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## Arguments Against Marriage Equality: Commemorating & Reconstructing Loving v. Virginia

Tucker Culbertson

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**ARGUMENTS AGAINST MARRIAGE EQUALITY:  
COMMEMORATING & RECONSTRUCTING  
*LOVING V. VIRGINIA***

**TUCKER CULBERTSON\***

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I. INTRODUCTION

The year 2007 marked the fortieth anniversary of *Loving v. Virginia*,<sup>1</sup> in which the Supreme Court denounced antimiscegenation law and policy. I argue here that *Loving* was wrongly decided. I argue against the fundamental right to marriage declared in *Loving*, and offer alternative interpretations of the harms and rights at issue in the case.

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This article is dedicated to, and exists because of, Jerome McCristal Culp.

The author thanks Kathryn Abrams, Wendy Brown, Angela Davis, Katherine Franke, Angela Harris, Jack Jackson, Herma Hill Kay, Audre Lorde, Catherine Mackinnon, Camille Nelson, Laura Rosenbury, and Ann Scales for their instruction, inspiration, and example.

1. 388 U.S. 1 (1967).

In renouncing traditional prohibitions of heteroracial marriage and mixing, the Court should have renounced all governmental traditions that privilege civil marriage. The Court should have wholly up-ended (instead of only amending) the benefits and burdens of Virginia's discriminatory civil marriage regime.

Homoracial Heterosexual civil marriage advanced the peculiar ideals, interests, identities, and institutions of particular classes and cultures, attempting to manifest through flesh the fantasies of White Supremacy, and thereby harming persons and peoples involved in heteroracial, Homosexual, polygamous, unmarried, and other ways of living and loving.<sup>2</sup> Proper constitutional<sup>3</sup> scrutiny of such privilege and prejudice must yield more than intermittent, incremental Constitutional<sup>4</sup> modification meant to enfranchise narrowly construed and newly sympathetic persons or practices (e.g., heteroracial and Homosexual couples and couplings) traditionally excluded from governmental benefit and recognition. Such a jurisprudence—which *Loving* typifies in many ways—is logically flawed, politically limiting, and constitutionally unfit.

Through its declaration of marriage as a fundamental right and its condemnation of antimiscegenation laws as facially racial and purposively racist infringements on that right, *Loving* reifies the very ideals, interests, identities, and institutions that ought to be its objects of scrutiny. In this way, *Loving* typifies judicial analyses and jurisprudential ideologies of discrimination that often seem intended to obstruct, and are in any event unable to manifest, the profound Constitutional Reconstruction<sup>5</sup> mandated by the Civil War Amendments.

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2. By White Supremacy I mean any and all of the diverse schools of thought and states of affairs wherein Whiteness is alleged to be an actual and most excellent endowment that inheres in certain humans' blood and culture, and which necessitates non-Whites' subordination. By subordination I mean both:

- (1) the classification and pathologization of non-Whites as lower, lesser, underdeveloped, deformed, degraded or deficient as compared to Whites; and
- (2) the violent possession, suppression, exploitation, consumption, and destruction of non-Whites as the righteous duty or legal right of Whites.

I capitalize "White", "White Supremacy", and other categories and ideologies of identity. Doing otherwise would render them common nouns and adjectives, which might elide such categories' and ideologies' cultural specificity and diversity, which in my opinion could wrongly suggest that an identity (e.g. Whiteness) is empirically real, conceptually coherent, and wholly consistent in what it means and how it matters in different spaces and times.

3. I use "constitutionalism" to refer generally to interpretive textual practices through which political communities articulate and negotiate foundational dimensions of their relations.

4. I use "Constitutionalism" when referring to particular interpretive practices involving a particular constitutional text, here the United States Constitution.

5. At a minimum, I take Reconstruction to mean the United States government's rejection of racial caste as moral law and public policy. Reconstruction, however, refers not merely to the

In light of the foregoing argument that *Loving* perpetuates the very harms it claims to cure, I argue that the Supreme Court should have condemned Virginia's homophobic Heterosexual civil marriage laws as an infringement not upon the fundamental right to marry, but rather upon the Lovings' rights to *the ends of marriage*—such as erotic pleasures and communities of care, which for ease I refer to as the rights to sex and family. Doing so would avoid the nearsighted and naturalizing defense of marriage *as such*, which mistakes a governmental means for a constitutional end, and thus perpetuates and legitimates discrimination against those whose forms of sex and family remain unrecognized and/or prohibited by civil marriage regimes.

Recognizing fundamental rights to the ends of civil marriage would enfranchise the liberty and equality *Loving* means to defend. Also, doing so more earnestly and explicitly identifies liberty interests that course through the United States' fundamental rights doctrines, but are often under- or entirely un-articulated.<sup>6</sup> In doctrines on procreation, contraception, abortion, sodomy, and other matters, we can clearly see what the courts rarely say: a consistent Constitutional investment in *some* subjects' freedom to have sex and family. Constitutionalizing fundamental rights to sex and family, moreover, contributes to central debates in fundamental rights jurisprudence regarding the proper relevance of tradition and abstraction in ascertaining and articulating liberty interests as being Constitutionally fundamental.

This Article proceeds as follows: In Part II, I give an account of the rise of the fundamental right to marriage. I engage with majority and concurring opinions in seminal Supreme Court cases which share key analytical, historical, and political failings inherent in their defenses of marriage. I then discuss others' criticisms of movements for "marriage equality," thereby compiling problems that attend the instantiation of marriage as a fundamental right.

I then argue that Constitutional scrutiny of civil marriage under the Fourteenth Amendment should be profoundly informed by the context of that amendment—our Constitutional Reconstruction. As an effectuation of Reconstruction, Justice Warren's opinion in *Loving* is deficient. Justice

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Constitutional amendments and Congressional acts of the early postbellum era. Reconstruction also signifies the massive, uncharted, unchartable cultural transformation demanded by our c/Constitutional transformation regarding race, races, and racism. Such is the basis, in part, of the new Jurisprudence of Reconstruction among antisubordinationist critical legal scholars. *See generally* Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Angela P. Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1995).

6. *See infra* notes 49–62 and accompanying text.

Warren cites the historically recognized, allegedly civilized “rights of man” as grounds for deeming Heterosexual marriage a fundamental Constitutional right. But the minimal meaning of the Reconstruction Amendments was the end of racial caste, which was historically not only coincident with, but also at the core of, modern Euro-American conceptions of the fundamental, natural, civilized “rights of man.”<sup>7</sup> Justice Warren’s faith in the traditional Euro-American “rights of man” should have been more greatly shaken by the radical fact of our Constitutional Reconstruction.

In Part III, I attempt to reconstruct *Loving*. I note first that my critique of *Loving* resembles countless contributions from critical antisubordination theorists on the violent legal construction of race, sex, gender, class, religion, and color (to only begin the list). In identifying these long standing lines of legal analysis by historical materialists, feminists, critical race theorists, and others, I establish an academic schema into which my particular arguments about *Loving* clearly fall.

I then expand my analytical criticisms of *Loving* and the jurisprudence on marriage from the prior section, arguing that marriage cannot in fact be a fundamental right, because it is actually an institutional means to c/Constitutional ends and not a c/Constitutional end in itself, and is neither a necessary nor sufficient means to its c/Constitutional ends.

Next, I discuss the broad political ramifications of framing the injury in *Loving* as one of access to marriage. Many forms of sex and family (and other imaginable ends of marriage) are *still* unjustly refused, neglected, burdened, disparaged, and otherwise injured by *any* (including *Loving*’s colorblind Heterosexual) civil marriage regime.

I finally argue that there are uniquely constitutional questions raised by the analytical and political errors of *Loving*’s fundamental rights analysis. Given the import of Reconstruction, and the example of doctrines on marriage, I argue that our fundamental Constitutional rights must not be tied too closely to fixed identity classes, present state practices, national traditions, or overly specific descriptions of liberty.

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7. I discuss the Fourteenth Amendment’s and the Reconstruction Constitution’s profound departure from Enlightenment and Modern Euroamerican politics and philosophy *infra* notes 12–13, 20.

## II. CONSTITUTIONALIZING THE FUNDAMENTAL RIGHT TO MARRIAGE

## A. Meyer v. Nebraska

*Loving* is located among the Supreme Court's decisions protecting sexual/familial privacy/autonomy as fundamental rights under the Due Process and Equal Protection Clauses. Such opinions, when pronouncing the right to marry, demonstrate a strange credulity, superficiality, and sparseness in articulating grounds for Constitutionally defending marriage. The manner in which they do so—and, in particular, the manner in which civil marriage erroneously or oppressively substitutes for a more general enfranchisement of sex, family, and marriage's other alleged ends—points to general challenges in U.S. Constitutional doctrines on fundamental rights.

An early case in which the Supreme Court opined on the fundamental right to marriage was *Meyer v. Nebraska*,<sup>8</sup> which in 1923 declared unconstitutional a statute mandating that public education through eighth grade be conducted in English only.<sup>9</sup> Decided under the doctrine of substantive due process, the *Meyer* Court found that:

Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right . . . to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>10</sup>

Thus marriage, along with contract, labor, education, reproduction, parenting, and religion form for the *Meyer* Court the exemplary canon of substantive due process. However, one's liberties here are limited to "common" occupations, "useful" knowledge, conscience as regards "worship[ing] God," and privileges "essential" to "orderly" happiness.<sup>11</sup> The meaningful determination of such fundamental freedoms depends fundamentally upon one's interpretation of the foregoing modifiers.

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8. 262 U.S. 390 (1923).

9. Exceptions were granted for instruction in Latin, Greek, and Hebrew. *Id.* at 401.

10. *Id.* at 399 (quoted in ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 768 (2d ed. 2002)).

11. *Id.*

### B. Loving v. Virginia

Qualified fundamental freedoms are similarly announced in *Loving*, where the fundamental right to marriage occupies its first direct holding by the Supreme Court. The Court considered Virginia laws which civilly prohibited and criminally penalized marriage between Whites and non-Whites—with the absurd and spectacular exception of Pocahontas’s descendants.<sup>12</sup> The Court found that Virginia’s laws violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Regarding equal protection, the Court considered the laws’ racial face and racist purpose:

[T]he Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the “most rigid scrutiny,” and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. . . .

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia only prohibits interracial marriages involving white persons demonstrates that the racial classifications [are] measures designed to maintain White Supremacy. . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.<sup>13</sup>

Thus *Loving* continues the general work and particular logic of *Brown v. Board of Education*,<sup>14</sup> identifying any racial classification as dubious, and invidious racial discrimination as damned, under the Equal Protection Clause. Justice Warren’s conclusion is confusing and, I think, confused insofar as the first paragraph above leads him to the conclusion that when there is “no legitimate overriding purpose *independent of invidious racial discrimination* which justifies [racial] classification,” then such classification is unconstitutional. Justice Warren, though, seems to ultimately suggest that racial classifications are *as such* unconstitutional, at least in regard to the fundamental right to marriage. Justice Warren

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12. *Loving v. Virginia*, 388 U.S. 1, 5 n.4 (1967).

13. *Id.* at 11–12.

14. 347 U.S. 483 (1954).

contends that “racial classifications” themselves “violat[e] the central meaning of the Equal Protection Clause,” despite suggesting just prior that such classifications—though requiring strict scrutiny—might well be justified if “necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.” This slippage between race-as-category and racism-as-content is important. Despite *Loving*’s recognition and condemnation of White Supremacy, the opinion’s rationale cultivates the anti-anti-subordination conceits of colorblind Constitutionalism.<sup>15</sup>

Justice Warren then turns to the Due Process Clause:

These statutes also deprive the Lovings of liberty without [due process]. . . . Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes [surely denies due process].<sup>16</sup>

Here too Justice Warren’s less than satisfactory distinction among racial classifications is troubling. Troubling too is Justice Warren’s unelaborated suggestion that mixed-sex marriage is fundamental to “our very existence and survival.” Like the suggestive and heavily qualified substantive due process canon listed in *Meyer*, the allegedly self-evident fundamentality of marriage asserted in *Loving* is perplexing. In suggesting that marriage is “fundamental” to human “existence and survival,” Justice Warren must mean that marriage is a literal prerequisite for the continuation of the species through procreative reproduction. However,

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15. See, e.g., *City of Richmond v. J.A. Croson*, 488 U.S. 469, 521, 527 (Scalia, J., concurring). See also Tucker Culbertson, *Another Genealogy of Equality: Further Arguments against Colorblind Constitutionalism*, STAN. J. OF CIVIL RIGHTS & CIVIL LIBERTIES (forthcoming 2008) (unpublished manuscript on file with *Washington University Law Review*):

On the back of *Brown* . . . the Courts’ decisions in *Richmond v. J.A. Croson Co.* [488 U.S. 469 (1989)], *Adarand Constructors Inc. v. Peña* [515 U.S. 200 (1995)], and *Shaw v. Reno* [509 U.S. 630 (1993)] [which are emblematic but not exhaustive of contemporary colorblind Constitutionalism] . . . at first glance depart fully from their . . . predecessors. Rather than citing the strict, self-evident boundary between the good and bad races, as the *Dred Scott* Court did [60 U.S. (19 How.) 393, 406–09 (1856)], and rather than identifying a cruel or derogatory will as the meaning of racial inequality, as the *Plessy* Court did [163 U.S. 537, 551 (1896)], [contemporary colorblind Constitutionalism] radically expands rather than refining the logic of *Brown* by presuming the presence of evil in any racial delineation in any government practice.

16. *Loving*, 388 U.S. at 12.

civil marriage is clearly neither necessary nor sufficient for procreative reproduction, let alone for the survival of offspring.

Also troubling is Justice Warren's unargued defense of marriage as "one of the 'basic civil rights of man.'"<sup>17</sup> Historically, this claim must mean that Heterosexual civil marriage is among the practices imagined by certain revolutionary eighteenth-century French, English, and American writers as essential to human nature and happiness.<sup>18</sup> Even if this claim is true, should "the basic rights of man" be so simply and self-evidently defended or expanded under the Fourteenth Amendment of the Reconstruction Constitution? How can any of the modern Euro-American "rights of man" be so self-evidently sacred when the Fourteenth Amendment's call for Reconstruction simultaneously (as in *Loving*) upends long-held practices of racial segregation and long-claimed rights of racial supremacy? Racial caste, of course, was historically endorsed alongside, or among, the rights of man. Justice Warren may be right that the "basic rights of man" included Heterosexual marriage, but they surely did not enfranchise African, Indian, Carib, or other women excluded for economic, political, religious, and/or biological reasons from the categories of "man" and "citizen."<sup>19</sup> As such, Justice Warren's excoriation of the rights of racial caste renders untenable his simplistic defense of Heterosexual civil marriage as among "the 'basic civil rights of man.'" The foregoing criticisms of Justice Warren's claims about species reproduction and the civil rights of man cumulatively suggest that *Loving's* defenses of marriage are sparse to the point of superficiality. They are also logically and historically unsound because they were uttered in the context of Constitutional Reconstruction.

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17. *Id.*

18. See generally THOMAS PAINE, RIGHTS OF MAN, pt. 1 (1792).

19. The revolutionary United States Constitution, and subsequent interpretations thereof, of course explicitly and frequently instantiated racial caste. Indeed, racial slavery was one of only a very few individual rights mentioned in the articles of the revolutionary Constitution. See U.S. CONST. art. I, § 9; U.S. CONST. art. IV, § 2; U.S. CONST. art. V. See CHERMERINSKY, *supra* note 10 at 4–5, 281–85, 485–87. Hence, the Reconstruction Constitution.

The French "Rights of Man and Citizen" similarly excluded racialized and subordinated peoples. The Friends of the Negroe, as well as various emissaries from the French colonies, argued that the "Rights of Man" should necessarily call for the full equality of multiracial persons, the emancipation of slaves, and an end to racial caste generally. See C.L.R. JAMES, THE BLACK JACOBINS, Ch. 2–5 (Vintage Press 1989). The Revolutionary French National Assembly consistently ignored, repressed, rejected, or granted and retracted such extensions of the "basic civil rights of man" to non-Whites. *Id.*

### C. *Zablocki v. Redhail*

Eleven years after *Loving*, in *Zablocki v. Redhail*,<sup>20</sup> the Supreme Court offered its most extensive exposition of the fundamental right to marry. As with *Loving*, *Zablocki* engages the Equal Protection Clause of the Fourteenth Amendment. Unlike *Loving*, *Zablocki* does not simultaneously rule under the Due Process Clause—to the chagrin of two concurring Justices.

In *Zablocki*, the Court considered a state statute requiring that people pay all owed child support and prove they have no children in the state's care before receiving a marriage license. In finding the statute unconstitutional, Justice Marshall's opinion closely resembles Justice Warren's in *Loving* by unequally and illiberally privileging the particular interests, identities, and traditions of mixed-sex civil marriage even as Justice Marshall understands himself to be enfranchising constitutional freedoms for persons historically subordinated, stigmatized, or ignored by the civil marriage regimes. Justice Marshall notes at the outset of the *Zablocki* opinion:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships [for] it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.<sup>21</sup>

Thus, the self-evident virtues of mixed-sex marriage are affirmed, even as states' interests in promoting nuclear and/or affluent families are denied. And like Justice Warren in *Loving*, Justice Marshall irrationally imagines marriage, sex, reproduction, and family to be necessarily, normatively, logically, and legally coterminous.

Strangely, Justice Marshall suggests that strict scrutiny is not always necessary for impositions on the right to marry, since there are reasonable regulations of marriage in which states may legitimately engage.<sup>22</sup> Thus,

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20. 434 U.S. 374 (1978).

21. *Id.* at 386.

22. *Id.*:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that

Justice Marshall can avow *Califano v. Jobst*,<sup>23</sup> in which the Court upheld the Social Security Act's termination of dependent disabled children's benefits upon their marriage to any person not also receiving Social Security benefits.<sup>24</sup> This infringement was alleged by the Court to be a consequence, and not a preemption, of marriage, and was thus deemed insignificant.<sup>25</sup> A unanimous Court held that "[a] general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby."<sup>26</sup>

Justice Marshall's qualification of marital rights in *Zablocki* is typical, strange, and revealing insofar as it makes clear the inherent violability of any allegedly fundamental Constitutional right. However, Justice Marshall's navigation of this traditional (if not inevitable) c/Constitutional paradox is uniquely troubled. By stipulating that strict scrutiny is not necessary for rational and legitimate impositions on the fundamental right to marry, Justice Marshall seems to propose a standard for determining regarding standards of Constitutional review that resembles the most plaintiff-hostile standard of review. This tautology is obstructionist in effect. Nonetheless, such is the character of Justice Marshall's rationalization in *Zablocki* of *Jobst*'s approval of the Social Security Act's disparate governance of disabled people, its disparate governance of married people, and its disparate impact on the poor. Justice Marshall concludes that strict scrutiny should apply only if governmental action directly and substantially infringes the fundamental right to marry.<sup>27</sup>

To summarize the cumulative motion of Marshall's opinion:

Because,

(1) some governmental impositions around marriage would pass our most plaintiff-hostile standards of review regarding fundamental rights,

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do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

23. 434 U.S. 47 (1977).

24. *Zablocki*, 434 U.S. at 386–87.

25. *Zablocki*, 434 U.S. at 391 (Burger, J., concurring):

Unlike the intentional and substantial interference with the right to marry effected by the Wisconsin statute at issue here, the Social Security Act provisions challenged in *Jobst* did not constitute an "attempt to interfere with the individual's freedom to make a decision as important as marriage," and, at most, had an indirect impact on that decision. It is with this understanding that I join the Court's opinion today. . . . (internal citations omitted).

26. *Califano*, 434 U.S. at 58 (quoted in CHEMERINSKY, *supra* note 9, at 771).

27. *Zablocki*, 434 U.S. at 376.

we should,

(2) require plaintiffs to demonstrate greater harm even than is demanded by our most plaintiff-hostile standards of review, in order to determine,

(3) how plaintiff-hostile our standard of review should be.

Requiring would-be wedders to pay child support<sup>28</sup> and would-be divorcees to pay administrative fees,<sup>29</sup> for Justice Marshall and the Court, were apparently sufficiently direct and substantial impositions on civil marriage as to warrant strict Constitutional scrutiny *and* a finding of Constitutional violation. Conversely, the Court deemed indirect, insubstantial, rational, and legitimate the Social Security Act's termination of disabled persons' financial support upon marriage to a person not on public benefits.<sup>30</sup>

In *Zablocki* Justice Marshall found that, because of direct and substantial infringement, disparate impact upon the poor, and the irrational and not-least-restrictive attempt to collect child support payment through marital restriction, the law at issue violated the fundamental right to marry.<sup>31</sup> Justices Stewart and Powell concurred with the Court's judgment but thought the case was better decided under the Due Process Clause.<sup>32</sup> Both Justices wrote against Justice Marshall's argued distinction between significant and insignificant restrictions on civil marriage.<sup>33</sup> Stewart and Powell also noted and avowed marriage's traditional—indeed, definitional—exclusivity. They recommended deference to “traditional” restrictions on the right to marriage,<sup>34</sup> just as Justice Marshall avowed marriage as a “traditional” right.

Justice Stewart wrote:

I do not agree with the Court that there is a “right to marry” in the constitutional sense. That right, or more accurately that privilege, is under our federal system peculiarly one to be defined and limited by state law. . . . A State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at

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28. *Id.* at 374.

29. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (finding filing and court fees for divorce proceedings unconstitutionally imposing upon the fundamental rights of the poor).

30. *Califano*, 434 U.S. at 47.

31. *Zablocki*, 434 U.S. at 374.

32. *See id.* at 395–96 (Stewart, J., concurring), 398–99 (Powell, J., concurring).

33. *See id.* at 395–96 (Stewart, J., concurring), 398–99 (Powell, J., concurring).

34. *See id.*

least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife. But . . . there is a limit beyond which a State may not constitutionally go. . . .

. . . .

[The] State's legitimate concern with the financial soundness of prospective marriages must stop short of telling people they may not marry because they are too poor or because they might persist in their financial irresponsibility. . . . A legislative judgment so alien to our traditions and so offensive to our shared notions of fairness offends the Due Process Clause of the Fourteenth Amendment.<sup>35</sup>

Justice Powell, by contrast, did not, on the basis of the foundational exclusivity of civil marriage, reject the notion of a fundamental right thereto. Nonetheless, he contended:

The Court does not present . . . any principled means for distinguishing between [regulations that directly and substantially interfere with a right to marry, and thus must pass strict scrutiny, and regulations that do not significantly infringe a right to marry, and thus need be only rational and legitimate]. Since state regulation in this area typically takes the form of a prerequisite or barrier to marriage or divorce, the degree of "direct" interference with the decision to marry or divorce is unlikely to provide either guidance for state legislatures or a basis for judicial oversight.

. . . .

[R]egulation has included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests. . . . A "compelling state purpose" inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage . . . .

[However,] State power over domestic relations is not without constitutional limits. The Due Process Clause requires a showing of justification [when regulation is undertaken] in a manner which is contrary to deeply rooted traditions. . . . [The Due Process Clause

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35. *Id.* at 392, 396 (Stewart, J., concurring).

also] limit[s] the extent to which the State . . . order[s] certain human relationships while excluding the truly indigent . . .<sup>36</sup>

Justice Powell does not advocate overruling the marriage restriction in question because it infringes on marriage in a manner contrary to tradition and thus violates the Due Process Clause. Rather, Justice Powell suggests that the law is improperly exclusive of the poor and not substantially related to its ends, and, as such, violates the fundamental right to marriage.

I find Justices Stewart's and Powell's formulations attractive and productive in their rejections of: (1) the government's disparate disciplining of the poor; (2) the government's irrational and not narrowly tailored lawmaking; and (3) Justice Marshall's seeming imputation of the terms of rationality review into the decision regarding standard of review. They maintain, though, Justices Marshall's and Warren's strange insistence upon the tradition of marriage, and they maintain, moreover, an investment in the traditional descriptions and exclusions thereof.

In this respect, Justices Stewart and Powell in *Zablocki* make more Constitutional sense than do Justices Marshall and Warren in *Zablocki* and *Loving*. The latter two Justices in those cases, respectively, defend marriage *as* tradition, while amending traditional marriage. Moreover, as I have noted already, both Justices presume, but do not convincingly defend, their claims that marriage entails sexual intercourse, reproduction, family, society, and survival. Both Justices likewise contradictorily hail the traditional "rights of man" as self-evident Constitutional liberties, even as their decisions are uttered after, *and under*, the Reconstruction Amendments' obliteration of the self-evidence of man's rights' grounds.

#### D. *Lawrence v. Texas*

Similar problems attend the case of *Lawrence v. Texas*.<sup>37</sup> Considering *Lawrence* helps consolidate the foregoing criticisms of the Court's various engagements with the fundamental right to marriage under the Reconstruction Constitution.

*Lawrence* did not—and indeed refused to—rule on the legitimacy of laws or customs prohibiting Homosexual civil marriage, but rather addressed laws criminalizing Homosexual sodomy.<sup>38</sup> As Katherine Franke discusses, *Lawrence* overrules a law against Homosexual sex by

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36. *Id.* at 396–97, 399–400 (Powell, J., concurring).

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

38. *Id.* at 570.

Constitutionally defending neither sex nor Homosexual sex *as such*. Rather, the Court valorized private sex among two people of either of two sexes conducted in furtherance of an intimate, presumably monogamous, romantic, familial, and not exclusively sexual relationship.<sup>39</sup>

*Lawrence*, of course, has been construed as a mandate for extending the fundamental right of marriage to same-sex partners,<sup>40</sup> as has *Loving*. Arguments like those in *Lawrence*, *Loving*, and most movements for “marriage equality” are much troubled. They champion traditional governmental practices as traditional liberties into which traditionally excluded classes deserve Constitutional admission. In the midst of calls for Reconstruction, they freeze—because they try to seize—the very governmental recognitions and benefits under challenge. As Jack Jackson and I argue elsewhere regarding “gay marriage” movements:

[M]arriage and other euroheteropatriarchal norms and institutions are expelled from the realm of politics at the very moment when they should be subject to critique and challenge. That is, once the question hinges on homosexuals’ fixed, unitary difference and their formal juridical exclusion, the proper object of radical critique becomes that which must be presupposed for difference to exist and politics to act. . . .

[H]omosexuals’ queer difference/s are reduced to a formal analogy involving same- and cross-sex marriages, rather than inducing an interrelated consideration of same-sex partners . . . disadvantaged under the heteropatriarchal . . . marriage contract.<sup>41</sup>

Katherine Franke’s comments on *Lawrence* are apt responses to Justices Warren’s and Marshall’s opinions in *Loving* and *Zablocki*:

Marriage is not a freedom. Rather, it is a *power* . . . . The states have created a civil status called marriage, just as the states have created voting criteria and rights to inheritance. One either is or is not the

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39. Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004). Franke’s eloquent and important observations about *Lawrence* and same-sex marriage movements powerfully reflect the sentiments of countless queers not represented by mainstream Homosexual rights organizations.

40. *Goodridge v. Dept. Public Health*, 798 N.E.2d 941 (Mass. 2003).

41. Jack Jackson & Tucker Culbertson, *Proper Objects, Different Subjects, and Judicial Horizons in Radical Legal Critique* (forthcoming in STRANGE BEDFELLOWS: UNCOMFORTABLE CONVERSATIONS IN FEMINIST AND QUEER LEGAL THEORY, in FEMINIST LEGAL THEORY PROJECT AT 11, 13 (Martha Fineman, Jack Jackson & Adam Romero eds.)).

kind of person to whom the state has given the power to enter into a civil marriage, to exercise the vote, and to inherit property. . . .

I fear that *Lawrence* and the gay rights organizing that has taken place in and around it have created a path dependency that privileges privatized and domesticated rights . . . while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality. . . .

. . . .

. . . *Lawrence* offers us no tools to investigate “kinds of intimacy [and sex] that bear no necessary relation to domestic space, to kinship, to the couple form, to property, or to the nation.”<sup>42</sup>

*Lawrence*'s anti-Homophobic Heteronormativity resembles *Loving*'s maintenance of traditional Heterosexual marriage even while its traditional homoracial parameters are undone. Perhaps Justice Warren's task in *Loving*, like Justice Kennedy's in *Lawrence*, is unavoidably contradictory insofar as he seeks to open the United States Constitution to the possibility of enfranchising classes and practices traditionally—indeed, definitionally—excluded and oppressed thereby. However, in ruling under the Fourteenth Amendment in a way that leaves the institutional exclusivity of civil marriage untroubled, their opinions fail.

### *E. Conclusion*

In encountering the individual interests, identity classes, and cultural practices alienated or enfranchised by Virginia's homoracial Heterosexual civil marriage policy, *Loving* should not have been reduced to questions of facially racial and/or purposively racist interference with the status of Heterosexual civil marriage as otherwise constituted. A richer and more rigorous description of the Lovings' injuries might have exposed more foundational problems with civil marriage as Constitutional paradigm for family, sexuality, reproduction, parenting, care, property, and so on. Civil marriage has served as an exclusive cultural and economic power protecting the ideals, institutions, and interests of particular classes and traditions, thereby excluding heteroracial, Homosexual, polygamous, unmarried, and other familial and sexual partners therefrom. A proper contemplation of such a regime under the Reconstruction Constitution

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42. Franke, *supra* note 39, at 1414–16 (quoting Lauren Berlant & Michael Warner, *Sex in Public*, 24 *CRITICAL INQUIRY* 547, 558 (1998)).

should not merely amount to intermittent and incremental modification as urged on behalf of historically excluded individuals, classes, and practices newly deemed sufficiently similar to the traditionally superordinated status quo.<sup>43</sup>

I find such c/Constitutionalism—which *Loving* in ways typifies—politically reckless if not disingenuous, logically unsustainable, and legally solipsistic and detrimental. Precisely because the Lovings' case demonstrates that homoracial Heterosexual civil marriage serves unconstitutionally illiberal and unequal ideals, interests, and institutions, Constitutional scrutiny of civil marriage (and reckonings with the provisions of Section 1 of the Fourteenth Amendment generally) requires a more profound set of philosophical, political, and constitutional tools than those offered by *Loving*. Whereas *Loving* announced a traditional right to Heterosexual marriage free from textual racial differentiation and/or dominative racist intent, we should now c/Constitutionally cognize the fundamental individual right to pursue sexual pleasures and construct social collectives—rights to have sex and family—as affirmative governmental obligations to not infringe, and indeed to enfranchise, the pursuit and enjoyment thereof.

### III. RECONSTRUCTING LOVING: HAVING SEX AND FAMILY

*Loving* addressed a particular factual context involving facial and purposive white supremacist restrictions on Heterosexual civil marriage. However, the *Loving* Court constructs the analytic content of its inquiry in terms that merely replicate, rather than reveal, the full Constitutional stakes of the case. As a consequence, the *Loving* Court's intervention against White Supremacy is ultimately less reconstructive than it might and should be. A guarantee of textually and purposively neutral access to civil marriage for heteroracial Heterosexual couples cannot enfranchise the equal liberty *Loving* means to defend.

The spirit of *Loving* requires a fundamental rights jurisprudence different from those declaring formal, facial equality as regards fixed

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43. See Jackson & Culbertson, *supra* note 41, at 17–18:

["Gay marriage" movements'] efforts at formal legal equality . . . work explicitly to sentimentalize, romanticize, and most importantly, naturalize the institution of marriage. . . . Rather than fusing certain feminist, queer, and Marxist critiques into a politics of Finemanesque reconsiderations, the rights-based politics of gay legal liberalism is working furiously to shore up and re-legitimate the institution of marriage.

identity classes' rights to traditional governmental benefits.<sup>44</sup> Calls for such recognition ground diverse critical legal theories on racial, sexual, and other subordination from at least the last two hundred years.<sup>45</sup> In contemporary U.S. law and legal scholarship, such theories have consistently and articulately condemned the reduction of antistatist jurisprudence to the formal inclusion of historically subordinated classes into traditional institutions and practices of governance;<sup>46</sup> the reduction of equal protection to prohibitions of facial (including remedial and reparative) engagements with identity categories;<sup>47</sup> and the reduction of non-discrimination to the prohibition of conscious, motivational animus.<sup>48</sup>

Following in this tradition of antistatist legal critique, this Part critiques the *Loving* Court's Constitutional disestablishment of homoracial Heterosexual civil marriage regimes. While the Court announced a right to

44. See *id.* at 10 (discussing constructions of identity and constrictions of politics in debates on "gay marriage" and "sexual harassment").

Unnuanced articulations of foundational identity difference/s, we claim, feed and feed upon a truncated, submissive imagination of politics through liberal legal and economic doctrines and dogmas. Consciousness of the contingencies and intersections of difference/s and subordinations would lead, we argue, to more searching and substantial critical radical movement against the euroheteropatriarchal marriage contract, and the sexed and sexualized exploitation of . . . labor . . . .

*Id.*

45. See, e.g., WENDY BROWN, STATES OF INJURY 52–76 (1995); WENDY BROWN, POLITICS OUT OF HISTORY 62, 84–90 (2001); Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26 (Robert Tucker ed., 2d ed. 1978) (arguing that religious freedoms under the liberal state merely displace religious discrimination to private spheres and admit subordinated believers into state systems built to their disadvantage); Malcolm X, *The Ballot or the Bullet*, in MALCOLM X SPEAKS 23–44 (George Breitman ed., 1965) (arguing that civil rights laws and politics in the United States cannot effectively empower African Americans, because "civil rights" extend the arms of an unjust state and thus merely subordinate differently, whereas "human rights" would force fundamental reconstruction of the state). Wendy Brown, *Wounded Attachments*, in STATES OF INJURY, *supra*; *Power without Logic without Marx*, in POLITICS OUT OF HISTORY, *supra*, at 62, 84–90 (2001).

46. See generally CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 32–45 (1988); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 41–42, 45–46 (1991); J.S. Mill, *On the Subjection of Women*, in THE BASIC WRITINGS OF JOHN STUART MILL 125, 128–33, 137–41 (Modern Library Press 2002); Angela P. Harris, *Equality Trouble*, 88 CAL. L. REV. 1923 (2000).

47. See generally Charles R. Lawrence, "One More River to Cross" . . . Recognizing the Real Injury in Brown: A Prerequisite to Shaping New Remedies, in SHADES OF BROWN 49 (Derrick Bell ed., 1980); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

48. See generally IAN F. HANEY LOPEZ, RACISM ON TRIAL (2003); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Ian Haney-Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000); Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 (4) J. OF SOCIAL ISSUES 835–48; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

Heterosexual civil marriage<sup>49</sup> free from textual racial differentiation and/or dominative racist intent,<sup>50</sup> I argue for fundamental individual rights to pursue erotic pleasures and construct social communities—rights to have sex and have family—and an affirmative governmental obligation not to infringe, and indeed to enfranchise, the pursuit and enjoyment thereof.<sup>51</sup>

*A. Precedent for the Rights to Sex and Family*

I am in no way the first to argue for fundamental rights to sex and family under the United States Constitution. Various movements, scholars, and precedents affirm these rights. The Constitutional right to cultivate and maintain family has been recognized by the Court in the context of marriage;<sup>52</sup> child custody;<sup>53</sup> child rearing;<sup>54</sup> and extended family.<sup>55</sup> The right to sex, by contrast, has been consistently unrecognized as such by the Court.<sup>56</sup> Even Justice Blackmun's momentous dissent in *Bowers v. Hardwick*<sup>57</sup> argues that consenting adults behind their own closed doors are due Blackmun's famous negative "right to be let alone"<sup>58</sup> rather than an affirmative right to want and get erotic pleasure.

Justice Kennedy, writing for the Court that overruled *Bowers* in *Lawrence*,<sup>59</sup> was similarly unwilling to avow a right to sex. At its core, *Lawrence* was a challenge to undue, illegitimate, and unequal infringements upon people's preferred forms of sex. As Justice Scalia notes in his dissent in *Lawrence*: "The Court embraces . . . Justice Stevens' declaration in his *Bowers* dissent, that 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the

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49. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

50. *Id.* at 11–12.

51. I will not discuss here in much depth my views on the *Loving* Court's conceptions of racial inequality under the Equal Protection Clause. Though I will refer to that dimension of the opinion, this article will focus chiefly on the Court's articulation of a fundamental right to marriage.

52. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving*, 388 U.S. at 1.

53. *Santosky v. Kramer*, 455 U.S. 746 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

54. *Parham v. J.R.*, 442 U.S. 584 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

56. See CHEMERINSKY, *supra* note 10, §10.2, at 768–82.

57. 478 U.S. 186 (1986).

58. *Id.* at 199 (1986) (Blackmun, J., dissenting) (citing *Omstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, Jr., dissenting)).

59. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

practice.”<sup>60</sup> However, the Court’s “embrace” of this argument is insufficiently energetic or explicit, thus occasioning Justice Scalia’s compelling dissent.

Rather than:

- (1) acknowledging the profundity of erotic pleasure in many human beings’ lives;
- (2) recognizing the consequent importance of erotic pleasure to our Constitutional conception of freedom; and
- (3) denouncing our deeply rooted national traditions of enfranchising sexual liberty only for an exclusive class of persons, preferences, and practices,

Justice Kennedy instead perversely draws upon a range of traditional familial and sexual norms—including mixed-sex civil marriage—in order to deduce a Constitutional right to not be jailed for sex traditionally deemed immoral.<sup>61</sup>

Similar to *Lawrence*’s repressed encounter with sexual liberty, the Supreme Court’s jurisprudence on procreation,<sup>62</sup> contraception,<sup>63</sup> and abortion<sup>64</sup> presumes but does not pronounce a right to engage in Heterosexual intercourse and family planning, given that the rights to control or refuse reproduction could *theoretically* correspond to a duty not to have intercourse, rather than a right to pregnancy prevention and termination free from irrational, illegitimate, or undue burdens. There is in such cases an implicit right to have sex and an explicit right to not have family. This right to sex, though, is too cabined as to place, manner, and gender of pleasure, just as the rights to family mentioned earlier are too cabined to marital and other exceedingly particular traditional paradigms.<sup>65</sup>

60. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

61. *Id.* at 567 (“To say that the issue in *Bowers* was simply the right to engage in certain *sexual conduct* demeans the claim the individual put forward, *just as it would demean a married couple* were it to be said marriage is simply about the right to have sexual intercourse. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”) (emphases added). *See also id.* at 562 (“In our tradition the State is not omnipresent *in the home* . . . It suffices for us to acknowledge that adults may choose to enter upon this relationship *in the confines of their homes and their own private lives* and still retain their dignity as free persons. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”) (emphases added).

62. *See Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Buck v. Bell*, 274 U.S. 200 (1927).

63. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

64. *See Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

65. Academics who have argued persuasively against heteronormative, heterocentrist, and

In *Griswold v. Connecticut*,<sup>66</sup> the Court defends access to contraceptive technologies by reference to the fundamentality and privacy of *marriage*, rather than the right to have sex and manage family.<sup>67</sup> Shortly thereafter, in *Eisenstadt v. Baird*,<sup>68</sup> access to contraception was individualized and unhinged from marriage as a fundamental right by the Court. Nonetheless, the original defense of contraceptive technology is the sanctity of marriage, though contraception seems a most obvious matter of sexual and familial liberty that matters beyond marital bedrooms. Moreover, in *Eisenstadt* fundamental rights were not even discussed by the Court's majority.<sup>69</sup> Though the lower court found Massachusetts's contraception ban a violation of single persons' fundamental rights under the Due

eurocentric c/Constitutional delimitations of rights to sex and family include Francisco Valdes, David Cruz, Janet Halley, Angela Harris, and Marc Spindelman. See generally Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 97 (Robert Wintemute & Mads Andenaes eds., 2001); Janet E. Halley, "Like Race" Arguments, in WHAT'S LEFT OF THEORY? 40 (Judith Butler, John Gillory & Kendall Thomas eds., 2000); Janet E. Halley, *The Sexual Economist and Legal Regulation of Sexual Orientation*, in SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 192–207 (David M. Estlund & Martha Nussbaum eds., 1997); David Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 4 (2002); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994); Angela Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL OF RIGHTS J. 1539 (2006); Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 (2004); Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L. J. 1361 (2005); Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 4 (2002); Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341 (2004).

66. 381 U.S. 479 (1965).

67. *Id.* at 486:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

68. 405 U.S. 438 (1972).

69. *Id.* at 447 ("The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons . . ."). The Court in *Eisenstadt* also stated:

Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a compelling state interest. E.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967). But just as in *Reed v. Reed*, 404 U.S. 71 (1971), we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.

*Id.* at n.7.

Process Clause of the Fourteenth Amendment,<sup>70</sup> the Supreme Court found the statute to be an unconstitutional imposition upon single people under the Equal Protection Clause in light of *Griswold's* defense of contraception for married couples.<sup>71</sup>

In these cases, clustered temporally around *Loving*, there is a Constitutional expansion of individual rights regarding decisions about sexual activity and family constitution. But these Constitutional expansions of sexual and familial freedom become Constitutional reconfirmations of marriage, despite the neither necessary, nor sufficient, nor exhaustive connection of Heterosexual civil marriage to the liberties the Court defends.

In excavating and explicitly affirming the fundamental rights to sex and family advanced but repressed in these cases, I am seconding and think myself continuing the work of William Brennan, David Cruz, Martha Fineman, Katherine Franke, Jack Jackson, and other legal scholars.<sup>72</sup> Fineman's 1995 book, *The Neutered Mother, The Sexual Family & Other Twentieth Century Tragedies*,<sup>73</sup> powerfully and persuasively makes a case against governments recognizing and privileging Heterosexual marriages as preferred forms of sexual and familial relations. Fineman argues that we should reorient family law around relations of inevitable and derivative dependency rather than conjugal pairing.<sup>74</sup> Though Fineman's critique centers marriage as a fulcrum of the right to family, she also understands

70. *Baird v. Eisenstadt*, 429 F.2d 1398 (1st Cir. 1970).

71. *Eisenstadt*, 405 U.S. at 446–55.

72. See Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting); FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY & OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Cruz, *supra* note 65; Jackson & Culbertson, *supra* note 41.

73. See *supra* note 72.

74. Despite various interventions within family law in the United States by liberal antipatriarchal, antiracist, and antihomophobic movements (which have altered the once facially sexist, racist, and homophobic language of much marriage law and policy), Fineman argues that:

[I]n spite of such reform, the family continues to be defined as an entity, built on and arising from the sexual affiliation of two adults. This heterosexual unit continues to be considered as presumptively appropriate and it has ongoing viability as the core family connection. At worst, heterosexual marriage is viewed as merely in need of some updating . . . .

FINEMAN, *supra* note 72, at 159. This brand of analogizing integration, Fineman shows, effectively maintains the operative inequalities and errors of governmental preferences for Heterosexual marriage in law and policy governing erotic pleasure and collective social units. Fineman notes the wide range of sexual and familial relationships that are not built upon marriage (whatever its racial or sexual orientations) and are therefore either neglected or disciplined and punished by governmental preferences for marriage. See *id.* at 165 (discussing single, divorced, and never-married mothers).

her critique of marriage to involve the right to sex.<sup>75</sup> This leads Fineman to recommend against querying as to the inclusive reach of the fundamental right to marriage. Rather, she “propose[s] two recommendations for legal reform: the abolition of the legal supports for the sexual family and the construction of protections for the nurturing unit of caretaker and dependant . . . .”<sup>76</sup>

The abolition of governmental preference for marriages in family law and policy would, Fineman argues, have the corollary effect of loosening governmental incursions on sex.<sup>77</sup> I am not sure that the legal disestablishment of marriage that Fineman advocates would necessarily result in the disestablishment of governmental sexual morality. A government could acknowledge diverse familial relationships and still espouse homophobic or white supremacist sexual morality (by recognizing and privileging diverse families but continuing to prohibit or punish mixed-race/same-sex erotic pleasures), just as it could renounce Homophobia and White Supremacy but still maintain the model of the sexual family (by legalizing mixed-race/same-sex marriage but continuing to privilege and recognize marriages over other families).<sup>78</sup> Precisely

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[I]n our society, marriage has historically been so venerated as to become a ‘sacred’ institution, the archetype of legitimate intimacy. . . . [Deviation] from the formal heterosexual paradigm of marriage has brought with it condemnation in the discourses of psychology, social work, and medicine. In law, marriage traditionally has been designated as the only legitimate sexual relationship.

*Id.* at 146.

76. *Id.* at 228.

77. *Id.* at 229–30:

Adult, voluntary sexual interactions would be of no concern to the state since there would no longer be a state-preferred model of family intimacy to protect and support. Therefore, all such sexual relationships would be permitted—nothing prohibited, nothing privileged. . . .

Instead of seeking to eliminate this stigma [against unmarried sexual and familial relationships] by analogizing more and more relationships to marriage, why not just abolish the category as a legal status and, in that way, render all sexual relationships equal with each other and all relationships equal with the sexual?

78. For a limited view of federal and state judicial recognitions and refusals of Constitutional liberty for specifically “homosexual” acts, desires, and identities, *see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (regarding homosexual sodomy); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *State v. Limon*, No. 85,898, 41 P.3d 303 (Kan. Ct. App. Feb. 1, 2002), *vacated by* *Limon v. Kansas*, 539 U.S. 955 (2003) (mem.) *and subsequently differently decided in* *State v. Limon*, 122 P.3d 22 (Kan. 2005) (regarding disparate statutory rape penalties for same-sex offenders); *Lofton v. Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (regarding adoption by same-sex spouses). For commentary on these and similar decisions, *see* Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Spindelman, *supra* note 65; Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 30 (2003); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Note, *Unfixing Lawrence*: 118 HARV. L. REV. 2858 (2005).

because the marital institution has collapsed sexual and familial relations, I believe the two fields must be individually articulated and disentangled from marriage.<sup>79</sup> Further, the diverse forms of social community and sexual pleasure which are excluded from civil marriage regimes, and which I mean to include within the concepts of sex and family, are not all encompassed by the caregiver-dependant relation emblemized by Fineman's mother-child paradigm.

As such, courts, legislators, wardens, police officers, benefits administrators, zoning commissions, and other actors ought to recognize that persons in the United States have a right to have both sex and family in whatever manner they desire—unless of course there exists a compelling interest that is: (1) distinct from the moral and social privileges and prejudices the Fourteenth Amendment is meant to reconstruct; and (2) advanced by a necessary and narrowly tailored law.<sup>80</sup> In what follows I offer logical, political, and constitutional grounds for this argument.

### *B. Logical Objections to the Right to Marriage*

Logically, civil marriage cannot rightly be a fundamental Constitutional right.<sup>81</sup> Civil marriage regimes are positive and particular governmental *means* for enfranchising some set of instrumental and ideological *ends*, which are energetically recited in cries against and defenses of civil marriage. All of civil marriage's imaginable ends might be achieved without a marriage, and none of those ends are guaranteed by the mere fact of a marriage alone. Such is the relation between every end and any single means. As such, it is the *ends* of civil marriage which should be deemed fundamental Constitutional rights. Instead, these ends ironically become grounds for deeming civil marriage itself a fundamental right—despite the fact that civil marriage regimes can only ever be one of many unnecessary and insufficient means to the ends that allegedly recommend it.

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79. Moreover, in arguing for affirmative and negative governmental obligations regarding people's rights to have sex and family, I imagine that sexual families, including mixed-sex same-race marriages, may well still deserve and rightly demand recognition and privilege from governments as sexual and familial relationships, but they may not do so solely on the basis of their racial, sexual, religious, or marital identity.

80. There are clearly rights, needs, desires, and interests beyond having sex and family involved in the nebulous ends of marriage enfranchised by the *Loving* Court.

81. I do not intend here to claim that marriage (most broadly defined) could never be an end in itself under any *constitutional* order. Hence my attempt—despite fearing that some readers will find it insubstantial or irritating—to consistently distinguish between *constitutional* and *Constitutional* matters. See discussion *supra* notes 3–4.

By mistaking means for ends in this way, the Court in *Loving* and *Zablocki* self-evidently avows the recognitions and privileges of civil marriage, even while the historical parameters of that very regime are condemned as illiberal and unequal. This seemingly contradictory engagement impairs the Court's constitutional inquiries and its Constitutional outcomes, mistaking the synthetic facts of particular cases for an analytical c/Constitutional rule by which to decide them. However, if we do heed logic and identify the ends of marriage as constitutionally fundamental, we must then question not only conscriptions of governmental recognition and privilege to homoracial Heterosexual marriages, but also the conscription of such recognition and privilege to civil marriage at all, whatever its racial or sexual parameters.<sup>82</sup>

### C. *Political Objections to the Right to Marriage*

The preceding section has broad, important, *political* consequences. These consequences are specifically political because they concern the ways in and wills with which individuals, communities, corporations, governments, and others apprehend, understand, and engage human needs, social problems, and public policies. If persuasive, the preceding claims (that civil marriage is merely one means to constitutional ends for which it is neither necessary nor sufficient) urge new approaches to the human needs, social problems, and public policies surrounding civil marriage regimes. Because civil marriage is unnecessary and insufficient for its ends, even the most obviously and seemingly unidimensionally discriminatory dimensions of such regimes (e.g. exclusions of heteroracial and Homosexual spouses) should be represented and redressed in ways that emphasize neither expansions of nor integrations into civil marriage regimes.

Many seemingly unrelated and unallied communities, policies, injuries, and issues become visibly politically connected when we challenge (for example) racist or homophobic marital regimes as improperly impinging

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82. To import particular factual analyses—regarding Heterosexual marriage, White Supremacy, and Homophobia—into fundamental rights doctrine is improper and leads to the nonconversant debates between advocates of homosexual marriage equality and those of traditional heterosexual marriage. The former reasonably assert that they cannot be denied marriage on the basis of sex differentiation, gender normativity, or homophobia, while the latter reasonably claim that marriage, by its very definition, is a heterosexual institution and cannot accommodate Homosexuals. There may be valuable cultural contestation, negotiation, and conflict in such debates. However, as a constitutional matter, such debates are unhelpful. They are also productively avoided if any failure to privilege or recognize the rights to sex and family are strictly scrutinized. *Cf.* FINEMAN, *supra* note 72 (arguing for the disestablishment of heterosexual marital privilege and the support of care-taking relationships).

on the rights to sex and family. Arguments about whether unmarried same-sex spouses ought to receive the same reciprocal vocational benefits granted to married cross-sex spouses become more general, complex, and meaningful political questions about the need for and cost of human health, care, and wellness.

Reframing The Marriage Question<sup>83</sup> as a reconstructive demand for equal sexual and familial liberty might enable our c/Constitutional politics to be more than an anachronistic, chronically late, analogical, incremental, and exclusive expansion of presently unconstitutional and inherently unjust practices of governance. By rejecting the conception of marriage as Constitutional end, fundamental right, or necessary or sufficient means thereto, we can more properly enfranchise and not infringe the ends of marriage. Constitutionalizing fundamental rights to sex and family would lead us to scrutinize the White Supremacist marital governance at issue in *Loving* (and Homophobic and/or Heterocentrist institutions challenged by Homosexual marriage movements) only and always along with (for but a few examples):

- visitation policies in prisons and other detention facilities that allow access only to certain (e.g., immediate, biological, etc.) family members<sup>84</sup>
- visitation restrictions in prison generally, given the right to have sex and family<sup>85</sup>
- penalties or privileges for marital, sexual, or other categories of families in the allocation of public benefits<sup>86</sup>

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83. By calling discussions about civil marriage and fundamental rights “The Marriage Question,” I mean to suggest that such discussions (like current debates over Homosexual marriage) reductively and sensationally represent a single, monumental question. My phrasing references other such monumental, contentious, and often reductive considerations, such as those involving White and Male Supremacy. See, e.g., KARL MARX ET AL., *THE WOMAN QUESTION* (Selected Writings) (1952); THEODORE STANTON, *THE WOMAN QUESTION IN EUROPE* (1884); Thomas Carlyle, *Occasional Discourse on the Negro Question*, *FRASER’S MAGAZINE* (1849); J.S. Mill, *The Negro Question*, *FRASER’S MAGAZINE* (1850).

84. Prisoners’ and detainees’ visitation privileges presently may be restricted so long as such restrictions bear a rational relation to any penological goal. *Turner v. Safley*, 482 U.S. 78 (1987). See ACLU, *Know Your Rights: Visitation in Prisons*, [www.aclu.org/images/asset\\_upload\\_file769\\_25745.pdf](http://www.aclu.org/images/asset_upload_file769_25745.pdf) for a general and accessible annotated introduction to the Constitutionality of restrictions on visits to incarcerated persons and pretrial detainees. In particular, note the Supreme Court’s recent decision in *Overton v. Bazzetta*, 539 U.S. 126 (2003) (establishing that recurrent violation of substance use policy justifies suspending visitation privileges for inmates).

85. *Id.* See *Champion v. Artuz*, 76 F.3d 483 (2d Cir. 1996), for the argument that conjugal visits may be Constitutionally denied to prisoners and detainees.

86. Consider the Bush administration’s “Initiative for Healthy Marriage.” See Robert E. Rector,

- prohibitions of sex toys<sup>87</sup>

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Melissa G. Pardue & Lauren R. Noyes, "MARRIAGE PLUS": SABOTAGING THE PRESIDENT'S EFFORTS TO PROMOTE HEALTHY MARRIAGE, Heritage Foundation, Aug. 22, 2003, <http://www.heritage.org/Research/Welfare/BG1677.cfm>:

Recognizing the widespread benefits of marriage to individuals and society, the federal welfare reform legislation enacted in 1996 set forth clear goals to increase the number of two-parent families and reduce out-of-wedlock childbearing . . . President Bush has sought to meet the original goals of welfare reform by proposing, as part of welfare reauthorization, a new model program to promote healthy marriage. The proposed program would seek to increase healthy marriage by providing individuals and couples with:

- Accurate information on the value of marriage in the lives of men, women, and children;
- Marriage-skills education that will enable couples to reduce conflict and increase the happiness and longevity of their relationship; and
- Experimental reductions in the financial penalties against marriage that are currently contained in all federal welfare programs. . . .

The proposal creates two separate funds to promote marriage. In the first, \$100 million per year would be provided in grants to state government for programs to promote healthy marriage. Participation would be voluntary and competitive. States would neither be required to participate nor guaranteed funds; instead, they would compete for funding by submitting program proposals to the U.S. Department of Health and Human Services (HHS). The states with the best proposals would be selected to receive funds. States receiving funding would be required to match federal grants with state funds. In the second fund, another \$100 million per year would be allocated in competitive grants to states, local governments, and non-government organizations.

Both funding pools could be used for a specified set of activities consistent with the overarching strategy of promoting healthy marriage. These activities would include:

- Public advertising campaigns on the value of marriage and skills needed to increase marital stability and health;
- Education in high schools on the value of marriage, relationship skills, and budgeting;
- Marriage education, marriage skills, and relationship skills programs, which may include parenting skills, financial management, conflict resolution, and job and career advancement, for non-married pregnant women and non-married expectant fathers;
- Pre-marital education and marriage-skills training for engaged couples and for couples or individuals interested in marriage;
- Marriage-enhancement and marriage-skills training for married couples;
- Divorce-reduction programs that teach relationship skills;
- Marriage mentoring programs that use married couples as role models and mentors in at-risk communities; and
- Programs to reduce the disincentives to marriage in means-tested aid programs, if offered in conjunction with any of the above activities.

87. See, e.g., ALA. CODE. § 13A-12-200.2(A)(1) (2006), which states:

It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for anything of pecuniary value.

The 1998 law was upheld again by a three judge panel of the Eleventh Circuit on February 14, 2007. See *Williams v. King*, No. 06-11892, 11th Cir., Feb. 14, 2007, available at <http://www.ca11.uscourts.gov/opinions/ops/200611892.pdf> (last visited Feb. 17, 2007):

- prohibitions of adultery<sup>88</sup>
- prohibitions of Homosexuals' adoptions<sup>89</sup>
- exclusions of multipartner marriages from governmental recognitions or privileges of family or sex<sup>90</sup>
- exclusions of friendships from governmental recognitions or privileges granted civil marriages or other families<sup>91</sup>
- governmental engagement with sexual morality and familial norms as such.

Though there are numerous compelling exceptions, U.S. government agents generally should neither punish nor penalize people's sexual

The only question remaining before us is whether public morality remains a sufficient rational basis for the challenged statute after the Supreme Court's decision in *Lawrence v. Texas*. . . . The district court distinguished *Lawrence* and held, following our prior precedent in this case, *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) (*Williams II*), that the statute survives rational basis scrutiny. Because we find that public morality remains a legitimate rational basis for the challenged legislation even after *Lawrence*, we affirm.

88. See, e.g., MICH. COMP. LAWS § 750.29—750.32 (2004). See Franklin Foer, *Adultery*, SLATE, June 15, 1997, at <http://www.slate.com/id/1063/>:

The United States inherited English common law, which made adultery, as well as fornication (sex between unmarried people) and sodomy (oral and anal sex), punishable crimes. In the mid and late 19th centuries, when states wrote their criminal codes, they incorporated these sex laws. Twenty-six states continue to have anti-adultery laws on the books. These laws vary considerably. Some define adultery as any intercourse outside marriage. According to others, it occurs when a married person lives with someone other than his or her spouse. In West Virginia and North Carolina, simply “to lewdly and lasciviously associate” with anyone other than one’s spouse is to be adulterous . . . Punishments also vary. Adultery is a felony in Massachusetts, Michigan, Oklahoma, and Idaho, and a misdemeanor everywhere else.

See also John Flesher, *Judges Footnote On Adultery Stirs a Tempest In Michigan*, WASH. POST, Jan. 19, 2007, at A08, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/18/AR2007011801777.html> (discussing *People v. Waltonen*, No. 270229 (Mich. Ct. App., LC No. 06-015110-FC) (Nov. 7, 2006), available at [http://courtofappeals.mijud.net/documents/OPINIONS/FINAL/COA/20061107\\_C270229\\_28\\_270229.OPN.PDF](http://courtofappeals.mijud.net/documents/OPINIONS/FINAL/COA/20061107_C270229_28_270229.OPN.PDF)) (last visited Nov. 26, 2007)).

89. *Lofton v. Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (finding no fundamental right to homosexual adoption and a rational, legitimate purpose in allowing only heterosexuals to adopt).

90. See, e.g., *State v. Holm*, 137 P.3d 726, 738–40 (Utah 2006), cert. denied, 127 S. Ct. 1371 (2007) (upholding criminal conviction for bigamy despite the Supreme Court’s recent invalidation of laws against “homosexual sodomy” in *Lawrence v. Texas*).

91. See Laura Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007) (arguing that friendships should be legally recognized and supported equally with families, because (1) friends perform many of the vital functions presumed to be, but often not, performed by families, and (2) legal recognition of friendship could innovatively advance a primary mission of contemporary family law—the dismantling of gender inequalities that thrive in “the family” as defined, produced, and disciplined by liberal patriarchal states and societies).

pleasures and familial collectives, but rather must enfranchise their experience and actualization of liberty through both sex and family.

*D. Constitutional Objections to the Right to Marriage*

The foregoing logical and political claims prompt an argument about constitutional theory and United States Constitutional doctrine. When governmental practices or institutions—such as those prohibiting miscegenation, sodomy, and adultery—are challenged as unconstitutional, such practices and institutions cannot be queried solely as to their imposition on or exclusion of the class or individual challenging it. Rather, when fundamental rights are at issue, what must be scrutinized are the practice's or institution's general construction, capacity, necessity, and sufficiency as means to stated Constitutional ends in light of their allegedly exclusive character. Fundamental rights under the Due Process and Equal Protection Clauses ought not be defined as existing governmental institutions or traditional cultural practices, and ought not be deemed to have been violated only when fixed identity classes are facially differentiated or purposively dominated by law. Again, such factors are, of course, relevant as the actual *context*, but cannot serve as the analytic *content* of fundamental rights, because such factors cannot (singly or in sum) account for the range of subordinating logics or techniques requiring c/Constitutional Reconstruction. Such factors will surely ground the outcome of the case at the level of synthetic description and procedural mandate, but such synthetic particulars are improper as components of constitutional theories and Constitutional doctrines.

My argument here raises contentious themes regarding doctrines on the Equal Protection and Due Process Clauses. Regarding the former, how is inequality to be apprehended, evidenced, and understood? And how are we to c/Constitutionally characterize individuals, classes, and practices subjected to inequality? Regarding the Due Process Clause, what role does tradition play in defining, extending, limiting, or otherwise constructing fundamental liberties? And how ought we characterize such liberties? At what level of abstraction should an interest or practice be described when advanced as a right?

*1. Class and Reconstruction*

Constitutional focus on the facial differentiation or intentional subordination of fixed identity classes thwarts c/Constitutional Reconstruction. It does not require the obvious or inherent traces of White

Supremacy and Homophobia evident in many laws prohibiting miscegenation, criminalizing sodomy, or defending traditional marriage to render a systemic violation of the fundamental rights of a historically and presently subordinated group. The policing and punishment of unmarried African American families, lovers, and other cohabitants in the wake of the Civil War, which Katherine Franke importantly recounts and theorizes,<sup>92</sup> demonstrates a racially and sexually disciplinary regime that worked to reinforce and reproduce White Supremacy. This regime, though, did not operate by *withholding* but rather by *extending* the terms of civil marriage. What is wrong with the law at issue in *Loving*, and with Constitutional amendments or other laws that disadvantage same-sex spouses, is also wrong with laws mandating marriage for cross-sex cohabitants and laws overbroadly benefiting *any* married couples over *any* other sorts of families. The problem with all such laws is their categorical and thus overbroad and overnarrow privileging of certain classes and practices over or under others, with respect to the ways in which such classes may practice and the state may recognize persons' fundamental rights to have sex and family.

## 2. *Tradition and Abstraction*

However traditional or foundational a particular government practice or institution may be, it still must be articulable as a means to an end beyond itself. Even in the least scrutinizing judicial review of even the least traditional government practice, plaintiffs and defendants must articulate interests and rights beyond the particular governmental practice or institution challenged, and beyond the particularly excluded class presently pleading for relief, so as to establish the constitutional background against which the particular state actions, identity classes, and individual interests at issue acquire their Constitutional meaning.

The federal and state constitutions—many written against monarchical sovereignty and feudal caste, and reconstructed against states' sovereignty and racial caste—cannot contain Due Process and Equal Protection clauses meant to function as reticent but supreme civil codes enshrining for posterity the precisely and positively established government institutions,

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92. See Katherine Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriage*, 11 *YALE J.L. & HUM.* 251 (1999); see also Franke, *supra* note 39, at 1420–25 (discussing discipline and policing of African Americans in the postbellum South through marital licensing and other habitation regulations).

cultural traditions, class distinctions, political philosophies, or historical moralities of an ancient, authoritative caste.

A fundamental rights jurisprudence anchored to tradition understood as static, particular cultural practices, or state institutions renders the Constitution unable to ever apprehend, let alone redress, let alone prevent subordination that seems traditional, even definitional, until a century or two of war and diplomacy renders such inequality apparently unnatural and illiberal.

Thus, it seems to me not only not ideal, but indeed *anticonstitutional* to fix fundamental rights analyses, and levels of Constitutional scrutiny generally speaking, too tightly to alleged traditions of the nation. It seems to me a contradiction of the Constitution's fundamental rights clauses, of the general philosophical systems and historical context out of which they arise, and of the political aims of Reconstruction to suggest that, to be deemed a fundamental right, a plaintiff's demanded liberty must conform to the government's historical practices, prejudices, or privileges.

Another argument regarding Due Process jurisprudence under the United States Constitution thus emerges. Fundamental rights must not be defined at the most specific level of abstraction discernible in the claims of plaintiffs or the canons of precedent. Doing so necessarily restricts fundamental rights to the institutions, practices, identities, and interests already rendered and recognized by the State.<sup>93</sup>

Discussing and debunking Justice Scalia's arguments regarding the role of tradition and descriptive abstraction in Due Process Clause jurisprudence will hopefully make my point clear. In *Michael H. v. Gerald D.*, the Court considered a law under which "a child born to a married woman living with her husband is presumed to be a child of the marriage."<sup>94</sup> The law was challenged by a biological father (Michael) attempting to secure parental rights regarding his daughter (Victoria), whose mother was previously and continuously married to another man, but with whom Michael had an ongoing relationship, as he did with Victoria.<sup>95</sup> In the plurality opinion in *Michael H.*, Justice Scalia argues that the liberty interest under consideration must be described in the most specific abstraction derivable from the facts.<sup>96</sup> Then, Justice Scalia

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93. See Jackson & Culbertson, *supra* note 42, at 19 ("The integrationist politics of identitarian liberal legalism thus helps to effect and incite a double expulsion: expulsion of different and discordant subjects from the identitarian-imagined community and also expulsion of the proper objects of left movements from the field of political vision.").

94. 491 U.S. 113 (1989). See CAL. EVID. CODE § 621 (West 1989).

95. *Michael H.*, 491 U.S. at 113–16.

96. *Id.* at 122–24.

suggests, we must decide whether this most specifically abstracted liberty has been traditionally protected in the United States:

[T]he legal issue in the present case reduces to whether the relationship between persons in the situation of [father] Michael and [daughter] Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection . . . . [T]o the contrary, our traditions have protected the marital family . . . against the sort of claim Michael asserts.<sup>97</sup>

Attached to this assertion is the following note from Justice Scalia:

Justice Brennan insists that in determining whether a liberty interest exists we must look at Michael's relationship with Victoria in isolation, without reference to the circumstance that Victoria's mother was married to someone else when the child was conceived . . . . We cannot imagine what compels this strange procedure of looking at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people—rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body.<sup>98</sup>

Recall that Justice Marshall in *Zablocki* refers to the standards of rationality review in deciding whether to apply rationality review.<sup>99</sup> Justice Scalia's opinion in *Michael H.* is similar in that, as Laurence Tribe and Michael Dorf note,<sup>100</sup> Justice Scalia recommends a jurisprudence that imputes the alleged governmental interest *against* the asserted liberty into the very definition of the liberty at issue. In doing so, "the state interest obliterates, without explanation and at the outset, any trace of the individual liberty at stake."<sup>101</sup>

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97. *Id.* at 127 n.6.

98. *Id.* at 110 n.4.

99. 434 U.S. at 376.

100. See Laurence Tribe & Michael Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1096–97 (1990) (quoted in *CHOPER ET AL.*, *supra* note 13, at 464–65).

101. *Id.*:

When we automatically incorporate the factors that provide the state's possible justification for its regulation into the initial definition of a liberty, the fundamental nature of that liberty nearly vanishes. . . . To state [fundamental rights] cases this way is to decide them in the government's favor. Anyone is free to argue that [*Roe v. Wade*, *New York Times v. Sullivan*, or *Mapp v. Ohio*] was wrongly decided. But arguments to this effect must explain why the state interest overcomes the liberty interest. Under Justice Scalia's . . . approach, by contrast, the state interest obliterates, without explanation and at the outset, any trace of the individual liberty at stake.

Tribe and Dorf also note that Justice Scalia's discernment of the most specifically abstracted liberty interest in *Michael H.* is not only analytically problematic, but also deceptively question-begging, insofar as there are far more specific abstractions available:

Justice Scalia's formulation of the rights at stake as the rights of "the natural father of a child adulterously conceived" is . . . already a considerable abstraction. . . . The natural father in *Michael H.* had a longstanding, albeit adulterous and sporadic, relationship with the mother of his child. He also had fairly extensive, if sporadic, contact with his child. . . . A more specific [abstraction] of the issue than Justice Scalia gives us would be: *what are the rights of the natural father of a child conceived in an adulterous but longstanding relationship, where the father has played a major, if sporadic, role in the child's early development?*

. . . [S]tarting from an even *more* specific [abstraction] of the case than did Justice Scalia, we have seen that he had no greater justification for abstracting away the father-child relationship than Justice Brennan had for abstracting away the adultery.<sup>102</sup>

Jack Balkin argues a similar point regarding tradition as the definition of liberty:

[I]f sexual harassment directed toward women in the workplace and respect for marital privacy are both traditions, but only one is worth protecting, how do we tell the difference?

. . . .

. . . [W]hat is most troubling about Justice Scalia's call for respecting the most specific tradition available is that our most specific historical traditions may often be opposed to our more general commitments to liberty or equality. . . . [D]ifferent parts of the American tradition may conflict with each other.<sup>103</sup>

Thus, as a matter of constitutional theory and Constitutional law, and as a consequence of all the foregoing arguments, I suggest that we systematically reject fundamental rights doctrines under the federal or state constitutions that:

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102. *Id.* at 1092–93.

103. J. M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1617–18 (1990) (quoted in CHOPER ET AL., *supra* note 13, at 463).

- misidentify particular governmental means (e.g., civil marriage) as general constitutional ends (e.g., the rights to sex and family),
- formalize inequality as the facial differentiation or intentional subordination of fixed or unitary identity classes,
- hinge upon or ignore particular histories of subordination or traditions of the nation,<sup>104</sup> or
- craft constitutional questions and answers at the most specific degree of abstraction.<sup>105</sup>

The particular contextual exclusions of mixed-race/same-sex spouses from civil marriage can only be decried or defended by calls to, and these exclusions should thus invoke a more robust general jurisprudence on, the constitutional ends of marriage—e.g., the rights to have sex and family. Such jurisprudence is evidently apt and necessary since mixed-race/same-sex couples are perhaps emblematic, but in no way exhaustive, of the wide range of sexual and familial relationships denied or disadvantaged by the recognition and privilege historically afforded same-race, mixed-sex marriages in United States law, policy, and culture.<sup>106</sup> As such, challenges to White Supremacist,<sup>107</sup> Homophobic,<sup>108</sup> Heterocentrist,<sup>109</sup> and

104. Justice Blackmun voices a similar sentiment in his dissent from the Court's opinion in *Bowers*, wherein he quotes Oliver Wendell Holmes' contention that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." 478 U.S. at 199 (Blackmun, J., dissenting) (quoting Oliver Wendell Holmes, *The Path of Law*, 10 HARVARD L. REV. 457, 469 (1897)).

105. As an alternative model, Randy Barnett suggests that the Court should—and, through *Lawrence*, has—embraced a libertarian conception of the Due Process Clause, one in which any claim of violated liberty—whether doctrinally sacrosanct or not—should trigger the searching review demonstrated in *Lawrence*, in which fundamentality and level of review are not correlated in nor central to the holding. See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21 (2003).

Although it may be possible to cabin this case to the protection of "personal" liberties of an intimate nature—and it is a fair prediction that that is what the Court will attempt—for *Lawrence v. Texas* to be constitutionally revolutionary, the Court's defense of liberty must not be limited to sexual conduct. The more liberties the Court protects, the less ideological it will be and the more widespread political support it will enjoy. Recognizing a robust "presumption of liberty" might also enable the court to transcend the trench warfare over judicial appointments. Both Left and Right would then find their favored rights protected under the same doctrine. When the Court plays favorites with liberty, as it has since the New Deal, it loses rather than gains credibility with the public, and undermines its vital role as the guardian of the Constitution. If the Court is true to its reasoning, *Lawrence v. Texas* could provide an important step in the direction of a more balanced protection of liberty that could find broad ideological support.

*Id.* at 41.

106. See FINEMAN, *supra* note 72; Franke, *supra* note 92; Jackson & Culbertson, *supra* note 41.

107. I agree with the Court's assessment in *Loving v. Virginia*, 388 U.S. at 11–12, that laws

patriarchal<sup>110</sup> recognitions or privileges of marriage should call for the c/Constitutional disestablishment of marriage as a necessary or sufficient condition for benefit or burden, and the Constitutional requirement that state and federal governments protect and not infringe persons' formation of collective social units, or their pursuit of sexual pleasure, except in the case of the narrowest governmental undertaking of a most compelling governmental interest *not* among those undermined by the Reconstruction Amendments.

#### IV. CONCLUSION

That which "marriage equality" movements oppose must indeed be undone by Constitutional fundamental rights analyses, but the unconstitutional governmental structures challenged must not themselves provide the core terms for such analyses if we are to both (1) intercede against unfreedom and inequality long before they become systematic, longstanding, or sympathetic practices of subordination; and (2) enfranchise fundamental rights understood as general and diverse

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prohibiting heteroracial marriage in the United States amount to governmental White Supremacy and are thus immoral, irrational, illegitimate, and unconstitutional.

108. I think the recent proposals and ratifications of state and federal constitutional amendments stipulating explicitly that marriage is solely available to mixed-sex couples amount to governmental homophobia, in that they emerge from a broadly cultural and political rejection of homosexual equality, freedom, and identity. This historical context, like that of the restriction on homosexual representative political participation at issue in *Romer v. Evans*, 517 U.S. 620 (1996), suggests a class-based animosity which ought not minimally or otherwise elevate the level of constitutional scrutiny in cases involving Due Process and Equal Protection, but ought rather to suggest exactly why such laws necessarily fail even the most minimal standard of review. I believe class-based animosity—demonstrable by text and context—can never yield a legitimate end or rational means. Evidence of such animosity necessarily, I believe, taints fundamental rights analyses (be it Due Process or Equal Protection under federal or state constitutions), such that the governmental action at issue must fail. Hence my genuine shock and dismay when encountering claims that there exists an animus-activated "heightened" rationality review under the Equal Protection Clause. See, e.g., *Romer*, 517 U.S. at 620; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Lawrence v. Texas*, 539 U.S. 558, 580 (2003), (O'Connor, J., concurring).

109. Laws prior to the recent statutory and Constitutional clarifications of marriage's exclusively heterosexual character are heterocentrist in that they presume the heterosexual couple as the center of all marriage. Similarly heterocentrist, though, are laws and movements that seek to include Homosexual marriages alongside the state's recognition and privilege of Heterosexual marriages. Such laws continue to center marriage in its imagination of family and sex, and sex in its imagination of family, thus maintaining the heterosexual marital norm as the model of sex and family. As such, the inclusion of homosexuals in civil marriage regimes perpetrates the same unconstitutional act as homophobic or heterocentrist marital *exclusions* of homosexuals.

110. Virtually all laws governing heterosexual marriage were patriarchal in their preferential and differential treatment of men and women. For a thorough and astute history see FINEMAN, *supra* note 72.

constitutional ends rather than overbroad and overnarrow traditional Constitutional means.

The Lovings' challenge to a law involving both sexual and racial governance of family, sexuality, reproduction, race, and gender should have called forth recognition of the complex, simultaneous, and multiple ways in which law can infringe on liberty and equality as regards family, sexuality, and identity. Instead, the Court presumes the legitimacy of illiberal and unequal sexual, religious, and other governance in order to condemn only the facial racial governance of antimiscegenation law.

Regulations of sex and family, such as antimiscegenation law, infringe on liberty and equality in diverse ways by denying sexual and familial rights to persons because of their conscience, culture, identity, and desire. As a means to any of its possible ends—procreation, promises of care, well-reared children, sexual pleasure, etc.—civil marriage is neither necessary nor sufficient. As such, the status afforded civil marriage is irrational and illegitimate. Moreover, the status afforded civil marriage violates the fundamental rights to the ends of marriage owed to unmarried and unmarriageable persons. The alleged and naturalized propriety of civil marriage as a biological, social, and political program can and should be rejected. Doing otherwise yields a jurisprudence that is logically untenable, politically unjust, and ultimately anticonstitutional.