

## NOTES

### GLUCKSBERG, LAWRENCE, AND THE DECLINE OF *LOVING*'S MARRIAGE PRECEDENT

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#### INTRODUCTION

IN recent debates about the constitutionality of laws banning same-sex marriage, both sides look to the seminal 1967 Supreme Court case of *Loving v. Virginia*, which invalidated a Virginia law banning interracial marriage.<sup>1</sup> Proponents of same-sex marriage claim that a ban on same-sex marriage violates the fundamental right to marriage as acknowledged by *Loving*, and that such a law discriminates on the basis of sexual orientation. Opponents of same-sex marriage attempt to distinguish *Loving* by arguing that sexual orientation and race are not legally equivalent. Both sides, however, fail to recognize that *Loving* is distinguishable on the basis of what rights are at issue, rather than which parties are allowed to marry. The core rights of marriage that the Court found to be fundamental in 1967 have been recognized outside of the institution of marriage by legal developments in the intervening years. In particular, the recognition of the right to cohabit and the right to consensual sexual intimacy has stripped marriage of its status as the exclusive domain where those rights can legally be exercised, rendering *Loving*'s substantive due process language irrelevant to the debate.

Part I will show that marriage at the time of *Loving* was defined by a set of rights, most importantly by the rights to legally cohabit and engage in an intimate sexual relationship. After examining the social

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<sup>1</sup>388 U.S. 1, 2 (1967).

norms that served as the basis for that legal definition of marriage, it will show that, in effect, marriage provided a defense against charges of cohabitation and fornication in a time when laws prohibiting such actions were still enforced. This set of rights that was exclusive to marriage was what defined the right to marriage, and the cases leading up to *Loving*, as well as *Loving* itself, had that definition in mind.

Part II will examine the changes in the law during the time between *Loving* and *Lawrence v. Texas*.<sup>2</sup> Specifically, it will examine how the social norms that dictated the definition of marriage prior to *Loving* underwent dramatic changes, with the result that the laws that prohibited fornication and cohabitation were repealed by legislatures, overturned by the courts, or simply no longer prosecuted by law enforcement. This evolution began soon after *Loving* in cases like *Eisenstadt v. Baird*, when the courts started giving more rights to nonmarried heterosexual couples that previously had been exclusive to marriage.<sup>3</sup> These changes effectively redefined and reduced the bundle of rights that constitute marriage.

Part III will examine the changes to the way the law regulates same-sex relationships and argue that there are strong parallels between those developments and the way the laws regulating cohabitation and fornication have evolved in the time since *Loving*. Although *Bowers v. Hardwick* delayed the transformation of the law regarding same-sex relationships,<sup>4</sup> a parallel legal evolution for same-sex couples, culminating in *Lawrence*, was not far behind. Consequently, marriage is no longer a requirement in order for any couple to live together as the Lovings did in an intimate relationship. In effect, by acknowledging the right to live together in an intimate sexual relationship, *Lawrence* granted the same rights to same-sex couples that *Loving* did to interracial couples.

Part IV will apply this observation to the substantive due process analysis of same-sex marriage cases. It will look at the way the Court has analyzed fundamental rights, arguing that because the fundamental right to marriage as defined in *Loving* is not the same bundle of rights that is at stake in the current same-sex marriage cases, the parts of the *Loving* opinion that hold marriage to be a fundamental right are no longer applicable. It will begin with a look at the inherent tension between

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<sup>2</sup>539 U.S. 558 (2003).

<sup>3</sup>405 U.S. 438, 453 (1972).

<sup>4</sup>478 U.S. 186, 192 (1986).

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the narrow formulation of fundamental rights in *Washington v. Glucksberg*<sup>5</sup> and the broader methodology of *Lawrence*.

Part IV will then consider how the Court's methodology in *Glucksberg* would apply to the use of *Loving* in the same-sex marriage debate. *Glucksberg* requires reading broad precedent in terms of the specific rights at issue. Consequently, because the specific rights that Virginia denied the Lovings are no longer exclusive to marriage, a *Glucksberg* analysis would likely discount *Loving* as inapplicable. Moreover, even if the Court were to follow the broader formulation of rights used in *Lawrence*, *Loving* might be relevant, but ultimately the Court would have to rely on more recent marriage precedent like *Turner v. Safley* that implies a broader fundamental right to marriage than *Loving*.<sup>6</sup> Nevertheless, there are several reasons the Court might be reluctant to rely on post-*Loving* marriage precedent in general, and *Turner* in particular, which makes the erosion of *Loving*'s relevance all the more crucial as support for any argument that marriage is a fundamental right for same-sex couples.

Part IV will conclude by examining the practical implications of the decline of *Loving*'s precedential value for both sides of the same-sex-marriage debate. Although there are still equal protection and substantive due process arguments to be made by each side with respect to the peripheral rights of marriage, the elimination of the exclusivity of the core rights of marriage has significant consequences for each side and their ability to use *Loving* as precedent. Because the core rights of marriage are available to same-sex couples after *Lawrence*, not only is *Loving* unavailable as supporting precedent, but the stakes are significantly lower for modern same-sex couples than they were for the Lovings. This observation, however, also has implications for opponents of same-sex marriage. Even when they do not explicitly rely on *Loving*, many of their arguments also depend on those same core elements of marriage and conclude that legal recognition of marriage should not be extended to same-sex couples.<sup>7</sup> To the extent that their argument ostensibly relies on those elements of marriage that are no longer legally exclusive to it, in particular the ability to live together in an intimate relationship for the

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<sup>5</sup> 521 U.S. 702, 722 (1997).

<sup>6</sup> 482 U.S. 78, 95–96 (1987).

<sup>7</sup> Brief for Proponents at 66, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696), 2010 WL 3762119 at \*66.

purpose of providing a stable framework for children, their policy arguments carry less weight. Because the core rights of marriage are enjoyed by same-sex couples already, the implications of the legalization of same-sex marriage for that social framework have reduced importance.

### I. *LOVING* MARRIAGES

While *Loving* is primarily an equal protection case,<sup>8</sup> Chief Justice Warren's opinion closes with a succinct and forceful due process analysis that declares, "[Antimiscegenation] [s]tatutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>9</sup> It is that holding—that marriage is a right encompassed in the liberty protected by the Fourteenth Amendment—that proponents of same-sex marriage cite as precedent and opponents attempt to distinguish.

The Court in *Loving* went on to declare:

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 . . . is surely to deprive all the State's citizens of liberty without due process of law . . . . Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.<sup>10</sup>

*Loving* is abundantly clear that marriage is a fundamental right, but the scope of that right and the degree to which the opinion can be applied as precedent in modern marriage cases is far more opaque.

In determining whether the fundamental rights language of *Loving* can be applied in modern same-sex marriage cases, one must first determine the scope of the rights at issue in the case. This in turn requires looking to what legal definition of marriage the *Loving* Court was referring to; that is, what rights were the Lovings denied? After examining the social norms that influenced marriage law prior to *Loving*, this Part

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<sup>8</sup>*Loving*, 388 U.S. at 7.

<sup>9</sup>*Id.* at 12.

<sup>10</sup>*Id.* (citations omitted).

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will attempt to answer that question by looking to *Loving* itself and its context within the case law leading up to the decision.

A. *Social Norms of Marriage Pre-Loving*

The set of rights that composes the legal construct of marriage can be roughly approximated as a reflection of the society's view of marriage.<sup>11</sup> There were several interpretations of society's view of marriage prior to *Loving*, though notably all have some common elements. Under one view, prior to *Loving* the cultural view of the purposes of marriage had already undergone evolution. This position, formulated by Professors Ernest Burgess and Harvey Lock in the 1940s and 1950s, proved true. It posits that until the mid-twentieth century the popular perception of marriage was an "institutionalized" one, a view that would soon begin to evolve.<sup>12</sup> The "institutional" phase was grounded in the "chief historic functions of the family," which included "economic," "educational," and "protective" factors.<sup>13</sup> Under this view, the archetypical "institutional" family contrasted starkly with the "companionship" family, which was characterized by "self-expression," "affection, congeniality, and common interests."<sup>14</sup>

Due to "long-term cultural and material trends" and the major social effect of the Great Depression and World War II, the institutional phase of marriage gave way to the "companionate" phase.<sup>15</sup> This phase valued the success of a marriage by "the degree to which each spouse could fulfill his or her role."<sup>16</sup> This phase is most easily described as the stereotypical 1950s marriage: the "single-earner, breadwinner-homemaker marriage."<sup>17</sup> But those marriages were not merely the economically efficient relationship of the "institutional" phase. Companionship and emo-

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<sup>11</sup> See Joseph A. Pull, Questioning the Fundamental Right to Marry, 90 Marq. L. Rev. 21, 63 (2006) ("In a state with a representative government, the boundaries of legal-marriage will be driven by social understandings of what marriage should mean—that is to say, by popular-marriage. The state will try to make its legal-marriage the same as the prevailing popular-marriage.").

<sup>12</sup> Ernest W. Burgess & Harvey J. Locke, *The Family: From Institution to Companionship* 22–25 (1953).

<sup>13</sup> *Id.* at 23.

<sup>14</sup> *Id.*

<sup>15</sup> Andrew J. Cherlin, The Deinstitutionalization of American Marriage, 66 J. Marriage & Fam. 848, 851 (2004).

<sup>16</sup> Susan Gregory Thomas, Gray Divorcés, Wall St. J., Mar. 3, 2012, at C1.

<sup>17</sup> Cherlin, *supra* note 15.

tional happiness from fulfillment of marital roles became a primary factor in what was considered a successful marriage.<sup>18</sup> Mate selection was not based on cold economic factors but on “romance, affection, and personality adjustment to each other.”<sup>19</sup>

Even with the rise and dominance of the “companionate” phase of marriage, the core elements of marriage remained completely unchanged. It was still expected that sexual relationships would occur only in marriage,<sup>20</sup> and one author even referred to the time period before the 1960s as “The Era of Mandatory Marriage.”<sup>21</sup> Cohabitation was very rare, and even academics did not foresee a change in that social norm. As one sociologist put it, “[n]ot a single 1950s or 1960s sociologist predicted the rise of cohabitation.”<sup>22</sup>

Another perspective on the evolution of marriage looks to even deeper origins and takes a broader view of the changes in society’s view of it. On this view, marriage evolved out of Catholic canon law,<sup>23</sup> and even after the rise of secularism, society continued to view a Christian natural law foundation as the basis for marriage.<sup>24</sup> During the era of the American Founding, this developed into a view of marriage as a way of “creating virtuous republican citizens,” followed by an emphasis on “Enlightenment-inspired individualism and the growing belief in free contract principles, both of which argued against expansive state regulation of marriage.”<sup>25</sup> Although there was some weakening of sexual mores in the 1920s, sexuality outside of marriage remained highly regulated.<sup>26</sup> It was not until the 1960s that the changes in the social view of sex and marriage started to have an effect on the law.<sup>27</sup>

Whatever view one takes of how marriage evolved over time, even in the late 1960s it was clear that certain basic elements were still consid-

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<sup>18</sup> *Id.*

<sup>19</sup> Burgess & Locke, *supra* note 12, at 23.

<sup>20</sup> Cherlin, *supra* note 15.

<sup>21</sup> John R. Gillis, *For Better, For Worse: British Marriages, 1600 to the Present* 229 (1985). Although Professor Gillis labels the time period as 1850 to 1960, his research does not indicate that the changes in the public viewpoint of marriage occurred as early as 1960, but rather sometime between 1960 and the mid-1970s. *Id.* at 307.

<sup>22</sup> Cherlin, *supra* note 15, at 857.

<sup>23</sup> Pull, *supra* note 11, at 68–69.

<sup>24</sup> *Id.* at 70.

<sup>25</sup> *Id.* at 70–71.

<sup>26</sup> *Id.* at 73.

<sup>27</sup> *Id.* at 74.

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ered essential and exclusive to marriage. Most prominent among these core marriage rights were the exclusive right to have an intimate sexual relationship and the right to cohabit.

*B. The Legal Rights of Marriage Pre-Loving*

The facts of *Loving* tell us a lot about what rights were at stake. The Lovings were not seeking to gain any government benefits or other incidental advantages of marriage. Rather, an element of their crime was exercising what a lay person might consider to be marriage in its most basic sense—living together in an intimate sexual relationship. Indeed, the ability to do that was unique to marriage. Fornication laws existed in many states prior to *Loving*, and Virginia was no exception.<sup>28</sup> Even single acts of sexual intercourse constituted a crime in many states.<sup>29</sup> Instead of, or as a supplement to, antifornication laws, many states also had laws against cohabitation by unmarried couples.<sup>30</sup> Statutes punishing “lewd and lascivious cohabitation” prohibited couples from living as husband and wife without a formalized marriage to prevent the normalization of relationships that would be an “evil example.”<sup>31</sup>

The unique status of marriage as the only safe haven for legal sex is corroborated by observations made in areas beyond basic family law. Professor Anne Coughlin has examined the implications of the way that rape doctrine developed from an assumption that nonmarital sex was illegal: specifically, the elements of rape are essentially the same as the elements of a woman’s defense to charges of fornication.<sup>32</sup> Although Coughlin’s insights are primarily applicable to normative views of modern rape law,<sup>33</sup> her work highlights an aspect of fornication laws that sheds light on what rights were included in marriage. Specifically, although the current line between legal and illegal sex is essentially con-

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<sup>28</sup> As late as 2005, Virginia had a fornication ban in effect. See Va. Code Ann. § 18.2-344 (2009) (ruled unconstitutional by *Martin v. Zihler*, 607 S.E.2d 367, 371 (Va. 2005)).

<sup>29</sup> Morris Ploscowe, *Sex and the Law* 149 (1951).

<sup>30</sup> *Id.* at 150; Jim Thompson, *The Role of Common Law Concepts in Modern Criminal Jurisprudence* (A Symposium), 49 *J. Crim. L., Criminology & Police Sci.* 350, 353 n.32 (1958).

<sup>31</sup> Ploscowe, *supra* note 29, at 150.

<sup>32</sup> Anne M. Coughlin, *Sex and Guilt*, 84 *Va. L. Rev.* 1, 6 & n.19 (1998).

<sup>33</sup> *Id.* at 6, 11–13.

sent, until recently it was marriage, not consent, that acted as a defense to both fornication and rape.<sup>34</sup>

The right to cohabit was so strongly associated with marriage that courts often used it as strong evidence of a formalized marriage. This was certainly the case in Virginia, even in cases that did not deal with marriage directly. The Supreme Court of Appeals of Virginia in *Eldred v. Eldred*, for example, noted that:

If parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and especially if they are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married.<sup>35</sup>

The court reiterated that principle in *Reynolds v. Adams*.<sup>36</sup> The court noted that the fact that the couple had “lived openly together as man and wife . . . unmolested by prosecution or any charge of illicit cohabitation” created strong evidence that they were in fact married.<sup>37</sup>

Common-law marriage also provides a window into the legal significance of cohabitation. Some states, including Virginia, did not recognize common-law marriage.<sup>38</sup> But for those states that did, it would seem to be an anomaly in the otherwise consistent legal proscription of cohabitation. At first glance common-law marriage appears to have been a significant legal loophole for couples in long-term cohabitation arrangements, protecting couples from prosecution for cohabitation or fornication.

In fact, common-law marriage had several nontrivial requirements attached to it that collectively made it almost indistinguishable from statutory marriage. Although the foundational requirements to establish a common-law marriage differed somewhat depending on the jurisdiction,<sup>39</sup> certain elements were universally required. Most important was the requirement that the couple have “a present intent and agreement of

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<sup>34</sup> Id. at 27 (“In the former world, the parties’ marriage—not their consent to the intercourse—was the element that distinguished lawful from unlawful sex.”).

<sup>35</sup> 34 S.E. 477, 478 (Va. 1899).

<sup>36</sup> 99 S.E. 695, 698–99 (Va. 1919).

<sup>37</sup> Id. at 698, 700.

<sup>38</sup> Walter O. Weyrauch, Informal and Formal Marriage—An Appraisal of Trends in Family Organization, 28 U. Chi. L. Rev. 88, 89–90 (1960). By the 1960s only sixteen states still recognized common law marriage. Id. at 89.

<sup>39</sup> John De Witt Gregory et al., Understanding Family Law 39–40 (2005).

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the parties to enter into a matrimonial relationship.”<sup>40</sup> Also necessary was the “community repute as husband and wife.”<sup>41</sup> Consequently, common-law marriage was essentially a marriage formalized by the parties, not the state, and was otherwise indistinguishable from state-formalized statutory marriages. The fact that states with rural or frontier conditions were more likely to have common-law marriage<sup>42</sup> suggests that it was intended to be indistinguishable from a statutory marriage formalized by the parties instead of the state. Where the cost of the formalization was high, due to factors like a long trip to the nearest courthouse, it follows that the state would be more likely to allow the parties to skip the formalization while giving them identical status to those couples who formalized.<sup>43</sup>

Common-law marriage was unlike simple cohabitation, but the courts that recognized it conclusively acknowledged cohabitation as a central element of the marriage. As one Georgia court explained:

The elements of proof in a common-law marriage—namely, cohabitation, reputation, declarations, conduct, and reception among friends and neighbors as married—are commonly, in a perfect case, found in combination. All the latter ones are shadows attending on cohabitation, and they should be simultaneous therewith. Together they make a complete case; while in legal doctrine there is no absolute necessity of exhibiting all the shadows in connection with that from which they fall, cohabitation.<sup>44</sup>

In other words, much more was necessary than mere cohabitation for a court to recognize a common-law marriage. But without those core elements of cohabitation “as husband and wife” and the commitment of the parties to have a binding marriage, there was no common-law marriage.

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<sup>40</sup> Id. at 39.

<sup>41</sup> Id.

<sup>42</sup> See, e.g., John R. Williams, *Solemnization of Marriages: The Common Law Marriage—Never Solemn and No Longer Common—Will It Remain Law?*, 13 U. Miami L. Rev. 447, 449–50 (1959); cf. Weyrauch, *supra* note 38, at 90.

<sup>43</sup> See Nancy Rebecca Shaw, Note, *Common Law Marriage and Unmarried Cohabitation: An Old Solution to a New Problem*, 39 U. Pitt. L. Rev. 579, 580 (1978) (“The recognition of common law marriages was a historical necessity, since the desire to start a family would otherwise have been thwarted in scattered and isolated agricultural and mountain communities with difficult access to ministers or justices of the peace.”).

<sup>44</sup> *Allen v. State*, 3 S.E.2d 780, 782 (Ga. Ct. App. 1939) (internal citation omitted).

*C. Loving's Fundamental Right to Marry*

The preceding background of marriage law makes clearer the analysis of the fundamental rights discussion in *Loving*. The reality that the Lovings had violated Virginia's statute prohibiting interracial marriage assumes that there was some legal definition of marriage for which they had met the requirements. The legal status of cohabitation played a prominent role in the genesis of *Loving*. The indictment read that Richard and Mildred Loving were married in the District of Columbia, "and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth."<sup>45</sup> The emphasis on their cohabitation was important because it was an element of the crime. As cited by the Court, the relevant statute provided that

[i]f any white person and colored person shall go out of this State . . . be married out of it, and afterwards return to and reside in it, *cohabiting as man and wife*, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. *The fact of their cohabitation here as man and wife shall be evidence of their marriage.*<sup>46</sup>

The conduct prohibited by the law seems merely to include the act of formalizing the relationship as a marriage. But was the fundamental right discussed in *Loving* simply the act of vows and the issuance of a marriage certificate? The Court's opinion does not speak at length to this issue, but at an earlier stage in the litigation the Supreme Court of Appeals of Virginia provided insight into exactly what the Lovings were being denied. Originally they were prevented from returning to Virginia together, but the court modified their sentence, allowing them to return to Virginia as long as they did not live together.<sup>47</sup> Guided by the principle that a sentence should "be reasonable, having due regard to the nature of the offense," the court concluded that the cohabitation was a necessary element of the crime, and that,

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<sup>45</sup> Brief for Appellee at 8, *Loving*, 388 U.S. 1 (No. 395).

<sup>46</sup> *Loving*, 388 U.S. at 4 (quoting Va. Code Ann. § 20-58 (1960 Repl. Vol.) (repealed 1968) (emphasis added)). According to the Court, Va. Code Ann. § 20-59 (1960 Repl. Vol.) (repealed 1968), was the broader antimiscegenation statute, which prohibited any "white person" and "colored person" from intermarrying. *Id.* It did not provide insight into what it meant by "intermarry" or how that would be determined, as § 20-58 did.

<sup>47</sup> *Loving v. Commonwealth*, 147 S.E.2d 78, 83 (Va. 1966).

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[w]ithout such cohabitation, there would have been no offense for which they could have been tried, notwithstanding their other actions. . . . The condition reasonably necessary to achieve [the purpose of preventing violation of the statute] was that the defendants not again cohabit as man and wife in this state.<sup>48</sup>

The exact statute violated by the Lovings, Section 20-59 of the Code of Virginia, appears to be a codification of *Kinney v. Commonwealth*,<sup>49</sup> a late-nineteenth-century case with facts similar to *Loving*. Andrew Kinney and Mahala Miller, both from Augusta, Virginia, traveled to the District of Columbia for ten days in 1877 to obtain a legal marriage because they were of different races and could not do so legally in Virginia.<sup>50</sup> Upon their return they lived “as man and wife,”<sup>51</sup> and Andrew was subsequently charged and found guilty of “lewdly associating and cohabiting” with Mahala.<sup>52</sup> The Kinneys’ lawyer moved to have a jury instruction include the fact that the couple was married at the time of the cohabitation, with the consequence that the jury must acquit.<sup>53</sup> The trial court denied the motion, and the Supreme Court of Appeals of Virginia affirmed.<sup>54</sup>

*Kinney* stands for the principle that Virginia did not have to recognize marriages that were performed in other jurisdictions if they violated the Commonwealth’s law. Indeed the Virginia legislature codified that principle in Section 20-59 of the Code of Virginia, resulting in the charges against the Lovings.<sup>55</sup> But aside from the exact holding promulgated in *Kinney*, the effects of the decision make it very clear what right was actually at stake for the Lovings: the right to cohabit in an intimate relationship. In fact, the commentary to the Code of Virginia even went so far as to include the observation that those who violated that section of

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<sup>48</sup> *Id.*

<sup>49</sup> 71 Va. (1 Gratt.) 858 (1878); Walter Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1199 (1966) (“Apparently because the practice of marrying in another state in order to avoid the Virginia proscription against interracial marriage had become prevalent by 1878, a special evasion provision was added in that year to the criminal section of the miscegenation laws.”).

<sup>50</sup> *Kinney*, 71 Va. (1 Gratt.) at 859.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 858–59.

<sup>53</sup> *Id.* at 859.

<sup>54</sup> *Id.* at 859, 870.

<sup>55</sup> Wadlington, *supra* note 49.

the statute could be indicted for “lewd and lascivious cohabitation.”<sup>56</sup> The real damage to the Lovings from the prohibition on formalizing their marriage in Virginia or elsewhere was not the lack of formalization itself, but rather the inability to, in the words of the court in *Kinney*, “live as man and wife.”<sup>57</sup>

The progression of case law that culminated with *Loving* was developed by courts that were mindful of this larger context in which the interracial marriage debate occurred. Even before marriage was clearly designated as a fundamental right it was assumed to have a special place in the law. That unique position was a function of the intimate relationship it created and the rights and obligations that accompanied that relationship, rather than the peripheral benefits that the state might attach to it in an effort to incentivize its use. As early as 1888, in *Maynard v. Hill*, the Supreme Court wrote that marriage “creat[es] the most important relation in life,”<sup>58</sup> and “is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>59</sup>

*Maynard* was merely echoing several state courts, which had already acknowledged marriage as a unique institution due to the intimate relationship it enabled. Courts in Kentucky,<sup>60</sup> Rhode Island,<sup>61</sup> and New York<sup>62</sup> had all used similar language when discussing marriage. Perhaps most interesting among these state cases is *Adams v. Palmer*, in which the Supreme Judicial Court of Maine stated that “[w]hen the contracting

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<sup>56</sup> Va. Code Ann. § 4540 (1942) (annotation) (“The parties who violate the provisions of the act prohibiting the intermarriage of a white with a colored person are liable to indictment for lewd and lascivious cohabitation.”).

<sup>57</sup> See also Wadlington, *supra* note 49, at 1221 (“Accordingly, it was their cohabitation as man and wife which was said to be the gravamen of the Lovings’ offense.”).

<sup>58</sup> 125 U.S. 190, 205 (1888).

<sup>59</sup> *Id.* at 211.

<sup>60</sup> *Maguire v. Maguire*, 37 Ky. (7 Dana) 181, 184 (1838) (describing marriage as “the most elementary and useful” of all social relations).

<sup>61</sup> *Ditson v. Ditson*, 4 R.I. 87, 101 (1856) (“Now, marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than ‘fatherhood’ or ‘sonship’ is a contract.”).

<sup>62</sup> *Wade v. Kalbfleisch*, 58 N.Y. 282, 284 (1874) (“It cannot be dissolved by the parties when consummated . . . It is more than a contract. It requires certain acts of the parties to constitute marriage, independent of and beyond the contract.”).

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parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest, not upon their agreement, but upon the general law of the State . . . .”<sup>63</sup> The court went on to describe marriage as “a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress. ‘*Tunc genus humanum primum mollescere coepit.*’”<sup>64</sup> It is particularly enlightening that the court closed with a quote from Lucretius that translates to “then first the human race began to grow soft.” The larger context of the full verse begins by intoning, “when they had got themselves huts and skins and fire, and women mated with man moved into one [home, and the laws of wedlock] became known, and they saw offspring born of them, then first the human race began to grow soft.”<sup>65</sup> To paraphrase the verse in a less poetic form, the court was acknowledging the definition of marriage that provided so many benefits to society: the ability to live together in an intimate sexual relationship.

Equally notable is the fact that these cases were all before many of the modern peripheral benefits of marriage were in place. For example, any federal income tax benefits could not have existed before the ratification of the Sixteenth Amendment.<sup>66</sup> But even later cases maintained this emphasis on the intimate relationship that a formalized marriage legalized, and they did so with more specific fundamental rights language. The Supreme Court in *Meyer v. Nebraska* declined to define liberty with comprehensive exactness but offered a baseline definition when it concluded that “[w]ithout doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>67</sup> And in *Skinner v. Oklahoma*, the Court included in its discussion of the unconstitutionality of a law that sterilized

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<sup>63</sup> *Adams v. Palmer*, 51 Me. 480, 483 (1863).

<sup>64</sup> *Id.* at 485.

<sup>65</sup> Lucretius, *De Rerum Natura* [On the Nature of Things] 5.1011-14 (translated in Natania Meeker, *Engendering Modernity: Epicurean Women from Lucretius to Rousseau*, in *Dynamic Reading: Studies in the Reception of Epicureanism* 133, 148 n.25 (Brooke Holmes & W. H. Shearin eds., 2012)).

<sup>66</sup> U.S. Const. amend. XVI.

<sup>67</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

certain criminals the observation that “[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”<sup>68</sup>

Cases based on facts closer to those of *Loving* also viewed marriage in this way. The first state court to strike down an antimiscegenation law was the Supreme Court of California in *Perez v. Lippold*, which held that marriage “is a fundamental right of free men,” and declared the statute in question to be in violation of the Fourteenth Amendment.<sup>69</sup> Justice Carter expounded on this view in his concurrence when he wrote that “[t]he freedom to marry the person of one’s choice has not always existed, and evidently does not exist here today. But is not that one of the fundamental rights of a free people?”<sup>70</sup> Though the court in *Perez* did not explicitly define marriage in terms of the core rights discussed earlier, while distinguishing *Pace v. Alabama*,<sup>71</sup> a Supreme Court case that upheld a law providing a greater penalty for nonmarital sex if the couple was interracial, the majority made the observation that “non-marital intercourse [is] not, like marriage, a basic right, but [is an offense] subject to various degrees of punishment.”<sup>72</sup> The specific legal consequences of the inability to marry were certainly in the background of the Court’s opinion.

Only two years before *Loving* was decided, the Supreme Court again signaled that marriage was a unique set of legal rights, though it did not discuss the right to contraception use by a married couple as a fundamental right. In *Griswold v. Connecticut*, the majority chose instead to use the framework of a “penumbral” “right to privacy” rather than rely on the Due Process Clause of the Fourteenth Amendment as Justice White’s concurrence urged.<sup>73</sup> But the Court was unambiguous that marriage was unique and disapproved of the law in question as “operat[ing] directly on an intimate relation of husband and wife.”<sup>74</sup> As in the previous cases, the Court wrote of marriage in terms of the intimate relationship it created:

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<sup>68</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

<sup>69</sup> *Perez v. Lippold*, 198 P.2d 17, 18–19, 29 (Cal. 1948).

<sup>70</sup> *Id.* at 31 (Carter, J., concurring).

<sup>71</sup> 106 U.S. 583 (1883).

<sup>72</sup> *Perez*, 198 P.2d at 26.

<sup>73</sup> *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring).

<sup>74</sup> *Id.* at 482 (majority opinion).

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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.<sup>75</sup>

The *Griswold* concurring opinions of Justices Goldberg and Harlan give even more clarity to the discussion of the right to marriage. Justice Goldberg spoke of the state's inability to interfere with "the marital relation and the marital home" when he stated: "The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so."<sup>76</sup> By arguing that the right was "as old and as fundamental as our entire civilization," Justice Goldberg's statement would necessarily exclude many of the peripheral rights of marriage that were relatively modern in origin. Moreover, he concluded his opinion by saying, "I believe that the right of privacy in the marital relation is fundamental and basic . . ."<sup>77</sup> And there was no doubt that he realized the unique ability of marriage to legalize those intimate relationships. In refuting Connecticut's argument that the state had an interest in preventing the spread of contraceptives, which could enable extramarital relations, he noted that "[t]he State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication."<sup>78</sup>

Justice Harlan's concurrence is perhaps most important of all because his analysis is more modern in its explicit use of substantive due process without reliance on language that finds a "right to privacy" in the bill of rights.<sup>79</sup> His dissent in *Poe v. Ullman* provides an expanded look into his

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<sup>75</sup> Id. at 486.

<sup>76</sup> Id. at 495–96 (Goldberg, J., concurring).

<sup>77</sup> Id. at 499.

<sup>78</sup> Id. at 498.

<sup>79</sup> Id. at 500 (Harlan, J., concurring) ("While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.").

thinking,<sup>80</sup> and consequently he and Justice Goldberg cited it in their *Griswold* concurrences.<sup>81</sup> *Poe* was decided only a few years prior to *Griswold* and concerned the same Connecticut statute, but the case was ultimately dismissed as nonjusticiable.<sup>82</sup> Justice Harlan's *Poe* dissent made it clear that in his mind the law violated due process because it interfered with a fundamental right—specifically, it intruded “upon the most intimate details of the marital relation with the full power of the criminal law.”<sup>83</sup> Harlan also made it clear what the fundamental marriage right was and what it was not.

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.<sup>84</sup>

He continued to distinguish the right to intimacy in marriage by noting that he “would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.”<sup>85</sup> And in case his distinction was not sufficiently clear, he continued:

Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. . . . [T]he intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which

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<sup>80</sup> *Id.* (“For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, *supra*, I believe that [the statute infringes the Due Process Clause of the Fourteenth Amendment].”).

<sup>81</sup> *Griswold*, 381 U.S. at 493–94.

<sup>82</sup> *Poe v. Ullman*, 367 U.S. 497, 508–09 (1961).

<sup>83</sup> *Id.* at 548 (Harlan, J., dissenting).

<sup>84</sup> *Id.* at 546.

<sup>85</sup> *Id.* at 552.

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the law has always forbidden and which can have no claim to social protection.<sup>86</sup>

In short, Harlan's dissent provides two valuable observations: first, the fundamental right to marriage was composed of the right to sexual intimacy between husband and wife, as well as their right to have a home together; and second, in general, marriage provided the only legal context in which these rights could be exercised.

The case offering a majority opinion that defines the fundamental marriage right with more detail actually occurred several years after *Loving*. The Supreme Court engaged in a discussion linking marriage to other specific fundamental rights in *Zablocki v. Redhail*.<sup>87</sup> Roger Redhail had challenged the constitutionality of a Wisconsin statute that provided that any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment" could not marry without court permission.<sup>88</sup> The Court began its discussion by noting that "decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."<sup>89</sup> The Court's opinion followed an analogous structure to its opinion in *Griswold* by first enumerating other rights, only this time it used a substantive due process framework rather than a "right to privacy" analysis.<sup>90</sup> After acknowledging those fundamental rights that were related to marriage, the Court explained the fundamental right to marriage in terms of those composite rights:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, child-birth, child rearing, and family relationships. As the facts of this case illustrate, 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. . . . And, if appellee's right to procreate means anything at

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<sup>86</sup> Id. at 553.

<sup>87</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>88</sup> Id. at 375.

<sup>89</sup> Id. at 384.

<sup>90</sup> It has been noted that although *Zablocki* uses the structure of an Equal Protection opinion, the dispositive reasoning in the opinion relies on the determination that there is a fundamental right to marriage. Pull, *supra* note 11, at 30–31.

all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.<sup>91</sup>

*Zablocki* is significant for several reasons. The Court explicitly defined the fundamental right to marry in terms of another fundamental right—procreation. Although it acknowledged marriage's role in the sexual relationship that it enabled, it did not equate the marriage right with living together in an intimate relationship as *Loving* had. In that sense, its procreation-centric view of the marriage right was a new development to the relationship-centric right to marriage in *Loving*.

Another significant aspect of *Zablocki* is the way in which the Court seemed to suggest that the fundamental right to marriage was limited to the enablement of those other fundamental rights, and did not extend to the more peripheral rights. The Court qualified its statement, clarifying that “[b]y 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.”<sup>92</sup> Instead, the Court reiterated that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”<sup>93</sup> This was likely a way for the Court to avoid overruling *Califano v. Jobst*,<sup>94</sup> which allowed the government to end a person's Social Security benefits if she married someone who was ineligible to receive those benefits.<sup>95</sup> Once again the Court was suggesting that the fundamental right to marriage included the intimate relationship between husband and wife, and not the incidental government benefits that might attach to the legal recognition of that relationship.

In short, the core rights of legal marriage up to and including the decision in *Loving* were understood to include and be based upon the right to cohabit in an intimate sexual relationship, and that core of marriage was considered to be a fundamental right exclusive to marriage. Nevertheless, after *Loving* those fundamental rights did not remain exclusive to marriage for very long.

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<sup>91</sup> *Zablocki*, 434 U.S. at 386.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See *id.* at 387 n.12.

<sup>95</sup> *Califano v. Jobst*, 434 U.S. 47, 48 (1977). The decision in *Califano* has even been described as allowing the government to “penalize someone for marrying.” Pull, *supra* note 11, at 27.

II. THE EVOLVING LEGAL NATURE OF MARRIAGE POST-*LOVING*

The use of *Loving v. Virginia* as precedent for the idea that marriage is a fundamental right implies that the composition of marriage has remained relatively constant in the interim, and any evolution of that composition suggests a more careful analysis is appropriate. After examining the social norms that influenced marriage following *Loving*, this Part will look to the changes in the law that accompanied that cultural shift and effectively redefined the bundle of rights to be included in marriage.

A. *Social Norms of Marriage Post-Loving*

If it is assumed that the public viewpoint of marriage had evolved even before the 1960s, one could argue that the change from the “institutional” to the “companionate” phase might have played a small part in creating the result in *Loving*. But many states allowed interracial marriage even when the dominant viewpoint was “institutional,” so it seems more likely that the timing of *Loving* was independent of the sequence of changes in the public perception of marriage. If so, it was coincidentally positioned immediately before a dramatic shift in the American viewpoint of marriage. Some have called this a transition to the “individualized” phase of marriage.<sup>96</sup> The roots of the change began in the 1960s, but were seen more explicitly in the 1970s.<sup>97</sup> The resulting new phase of marriage was based on the individual’s self-development, self-determination, and self-expression—what one commentator termed an “egocentric” perspective on marriage.<sup>98</sup>

The social effects of this change were substantial. Cohabitation rates (and, by implication, rates of accepted nonmarital sexual relationships) increased sharply starting in 1970,<sup>99</sup> reflecting an increased acceptance of cohabitation as a relationship option. While in the 1950s and 1960s cohabitation was predominantly a phenomenon that was limited for the most part to the less educated classes, cohabitation rates among the college educated starting in the early 1970s were even higher than the rates

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<sup>96</sup> See, e.g., Cherlin, *supra* note 15, at 852.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; Thomas, *supra* note 16.

<sup>99</sup> Andrew Cherlin, Marriage, Divorce, Remarriage 11–13 (1992); see also Larry L. Bumpass et al., The Role of Cohabitation in Declining Rates of Marriage, 53 *J. Marriage & Fam.* 913, 913 (1991).

among the uneducated in previous decades.<sup>100</sup> Some survey data from the 1980s show the biggest factors in deciding to merely date and not cohabit were concerns about personal and sexual commitment and emotional risk; some of the least cited reasons were disapproval of friends or family and moral concerns.<sup>101</sup> In sum, there is little doubt that a seismic shift in the collective approval of cohabitation occurred around 1970, with a corollary shift in approval of nonmarital sexual relationships.<sup>102</sup> Marriage had become “a choice rather than a necessity for adults who want intimacy, companionship, and children,”<sup>103</sup> and “the presumption of marriage no longer logically [followed] from the mere fact of cohabitation and general reputation in the community.”<sup>104</sup>

This Note focuses on the core marriage rights at stake in *Loving*, but it is notable that from a social perspective, under the new “individualized” viewpoint of marriage, even the peripheral marriage rights have become less important than they once were.<sup>105</sup> Although in some places marriage uniquely provides an “enforceable trust” that “lowers the transaction costs of enforcing agreements between the partners,” sociological research indicates that simply acquiring the legal status of marriage through a civil ceremony is not enough, and that “[p]eople marry now less for the social benefits that marriage provides . . . [and more] for the personal achievement it represents.”<sup>106</sup>

With the advent of the individualistic approach to marriage and increased social acceptance of cohabitation, dramatic changes in the laws governing marriage and nonmarital sexual relationships were soon to follow.

### *B. The Evolving Legal Rights of Marriage*

From a legal perspective, marriage ceased to be useful as a defense to a charge of fornication because such laws were no longer enforced. As early as 1980 there was little disagreement that “[t]he law against fornication . . . has fallen into decline, withering away under the impact of mass open defiance, lack of prosecution and enforcement, a complete

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<sup>100</sup> Bumpass et al., *supra* note 99, at 918.

<sup>101</sup> *Id.* at 914, 920.

<sup>102</sup> Cherlin, *supra* note 99.

<sup>103</sup> Cherlin, *supra* note 15, at 853.

<sup>104</sup> Shaw, *supra* note 43, at 582.

<sup>105</sup> Cherlin, *supra* note 15, at 857.

<sup>106</sup> *Id.* at 854–55, 857.

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absence of public support, and apathy toward the law (including ignorance of the law) on the part of violators.”<sup>107</sup> In effect, fornication gained de facto legalization.

Once again the full effect of this change to the legal rights of marriage is apparent when observing its impact on other areas of law. Professor Coughlin’s observation that “the substantive elements of rape still are calibrated so as to require women to prove . . . that they should not be held responsible for” fornication or adultery is significant precisely because those elements remained even though crimes of fornication were no longer prosecuted.<sup>108</sup> Simply put, “[o]stensibly, our culture long ago rejected the notion that those who engage in nonmarital sex should bear an official stigma, and, therefore, our lawmakers (practically) have repealed the fornication and adultery laws, leaving the field of heterosexual intercourse to the autonomous choices of the individual participants.”<sup>109</sup>

After fornication became de facto legal, sexual activity outside of marriage also quickly gained de jure legalization, both by the expressed will of legislatures that repealed fornication statutes and by courts that found some such laws to be unconstitutional.<sup>110</sup> Many state legislatures followed the suggestions of the American Law Institute and, later, the American Bar Association and repealed their bans on private sexual acts between consenting adults.<sup>111</sup>

Cohabitation followed a similar path to legality: de facto legalization through popular acclimation and prosecutorial apathy, followed by de jure legalization by the legislatures and courts. As noted in Section II.A, the societal acceptance of cohabitation expanded dramatically very soon after *Loving*. The increase in rates of cohabitation “began in the 1970s” and “accelerated in the 1980s and 1990s.”<sup>112</sup>

Shortly after *Loving*, the Court followed this trend of removing any special status of marriage with regard to sexual intimacy. In sharp contrast to the language in *Griswold*, which made prominent distinctions between the rights of those in and out of a marital relationship, the Court’s opinion in *Eisenstadt v. Baird* virtually eliminated the distinction. The

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<sup>107</sup> Gerhard O.W. Mueller, *Sexual Conduct and the Law* 36 (1980).

<sup>108</sup> Coughlin, *supra* note 32, at 45.

<sup>109</sup> *Id.*

<sup>110</sup> Mueller, *supra* note 107, at 36–37.

<sup>111</sup> *Id.* at 36–37, 57, 60.

<sup>112</sup> Cherlin, *supra* note 15, at 849.

Court stated that “the marital couple is not an independent entity with a mind and heart of its own, but an association of two *individuals*,” and that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>113</sup> Although the Court declined to decide if single people had a fundamental right to contraceptives and chose to decide the case on equal protection principles,<sup>114</sup> the decision eroded the unique constitutional status of marriage.

Moreover, the Court’s cases that discussed the fundamental right to marry started to develop definitions that moved away from the relationship-centric definitions of earlier opinions. *Turner v. Safley*<sup>115</sup> is the clearest example of this phenomenon. The case was brought by prison inmates who were contesting, inter alia, the constitutionality of a prison marriage regulation that did not allow prisoners to marry other inmates or non-inmates without approval from the prison superintendent and a compelling reason for such approval to be granted.<sup>116</sup> In that context, any marriage would necessarily be lacking the cohabitation and sexual intimacy that constituted the core attributes of marriage in previous cases. It was not surprising, therefore, that in striking down the regulation, the Court in *Turner* relied on a definition of the fundamental right to marriage that was very different from the one applied in earlier cases. Indeed, if any case offers support for a fundamental right to marry in the current landscape, it is *Turner*, and not *Loving*.<sup>117</sup> *Turner* emphasized the fundamental right to marriage as a very different bundle of rights, stating that “[m]any important attributes of marriage remain, however, after taking into account the limitations imposed by prison life,” which included:

[E]xpressions of emotional support and public commitment[,] . . . an exercise of religious faith as well as an expression of personal dedication[,] . . . the expectation that they ultimately will be fully consummated[,] . . . [and] the receipt of government benefits (e.g., Social Se-

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<sup>113</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added).

<sup>114</sup> *Id.* (“We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”).

<sup>115</sup> 482 U.S. 78 (1987).

<sup>116</sup> *Id.* at 81–82.

<sup>117</sup> Nevertheless, as Part III will show, *Turner*’s utility for that proposition is limited by more recent fundamental rights jurisprudence.

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curity benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock).<sup>118</sup>

This list of rights is essentially the peripheral rights of marriage, which, until *Turner*, had not been considered fundamental.

Thus, by the beginning of the twenty-first century, the bundle of rights that composed the legal construct of marriage included only what could be described as peripheral rights. The right of a couple to cohabit and engage in an intimate sexual relationship was no longer exclusive to marriage. Though a significant minority of states still had not repealed their laws prohibiting such conduct,<sup>119</sup> the Supreme Court's opinion in *Lawrence v. Texas* called the validity of these laws into question.<sup>120</sup>

### III. *BOWERS*, *LAWRENCE*, AND THE EVOLUTION OF THE REGULATION OF SAME-SEX RELATIONSHIPS

The changes to the way the law treated heterosexual relationships outside of marriage was mirrored by changes to how it treated homosexual relationships. Prior to *Lawrence v. Texas*, the most recent Supreme Court case to address same-sex relationships was *Bowers v. Hardwick*.<sup>121</sup> In upholding a Georgia anti-sodomy law, the Court stated quite simply that "respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do."<sup>122</sup> The statute at issue in *Bowers* was not unique; at the time the case was decided half of all states had anti-sodomy laws.<sup>123</sup>

Over the next two decades, about half of the states with anti-sodomy laws repealed their statutes.<sup>124</sup> Yet even while state laws against fornication and cohabitation were being repealed, some states preserved their

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<sup>118</sup> *Turner*, 482 U.S. at 95–96.

<sup>119</sup> Coughlin, *supra* note 32, at 21–22 ("As of today, the penal codes of seventeen states and the District of Columbia forbid fornication; under eight of these provisions, it is a crime for unmarried partners to engage in a single act of sexual intercourse.")

<sup>120</sup> 539 U.S. 558, 578 (2003).

<sup>121</sup> 478 U.S. 186 (1986).

<sup>122</sup> *Id.* at 191.

<sup>123</sup> *Id.* at 196.

<sup>124</sup> *Lawrence*, 539 U.S. at 573 ("The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.")

prohibitions on homosexual acts.<sup>125</sup> Texas was one of those states, with the result that by the turn of the twenty-first century it had legalized heterosexual sodomy but kept its ban on homosexual sodomy.<sup>126</sup> There is some evidence that prosecutions were rare,<sup>127</sup> and one could argue that it had almost gained de facto legality. But there was at least one prosecution, and it was the genesis of *Lawrence*.

The Supreme Court's opinion in *Lawrence* could not have overruled *Bowers* more emphatically. The Court stated that *Bowers* had "misapprehended the claim of liberty there presented to it,"<sup>128</sup> "[t]he foundations of *Bowers* [had] sustained serious erosion" from more recent decisions,<sup>129</sup> and "[t]he rationale of *Bowers* [did] not withstand careful analysis."<sup>130</sup> The Court concluded that "[t]he petitioners are entitled to respect for their private lives. . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."<sup>131</sup>

Most importantly, this substantive due process language of *Lawrence* has implications beyond the Texas law at issue in the case. A common interpretation of *Lawrence* suggests that it has implications for heterosexual couples as well. Prior to *Lawrence*, there remained several states that still had laws on the books prohibiting sex outside of marriage,<sup>132</sup> but post-*Lawrence* many of the statutes were declared unconstitutional. For example, as late as 2005 Virginia still had a law that made fornication a misdemeanor,<sup>133</sup> but the Virginia Supreme Court declared it un-

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<sup>125</sup> *Id.*; see also Mueller, *supra* note 107, at 58 ("The Texas legislature reformed its sex laws when it revised its entire penal code in the early 1970's. It decriminalized for all consenting heterosexuals but retained homosexual conduct as an infraction.").

<sup>126</sup> Mueller, *supra* note 107, at 58; see also Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, *New Yorker*, Mar. 12, 2012, at 76, 78.

<sup>127</sup> Lithwick, *supra* note 126, at 77 ("[T]he charge of sodomy was so rare that it didn't even have an assigned code [for the arrest report] . . .").

<sup>128</sup> *Lawrence*, 539 U.S. at 567.

<sup>129</sup> *Id.* at 576.

<sup>130</sup> *Id.* at 577.

<sup>131</sup> *Id.* at 578.

<sup>132</sup> See, e.g., William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* 98 (Robert C. Clark et al. eds., 2d ed. 2004) (noting that at the time of *Lawrence*, there were seven states that prohibited fornication and seven others in which cohabitation was illegal); Coughlin, *supra* note 32, at 21–23.

<sup>133</sup> Va. Code Ann. § 18.2-344 (2009) ("Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor.").

constitutional in *Martin v. Zihler*.<sup>134</sup> In that case, Muguet Martin had contracted a sexually transmitted disease from Joseph Zihler, who knew about his infection prior to their sexual activity.<sup>135</sup> She sued him, claiming various torts, including intentional battery and intentional infliction of emotional distress, and sought damages.<sup>136</sup> As a defense, Zihler asserted the Virginia anti-fornication statute in conjunction with a Virginia case that “disallow[ed] tort recovery for injuries suffered while participating in an illegal activity.”<sup>137</sup> In finding that the statute was unconstitutional—and therefore the tort liability defense was inapplicable—the Supreme Court of Virginia found “no relevant distinction between the circumstances in *Lawrence* and the circumstances in the present case.”<sup>138</sup> And *Martin* was not unique.<sup>139</sup> *Lawrence* had effectively become the end of state regulation of consensual sexual activity between adults.

Had the substantive due process language invoked in *Loving* been replaced with that of *Lawrence*, there would have been almost no practical difference for Richard and Mildred Loving. The fundamental rights language in either decision would have acknowledged the same right to “live as husband and wife” that was granted in their case, and would have prevented their prosecution. *Lawrence* gave same-sex couples the constitutional right to have an intimate sexual relationship and cohabit. To the extent that the right to marriage declared in *Loving* was defined by those core rights of marriage, *Lawrence* was, in effect, *Loving* for same-sex couples.

#### IV. THE DECLINING PRECEDENT OF *LOVING*

On its face, the observation that the changing legal composition of marriage should render precedent like *Loving* inapplicable to modern marriage cases seems intuitive. Indeed, some scholars have gone as far as to say that “the Court’s modern jurisprudence renders those understandings [of marriage arising out of historically based natural law beliefs about sexuality and marriage] no longer tenable as the basis for

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<sup>134</sup> 607 S.E.2d 367 (Va. 2005).

<sup>135</sup> *Id.* at 368.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 370.

<sup>139</sup> See, e.g., *Reliable Consultants v. Earle*, 517 F.3d 738 (5th Cir. 2008).

constitutional law.”<sup>140</sup> Similarly, Professor Cass Sunstein has pointed out that legal developments have essentially left *Zablocki* behind. “The apparent suggestion [in *Zablocki*] is that the right to marry has constitutional status because the status of marriage represents a legal precondition for sexual relations. (In a period in which the Constitution is seen to protect sexual relations outside of marriage, this suggestion loses its foundation.)”<sup>141</sup> Others have made the more general observation that in light of all the legal and cultural changes in marriage over time, “[i]f we can learn anything from the past, it is how few precedents are now relevant in the changed marital landscape in which we operate today.”<sup>142</sup>

Even if the inapplicability of *Loving* in the context of modern marriage seems intuitive, the Court’s jurisprudence requires a more exacting analysis when determining if a fundamental right to marriage exists. This Part will focus on the competing methods of making that determination. Specifically, it will focus on what level of particularity is required in defining the right in question. It will first consider the broader fundamental rights analysis of Justice Harlan’s dissent in *Poe v. Ullman*, followed by the rejection of that broad interpretation in *Bowers v. Hardwick* and *Washington v. Glucksberg*. It will then follow the apparent change in methodology back to a broader definition of fundamental rights in *Lawrence v. Texas*, and conclude with the renewal of the *Glucksberg* methodology in *McDonald v. City of Chicago*.<sup>143</sup> Finally, it will analyze the way in which the *Glucksberg* and *Lawrence* frameworks would affect the Court’s use of *Loving* as precedent in any future marriage case that relies on a fundamental right to marriage.

#### A. Defining the Fundamental Right

The Court has long struggled with competing ideas of what the correct process should be for determination of a fundamental right.<sup>144</sup> One

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<sup>140</sup> Pull, *supra* note 11, at 85. Although Pull makes the similar observation that the legal rights that marriage encompassed have changed over time, he assumes that makes the Court’s jurisprudence with regard to a fundamental right to marriage “incoherent.” *Id.* at 67. In contrast, this Note follows the *Glucksberg* analysis before making any judgment concerning the applicability of older precedent.

<sup>141</sup> Cass R. Sunstein, *The Right to Marry*, 26 *Cardozo L. Rev.* 2081, 2087–88 (2005).

<sup>142</sup> Stephanie Coontz, *Marriage, a History: From Obedience to Intimacy or How Love Conquered Marriage* 11 (2005).

<sup>143</sup> 130 S. Ct. 3020 (2010).

<sup>144</sup> See Pull, *supra* note 11, at 56–57.

view supports a very broad reading of fundamental rights; *Lawrence* is a classic example of this kind of analysis. The alternative view requires a precise formulation of the rights at issue, usually by looking to what conduct the statute in question specifically prohibits; *Glucksberg* contained a thorough formulation of this framework. Not surprisingly, the cases that have discussed competing methodologies are many of the same ones previously cited with respect to changing views of the right to marry. The first view finds its genesis in Justice Harlan's dissent in *Poe*, where he stated that "[t]his 'liberty' is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." <sup>145</sup> Although Harlan's opinion does discuss marriage in more particular terms, his dissent has been used to support a very broad definition of the rights at issue when the Court is faced with a substantive due process question.

*Bowers* rejected this methodology, and instead adopted the mode of analysis that would later be developed in *Glucksberg*. In more precise terms, the Court looked to what conduct was specifically prohibited by the statute in question. So instead of the broad "autonomy" right of *Lawrence*, <sup>146</sup> *Bowers* instead defined the right in question as the right to engage in homosexual sodomy. The Court then found that the right was not fundamental because it was not "deeply rooted in this Nation's history and tradition." <sup>147</sup>

*Glucksberg* followed the same methodology. In that case, the right at stake was defined not as the "right to die," but rather as the "right to physician-assisted suicide." <sup>148</sup> This was based on a "tradition of carefully formulating the interest at stake in substantive-due-process cases." <sup>149</sup> With this "careful description" requirement in place, the Court looked to the precise wording of the statute.

The Washington statute at issue in this case prohibits "aid[ing] another person to attempt suicide," . . . and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause

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<sup>145</sup> *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

<sup>146</sup> *Lawrence*, 539 U.S. at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

<sup>147</sup> *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (citation omitted).

<sup>148</sup> *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997).

<sup>149</sup> *Id.* at 722.

includes a right to commit suicide which itself includes a right to assistance in doing so.<sup>150</sup>

*Lawrence* broke from this line of reasoning, and explicitly rejected the “careful formulation” of *Bowers* that had defined the right in question in terms of the specific conduct prohibited by the statute. The Court held that although *Bowers* had stated that

“[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy” . . . [t]hat statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward . . . .<sup>151</sup>

Many commentators assumed that *Lawrence* would basically eliminate the *Glucksberg* methodology from Supreme Court jurisprudence.<sup>152</sup> But if there was any doubt on that front, *McDonald v. City of Chicago* laid it to rest. In *McDonald*, the Court reaffirmed the “tradition-based methodology” of *Glucksberg*.<sup>153</sup> More specifically, there was agreement from Justices on both sides of the decision that in order to limit judicial discretion, there is a requirement of a “careful description of the asserted fundamental liberty interest.”<sup>154</sup> Although there was disagreement between Justice Scalia’s concurrence and Justice Stevens’s dissent on the issue of exactly how to comply with that requirement, there did not seem to be a disagreement over the correct methodology, notwithstanding opinions like *Lawrence*.<sup>155</sup>

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<sup>150</sup> *Id.* at 723 (citation omitted).

<sup>151</sup> *Lawrence*, 539 U.S. at 566–67 (citation omitted).

<sup>152</sup> Brian Hawkins, Note, The *Glucksberg* Renaissance: Substantive Due Process Since *Lawrence v. Texas*, 105 Mich. L. Rev. 409, 410–11, 411 n.7 (2006) (“Indeed, *Lawrence* so strongly denounced narrow interpretations of the Due Process Clauses that one might reasonably wonder whether *Lawrence* intended implicitly to repudiate *Glucksberg* through its explicit rejection of *Bowers*. Many commentators have reached essentially this conclusion, predicting that *Lawrence* would usher in a new era of expanded constitutional freedoms.”).

<sup>153</sup> 130 S. Ct. 3020, 3023 (2010); see also Christopher R. Green, Substantive Due Process After *McDonald v. Chicago*, 80 Miss. L.J. Supra 49, 61 (2010–2011).

<sup>154</sup> *McDonald*, 130 S. Ct. at 3053 (Scalia, J., concurring) (internal quotation marks omitted).

<sup>155</sup> *Id.*

*B. Loving Through the Lens of Glucksberg and Lawrence*

Regardless of which methodology the Court is to use in a same-sex marriage case, however, *Loving* would not be helpful precedent for the question of whether marriage is a fundamental right. Most commentators who have acknowledged the split between *Glucksberg* and *Lawrence* in the context of the same-sex marriage issue have framed the analysis in terms of the parties involved. Specifically, “[i]n a gay-marriage case, we have to choose between characterizing the exclusion of gay couples from marriage as implicating either (1) a ‘right to same-sex marriage’ (narrow), or (2) a ‘right to marry’ (broad).”<sup>156</sup> The real distinction between the methodologies would be whether the right is defined as the right to cohabit in a sexually intimate relationship (the narrow right), or a broader definition rooted in autonomy or other terms from the *Lawrence* opinion. Therefore, if one is looking to apply the precedent of *Loving*, an important question is how *Loving* would be applied within the *Glucksberg* and *Lawrence* frameworks.

The *Glucksberg* methodology is usually found in cases like *McDonald*, where a statute is at issue; so applying it to the use of case law like *Loving* is unusual. In *Glucksberg* itself, however, one can see the way in which the Court envisioned the framework that should be used when it is applied to precedent. The two precedents that the plaintiff in *Glucksberg* argued supported a broad right to die<sup>157</sup> were *Cruzan v. Director, Missouri Department of Health*,<sup>158</sup> and *Planned Parenthood v. Casey*.<sup>159</sup> The court of appeals in *Glucksberg* had decided that “*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognize[d] a liberty interest in hastening one’s own death.”<sup>160</sup> The Supreme Court disagreed, interpreting *Cruzan* as “not simply deduced from abstract concepts of personal autonomy,” but as instead based on the “common-law rule that forced medication was a battery.”<sup>161</sup> By limiting its seemingly broad precedent to a more careful definition of the rights at stake, the Court distinguished

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<sup>156</sup> Dale Carpenter, *The New York Marriage Decision, Due Process, and Defining Fundamental Rights*, Volokh Conspiracy, July 6, 2006, 8:41 PM, <http://www.volokh.com/2006/07/06/the-new-york-marriage-decision-due-process-and-defining-fundamental-rights/>.

<sup>157</sup> Brief for Respondents, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 708925.

<sup>158</sup> 497 U.S. 261 (1990).

<sup>159</sup> 505 U.S. 833 (1992).

<sup>160</sup> *Glucksberg*, 521 U.S. at 725 (citations omitted).

<sup>161</sup> *Id.*

the right to refuse medical treatment in *Cruzan* from the right to physician-assisted suicide in *Glucksberg*.<sup>162</sup>

The *Glucksberg* opinion dealt with *Casey* in a similar fashion. The lower court had again focused on the broad rights language, noting that *Casey* had held that many fundamental “rights and liberties ‘involv[e] the most intimate and personal choices a person may make in a lifetime,’” and that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>163</sup> The Court rejected this broad reading of *Casey*, writing,

“[Although a fundamental right] may originate within the zone of conscience and belief, it is *more than a philosophic exercise*.” That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.<sup>164</sup>

*Casey* was therefore not precedent for those broad autonomy-based rights the opinion discussed at length; rather it was only precedent for the specific rights at issue based on the specific statute in question. Therefore, *Glucksberg* suggests that any court using a fundamental rights opinion as precedent would have to carefully define the rights found in the precedent when deciding its applicability.

*Loving* would receive the same treatment under a *Glucksberg* analysis. Although the term used in *Loving* was a seemingly broad “right to marry,” the *Glucksberg* framework would look to the conduct that was prohibited by the statute. Even though the law said that the prohibited conduct was simply the formalization of the marriage, the fundamental right it enabled was particularly defined by the other statutory provisions that would have been triggered, as *Kinney v. Commonwealth* demonstrates.<sup>165</sup> The fundamental marriage right in *Loving* was equivalent to the rights acknowledged in *Lawrence*, so a new “right to marry” would have to be defined as something broader. In other words, the Court’s requirement that fundamental rights be narrowly defined ultimately requires that *Loving* and other, older marriage precedent be distinguished

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 726 (quoting *Casey*, 505 U.S. at 851).

<sup>164</sup> *Id.* at 727–28 (citations omitted).

<sup>165</sup> 71 Va. (1 Gratt.) 858, 870 (1878).

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from present cases. Consequently, any modern marriage cases that assert a fundamental right to marry would require a fresh analysis of the rights in question.

Although the Court has supported the *Glucksberg* methodology, it is worthwhile to note that even under the *Lawrence* framework *Loving* would have decreased influence. In light of the observations in Part I, the *Lawrence* line of reasoning would have no use for *Loving* since it supports a more narrowly defined right. In fact, it is clear what the *Lawrence* methodology would say about a narrowly defined right in *Loving*: “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.”<sup>166</sup> *Loving* was somewhat broader than that; the right seemed to be more than sexual intercourse, and more like the right to a traditional family format. But the point is clear: to the extent that *Loving* supports a specific, particular fundamental right, it does not support the broad “autonomy” rights in *Lawrence*, or, for that matter, the peripheral rights in *Turner*. Therefore, even if the Court were to move away from cases like *McDonald* and return to the methodology of *Lawrence*, it would have to justify an expanded use of *Loving* beyond the scope of the original opinion.

In making that determination without the use of *Loving*, it seems likely that the Court would look to *Turner*. The language in that opinion suggests that there is a fundamental right to marriage even when it only includes the peripheral rights. Obviously, the incarcerated inmates of *Turner* were not going to be able to consummate their marriages or cohabit, so at first glance *Turner* seems to stand for the idea that there is indeed a fundamental right to the peripheral rights of modern marriage, even though it is no longer equivalent to the core rights in *Loving*.

There are, however, several reasons why *Turner* is a much weaker precedent than *Loving* and does not strongly support the assertion that same-sex marriage is a fundamental right. First, *Turner* seems to view marriage as a positive right rather than a negative right, and so it entails certain active obligations that are owed the couple, specifically “receipt of government benefits (for example, Social Security benefits), property

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<sup>166</sup> *Lawrence*, 539 U.S. at 567.

rights (for example, tenancy by the entirety, inheritance rights), and other, less tangible benefits.”<sup>167</sup>

In contrast, the interpretation of *Loving* that views the right to marry as a narrow right of legal cohabitation and sexual intimacy suggests that the fundamental right to marry is a negative one. Similar to the more precisely defined fundamental unenumerated rights,<sup>168</sup> the *Loving* definition of the right to marry puts an obligation of noninterference on the government, rather than an affirmative obligation to provide the peripheral benefits. Because modern marriage is no longer equated with that negative right, it is not so easily grouped into the list of fundamental rights. The lack of discussion on these points in the *Turner* opinion suggests that the Court attempted a redefinition of what constitutes the fundamental right to marry without a robust analysis of why it was doing so.

Another way of showing the weakness of *Turner* in a litigation context is simply the observation that *Glucksberg* itself would suggest that *Turner* should be distinguished, if not overruled outright. On both parts of the *Glucksberg* test, *Turner*'s reasoning could be problematic. In *Turner* the Court listed several things that are included in the marriage right, specifically “expressions of emotional support and public commitment,” an “exercise of religious faith,” “expression of personal dedication,” the expectation of consummation, “the receipt of government benefits,” “and other, less tangible benefits.”<sup>169</sup> This list is not carefully defined in terms of what conduct is prohibited by the statute, and more-

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<sup>167</sup> *Turner v. Safley*, 482 U.S. 78, 96 (1987). Other scholars have reinforced the idea of marriage as a positive right. Some contrast it with other fundamental rights by asserting that it “fits with the list [of other unenumerated fundamental rights] in that it involves family life and intimate life, but it also does not fit because it is a positive liberty.” Pull, *supra* note 11, at 56. Others have gone as far as to say that to the extent marriage is a positive right “there is probably no right to the institution of marriage as such. We are speaking here of fundamental rights, and rights protected as such are generally rights to be free from government intrusion; they do not require affirmative provision by the state.” Sunstein, *supra* note 141, at 2094.

<sup>168</sup> One commentator lists these other negative, unenumerated fundamental rights as

(1) [T]he right to educate one's children as one chooses; (2) the right to raise one's children as one chooses; (3) the right to study German in a private school; (4) the freedom to associate and privacy in associations; (5) the right of biologically related persons to live together; (6) the right of married people to use contraceptives; (7) the right of unmarried people to use contraceptives; (8) the right to interstate travel; and (9) the right to sexually intimate behavior.

Pull, *supra* note 11, at 55–56 (citations omitted).

<sup>169</sup> *Turner*, 482 U.S. at 95–96.

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over, it is not clear which rights or how many are necessary to create the fundamental right. As Justice O'Connor wrote, the Court was holding that "[t]aken together . . . these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context."<sup>170</sup> This would not appear to comport with the *Glucksberg* idea of a careful, precise formulation.

Finally, even assuming that the reasoning in *Turner* meets the narrow definition requirement of *Glucksberg*, an examination of each of the elements it mentioned as composing the fundamental right to marriage is in order. This is essentially the first step of the *Glucksberg* analysis—the determination of whether the rights in question are “deeply rooted in this Nation’s history and tradition.”<sup>171</sup> The “emotional support and public commitment,” “spiritual significance,” “prospect of full consummation,” and government benefits are all listed as aspects of the fundamental right to marriage, and the description of each of them as fundamental is problematic.<sup>172</sup> In short, they are not the kinds of rights that are likely to be considered as fundamental on their own.<sup>173</sup> Thus, looking beyond the relatively narrow implication that *Loving* no longer provides support for modern marriage as a fundamental right, a new view of *Turner* through the lens of *Glucksberg* and *McDonald* supports the far broader assertion that there may not be a fundamental right to post-*Lawrence* marriage at all.

### C. The Use of *Loving* in Modern Marriage Cases

At first glance, the erosion of *Loving* as precedent appears to be detrimental for proponents of same-sex marriage. But the observations that support that conclusion provide similar detriment to the opponents of same-sex marriage. Each will be considered in turn. The Supreme Court is likely to confront same-sex marriage in the near future.<sup>174</sup> One case

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<sup>170</sup> Id. at 96.

<sup>171</sup> *Glucksberg*, 521 U.S. at 720–21.

<sup>172</sup> See, e.g., Pull, *supra* note 11, at 33 n.51.

<sup>173</sup> See, e.g., Earl M. Maltz, Constitutional Protection for the Right to Marry: A Dissenting View, 60 *Geo. Wash. L. Rev.* 949, 956–58, 967 (1992) (enumerating the aspects of marriage other than the sexual relationship between marital partners as “emotional support and public commitment,” “economic benefits derived from the marital relationship,” and “the relationship between the husband, wife, and offspring of the marriage,” and finding the designation of any of them as fundamental rights to be unsupported).

<sup>174</sup> Jesse McKinley, Both Sides in California’s Gay Marriage Fight See a Long Court Battle Ahead, *N.Y. Times*, June 27, 2010, at A12.

that might present the question, for example, is *Perry v. Brown*,<sup>175</sup> a Ninth Circuit case that concerns California's Proposition 8. It was decided on narrow grounds, avoiding the issue of whether there is a fundamental right to marry.<sup>176</sup> That does not limit the Supreme Court to deciding the case narrowly, but regardless of whether the Court takes the opportunity to address the broader issue now or later, it will have limited precedent from which to draw. The discussion in the district court decisions and the arguments made throughout *Perry* are illustrative of the reliance both sides place on *Loving*, and why both sides will be affected by the erosion of *Loving*'s precedent.

Proponents of same-sex marriage have usually taken an approach that is common in many of the prior marriage cases, pursuing both an equal protection claim and a substantive due process claim.<sup>177</sup> The equal protection claims will not be affected by a proper understanding of *Loving*. The substantive due process claims, however, are likely to be negatively affected as outlined in the previous Section. In *Perry*, for example, the proponents of same-sex marriage argued to the court of appeals that "[t]he right to marry has always been based on, and defined by, the constitutional liberty to select the partner of one's choice."<sup>178</sup> This was consistent with the lower court decision, which defined the right to marriage as "the right to choose a spouse and, with mutual consent, join together and form a household."<sup>179</sup> This language is consistent with *Loving*, but under the *Glucksberg* analysis, *Loving* does no work to reach the ultimate conclusion of whether the statute is constitutional, since the carefully formulated rights that *Loving* acknowledged (that is, cohabiting in a sexual relationship) are not prohibited by the statute in question. At the very least, *Loving* will be unavailable as a useful precedent in light of *Glucksberg*.

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<sup>175</sup> 671 F.3d 1052, 1063 (9th Cir. 2012).

<sup>176</sup> *Id.* at 1082.

<sup>177</sup> Brief for Appellees at i, *Perry*, 671 F.3d 1052 (No. 10-16696), 2010 WL 4310749 at \*i; see also Final Brief of Plaintiffs-Appellees at 17, 24, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499), 2008 WL 5156764 at \*17, \*24.

<sup>178</sup> Brief for Appellees at 41, *Perry*, 671 F.3d 1052 (No. 10-16696), 2010 WL 4310749 at \*41.

<sup>179</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010). The court then proceeded to treat the peripheral rights as fundamental, rather than merely those core rights it had identified. *Id.* ("Plaintiffs seek to have the state recognize their committed relationships.").

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The negative consequences of this analysis, however, are not limited to the proponents of same-sex marriage. The observation of the changing nature of marriage substantially weakens many of the arguments used in opposition to same-sex marriage. Many of those arguments turn on the issue of procreation. It is clear from *Zablocki* and *Skinner* that the issue of procreation was important to marriage, but *Loving* implies that the fundamental right to marriage was more focused on the relationship of the married couple and their ability to live together in a sexually intimate context. That interpretation would comport with traditional morals and natural law views of marriage,<sup>180</sup> and some of the arguments do take that view, with procreation in the background. In *Perry*, the supporters of Proposition 8 argued that

“the existential purpose of marriage in every society is, and has always been, to regulate sexual relationships between men and women” and to “increase the likelihood that children will be born and raised in stable and enduring family units by the mothers and fathers who brought them into this world.”<sup>181</sup>

But after *Lawrence*, that conduct is no longer exclusive to marriage for couples of any sort, and as a result that argument appears to have been lost in 2003. When the sexual intimacy and cohabitation that form the basis for marriage are no longer exclusive to marriage, the argument that marriage ensures a stable environment for children loses its gravity.

#### CONCLUSION

The decline of *Loving's* precedent for the fundamental right to marry, along with the reasons for that change, essentially lowers the stakes for both sides of the debate. There are certainly other arguments that might prove dispositive, not the least of which would be persuasive equal protection arguments from each side. In the context of any substantive due process argument, however, the waning of *Loving's* precedential value limits their ability to rely on its acknowledgement of the fundamental right to marry. It is a reality that both sides will have to address, and the Court will have to confront it as well. When the Court decides whether

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<sup>180</sup> Sherif Girgis et al., What is Marriage? 34 Harv. J.L. & Pub. Pol'y 245, 284 (2011); Pull, supra note 11, at 85.

<sup>181</sup> Brief for Appellees at 40, *Perry*, 671 F.3d 1052 (No. 10-16696), 2010 WL 4310749 at \*40.

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marriage is a fundamental right, it will be unable to rely on *Loving's* substantive due process holding as precedent.