

WE'VE HEARD THIS BEFORE: THE LEGACY OF INTERRACIAL MARRIAGE BANS AND THE IMPLICATIONS FOR TODAY'S MARRIAGE EQUALITY DEBATES

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INTRODUCTION

Is it fair to compare bans on interracial marriage to bans on same-sex marriage? Courts have wrestled with this question since the inception of the debate on same-sex marriage. The first same-sex marriage cases were filed soon after the United States Supreme Court's 1967 decision in *Loving v. Virginia*, which struck down bans on interracial marriage in Virginia and fifteen other states.¹ The Court stated boldly, "Marriage is one of the 'basic civil rights of man[.]'"² Same-sex couples argued this broad language applied to them as well. The early same-sex marriage cases all rejected this analogy. The Minnesota Supreme Court, in the first same-sex marriage case in 1971, dismissed the comparison in a single sentence, which seemed so self-evident to the court that it did not need a citation: "[I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."³

In recent times, however, courts have used *Loving* to support the constitutional claim to same-sex marriage.⁴ The Vermont Supreme Court relied on *Loving* in *Baker v. State*, the groundbreaking 1999 decision, which

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

2. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

3. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971).

4. The Massachusetts Supreme Judicial Court, for example, relied on *Loving* and *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), a California miscegenation case, in its historic decision granting same-sex couples the right to marry. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003).

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.

Id.

resulted in the Vermont Legislature passing a first-in-the-nation civil union law.⁵ Chief Justice Amestoy, writing for the majority, focused less on the race component of *Loving* and more on the U.S. Supreme Court's view that guaranteeing a fundamental right to marry was essential to the welfare of society.⁶ When viewing *Loving* through this wider lens, the Vermont court saw plenty of parallels between the earlier case and today's debate on same-sex marriage.⁷ Other courts have relied on *Loving* for this more general principle of marriage equality when holding that same-sex couples have a constitutional right to marry.⁸

The academic community has also debated the relevance of the old bans on interracial marriage. Some agree with Professor Peggy Pascoe that "it is virtually impossible to understand the current debate over same-sex marriage without first understanding the history of American miscegenation laws and the long legal fight against them"⁹ Noted gay-rights scholar William Eskridge believes that *Loving*'s declaration of a fundamental right to marry "bears directly on the right of same-sex couples to marry."¹⁰ On the opposite end, the late Professor David Coolidge, a prominent opponent of marriage equality, accused those who use the analogy of playing "the *Loving* card" in an attempt to "slander[] with the brush of bigotry."¹¹ Gay

5. *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999); VT. STAT. ANN. tit. 15, §§ 1201–1207 (2000).

6. *Baker*, 744 A.2d at 883 ("The [United States Supreme] Court's point was clear; access to a civil marriage license and the multitude of legal benefits, protections, and obligations that flow from it significantly enhance the quality of life in our society.').

7. *Id.* "The Supreme Court's observations in *Loving* merely acknowledged what many states, including Vermont, had long recognized. One hundred thirty-seven years before *Loving*, this court characterized the reciprocal rights and responsibilities flowing from the marriage laws as 'the natural rights of human nature.'" *Id.* (citation omitted).

8. *See, e.g.*, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008) (citing *Loving* for the proposition that marriage is a basic civil right).

9. Peggy Pascoe, *Why the Ugly Rhetoric Against Gay Marriage is Familiar to this Historian of Miscegenation*, HIST. NEWS NETWORK, Apr. 19, 2004, <http://hnn.us/articles/4708.html>.

10. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 159 (1996). Eskridge sees many parallels between the earlier and the current struggles for marriage equality.

The strategy of opponents [of same-sex marriage] has been to essentialize the social institution of marriage around the concept of husband and wife. The same strategy was followed by opponents of different-race marriage, who essentialized marriage around the concept of racial purity. To support their definitional argument, opponents cited historical practice, natural law's abhorrence of procreative mixing, and religious text and tradition. And for almost all of American history, opponents prevailed. *Loving* was a rejection of this way of thinking, however. Its reasoning provides support for other challenges to natural law thinking about the legal institution of marriage.

Id. at 154.

11. David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 213 (1998).

rights advocates are split on the merits of the comparison. Some fear the “sameness” argument risks contributing to injustice and alienating potential supporters in the African–American community by ignoring the differences between the two civil rights struggles.¹² Professor George Chauncey has said “[c]laiming the two experiences have been the same does no justice to history and no service to the gay cause.”¹³

I certainly agree that supporters of marriage equality must make an independent, moral claim as to why same-sex couples should be allowed to marry. At the same time, my study of the bans on interracial marriage and the cases that upheld them has convinced me that the earlier struggle for marriage equality is relevant to today’s debate. In 1948, the California Supreme Court decided *Perez v. Lippold* and became the first high court in the country to declare unconstitutional a state’s ban on interracial marriage.¹⁴ Ace advocates like Beth Robinson have used *Perez* to great effect in arguing for same-sex marriage.¹⁵ Far more fascinating to me, though, are the many, many cases before 1948, which upheld bans on interracial marriage. I have had the unpleasant task of immersing myself in this disturbing jurisprudence. The arguments made in these cases are strikingly similar to arguments made today against same-sex marriage. These arguments include religion and natural law, procreation, concern for the children, deference to the legislature,¹⁶ and the slippery-slope argument

12. Rebecca Schatschneider, *On Shifting Sand: The Perils of Grounding the Case for Same-Sex Marriage in the Context of Antimescegenation*, 14 TEMP. POL. & CIV. RTS. L. REV. 285, 304–05 (2004) (“[W]e contribute to the very injustice we condemn when we indiscriminately claim the moral authority of the civil rights movement for ourselves.”); Catherine Smith, *Queer as Black Folk?*, 2007 WISC. L. REV. 379, 407 (“LGBT discourse that frames homophobia as being the same as racism reinforces homophobia, racism, and sexism.”).

13. GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY 161 (2004).

14. *Perez v. Lippold*, 198 P.2d 17, 35 (Cal. 1948).

15. Robinson, lead attorney for the plaintiffs in *Baker v. State*, opened her oral argument before the Vermont Supreme Court with a persuasive analogy to *Perez*. Comparing attitudes toward interracial marriage at the time of *Perez* to attitudes toward same-sex marriage at the time of *Baker*, she said, “The notion of a black person and a white person marrying was as antithetical to many peoples’ conception of what a marriage was as the notion of a man marrying a man or a woman marrying a woman appears to be to the State of Vermont today.” DVD: Oral Argument in *Baker v. State* (1998) (on file with author). Robinson chronicled the arguments made against interracial marriage in the dissent in *Perez* to reveal how those same arguments were made by the State of Vermont against same-sex marriage. She said, “the parallels between [*Perez*] and this case are striking.” *Id.*

16. See, e.g., *Scott v. State*, 39 Ga. 321, 1869 WL 1667, at *3 (Ga. 1869). “The Code of Georgia . . . prohibits the marriage relation between the two races, and declares all such marriages null and void. With the policy of this law we have nothing to do. It is our duty to declare what the law is, not to make law.” *Id.*; see also *Frasher v. State*, 3 Tex. Ct. App. 263, 1877 WL 8520, at *8 (Tex. Ct. App. 1877) (“The objection to our statute . . . should be addressed to the legislative, and not the judicial, branch of the government.”).

(that is, allowing interracial marriage will lead to polygamy and incest).¹⁷ The ultimate rejection of all these arguments in the interracial marriage context may speak to their long-term viability in the same-sex marriage debate.

I. PARALLELS BETWEEN ARGUMENTS AGAINST INTERRACIAL MARRIAGE AND SAME-SEX MARRIAGE

First, courts firmly believed that interracial marriage was “unnatural” and against God’s plan. In *Loving*, the Virginia trial court famously concluded,

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.¹⁸

Yet, Virginia was far from alone in holding this view. So many courts relied on “God’s plan” and natural law that one commentator has said “judges formed a virtual chorus” on this issue.¹⁹ Some courts quoted the Bible directly.²⁰ Other courts, like the Pennsylvania Supreme Court, expressed wonderment at God’s plan.

“Why the Creator made one white and the other black, we do not

17. Other authors have found additional parallels between arguments made in the interracial marriage cases and those made today against same-sex marriage. Josephine Ross has perceptively argued that “the sexualization of gay relationships is similar to the way interracial relationships were sexualized in the past.” Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 256 (2002). Ruth A. Chananie-Hill lists twelve arguments against marriage that are the same in both contexts. These include: (1) it would be against Nature and/or God; (2) the Bible and Christian doctrine forbid it; (3) legal history supports anti-miscegenation laws; (4) the framers of the constitution did not intend for races to intermarry; (5) traditional and social customs support racial separation; (6) scientific evidence supports a marriage ban in such contexts; (7) blacks and other non-white races are sexually promiscuous or immoral; (8) mixed-race children are inferior and suffer social prejudice; (9) civil rights laws already provide adequate protection; (10) existing marriage laws are not discriminatory because they treat races equally; (11) lifting the ban will result in social harm; and (12) in a democracy, the issue is best decided by the majority via the legislature. Ruth A. Chananie-Hill, *Framing and Collective Identities in the Legal Setting: Comparing Interracial Marriage and Same Sex Marriage* (Aug. 2007) (unpublished Ph.D. dissertation, Southern Illinois University) (available at UMI ProQuest).

18. *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

19. Pascoe, *supra* note 9.

20. *See, e.g.,* *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 1871 WL 3597, at *10 (Tenn. 1871) (“‘Thou shalt not,’ said Abraham, ‘take a wife unto my son of the daughters of the Canaanites’”).

know; but the fact is apparent, and the races are distinct, each producing its own kind and following the peculiar law of its constitution. . . . The natural law, which forbids their intermarriage and that amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.”²¹

Courts considered race restrictions part of the very definition of marriage, decreed “by God himself.”²² Here is the Oklahoma Supreme Court’s rationale: “Statutes forbidding intermarriage by the white and black races were without doubt dictated by wise statesmanship, and have a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but is always productive of deplorable results.”²³ These were not the words of some hysterical outlier. This was the reasoned judgment of respected jurists across the country in case after case.

Religion has, of course, been used against same-sex marriage from the start. The Minnesota Supreme Court, in the case I referred to earlier, based its decision on the Bible: “The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”²⁴ Religious arguments against same-sex marriage have fallen out of favor in the courts, but they are still an important part of the popular discourse. We would do well to remember that this is not the first time religion was used to prevent couples from marrying.

Courts also defended bans on interracial marriage out of a concern for “racial integrity.” The Virginia Supreme Court upheld the law the U.S. Supreme Court later struck down in *Loving* out of a concern that interracial marriage would “corrupt[] [the] blood,” and lead to a “mongrel breed of citizens.”²⁵ One court opined that “offspring of these unnatural connections are generally sickly and effeminate.”²⁶ Perhaps the strangest (non)procreation argument came from a judge on the Missouri Supreme

21. *Green v. State*, 58 Ala. 190, 1877 WL 1291, at *4 (Ala. 1877) (quoting *W. Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209, 1867 WL 2422, at *4 (Pa. 1867)); see also *Kinney v. Commonwealth*, 71 Va. 858, 1878 WL 5945, at *7 (Va. 1878) (“[C]onnections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.”).

22. See, e.g., *State v. Gibson*, 36 Ind. 389, 1871 WL 5021, at *9 (Ind. 1871) (describing marriage as “a public institution established by God himself”).

23. *Eggers v. Olson*, 231 P. 483, 484 (Okla. 1924).

24. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

25. *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)).

26. *Scott v. State*, 39 Ga. 321, 1869 WL 1667, at *3 (Ga. 1869).

Court, who said, “if the issue [sic] of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites”²⁷ The Georgia Supreme Court succinctly summarized the sentiment of essentially every court to consider this issue before *Perez* when it said, interracial marriages “are productive of evil, and evil only, without any corresponding good.”²⁸

Arguments about racial integrity are, of course, procreation arguments, yet with an opposite result from the procreation argument made today. Interracial couples should not be allowed to marry because they *can* procreate, and same-sex couples should not be allowed to marry because they *cannot* procreate. Which is it? Early same-sex marriage cases (and many interracial marriage cases) accepted the procreation argument. More recent same-sex marriage cases have rejected it and with good reason. As the California Supreme Court said last year, “the constitutional right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children.”²⁹

Another argument used against interracial marriage was the slippery slope. Defenders of traditional marriage back then worried that allowing interracial marriage would lead to, as one court put it, “the father living with his daughter, the son with the mother,” and the “Turk or Mohammedan, with his numerous wives, [] establish[ing] his harem at the doors of the capitol”³⁰ When the California Supreme Court struck down that state’s ban on interracial marriage, it had to defend its decision against the charge that allowing interracial marriage would lead to polygamy.³¹ It has been sixty years since the California decision. Striking down the ban on interracial marriage obviously did not lead to polygamy or fathers marrying daughters. Perhaps the same specious argument can now also be laid to rest in the same-sex marriage debate.

Finally, courts in the interracial marriage cases feared that allowing interracial couples to marry would tarnish the institution and destabilize fragile one-race marriages. Listen to the Alabama Supreme Court’s curious defense of that state’s ban on interracial marriage:

27. *State v. Jackson*, 80 Mo. 175, 1883 WL 9519, at *3 (Mo. 1883).

28. *Scott*, 1869 WL 1667 at *3.

29. *In re Marriage Cases*, 183 P.3d 384, 431 (Cal. 2008); *see also Baker v. State*, 170 Vt. 194, 216–19, 744 A.2d 864, 881–82 (1999) (rejecting the State’s procreation argument).

30. *State v. Bell*, 66 Tenn. 9, 1872 WL 4237, at *1 (Tenn. 1872). The court added that none of these hypotheticals was “more revolting, more to be avoided, or more unnatural” than interracial marriage. *Id.*

31. *Perez v. Lippold*, 198 P.2d 17, 35 (Cal. 2008) (Carter, J., concurring).

It is through the marriage relation that the *homes* of a people are created These homes, in which the virtues are most cultivated and happiness most abounds, are the true . . . nurseries of States. Who can estimate the evil of introducing into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, [and] disruption of family circles [T]he more humble and helpless families are, the more they need this sort of protection. Their spirits are crushed, or become rebellious, when other ills besides those of poverty, are heaped upon them. . . . [T]he law should absolutely frustrate and prevent the growth of any desire or idea of such an alliance . . . by making marriage between the two races, legally impossible[.]”³²

Today, courts rejecting constitutional claims to same-sex marriage have also expressed fear that allowing same-sex couples to marry will destabilize heterosexual marriage.³³ To these courts, the fact that same-sex couples maintain stable relationships and display exemplary parenting skills is irrelevant. The sole concern is insuring that heterosexuals get married and stay married. These courts believe this can be achieved by banning same-sex marriage. The logic of this argument has always escaped me. The fact that courts banning interracial marriage a half-century ago made the same destabilization argument makes its use today even more dubious.

II. ARGUMENTS MADE BY OPPONENTS OF MARRIAGE EQUALITY AGAINST THE *LOVING* ANALOGY

Given the close parallels between bans on interracial and same-sex marriages, opponents of marriage equality today are sensitive to this issue and have tried a number of arguments to distance current laws banning same-sex marriage from the earlier bans on interracial marriage. They like to depict the bans on interracial marriage as a “leftover from slavery”³⁴—more a manifestation of white supremacy than an expression of the real

32. *Green v. State*, 58 Ala. 190, 1877 WL 1291, at *3–4 (Ala. 1877) (emphasis in original).

33. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (“The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.”). The dissent in *Goodridge*, Massachusetts’ same-sex marriage case, also thought it legitimate for the Legislature to ban same-sex marriage in the interest of protecting heterosexual marriage. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 1001–02 (Mass. 2003) (Cordy, J., dissenting) (“[T]he Legislature could conclude that redefining the institution of marriage to permit same-sex couples to marry would impair the State’s interest in promoting and supporting heterosexual marriage as the social institution that it has determined best normalizes, stabilizes, and links the acts of procreation and child rearing.”).

34. Coolidge, *supra* note 11, at 219.

meaning of marriage. The real issue was race, they say, with marriage caught in the middle. This argument distorts the longstanding and universal nature of the bans on interracial marriage.

As a threshold matter, even if the earlier bans were more about race than marriage, I would argue that the same is true today—the debate about same-sex marriage is more about sexual orientation than it is about marriage. The debate is, in short, a referendum on homosexuality and gay rights. Marriage is our society's most cherished institution. If we allow same-sex couples to marry, we are giving their relationship and their sexual orientation our full societal blessing. Now, as then, arguments about natural law and procreation are conjured up, but they merely mask the real debate. Today's marriage equality debate is just as much about sexual orientation as the earlier debate was about race.

Yet the bans on interracial marriage were about so much more than race and white supremacy. They spoke to all of America's core conception of marriage. Bans on interracial marriage date back to the colonial period.³⁵ In 1948, the year of the *Perez* decision from the California Supreme Court, 30 of the 48 states banned interracial marriage, some by constitutional amendment.³⁶ Bans on interracial marriage were prevalent across the country, not just in the South. The list outside the South includes some states that might surprise you, and some states that will not: Arizona, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.³⁷

Opponents of same-sex marriage argue that interracial couples could get married in some states even at the height of anti-miscegenation laws, suggesting the racial component of marriage was not as central to the definition of marriage then as the gender component seems to be today. Yet courts at the time were quick to point out the only states that did not prohibit interracial marriage were those with little or no racial minority population, and which therefore presumably had no need for such a law.³⁸

This would describe Vermont today and especially in the 18th and 19th centuries. Vermont never banned interracial marriage, but it did have an "evasion" statute, which prevented couples from coming to Vermont to get married if their own state banned the marriage.³⁹ The evasion law served as

35. *Loving v. Virginia*, 388 U.S. 1, 6 (1967).

36. *Id.* at 6 n.5 (listing states with marriage bans, including those that instituted bans by constitutional amendment).

37. *Id.*

38. *Green v. State*, 58 Ala. 190, 1877 WL 1291, at *4 (Ala. 1877).

39. VT. STAT. ANN. tit. 15, § 6 (1947), *repealed by An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage*, § 12(a)(4), 2009 Vt. Acts & Resolves 37.

A marriage shall not be contracted in this state by a person residing and intending

Vermont's equivalent to a ban on interracial marriage, since that was its practical effect. This law, passed in the early 1900s, had racist origins.⁴⁰ One of the hidden achievements of Vermont's marriage equality law is that it repealed Vermont's evasion statute for both same-sex and opposite-sex marriages.⁴¹ This means same-sex couples from across the country can come to Vermont to get married. It also means that Vermont has taken old, bad law off the books.

Not too long ago, all across America, people understood marriage to be a sacred union within one's race. In 1958, ten years after *Perez*, a Gallup poll determined that only 4% of Americans approved of interracial marriage.⁴² That number had inched up to 20% in 1968,⁴³ a year after *Loving*, but both of these percentages are way lower than the percentage of Americans who currently support same-sex marriage.⁴⁴ The white supremacy argument might work for the South, but states across the country—not just those with Jim Crow laws—banned interracial marriage, and dozens of courts across decades and centuries upheld these laws. I doubt that opponents of marriage equality now would say that, in 1958, 96% of Americans were white supremacists. No, the answer closer to the historical truth is that essentially all Americans, good people and not, racist and otherwise, simply understood marriage was between two members of the same race. This principle was central to the definition of marriage. It was ordained by God and was wise social policy for the family and for the country.

The many cases upholding bans on interracial marriage were simply a reflection of the accepted definition of marriage. When Professor Coolidge says that in the *Loving* litigation “the Virginia courts were trying to redefine marriage for their purposes, thereby distorting its genuine meaning,”⁴⁵ he is

to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction. Every marriage solemnized in this state in violation of this section shall be null and void.

Id.

40. The Boston Globe, commenting on an identical evasion statute in Massachusetts, said the law “was enacted in part to prevent interracial couples from evading their own state's ban by traveling to Massachusetts to marry.” Matt Viser, *Gay-Marriage Advocates Hope to Repeal Old Law: Nonresidents Now Barred*, BOSTON GLOBE, July 10, 2008, at 1.

41. An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, § 12(a)(4), 2009 Vt. Acts & Resolves 37.

42. See Joseph Carroll, *Most Americans Approve of Interracial Marriage*, GALLOP NEWS SERVICE, Aug. 16, 2007, www.gallup.com/poll/28417/most_americans_approve_interracial_marriages.aspx (finding that, by 2007, 77% of Americans approved of interracial marriage).

43. *Id.*

44. A recent CNN poll found that 45% of adults nationwide think that gays and lesbians have a constitutional right to marry, with 54% opposed and 1% unsure. Same-sex Marriage, Gay Rights, CNN Opinion Research Corporation Poll (2009), <http://www.pollingreport.com/civil.htm>.

45. Coolidge, *supra* note 11, at 236.

playing the *Loving* card and mischaracterizing the record. The exact opposite is true. Courts—not only in Virginia but across the country—were upholding a traditional definition of marriage that predated the founding of this country. They were defending that traditional definition against activists who sought to redefine marriage. These courts thought the welfare of society depended on them upholding laws banning interracial marriage.

These cases undermine the argument that what same-sex couples seek now is entirely different from what interracial couples sought in the earlier cases. Here is how the New York Court of Appeals (New York's highest court) distinguished *Loving* in a 2006 opinion holding that same-sex couples did not have a constitutional right to marry:

[T]he historical background of *Loving* is different from the history underlying this case. Racism has been recognized for centuries—at first by a few people, and later by many more—as a revolting moral evil. . . . *Loving* was part of the civil rights revolution of the 1950's and 1960's, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began.

It is true that there has been serious injustice in the treatment of homosexuals But the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.⁴⁶

My study of the sizable body of jurisprudence upholding bans on interracial marriage convinces me that the traditional definition of marriage largely is a by-product of historical injustice. What the court says about the “idea” of same-sex marriage was equally true for interracial marriage until recent times. From the origin of this country and for centuries after, “it was the accepted truth that for almost everyone who ever lived, in any society in which marriage existed, that there could have been marriages only between participants” of the same race.⁴⁷ One can try to dismiss this fact with ennobling language about the valiant fight against racism, but this does not make the inconvenient truth go away. What interracial couples sought then was seen by many, many people as an abridgement of the traditional

46. *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

47. *Id.*

definition of marriage and a disruption of a divinely inspired natural order. Sound familiar?

What is one to make of this tainted jurisprudence? Short of any use in the struggle for marriage equality today, these cases are to be appreciated in their own right, as a fascinating and upsetting historical account of a different America. The words in these opinions are hurtful. Lines like, “The natural separation of the races is . . . an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature,”⁴⁸ hit you like a sock on the jaw. How could we have been so wrong?

One conclusion seems irrefutable. These cases prove that our understanding of equal protection and the fundamental right to marry does evolve over time. As recently as 1948, suggesting that interracial couples had a constitutional right to marry would have been radical, even risible. The arguments against interracial marriage were embraced by dozens of courts across the country. Yet today these arguments have been thoroughly discredited and are now rightfully held in disgrace. Time will tell how similar arguments will fare in the ongoing same-sex marriage debate.

It is not necessary to claim that homophobia is as bad as racism, or that lesbians and gays have been discriminated against in the same ways as have people of color, to make the legal comparison between the two movements for marriage equality. I agree with Professor Catherine Smith that on the political and social fronts “[t]he compelling message for LGBT advocates to build alliances with black communities is not one of sameness but one of common interest.”⁴⁹ The need for bridge-building between communities was highlighted in the recent vote in California on Proposition 8. One early exit poll suggested that African Americans and other racial minorities voted disproportionately in favor of Proposition 8.⁵⁰ A more thorough analysis by professors from New York University and Hunter College, sponsored by the National Lesbian and Gay Task Force, has found this claim to be exaggerated.⁵¹ Their precinct-by-precinct study has shown that party, ideology, religious attendance, and age drove the ‘yes’ vote far more so than race.⁵² Still, the vote in California was a wake-up call for marriage

48. *State v. Gibson*, 36 Ind. 389, 1871 WL 5021, at *10 (Ind. 1871) (quoting *W. Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209, 1867 WL 2422, at *4 (Pa. 1867)).

49. Smith, *supra* note 12, at 403.

50. John Wildermuth, *Black Support for Prop. 8 Called an Exaggeration*, S.F. CHRON., Jan. 7, 2009, at B1 (“Exit polls found that 70 percent of black voters backed Prop. 8 . . .”).

51. PATRICK J. EGAN & KENNETH SHERRIL, NAT’L GAY AND LESBIAN TASK FORCE, CALIFORNIA’S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD? 2 (2009), available at http://www.thetaskforce.org/downloads/issues/egan_sherrill_prop8_1_6_09.pdf.

52. *Id.*

equality advocates to continue to reach out to diverse communities by building coalitions around common interests.

The “sameness” argument, however, should be used in court, regardless of its impact on relations between communities. Courts operate by *stare decisis*. Like cases should be decided alike; precedent binds. I have tried to show here how attempts to distinguish the bans on interracial marriage from the current debate fail. The same arguments were made then as are made now. Their descent from renown to ignominy in the interracial marriage context should cast some doubt on, or at least put in perspective, their relative merits in the same-sex marriage context. I agree with Professor Adele Morrison’s take on the use of *Loving*:

Groups may disagree about the contexts in which *Loving*’s holdings may apply or may argue that it is being misinterpreted, or even misused. However, to say that *Loving* cannot be used at all because one group disagrees with the usage by another, is counter to the very purpose of legal precedents and reasoning by analogy.⁵³

CONCLUSION

Mildred Loving passed away in 2008 at the age of 68.⁵⁴ Richard Loving died tragically in a car accident in 1975. But Mildred Loving was lucky enough to see her children, and then grandchildren, grow up in a country with a radically different view of marriage than when she and Richard were sentenced to a year in prison for having the audacity to marry the person they loved.⁵⁵ All the worries about the end of marriage and the end of society, should interracial couples be allowed to marry, were obviously misplaced. The institution of marriage was not destroyed or even weakened by allowing interracial couples into the institution; it was strengthened. Personal liberty was enriched, and the social compact made firm, by extending marriage to interracial couples. Mildred Loving knew this, and she believed the same arguments made today against same-sex marriage fared no better. I will let her have the last word. Here is what

53. Adele M. Morrison, *Same-Sex Loving: Subverting White Supremacy Through Same-Sex Marriage*, 13 MICH. J. RACE & L. 177, 189 (2007).

54. Douglas Martin, *Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68*, N.Y. TIMES, May 6, 2008, at B7.

55. After sentencing the Lovings to one year in prison, the trial judge suspended the sentence “on the condition that the Lovings leave the State and not return to Virginia together for 25 years.” *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

Mildred Loving said in 2007 on the 40th anniversary of *Loving* about using her case in defense of marriage equality today:

My generation was bitterly divided over something that should have been so clear and right. The majority believed what the judge said, that it was God's plan to keep people apart . . . [N]ot a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry.⁵⁶

56. Mildred Loving, Statement Prepared for the 40th Anniversary of the *Loving v. Virginia* Announcement: Loving For All 2 (June 12, 2007), available at http://www.freedomtomarry.org/pdfs/mildred_loving-statement.pdf.

