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Authors

Lenhardt, RA
Cooper, Elizabeth B
Foster, Sheila
et al.

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May, 2008Symposium: **Forty Years of Loving**: Confronting Issues of Race, Sexuality, and the Family in the Twenty-First Century***2669 INTRODUCTION**

R.A. Lenhardt [FN1]

Elizabeth B. Cooper [FNaa1]

Sheila R. Foster [FNaaa1]

Sonia K. Katyal [FNaaaa1]

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In a recent New York Times editorial, Professor Stephanie Coontz provocatively asked, “Why do people--gay or straight--need the state's permission to marry?” [FN1] The question is one many legal scholars have *2670 increasingly begun to ask. [FN2] But the fact that it was raised so publicly in a year in which the nation celebrates the fortieth anniversary of the U.S. Supreme Court's landmark decision in *Loving v. Virginia* is nevertheless striking. [FN3]

Loving is a landmark decision and, significantly, one of the Court's most important cases on matters of marriage. [FN4] It is the first Supreme Court case to recognize that the right to marry is fundamental under the Due Process Clause of the Fourteenth Amendment. [FN5] And yet, perhaps curiously, the Court never discussed the threshold issue whether it was appropriate for the state of Virginia to play a role in deciding who could and could not marry. Rather, the question Chief Justice Earl Warren addressed in his opinion for the Court was whether Virginia, in enforcing its antimiscegenation laws, [FN6] could deny permission to marry on the ground that the individuals requesting it were of different races. [FN7] The basic legitimacy of the state's role as the gatekeeper for marriage was a foregone conclusion.

*2671 The *Lovings*, importantly, did not set out to change the way we think about marriage and the state's role in it. [FN8] The aim of these childhood sweethearts--Mildred Jeter, an African American woman, and Richard Loving, a white man--was actually much more modest. [FN9] After years of forced exile in Washington, D.C., for violating Virginia's prohibition on interracial marriage, [FN10] the *Lovings* wanted only to secure the right to live as a married couple in their native state. [FN11] As Mildred explained years later, “All we ever wanted was to get married, because we loved each other. Some people will never change, but that's their problem, not mine. I married the only man I had ever loved, and I'm happy for the time we had *2672 together. For me, that was enough.” [FN12] In the end, however, the impact of the decision in *Loving* extended far beyond Mildred and Richard's particular case.

Significantly, Loving received no mention in Professor Coontz's New York Times editorial, which argued for the privatization of marriage. [FN13] While Coontz references the identity-based restrictions placed on marriage over the years, [FN14] she bases her overall argument for relieving states of the power they have long wielded in the marriage arena not on past abuses of that power, but on the notion that society no longer benefits from governmental regulation in this context. [FN15] The proof of this, Coontz maintains, can be seen, in part, from the tremendous societal changes that have occurred in traditional marriage over the last few decades. [FN16] Divorce rates have skyrocketed since the 1950s and 1960s. [FN17] Many people never marry at all. [FN18] And those who choose to marry are doing so later and later in life. [FN19] In short, as Professor Rachel Moran recently noted, marriage now serves a very different purpose than it did in the past. [FN20] It is no longer a *2673 prerequisite for cohabitation or sexual intimacy. [FN21] Nor is a marriage license necessary to raise children. [FN22] Despite the New York Court of Appeals 2006 decision in *Hernandez v. Robles*, which regarded heterosexual marriage as a virtual precondition for the rearing of well-adjusted children, [FN23] the reality is that, today, “[a]lmost 40 percent of America's children are born to unmarried parents.” [FN24]

The significance of these and other similar changes cannot be ignored. As Coontz maintains, they reflect tremendous shifts in the nature of the personal and intimate obligations individuals--gay, straight, bisexual, or transgendered--now have to one another. [FN25] Marriage in the twenty-first century is arguably very different from what Mildred and Richard Loving had in mind. [FN26] There is good reason to explore this reality and to engage questions about the proper place of marriage in contemporary society, given the evolution we have witnessed in an institution that the Supreme Court has described as “the most important relation in life” [FN27] and “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 . . . an association for as noble a purpose as any . . .” [FN28] It may be, as Coontz and other scholars, including some in this book, [FN29] have suggested, that marriage's elevated status in the hierarchy of models for human intimacy and obligation has been undermined by the shifts in societal norms that have occurred. We submit, however, that it would be futile to try to comprehend fully the significance of the societal changes that have *2674 occurred since the 1960s and 1970s in the area of marriage without also considering Loving and the impact of the Supreme Court's opinion in that case. A full determination of where we are with marriage and “loving” cannot be made in the absence of a more complete understanding of Loving.

Our insistence on placing Loving at the center of any attempt to comprehend contemporary marital and intimate relations may be counterintuitive to some. After all, we noted at the outset that Loving did not purport fundamentally to change marriage or the role of the state in regulating it. At the same time, it seems clear that in spite of this and the modest aims of the Loving plaintiffs, the decision in Loving has been transformative on a number of levels. [FN30] Indeed, in recent years, it has been at the forefront of efforts to rethink marriage, the nature of the obligations it imposes, and the role of the state in determining which relationships are licit and which are illicit. One need only look at recent litigation to secure rights for same-sex couples to get some sense of this. Loving has been a centerpiece of litigation efforts waged by advocates for the right of gay and lesbian couples to marry. [FN31] Even more significantly, it figured prominently in the Massachusetts Supreme Judicial Court's 2003 decision in *Goodridge v. Department of Public Health*, which extended marriage rights to gay and lesbian couples in Massachusetts. [FN32] As the following excerpt highlights, *2675 the Goodridge court relied a great deal on Loving and *Perez v. Sharp*, [FN33] the first post-Reconstruction case to invalidate an antimiscegenation law [FN34]:

As both *Perez* and *Loving* make clear, the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public

health, safety, and welfare. . . . In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance--the institution of marriage--because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination. [FN35]

Our objective in planning this fortieth celebration of *Loving* was to devise a program that would allow us to explore in depth the modern implications of the Court's 1967 decision in *Loving*--what it says about the state's role in intimate relationships, as well as what it might explain about race, family, and the place of marriage in modern society. Too often, the inclination among scholars is to choose between the different aspects of Warren's opinion for the Court. [FN36] On the one hand, there are Warren's statements about race and the dangers of racial prejudice. The assertion that "the racial classifications [in Virginia's antimiscegenation statute] must stand on their own justification, as measures designed to maintain White Supremacy," [FN37] is viewed as a "key sentence" in *Loving*, [FN38] one absolutely critical to understanding both issues of race and equality, and the concerns of the Court during this period. [FN39] On the other hand, there is the aforementioned language about marriage. Warren's conclusion that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival," was extremely significant, [FN40] both because of what *2676 it said about what was at stake for the Lovings and what it signaled about the status of marriage in the constitutional hierarchy. [FN41]

Rather than choose between these two poles, we have preferred to think of them, as the *Loving* Court arguably did, as interdependent, each necessary to comprehend the issues at hand. [FN42] As the essays by Angela Harris and Kevin Noble Maillard in this book help to elucidate, state laws pertaining to marriage and sexual intimacy have been instrumental in promoting racial segregation and stratification and, more generally, in constructing racial identity. [FN43] Nothing illustrates this better than the opinion of the Virginia trial court in *Loving*, which regarded the state's antimiscegenation laws as essential to restoring what it perceived as the racial order originally established by "Almighty God [with] white, black, yellow, malay and red [persons] . . . on separate continents." [FN44] Likewise, as Erica Chito Childs's and Russell Robinson's essays emphasize, race, or more specifically the racial identity of one's intimate partner, still plays a critical role in shaping how individuals think about sexual intimacy and the prospect of marrying someone of a different race. [FN45] Indeed, although the rates of interracial marriage have increased since 1967, [FN46] they have not done so to the extent one might expect. [FN47] Interracial sexual intimacy may *2677 occur, but for many people, the idea of entering into a lifelong partnership with someone of a different race is still simply unimaginable. [FN48]

The dual dimensions of Warren's opinion are also a lens on matters beyond those formally addressed in the opinion--concerns that Warren and his colleagues on the Court probably never contemplated but that are nevertheless implicated by the Court's decision. [FN49] For example, what can *Loving* be understood to say about same-sex couples seeking to marry, particularly in light of the Supreme Court's 2003 decision in *Lawrence v. Texas*, [FN50] which held that state laws criminalizing same-sex intimacy deprived gays and lesbians of the liberty interests secured by the Due Process Clause of the Fourteenth Amendment? [FN51] Is there a meaningful analogy between identity-based restrictions on marriage that concern race and those that pertain to gender or sexual orientation? [FN52] Does it make sense for marriage to be so much at the center of the movement for LGBT *2678 rights? [FN53] Can access to marriage for same-sex couples "deliver" on citizenship and the benefits it confers in the way that it arguably did for African Americans? [FN54] In addition, one might contemplate the reverberating effects of *Loving* for other kinds of intimate associations and their place in American society and law. [FN55] What of the relationship between a parent and child? [FN56] Or the relationship between extended family members or even friends? [FN57] Does *Loving* offer a way of thinking about these types of interper-

sonal relationships? Does it tell us something about handling matters of identity that might arise within them?

Finally, looking beyond the particular facts of *Loving* invites an inquiry into the treatment of matters of race and marriage outside the borders of the United States. Have other countries managed to construct a model of state regulation of marriage that is different than what we have seen in the United *2679 States? [FN58] If, as the *Lawrence* Court suggested, it is reasonable and even desirable to permit the practices of other nations with respect to same-sex intimacy to inform constitutional decision making on such matters in this country, [FN59] might we, for example, look to what other countries have done in thinking about the legitimacy of state laws that exclude same-sex couples from the institution of marriage? [FN60] Could the experience of South Africa or Canada be instructive? [FN61]

In a very real sense, our goal in organizing the Forty Years of *Loving*: Confronting Issues of Race, Sexuality, and Family Symposium was to examine the *Loving* decision in all of its dimensions and to look at all the dimensions of “loving.” Admittedly, this agenda was more than a little ambitious. But, as this book attests, we were able, through the incredible contributions of the Symposium participants and attendees, to achieve a good part of our goal. On November 2, 2007, scores of legal and nonlegal scholars, practitioners, and students filled the auditorium at Fordham University School of Law to give *Loving* what, at this point in its forty-year existence, may be the very best celebration we could offer: a thorough and in-depth discussion of what it has meant and can mean to those concerned about matters of race, sexuality, and family in modern society.

Each of the four sessions held during the Symposium focused on an important aspect of *Loving* and/or loving. The panelists in our opening session, *Historical Perspectives on Race, Sex, and Family*, endeavored to put in context the *Loving* decision and questions regarding the identity-based restrictions that states have historically placed on marriage. Professor Maillard, addressing questions of race and collective memory, challenged us to reject the vision of *Loving* as “Multiracial Epiphany,” the idea that it somehow began or made possible the formation of interracial relationships or the existence of mixed race individuals. [FN62] Through a compelling discussion of three “contemporary disputes over racial identity and membership” [FN63]—that concerning Thomas Jefferson and Sally Hemmings, one of his former slaves, and those claiming to be their descendants; that *2680 involving Essie Mae Washington-Williams, a woman of color who recently revealed that she was the daughter of former Senator Strom Thurmond, once an avowed segregationist; and that pertaining to descendants of West Ford, a slave said to be the son of George Washington and a slave named Venus—Maillard’s essay in this book both documents the existence of interracial intimacy that occurred long before *Loving* and focuses our attention on the continued resistance to interracial relationships and the inability of some to acknowledge a pre-1967 past that includes them.

Professors Katherine Franke and Darren Hutchinson turned our attention to recent litigation to secure marriage equality for LGBT couples, each effectively arguing that “there are good reasons to resist the analogy to *Loving*.” [FN64] Concerned that the current focus on marriage will ultimately require the “surrender of a great deal of the liberty rights acknowledged in *Lawrence*” [FN65] as well as gay and lesbian acquiescence in intimate lives patterned exclusively on heterosexual relationships, [FN66] Franke’s essay urges advocates to undertake “efforts to secure marriage equality for same-sex couples . . . in a way that is compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire.” [FN67] In this connection, she proposes friendship as an alternative model for reconceptualizing social structures, one that does not implicitly use marriage as the ultimate measure of human intimacy and commitment, and that would not, in her estimation, result in increased regulation of gay and lesbian sexual liberty. [FN68] In Franke’s view, friendship has the advantage of “destabiliz[ing] the meanings and the makings of

meaning of fundamental human life,” [FN69] of letting individuals decide for themselves how to interact, and what their commitments and obligations to one another should be. [FN70]

The panelists in the second session, Social and Legal Norms Regarding Race, Sex, and Gender Nonconformity, built on the tremendous foundation laid by the first panel in diverse and innovative ways. Professor Carlos Ball continued the focus on current marriage litigation, broadening the discussion to concentrate not only on the arguments made by gay advocates of equal access to marriage, but also those advanced by state officials and judicial officers. In particular, Ball's essay critiques the emphasis on child rearing in judicial opinions upholding as constitutional bans on marriage for same-sex couples, demonstrating that similar arguments were made in defense of antiscegenation laws such as those struck down by *Loving*.

***2681** The remaining panelists in this session shifted the conversation away from litigation matters and toward an exploration of modern examples of interracial “loving.” Professor Adrienne Davis addressed matters of race and gender underlying the film *Monster's Ball*, critiquing the storyline for its adherence to flawed conceptions of both race and gender in interracial relationships. Professor Chito Childs, for her part, looked more broadly at the attitudes of Whites and Blacks toward interracial marriage in the twenty-first century. Arguing that black-white relationships function as a “miner's canary . . . expos[ing] lingering racism, prejudice, and segregation in society,” [FN71] Chito Childs's fascinating essay provides the results of qualitative interviews on cross-racial intimacy and explores the “dominant” and sometimes shocking “images and beliefs about black-white couplings” and what they suggest about the state of “contemporary race relations.” [FN72]

Professor Robinson invited the audience to think harder about results such as these by drawing attention to the “impact of structural conditions on preferences regarding intimacy.” [FN73] In an essay that blends personal narrative and empirical analysis, Robinson explores the impact of racial screening devices such as Internet dating sites and sex-segregated queer social spaces. He concludes that these and other social structuring devices greatly influence romantic preferences, giving special attention to black-white intimate interactions involving gay men. [FN74]

Professor Harris of the University of California-Berkeley School of Law was magnificent as the conference's keynote speaker. A distinguished scholar, and leader in Critical Race Theory, Critical Race Feminism, and LatCrit, Harris delivered an address that both synthesized themes raised in the prior two sessions and compelled the audience and participants to travel to entirely new intellectual territory. In *Loving Before and After the Law*, Harris considers “marriage as a practice of national citizenship,” [FN75] focusing specifically on notions of citizenship that bear on the “possession and enjoyment of certain political, civil, and social rights” [FN76] and “active engagement in the public life of the community.” [FN77] In Harris's view, “the legacy of *Loving v. Virginia* looks strikingly different depending on which [of these] ax[e]s of citizenship one chooses to examine.” [FN78] From the perspective of rights, Harris—who develops a theory of state power ***2682** premised on “racialized gender” [FN79] and the preparation of “proper” citizens through marriage [FN80]—argues that *Loving* should be read to require gay and lesbian access to marriage, “not because marriage holds any special position in human life,” [FN81] but because “the denial of the right . . . signals that state power is being used to enact a system of caste.” [FN82] From the perspective of participation, however, Harris contends that *Loving* may very well be irrelevant, to the extent it emphasizes the citizenship-building capacity of marriage, an institution that, as Coontz emphasizes, is in serious decline in the United States. In concluding, Harris points us toward alternatives for possible reconciliation of these divergent views. Apart from the options presented by various forms of political theater, such as queers marrying en masse and “heterosexuals . . . refus[ing] to get married,” she emphasizes the new and productive avenues that might be opened by a critical examination of prevailing

conceptions of family. [FN83]

Finally, our last session of the day--a panel entitled Transnational Perspectives on Race, Sex, and Family--followed the path blazed by Harris in the previous session, turning the focus to the international context and an inquiry into how other countries have handled their own Loving moments, instances when they have been confronted with diverse claims for racial, gender, sexual, or familial diversity. As with the prior sessions, the panelists provided in-depth and thought-provoking analyses of the conference themes and issues. Professor Chandan Reddy delivered remarks that considered the challenges for LGBT organizing in the domestic and international contexts, advocating the adoption of a new paradigm for queer political engagement. His essay in this book picks up on that theme by exploring the limits of legal efforts to secure marriage rights and equal citizenship for gay men and lesbians. More specifically, Reddy asks what gay advocates gain and lose by invoking Loving in current marriage litigation. [FN84] Engaging critical texts relevant to his query, Reddy accuses advocates of living too much in the past and relying on the social hierarchies and structure that constituted it, concluding that the use of Loving and the move toward "the universalization of the right to marriage" it reflects "is the very means by which the law forecloses other, possibly more difficult and imaginative articulations of antiracism." [FN85] In his view, "the desire for the universal right of marriage is primarily the preservation of an episteme that has lived beyond its utility." [FN86]

***2683** Professor David Eng addressed similar issues in his presentation, advancing a critique of what he refers to as queer liberalism. He focused primarily on the implications of regarding the Court's 2003 decision in *Lawrence* as one that concerns gay rights alone. Reminding us that *Lawrence* involved a couple that was gay as well as interracial, Eng urged a more sustained focus on intersectionality and the ways in which legal restrictions in the area of intimacy can have effects on matters of race and sexuality. For Eng, the success of queer liberalism--which so often entails an embrace of Loving, as *Goodridge* and other recent marriage cases attest--should not rest on what amounts to a "forgetting of race."

Professors Adrien Wing and Darren Rosenblum took the conversation in a different, but equally productive direction by considering the identity-related implications of international laws and policies bearing on questions of race and gender. Darren Rosenblum focused on Norway, comparing judicial efforts to achieve racial equality in *Loving* with efforts by the legislature of Norway to secure a level of gender equality for women through the implementation of the Corporate Board Quota (CBQ). In his essay, Rosenblum urges a renewed focus on the possibilities presented by "assertive remedies for inequality" such as quotas. He argues that, in the final analysis, Norway's QBC has been more effective than Title IX and other similar measures in the United States for achieving equity through forms of balancing. In this connection, Rosenblum, while praising the outcome of *Loving*, concludes that, as a necessarily passive remedy, it is inherently limited in its ability to facilitate interracial intimate relationships.

Employing themes from Critical Race Feminism, as well as personal experience and narrative, Professor Adrien Wing closed the session and the Symposium by asking how *Loving* can help us think about the challenges faced by "Muslim women who . . . want the legal freedom to marry outside their faith," something forbidden in most Muslim countries. [FN87] Her essay in this book, *Twenty-First-Century Loving: Nationality, Gender, and Religion in the Muslim World*, explores the multiple race, gender, and family-based identities possessed by Muslim women and discusses in detail the challenges they face both under Islamic family law precepts subordinating women to men and in the secular world, where head scarves and other indicia of spiritual devotion mark Muslim women as targets for abuse and discrimination. Explaining that these forces combine to make life extremely difficult for Muslim women who want to enter into interfaith unions, Professor Wing urges a focus on

the many ways in which “[g]ender discrimination manifests itself.” [FN88] And she offers specific solutions for addressing the inequities posed by interfaith marriage bans that range from public education to legal strategies centered on gender equality provisions contained in the constitutions of countries in the Muslim world and international provisions, such as the International Covenant on Civil and *2684 Political Rights, [FN89] the International Covenant on Economic, Social and Cultural Rights, [FN90] and the Convention on the Elimination of All Forms of Discrimination Against Women. [FN91] While acknowledging that barriers to interfaith marriage are unlikely to rank high on the international human rights agenda in the near future, Professor Wing, referring to *Loving* and the presidential candidacy of Senator Barack Obama—who is the product of a union that was both interracial and interfaith—reminds us that there are good reasons to expect and hope for productive change down the road.

Together, the talented group of scholars who participated in *Forty Years of Loving: Confronting Issues of Race, Sexuality, and the Family in the Twenty-first Century* managed to make important interventions in the field that will significantly advance thinking about *Loving* in the context of the intersecting realities of race, sexuality, and family in contemporary American society. No doubt some will find that there are questions and issues relevant to understanding *Loving* that were not addressed by this Symposium or that were explored only superficially. This gathering of scholars was not, however, meant in any way to close the book on *Loving*—to somehow wrap up neatly a case that, as the discussion above details, touches on some of the most difficult and complex issues facing our society. Like the *Lovings*, our aim here was ultimately more modest. In the end, we wanted simply to launch a critical conversation about the Court's decision in *Loving*, one that perhaps complicates as many issues as it resolves. In opening up the discussion, we invite others to join in what we expect will be a conversation that continues for at least another forty years.

[FNal]. Associate Professor of Law, Fordham University School of Law.

[FNaa1]. Associate Professor of Law, Fordham University School of Law.

[FNaaa1]. Albert A. Walsh Professor of Law, Fordham University School of Law.

[FNaaaa1]. Associate Professor of Law, Fordham University School of Law. This book and the Symposium it commemorates would not have been possible without the support and contributions of many people. First, we would like to express our deep gratitude to Professor Angela Harris, who delivered the Symposium's keynote address, and to the distinguished professors who participated as panelists during the Symposium and submitted essays for publication. They include Carlos Ball, Erica Chito Childs, Adrienne Davis, David Eng, Katherine Franke, Darren Hutchinson, Kevin Noble Maillard, Chandan Reddy, Russell Robinson, Darren Rosenblum, and Adrien Wing.

We are also extremely thankful to Katherine Hughes, Nasim Farjad, Patrick Connorton, Adam Perry, Mike Buescher, and the other members of the Fordham Law Review for their excellent work on this book and for the organizational assistance they provided during the *Forty Years of Loving* Symposium. In this connection, we would like to extend our sincere thanks to Helen Herman and the staff of the Fordham University School of Law Office of Public Programming and Continuing Legal Education, whose expertise in planning major events and attention to every administrative detail ensured that the Symposium ran smoothly and was enjoyed by all who attended. Finally, we are thankful to Michael Dunn and William Lim for their invaluable research assistance, and to Dean William Michael Treanor and Associate Dean Matthew Diller for their enthusiasm and support, both monetary and otherwise, over the last year. We regard ourselves as extremely fortunate to be part of an in-

tellectual community whose leadership recognizes the importance of the issues addressed by this Symposium.

[FN1]. Stephanie Coontz, Op-Ed., *Taking Marriage Private*, N.Y. Times, Nov. 26, 2007, at A23.

[FN2]. See, e.g., Martha Albertson Fineman, *Why Marriage?*, 9 Va. J. Soc. Pol'y & L. 239, 245 (2001) (reflecting on various meanings and constructions of civil marriage and arguing that “for all relevant and appropriate societal purposes we do not need marriage, per se, at all”); Charles J. Reid, Jr., *And the State Makes Three: Should the State Retain a Role in Recognizing Marriage?*, 27 Cardozo L. Rev. 1277 (2006) (considering the “privatization” of marriage and the appropriate role of the state); Katharine B. Silbaugh, *The Practice of Marriage*, 20 Wis. Women's L.J. 189 (2005) (criticizing, inter alia, the state's use of marriage to control social issues); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 Cal. L. Rev. 1479 (2001) (calling for a laissez-faire approach to marriage “privatization”); see also Anita Bernstein, *For and Against Marriage: A Revision*, 102 Mich. L. Rev. 129, 142 (2003) (engaging calls to eliminate state-sponsored marriage, but concluding that marriage best satisfies the need for regulation in our “[i]ntimate lives”); Summer L. Nastich, *Questioning the Marriage Assumptions: The Justifications for “Opposite-Sex Only” Marriage as Support for the Abolition of Marriage*, 21 Law & Ineq. 114 (2003) (exploring the redistribution of the legal benefits of marriage by abolishing legal marriage).

[FN3]. *Loving v. Virginia*, 388 U.S. 1 (1967).

[FN4]. See R.A. Lenhardt, *The Story of Perez v. Sharp: Forgotten Lessons on Race, Marriage, and Family*, in *Race Law Stories* 341, 341-42 (Devon W. Carbado & Rachel F. Moran eds., 2008).

[FN5]. See *id.* at 365-66. Some scholars argue that, because of the dual grounds--race and marriage--on which *Loving* was decided, the first clear articulation of the due process right to marry did not come until *Zablocki v. Redhail*, 434 U.S. 374 (1978), which declared unconstitutional a Wisconsin statute requiring any person with child-support obligations to get court approval before being permitted to marry. See, e.g., Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 Marq. L. Rev. 21, 31 (2006).

[FN6]. At the time *Loving* was decided, Virginia had several statutes concerning miscegenation. See *Loving*, 388 U.S. at 4-7. One of the statutes the Lovings were found to have violated provided, in relevant part, that, “[i]f any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.” *Id.* at 4. Significantly, this statute was only one of many Virginia had enacted in its history. The first Virginia law banning interracial marriage was enacted in 1691. A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L.J. 1967, 1967 n.5 (1989). Laws prohibiting sexual intimacy between whites and blacks appeared in the American colonies as early as 1662. *Id.* at 1968 n.6 (discussing the first prohibition on interracial sex).

[FN7]. *Loving*, 388 U.S. at 2.

[FN8]. See Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 How. L.J. 229, 231 (1998).

[FN9]. Mildred and Richard Loving grew up together in Central Point, Virginia, a community whose racial norms were more relaxed than they were in other parts of the state. *Id.* at 234. As Robert Pratt explained in his personal essay about the *Loving* case, interracial intimacy was fairly common in Central Point, so much so that

Mildred and Richard's "budding romance drew little attention from either the white or the black communities" of the town. [Id. at 235](#).

[FN10]. The Lovings married in 1958 in neighboring Washington, D.C. [Id. at 236](#). At that time, the state of Virginia refused to recognize not only interracial marriages procured within its borders, but also those outside of them. [Id.](#) When sheriffs' deputies, acting on an anonymous tip, discovered the Lovings living as a married couple in the home of Mildred's parents, they arrested them and charged them with violating the law. [Id.](#) Following grand jury indictments for violation of the state's 1924 Racial Integrity Act, a judge sentenced both Mildred and Richard to a year of imprisonment. [Id.](#) Their sentences, however, were suspended "on the condition that they leave the state of Virginia and not return together or at the same time for a period of twenty-five years." [Id.](#)

Significantly, the question of how a state should regard marriages procured outside its borders that could not have been obtained within them has arisen again in the context of efforts to secure marriage rights for same-sex couples. Many states, emboldened by the federal Defense of Marriage Act passed by Congress in 1996, [Pub. L. No. 104-199, 110 Stat. 2419](#) (codified at [1 U.S.C. § 7 \(2000\)](#); [28 U.S.C. § 1738C](#)), have refused to recognize marriages secured by gays and lesbians in jurisdictions within the United States, such as Massachusetts, or in foreign countries. See Andrew Koppelman, [Against Blanket Interstate Nonrecognition of Same-Sex Marriage, 17 Yale J.L. & Feminism 205, 206 \(2005\)](#) (noting that "[f]orty states have laws on the books declaring that they will not recognize foreign same-sex marriages"). New York, however, recently indicated that it would recognize such marriages. See [Martinez v. County of Monroe, 850 N.Y.S.2d 740 \(App. Div. 2008\)](#) (holding that a same-sex marriage obtained in Canada is entitled to recognition in New York); see also [Beth R. v. Donna M., No. 0350284/2007, 2008 WL 696441 \(N.Y. Sup. Ct., Feb. 25, 2008\)](#) (permitting a divorce action involving a same-sex marriage obtained in Canada). In this sense, New York's approach is similar to that employed by California and other states pre-**Loving**. See R.A. **Lenhardt**, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 Cal. L. Rev. (forthcoming Aug. 2008) (manuscript at 101, 104-05, 104 n.19, on file with authors). Unlike Virginia, California, which also had antimiscegenation laws on its books, determined that it would recognize interracial marriages obtained in other states. [Id.](#) (manuscript at 104 n.19); see also [Pearson v. Pearson, 51 Cal. 120, 125 \(1875\)](#) (holding that a marriage "valid by the law of the place where it was contracted, is also valid in this State").

[FN11]. Richard Loving famously asked one of the attorneys who handled his case in the Supreme Court to "[t]ell the Court I love my wife, and it is just unfair that I can't live with her in Virginia." Pratt, *supra* note 8, at 239. For a discussion of this and other aspects of the Loving narrative, see Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law--An American History* (2004).

[FN12]. Pratt, *supra* note 8, at 244 (internal quotation marks omitted).

[FN13]. Coontz, *supra* note 1.

[FN14]. [Id.](#)

[FN15]. [Id.](#)

[FN16]. [Id.](#)

[FN17]. Rachel F. Moran, [Loving and the Legacy of Unintended Consequences](#), 2007 Wis. L. Rev. 239, 269. Some sources indicate that as many as fifty percent of marriages end in divorce. See Jeffrey G. Sherman, [Prenuptial Agreements: A New Reason to Revive an Old Rule](#), 53 Clev. St. L. Rev. 359, 372-73, 373 nn.67-68

(2005) (citing various sources, including U.S. Census data, in supporting the fifty percent claim); see also U.S. Census Bureau, Statistical Abstract of the United States: 2008 (2008) (indicating that the divorce rate in the 1980s fell from that in the 1970s, falling to 3.6 divorces per thousand from 5.3 per thousand).

[FN18]. See Moran, *supra* note 17, at 269. Nationally, from 1970 to 2006, there was an eighty-seven percent increase in the number of men who never married and an eighty-three percent increase in the number of women who never married. See U.S. Census Bureau, Table MS-1: Marital Status of the Population 15 Years Old and Over, by Sex and Race: 1950 to Present (2007), available at <http://www.census.gov/population/socdemo/hh-fam/ms1.xls>; see also R. Richard Banks & Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage*, 11 Mich. J. Race & L. 115, 119, 124 (2005) (finding that “[b]lack women now marry at a lower rate than any other group of women,” and noting a similar decline for black men); Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitants*, 9 J.L. Fam. Stud. 1, 7-9 (2007) (“Some commentators have concluded that cohabitation has substituted for the lost or postponed marriages....”); Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 Fam. L.Q. 1, 17-21 (2000) (discussing the decline in marriage rates in the context of women's marital preferences).

[FN19]. See Moran, *supra* note 17, at 274. Nationally, the estimated median age at first marriage rose from 23.2 for men in 1970 to 27.5 in 2006. See U.S. Census Bureau, Table MS-2: Estimated Median Age at First Marriage, by Sex: 1890 to the Present (2007), available at <http://www.census.gov/population/socdemo/hh-fam/ms2.xls>. At the same time, the median age for women rose from 20.8 to 25.5. *Id.*; see also Claudia Goldin, *The Long Road to the Fast Track: Career and Family*, 596 Annals Am. Acad. Pol. & Soc. Sci. 20 (2004) (tracing the rise in age at first marriage among college-educated women).

[FN20]. See Moran, *supra* note 17, at 268-69.

[FN21]. Moran, *supra* note 17, at 269; Coontz, *supra* note 1. Along these lines, we no longer stigmatize children born outside of marriage as illegitimate. See Thomas Healy, *Stigmatic Harm and Standing*, 92 Iowa L. Rev. 417, 479 (2007) (arguing that the “stigma of illegitimacy has lessened somewhat over time, as the number of illegitimate births has increased and as alternative models of the family have become more accepted”); Linda C. McClain, “Irresponsible” Reproduction, 47 Hastings L.J. 339, 350 (1996) (critiquing rhetoric decrying “the decline in stigma attached to out-of-wedlock births”); see also *Gomez v. Perez*, 409 U.S. 535, 537-38 (1973) (holding that state denial of public benefits to illegitimate children violates the equal protection guarantee).

[FN22]. See Moran, *supra* note 17, at 269.

[FN23]. *Hernandez v. Robles*, 855 N.E.2d 1, 7-8 (N.Y. 2006).

[FN24]. Coontz, *supra* note 1. Based on 2005 data, the percentage of out-of-wedlock births is 36.8 nationally. See U.S. Census Bureau, *supra* note 17; see also Bowman, *supra* note 18, at 31-34 (distinguishing between children in single-parent households and those in cohabitation households, and noting that half of the latter are biological children of both cohabitants).

[FN25]. Coontz, *supra* note 1.

[FN26]. Moran, *supra* note 17, at 268-69.

[FN27]. [Maynard v. Hill](#), 125 U.S. 190, 205 (1888).

[FN28]. [Griswold v. Connecticut](#), 381 U.S. 479, 486 (1965); see also, e.g., [Skinner v. Oklahoma ex rel. Williamson](#), 316 U.S. 535, 541 (1942) (describing marriage as “fundamental to the very existence and survival of the race”); [Meyer v. Nebraska](#), 262 U.S. 390, 399 (1923) (describing a due process right “to marry, establish a home and bring up children”).

[FN29]. See, e.g., Angela P. Harris, [Loving Before and After the Law](#), 76 Fordham L. Rev. 2821 (2008); see also Katherine M. Franke, [Longing for Loving](#), 76 Fordham L. Rev. 2685 (2008) (contesting the centrality of marriage in claims for gay rights and advocating an increased focus on other models for human intimacy and obligation).

[FN30]. Loving has led to changes in cross-racial intimacy. See Randall Kennedy, [How Are We Doing with Loving?: Race, Law, and Intermarriage](#), 77 B.U. L. Rev. 815, 817-19 (1997) (describing, inter alia, Loving as a “triumph” for freedom of choice); Pratt, *supra* note 8, 240 (describing the decision's effect on Mildred and Richard Loving personally); Tim Padgett & Frank Sikora, Color-Blind Love: Once Considered Taboo, Interracial Marriages Are Now on the Rise--Even in Some Unexpected Places, *Time*, May 12, 2003 (unpaginated) (claiming a 1000% increase in the number of interracial marriages since Loving and profiling several such couples in Alabama). But its greatest impact may be on thinking about race, marriage, and the law. See John DeWitt Gregory & Joanna L. Grossman, [The Legacy of Loving](#), 51 *How. L.J.* 15, 52 (2007) (noting that Loving's legacy has mostly been legal, not cultural, since interracial marriage is still a “relatively unusual occurrence”); see also Reginald Oh, [Regulating White Desire](#), 2007 *Wis. L. Rev.* 463, 508-11 (discussing the impact of Loving on the legality of racial subordination). But see Rashmi Goel, [From Tainted to Sainted: The View of Interracial Relations as Cultural Evangelism](#), 2007 *Wis. L. Rev.* 489 (cautioning that Loving failed to address the racist “cognitive imprint” that favors the white partner in an interracial relationship); Camille A. Nelson, [Lovin' the Man: Examining the Legal Nexus of Irony, Hypocrisy, and Curiosity](#), 2007 *Wis. L. Rev.* 543 (same, from Nelson's own personal perspective).

[FN31]. Loving has been cited and is often discussed at length in major case filings submitted by advocates for the right of same-sex couples to marry. See, e.g., Respondents' Opening Brief on the Merits, [In re Marriage Cases](#), 149 P.3d 737 (Cal. 2006) (No. A110451); Memorandum of Authorities in Support of All Plaintiffs' Motion for Summary Judgment and In Support of All Plaintiffs' Resistance to Defendant's Motion for Summary Judgment, *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Jan. 30, 2007); Brief of Plaintiffs-Appellants, [Goodridge v. Dep't of Pub. Health](#), 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860); Brief of Appellants, [Lewis v. Harris](#), 908 A.2d 196 (N.J. 2006) (No. 58398); Brief for Plaintiff-Appellants, [Hernandez v. Robles](#), 855 N.E.2d 1 (N.Y. 2006) (No. 103434/04); Appellants' Brief, [Baker v. State](#), 744 A.2d 864 (Vt. 1999) (No. 98-32); Corrected Brief of Respondents, [Andersen v. King County](#), 138 P.3d 963 (Wash. 2006) (No. 75934-1).

[FN32]. [Goodridge](#), 798 N.E.2d at 969.

[FN33]. 198 P.2d 17 (Cal. 1948). For more on *Perez v. Sharp* and its utilization in recent marriage cases, see [Lenhardt](#), *supra* note 10.

[FN34]. See, e.g., [Goodridge](#), 798 N.E.2d at 958-59.

[FN35]. *Id.* at 958 (citation omitted).

[FN36]. Cf. **Lenhardt**, *supra* note 10 (manuscript at 126).

[FN37]. **Loving v. Virginia**, 388 U.S. 1, 11 (1967).

[FN38]. Cass R. Sunstein, **Homosexuality and the Constitution**, 70 Ind. L.J. 1, 17 (1994) (“The key sentence in **Loving** says that ‘the racial classifications [at issue] must stand on their own justification, as measures designed to maintain White Supremacy.’” (alterations in original) (quoting **Loving**, 388 U.S. at 11)).

[FN39]. See *id.* at 17-18 (“The striking reference to White Supremacy--by a unanimous Court, capitalizing both words and speaking in these terms for the only time in the nation's history--was designed to get at the core of Virginia's argument that discrimination on the basis of participation in mixed marriages was not discrimination on the basis of race. The Supreme Court appeared to be making the following argument: Even though the ban on racial marriage treats blacks and whites alike--even though there is formal equality-- the ban is transparently an effort to keep the races separate and, by so doing, to maintain the form and the conception of racial difference that are indispensable to White Supremacy.”); see also Christopher A. Bracey, **Dignity in Race Jurisprudence**, 7 U. Pa. J. Const. L. 669, 713 & n.198 (2005); Richard Delgado, **The Current Landscape of Race: Old Targets, New Opportunities**, 104 Mich. L. Rev. 1269, 1280 n.49 (2006); John A. Powell, **Whites Will Be Whites: The Failure to Interrogate Racial Privilege**, 34 U.S.F. L. Rev. 419, 463 (2000).

[FN40]. **Loving**, 388 U.S. at 12.

[FN41]. **Lenhardt**, *supra* note 10 (manuscript at 126-28).

[FN42]. On the importance of considering both aspects of the **Loving** decision, see William N. Eskridge, Jr., **Destabilizing Due Process and Evolutive Equal Protection**, 47 UCLA L. Rev. 1183, 1186-87 (2000); **Lenhardt**, *supra* note 10 (manuscript at 126-28, 152-61); Laurence H. Tribe, **Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name**, 117 Harv. L. Rev. 1893 (2004).

[FN43]. See Kevin Noble Maillard, **The Multiracial Epiphany of Loving**, 76 Fordham L. Rev. 2709 (2008); Erica Chito Childs, **Listening to the Interracial Canary: Contemporary Views on Interracial Relationships Among Blacks and Whites**, 76 Fordham L. Rev. 2771 (2008). For a fuller discussion of the role of marriage laws in constructing racial and gender identity, see Randall Kennedy, **Interracial Intimacies: Sex, Marriage, Identity, and Adoption** (2003); Rachel F. Moran, **Interracial Intimacy: The Regulation of Race and Romance** (2001); and **Lenhardt**, *supra* note 10 (manuscript at 128-41).

[FN44]. **Loving**, 388 U.S. at 3 (internal quotation marks omitted). The trial court concluded that “[t]he fact that [God] separated the races shows that he did not intend for the races to mix.” *Id.* (internal quotation marks omitted).

[FN45]. Chito Childs, *supra* note 43; Russell K. Robinson, **Structural Dimensions of Romantic Preferences**, 76 Fordham L. Rev. 2787 (2008).

[FN46]. Maillard, *supra* note 43, at 2710. The U.S. Census Bureau reports that, in 1960, only 0.4% of all marriages were interracial, including interracial couples that were not black-white. U.S. Census Bureau, Table 1: Race of Wife by Race of Husband: 1960, 1970, 1980, 1991, and 1992 (1998), available at <http://www.census.gov/population/socdemo/race/interractab1.txt>. By 1970, that figure rose to 0.7%. *Id.* The figures were 1.3% in 1980, 1.8% in 1990, 2.6% in 2000, and 3.8% in 2006. See U.S. Census Bureau, *supra* note 17;

see also Padgett & Sikora, *supra* note 30 (claiming a 1000% increase in interracial marriages between 1967 and 2003).

[FN47]. See Kennedy, *supra* note 43, at 127; Gregory & Grossman, *supra* note 30, at 48-51 (“[A] significant proportion of the population prefers to date people of the same race”); see also Rachel F. Moran, *The Mixed Promise of Multiracialism*, 17 *Harv. BlackLetter L.J.* 47, 49 (2001) (noting “[d]isparities in intermarriage patterns” such as “93% of interracial marriages involving an Asian, Latino, or Native American were to white partners”); R. Richard Banks, *The Aftermath of Loving v. Virginia: Sex Asymmetry in African American Intermarriage*, 2007 *Wis. L. Rev.* 533, 535 (recognizing that black women are less likely than black men to enter into interracial marriages); Banks & Gatlin, *supra* note 18, at 130-31 (finding that African Americans as a whole are less likely than Latinos or Asian-Americans to intermarry).

[FN48]. See Chito Childs, *supra* note 43; see also Juliet A. Cox, Comment, *Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Societal Homogeneity?*, 59 *Mo. L. Rev.* 775, 785 (1994) (noting a 1991 poll in which forty-five percent of white respondents disapproved of interracial marriage); Angela Onwuachi-Willig, *Undercover Other*, 94 *Cal. L. Rev.* 873, 891-92 (2006) (discussing, *inter alia*, responses to interracial relationships).

[FN49]. See Moran, *supra* note 17, at 264.

[FN50]. 539 U.S. 558 (2003).

[FN51]. See Cass. R. Sunstein, *Liberty After Lawrence*, 65 *Ohio St. L.J.* 1059 (2004); Tribe, *supra* note 42, at 1945-51 (discussing *Lawrence* and marriage for gay and lesbian couples).

[FN52]. The debate over whether a meaningful analogy can be drawn between the race and same-sex marriage contexts has been waged in law reviews for many years now. See Lenhardt, *supra* note 10 (manuscript at 107 n.36, 128-31) (citing various law review articles). Many scholars maintain the analogy works. See, e.g., William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 *Alb. L. Rev.* 853 (2001); Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 *Utah L. Rev.* 781, 783-84; Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 *Yale L.J.* 145 (1988); Adele M. Morrison, *Same-Sex Loving: Subverting White Supremacy Through Same-Sex Marriage*, 13 *Mich. J. Race & L.* 177 (2007); Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 *Harv. C.R.-C.L. L. Rev.* 255 (2002); Sharon Elizabeth Rush, *Equal Protection Analogies-- Identity and “Passing”: Race and Sexual Orientation*, 13 *Harv. BlackLetter L.J.* 65 (1997); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 *Suffolk U. L. Rev.* 981 (1991). Other scholars have raised concerns about deploying the analogy. See Lenhardt, *supra* note 10 (manuscript at 128-31). For example, some have expressed concern that it distorts the holding of *Loving* and other similar cases. See, e.g., Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 *BYU L. Rev.* 555. Others have argued that the analogy masks problems of race and hierarchy within the gay and lesbian community, among other things. See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 *UCLA L. Rev.* 1467, 1484-1500 (2000); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *Conn. L. Rev.* 561, 631-35 (1997).

[FN53]. See Franke, *supra* note 29, at 2685-87; see also Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 *Colum. J. Gender & L.* 236 (2006). We use the term “LGBT” to refer to lesbians, gay men, bisexuals, and transgendered individuals.

[FN54]. Numerous scholars have discussed the denial of marriage rights of same-sex couples as a citizenship issue. See, e.g., Amy L. Brandzel, *Queering Citizenship?: Same-Sex Marriage and the State*, 11 GLQ 171, 195 (2005); Harris, *supra* note 29; Lenhardt, *supra* note 10 (manuscript at 107, 108, 151-61). Katherine Franke has explained elsewhere that “[t]he right to marry [also] figured prominently among the bundle of rights African Americans,” who had lacked the capacity to marry as slaves, “held dear in the postbellum years.” Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 Yale J.L. & Human. 251, 252 (1999). At the same time, Franke, expressing caution about the move toward marriage among gays and lesbians, has emphasized that marriage also served as an avenue for state intervention in the intimate relations of freedmen and women. *Id.* at 252-53.

[FN55]. Scholars have engaged in a wide-ranging discussion about alternatives to marriage and the possibilities for other models of human intimacy, connection, and obligation. See generally Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law* (2008) (challenging the use of marriage as a mechanism for providing numerous public and private benefits); Bowman, *supra* note 18 (recommending reforms in recognition of the prevalence of cohabitation); Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 La. L. Rev. 403 (2004) (discussing the feasibility of cohabitation as an alternative to legal marriage); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. Rev. 815 (2005) (same); Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 Hofstra L. Rev. 379 (2003) (discussing alternative kinship forms); Nastich, *supra* note 2; Allen M. Parkman, *The Contractual Alternative to Marriage*, 32 N. Ky. L. Rev. 125 (2005) (discussing potential alternatives to civil marriage); Laura A. Rosenbury, *Friends with Benefits?*, 106 Mich. L. Rev. 189 (2007) (advocating legal recognition of friendship and family care-taking arrangements); Stark, *supra* note 2; Daniel I. Weiner, *The Uncertain Future of Marriage and the Alternatives*, 16 UCLA Women's L.J. 97 (2007) (discussing proposed alternatives to legal marriage).

[FN56]. See, e.g., Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 Yale L.J. 875 (1998) (discussing cross-racial adoption); Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 Yale L.J. 2351 (1998) (responding to Banks, *supra*).

[FN57]. Laura Rosenbury discussed the stance the law should take with respect to friendship and the recognition of extramarital care-taking arrangements in a recent article. See generally Rosenbury, *supra* note 55 (advocating the legal recognition of friendship and family care-taking arrangements).

[FN58]. For a survey of developments in marriage in other countries, see, for example, M.V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience to the United States*, 17 Yale J.L. & Feminism 71 (2005); and Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. Ill. U. L. Rev. 589, 603-76 (2004).

[FN59]. See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (discussing the treatment of homosexual intimacy in European countries).

[FN60]. For a discussion of *Lawrence* and its global implications, see Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 Wm. & Mary Bill Rts. J. 1429 (2006).

[FN61]. See Anjuli Willis McReynolds, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. Rev. 1073 (2006) (suggesting that the experiences of other countries can support claims for same-sex marriage in the United States). To date, Belgium, Canada, the Netherlands, South Africa, and

Spain have recognized same-sex marriages. See Bruce M. Wilson, [Claiming Individual Rights Through a Constitutional Court: The Example of Gays in Costa Rica](#), 5 *Int'l J. Const. L.* 242, 253 n.71 (2007).

[FN62]. Maillard, *supra* note 43, at 2711.

[FN63]. *Id.* at 2712.

[FN64]. Franke, *supra* note 29, at 2685.

[FN65]. *Id.* at 2688.

[FN66]. *Id.* at 2697-98 (critiquing the default rule under the American Law Institute Principles of the Law of Family Dissolution that treats relationships where the individuals have jointly maintained a household and cohabited for a specific period of time as presumptive domestic partnerships).

[FN67]. *Id.* at 2686.

[FN68]. *Id.* at 2702-05.

[FN69]. *Id.* at 2704.

[FN70]. *Id.* at 2705.

[FN71]. Chito Childs, *supra* note 43, at 2784.

[FN72]. *Id.* at 2774.

[FN73]. Robinson, *supra* note 45, at 2787.

[FN74]. *Id.*

[FN75]. Harris, *supra* note 29, at 2821.

[FN76]. *Id.*

[FN77]. *Id.* at 2822.

[FN78]. *Id.* at 2823. Citing the work of Professor Linda Bosniak, Professor Harris acknowledges that there are additional dimensions of citizenships that marriage implicates, but which she chose not to explore in her keynote address. For a discussion of the dimensions of citizenship generally, see Linda Bosniak, [Citizenship Denationalized](#), 7 *Ind. J. Global Legal Stud.* 447, 455 (2000); and Leti Volpp, “Obnoxious to Their Very Nature”: Asian Americans and Constitutional Citizenship, 8 *Asian L.J.* 71, 71-72 (2001).

[FN79]. Harris, *supra* note 29, 2824-26.

[FN80]. *Id.* at 2829.

[FN81]. *Id.* at 2846.

[FN82]. *Id.* For a discussion of the benefits denied same-sex couples by the bar of marriage rights, see Elizabeth

B. Cooper, [Who Needs Marriage?: Equality and the Role of the State](#), 8 J.L. & Fam. Stud. 325 (2006).

[FN83]. Harris, *supra* note 29, at 2846-47.

[FN84]. Chandan Reddy, [Time for Rights? Loving, Gay Marriage, and the Limits of Legal Justice](#), 76 Fordham L. Rev. 2849 (2008).

[FN85]. *Id.* at 2871.

[FN86]. *Id.*

[FN87]. Adrien Katherine Wing, [Twenty-First-Century Loving: Nationality, Gender, and Religion in the Muslim World](#), 76 Fordham L. Rev. 2895, 2896 (2008).

[FN88]. *Id.* at 2905.

[FN89]. International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

[FN90]. International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3.

[FN91]. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13.
76 Fordham L. Rev. 2669

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