

## Questioning the Fundamental Right to Marry

### Abstract

The Supreme Court has adopted the doctrine of a constitutional “fundamental right to marry,” and has construed this doctrine to mean a fundamental right to state-recognized legal-marriage. However, the doctrine has several problems: (a) the Court never satisfactorily explains why marriage is a fundamental right; (b) the Court never defines the boundaries of marriage as a fundamental right; and (c) the Court has occasionally treated marriage as if it were *not* a fundamental right.

Further, the idea of a “fundamental right to marry” contains a debilitating internal contradiction: the notion of a fundamental right implies firm privileges which the state cannot deny, define, or disrespect, but marriage boundaries (the legal rules establishing who is eligible to marry whom, what formalities are required for marriage, and the legal ramifications of marriage) in the United States have always been subject to almost plenary state control which denies some marriages and refuses to give legal effect to others. What can a “right to marry” protecting individuals against the state possibly mean when the state itself determines what this thing called “marriage” is?

Two observations about marriage suggest the answer to this question. First, the word “marriage” carries several different meanings which are related to each other but conceptually distinct. The “fundamental right to marry” conundrum arises in part from the conflation of these various meanings. Second, the history of western marriage regulation—particularly the contemporary rejection of the traditional beliefs about sexuality and marriage that once provided principled boundaries for a right to marry—explains why the various meanings of marriage often are conflated today, and it suggests how the law can escape the “fundamental right to marry” conundrum. The Supreme Court should reinterpret the fundamental right to marry as referring to the practice of personal-marriage behaviors (cohabitation, economic partnership, joint decision-making, etc.) rather than state-recognized legal-marriage. This would preserve the entrenched idea of a fundamental right to marry while cohering with the negative liberty nature of the Court’s other recognized fundamental rights and accommodating the reality that the Constitution does not (currently) textually define or even mention marriage in any way.

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## Introduction

The proposed Federal Marriage Amendment<sup>1</sup> would insert the word “marriage” into the Constitution for the first time. This would be something of an uneasy addition to the document, for the Constitution currently leaves government regulation of domestic relations nearly unmentioned.<sup>2</sup> A constitutional policy leaving domestic relations laws largely to the discretion of the state legislatures has been affirmed for two centuries and has reached quasi-constitutional status as a bedrock element of federalism jurisprudence.<sup>3</sup>

Yet the Supreme Court is not new to controversy over marriage. Over the years it has dealt with marriage law in at least three different contexts. One is disputes between litigants from different states, through diversity jurisdiction. The second is disputes arising on land administered directly by the federal government, such as non-state territories. More recently, the Court has found and enforced nontextual constitutional protection for marriage under the doctrine of the “fundamental right to marry.”

Thus a Federal Marriage Amendment, if passed, would not launch the Court into completely uncharted constitutional wilderness; rather, it would reshape a constitutional landscape which already has some contours defined. But this is a potentially dynamic landscape,

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<sup>1</sup> “Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”

<sup>2</sup> The two exceptions to this statement are the provisions relating to slavery (Art. IV § 2) and the “full faith and credit” clause (Art. IV § 1) which requires states to credit the “public acts, records, and judicial proceedings” (including marriages) of each other. Though the slavery provisions are essentially irrelevant today, slavery was considered a “domestic relationship” prior to the Civil War.

<sup>3</sup> See, e.g., *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (“One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States”....So strong is our deference to state law in this area that we have recognized a “domestic relations exception” that “divests the federal courts of power to issue divorce, alimony, and child custody decrees.”); *United States v. Morrison*, 529 U.S. 598, 615-616 (2000) (rejecting petitioners’ argument because it “will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”); *Ankenbrandt v. Richards*, 504 U.S. 689 (1992)

as evidenced by the current controversy surrounding same-sex marriage. In this article, I consider the current state of the constitutional marriage landscape. I argue that the idea of a “fundamental right to marry” contains a debilitating internal contradiction: the notion of a fundamental right implies firm privileges which the state cannot deny, define, or disrespect, but marriage boundaries in the United States have always been subject to almost plenary state definition and control which denies some marriages and refuses to give legal effect to others.<sup>4</sup> What can a “right to marry” protecting individuals against the state possibly mean when the state itself determines what this thing called “marriage” is?

The contradiction has long lurked beneath the surface of the Supreme Court’s marriage rhetoric but has only recently become apparent as a problem for the Court in deciding cases. Consideration of that problem in the context of a vastly changed modern constitutional landscape where privacy-related rights often receive significant protection forces the conclusion that the Court’s past analyses of marriage under the Constitution are largely unhelpful for untangling the dilemma of what a “fundamental right to marry” can possibly mean.

Rather, the puzzle must be understood through the historical context in which it arose. The tension between state regulation of marriage and the idea of marriage as a right has existed since the Founding, but long carried little significance because traditionally the same force that gave rise to notions of a right to marry also motivated state definitions of the legal boundaries of marriage. That force was the religious dictates of the Catholic/Anglican tradition carried to America by English colonists. Eventually the social consensus that church tradition should

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<sup>4</sup> By “boundaries” of marriage I mean the substantive rules which define marriage as a concept: who is eligible to marry; whom they are eligible to marry; what procedures are necessary to create a marriage; what rights are granted by marriage, both between spouses and between a spouse and the state; what obligations marriage imposes, both between spouses and between a spouse and the state or other social actors; what conditions allow the termination of a marriage; etc. All of these are “boundary” issues in the sense that they describe where marriage begins and where it ends—what it means and what it does not mean.

define state marriage policy eroded, and individual rights claims concerning marriage which challenged the content of state marriage regulation began to receive sympathetic hearings from courts rather than being dismissively slapped down as unreasonable. When courts began giving serious consideration to such claims, the idea of a fundamental right to marry gained the potential for enormous constitutional and social power, and the long-dormant tension between marriage as a right and legal marriage as a creation of the state became significant.

The Christian understanding which undergirded the original idea of a fundamental right to marry has mostly been discarded, both in American social norms and in American law. Recognition that the theoretical foundation of the traditional right to marry no longer exists should force the Supreme Court to develop a new account of the right to marry. However, analysis of the abstract concept “marriage” suggests that development of such an account is a difficult, perhaps impossible, task. Separating out the various ways in which the word “marriage” is used (both in common parlance and in legal rhetoric) shows “marriage” to carry several different meanings, each of which has different implications for a fundamental right to marry. However, no satisfying principled method of choosing a particular account of “marriage” to be the constitutionally protected one exists. Only the simplest meaning of “marriage”—its manifestation as a personal relationship between particular individuals—is justifiable as a fundamental right if the Court is to use a non-ideological approach in determining what the constitutional right to marry means.

My conclusion, then, is that the Supreme Court’s “fundamental right to marry” needs to be reinterpreted as a negative liberty—a claim of individual autonomy against the encroaching hand of the state—rather than a positive right<sup>5</sup> which obligates the state to provide all persons a particular set of options under the heading “marriage.” Only in this way can the right be given

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<sup>5</sup> See Frank B. Cross, *The Error of Positive Rights*, 48 U.C.L.A. L. Rev. 857 (2001)

content without that content being simply the aggregate policy preferences of a five-member majority of the sitting Justices.

## **I. Constitutional Marriage Cases: Origins of the Right to Marry**

### A. Groundwork

Over the past 150 years, the Supreme Court has developed a jurisprudence of a fundamental constitutional right to “marry” and to “marriage.” The process started at least as far back as 1877, when Justice Strong wrote for the Court, “Marriage is everywhere regarded as a civil contract. Statutes in many of the States, it is true, regulate the *mode* of entering into the contract, but they do not confer the right...”<sup>6</sup> Strong’s opinion also referred to the “common-law right to form the marriage relation by words of present assent” and the “common right” to marry.<sup>7</sup>

In 1923, during the heyday of its first notorious foray into the realm of “substantive due process,”<sup>8</sup> the Court declared in *Meyer v. Nebraska*, “Without doubt, [constitutionally-protected 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>9</sup> *Meyer* argued that some restrictions on marriage would be unconstitutional, using the arrangement in Plato’s *Republic* (where wives and children are held in common) as an example.<sup>10</sup>

By 1942 the *Lochner* era was over, but the idea of marriage as a nontextual constitutional right persisted. In *Skinner v. Oklahoma* Justice Douglas wrote for the majority, “We are dealing

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<sup>6</sup> *Meister v. Moore*, 96 U.S. 76, 78-79 (1877)

<sup>7</sup> *Meister v. Moore*, 96 U.S. 76, 78-79, 81 (1877).

<sup>8</sup> See, e.g., *Lochner*

<sup>9</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>10</sup> *Id.* at 401-402

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>11</sup> Douglas’ identification of marriage and procreation with each other was an old sentiment, but it was soon to be challenged and rejected in an opinion written by Douglas himself.

During the 1960s the Supreme Court inaugurated the field of modern privacy jurisprudence, and the Court instinctively gathered the right to marry into this new constitutional structure. In 1965 the Court used “the notions of privacy surrounding the marital relationship” to justify striking down a state ban on the use of contraceptives in *Griswold v. Connecticut*.<sup>12</sup> This decision, which deployed expansive language valorizing marriage to justify its holding barring the states from interfering with the intimate aspects of marriage, severed procreation from marriage by granting married persons a constitutional right to prevent conception.<sup>13</sup> Justice Douglas concluded the *Griswold* opinion with an extraneous paean to marriage that did not relate to contraceptive use, but which the Court would find itself regularly quoting when deciding other marriage cases in the succeeding decades:

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>14</sup>

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<sup>11</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942),

<sup>12</sup> 381 U.S. 479, 485 (1965)

<sup>13</sup> Within seven years the Court revealed that marriage was not really the source of the privacy right justifying *Griswold*’s holding. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court used equal-protection arguments to extend privacy protection to the use of contraceptives by *unmarried* couples as well. “If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If 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.” *Id.* at 453.

<sup>14</sup> *Id.* at 485-86.

## B. Genesis

Two years later, in *Loving v. Virginia* the Court declared marriage to be a constitutional liberty protected by the Due Process Clause because “[t]he 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>15</sup> Like the *Griswold* ode to marriage, though, the *Loving* reference to “freedom to marry” was entirely unnecessary for the Court’s holding.<sup>16</sup> Ten-and-a-half pages of the eleven-page *Loving* opinion developed an equal protection analysis striking down Virginia’s antimiscegenation law on the simple ground that the law constituted invidious racial discrimination. The “freedom to marry” language appeared in a two-paragraph section at the end of the opinion that did not in any way affect the outcome of the case. Its only significance was the fact that it placed the idea of “freedom to marry” into a Supreme Court decision which found a state marital regulation unconstitutional.

It would take eleven years for the Court to expand upon *Loving* and decide another case striking down a state regulation of marriage because of the right to marry. In the interval, however, references to the right or freedom to marry began popping up in the U.S. Reports. In 1971, the Justices decided that the Due Process Clause prohibited states from allowing court fees to prevent indigent persons from filing for divorce. “[M]arriage involves interests of basic importance in our society,” said the majority. “[Access to the courts] is the exclusive precondition to the adjustment of a fundamental human relationship.”<sup>17</sup> Justice Harlan’s opinion for the Court took pains to clarify that it did not hold access to the courts to be a fundamental

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<sup>15</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967)

<sup>16</sup> “[*Loving*] could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause.” *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). “But for this expansive rhetoric, which...went beyond what the decision of the case at hand actually required, *Loving v. Virginia* would have been an unremarkable application of the Equal Protection Clause....But with this language, the case casts doubt on the validity of much state regulation of marriage.” Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* 81 (1989).

<sup>17</sup> *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971).



right in all circumstances, but only in this case where court access was “the exclusive precondition to the adjustment of a fundamental human relationship.”<sup>18</sup> In 1973, the Court mentioned the right to marry in *Roe v. Wade*.<sup>19</sup> In 1974, the right appeared in *Cleveland Board of Education v. LaFleur*.<sup>20</sup> In 1977, the Court referred to the right to marry in *Moore v. City of East Cleveland*<sup>21</sup> and in *Smith v. Organization of Foster Families for Equality and Reform*.<sup>22</sup>

Also decided in 1977 was *Califano v. Jobst*, which appeared to trim back the implications of the right to marry.<sup>23</sup> The Court upheld federal rules terminating a dependent person’s Social Security benefits if he or she married someone who was ineligible for the same benefits. In effect, the federal government was allowed to penalize someone for marrying.

### C. Fruition

However, later in the same 1977-78 Term the decision in *Zablocki v. Redhail*<sup>24</sup> shoved *Jobst* aside in the pantheon of the constitutional marriage cases. In *Zablocki* the Supreme Court’s scattered historical references to a right to marry coalesced around the doctrinal right-to-marry nucleus established in *Loving*. The *Zablocki* opinion attempted to constitutionally anchor the right to marry and bring order to the doctrine by comprehensively setting forth the reasons for recognizing a fundamental right to marry.

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<sup>18</sup> *Id.* at 382-83

<sup>19</sup> “[O]nly personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ ...are included in this guarantee of personal privacy....[This personal privacy] right has some extension to activities relating to marriage...” *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>20</sup> “This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974).

<sup>21</sup> “The Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Fourteenth Amendment.” *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (quoting *LaFleur*, 414 U.S. at 639-40).

<sup>22</sup> “The individual’s freedom to marry and reproduce is ‘older than the Bill of Rights’...” *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (quoting *Griswold*, 381 U.S. at 486).

<sup>23</sup> *Califano v. Jobst*, 434 U.S. 47 (1977)

<sup>24</sup> 434 U.S. 374 (1978)

The facts of *Zablocki* involved a Wisconsin statute which provided that Wisconsin residents having court-ordered obligations to pay child support could not marry unless they first proved they were current in paying the support. Plaintiff Roger Redhail was \$3700 behind in his child support payments, so the county clerk denied him a marriage license. He sued, claiming the statute violated his constitutional rights. A three-judge district court applied strict scrutiny under the Equal Protection Clause on the grounds the statute infringed the fundamental right to marry; the panel then held the statute unconstitutional. On appeal, the Supreme Court affirmed on equal protection grounds.

Justice Marshall summarized the Court's decision, "Appellee defends the lower court's equal protection holding and, in the alternative, urges affirmance of the District Court's judgment on the ground that the statute does not satisfy the requirements of substantive due process. We agree with the District Court that the statute violates the Equal Protection Clause."<sup>25</sup> He then launched into his analysis. "In evaluating [the statute] under the Equal Protection Clause, 'we must first determine what burden of justification the classification created thereby must meet by looking to the nature of the classification and the individual interests affected.'"<sup>26</sup> Here, the burden of justification was a "'critical examination' of the state interests advanced in support of the classification" because "the right to marry is of fundamental importance."<sup>27</sup>

Marshall explained why the right to marry was of fundamental importance and required such a "critical examination." He cited *Loving* as establishing "a fundamental liberty protected by the Due Process Clause, the freedom to marry,"<sup>28</sup> and then deployed a long list of reasons for considering marriage a fundamental right: marriage's "vital" role in "the orderly pursuit of

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<sup>25</sup> *Id.* at 382.

<sup>26</sup> *Id.* at 383 (quoting *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253 (1974))

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

<sup>28</sup> *Id.*

happiness by free men”; its necessity “to our very existence and survival”; its status as “the most important relation in life” and “the foundation of family and society”; its status as “part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause”; the fact that it “involves interests of basic importance in our society”; its “associational interests”; its role as the foundation of family life (which has its own privacy protections); and its role in legalizing sexual relations.<sup>29</sup> After establishing the “fundamental” status of the freedom to marry in this way, Marshall accommodated *Califano v. Jobst* by allowing that the government may impose “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship...”<sup>30</sup>

Returning to the statute, Marshall concluded that it “absolutely prevented” some people from being able to marry merely because of insufficient “financial means.”<sup>31</sup> Applying the standard of review to his determination that the statute implicated constitutionally protected interests, Marshall asked what purpose the classification served: “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”<sup>32</sup> He rejected Wisconsin’s argument that the classification allowed for “opportunity to counsel the applicant as to the necessity of fulfilling his prior [child] support obligations” because there was no reason to continue to deny marriage once an applicant *received* such counseling, and he rejected the state’s argument that the classification justifiably furthered the well-being of the child-beneficiary of the support obligation on the grounds that the marriage

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<sup>29</sup> *Id.* at 383-386

<sup>30</sup> *Id.* at 386. He later distinguished *Califano* with the explanation that there the “Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and...there was no evidence that the laws significantly discouraged...any marriages.” *Id.* at 387 n.12.

<sup>31</sup> *Id.* at 386-87

<sup>32</sup> *Id.* at 388

prohibition did not directly collect money for the support beneficiaries and because the state had other means for enforcing the support obligation.<sup>33</sup> The opinion concluded simply, “The statutory classification created by [the statute] cannot be justified by the interests advanced in support of it.”<sup>34</sup>

The *Zablocki* opinion is perplexing because it fuses together equal protection, due process, and fundamental rights analysis. Justice Marshall’s argument is structured like a classic equal protection opinion: (1) it locates a constitutionally protected interest in the statute (in this case, the right to marry); (2) it uses this interest to establish a level of scrutiny for the statute (in this case, because marriage is a fundamental right, state classifications implicating marriage are subject to “critical examination” by the courts); (3) it analyzes the state interests advanced to justify the statute to determine if they are sufficiently important and narrowly drawn (in this case, the Wisconsin statute’s marriage do not survive the critical examination).

However, the classification made by the statute here is not *based upon* the constitutionally protected interest, as in a classic equal protection case; rather, the statute implicates *access to* the constitutionally protected interest. The protected interest is not a suspect class; the protected interest is marriage. The statute’s classification is the line it draws between people who are allowed to marry (the default) and people who are not allowed to marry (because they owe child support). The Court’s holding is that this classification violates the Equal Protection Clause because the state does not have a good reason for the classification; the classification does not adequately accomplish what the state claims it is intended to accomplish.

This is strange. Standard equal protection review allows that *any* remotely conceivable “rational basis” for a classification is sufficient to justify the classification, unless the

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<sup>33</sup> Id. at 388-89

<sup>34</sup> Id. at 390-91

classification utilizes or implicates forbidden characteristics, like race. No such characteristics are involved here, and the Court could not plausibly argue that men who are years behind in their child support are a threatened class in need of special judicial protection from legislative animosity. Ordinarily, the legislature could single out men-who-are-delinquent-in-child-support as a class in any number of different ways for unfavorable treatment intended to persuade them to pay their child support.<sup>35</sup>

The Court's technique in *Zablocki* for ratcheting up its level of scrutiny from "rational basis" to a "critical examination" is to say that the classification in question affects the plaintiffs' access to marriage, which is a fundamental right. From there on, the analysis is an equal protection analysis. But the substance of the Court's conclusion is really that Wisconsin cannot define the boundaries of marriage as "a legal relationship available to anyone who has not been irresponsible enough to fall behind in his or her child support payments." Such a declaration says more about the boundaries of the fundamental right to marry than it does about the classification of men-who-are-delinquent-in-child-support. In *Zablocki*, the substance of the right to marry, rather than the classification of men-who-are-delinquent, is the real issue, though the Court's use of equal protection analysis and rhetoric obscures this fact.

Thus, the *Zablocki* Court says it strikes down the statute on equal protection grounds, but the holding's work is being done *sub silentio*, at least in part, by substantive due process notions.<sup>36</sup> We will return to this puzzle later; for present purposes, it is sufficient to note that

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<sup>35</sup> As the Court itself notes; see *id.* at 389-90

<sup>36</sup> "The problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom." *Zablocki*, 343 U.S. at 391-92 (Stewart, J., concurring in judgment). Cass Sunstein argues, "Notwithstanding its clear association of the right to marry with other rights protected by the Due Process Clause, [*Zablocki*'s] ultimate holding turned on the fundamental right branch of the equal protection doctrine, not on substantive due process..." Cass R. Sunstein, *The Right to Marry*, 26 *Cardozo L. Rev.* 2081 (2005). Thus, "judgments about the scope of the right to marry ought to be made with close attention to the Equal Protection Clause." *Id.* at 2112. Sunstein's attempt to bring clarity to *Zablocki* is unsatisfying. It is unclear what a "fundamental right to marry" contributes to constitutional doctrine if the extent of that right is determined by equal protection

*Zablocki* picked up *Loving*'s language about a fundamental right to marry and relied solely upon the right to marry to strike down a state marriage regulation—the first case to do so.

#### D. Exposition

Nine years later, *Turner v. Safley*, 482 U.S. 78 (1987), held that because of the fundamental right to marry a Missouri prison could not have an “almost complete ban on the decision to marry” for its inmates.<sup>37</sup> The prison in *Safley* enforced a regulation allowing inmates to marry only if the prison superintendent granted them permission; permission was only granted for “compelling reasons,” which usually meant only in the case of a pregnancy or an illegitimate child.<sup>38</sup> When inmates seeking to marry challenged the rule, the federal district and appellate courts applied strict scrutiny to it on the ground that marriage was a fundamental right. Both found the restriction impermissibly broad in light of the state’s asserted interests of promoting prisoner rehabilitation and prison security.<sup>39</sup>

The Supreme Court affirmed, declaring, “The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life.”<sup>40</sup> Citing marriage as conveying “emotional support and public commitment”; carrying “spiritual significance”; promising the prospect of “ultimate[...full] consumma[tion]”; and being a “precondition to the receipt of government benefits,” Justice O’Connor decided, “Taken

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considerations. If equal protection concerns are what drive the Court to a conclusion about regulation of marriage, why not simply rest the holding on equal protection grounds without reference to any right to marry? Sunstein’s proposal to hide equal protection holdings in a substantive fundamental right analysis is an inversion of what the *Zablocki* majority did (hiding substantive fundamental right analysis in an equal protection holding), and it risks creating a legal regime where future marriage regulations which do *not* implicate equal protection concerns are struck down merely because the notion of a fundamental right has been unnecessarily attached to legal marriage.

<sup>37</sup> *Safley*, 482 U.S. at 99.

<sup>38</sup> *Id.* at 82

<sup>39</sup> *Id.* at 83-84

<sup>40</sup> *Id.* at 95.

together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context.”<sup>41</sup> The Court then found the prison’s marriage restrictions to not even pass a “reasonable relationship” test in light of the reasons given by the state for the regulations.<sup>42</sup>

*Turner*’s discussion of the right to marry is quite brief, and the Court makes little effort to explain what it envisions the larger ramifications of its opinion should be. However, the implications of the decision are potentially quite broad. The “attributes of marriage” the Court found adequate to merit constitutional protection in *Turner* are small and, with the exception of government benefits, include little that inmates could not obtain by a declaration of commitment apart from an official, legal marriage. If this shadow of marriage is sufficient to qualify as a fundamental right, the fundamental right to marry might be robust, indeed.<sup>43</sup>

On the other hand, such a thin account of marriage raises the question of what minimum core of attributes is necessary to create a constitutionally protected marriage interest, and why this particular minimum core qualifies, rather than a broader or narrower one. *Turner* does not even attempt to answer this question; it cryptically declares “we conclude these remaining elements are sufficient” and moves on. This approach disposes of the case at hand, but its lack of explanation smacks of legislation rather than adjudication, and it provides little guidance for the

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<sup>41</sup> Id. at 95-96.

<sup>42</sup> Id. at 97.

<sup>43</sup> See, e.g., Jamal Greene, Case Comment: Divorcing Marriage from Procreation, 114 Yale L.J. 989, 996 (2005) (“The *Turner* Court had to evaluate whether prisoners--prisoners!--with no procreative justification still have a fundamental right to marry, and it held unanimously that they do. The case demonstrates, therefore, that marriage is fundamental under the U.S. Constitution not because it provides a setting for heterosexual procreation but because it solemnizes a social relationship that individuals regard as fundamentally important. Employing *Turner* for this proposition might have added the legitimacy of doctrinal argument to [*Goodridge v. Department of Public Health*]’s revolutionary outcome [requiring Massachusetts to grant same-sex couples marriage licenses.]”); Carlos A. Ball, Symposium: Gay Rights after *Lawrence v. Texas*: *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 Minn. L. Rev. 1184, 1202 (2004) (“it is important to note that *Turner* by necessity delinks marriage from privacy. This is so because prisoners do not enjoy constitutionally protected privacy rights....Furthermore, the fundamental right to marry applied in *Turner* even though there is no corresponding right of married individuals to engage in sexual intimacy while in prison.”)

future, especially in light of the fact that the attributes the opinion considers sufficient to qualify as a “constitutionally protected marital relationship” are not convincing on that question.<sup>44</sup> In view of the opinion’s declaration that the prison regulations in question did not even have a “reasonable relationship” to the ends advanced by the state to justify them, it might make more sense to read *Turner* very narrowly, since rules which fail a “reasonable relationship” test would be stricken down for infringing on almost *any* interest, fundamental right or not.

## II. Constitutional Marriage Doctrine: Contradiction within the Right to Marry

Though the idea of a right to marry has intuitive appeal to anyone familiar with the place of marriage in American tradition and society, the fundamental right to marry jurisprudence remains murky. The extent of the right to marry has not been detailed.<sup>45</sup> In part, this is because the constitutional marriage jurisprudence contains a significant internal tension. As seen above, the Court calls marriage a fundamental right. However, the Court has also long said that states have almost total power to regulate marriage. “The State...has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the

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<sup>44</sup> As noted above, the *Turner* Court mentions four aspects of marriage which can persist, even in a prison setting: “emotional support and public commitment”; “spiritual significance”; the prospect of full consummation in the future; and the receipt of government benefits. Why marriage’s expression of “emotional support and public commitment” makes it deserve special constitutional protection is unclear. In *Safley* itself the Court upheld restrictions on inmate letter-writing, which is certainly a means of expressing emotional support and commitment. Perhaps the Court intends this argument to be placed in the historical favoritism shown to marriage, but it does not say this, and such an argument would be vulnerable to the counterpoint that marriage has historically been closely regulated and restricted by the state, any emotional support and public commitment function notwithstanding. See Part VI.A, *infra*. Arguments that religious beliefs about marriage rendered state limitations on it invalid were decisively rejected by the Court in *Reynolds v. United States*, 98 U.S. 145 (1879). This, along with the Court’s affirmation that laws of general applicability are not rendered invalid by particular religious beliefs in *Employment Division* suggests that “spiritual significance” cannot justify a fundamental right to marry. The prospect of full consummation of marriage is irrelevant to prison marriages because the intended spouses could always marry later, when the “prospect” became real. This leaves only the receipt of government benefits, and it is clear that there is no fundamental right to receive such benefits. See Section III.A.6, *infra*.

<sup>45</sup> “There is little consensus on the parameters and boundaries of the right to marry. The courts have yet to decide what exactly is meant by the right to marry....They have yet to decide on the fundamental purpose of marriage.” John Hiski Ridge, A Philosophical Analysis of the Fundamental Law of Marriage in American Jurisprudence, Ph.D. dissertation at Boston College 19 (2004).



causes for which it may be dissolved”<sup>46</sup>; “Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature....rights under it are determined by the will of the sovereign, as evidenced by law.”<sup>47</sup>

### A. Logical Tension

Quite simply, broad state power to regulate marriage clashes with the idea of marriage as fundamental right. If a state can define the boundaries of marriage, then it can manage its citizens’ access to marriage through those boundaries. But if marriage is a fundamental constitutional right, such state attempts to restrict access to it should be viewed with great suspicion by the courts.

This tension has been noted by historians<sup>48</sup> and by commentators attempting to analyze the fundamental right to marry. John Hiski Ridge notes “the apparent conflict of two seemingly incompatible lines of cases that have developed in the common law.”<sup>49</sup> He describes competing claims about the nature of marriage, each based upon Supreme Court cases: one line with the view “that government should exercise broad control over marriage to support and protect...traditional purposes and perceptions,” and another line with the view “Each individual citizen should have the right to define marriage for herself...[and] government involvement in

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<sup>46</sup> *Pennoyer v. Neff*, 95 U.S. 714, 734-735 (1877)

<sup>47</sup> *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888)

<sup>48</sup> “Marriage remained simply too important to be left entirely to the invisible hand of the nuptial marketplace. Rather, a recurrent tension between public and private nuptial responsibilities persisted. Lawyers and laypersons, haunted by a fear of marriage lapsing either into individual anarchy or state coercion, repeatedly struggled to balance the two.” Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 21 (1985).

<sup>49</sup> John Hiski Ridge, *A Philosophical Analysis of the Fundamental Law of Marriage in American Jurisprudence*, Ph.D. dissertation for Boston College 11 (2004). Though Ridge analyzes in detail the Supreme Court cases dealing with a fundamental right to marry, the question he asks is philosophical rather than jurisprudential: “The question being asked here is not how does or should the law define marriage...” *Id.* at 180-81.

marriage should be limited.”<sup>50</sup> William Hohengarten writes, “There is an obvious tension between the states’ power to define marriage and their obligation not to interfere with decisions to enter into a marital relationship.”<sup>51</sup> Jamal Greene muses, “It has become popular to state without elaboration that legislatures, not judges, define marriage. But if this is so, then marriage is an odd fundamental right. The jurisprudential purpose of calling a right ‘fundamental’ is to remove it from the vagaries of the ordinary political process.”<sup>52</sup>

Some have argued that the right to marry is itself nonsensical. Earl Maltz sees “unusually complex theoretical problems” behind a fundamental right to marry, including federalism issues, defining what the right to marry means, and the problem of a fundamental right requiring the exertion of state power behind a consensual arrangement rather than merely granting freedom from constraint.<sup>53</sup> Arguing that the traditional purposes of marriage—public expression of support and commitment, economic partnership, and sexual activity—can be fulfilled for any individual without them entering into a legally recognized marriage, he concludes, “Fundamental right/compelling governmental interest analysis is ill-suited to the task of dealing with the complex variety of rights and obligations implicated by the right to marry.”<sup>54</sup>

Others have simply taken the Court’s pronouncements of a fundamental right to marry at face value as limitations on state power over marriage.

[C]ivil marriage...cannot exist in the absence of state recognition. It is State action that creates the very institution that makes the exercise of the fundamental right to liberty in the context of marriage possible.

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<sup>50</sup> *Id.* at 10-11.

<sup>51</sup> William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 *Yale L.J.* 1495, 1505 (1994).

<sup>52</sup> Jamal Greene, Case Comment: Divorcing Marriage from Procreation, 114 *Yale L.J.* 1989, 1992-93 (2005) (internal citations omitted).

<sup>53</sup> Earl M. Maltz, Constitutional Protection for the Right to Marry: A Dissenting View, 60 *George Wash. L. Rev.* 949, 954-55 (1992)

<sup>54</sup> *Id.* at 956-61

There are constitutional limitations, therefore, in the ability of the state to refuse to recognize (heterosexual) marriage.<sup>55</sup>

Cass Sunstein attempts to balance the tension between state regulation and a fundamental right to marry by comparing marriage to voting: “[L]ike the right to vote, the right to marry is a right of equal access to a publicly-administered institution....[T]he right to marry is parasitic on positive law. It is a right of access...to the expressive and material benefits that official marriage provides.”<sup>56</sup> Sunstein’s approach would classify the right to marry not under substantive due process, but “as part of the ‘fundamental rights’ branch of equal protection doctrine.” However, he admits “there is no simple explanation of why it should so qualify,” advancing “the expressive benefits of marriage” as the “most plausible account.”<sup>57</sup>

This escape, though, renders any “fundamental right” aspect of marriage essentially irrelevant. Marriage is different from voting because voting is a *system*; an individual’s right to vote is meaningless outside the context of other people’s voting rights. In contrast, a marriage can exist on its own.<sup>58</sup> Under Sunstein’s approach, the hard questions about the permissible range of state limitations on marriage would be answered by equal protection considerations. Comments about the “fundamental” nature of the marriage would be little more than rhetorical place-fillers in judicial opinions. Sunstein’s approach resolves the state regulation/fundamental right tension by largely eviscerating the significance of the fundamental right, at least as it applies to state-recognized marriage.<sup>59</sup>

## B. Rhetorical Tension

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<sup>55</sup> Ball, at 1206. *See also*, Hohengarten, at 1496 (“[T]he right to marry necessarily imposes an affirmative obligation on the state to establish this legal framework.”)

<sup>56</sup> Sunstein, at 2118

<sup>57</sup> *Id.*

<sup>58</sup> *See* Sunstein at 2097

<sup>59</sup> Sunstein does reserve meaning for the fundamental right to marry by concluding it includes “some right of intimate association in the private sphere” which the state may not prohibit. *Id.* at 2096. *Cf.* Parts V and VI, *infra*.

A second, closer look at the Court’s marriage rhetoric reveals that the tension between fundamental right and state regulation has been present in the Court’s language about marriage from the beginning, though it lurked unrecognized. *Meister* declared:

Statutes in many of the States, it is true, regulate the mode of entering into the [marriage] contract, but they do not confer the right....No doubt, a statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent.<sup>60</sup>

Here, the Court equivocated between broad legislative power to regulate the entering of marriage, the right to marry which it considered prior to legislation, the legitimate power of the state to require procedural formalities for marriage, and the common-law right to marry by simple words of assent. Similarly, in *Maynard* the Court said that because marriage is the “most important relation in life” (an argument that would today be used to justify a claim of some right as a fundamental right or a substantive due process right outside the control of the legislature<sup>61</sup>) this is *why* it “has always been subject to the control of the legislature.”<sup>62</sup>

Tension between the right/freedom to marry and state regulation of marriage bubbled to the surface in *Boddie v. Connecticut*. There the majority declared:

[G]iven the basic position of the marriage relationship in this society’s hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely

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<sup>60</sup> *Meister v. Moore*, 96 U.S. 76, 78-79 (1877).

<sup>61</sup> *E.g.*, “The reason that marital prohibitions must be examined closely is that marriage involves such an important right, which serves a variety of societal and individual purposes. Marriage provides a setting in which children might be produced and raised and, given the lesbian and gay baby boom, this is an important reason to *recognize* same-sex unions.” Mark Strasser, *On Same Sex Marriage, Civil Unions, and the Rule of Law* 118 (2002).

<sup>62</sup> *Maynard*, 125 U.S. at 205.

because of inability to pay, access to its court to individuals who seek judicial dissolution of their marriages.<sup>63</sup>

This statement is interesting because it gestures back to the early nineteenth-century understanding that the social significance of marriage justifies state regulation of marriage while simultaneously invoking the modern understanding that individual rights justify limitations on the state's regulatory power. Thus, *Boddie* attempted to straddle old understandings of marriage and new views on individual liberty. But in response, Justice Black's *Boddie* dissent argued:

This is a strange case and a strange holding. Absent some specific federal constitutional or statutory provision, marriage in this country is completely under state control, and so is divorce...The Court here holds, however, that the State of Connecticut has so little control over marriages and divorces of its own citizens that it is without power to charge them practically nominal initial court costs...<sup>64</sup>

Black thus took the position that state power over marriage is almost plenary and threw down the gauntlet to the majority to say otherwise.

The *Boddie* majority had only a weak response to this challenge. It acknowledged state power over "many aspects" of marriage but tried to avoid addressing the details of the extent of such power, framing the case (and most of its analysis) instead in terms of a due process right of access to the courts. However, these access-to-court considerations were rendered peripheral when the end of the opinion qualified its holding as only reaching "this legal relationship" of marriage which is "a fundamental human relationship."<sup>65</sup> Thus *Boddie* gave decisive weight to the fundamental status of marriage but did so gingerly, hiding behind notions of court access to avoid giving any substantive explication of the "fundamental human relationship" of marriage.

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<sup>63</sup> *Boddie*, 401 U.S. at 374.

<sup>64</sup> *Boddie*, 401 U.S. at 389-90 (Black, J., dissenting)

<sup>65</sup> *Boddie*, 401 U.S. at 383.

Perhaps the most significant manifestation of the Court’s fundamental right/state regulation of marriage tension appeared in *Zablocki* itself:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.<sup>66</sup>

After this glib assertion, *Zablocki* failed provide any rubric for determining what regulations are “reasonable” and “do not significantly interfere” with decisions to marry. It did not address longstanding state bans on polygamy, which certainly interfere with decisions to enter into marital relationships, nor did it give any account of what minimum set of relationships the boundaries of marriage must constitutionally include.

This unresolved tension between state power to regulate marriage and the idea of a fundamental right to marry explains the above-noted puzzle in the *Zablocki* opinion—the use of equal protection analysis to strike down the statute when substantive due process considerations do most of the analytic work. The *Zablocki* Court was unwilling—perhaps unable—to lay down an explanation of the boundaries of the fundamental right to marry, but it wanted to use the notion of a fundamental right to marry to strike down the statute. So it used the substantive due process right to trigger an equal protection analysis. By cloaking its holding in equal protection language, it hid the fundamental right to marry doctrine’s need of an account of its borders.

This stratagem, though, did not go unnoticed. *Zablocki* generated three separate opinions concurring in judgment, and a dissent. The multiplicity of opinions is explained by the Justices’ disagreement over how to deal with the problem of finding a principled way to define the boundaries of a fundamental right to marry.

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<sup>66</sup> *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)

Justice Stewart’s concurrence in the judgment pointed out the misdirection in the majority opinion, declaring, “The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications,”<sup>67</sup> and accusing the majority of using “substantive due process by another name” to avoid the criticisms associated with the doctrine.<sup>68</sup> He advocated, “bring[ing]...into the open” the substantive due process holding to “force[ ] a healthy and responsible recognition of the nature and purpose of the extreme power we wield when...we invalidate *pro tanto* the process of representative democracy.”<sup>69</sup>

Though he used substantive due process to reach the same conclusion as the majority on the facts of *Zablocki*, Stewart’s opinion rejected the Court’s premise:

I do not agree with the Court that there is a ‘right to marry’ in the constitutional sense. That right, or more accurately that privilege, is under our federal system peculiarly one to be defined and limited by state law....A State may not only ‘significantly interfere with decisions to enter into marital relationship,’ but may in many circumstances absolutely prohibit it....<sup>70</sup>

He found instead a liberty interest in the decision to marry, and argued that Wisconsin’s regulation impermissibly infringed this liberty by preventing the poor from marrying.<sup>71</sup>

Like the majority, though, Stewart did not himself provide a principled way of defining the boundaries of the constitutionally protected liberty to marry or a solution to the tension between state power over marriage and the liberty to marry. He simply phrased his ducking of the question differently: “But, just as surely, in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go.”<sup>72</sup>

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<sup>67</sup> *Zablocki*, 434 U.S. at 391 (Stewart, J., concurring in judgment)

<sup>68</sup> *Id.* at 395.

<sup>69</sup> *Id.* at 396.

<sup>70</sup> *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring in judgment)

<sup>71</sup> *Zablocki*, 434 U.S. at 394-96 (Stewart, J., concurring in judgment)

<sup>72</sup> *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring in judgment)

Justice Powell's concurrence in judgment in *Zablocki* opened by criticizing the majority's failure to provide an account of the boundaries of the fundamental right to marry: "the majority's rationale sweeps too broadly in an area which traditionally has been subject to pervasive state regulation....The Court does not present...any principled means for distinguishing between [marriage regulations which impermissibly interfere with the decision to marry and regulations which are reasonable and legitimate]." <sup>73</sup> Aside from that clear observation and a slightly longer exposition of the states' traditional power to regulate domestic relations, his conclusions differed little in substance from Stewart's—and he, too, failed to provide a "principled means" for distinguishing between legitimate marriage regulations and illegitimate ones.

Of those agreeing with the judgment in *Zablocki*, Justice Stevens came closest to a pure equal protection holding. His concurrence in judgment acknowledged state marital regulatory power:

The individual's interest in making the marriage decision independently is sufficiently important to merit special constitutional protection....It is not, however, an interest which is constitutionally immune from evenhanded regulation. Thus, laws prohibiting marriage to a child, a close relative, or a person afflicted with venereal disease, are unchallenged even though they 'interfere directly and substantially with the right to marry.'<sup>74</sup>

Stevens focused his analysis primarily on the way in which the Wisconsin statute discriminated between rich and poor, and he would have invalidated the statute as irrational discrimination simply on those grounds.<sup>75</sup> However, his reference to "special constitutional protection" for the individual interest "in making the marriage decision independently" let the marriage boundary problem in the back door of the opinion, and to this question he offered only the unenlightening standard of requiring state regulation of the decision to marry to be "evenhanded."

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<sup>73</sup> *Zablocki*, 434 U.S. at 396 (Powell, J., concurring in judgment)

<sup>74</sup> *Zablocki*, 434 U.S. at 404 (Stevens, J., concurring in judgment)

<sup>75</sup> *Zablocki*, 434 U.S. at 406 (Stevens, J., concurring in judgment)



Justice Rehnquist was the only dissenter in *Zablocki*. He rejected the idea that a fundamental right to marry required strict scrutiny of the statute, finding it only subject to rational basis review for both equal protection and due process challenges. His approach was largely based on an interpretation of *Califano v. Jobst* that required a rational basis standard for all marriage regulations. In his view, the statute passed such a test.<sup>76</sup>

One can see in the *Zablocki* opinions the Justices struggling to extricate themselves from the horns of a dilemma. With the exception of Rehnquist (and possibly Stevens), they all see marriage as an arrangement meriting at least some substantive constitutional protection from the intruding eyes and hands of the state. Yet none can specify where the constitutional boundaries of marriage lie, or where a principled account of such boundaries can be found. They are forced to resort to formulations of “reasonable” or “evenhanded” regulations, or to invoke vague concepts of “a limit” or “family life.” They are adjudicating on simple instinct.

### C. Legal Tension

Prompted by the realization that the Court’s marriage *rhetoric* contains contradictory themes of broad state power and fundamental rights, one can find in the U.S. Reports marriage cases whose *holdings* implicitly treat marriage as not being a fundamental right, and which therefore do not use the language of fundamental rights.

In *Cannon v. United States*, 116 U.S. 55, 72 (1885), the Court upheld the criminalization of polygamy, saying it was “not the lawful substitute for the monogamous family, which alone the statute tolerates.”<sup>77</sup> It would be odd if a fundamental right to marry could be overridden by a

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<sup>76</sup> *Zablocki*, 434 U.S. at 407 (Rehnquist, J., dissenting)

<sup>77</sup> Later, in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890), the Court again upheld the laws banning polygamous marriage, despite arguments that such laws forbade Mormons from practicing their deeply held religious beliefs.

mere statute limiting marriages to one at a time; no law restricting authors writing more than one book at a time or limiting a property owner's search and seizure protections to one home at a time would be considered as complying with First Amendment or Fourth Amendment protections. But *Cannon* implicitly holds that the constitutional boundaries of protection for marriage do not require allowing a person to have more than one marriage at a time.

In *Williams v. North Carolina*, 325 U.S. 226 (1945), the Court upheld North Carolina's refusal to recognize two divorces accomplished in Nevada. O.B. Williams and Lillie Hendrix, each married to another person, had traveled from North Carolina to Nevada, divorced their respective spouses under Nevada law, and married each other. When they returned to North Carolina, they were prosecuted for bigamous cohabitation, the North Carolina courts having declared the Nevada divorces were invalid under North Carolina law since Williams and Hendrix had not established domicile in Nevada at the time of their divorce decrees.

The United States Supreme Court held that the North Carolina courts acted lawfully in refusing to recognize the Nevada divorces. Its analysis focused on federalism issues and gave no consideration to any question of marriage as a fundamental right. Justice Rutledge pointed out that the result of the decision was two divorces which were valid in Nevada but not in North Carolina (so Williams and Shaver had their marital status change when they crossed state lines), but his view was the dissent.

A truly robust notion of marriage as a fundamental right would allow individuals to choose to enter and exit marriages as they wished, making divorce largely a question of intent and making a person's marital status wherever he or she traveled. However, the *Williams* Court did not even consider such a possibility, instead allowing a couple to be punished for bigamy

when both spouses had *bona fide* beliefs that their previous marriages had been terminated by the Nevada court system.

In *Lutwak v. United States*, 344 U.S. 604 (1953), the Supreme Court upheld several convictions for conspiracy to defraud, rejecting the defendants' argument that their marriages rendered their conduct legal. Marcel Lutwak and his aunt Regina Treitler lived in the United States and sought to get Treitler's brothers, Polish refugees living in Paris, into the United States. They arranged for World War II veterans to marry the brothers so they could enter the United States as alien spouses under the War Brides Act, with the understanding that the new couples would divorce after arriving back in America.<sup>78</sup> When the scheme was discovered, Lutwak and Treitler were prosecuted for conspiracy to defraud the United States by circumventing the immigration laws. It was stipulated that the marriages in question had been formally contracted in Paris, and the defendants argued that because the marriages were legitimate, it could not be fraudulent for them to tell immigration officials they were married.<sup>79</sup>

The Court dismissed the legally binding marriages as irrelevant. "We do not believe that the validity of the marriages is material....We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States..."<sup>80</sup> It further declared, "The common understanding of a marriage, which Congress must have had in mind when it made provisions for 'alien spouses' in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations."<sup>81</sup> Justice Jackson argued in dissent:

These marriages were legally contracted in France, and there is no contention that they were forbidden or illegal there for any reason...If the parties are validly married, even though the marriage is a sordid one, we should suppose that would end the

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<sup>78</sup> *Lutwak*, 344 U.S. at 483-84.

<sup>79</sup> *Id.* at 610-11

<sup>80</sup> *Id.* at 611

<sup>81</sup> *Id.* at 611

case....Marriages of convenience are not uncommon and it cannot be that we would hold it a fraud for one who has contracted a marriage not forbidden by law to represent himself as wedded...<sup>82</sup>

The *Lutwak* Court decided that a marriage, assumed to be valid, may be treated as nonexistent merely because the subjective purpose of the spouses in marrying was not the purpose the Court thought the immigration statute “must have” required for a marriage. But if marriage is a fundamental right, immigration laws should not be able to impose subjective intent conditions upon it. Further, one would expect a fundamental right to marry to include the requirement that a validly contracted marriage be treated on equal terms as other valid marriages.

In *Wyatt v. United States*, 362 U.S. 525 (1960), the Court held that a woman could be forced to testify against her will against her husband despite the marital privilege against such testimony. The context was a prosecution under the Mann Act for the interstate transportation of a woman for the purpose of prostitution; upon arrest, the defendant married the woman he was accused of transporting. At trial, both spouses claimed that spousal privilege prevented the wife from testifying against him. The Supreme Court found that the purpose of the Mann Act—“to protect women who were weak from men who were bad”—would not be served by allowing the wife to avoid testimony in such a case.<sup>83</sup> This decision, then, put the legislative scheme of the Mann Act above the trial rights which were seen as an important part of the marriage relationship. Ariela Dubler characterizes the import of *Wyatt* as being that the law (here, the Mann Act specifically) protected marriage as an institution before it protected the rights and well-being of individuals: “Marriage, not individual women, needed to be protected from the amorphous threat of illicit sexual activity.”<sup>84</sup>

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<sup>82</sup> *Lutwak*, 344 U.S. at 490-91 (Jackson, J., dissenting)

<sup>83</sup> *Wyatt*, 362 U.S. at 530.

<sup>84</sup> Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756, 806 (2006)

In 1975 *Sosna v. Iowa* held that Iowa could constitutionally limit the divorces granted by its courts to applicants with at least a full year of residence in Iowa.<sup>85</sup> Carol Sosna had challenged the residency requirement as a violation of her constitutional rights to travel and as an unconstitutional restriction on her only means of ending her marriage, citing *Boddie*. However, the Supreme Court upheld the statute, finding that Iowa’s law only delayed access to divorce, rather than denying it, and that Iowa had a legitimate interest to support the waiting period (protecting its divorce decrees from collateral attack in other states). The effect of this decision was to prevent Sosna from remarrying until the residency requirement was fulfilled; it is difficult to imagine the Court having such a cavalier attitude toward state-imposed delay in exercising constitutional rights in contexts other than the right to marry.

In 1977 *Califano v. Jobst*<sup>86</sup> declared valid a law diminishing government benefits to someone upon marriage despite the fact “some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby.”<sup>87</sup> As with *Sosna*, it is difficult to imagine such a result for a hypothetical law attaching a penalty to the exercise of other recognized constitutional rights, like free speech or the use of contraceptives.

### **III. Constitutional Marriage Reasoning: Justifications for the Right to Marry**

The marriage boundary disputes in the cases above illustrate how a state’s definition and treatment of marriage can affect the access of its citizens to the benefits of marriage. *Maynard* listed how many such marriage boundary issues exist, citing “the age at which parties may contract to marry, the procedure or form essential to constitute a marriage, the duties and

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<sup>85</sup> *Sosna v. Iowa*, 419 U.S. 393 (1975)

<sup>86</sup> 434 U.S. 47 (1977)

<sup>87</sup> *Califano*, 434 U.S. at 54. Though it recognized this deterrent effect or burden on the decision to marry, the *Califano* majority also found significance in the fact that the regulation in question was not “an attempt to interfere with the individual’s freedom to make a decision as important as marriage.” *Id.*

obligations it creates, its effects upon the property rights...and the acts which may constitute grounds for its dissolution.”<sup>88</sup> To these might be added who is allowed to marry whom; the permissible reasons for marrying; the conditions and procedures necessary to dissolve a marriage; and the privileges bestowed by marriage.

For a fundamental right to marry to have useful meaning, it must provide a way of approaching marriage boundary questions. What is the substantive core of the fundamental right to marry, upon which marriage legislation may not trespass? Do constitutional protections fix a maximum age of consent for marriage? Do they require a person be allowed to marry anyone he or she chooses, or do they allow states to restrict the field of spousal choice with general rules (like incest rules or opposite-sex requirements)? Do they specify that certain procedures *must* be sufficient to create a legal marriage? Does the fundamental right mandate sex roles within a marriage? Forbid them? Is a state’s limitation of marriages to one-at-a-time-per-person acceptable under the fundamental right? Can federal immigration law give special treatment to some marriages but not others?

In the face of all these questions about the boundaries of constitutionally-protected marriage, *Zablocki* magisterially pronounces marriage a fundamental right and commands that only “reasonable” state regulation of marriage is permissible. But the critical question—the details of the constitutionally-protected core of marriage, which “reasonable” regulations must leave intact—goes unaddressed and unanswered. To that question we now turn. There exist three obvious potentially fruitful approaches to defining the constitutional core of the fundamental right to marry: (1) purpose (the reason *why* “marriage” is a fundamental right might indicate what “marriage” is); (2) deduction (the characteristic features of “fundamental rights” might indicate what attributes “marriage” possesses, on the assumption that marriage is a fundamental

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<sup>88</sup> *Maynard*, 125 U.S. at 205.

right); (3) essence (“marriage” might have unchanging inherent meaning, like the concept “square”).

### A. Purposive Approach: Reasoning from *Why Marriage Is a Fundamental Right*

One might expect the explanation of *why* marriage is a fundamental right to offer an account of the boundaries of the right to marry. Unfortunately, the marriage cases do not give a complete or satisfactory account of why marriage should be a fundamental right. They are long on platitudes about how marriage “involves issues of basic importance in our society,”<sup>89</sup> but this observation by itself does little to separate marriage from labor regulations, education requirements, environmental laws, or transportation rules.

#### 1. Tradition

Perhaps the most common reason given for recognizing a fundamental right to marry is simple tradition. *Loving* refers to the right to marry as having “long been recognized”;<sup>90</sup> *Meyer* to the right as “long recognized at common law”;<sup>91</sup> and *Zablocki* to “our past decisions [which] make clear that the right to marry is of fundamental importance.”<sup>92</sup> *Stare decisis* is a powerful argument, and the Court has considered history and tradition important in evaluating claims of fundamental rights,<sup>93</sup> but one would hope that at the beginning of the trail *some* practical or theoretical justification for the right would exist. A right defined by tradition alone gives little

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<sup>89</sup> *Boddie* at 376

<sup>90</sup> *Loving* at 12

<sup>91</sup> *Meyer* at 399

<sup>92</sup> *Zablocki* 383

<sup>93</sup> *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (“Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’” (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)); *Moore*, 431 U.S. at 503 (plurality opinion) (“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”). *Cf. Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

guidance as to its constitutional boundaries, especially if social practice surrounding that right is highly dynamic. Further, since traditional (to some) conceptions of marriage were rejected by the Court as unconstitutional in *Loving*, strict adherence to tradition cannot be the whole story regarding the right to marry. The Court's acceptance of some traditional aspects of marriage as fundamental in conjunction with its rejection of other traditional aspects suggests that tradition is not determinative of the boundaries of the right to marry.

## 2. Personal Freedom

A second constellation of justifications given by the Court for the right to marry involves personal freedom considerations. *Meyer* asserted that marriage was “essential to the orderly pursuit of happiness by free men,”<sup>94</sup> and *Loving* and *Zablocki* echoed this thought.<sup>95</sup> However, this is objectively wrong, at least as applied to state licensing of marriage. Free men doubtless felt free to pursue happiness before governments began licensing marriage. The pursuit of happiness cannot support a fundamental right to government licensing of one's marriage any more than it can support a fundamental right to a government-provided Cadillac, no matter how much some people may feel a Cadillac necessary for their personal happiness.

Another formulation of the happiness argument rephrases the right to marry in terms of its importance to people's lifestyle choices. *Zablocki* declared, “the right to marry is of fundamental importance for all individuals....marriage [is characterized] as ‘the most important relation in life.’” *Boddie* emphasized marriage as a “fundamental human relationship.”<sup>96</sup>

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<sup>94</sup> *Meyer*, 262 U.S. at 390

<sup>95</sup> *Loving*, 388 U.S. at 12; *Zablocki*, 434 U.S. at 383

<sup>96</sup> *Zablocki* at 384 (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)); *Boddie*, 401 U.S. at 383



Such assertions about marriage are true for many, but others reject them.<sup>97</sup> Unless the Court can explain why the Constitution enshrines marriage as the most important relation in life for all individuals, views about the “fundamental importance” of marriage remain mere personal preferences. The importance of something to an individual does not justify considering it a fundamental right, even if that preference enjoys widespread popular affirmance. Individuals who prize education may consider it fundamentally important that they earn a Ph.D., but there is no fundamental right to such a degree.

A third formulation of the personal freedom argument for a fundamental right to marry invokes marriage as an expressive resource, a way of publicly communicating commitment to another person. Clearly, this is a purpose which marriage can serve. To claim it justifies marriage as a fundamental right, though, is strange. The government is not constitutionally required to provide a forum for expression of ordinary messages; why should an expression of commitment to another person any different?<sup>98</sup>

### 3. Social Practice

A stronger formulation of the personal-significance argument for a fundamental right to marry changes the focus from the *personal* significance of marriage to the *social* significance of marriage. The Court has made this argument in three different ways.

First, in *Boddy* the Court declared:

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<sup>97</sup> [quote about marriage as oppression] Others argue that marriage oppresses those who are *not* part of it: “Marriage sanctifies some couples at the expense of others. It is selective legitimacy. This is a necessary implication of the institution, and not just the result of bad motives....The ennobling and demeaning go together. Marriage does one only by virtue of the other.” Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* 82 (1999). See also Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* 230 (1995) (Marriage “will continue to occupy a privileged status and be posited as the ideal, defining other intimate entities as deviant. Instead of seeking to eliminate the stigma by analogizing more and more relationships to marriage, why not just abolish the category as a legal status and, in that way, render all sexual relationships equal with each other and all relationships equal with the sexual?”); Steven K. Homer, Note, *Against Marriage*, 29 Harv. C.R.-C.L. L. Rev. 505, 505-506 (1994) (calling the fundamental right to marry either “a complete constitutional anomaly” or “an expression of structural heterosexism.”)

<sup>98</sup> See Sunstein, at 2094

[G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.<sup>99</sup>

The Court thus argues that marriage has some status in the social hierarchy of values which justifies judicial abrogation of legislation impinging upon marriage. This claim does not withstand scrutiny, for the foundational principle of democratic government is that the elected legislature reflects society's hierarchy of values through its official acts. Legislative restrictions upon marriage thus *constitute* the social hierarchy of values regarding marriage, making it nonsensical for a court to strike down marriage legislation purely on the ground that it violates social values.<sup>100</sup> The hierarchy-of-values argument can only justify a social-consensus derived fundamental right if it claims the courts have a better understanding of popular beliefs than does the legislature, a dubious proposition at best.<sup>101</sup>

The second social practice argument the Court has given for a right to marry emphasizes marriage's role as the foundation of the family unit. It calls marriage the "foundation of the family and of society, without which there would be neither civilization nor progress"<sup>102</sup> and says "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society...."<sup>103</sup>

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<sup>99</sup> *Boddie* at 374

<sup>100</sup> The hierarchy-of-values argument claims that marriage is a fundamental right because there is a social understanding that marriage is of fundamental importance. Once it establishes the existence of the right *through* social consensus, the argument proceeds to fill in the substantive content of that right *against* social consensus (as embodied in democratically-enacted law) by allowing courts to strike down regulations they deem violative of the right. The second step rejects the reasoning of the first.

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<sup>102</sup> *Maynard*, 125 U.S. at 211; *Zablocki*, 434 U.S. at 384 (quoting *Maynard*, 125 U.S. at 211)

<sup>103</sup> *Zablocki*, 434 U.S. at 386

This claim falls prey to the same difficulties that plagued the marriage-as-personally-important-to-people claim: the Court’s rejection of government-imposed lifestyles and its protection of individual freedom in personal relationships make it clear that the state cannot require marriage to be the basis of individual living arrangements.<sup>104</sup> The government can no longer treat marriage as the sole legitimate organization of private life.<sup>105</sup> The optionality of marriage coupled with the law’s blurring of marriage through the extension of many of marriage’s legal characteristics to nonmarital relationships<sup>106</sup> and the real decline of marriage as the “foundation of the family”<sup>107</sup> render the foundation-of-the-family argument unable to justify a fundamental right to marry.

A third social-practice argument for a fundamental right to marry invokes vague “associational interests.” In *United States v. Kras*<sup>108</sup> the Court found *no* fundamental right to court access in a bankruptcy case, despite the right of court access to obtain a divorce established

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<sup>104</sup> “Our precedents ‘have respected the private realm of family life which the state cannot enter’ . . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At 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.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); “The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.” *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

<sup>105</sup> *Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977) (declaring constitutionally protected privacy interest in the “‘right of an individual to be free in action, thought, experience, and belief from government compulsion’”) (quoting Kurland, *The private I*, *The University of Chicago Magazine* 7, 8 (autumn 1976)).

<sup>106</sup> “The legal and social differentiation of treatment between the married and unmarried has changed beyond the recognition of a couple of generations ago. Sex before marriage is normal, childbearing by single women and unmarried couples is no longer much condemned, men can be held responsible for the support of their children irrespective of whether they are married, and married couples can deal with their tax and incomes separately.” Janet Radcliffe Richards, Editor’s Symposium: The Meaning of Marriage, *Metaphysics for the Marriage Debate*, 42 *San Diego L. Rev.* 1125, 1135 (2005). *E.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (unmarried couples have same reproductive privacy rights as married couples).

<sup>107</sup> “The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States.” *Troxel v. Granville*, 530 U.S. 57, 63-64 (2000) (plurality opinion).

<sup>108</sup> 409 U.S. 434 (1973)

in *Boddie*. It distinguished the two types of proceedings on the basis of the “associational interests that surround the establishment and dissolution of [marriage].”<sup>109</sup> The extent and significance of these “associational interests” is unclear; the Court has not subsequently expounded upon the phrase. *Kras* itself cited only *Loving*, *Skinner*, *Griswold*, *Eisenstadt*, and *Meyer* to support the “associational interests,” so the phrase seems to be merely a restatement of the argument that marriage has historically been important, rather than a reference to the separate right of free association.<sup>110</sup>

#### 4. Political Justification

Occasionally, the Court has argued that marriage is necessary for the continued existence of a free state. In language reminiscent of the Second Amendment, it has claimed:

[N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth...than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political movement.<sup>111</sup>

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<sup>109</sup> *Kras*, at 444

<sup>110</sup> In 1984, The Court recognized a constitutional “freedom of association” in *Roberts v. U.S. Jaycees*, 468 U.S. 609, though it upheld a state nondiscrimination statute in that case against constitutional challenge that it infringed club members’ freedom of association. *Roberts* cited *Loving* and many of the family privacy cases in discussing the freedom of intimate association. *Id.* at 618-620. However, extrapolating from freedom of association to a right to have the government license a marriage is unjustified in light of the Court’s holdings in other cases that the government has no obligation to subsidize the exercise of even a fundamental right. See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983) (“We have held in several contexts [including the First Amendment] that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”); *Lyng v. International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW*, 485 U.S. 360, 368 (1988) (rejecting claim that cutting off food stamps from striking employees violated their freedom of association because it pressured them to quit their union); “[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.” *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (upholding law that prohibited use of federal funds to pay for abortion counseling, despite constitutional rights of freedom of speech and to have an abortion).

<sup>111</sup> *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

To similar effect are *Loving* and *Meyer*'s assertions of the importance of marriage to "free men."<sup>112</sup>

Aside from its reliance on beliefs about political significance of marriage which are now contested,<sup>113</sup> this argument is more in the nature of a policy argument for marriage legislation than useful evidence of a fundamental right to marry. Citizens may have varying beliefs about what social arrangements strengthen and promote liberty, but beliefs cannot translate those social arrangements into fundamental rights. And just because something has a salutary effect on political freedom does not mean it is a fundamental right.<sup>114</sup>

## 5. Privacy

The first four categories of justifications for a right to marry had their origins in the nineteenth century. The Court's more recent cases deploy subsequent developments in constitutional law to justify the right to marry. Most notably, the Court refers to marriage as a manifestation of privacy rights.<sup>115</sup>

*Zablocki* interpreted *Griswold* as saying that marriage is right derivative of the right to privacy,<sup>116</sup> despite the lack of language in *Griswold* explicitly gathering the right to *enter*

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<sup>112</sup> *Loving*, 388 U.S. at 12; *Meyer*, 262 U.S. at 399. Bruce Hafen argues, "Marriage alone plays a critical role in the democratic structure by interposing a significant legal entity between the individual and the state." Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 483 (1983). This view, at least as a legal matter, has been rejected by the Supreme Court: "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).  
<sup>113</sup> "[E]mphasis on relationships associated with traditional nuclear family arrangements is anomalous. As individuals in record numbers reformulate the social arrangements in which they choose to live, and social acceptance of alternative families increases, the divide between family privacy jurisprudence and the majority of families grows....it is critical to consider the extent of the deprivation of privacy protection to nontraditional families..." Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 Missouri L. Rev. 527, 530-31 (2001) (internal citations omitted).

<sup>114</sup> Consider the "rights" of universal access to books and universal access to means of publishing one's political views.

<sup>115</sup> E.g. *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977); *Carey v. Population Services International*, 431 U.S. 678, 684 (1977).

<sup>116</sup> *Zablocki*, at 384

marriage under the mantle of privacy. On the facts of *Griswold*—intimate conduct typically associated with marriage—privacy considerations seemed a natural reason to strike down the legislation in question. However, that case had nothing to say about entry into marriage or the boundaries of marriage. Applying *Griswold*'s use of privacy to an entirely different context, as *Zablocki* did, is a doubtful proposition. The marriage at issue in *Zablocki* was anything but private—the plaintiff there was demanding *public* licensing of a marriage for himself. Nothing prevented him from privately conducting a religious marriage ceremony. A claim of a *privacy* right to *public* marriage is contradictory on its face.<sup>117</sup>

The *Zablocki* Court's reinterpretation of *Griswold* was likely prompted by the consideration that privacy interests could attach to marriage because Wisconsin law criminalized private conduct—sexual relations—which was legalized by public marriage in that state. “[I]f appellee’s right to procreate means anything at 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>118</sup> If the state restricts private conduct, one might easily conclude that privacy rights attach to the legal gateway to that private conduct. The difference between this conclusion (which the *Zablocki* opinion justifies) and a fundamental right to marry (which *Zablocki* cements as constitutional doctrine) is that the first formulation does not justify marriage as an independent fundamental right, but rather as a right parasitic upon the initial criminalization of the intimate behavior. Should the initial criminalization be removed, the right to marry would also disappear.<sup>119</sup>

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<sup>117</sup> “This connection [of marriage rights and the right to privacy] is problematic, however, because the right to marry is an associational right traditionally governed by the body-politic, while the right to privacy is an individual right with which the body-politic traditionally cannot interfere.” Ridge, at 85. One might argue that privacy rights include the right to enter into the only relationship where privacy is respected, but this is foreclosed by the Court’s extension of privacy rights to unmarried couples. See, e.g., *Eisenstadt* and *Lawrence*.

<sup>118</sup> *Zablocki*, at 386

<sup>119</sup> See Sunstein, at 2098

An alternate formulation of the right to marry as a privacy right claims that the right to marry derives from the fundamental right to procreate.<sup>120</sup> Several of the Supreme Court marriage cases asserted that marriage was “fundamental” to the “very existence and survival” of humanity.<sup>121</sup> By itself, this is patently untrue; humans have procreated outside of marriage since long before Hawthorne’s *The Scarlet Letter*. As discussed above, the right to procreate, coupled with criminal statutes forbidding sexual relations except between spouses, can persuasively justify a right to marry. Here again, though, the right to marry only appears if the government criminalizes nonmarital intercourse. It is parasitic upon fornication statutes, and does not exist in the absence of them.

## 6. Economic Justification

In *Turner*, Justice O’Connor noted that marriage is often the only way of accessing certain government benefits.<sup>122</sup> This, however, cannot justify a fundamental right to marry unless those benefits *themselves* are already fundamental rights. “In general, denial of access to economic benefits does not have any particular constitutional significance. Rather, such denials normally are subject only to the deferential, rational basis test.”<sup>123</sup> The simple fact that marriage is used as a mechanism to distribute benefits does not turn it into a fundamental right any more than the fact that fishing licenses are used to distribute benefits makes a fishing license a fundamental right.

## 7. Constitutional Text

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<sup>120</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942)

<sup>121</sup> *Id.* at 541; *Zablocki*, 434 U.S. at 383; *Loving*, 388 U.S. at 12.

<sup>122</sup> *Turner v. Safley*, 482 U.S. 78, 96 (1987)

<sup>123</sup> Maltz, at 958. *See also*, Cass Sunstein, 26 *Cardozo L.Rev.* 2081, 2098 (2005) (“[M]aterial benefits cannot be the basis for the view that marriage counts as a fundamental right. Material benefits of the most fundamental kind are involved in many programs involving welfare and subsistence; and under current doctrine, they do not qualify as fundamental for equal protection purposes.”)

Two final reasons for a right to marry have been asserted by the Court: generic appeals to due process rights<sup>124</sup> and equal protection rights.<sup>125</sup> These claims were neither explained nor justified by the Court when they were made. Whether marriage is a substantive due process right is the very question we are asking, so merely asserting that it is a due process right cannot answer the question. And while one can easily frame an argument that Person *A* has an equal protection right to marry because he is just like Person *B* who is allowed to marry, this equal protection argument does nothing to establish that *all* Persons *A*, *B*, *C*... possess the fundamental right to marry, or what the right to marry means. The due process and equal protection arguments for a fundamental right to marry are conclusions in need of justification themselves, not explanations.

The unsatisfactory array of justifications the Court has offered for a fundamental right to marry only serves to highlight the indeterminacy in the Court's treatment of marriage. Rhetorical flourishes and nods to tradition fill the opinions, but these provide little guidance for fleshing out the boundaries of the fundamental right to marry.

#### B. Deductive Approach: Reasoning from the Nature of Fundamental Rights

If the Court's offered justifications for marriage as a fundamental right do not provide an account of the boundaries of the right, perhaps analyzing marriage *as* a fundamental right can provide insight into its boundaries, based on the inherent characteristics of fundamental rights.

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<sup>124</sup> *Zablocki* at 384

<sup>125</sup> *Skinner*, 316 U.S. at 541



The idea of a “fundamental right” in itself is not original. Though its original trek into substantive due process rights ended with repudiation,<sup>126</sup> the Supreme Court has regularly relied upon and referred to fundamental rights over the past forty years, and it has continued using some fundamental rights declared during the *Lochner* period. The Court’s non-textual fundamental rights now include (1) the right to educate one’s children as one chooses;<sup>127</sup> (2) the right to raise one’s children as one chooses;<sup>128</sup> (3) the right to study German in a private school;<sup>129</sup> (4) the freedom to associate and privacy in associations;<sup>130</sup> (5) the right of biologically related persons to live together;<sup>131</sup> (6) the right of married people to use contraceptives;<sup>132</sup> (7) the right of unmarried people to use contraceptives;<sup>133</sup> (8) the right to interstate travel;<sup>134</sup> and (9) the right to sexually intimate behavior.<sup>135</sup>

Several themes are discernible in this eclectic collection of rights. Many of them involve the intimacy of family life (child rearing and education; family living arrangements; contraceptive use; sexual intimacy). There is a sense of the need for privacy and autonomy surrounding almost all of them. And all of them involve negative liberties (banning state action that coercively affects individual choices) rather than positive liberties (forcing state action to

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<sup>126</sup> Cf. *Lochner v. New York*, 198 U.S. 45 (1905) with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). See generally William G. Ross, *When Did the “Switch in Time” Actually Occur?: Re-discovering the Supreme Court’s “Forgotten” Decisions of 1936-1937*, 37 *Ariz. St. L.J.* 1153 (2005).

<sup>127</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

<sup>128</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion)

<sup>129</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923)

<sup>130</sup> *NAACP v. Alabama*, 357 U.S. 449 (1958)

<sup>131</sup> *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (city may not use zoning ordinance to prevent grandson from living with grandmother) (plurality opinion). Cf. *Moore with Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (allowing zoning ordinance to prevent six unrelated college students to live together).

<sup>132</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965)

<sup>133</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972)

<sup>134</sup> *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974)

<sup>135</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003)

benefit individuals). A fundamental right to marry fits with the list in that it involves family life and intimate life, but it also does not fit because it is a positive liberty.<sup>136</sup>

The eclecticism of the listed rights illustrates the *ad hoc* nature of the process of finding them. The Court has never articulated a systematic way of identifying fundamental rights; indeed, it has essentially declared such a systematic approach is impossible.<sup>137</sup> Legal observers have analyzed and commented upon this approach, both critically and complimentarily.<sup>138</sup> And though some have offered theories purporting to expound a larger, organized logic behind the list of fundamental rights,<sup>139</sup> none have authoritatively carried the day. It seems, then, that we cannot use the notion of a “fundamental right” itself to determine what a “fundamental right to marry” must mean.

### C. Essential Approach: Reasoning from the Meaning of “Marriage”

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<sup>136</sup> This fact by itself is enough to convince at least one commentator that marriage cannot be a fundamental right. See Patricia A. Cain, *Imagine There’s No Marriage*, 16 *Quinnipiac Law Review* 27 (1996). See also, Sunstein, at 2094 (“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.”)

<sup>137</sup> “The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule....As Justice Harlan observed: ‘Due process has not been reduced to any formula; its content cannot be determined by reference to any code....If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.’” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 849-850 (1992) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))

<sup>138</sup> Compare Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 *Colum. L. Rev.* 833, 892 (2003) (arguing that certain recent Supreme Court attempts to limit the effect of substantive due process rights are undesirable “for the broader structures of constitutional governance” and that “[t]he doctrine can only be rationally shaped by a clearer understanding of and focus upon its structure and internal logic”) with David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 *Harv. J. L. & Pub. Pol’y* 795, 805 (1996) (“[T]he Supreme Court’s methods are not scientific at all....They are more like the methods of astrology, by which a visionary seer claims the power to trace general but durable-sounding statements back to ambiguous symbols, from which the interpreter insists they can be derived.”)

<sup>139</sup> E.g., Rubin, *supra* note 123; John Rawls, *Political Liberalism* (1993); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 *U. Chi. L. Rev.* 1057 (1990); Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (1998)

The search for the meaning of the fundamental right to marry requires resort to another methodology; namely, asking directly what “marry” and “marriage” mean. The dictionary says “marry” means “To join as spouses by exchanging vows.” “Spouse,” in turn, means “A marriage partner.” “Marriage” means “The legal union of man and woman as husband and wife” or “wedlock.” “Wedlock” is “The state of being married,” and “husband” and “wife” are, respectively, male and female spouses.<sup>140</sup> It becomes apparent from this circle of definitions that “marriage” is not something susceptible to a simple or short definition.

Perhaps a legal dictionary offers a more useful explanation. Black’s Law Dictionary defines “marriage”:

**marriage, n. 1.** The legal union of a couple as husband and wife. • The essentials of a valid marriage are (1) parties legally capable of contracting to marry, (2) mutual consent or agreement, and (3) an actual contracting in the form prescribed by law. Marriage has important consequences in many areas of the law, such as torts, criminal law, evidence, debtor-creditor relations, property, and contracts.

This definition boils down to “the legal union of a couple as husband and wife as defined by law”—no help in determining the boundaries of a fundamental right to marry.

The dictionaries confirm what anyone passingly familiar with American society could readily say: marriage involves a complicated labyrinth of practices, beliefs, legal regulations, and social expectations.<sup>141</sup> In light of this reality, commentators on “marriage” have often tried to break the concept down into smaller, more manageable pieces.<sup>142</sup> Taking the same approach, let

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<sup>140</sup> American Heritage College Dictionary (Third Edition 1997) 832, 1317, 1529, 664, 1542.

<sup>141</sup> Our definitional difficulties are not a recent phenomenon. “In an 1881 essay on the confusion of American marriage law...Charles Noble bemoaned ‘the contradictory and indefinite rules which come to us from various parts of the United States, when we ask this most fundamental of questions, ‘What constitutes a valid marriage?’” Grossberg 92 (quoting Charles Noble, *A Compendium of the Laws on Marriage and Divorce* 28 (1881)). A more recent conclusion: “marriage has no theoretical coherence...” Homer, at 521.

<sup>142</sup> See, e.g., E.J. Graff, 38 *New England L. Rev.* 541, 544 (2004) (arguing that marriage means four things: an “inner bond” (commitment); a wedding ceremony; a religious marriage; or government recognition of the bond between two people); John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* 2 (1997) (discussing four perspectives on marriage from the Western Church: religious; social/legal);

us note three different theoretical approaches one might take toward defining the boundaries of “marriage.”

### 1. Marriage as Bounded by Government Decree

The state officially recognizes marriage in part because it seeks to shape citizen behavior into socially desirable patterns.<sup>143</sup> If this is the purpose of marriage, then the boundaries of marriage are a function of the behavior determined by the legislature to be socially desirable. If marriage consists of a set of laws establishing some people as married and others as unmarried, and if the laws treat the two groups differently for some purposes, then marriage is a state registration and licensing scheme, a form of government categorization.

The notion of marriage as a registration and licensing scheme has two implications. First, the government licenses people (for hunting, operating automobiles, flying, serving as an accountant) and categorizes people (over eighteen, resident of New York, government employee, dependent) all of the time, yet these licenses and categories are not considered to be fundamental rights. Therefore, if it is to be a fundamental right, marriage must also be *more* than just a licensing scheme. Second, if the state creates marriage as a licensing or registration scheme, it can define the boundaries of that scheme—who is eligible to marry, how marriage is entered into, and the rights, responsibilities, and consequences attached to being married.

### 2. Marriage as Bounded by Supra-Governmental Source

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contractual; naturalist). Witte finds “considerable tension” between the four perspectives because they have “competing claims of ultimate authority over the form and function of marriage.” *Id.*

<sup>143</sup> “Society attaches benefits to marriage because the married have undertaken crucial social responsibilities; those benefits help to carry them out—chiefly the legal, moral, and economic responsibilities to care for each other and for the children of their marriage.” Maggie Gallagher, *The Abolition of Marriage: How We Destroy Lasting Love* 138 (1996); “Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.” Wilson, at 41.

In some sense marriage pre-exists the state, both chronologically/historically (because people married before the rise of the modern nation-state) and jurisprudentially.<sup>144</sup> In this sense, marriage is a right which is not conferred by the state, but which is rather above or prior to the state. This implies that marriage is a structure existing irrespective of the state, which the state may utilize, accommodate, or work around (like the laws of physics, or the parent-child relationship), but which it cannot abolish or alter.<sup>145</sup> Under this view, the terms of marriage are set, at least to some extent, independently of the state.<sup>146</sup> Such a theory of marriage obviously requires a second piece: a source external to the state which defines the boundaries of marriage.

### 3. Marriage as Bounded by Individual Preferences

Marriage is commonly referred to as a “contract.”<sup>147</sup> This paradigm implies that marriage is simply an agreement created between rational individuals. Because the individuals form the contract, they should be able to set the terms of it themselves—which means the state does not set the terms.

The contract theory of marriage is logical, but it does not entirely reflect the reality of marriage as it has ever been or is currently practiced.<sup>148</sup> Common social understandings about

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<sup>144</sup> “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...” *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>145</sup> *E.g.*, “The theory that marriage has an essential core, one that precedes the state, has a different tenor: marriage is not so much a service that the state must provide, but an essentialized entity around which the state must conform.” Steven K. Homer, Note, *Against Marriage*, 29 Harv. C.R.-C.L. L. Rev. 505, 517 (1994). Homer, however, rejects this theory.

<sup>146</sup> This idea, so intuitive to earlier generations that it was not always articulated, was nicely exhibited by Justice Harlan in his famous dissent in *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting): “It is one thing when the State exerts its power either to forbid extra-marital sexuality...or to say who may marry, but it is quite another when, *having acknowledged a marriage and the intimacies inherent in it*, it undertakes to regulate by means of the criminal law the details of that intimacy” (emphasis added). Harlan suggests that the state can choose to take or leave marriage, but if it chooses to take it—to regulate it—it is bound by the “inherent” nature of marriage. *See Ball*, at 1194-95.

<sup>147</sup> *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (“Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law.”)

<sup>148</sup> “[T]here is an implicit contract that governs every marriage—an unwritten contract that is imposed by law. Clearly, this ‘marriage contract’ is unlike most contracts: its provisions are unwritten, its penalties are unspecified, and the terms of the contract are typically unknown to the contracting parties. Nor are prospective spouses allowed

normal human conduct create the social space for marriage to exist as something qualitatively different from a commercial contract; marriage cannot be a purely private contract and remain “marriage.”<sup>149</sup> For it to have any independent significance as a fundamental right, marriage must have some recognized term or terms to differentiate it from contracts which are *not* fundamental rights.<sup>150</sup> In the Anglo-American tradition, a governing authority (church or state) has, by statute, provided and enforced marriage terms since 1534;<sup>151</sup> individuals have (theoretically) only opted between entering into the official form of marriage or remaining outside of it.

That said, individuals today have wide latitude to determine for themselves the responsibilities and conduct *within* their marriages. The government’s established boundaries for marriage do not extend to dictate intimate conduct within a marriage, such as living arrangements, financial cooperation, allocation of domestic responsibilities, and sexual behavior.<sup>152</sup>

Even with such brief descriptions of the three theories, it is apparent that contemporary marriage does not fit perfectly into any of these categories but rather straddles all three of them. States legislate the boundaries of marriage, but most people have some prototypical idea of what

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any options about these terms.” Lenore J. Weitzman, *The Marriage Contract: Spouses, Lovers, and the Law* xv (1981)

<sup>149</sup> “Marriage is a sexual option carved out of nature by law, faith, custom, and society. In other words, to have the choice as individuals to marry we must first choose as a society to create marriage.” Gallagher, *The Abolition of Marriage* 9. Even under the marriage-as-contract theory, at least *some* official definition of “marriage” seems necessary to give the term meaning separate from the ordinary economic contracting which individuals, banks, and businesses engage in every day.

<sup>150</sup> This observation separates the right to marry from the specter of Lochnerism—constitutional protection for the general right to contract. In contrast to economic contracts, marriage during the *Lochner* period remained heavily state-regulated. See Section IV.A, *infra*.

<sup>151</sup> “A parliamentary act of 1534 gave the Archbishop of Canterbury powers to grant such licenses and dispensations as had formerly been granted by the Pope...” R.B. Outhwaite, at 6

<sup>152</sup> “[A] married couple is by and large free to have or not have sex, vaginal or not, procreative, contracepted, or otherwise; to be faithful or not, to divorce and remarry, to commingle finances or keep them separate, to live together or separately, to differentiate their roles or share all tasks, to publicize their relationship or be discreet about it, while still having their commitment to one another recognized by third parties including the state.” Mary Anne Case, *Marriage Licenses*, 89 Minn. L. Rev. 1758, 1765 (2005).

marriage *should* mean, so that radically different legal boundaries of marriage would seem strange (even illegitimate) to them. And while the state can legislate what relationships are given the label “marriage,” modern privacy doctrine renders illegitimate most state attempts to control actual behavior within marriage, with the result that individuals do set many of the most important terms of their marriage contracts.

One way of dealing with the cross-cutting theories of “marriage” is to recognize that the word “marriage” might have multiple meanings—meanings related to one another but not identical. Consider “examination” as an example of such a word: in a legal context, “examination” can mean an attorney’s questioning of a witness during a trial, but “examination” can also mean a doctor’s procedure to assess a patient’s health;<sup>153</sup> a teacher’s procedure to assess a student’s knowledge;<sup>154</sup> or even a thinker or writer’s grappling with a problem in an attempt to explain it.<sup>155</sup> Similarly, “marriage” invokes a wide range of concepts which overlap substantially but which also diverge in important ways:<sup>156</sup>

#### A. Marriage as Personal Relationship

From the perspective of a particular individual, “marriage” refers to a relationship between him or herself and another person which both of them understand to require certain behavior of themselves and which they both understand to grant certain legitimate expectations regarding the behavior of the other spouse. This might be called “personal-marriage.” A personal-marriage (or a collection of personal-marriages) should not be confused with the larger

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<sup>153</sup> “Dr. Smith’s examination confirmed that the wound was infected.”

<sup>154</sup> “John’s examination proved he was able to solve differential equations and recite the capitals of Africa.”

<sup>155</sup> “The paper argued that examination of the statute in light of constitutional free speech doctrine would show that the statute’s ban on certain campaign donations was impermissible.”

<sup>156</sup> People tend to understand that there are different meanings of the word “marriage,” though they may not realize it. Consider Representative Barney Frank’s famous question to Henry Hyde during the debate over the Defense of Marriage Act: “If other people are immoral, how does it demean your marriage?” Frank was distinguishing between Hyde’s personal-marriage and the legal-marriage regime Hyde was advocating. See David B. Cruz, “*Just Don’t Call It Marriage*”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. Cal. L. Rev. 925, 950 n.129 (2001).

social ideal of marriage, or the government’s classifications of some relationships as marriages:

“It is important to distinguish the individual interests in domestic relations from the social interest in the family and marriage as social institutions.”<sup>157</sup>

### B. Marriage as Ideology

From the perspective of society as a whole, “marriage” refers to commonly held beliefs about the operation of personal-marriages. “Marriage” is a collective understanding of what constitutes and creates a personal-marriage, how spouses within a personal-marriage should behave, and how outsiders to a personal-marriage should treat the arrangement and the spouses within it.<sup>158</sup> This set of social beliefs might be called “popular-marriage.” There might be more than one popular-marriage current within a single society at the same time, if the people are divided among multiple understandings of what constitutes a personal-marriage.

Obviously, there is a close relationship between personal-marriage and popular-marriage. Popular-marriage largely defines personal-marriage, since individuals entering into a personal-marriage are likely to have their understanding of their own personal-marriage shaped by the prevailing social consensus about marriage. However, a personal-marriage may differ from the popular-marriage if the particular spouses agree on a unique course of behavior between themselves.

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<sup>157</sup> Roscoe Pound, *Individual Interests in Domestic Relations*, 14 Mich. L. Rev. 177 (1916). Similarly, “[W]e need to distinguish the ‘meaning’ of marriage as an institution the state has an interest in recognizing and regulating, from the ‘meaning’ of marriage as supplied by religious or other civil associations.” Connie S. Rosati, *What is the “Meaning” of “Marriage”?*, Symposium, 42 San Diego Law Rev. 1003, 1007 (2005).

<sup>158</sup> Nancy Cott argues, “To be marriage, the institution requires public affirmation. It requires public knowledge—at least some publicity beyond the couple themselves; that is why witnesses are required for the ceremony and why wedding bells ring.” Cott 1-2. This assertion is questionable as applied to any particular couple; most people would probably accept a marriage conducted in secret and kept from the public eye as a *real* marriage. However, Cott’s point is insightful as applied to the *institution* of marriage. The institution retains vitality and relevance through regular public participation in it; this participation in turn creates shared expectations about the meaning of marriage. Such shared expectations might include the duty to recognize, support, and affirm the marital unit; acceptance of a sexual relationship within the unit as legitimate; and recognition of the unit as a family which can include children.



Philosophical or religious beliefs may play a significant role in shaping popular-marriage. If many people in a society believe that marriage practices should be defined by an account of marriage which comes from a particular source external to themselves,<sup>159</sup> then that account will coincide with a popular-marriage. One might call such a philosophical or religious account of marriage a “natural-law-marriage.”<sup>160</sup>

### C. Marriage as Legal Status

From the legal perspective, “marriage” refers to a certain relationship between people which the government recognizes as having particular consequences, which happen to be different than the consequences attached to a relationship between random strangers or between parent and child. This might be called “legal-marriage.”

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. However, once a definition of legal marriage is enshrined, that definition will work to shape popular-marriage, since people will see the legal-marriage definition coercively enforced by the power and prestige of the state.<sup>161</sup>

The state’s treatment of legal-marriage might involve requiring certain formalities before a relationship is officially recognized. Or, the state might declare that all relationships having

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<sup>159</sup> Possibilities include divine mandate, natural law, and pure reason.

<sup>160</sup> Robert George’s “one-flesh communion of persons” is perhaps the most well-known natural-law-marriage recently advanced in law journals. *See, e.g.*, Robert P. George, *What’s Sex Got to Do with It? Marriage, Morality, and Rationality*, 49 Am. J. Juris. 63 (2004); Robert P. George and Gerard V. Bradley, *Marriage and the Liberal Imagination*, Georgetown L.J. 84 (1995).

<sup>161</sup> “In shaping an institution like marriage, public authorities work by defining the realm of cognitive possibility for individuals as much as through external policing. Law and society stand in a circular relation: social demands put pressure on legal practices, while at the same time the law’s public authority frames what people can envision for themselves and can conceivably demand.” Nancy F. Cott, Public Vows 8. “The ‘prophecies’ of people in power have an inevitably self-fulfilling character, even when what is being ‘prophesied’ is popular opinion...the fact that things turned out as the Supreme Court predicted may prove only that the Supreme Court is the Supreme Court. Thus by predicting the future the justices will unavoidably help shape it...” Ely, at 70.

certain characteristics will be considered legal-marriages. Either way, the state will be forced to create an account of marriage by which to measure either applicants for official recognition or relationships which some litigant claims deserve legal treatment as a legal-marriage.

When it attempts to establish the boundaries of legal-marriage, the state might encounter difficulty if there are multiple popular-marriages. That is, if there is social dissensus as to what personal-marriage means (whether in who may marry, or in what responsibilities and behaviors marriage requires), political conflict will result. The representative government may respond by recognizing multiple (different) popular-marriages as arrangements which qualify as legal-marriage when reduced to practice in a personal-marriage. Alternatively, if a majority subscribes to the same popular-marriage, that majority may be able to establish its own popular-marriage as the sole template for legal-marriage.<sup>162</sup>

There is public-private tension in the concept of legal-marriage. An account of legal-marriage is necessary because the state (especially the court system) must deal with the social reality of personal-marriage and popular-marriage—whether it is settling disputes over dissolved personal-marriages (such as asset distribution or child custody) or settling disputes in which one party claims the existence of a personal-marriage should affect the outcome (such as who will make decisions on behalf of an incapacitated person or claims of wrongful treatment within a relationship).<sup>163</sup> Thus, legal-marriage is an intensely public concept. Yet modern American

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<sup>162</sup> Conflict over the content of legal-marriage between proponents of the differing popular-marriages is likely to be intense, since an established legal-marriage will eventually change public opinion to more closely conform to the official legal-marriage. Legal-marriage, in other words, has a tendency to conform popular-marriage to itself. This happens because legal-marriage is imposed as a solution on individuals who resort to the courts to settle disputes within their own personal-marriage, and these results are reported through the media.

<sup>163</sup> Maggie Gallagher puts it quite colorfully: “[T]he family, alone among the major structures of our society, remains stubbornly preliberal. The family cannot be rationalized according to the forms of bureaucracy because it is not rational. Why pour out your sweat and blood, why shed your tears for this child and not that one? Oh, it was your sperm, you say? Are you mad? Yes, quite mad. No family policy that ignores this universal human madness can possibly succeed.” Gallagher, *The Abolition of Marriage* 240. Also, marriage has an unavoidable shaping effect

popular-marriage considers a personal-marriage to be the most intimate of relationships, the place where majority opinion has little authority to dictate how lives are conducted. This tension within legal-marriage parallels our original problem, the constitutional law tension between state regulation of marriage and marriage as a fundamental right.

D. The Origin of the Right to Marry Conundrum

Our three theories of the origin of marriage boundaries roughly map onto the common usages of the word “marriage”:<sup>164</sup>

<u>Usage</u>		<u>Theory</u>
Personal-marriage	→	marriage as personal contract
Popular-marriage/natural-law-marriage	→	marriage as autonomous concept
Legal-marriage	→	marriage as state-created relationship

This correspondence suggests that the proper constitutional understanding of “marriage” in a given context could be determined by which type of marriage (and thus which theory) is being referenced by the vague term “marriage.” It suggests that a given use of “marriage” might be ambiguous; we may not be able to determine from context which type of marriage is intended. Most disturbingly, it suggests that the unreflective carrying of statements about “marriage” from

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on a nation’s population: “No modern nation-state can ignore marriage forms, because of their direct impact on reproducing and composing the population.” Cott, at 5.

<sup>164</sup> Compare this scheme with the tri-partite scheme offered by Connie Rosati involving “three types of talk about marriage”: (1) marriage as multipurpose union (descriptive and normative); (2) marriage as a legal institution that creates a binding relationship; (3) “richly normative” marriage as a “fundamental moral relation between partners” (irrespective of legal status). Rosati, at 1013-1015.

one context to another in reasoning about marriage might lead to illogical conclusions, since a statement about personal-marriage might not be true about legal-marriage, and vice versa.<sup>165</sup>

So which meaning of “marriage” is the Supreme Court using when it refers to the “fundamental right to marry”?

In general, the Supreme Court has meant legal-marriage when using the word “marriage,” and the Court’s holdings in the right-to-marry cases fit well with an interpretation of the fundamental right to marry as a right to legal-marry. *Loving*’s dicta declared that the fundamental right to marry prevented states from disallowing interracial legal-marriages; the context was a miscegenation prosecution, but the clear implication of the Court’s holding was that the state must give interracial marriages the same legal recognition as intraracial ones.<sup>166</sup> *Turner* obligated the state to accommodate a prisoner’s desire to legal-marry. *Zablocki* held the state’s denial of legal-marriage to the plaintiff a violation of his fundamental right to marry. These three cases forced the state governments to change their legal-marriage regimes to accommodate plaintiffs seeking admission to it.

It seems like declaring the obvious to conclude that the Court has meant legal-marry when talking about the fundamental right to marry, but this conclusion and the analysis leading up to it show how deep the conundrum contained within the “fundamental right to marry” runs. Having picked apart several different meanings for “marriage,” we have discovered that the theory behind legal-marriage is marriage as a state-created social policy tool, which suggests that

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<sup>165</sup> Take the “examination” example. A criminal defendant has a constitutional right to examination of witnesses as evidence at trial. However, this does not mean a defendant always has the right to give a witness a medical examination at trial, or to give an academic examination to a witness at trial. One step further, the idea of a defendant having a constitutional right to engage in examination in the sense of philosophical inquiry at trial is ridiculous, even nonsensical.

<sup>166</sup> See *Loving*, at 12.

the state can define the boundaries of marriage however it chooses.<sup>167</sup> However, the theory behind a fundamental right to marry militates against allowing coercive state regulation of legal-marriage. “Fundamental right” and legal-marriage, on this account, are incompatible.

Perhaps, though, this theoretical incompatibility is irrelevant. In light of the Court’s ubiquitous references to tradition when talking about marriage, one might guess that there exists an historical understanding of the boundaries of marriage driving the “fundamental right to marry” jurisprudence. Even without a theory behind it, a historical approach toward defining the boundaries of legal-marriage seems promising, especially in light of the commonness of personal-marriage. Personal-marriage surrounds us and affects our beliefs and behaviors without us even pausing to consider why this should be so. In that sense, personal-marriage is similar to gravity or traffic control devices—we usually do not contemplate them; we simply adjust our behavior to accommodate the effects they have on us. Maybe legal-marriage is like obscenity—we can’t define it, but we “know it when [we] see it.”<sup>168</sup>

This explanation is superficially attractive, but a little historical inquiry shows it to be incorrect. Legal-marriage is not something whose definition everyone has agreed upon for most of history; it has been often contested and occasionally changed.<sup>169</sup> But though the “know it when we see it” theory turns out to be incorrect, it nonetheless contains a valuable insight:

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<sup>167</sup> This view is supported by decisions upholding state restrictions on legal-marriage. *See Reynolds v. United States*, 98 U.S. 145 (1878) (upholding polygamy ban as constitutional); *Lutwak v. United States*, 344 U.S. 604 (1953) (ignoring legally valid marriage to uphold criminal conviction for fraudulently evading the immigration law); *Wyatt v. United States*, 362 U.S. 525 (1960) (ignoring legally valid marriage and requiring wife to testify against husband because husband was prostituting wife before they were married). For cases upholding state prohibitions on incestuous relationships, see Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 *Nw. U. L.Rev.* 1543, 1566 n.95 (2005).

<sup>168</sup> *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)

<sup>169</sup> “[M]arriage has always been a battleground, owned and defined first by one group and then another. While marriage may retain its ancient name, very little else in this city has remained the same...” Graff, at 546; “If 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.” Stephanie Coontz, *Marriage, a History* 11 (2005)

though “know it when we see it” is objectively incorrect, the courts have *acted as if* it is correct. This error has allowed marriage jurisprudence based on an outdated social consensus about marriage to persist, with the foundation of the legal doctrine no longer extant. In short, the Court’s current treatment of the fundamental right to marry is incoherent, and the history of Western marriage regulation explains why.

#### **IV. Constitutional Marriage Roots: History of Western Marriage Regulation**

##### A. History of Western Marriage Regulation

Personal-marriage as a practice goes far, far back in human history.<sup>170</sup> However, large-scale state regulation and licensing of marriage (legal-marriage) is a much more recent phenomenon. In Roman times, the state established a few marital eligibility rules (citizens needed permission to marry a foreigner and “could not marry slaves or prostitutes”), but other than that “did not get involved in ratifying marriage or divorce.” For Romans, marriage could be accomplished by a man and a woman moving in together and having marital intent.<sup>171</sup> Thus, before (and during) the rise of the Catholic Church, marriage was an arrangement entered and exited with little difficulty. The legal and social effects of personal-marriage were determined by social norms (popular-marriage).<sup>172</sup>

As the Catholic Church gained ascendance in Europe, both as belief system and as agent exercising social control, it sought ways to enforce its teachings on sexuality and marriage—to conform individual behavior to its understanding of moral behavior. The Church’s canon law prohibited “sodomy, adultery, pedophilia, fornication, and ‘eager gazing’ on women....bestiality,

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<sup>170</sup> See, e.g., Coontz, at 34-77

<sup>171</sup> Coontz, at 79-80

<sup>172</sup> “Our medieval ancestors did not need civil marriage. Most of them lived in small villages where everyone knew who was married—with or without a ceremony—and who was not.” Graff, at 545; “Neighbors [in the Middle Ages] had many ways to prevent or punish matches they considered inappropriate.” Coontz, at 111.

polygyny and polyandry...”<sup>173</sup> Marriage, which alone legitimated sexual activity, was considered a sacrament, and divorce was prohibited.<sup>174</sup> Eventually, the canon law was considered “the one universal law of the West,” and the Church enforced it upon all persons.<sup>175</sup>

Such a regime required clear rules about entry into marriage. Church doctrine declared mutual consent between a man and a woman sufficient to create a marriage.<sup>176</sup> This, however, created problems. Individuals could, and did, marry clandestinely. These secret marriages could be disclaimed by one spouse against the wishes of the other; conversely, an individual could falsely claim he or she had secretly married another, thus potentially marrying that person against his or her will. Once marriage was established in the eyes of the Church, it was permanent—and carried heavy consequences for almost every aspect of one’s life.<sup>177</sup> These consequences included strictly differentiated domestic sex roles; the man was required to be the husband/provider/legal representative of the marriage unit, while the woman was required to be a wife/dependant/domestic worker without separate legal personality.<sup>178</sup> Additionally, the two members of the couple were considered to merge into a single legal person, represented in the person of the husband. The wife lost all legal identity.<sup>179</sup>

Evidentiary problems in evaluating claims of marriage, the loss of control over the descent of property caused by children marrying without their parent’s knowledge, and the desire to prevent individuals from secretly marrying and divorcing pushed the Church to find a way of

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<sup>173</sup> Witte, Jr. 19

<sup>174</sup> Witte, Jr. 26-30, 36

<sup>175</sup> Witte, Jr. 30-31

<sup>176</sup> Under canon law, “A valid and indissoluble marriage was effected when a man and a woman who were free to do so exchanged words in the present tense indicating their consent to be husband and wife. There was no necessity for any ceremony, publicity, witnesses, or consent by any other parties...” Eric Josef Carlson, *Marriage and the English Reformation* 18 (1994).

<sup>177</sup> See Coontz at 106-109

<sup>178</sup> In 1753, a marriage license was “something like a certificate of ownership of the wife, entitling the husband to her property, her body and its products, including the labor she engaged in for wages and the labor that produced offspring; obliging him to provide for her care and feeding...” Case, *Marriage Licenses*, at 1768

<sup>179</sup> Coontz, at 115, 186

controlling marriage. It began formally licensing marriages and requiring public marriage ceremonies as an attempt to cut down on secret marriages.<sup>180</sup> Thus, when popular-marriage did not conform marital and sexual behavior to Church expectations (the Church's natural-law-marriage), the Church created legal-marriage to regulate personal-marriage behavior.

As secular governments became increasingly powerful, they began to compete with the Church for control over marriage.<sup>181</sup> The Protestant Reformation allowed governments in Protestant areas to take charge of marriage licensing because, unlike Catholic teaching, Protestant theology did not consider marriage a sacrament, and thus did not consider direct church control of legal-marriage necessary or desirable.<sup>182</sup> Though regulation of marriage began shifting from church to state, religious doctrine still shaped the substantive content of marriage regulation.<sup>183</sup> Protestant political units sought to "tame" sexuality and prevent people from marrying merely out of sexual desire.<sup>184</sup> Legal-marriage had been wrested from the church, but its boundaries continued to be defined by the church's natural-law-marriage.

This is the context in which marriage regulation was initially exported to the English colonies in North America: the government exercised marital controls based on a Christian view of marriage and morality.<sup>185</sup> However, by the time of American independence, the Christian

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<sup>180</sup> Coontz 106-107; R.B. Outhwaite, *Clandestine Marriage in England 1500-1850*, 4 (1995)

<sup>181</sup> Cott, at 5

<sup>182</sup> Witte, Jr., at 42-43

<sup>183</sup> "[T]here never was an English law of marriage apart from that administered by the Church courts." R.H. Helmholz, *Marriage Litigation in Medieval England* 3 (1974). *See also* Witte, Jr. 5-9.

<sup>184</sup> "Protestants objected to the Church's willingness to recognize secret or informal marriages even though that willingness had a long philosophical history. To reformers, however, that recognition would encourage people to marry 'on the basis of sexual desire alone.' As historian Steven Ozment put it, Protestants wanted to 'tame the old Adam in human nature, not strengthen it.' Wherever Protestants came to power, they challenged secret marriages by insisting, to the extent they could, that some public ceremony was necessary and by creating secular courts to oversee marital affairs." James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* 78 (2002) (quoting Steven Ozment, *When Fathers Ruled: Family Life in Reformation Europe* 28 (1983)).

<sup>185</sup> "The Anglican commonwealth model [of marriage] prevailed in much of Great Britain and its many colonies across the Atlantic." Witte, Jr., at 10. "The common sense of British colonials at the time of the American



moral-behavior justification for legal-marriage began to be supplemented in the United States with another view of the purpose of legal-marriage: creating virtuous republican citizens through virtuous republican families centered on virtuous republican marriages.<sup>186</sup>

As the new nation launched into the 1800s, the republic-shaping view of marriage was in turn challenged by Enlightenment-inspired individualism and the growing belief in free contract principles, both of which argued against expansive state regulation of marriage.<sup>187</sup> This individualist enthusiasm caused a contraction in public regulation of marriage on all levels (family, community, and state) during the first half of the nineteenth century, with private contracting and dispute resolution in courts filling the void left by the retreating state.<sup>188</sup> As a result, informal marriages flourished, leading to the development of the doctrine of common-law marriage by courts in response.<sup>189</sup>

During this period, as the republic-shaping view and then the private-contract view of marriage held ascendance, legal-marriage (and popular-marriage) began to slowly, almost

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Revolution was Christian; Christian common sense took for granted the rightness of monogamous marriage....Learned knowledge deemed monogamy a God-given but also a civilized practice, a natural right that stemmed from a subterranean basis in natural law." Cott, at 9.

<sup>186</sup> Cott, at 9, 18-21. "The colonial family's status as a vital link in the colonial chain of authority provided the major rationale for its internal organization." Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 5 (1985). "Marriage law guarded the entrance to the republican household. In the 1790s Connecticut Supreme Court Reporter Jesse Root voiced the central assumptions of nuptial law when he declared that the idea that 'one man should be joined to one woman in a constant society of cohabiting together, is agreeable to the order of nature, is necessary for the propagation of their offspring, and to render clear and certain the right of succession.' Root offered a lawyerly version of the popular belief that stable marriages performed critical roles in the society by producing healthy children, curbing sexual passions, and protecting private accumulation. Faith in those assumptions never wavered." *Id.* at 18.

<sup>187</sup> "The Enlightenment took root in England and Scotland in ways that slowly but inevitably led to a redefinition of marriage as an agreement between two people with individual rights rather than as a partnership made sacred by law, custom, and God." Wilson, at 87

<sup>188</sup> Witte, Jr. 70

<sup>189</sup> Grossberg 67-74. A lack of formal state authority did not mean marriage was unregulated, though. "When couples married informally, or reversed the order of divorce and remarriage, they were not simply acting privately, taking the law into their own hands....The surrounding local community provided the public oversight necessary. Without resort to the state apparatus, local informal policing by the community affirmed that marriage was a well-defined public institution as well as a contract made by consent." Cott 37. And "courts' recognition of informal marriage silently incorporated a particular definition of 'matrimony' and its 'duties and obligations.' In accepting self-marriage, state authority did not retreat, but widened the ambit of its enforcement of marital duties." Cott 40.

imperceptibly, separate from their theoretical foundation on Christian natural-law-marriage. The republic-shaping view of marriage had social-instrumental underpinnings, and the private-contract view was based on notions of individual consent alone.<sup>190</sup> However, inertia kept the substantive content of the marriage regulation mostly static, even when a sense of family crisis prompted re-regulation of marriage following the Civil War.<sup>191</sup>

The return of state legislatures to marriage in the last half of the nineteenth century forced courts to decide cases which pitted old common law marriage rules against new statutes. New statutes required that personal-marriages be solemnized by certain formalities in order for them to qualify as legal-marriages, but these formalities were often ignored by couples who entered into personal-marriages. Upon the death of a property-holder, disputes could arise over the estate, with one side claiming the existence of a valid legal-marriage and the other saying the formalities had not been observed, so the marriage could not be given legal effect in probate. The responses of judges to such controversies illustrated the uncertainty surrounding the nature of

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<sup>190</sup> By the mid-1800s, “In a society that had disestablished religion and enshrined individual rights, most kin nuptials fell outside of the shrinking domain of public regulatory authority.” Grossberg 111. “Marital unions were increasingly defined as private compacts with public ramifications rather than social institutions with roles and duties fixed by the place of the family in a hierarchical social order....[This process] reinforced common-law authority over marriage, and thus encouraged judges to define the legal boundaries of nuptials.” Grossberg 20. In 1834 treatise, Joseph Story called marriage “more than a mere contract” but also an “institution of society” with “peculiarities” not present in ordinary contracts. Grossberg 21 (quoting Joseph Story, *Commentaries on the Conflicts of Law* 100 (1834)).

<sup>191</sup> The reformers who successfully pushed for increased state regulation of marriage emphasized the status nature of marriage and the public interest in it against the contractual aspects of it. Grossberg 92. *See generally* Grossberg 83-86. “At the turn of the twentieth century, English and American legislatures treated marriage much the same way that the Catholic leaders of Trent and the Protestant leaders of Wittenberg, Geneva, and Westminster had done in the sixteenth century.” Witte, Jr. 194. This inertia was partially due the persistence among many people of belief in the old natural law basis for marriage. *See, e.g.*, Joel Bishop’s treatise defining marriage as “civil status, existing in one man and one woman, legally united for life, for those civil and social purposes which are founded in the distinction of sex. Its source is the law of nature, whence it has flowed into the municipal law of every civilized country, and into the general law of nations.” Joel Bishop, *Commentaries on the Law of Marriage and Divorce* 25 (Boston, 1852) (quoted in Grossberg 23).

legal-marriage, for they often ignored the unambiguous command of the statutes in favor of the common law.<sup>192</sup>

Ebb and flow of the *extent* of marriage regulation aside, the now-entrenched non-religious theories behind legal-marriage (the social-instrumental view and the private consent view) made it possible for states to begin changing the boundaries of legal-marriage in ways contrary to religious teachings, most notably in easing access to divorce.<sup>193</sup> While marriage rhetoric remained Christian (public figures spoke of marriage as a self-existent, traditional institution), underneath its rhetorical surface legal-marriage was abandoning the boundaries of religious natural-law-marriage for boundaries defined by popular preferences.<sup>194</sup>

As the 1900s began, the abandonment of the traditional natural-law-marriage template was reinforced and speeded by industrialization and new ideals about the status of women, who entered the workforce on a large scale and sought treatment as coequals with men. The increasing independence of women brought the former political citizenship nature of marriage into question, for now all persons had a direct relationship with the state regardless of marital status.<sup>195</sup> A changing society began discarding the marital structure of husband/provider and wife/dependent homemaker, thus removing another holdover piece of medieval natural-law-marriage. The gradual (theoretical) general rejection of laws intended solely to enforce moral values changed legal-marriage by rendering its original justification—moral coercion—

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<sup>192</sup> Clear statement rules provided a convenient means of accomplishing this task. “Judges preserved their discretion by retaining the axiom that marital regulations without explicit language making them compulsory were only directory.” Grossberg 95.

<sup>193</sup> Legislative revisions of divorce rules showed that “Far from being an institution fixed by God, marriage was in the hands of the legislature. The legislative legerdemain of the antebellum decades taught the lesson that ‘rightful and formal’ marriage was political, rather than simply natural or God-given.” Cott 54

<sup>194</sup> Cott 46-47, 219

<sup>195</sup> “The prior relation between marriage and citizenship became ‘as archaic as the doctrine of ordeal by fire’ once women had the ballot, a Massachusetts congressman remarked.” Cott 164.

illegitimate.<sup>196</sup> By the 1920s, Christian sexual mores were also slowly being discarded, and the legal-marriage monopoly on socially acceptable sexual activity was broken.<sup>197</sup> The new popular-marriage had rejected the old natural-law-marriage teaching both on sex roles within marriage and sexual behavior without it.<sup>198</sup>

The process of dismantling state regulation of sexuality was slow, however. Court decisions continued to reaffirm state power to regulate sexual activity for decades after common practice had embraced extramarital sexuality.<sup>199</sup> And the growth of the administrative state during the Depression and following World War II saw marriage revived as a convenient tool for government *economic* treatment of the family.<sup>200</sup>

In the 1960s, though, the effects of the social change began to be felt in law. The “Enlightenment contractarian model” of marriage was “implemented legally.”<sup>201</sup> The Supreme Court began to strike down government attempts to regulate individual sexual and marital behavior, proclaiming individual liberty to live a life of one’s own choosing.<sup>202</sup>

With its skeleton of sex roles rejected, its monopoly on sexuality broken, and its religious justification discarded, marriage was loudly questioned in the 1970s.<sup>203</sup> Still, out of habit (and,

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<sup>196</sup> The key figure in this process was John Stuart Mill, who wrote against the state imposing theologically-based social arrangements. Mill forcefully proclaimed the absolute equality of men and women and envisioned marriage as an arrangement of “liberty and affection, shaped by the preferences of wife and husband, not the prescriptions of church and state.” Witte, Jr. 201.

<sup>197</sup> Cott 159-161

<sup>198</sup> After 1900 “new patterns in women’s lives were not simple or unidirectional and neither were signals about the institution of marriage. One shift was clear: government authorities eased up on political and moral strictures about marriage and concentrated more on enforcing its economic usefulness.” Cott 157.

<sup>199</sup> See generally Dubler

<sup>200</sup> “New Deal policy innovations revived the fading connection between citizenship and marital role through economic avenues. These choices diluted the formal political equality of women and deeply imprinted marriage on citizenship entitlements, while refiguring what those entitlements were.” Cott 174

<sup>201</sup> Witte, Jr. 10-11

<sup>202</sup> “Today...every constitutionally recognized aspect of liberty legal marriage formerly monopolized (sex, cohabitation, reproduction, parenting, etc.) seems, as a matter of constitutional right, no longer within the state’s or marriage’s monopoly control.” Case, *Marriage Licenses*, at 1769. See also Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 La. L. Rev. 243 (2003)

<sup>203</sup> See Cott, at 212

for some, a lingering belief in natural-law-marriage) people continued to enter into legal-marriage. The marriage shell began to be filled by a new popular-marriage, which redefined legal-marriage in solely personal terms—privacy, personal fulfillment, and autonomy.<sup>204</sup> An institution whose shape and meaning is determined by each individual in terms of his or her personal preferences will lead to varying interpretations, and in the 1980s and 1990s, legal-marriage became the object of progressively greater political conflict as people advocating inconsistent popular-marriages struggled to have their own model enshrined as the legal one.

## B. Implications for the Fundamental Right to Marry

What does this history say about the “fundamental right to marry”? Under the traditional regime (where legal-marriage was rationalized as the state’s tool to enforce Christian morality and particular sex roles for men and women), one could propound two reasons why individuals had a fundamental right to legal-marry.

First, in the context of government regulation of sexual behavior, the “right to procreate” implies a right to marry.<sup>205</sup> The right to procreate is meaningless unless one also has a right to enter into the only legal status in which one can legally engage in procreative (sexual) behavior, and traditional laws against adultery and fornication made civil marriage necessary for a couple who wished to have a sexual relationship without the risk of criminal prosecution.<sup>206</sup> Second, if

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<sup>204</sup> “[M]id-twentieth-century discourse saw the hallmarks of the institution [of marriage] in liberty and privacy, consent and freedom.” Cott 197. “The legal, social, and economic supports that sustained marriage over centuries have dispatched with astonishing speed, and marriage has been reconceived as a purely private act, not a social institution but one possible scenario, sustained entirely by and for two individuals for their own mutual pleasure.” Gallagher, *The Abolition of Marriage* 7.

<sup>205</sup> *Zablocki*, 434 U.S. at 386.

<sup>206</sup> The traditional intertwining of procreation and marriage appears starkly in *Skinner*. There, the facts and holding had nothing to do with marriage; the case was about involuntary sterilization of convicts. Nevertheless, the Court mentioned procreation and marriage together: “Marriage and procreation are fundamental to the very existence and survival of the race.” *Skinner*, at 541. Clearly, procreation can occur without marriage; this statement tells us nothing about biology but a lot about social attitudes toward sex and marriage in 1942.

marriage is a natural law concept, then the state cannot legitimately prevent individuals from entering into marriage as defined by the natural law. Since natural law is prior to and higher than the state's law, the state can only use its authority to enforce the marriage boundaries which have been separately established by the natural law.<sup>207</sup>

The rhetoric in the Supreme Court's early marriage cases reflects these two considerations. *Zablocki* itself made the point about marriage being the only legal gateway to procreation. *Meister* seemed to have a natural-law-marriage in mind when it declared that marriage statutes "do not confer the right" to marry.<sup>208</sup> *Murphy v. Ramsey* appealed to the natural-law "idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony..."<sup>209</sup> *Meyer* considered the right to "marry, establish a home and bring up children" as "essential to the orderly pursuit of happiness," another natural law theory.<sup>210</sup> Justice Douglas' equation of marriage and procreation in *Skinner* reflected the Christian natural law view.<sup>211</sup>

However, modern developments in American constitutional law render both of these justifications of marriage as a fundamental right impermissible. Government regulation of sexual behavior solely for moral reasons is no longer allowed,<sup>212</sup> and attempts to use a Christian natural law justification for marriage would run afoul of Establishment Clause jurisprudence. Thus, the legal principles which initially moved the Court to pronounce a fundamental right to marry have

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<sup>207</sup> "When state legislators went about altering marriage in response to social and economic pressures, they did so with some ambivalence, looking above and behind them as though a more powerful presence were watching." Cott 47.

<sup>208</sup> *Meister v. Moore*, 96 U.S. 76, 78-79 (1877)

<sup>209</sup> *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)

<sup>210</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>211</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.")

<sup>212</sup> *Lawrence v. Texas*, 539 U.S. 558, 564, 571 (2003) ("The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'") (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992))

been completely eroded. Yet the idea of the fundamental right has lingered, cast adrift from its moorings.<sup>213</sup>

## V. Questioning the Fundamental Right to Marry

We have seen how the Supreme Court instinctively found a fundamental right to marry and instinctively found the fundamental right to marry to mean legal-marriage. This jurisprudence, however, was built upon understandings of law and legal-marriage which the Court itself rejected in the line of cases beginning with *Griswold* and which had been gradually disintegrating for a century and a half before *Griswold*. Can the modern jurisprudence of privacy and personal autonomy make its own sense of a “fundamental right to marry”? The different meanings of “marriage” (personal, social, natural-law, legal) suggest an answer.

A fundamental right to *personal*-marriage fits easily within the negative liberty constitutional tradition. The freedom to engage in a marital relationship, meaning only that the government cannot stop an individual from doing so, seems natural and intuitive.<sup>214</sup> A fundamental right to personal-marriage can summon in its defense many long-recognized constitutional protections (the autonomy of the household; freedom of speech; liberty to associate with friends of one’s choosing; freedom of conscience) along with more recently-birtherd constitutional protections (for privacy and sexual behavior). Few would argue that the government should be able to prevent two people from calling themselves married and behaving according to their understanding of what personal-marriage means.

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<sup>213</sup> “Too much of contemporary society seems to have lost sight of the rich and diverse Western theological heritage of marriage and of the uncanny ability of the Western legal tradition to strike new balances between order and liberty, orthodoxy and innovation with respect to our enduring and evolving sexual and familial norms and habits....These ancient sources ultimately hold the theological genetic code that has defined the contemporary family for what it is...” Witte, Jr. 15

<sup>214</sup> See Sunstein, at 2095-96

As applied to the notion of a fundamental right to marry, *popular-marriage* has little meaning, referring as it does to a set of beliefs shared by many people. Two individuals might enter into a personal-marriage patterned after a popular-marriage template, but this arrangement would still be a personal-marriage. If it meant anything, a fundamental right to popular-marriage would mean simply a right have one's own views about marriage—certainly a First Amendment right, but nothing more significant than that. Similarly, a fundamental right to *natural-law-marriage* would be nothing more than a First Amendment right. A natural-law-marriage is an abstract concept; its principles might be observed by participants in a personal-marriage, but this would still be a personal-marriage.

As the problems in the Supreme Court's marriage cases demonstrate, the idea of a fundamental right to *legal-marriage* is where the real puzzle lies. *Loving*, *Zablocki* and *Turner* declared a fundamental right to legal-marry, but did not adequately justify this pronouncement. Could they have? Approaching the problem systematically, we see there are potentially five different ways to justify a fundamental right to legal-marriage.

First, there might be a characteristic of legal-marriage itself to which all persons have a fundamental right—a fundamental right directly to legal-marriage. Since legal-marriage is defined by the state, it is hard to see what this would mean. Legal-marriage by itself is empty, a shell into which the state pours meaning. In theory, legal-marriage could involve two people or ten; it could require spouses to live together or to live apart; it could grant spouses intestacy rights or it might say nothing about intestacy. Without an account of legal-marriage extrinsic to the whims of the legislature, a direct fundamental right to legal-marriage means nothing—it is a fundamental right to whatever the legislature decides to give.<sup>215</sup>

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<sup>215</sup> A fundamental right directly to legal marriage might make sense if one accepted that people could have constitutional rights as a group (rather than as a collection of individuals). A group might claim the right to be



Second, the state might be fundamentally required to give legal-marriage treatment to all personal-marriages conforming to a certain natural-law-marriage. Under this view the state must acknowledge personal-marriages in conformance with the natural law because the natural law is superior to the state. This theory, obviously, requires the authoritative adoption of an account of natural law, something the Supreme Court is unlikely to do.<sup>216</sup>

Third, one might say there is a fundamental right to have popular-marriage define the boundaries of legal-marriage. However, a belief does not become a fundamental right merely because some group of people shares it, so this argument must be a democratic one for it to make any sense. Perhaps a belief should be considered a fundamental right if a majority shares it. Yet this theory grants a *minority* no rights against the majority because a minority view does not qualify as something a democratic government must adopt. Since it has a majoritarian justification, popular-marriage is not a useful justification for a fundamental right; fundamental rights are significant because they are counter-majoritarian.<sup>217</sup>

Fourth, one might say the fundamental right to personal-marriage requires legal recognition of all personal-marriages.<sup>218</sup> The key move here is the idea that any individual personal-marriage must be recognized also as a legal-marriage, simply because the spouses want

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treated as a marriage unit by the state simply by virtue of its groupness. The idea of group rights in marriage, though, was rejected by the Supreme Court in *Eisenstadt*; see note 96, *supra*. See also, Anita Bernstein, *For and Against Marriage: A Revision*, 102 Mich. L. Rev. 129, 140 (2003) (“[M]ore than ever, married people are individuals.”)

<sup>216</sup> “One thing has changed since 1931: constitutional lawyers have gotten the message, and the concept [of natural law] is no longer respectable in that context [of constitutional law] either.” John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 52 (1980). “The idea [of natural law] is a discredited one in our society...and for good reason....[Y]ou can invoke natural law to support anything you want.” *Id.* at 50.

<sup>217</sup> Unless one posits that a popular-marriage embraced by a *minority* has claim to recognition as legal-marriage. For the purpose of this argument, such a popular-marriage is not really distinguishable from a personal-marriage; its only claim to special status is that some people believe in it. Accordingly, there is no need to consider such a popular-marriage separately from the consideration of personal marriage below.

<sup>218</sup> See Greene, at 1996: “[*Turner*] demonstrates, therefore, that marriage is fundamental under the U.S. Constitution not because it provides a setting for heterosexual procreation but because it solemnizes a social relationship that individuals regard as fundamentally important. Cf. Karst, *The Freedom of Intimate Association*, 80 Yale L.J. 624 (1980).

it to be a legal-marriage. Such an assertion demands explanation, though, and a good reason for it is unavailable. There is no general obligation for the law to conform itself to an individual's desires. The history of marriage offers no help; legal-marriage has always been limited in its availability. And there is no constitutional obligation for the government to officially license other kinds of consensual relationships.

Fifth, if a fundamental right to legal-marriage cannot directly be shown, perhaps it can be shown indirectly. That is, perhaps there exists a separate fundamental right which itself entails legal-marriage. Thus,

- (1) There exists fundamental right *X*
  - (2) *X* requires legal-marriage
- Therefore,
- (3) There exists a fundamental right to legal-marriage

One such argument which has been made fills in *X* with "being treated by the government as a human being," so that we have: (1) all people have the fundamental right to be treated as humans by the state; (2) the right to legal-marriage is an inherent part of being human; (3) therefore, all people have the fundamental right to be allowed to legal-marry in the eyes of the state.<sup>219</sup> Considering current popular-marriage views in conjunction with the treatment-as-a-human argument appears to strengthen it. If most people believe that legal-marriage is a right that accrues simply from being a person, then denying marriage to someone seems like denying their humanity.

However, a little probing demonstrates that this argument fails to show that legal-marriage is a fundamental right. Assume that (1) is true; all people have the fundamental right to be treated as human by the state. This leaves two questions: (i) *is* legal-marriage inherently part

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<sup>219</sup> *E.g.*, "A society that fails to recognize the relationships and families of lesbians and gay men is a society that fails to respect their personal dignity and full humanity." Ball, at 1218. Similarly, Nancy Cott argues, "At the same time that any marriage represents personal love and commitment, it participates in the public order. Marital status is just as important to one's standing in the community and state as it is to self-understanding." Cott, at 1

of being treated as human by the state? (ii) if so, what shape must legal-marriage take, and why? Question (i) is contestable; those who value legal-marriage might say access to it is a vital part of human existence, while those who think legal-marriage oppressive might say it is *harmful* to one's humanity. One might embark on extended philosophical and sociological theorizing to justify the claim that entering into legal-marriage is an inherent part of being human. Sidestepping that question and accepting *arguendo* that the answer to (i) is yes, though, all we have accomplished is to arrive back at the original question: what shape must legal-marriage take in order for being human to require it, and why? The answer to this question can only come from a philosophical account of what being human means—a question the Court has found the Constitution to leave open to individuals to decide for themselves.<sup>220</sup> There is a strong counterargument to any such detailed account of being human, no matter how carefully constructed: “I have different beliefs about the meaning of legal-marriage and about the relationship of legal-marriage and being human, and the Constitution does not support your view any more than it does mine.”

Another way of seeing this is to realize that legal-marriage might have multiple necessary components; simply being a person need not guarantee that one can marry. If legal-marriage requires you to be human and fulfill the requirements A, B, and C, then if John is unable to legal-marry, it could be because he fails A, B, or C—there is no necessary inference about whether the law is treating him as a person or not. Which A, B, and C are permissible requirements for legal-marriage? Unless one arbitrarily imposes an account of legal-marriage whose boundaries are defined by an extra-constitutional source, these questions cannot be answered by reference to a “fundamental right to marry.”

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<sup>220</sup> See note 89, *supra*.

One last objection remains. Even if no principled account of the boundaries of a fundamental right to legal-marry is available, perhaps the vague concept of a fundamental right to legal-marry is still useful. Perhaps such a fundamental right prevents a majority from defining marriage so that it is only available to the majority. That is, a majority—believing legal-marriage is a good thing—should not be allowed to create a legal-marriage regime which maliciously excludes a minority group. The classic example of this injustice was laws restricting the ability of racial minorities to marry.<sup>221</sup>

However, this argument is based upon equal protection notions, not any unique property of marriage as a fundamental right. A majority should not be able to deny a minority equal access to any legal structure, whether it be marriage, the incorporation of a company, or a passport. None of these need be considered fundamental rights for the Constitution to prevent a majority from unfairly administering them. Introducing vague notions of an indeterminate fundamental right to marry adds nothing to the analysis; it merely obscures the main point and creates extraneous doctrine to confuse future cases involving marriage.

To make a fundamental right to legal-marry matter, one must posit that there is a core meaning to “marry” which the state cannot alter. Yet there is no core meaning of marriage which can be justified in our constitutional scheme. If legal-marriage is defined by the state, a fundamental right to legal-marry is meaningless. If legal-marriage is defined by majority rule, a fundamental right to legal-marry offers no protection, of itself, for a minority. If legal-marriage

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<sup>221</sup> Either by refusing to recognize as legal-marriage the same arrangements among members of the minority which would be recognized as legal-marriage among members of the majority, or by refusing to recognize as legal-marriage arrangements between a member of the majority and a member of the majority. Such laws played significant roles in the tragic American experience with slavery. “The denial of legal marriage to slaves quintessentially expressed their lack of civil rights. To marry meant to consent, and slaves could not exercise the fundamental capacity to consent.” Cott, at 33

is defined by a law higher than the Constitution, the Supreme Court must tell us what that law is. And saying that legal-marriage must include all individual personal-marriages is silly; there is no constitutional right for an individual to have the law as it applies to them say whatever they want it to say.

If required to do so, courts can decide on a case-by-case basis whether specific state marital regulations qualify as constitutionally “reasonable.” But “reasonable” as applied to legal-marriage will have very different meanings depending on who is deciding. In the face of right-to-marry indeterminacy, the suspicion inevitably arises that judicial decisions about the constitutional boundaries of marriage are not so much the result of orderly constitutional mandates as they are the channeling of judicial policy preferences whispering, “I think people should behave in manner *x*, so the fundamental right to marry must mean *y*, regardless of how many people say otherwise.”<sup>222</sup>

## **VI. Escaping the Constitutional Marriage Conundrum**

There does not seem to exist an adequate justification for considering legal-marriage a fundamental right protected by the Constitution, and no principled account of the boundaries of legal-marriage is available. How can the jurisprudence be fixed to reflect this reality, while doing as little damage to constitutional precedents as possible?

The earlier breaking down of the umbrella term “marriage” into various more specific meanings, coupled with the “negative rights” nature of the rest of the Court’s fundamental rights jurisprudence, suggests an answer. As noted above, a fundamental right to personal-marriage—specific individual, private marital arrangements—fits comfortably within the negative rights

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<sup>222</sup> See Ely, at 56-60. “The objection to ‘reason’ as a source of fundamental values is therefore best stated in the alternative: either it is an empty source...or, if not empty, it is so flagrantly elitist and undemocratic that it should be dismissed forthwith.” *Id.* at 59.

nature of the recognized fundamental rights (like the right to raise and educate one's children as one pleases, and the right to use contraceptives).<sup>223</sup> Thus, a fundamental right to personal-marriage would forbid the government from interfering with the decisions of individuals to form arrangements they deemed marriages, though it would allow the states to create boundaries for legal-marriage however they deemed best (within the constraints of other constitutional guarantees, like the Equal Protection Clause).<sup>224</sup>

Of course, this strategy only kicks the problem of defining constitutional protections for marriage down a level; how far can someone stretch their own personal-marriage boundaries and still receive constitutional protection? However, this question is similar to other questions the Court regularly answers: how far does *any* negative liberty right extend, whether the right to educate one's children or the right to speak freely? This is territory in which judicial decisions often *prevent* government action but in which they rarely *force* government action. The difference is significant. Court decisions to force government action initiate confrontation between the legislative and judicial branches, while decisions preventing government action usually happen in response to controversies initiated by the legislative or executive branches. Further, since judicial decisions about negative liberties prevent state action, they often do not need to precisely describe the boundaries of the liberty; they may merely say a particular state action lies on the wrong side of the line. There is accordingly less pressure on the Court to be

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<sup>223</sup> In contrast, a fundamental right to legal-marriage would decidedly *not* fit the larger pattern. "Because the Supreme Court has long rejected demands for affirmative entitlements cast as constitutional rights—among them health care, government-funded abortion, and education at a state-mandated level of quality—the Court cannot rely on its precedents to recognize a constitutional right to be married in the eyes of the law." Anita Bernstein, *For and Against Marriage: A Revision*, 102 Mich. L. Rev. 129, 143 (2003). Cf. Ball, at 1204 ("[E]ven if the Due Process Clause primarily protects negative rights, the fundamental right to marry stands as an important exception.")

<sup>224</sup> See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 385-86 (1971) (Douglas, J., dissenting) ("The power of the States over marriage and divorce is, of course, complete except as limited by specific constitutional provisions."); *id.* at 389 (Black, J., dissenting) ("Absent some specific federal constitutional or statutory provision, marriage in this country is completely under state control, and so is divorce.")

specific and aligned with public opinion when it prevents government action than when the Court forces legislative or executive bodies to act in ways they do not wish to act.

There are several themes in the existing constitutional jurisprudence of marriage that support reinterpreting the fundamental right to marry to mean personal-marriage. The Court's assertion in *Griswold* that marriage precedes the state is nonsensical as applied to legal-marriage, but an obvious statement of historical fact as applied to personal-marriage. The state is already prevented (under normal circumstances) from interfering with practices commonly associated with personal-marriage (childrearing, living arrangements, sexual behavior) but has long been understood to have power to fix the consequences of legal-marriage (inheritance, divorce, child support). Removing legal-marriage from the domain of the fundamental right to marry explains how the venerable doctrine of common law marriage—which occasionally results in the imposition of legal-marriage on a couple against their wishes—can be constitutional.<sup>225</sup>

Similarly, there are themes in the existing constitutional jurisprudence of legal-marriage which are inconsistent with legal-marriage being a fundamental right. The *Lutwak* decision's explicit rejection of several "legal marriages" as qualifying for favorable immigration treatment fits better with the idea of legal-marriage as a tool of state social policy than it does with legal-marriage as a fundamental right the state is bound to respect. And longstanding bans on polygamy do not fit well with the idea that rights may be exercised by the individual as broadly and as often as he or she desires.

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<sup>225</sup> The fundamental right to marry implies the fundamental right to marry to be not married. *See Boddie v. Connecticut*, 401 U.S. 371, 380-83 (1971). Yet common law marriage allowed a state to impose marriage on a cohabiting person against his or her will. "A New York man, for example, who tried to sever informally his relationship with his long-time cohabitant found that he needed to go to court to do so, because the couple had spent a few nights in the common law marriage states of Georgia and South Carolina while on a motor trip to Disney World." Glendon, at 278 (citing *Kellard v. Kellard*, 13 Family L. Reporter 1490 (N.Y. Sup. Ct. 1987)).

There are significant theoretical advantages associated with considering the right to marry as applying to personal-marriage rather than “legal marriage.” This approach is internally coherent—it doesn’t rely on long-discarded (by the courts, at least) religious beliefs about legal-marriage to justify a fundamental rights claim. It is an externally coherent approach—it fits easily with the Court’s treatment of other fundamental rights by framing the “right to marry” as a negative right and by emphasizing the family life/privacy aspect of marriage. And it allows the state flexibility as it tries to design legal institutions which will maximize social welfare.<sup>226</sup>

The interpretation of the “right to marry” as meaning personal-marriage also allows courts to avoid taking sides in the cultural debate over the meaning of legal-marriage. A court decision establishing legal-marriage as *X* and then authoritatively calling this the “fundamental right to marry” has the effect of closing off debate and handing victory to one side—potentially in the minority—without it necessarily convincing a majority that its view of marriage is the best. In a society with democratic ideals, this is undesirable, especially because the court’s imposed definition will then begin to conform public opinion to itself.

The biggest problem with reinterpreting the fundamental right to marry as meaning personal-marriage has three names: *Loving*, *Zablocki*, and *Turner*. However, these obstacles are not as daunting as they might appear. All three could be easily re-read, without outright overruling, in a way that would not establish legal-marriage as the fundamental right to marry. The language about legal-marriage being a fundamental right in *Loving* was completely unnecessary to the holding of the case; equal protection doctrine alone required the *Loving* outcome. The Court in *Zablocki* mentioned that the plaintiff’s right to marry could arise from the

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<sup>226</sup> “The implications of classifying the right to marry on the extreme individual rights end of the spectrum of constitutional protections do not bode well for permitting careful analysis of the relationship between individual and social interests in this most basic of social institutions—unless, of course, the Court adopts a test that weighs those two interests as part of the process of determining whether a ‘liberty’ interest is present in the first place.” Hafén, at 510.



combination of his right to procreate and the illegality under Wisconsin law of doing so without being married; one might reasonably confine the significance of the case those facts, which seem unlikely to recur in the wake of *Lawrence v. Texas*. And *Turner* could be reread, as Justice Thomas suggested in *Overton v. Bazzetta*, merely as saying that withholding the right to marry was not part of Safley's statutory sentence.<sup>227</sup>

## Conclusion

The Supreme Court has adopted a doctrine of the fundamental right to marry. However, this doctrine has several problems: (a) the Court never satisfactorily explains why marriage is a fundamental right; (b) the Court never defines the boundaries of marriage as a fundamental right; (c) the Court has occasionally treated marriage as if it were *not* a fundamental right; (d) the Court has long said that states have broad powers to regulate marriage.

Commentary (including court decisions) on marriage often refers to "marriage" as if its meaning is obvious, but the word "marriage" carries several different denotations. It can refer to a personal relationship, a popular understanding of a type of relationship, a religiously or philosophically defined type of relationship, or a legal category. These categories overlap because each one affects our understanding of the others, but they are conceptually distinct.

The idea of a fundamental right to marry, by which the Court has meant legal-marry, arose out of historically based natural law beliefs about sexuality and marriage. These beliefs provided principled boundaries for a fundamental right to marry. However, the Court's modern jurisprudence renders those understandings no longer tenable as the basis for constitutional law,

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<sup>227</sup> "*Turner* is therefore best thought of as implicitly deciding that the marriage restriction was not within the scope of the State's lawfully imposed sentence and that, therefore, the regulation worked a deprivation of a constitutional right without sufficient process." *Overton v. Bazzetta*, 539 U.S. 126, 140-141 (2003) (Thomas, J., concurring in judgment)

and no other principled manner of justifying or deriving boundaries for a fundamental right to legal-marry is available under the modern regime.

The best solution to this dilemma is for the Court to reinterpret the fundamental right to marry as referring to personal-marriage. This would preserve the entrenched idea of a fundamental right to marry while cohering with the negative liberty nature of the Court's other recognized fundamental rights and accommodating the reality that the Constitution does not (currently) textually define or even mention marriage of any kind.