interacting with acquaintances, relatives, or private economic actors.²⁷

Examining the debate surrounding guest worker programs might enrich the civil union debate by motivating advocates to identify the second-best option to attaining full equality. If the alternative to civil unions is no legally recognized relationship recognition at all, civil unions may seem attractive, just as guest worker programs seem attractive where the alternative is exclusion. Civil unions and guest worker programs may be even more attractive if they produce increased acceptance of marriage or full citizenship for those previously excluded, via phenomena like increased social contact or the formation of favorable legal precedents.²⁸ On the other hand, if accepting an intermediate status relieves the pressure for full equality, these statuses look less attractive.²⁹ Hence the choice of whether or not to press for or recognize an intermediate status, whether in citizenship or marriage law, depends on the marginal value of the intermediate status in comparison to alternatives, and the relationship between accepting an intermediate status and fighting for continued progress.

25. Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 153 n.41 (2005).

26. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 973-75 (N.D. Cal. 2010) (summarizing evidence that civil unions are seen as different from and inferior to marriage); *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004) (“The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”).

27. See Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 690-91 (2010).

28. See Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL’Y 105, 113-16 (2010) (reviewing the “theory of small change” advanced by Kees Waaldijk and William Eskridge, which sees civil unions as a helpful step along the way to gay marriage) (citing William N. Eskridge, Jr., Essay, *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 650-52 (2000)).

29. See Aloni, *supra* note 28, at 127-35 (critiquing the “theory of small change” and contending that the recognition of civil unions can stall progress toward gay marriage); see also James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights Is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1, 31-32 (2001) (arguing that incremental extensions of rights can prevent the further extension of those rights).

III. STATUSES AS GATEWAYS

A. *Spouses with Benefits*

Modern gay rights advocates have by and large adopted the strategy of seeking access to marriage while continuing to understand marriage as a status with special significance, largely leaving its content unchallenged. This decision may reflect the path-dependent nature of marriage rights; since marriage exists, we have reason to preserve and expand access to it.³⁰ The choice to pursue marriage as a goal, however, was not without initial controversy. Many activists argued that pursuing marriage entailed assimilating into mainstream institutions.³¹

More recently, some commentators have argued that marriage should be separated into its component rights and responsibilities, or eliminated as a legal status altogether.³² Others have argued for increased access to, and recognition of, new forms of marriage.³³ Still others have argued that gay rights advocates are overemphasizing marriage and underemphasizing rights that will help all families.³⁴ Amy Brandzel exemplifies this critique when she argues that marriage and citizenship are linked as exclusive and privilege-replicating statuses: “[C]itizenship itself is necessarily exclusive, privileged, and normative—and . . .

30. See, e.g., 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, 448 (1996) (“I do not claim that, if a new legal code of human or family relationships were developed completely afresh, governments should continue to sanctify the two-person enduring union over every other relationship in precisely the manner they do today. Rather, my claim is that, after thousands of years of human history, the union of two persons in a relationship called ‘marriage’ is almost certainly here to stay.”).

31. See Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 387-93 (2009) (providing a history of the debate over whether to pursue same-sex marriage and summarizing the arguments of marriage skeptics Paula Ettelbrick and Michael Warner).

32. Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006) (arguing that the state should cease to legally recognize or define marriage). *But see* Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights*, 71 OHIO ST. L.J. 127, 132 (2010) (“[T]he tendency to disaggregate both marital and parental rights from marital and parental status jeopardizes the traditional constitutional protection of families.”).

33. See, e.g., Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 667 (2011); Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 CALIF. L. REV. 235, 240 (2011) (discussing “exploding marriage, three-strikes marriage, line marriage, renewable marriage, self-marriage, and exculpatory marriage” as other “visions of what marriage might be”).

34. See, e.g., Nancy D. Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 85, 103 (2009) (“A strategy in the name of gay rights toward recognition of same-sex partnerships, where successful, is a civil rights triumph. It may, however, have unfortunate consequences for family policy.”).

advocacy for same-sex marriage reifies and reproduces these effects.”³⁵ Brandzel concludes that “queers, especially those who are privileged and well off enough to do so, should refuse citizenship.”³⁶

Given the parallels between citizenship and marriage, the strategic choices of gay rights advocates offer both helpful and cautionary precedents for those seeking to expand access to citizenship. On the one hand, gay rights advocates have been successful in many local contexts in opening up access to marriage. On the other hand, these efforts have been so far unsuccessful on a federal level, and may have provoked “backlash” in which political leaders have launched initiatives to attempt to restrict access to marriage or even civil unions.³⁷ Further, the legalization of marriage in some areas of the country has arguably created incentives for those gay people who can move out of no-marriage areas to pro-marriage areas to do so.³⁸ As such, the effort to obtain marriage rights has arguably introduced new inequalities within the gay and lesbian community. A more promising alternative might involve pursuing marriage while at the same time challenging the exclusion of unmarried people from important rights.³⁹

B. Citizenship Rights

The Fourteenth Amendment’s due process and equal protection rights extend to all persons within the United States, and not only to citizens.⁴⁰ As such, many noncitizens have almost all of the same rights and responsibilities as citizens,⁴¹ and laws discriminating against resident

35. Amy L. Brandzel, *Queering Citizenship? Same-Sex Marriage and the State*, 11 GLQ: J. LESBIAN & GAY STUD. 171, 173 (2005).

36. *Id.* at 197.

37. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1154-55 (2009).

38. See Sharon Scales Rostosky et al., *Lesbian, Gay, and Bisexual Individuals’ Psychological Reactions to Amendments Denying Access to Civil Marriage*, 80 AM. J. ORTHOPSYCHIATRY 302, 306 (2010) (“Many expressed the desire to relocate their residence after their state passed a marriage amendment. For example, one participant wrote, ‘I no longer want to live in a state that has discrimination against me written into the constitution.’”).

39. See Joan Callahan, *Same-Sex Marriage: Why It Matters—At Least for Now*, 24 HYPATIA 70, 79 (2009) (“[S]ame-sex marriage does matter—at least for now—and achieving it needs to remain a political priority, though not the only political priority, of queer people and all people who are committed to just treatment for everyone.”).

40. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any state deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.”) (emphasis added).

41. See Kalhan, *supra* note 4, at 1141 (“[L]awful permanent residents are entitled to many of the same rights and are subject to many of the same obligations as U.S. citizens, and despite the important distinctions between lawful permanent residents and non-immigrants, even non-immigrants have many of the same rights and benefits as U.S. citizens.”); Peter H. Schuck,

aliens are subject to enhanced scrutiny.⁴² However, some important benefits and detriments are constitutionally or statutorily accessible only to citizens, including the right to vote⁴³ and to hold certain governmental positions.⁴⁴ More recently, the Personal Responsibility and Work Opportunity Reconciliation Act guaranteed certain social benefits, such as Medicaid, only to citizens and not to resident aliens,⁴⁵ although many of these benefits were later restored.⁴⁶ Additionally, the Privileges or Immunities Clause of the Fourteenth Amendment, recently revived in *Saenz v. Roe*, protects “citizens of the United States” rather than protecting “person[s]” as the Equal Protection and Due Process Clauses do.⁴⁷ If more legal rights are upheld via the Privileges or Immunities Clause, the differences in legal protection between citizens and noncitizens may grow.⁴⁸

Membership in the Liberal Polity: The Devaluation of American Citizenship, 3 GEO. IMMIGR. L.J. 1, 1 (1989) (arguing that the United States has “reduced almost to the vanishing point the marginal value of citizenship as compared to resident alien status”).

42. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (“[T]he Court’s decisions have established that classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.”).

43. See U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); U.S. CONST. amend. XIX (identical, but replacing “race, color, or previous condition or servitude” with “sex”); U.S. CONST. amend. XXVI (similar, for “age,” for all citizens 18 or older); U.S. CONST. amend. XXIV (prohibiting the use of a poll tax or other tax to prevent citizens from voting).

44. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 445 (1982) (upholding police department’s restriction of peace officer positions to citizens).

45. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400-02 110 Stat. 2105, 2260-65 (codified at 8 U.S.C. §§ 1601, 1611-1612) (limiting eligibility of legal resident aliens for certain federal benefits).

46. Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Pub. L. No. 105-306, § 2, 112 Stat. 2926 (restoring SSI to aliens receiving SSI as of date of enactment of 1996 Welfare Reform Act); Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. No. 105-185, §§ 504, 506, 507, 112 Stat. 523, 578-79 (restoring food stamp benefits to all disabled lawfully resident aliens and to elderly and minor aliens lawfully resident as of effective date of 1996 Welfare Reform Act); Emergency Supplemental Appropriations for the Department of Defense, Pub. L. No. 105-18, tit. VII, 111 Stat. 158, 216 (1997) (allowing states to restore food stamp benefits to aliens at state expense).

47. See *Saenz v. Roe*, 526 U.S. 489, 510-11 (1999). Compare U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”), with *id.* (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”) (emphasis added).

48. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring) (arguing “[T]he right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”); Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1289 (2002) (discussing the possibility that a revival of the Privileges or Immunities Clause would exclude noncitizens from protection).

How should advocates for noncitizens attempt to expand access to important rights, like political participation and social welfare? Seeking an expansion of citizenship federally, or seeking to expand citizenship-like rights under local laws, may—as was the case with marriage advocacy—lead to backlash and inequality. While a successful effort to expand citizenship federally—like an effort to federally legalize same-sex marriage—might put an end to these regional inequalities, if not accompanied by changes in broader social mores, it might also lead to discriminatory practices in private contexts.

An alternative—or an adjunct—to an effort to expand access to citizenship would be to decouple many of the rights that citizens enjoy from citizenship itself. Efforts to grant voting rights, drivers' licenses, and education subsidies to noncitizen immigrants—both documented and undocumented—can be seen as representing this strategy.⁴⁹ Some have even argued that we should seriously consider what would follow from the abolition of citizenship.⁵⁰

Like guest worker programs, rights-decoupling proposals interact with proposals to expand access to citizenship in unpredictable ways. Rights-decoupling may reduce the pressure to expand access by reducing the substantive difference between citizenship and noncitizenship.⁵¹ Conversely, it may strengthen the case for expanding access to citizenship, by making it hard to justify an economic rationale for limiting citizenship. Analogously, where domestic partnerships have access to most of the important legal rights without marrying, courts have inferred that the remaining reasons for restricting access to marriage rest only on social prejudice.⁵²

49. Debra Urteaga, Note, *California Dreaming: A Case To Give States Discretion in Providing In-State Tuition to Its Undocumented Students*, 38 HASTINGS CONST. L.Q. 721, 721-23 (2011) (discussing attempts to extend educational subsidies to undocumented immigrants). See generally Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (2000) (discussing attempts to extend voting rights to noncitizens).

50. E.g., Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279, 285 (1994); see also Stephen H. Legomsky, *Citizens' Rights and Human Rights*, 43 ISR. L. REV. 67, 78 (2010) (discussing similar issues).

51. Cf. Aloni, *supra* note 28, at 151 (“When LGB couples have the same economic benefits and rights as opposite-sex couples, they have less incentive to fight for marriage. Additionally, courts and legislatures have less of an impetus to push for same-sex marriage as there is less of an identifiable harm or damage.”).

52. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944 (N.D. Cal. 2010), *aff'd*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (“The evidence at trial shows that domestic partnerships exist solely to differentiate same-sex unions from marriages . . . while domestic partnerships offer same-sex couples almost all of the rights and responsibilities associated with marriage, the evidence shows that the withholding of the designation ‘marriage’ significantly disadvantages plaintiffs.”).

C. *Cosmopolitanism, Rawlsianism, and Status*

Ultimately, I believe that the disagreement between those favoring expanded access to entrenched statuses like citizenship and marriage and those arguing for their demolition may be helpfully understood by examining a deeper divide in political theory, that between Rawlsians and political cosmopolitans. John Rawls argued in his early work that domestic law and politics should be organized around the idea that the paradigm individual is a member of a “monogamous family,”⁵³ and, in his later work, that the international domain should similarly be organized around the idea that each individual is most fundamentally a member of a nation-state.⁵⁴ These aspects of the Rawlsian vision do not endorse a thickly communitarian vision of identity. But in a Rawlsian view, individual rights must be understood in relation to the institutions, like the family and the nation-state, in which individuals participate.⁵⁵

In contrast, cosmopolitans like Martha Nussbaum have argued that international law and politics should acknowledge the multiple institutions in which individuals participate, rather than giving primacy to the nation-state,⁵⁶ just as some of the political and legal theorists I discuss above argue for a less socially universal and a more plural understanding of marriage. In a cosmopolitan account, fundamental rights are rights we enjoy simply as members of a global human community, rather than in virtue of our relationship to particular social institutions.⁵⁷ As such, I believe that comparing the background plausibility of the Rawlsian and cosmopolitan worldviews may help advocates in assessing whether they

53. JOHN RAWLS, *A THEORY OF JUSTICE* 6–7 (rev. ed. 1999) (describing “the monogamous family,” alongside private property and freedom of conscience, as one of the “major social institutions”). Rawls later backed away from requiring monogamy in *JUSTICE AS FAIRNESS* 163 (Erin Kelly ed., 2001), stating, “[N]o particular form of the family (monogamous, heterosexual, or otherwise) is so far required by a political conception of justice.”

54. See JOHN RAWLS, *THE LAW OF PEOPLES* 17 (1999) (describing people as “organized within a reasonably just domestic society”).

55. See Simon Caney, *Cosmopolitan Justice, Rights and Global Climate Change*, 19 *CAN. J.L. & JURIS.* 255, 277 (2006) (contrasting Caney’s own “universalist conception of moral personality” with Rawls’s account).

56. See Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, *BOS. REV.*, Oct.-Nov. 1994, at 3, available at <http://bostonreview.net/BR19.5/nussbaum.php>; see also Kwame Anthony Appiah, *Cosmopolitan Patriots*, 23 *CRITICAL INQUIRY* 617, 629 (1997) (“What is required to live together in a nation is a mutual commitment to the organization of the state—the institutions that provide the over-arching order of our common life. But this does not require that we have the same commitment to those institutions, in the sense that the institutions must carry the same meaning for all of us.”).

57. Caney, *supra* note 55, at 277; see also David Held, *Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective*, 39 *GOV’T & OPPOSITION* 364, 387 (2004) (“Built on the fundamental rights and duties of all human beings, global citizenship underwrites the autonomy of each and every human being.”).

should seek to expand access to a status with which many important rights are bundled or seek to make those rights accessible outside the status.

IV. PLURAL STATUSES

While the two parallels between citizenship and marriage I discuss above require some spadework to uncover, the next parallel I discuss has been at the surface for some time—though, as I will argue, the analysis has too often failed to go any deeper. In this Part, I will consider the argument that dual citizenship and polygamy are analogous, and consider how dual citizenship and polygamy advocates should respond to the analogy.

A. *Dual Citizenship*

Dual citizenship and polygamy were analogized as early as 1850.⁵⁸ Legal theorists have continued to employ or rebut the analogy when discussing dual citizenship.⁵⁹ Perhaps more importantly, the citizenship-marriage analogy features prominently in modern-day American political criticisms of dual citizenship. Congressman Todd Akin advanced the analogy on the House floor.⁶⁰ Conservative immigration critic John Fonte, who has testified several times before Congressional committees,

58. See Letter from George Bancroft to Lord Palmerston (Jan. 26, 1849), reprinted in SEN. EXEC. DOC. NO. 38, 36th Cong. 164 (1850) (“The United States, when they receive a man to citizenship, require of him a renunciation of all other allegiance. They would as soon tolerate a man with two wives as a man with two countries; as soon bear with polygamy as that state of double allegiance which common sense so repudiates that it has not even coined a word to express it.”).

59. See, e.g., David Martin, *New Rules for Dual Nationality*, in DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE 34, 39 (Randall Hansen & Patrick Weil eds., 2002) (“Oppositionists [to dual citizenship] tend to assume that loyalty is one-dimensional; loyalty to a second dilutes or destroys loyalty to the first. Dual nationality then draws condemnation as akin to bigamy.”); Constantin Iordachi, *Dual Citizenship in Post-Communist Central and Eastern Europe: Regional Integration and Inter-Ethnic Tensions*, in RECONSTRUCTION AND INTERACTION OF SLAVIC EURASIA AND ITS NEIGHBORING WORLDS 105, 109 (Ieda Osamu & Uyama Tomohiko eds., 2004) (stating that “legislators and jurists have generally regarded dual citizenship” as “equal” to polygamy).

60. 151 CONG. REC. H11968 (Dec. 16, 2005) (statement of Congressman Todd Akin: “[The oath of allegiance] is, in a sense, a form of what is sometimes called in old-fashioned language a covenant, a covenant between a people and a person who wants to join a nation. What are other types of covenants? One of them is a marriage, where a man and a woman pledge allegiance to each other equally. So this is a solemn moment. Try to picture yourself getting married and saying, yes, I want to get married, but I have got a couple of other marriages going, too. That is not going to fly very well.”).

has used the parallel to criticize dual citizenship.⁶¹ Politicians and policy advocates outside the United States, from Zimbabwe to Cambodia to Canada, have similarly analogized dual citizenship to polygamy.⁶² The parallel has also influenced scholarship in the social sciences; Ulrich Beck has described the deep attachments to geographically disparate places common in the modern era of globalization as a sort of “place polygamy.”⁶³

Most who advance the parallel do so as a *reductio ad absurdum* of dual citizenship: “We should permit dual citizenship if and only if we permit polygamy: we don’t permit polygamy, so we shouldn’t permit dual citizenship.” One possible conclusion to draw from this is that the parallel fails; we can endorse dual citizenship without endorsing polygamy, because dual citizenship and polygamy are conceptually disparate.

Another potential conclusion, however, is that the recognition of dual citizenship presages a future recognition of polygamy: “We should permit dual citizenship if and only if we permit polygamy: we permit dual citizenship, so we should permit polygamy.” Interestingly, prominent dual citizenship advocate Peter Spiro has suggested both conclusions at different times: he suggested in a 1997 article that wide acceptance of dual citizenship might be correlated with increasing openness to polygamy, but in his 2008 book pronounced the dual

61. JOHN FONTE, *Dual Allegiance: A Challenge to Immigration Reform and Patriotic Assimilation*, CENTER FOR IMMIGRATION STUDIES 8 (2005) (“The dual citizen . . . could be described as a type of ‘civic bigamist,’ whose allegiance and loyalty included another constitutional regime besides the United States.”); see also SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 212 (2004) (“With respect to citizenship . . . bigamy is now acceptable. This shift fundamentally changes the meaning and significance of citizenship.”).

62. See, e.g., J.L. FISHER, PIONEERS, SETTLERS, ALIENS, EXILES: THE DECOLONISATION OF WHITE IDENTITY IN ZIMBABWE 111 (2010) (relating criticism of a dual citizen as akin to a bigamist); Peter Nyers, *Dueling Designs: The Politics of Rescuing Dual Citizens*, 14 CITIZENSHIP STUDIES 47, 54 (2010) (“Conservative Party MP Garth Turner went so far as comparing dual citizenship to bigamy and calling Canadians with two or more passports ‘accidental citizens.’”); Kathryn Poethig, *Sitting Between Two Chairs: Cambodia’s Dual Citizenship Debate*, in EXPRESSIONS OF CAMBODIA: THE POLITICS OF TRADITION, IDENTITY, AND CHANGE 73, 76-77 (Leakhitha Chan-Pech Ollier & Tim Winter eds., 2006) (recounting that Prime Minister Hun Sen “caricatured officials with dual citizenship as the nation’s bigamists: ‘When one wife is angry at him, he runs to the embrace of the other wife. He steals things from one place and keeps them in the other place. . . . Politicians should have only one nationality in order to be fully responsible to the nation and to maintain equity between two countries.’”).

63. ULRICH BECK, WHAT IS GLOBALIZATION? 73 (Patrick Camiller trans., 2000) (describing “place polygamy” via an example of a woman who lives part-time in Germany and part-time in Kenya, and has deep attachments to both places).

citizenship-polygamy analogy dead, notwithstanding its continued vitality in popular debate.⁶⁴

A deeper investigation of polygamy by both the analogy's proponents and its critics may help to inform debates about whether dual citizenship should be legally recognized, as well as whether polygamy should be. The debate over same-sex marriage, in which competing advocates advanced and rejected analogies to polygamy, similarly highlighted the need for a deeper engagement with the actual facts about polygamy. As David Chambers suggests, advocates in the marriage debate have erred by adopting shallow and uncharitable characterizations of polygamy in an effort to differentiate same-sex marriage from polygamous marriage.⁶⁵

The dual citizenship debate seems to have employed polygamy in a similar way to the same-sex marriage debate. Critics of dual citizenship have often treated the analogy to polygamy as a criticism that requires no further explanation or support. Advocates of dual citizenship, meanwhile, have responded to these conclusory attacks with similarly conclusory attempts at distancing dual citizenship from polygamy,⁶⁶ which implicitly concede the parallel's odiousness.

More developed defenses of dual citizenship often still employ argumentative strategies that fail to address the most plausible arguments for recognizing polygamy. Aleinikoff and Klusmeyer, for instance, consider the argument that "[t]he domestic laws of western-style democracies prohibit bigamy—not for economic reasons, but because of our belief that certain relationships, to be true and successful, cannot be plural."⁶⁷ According to this argument, citizenship, like marriage, cannot be plural because "[n]ation-states are increasingly fragile entities, under attack from both supra- and sub-national forces" and plural attachments are "watered down and rendered too weak" to provide the level of loyalty

64. Compare PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* 73 (2008) ("No longer is dual citizenship considered freakish or immoral; one would find few in the mainstream who would persist with the analogy to polygamy."), with Spiro, *supra* note 41, at 506 n.136 ("Intriguingly, just as dual citizenship seems to have become accepted as a fact of globalization, polygamy itself seems to be making a comeback." (citing David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997))).

65. Chambers, *supra* note 64, at 78-82 (examining Mormon polygamy and tentatively endorsing the legal recognition of some polygamous relationships).

66. E.g., Jeffrey R. O'Brien, Note, *U.S. Dual Citizen Voting Rights: A Critical Examination of Aleinikoff's Solution*, 13 GEO. IMMIGR. L.J. 573, 595 (1999) (asserting, without further defense or explanation, that "dual citizenship is not bigamy").

67. T. Alexander Aleinikoff & Douglas Klusmeyer, *Plural Nationality: Facing the Future in a Migratory World*, in DEMOGRAPHY AND NATIONAL SECURITY 154, 167-68 (Myron Weiner & Sharon Stanton Russell eds., 2001).

needed to sustain the nation-state.⁶⁸ Aleinikoff and Klusmeyer ultimately reject the argument that plural citizenship undermines the value of citizenship, arguing that dual citizenship has not in practice undermined national commitment, and that other background factors explain any decline in civic commitment.⁶⁹ But they do not consider whether the argument that plural marriage undermines the value of marriage is any more plausible. Similarly, David Martin argues that the analogy between bigamy and dual citizenship is “weak as psychology,”⁷⁰ because, since national allegiance is compatible with many other forms of allegiance (such as community, church, and family allegiances), there is “no reason why national allegiance must *ipso facto* crowd out loyalty to another nation.”⁷¹ But marital allegiance is equally compatible with these other forms of allegiance—is there a reason why marital allegiance must crowd out loyalty to another spouse? Alternatively, one might criticize Martin’s analogy for failing to appreciate that allegiances to two entities of the same *kind*—as in both polygamy and dual citizenship—are incompatible.⁷²

A more nuanced treatment of the analogy, I believe, would seriously explore the possibility of defending plural citizenship without denigrating (but also without defending) plural marriage. One way plural citizenship might be defended without implications for plural marriage is if one’s relationship to a person is fundamentally disparate from one’s relationship to a nation. Some personal relationships, for instance, may be deeper and more demanding than political relationships, and so potentially require a kind of attention that makes engaging in multiple relationships impossible.⁷³ In contrast, engaging in multiple political relationships may have a synergistic effect in which each

68. *Id.* at 168.

69. *Id.*

70. Martin, *supra* note 59, at 39.

71. *Id.* at 40.

72. See Karin Scherner-Kim, Note, *The Role of the Oath of Renunciation in Current U.S. Nationality Policy—To Enforce, to Omit, or Maybe to Change?*, 88 GEO. L.J. 329, 352 (2000) (criticizing the “comparison of dual citizens’ relationship to their countries of citizenship with mono-citizens’ membership in families, churches, clubs, or associations that may also influence the way votes are cast and other political decisions are made” and arguing that “voting in two countries is more akin to membership in two churches of different denominations or to having polygamous marriages, both of which are generally prohibited”).

73. Cf. Peter J. Spiro, *Perfecting Political Diaspora*, 81 N.Y.U. L. REV. 207, 225 (2006) (“Even intensive political engagements fall short of what is demanded in the context of the true family, and would usually allow room for parallel commitments.”).

commitment strengthens the others.⁷⁴ Such an argument might analogize citizenship to interpersonal relationships that are not commonly believed to be binary and exclusive, such as in-law relationships or sibling relationships.⁷⁵ Some see factors pointing the other way, however. While one person's marrying badly will only lead to private injuries, admitting an unsuitable person as citizen has the potential to harm the polity more generally.⁷⁶ Conversely, one might argue that the effects of bad marriages spill over extensively to third parties, while the bad effects of admitting an unsuitable citizen are no worse than the effects of a native-born citizen's engaging in bad conduct.

Perhaps the most sensitive, while politically practical, way of defending dual citizenship is to acknowledge the political unpopularity of polygamy while maintaining that endorsing dual citizenship speaks neither for nor against polygamy. The dual citizenship advocate would argue that the parallel is false, but also—just as importantly—that the parallel is substantively irrelevant even though rejecting it matters pragmatically.⁷⁷

B. Polygamous Marriage

Polygamy, as Chambers described, recently entered the marriage debate as a specter raised by foes of same-sex marriage. But it has been (unsuccessfully) supported in its own right historically by religious groups,⁷⁸ and more recently by those who have attempted to use recent marriage equality rulings to revisit the issue.⁷⁹ Most recently, outside a U.S. context, the Supreme Court of British Columbia heard but ultimately rejected an appeal from parties seeking the right to a

74. See *id.* at 224 (“Involvement with a school board, for example, would not necessarily be inconsistent with activity in other political arenas; indeed, one might expect that the individual engaged on school issues would be more likely to maintain involvement on other civic fronts.”).

75. See T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1474 (1986) (“Allegiance is not necessarily indivisible. Just as people may feel loyalty to different family members, different groups, or different institutions of higher learning, so might a person have allegiance to more than one nation.”).

76. Cf. Dennis C. Mueller, *Defining Citizenship*, 3 THEORETICAL INQUIRIES IN LAW 151, 162-64 (2002) (arguing that citizenship tests are helpful in preserving a well-functioning polity).

77. Cf. John Corvino, *Homosexuality and the PIB Argument*, 115 ETHICS 501, 510 (2005) (discussing what he calls the “‘What-does-one-thing-have-to-do-with-another?’ response” to analogies between polygamy and gay marriage).

78. *E.g.*, *Reynolds v. United States*, 98 U.S. 145, 161-68 (1878) (discussing and rejecting arguments that religious liberty should protect polygamous marriage).

79. *E.g.*, *State v. Holm*, 137 P.3d 726, 742-43 (Utah 2006) (distinguishing Utah's prohibition on polygamy from *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003), which found that private sexual conduct was protected by the Fourteenth Amendment); see also *Bronson v. Swensen*, 500 F.3d 1099, 1111 (10th Cir. 2007) (dismissing a similar case on standing grounds).

polygamous marriage.⁸⁰ Nonreligious polygamy has also become a recent topic of legal theorizing.⁸¹ As such, it is worth considering whether, despite the suggestions I have made above for how dual citizenship advocates might avoid arguing in a way that has implications for polygamy, advocates for polygamy might be able to benefit from the example of dual citizenship.

One argument for recognizing dual citizenship is that, far from weakening one's loyalties, it actually strengthens them. Francesca Mazzolari argues that her work, which shows that dual nationality promotes economic assimilation in the receiving country, rebuts the criticism that dual nationality is a "sort of political bigamy, a way of devaluing the meaning of citizenship and impeding assimilation in the destination country."⁸² But while Mazzolari's work might show that dual citizenship is not bigamy in a *negative* sense—that of a status devalued for all participants—it does not necessarily show that it is not bigamy in *any* sense. Her work might instead be read to support analogizing dual citizenship to a more positive form of polygamy, which actually strengthens the polygamist's relationship to both partners. The question, in terms of the parallel, would be whether any actual forms of polygamy could gain support via a parallel to Mazzolari's example.

Analogies to bigamy also often tacitly assume that the dual citizen, as political bigamist, is deceiving one or both partners.⁸³ But a bigamous or polygamous relationship does not necessarily involve deception.⁸⁴ As such, the possibility of a deception-free plural relationship may strengthen the need for recognition of both forms of plural status.

Dual citizenship and plural marriage may also both become more appealing when juxtaposed with unappetizing alternatives. One clear problem with the parallel is that "traditional" citizenship does not

80. *In re* Section 293 of the Criminal Code of Canada, 2011 CarswellBC 3130 (Can. B.C.S.C.) (WL), available at <http://www.courts.gov.bc.ca/jdb-txt/SC/11/15/2011BCSC1588.htm>; see also Ian Austen, *Canadian Court Rules that Polygamy Ban Is Constitutional*, N.Y. TIMES, Nov. 24, 2011, at A21 (summarizing and discussing the court's ruling).

81. *E.g.*, Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 282-84 (2004); Hadar Aviram, *Make Love, Not Law: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 J. BISEXUALITY 261, 279-83 (2007).

82. Francesca Mazzolari, *Dual Citizenship Rights: Do They Make More and Richer Citizens?*, 46 DEMOGRAPHY 169, 187 (2009).

83. T. ALEXANDER ALEINIKOFF & DOUGLAS KLUSMEYER, *CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION* 29 (2002).

84. *Cf.* Chris Day, *My Oath, I'll Join the Team*, MESSENGER-NEWS REV. (Austl.), Jan. 26, 2011, available at 2011 WLNR 1891643 ("I liken becoming a dual citizen to the difference between a Mormon and a bigamist: if you are going to have two wives, at least be upfront about it.").

demand *equal* exclusivity of both parties; to reverse Bancroft's analogy,⁸⁵ no one claims that we should as soon tolerate a wife with two husbands as a country with two citizens. Rather, a nation is expected to stand in the citizenship relation to thousands, millions, or even billions of citizens. This disparity suggests that Bancroft's analogy, rather than analogizing nondual citizenship to reciprocal, egalitarian monogamy, actually analogizes nondual citizenship to an unequal polygamous relationship—one in which many subordinate individuals are exclusive partners to one dominant individual who is not reciprocally exclusive.⁸⁶ Such relationships are most often found in traditional patriarchal polygamy, and such forms of unequal polygamy are generally held to be bad for the subordinate partners and are used to justify legal prohibitions of polygamy.⁸⁷ By contrast, dual citizenship would be much more like symmetrical or egalitarian forms of polygamy; just as in egalitarian polygamy, where each partner may be married to more than one other partner, each citizen may be permitted allegiance to more than one nation under a legal regime that recognizes dual citizenship.

Plural marriage advocates, at least in its egalitarian form, may also be able to argue that it is more normatively attractive than plural citizenship, inverting the current order of political privilege. Consider Peter Schuck's claim that "marriage probably comes closer than any other common relationship to capturing the quality of enduring loyalty and priority of affection and concern that most Americans expect from those who apply to become their fellow citizens."⁸⁸ Schuck does not state that *America* expects "enduring loyalty and priority of affection" from applicants for citizenship, but that *American citizens* expect loyalty and affection from their prospective fellows.⁸⁹ Such a conception of citizenship invites an analogy to an equal polygamous partnership in which each citizen pledges loyalty to each other citizen, rather than an unequal polygamous relationship with the state as patriarch. Schuck is not the only one to see the relationship between citizens, rather than (or

85. See *supra* note 58 and accompanying text.

86. See Rickless, *supra* note 4, at 1048 (differentiating "marriages in which (in some sense) each of the spouses is 'married' to each of the other spouses" from "the sort of asymmetrical relationship definitive of polygamous marriage," in which many people are married to another person, though not to one another, and arguing that only the latter form of plural marriage raises serious problems).

87. See, e.g., Austen, *supra* note 80 (discussing the British Columbia Supreme Court's appeal to the dangers of traditionalist Mormon and Muslim polygamy as part of their decision to uphold a statute that prohibited polygamy).

88. Schuck, *supra* note 12, at 84.

89. *Id.*

as well as) the relationship between citizen and state, as marital.⁹⁰ On this view, dual citizenship would be troubling, akin to a member of an egalitarian polygamous relationship seeking to add a new partner whom all other members have not approved.⁹¹ But (egalitarian) polygamy would be parallel to ordinary, nondual citizenship.

C. *Human Nature, Plural Relationships, and Two Aristotelian Challenges*

One argument for rejecting both plural citizenship and plural marriage is simply that, given the limitations of human nature, both are more challenging than their dyadic alternatives.⁹² This argument seems to depend on the hidden and controversial premise that if a proposed social arrangement is more psychologically challenging than alternatives (perhaps especially because of features of human nature), legal doctrine would do well to steer clear of recognizing it.⁹³

Alternatively, even if citizenship and marriage are disanalogous, the interpersonal statuses to which citizenship *is* analogous may be plural only in a limited way. For instance, one dual national analogized the relationship between citizen and state to that between child and parent: “I love both countries . . . [Before dual nationality] it was like I was being asked to choose between my mother and my father.”⁹⁴ This alternative analogy seems attractive in many ways, given the differences in power that characterize both filial and citizenship relationships, as well as the rhetoric of describing nations as “motherland” or “fatherland.” But the parent-child relationship, while not dyadic in the way that monogamous

90. *E.g.*, Editorial, *Contesting Election Tally Dangerous for Country*, ATLANTA J.-CONST., Nov. 10, 2000, at A26 (arguing, in the context of the disputed 2000 election, that “[b]eing citizens of a democracy is like being spouses in a marriage”); Alexandra Pye, Editorial, *Citizenship Democracy Like a Marriage: It Takes Responsibility by All*, SEATTLE TIMES, Jan. 14, 2000, at B5 (“Keeping democracy alive is like a good marriage: It won’t work unless we all assume responsibility to make it work.”).

91. *See* Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 455 (2003) (discussing the consent required in adding a new partner to an egalitarian polygamous union and stating that “[a]dding a new partner to an existing family requires a process of group courtship”).

92. *See* George Jonas, *Dual Citizenship: A Contradiction in Terms*, NAT’L POST (Canada), June 9, 2010, at A21, available at 2010 WLNR 25950743 (“If being multi-sexual is hard, being multi-spousal is even harder. Of course, feeling romantic love and/or sexual desire for two or more people is easy, but being a spouse to more than one isn’t.”).

93. David Estlund challenges this assumption in his *Human Nature and the Limits (If Any) of Political Philosophy*, 39 PHIL. & PUB. AFF. 207 (2011).

94. Sam Howe Verhovek, *Torn Between Nations, Mexican-Americans Can Have Both*, N.Y. TIMES, Apr. 14, 1998 (reporting a statement by Mexican-American dual citizen Ericka Abraham Rodriguez).

marriage is, does not permit limitless plurality. The paradigmatic parent-child relationship involves a child and no more than two parents. While the modern era of blended families and assisted reproduction has changed that norm, even this expansion of parenthood has generated concerns about divided and diluted allegiances.⁹⁵ The idea that a vast number of parents could successfully raise a child has been challenged as far back as Aristotle's *Politics*; "massively multiple" citizenship may face similar problems.⁹⁶ The analogy between citizenship and filial relationships thus might suggest permitting and even welcoming *dual* citizenship, while maintaining a wary attitude toward any more extensively *multiple* citizenship.

Problems of massive multiplicity also arise if we imagine ordinary citizenship as a marriage between citizens analogous to egalitarian polygamy. Even without dual citizenship, most modern nation-states are comprised of so many citizens that it would be challenging for any citizen to maintain the close ties to every other citizen that Schuck's description of the "civic relationship" suggests.⁹⁷ The problem of maintaining civic ties in a vast and populous nation-state again was recognized as early as Aristotle.⁹⁸

V. CONCLUSION

There are many other contexts where the parallel between citizenship and marriage is relevant. I cannot explore every one in depth, but many merit further exploration. One is the parallel between divorce and loss of citizenship.⁹⁹ Can the end of a status relationship be brought about through actions, or does it require an explicit statement of intent as

95. See Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 16-26 (2008) (reviewing debates over whether children should have more than two legally recognized parents).

96. ARISTOTLE, THE POLITICS 33 (Stephen Everson ed., 1996) (criticizing Plato's *Republic* for having the consequence that "[e]ach citizen will have a thousand sons who will not be his sons individually, but anybody will be equally the son of anybody, and will therefore be neglected by all alike").

97. Schuck, *supra* note 12, at 61.

98. ARISTOTLE, *supra* note 96, at 172 (arguing that "a very populous city can rarely, if ever, be well governed"); *id.* at 172-73 (noting the problems that arise in a populous city, which include disorder, the difficulty of identifying and selecting good lawmakers, and inability to differentiate citizens from foreigners).

99. Cf. Peter H.L. Lim, *My Take on The Green, Green Grass of Home*, STRAITS TIMES (Singapore), May 30, 2009, available at 2009 WLNR 10232735 ("Citizenship is not marriage. But, like marriage, it can cause estrangement which can lead to desertion and divorce. Let it be. There will be re-marriage situations, and there will be new citizens, so long as Singapore remains desirable.").

well?¹⁰⁰ This question arises both in the case law surrounding loss of citizenship and in divorce law.¹⁰¹

Another is the parallel between consent in citizenship and consent to marriage. Is the native-born citizen like a sort of child bride—a participant in a normally consensual status relationship who is unable to consent?¹⁰² To the extent this analogy persuades, and to the extent that we treat the unacceptability of child marriage as a fixed point, it counts in favor of the sort of proposal that Peter Schuck and others have advanced—that children be given the option to affirm or reject citizenship when they reach majority, rather than entering citizenship at birth.¹⁰³ This regime would attempt to make the relationship consensual on both sides—both citizen and state have an opportunity to refuse the other.¹⁰⁴

I have not here attempted to offer a broader theory of legal status beyond citizenship and marriage. Nonetheless, this project may offer some relevant insights for that greater goal. Some accounts of legal status appeal to bedrock, prelegal normative principles—Christian marriage, or libertarian citizenship, or parenthood informed by evolutionary psychology. Solely relying on such justifications risks turning soluble debates over the structure of status into more intractable

100. See 6 ANNA MARIE GALLAGHER ET AL., IMMIGRATION LAW SERVICE § 1293(e) (2d ed. 2012) (“[A] guardian or trustee cannot renounce on behalf of the incompetent individual because renunciation of one’s citizenship is regarded, like marriage or voting, as a personal elective right that cannot be exercised by another.”).

101. See, e.g., *Vance v. Terrazas*, 444 U.S. 252, 270 (1980) (holding that U.S. citizenship can only be lost by engaging in an expatriating act accompanied by an intent to renounce citizenship); Lynne Marie Kohm, *On Mutual Consent to Divorce: A Debate with Two Sides to the Story*, 8 APPALACHIAN J.L. 35, 39 (2008) (arguing that the explicit consent of both parties, not only one, should be required for divorce).

102. See Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U. J. GENDER, SOC. POL’Y, & L. 233, 249 (2004) (“[N]o marriage shall be legally entered into without the full and free consent of both parties.” (quoting Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Nov. 9, 1962, 521 U.N.T.S. 231) (internal quotation marks omitted)).

103. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 122-28 (1985); see also Liav Orgad, *Five Liberal Concerns about Citizenship Tests*, in HOW LIBERAL ARE CITIZENSHIP TESTS 21, 22 (Rainer Bauböck & Christian Joppke eds., 2010) (“[W]hy not require knowledge and understanding of history and civics from any native-born citizen? Why not ask every citizen to pass a test at the age of 18 before enrolment [sic] on the electoral votes (this suggestion has recently been made in Australia).”).

104. But see David S. Schwartz, *The Amorality of Consent*, 74 CALIF. L. REV. 2143, 2156-57 (1986) (book review) (arguing that Schuck and Smith’s proposal fails to provide meaningful consent).

debates over fundamental values.¹⁰⁵ In contrast, an intra-legal comparative approach—one that juxtaposes the legal treatment of two statuses and uses each to inform the other—can provide enough distance to normatively critique a status regime, but not so much distance that the debate devolves into a battle between deeply competing worldviews. Such an approach can also enable legal insights that developed in a particular, often marginalized context, like those of gay rights advocates, to inform a broader set of questions. Rather than working vertically by trying to reconstruct forms of status from first principles or deconstruct them from the top down, I have endeavored to illustrate the value in looking horizontally from one contested status to another.

105. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 803 (1997) (warning of the danger that political debates will become bitter and intractable when arguments are grounded solely in sectarian values).

