



2-2-2015

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Ronald Turner, *Same-Sex Marriage and Loving v. Virginia: Analogy or Disanalogy?*, 71 WASH. & LEE L. REV. ONLINE 264 (2015), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol71/iss4/4>

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Same-Sex Marriage and *Loving v. Virginia*: Analogy or Disanalogy?

Ronald Turner*

Abstract

In its 1967 decision in Loving v. Virginia, the United States Supreme Court struck down Virginia antimiscegenation laws prohibiting and criminalizing interracial marriages, holding that the challenged laws violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. In recent federal appeals court decisions, Loving has been invoked as an authoritative analogy supporting plaintiffs' claims that same-sex marriage bans violate the Constitution. This Essay considers the posited Loving analogy and the contentions (1) that different-race marriage and same-sex marriage prohibitions present similar, albeit not identical, instances of unconstitutional state limitations on an individual's freedom to marry the person of his or her choice, and (2) that interracial marriage bans are conceptually distinguishable from laws forbidding same-sex marriages and therefore do not violate the Constitution. The Essay concludes that Loving is a useful and authoritative analogy supporting the claims of plaintiffs who contend, among other things, that states may not constitutionally deny same-sex couples the right to marry based solely on the traditional view that marriage is, and should only be, the legal union of one man and one woman.

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I. Introduction

In October 2014 the United States Supreme Court declined to review federal appeals courts' decisions invalidating same-sex marriage bans in the states of Indiana, Oklahoma, Utah, Virginia, and Wisconsin.¹ President Barack Obama remarked that the Court's denials of certiorari in those cases "signals that although the Court was not quite ready—it didn't have sufficient votes to follow *Loving v. Virginia* and go ahead and indicate an equal-protection right across the board—it was a consequential and powerful signal of the changes that have taken place in society and that the law is having to catch up."²

President Obama referred, of course, to *Loving v. Virginia*,³ the Court's 1967 decision striking down Virginia's

1. See *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014).

2. Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <http://www.newyorker.com/magazine/2014/10/27/obama-brief> (last visited Jan. 24, 2015) (quoting President Obama on the approval of same-sex marriage through the political process) (on file with the Washington and Lee Law Review).

3. 388 U.S. 1 (1967).

antimiscegenation⁴ laws prohibiting and criminalizing interracial marriages. In that seminal ruling the Court determined that the Commonwealth's antimiscegenation regime, which was "designed to maintain White Supremacy" and deprived the plaintiffs of the liberty to marry a person of the other race,⁵ violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.⁶

Is President Obama correct in associating *Loving's* invalidation of interracial marriage bans with claims that laws prohibiting marriage between persons of the same sex violate the Constitution? Does *Loving* provide an authoritative analogy⁷ supporting the claimed right to same-sex marriage? Yes, say those who posit that interracial marriage and same-sex marriage prohibitions present similar, albeit not identical, instances of unconstitutional state limitations on all individuals' right and freedom to marry the person of their choice.⁸ No, say those who

4. The word "miscegenation" is a combination of the Latin words *miscere* (meaning "to mix") and *genus* (race). See RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 20 (2003). "Miscegenation" was first used in 1864 in a pamphlet discussing the theory of the blending of races. See Emily Field Van Tassel, "Only the Law Would Rule Between Us": *Antimiscegenation, the Moral Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 896 n.93 (1995) (discussing development of the term "miscegenation").

5. *Loving*, 388 U.S. at 11, 12.

6. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

7. On analogy in legal argument, see generally Scott Brewer, *Exemplary Reasoning, Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996) (presenting a detailed model of the analogical reasoning process).

8. See Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781, 789 (discussing several of the differences between the conflicts over interracial and same-sex marriage); see also WILLIAM N. ESKRIDGE JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 11 (1996) ("The arguments rejected by the [*Loving*] Court are eerily similar to those advanced by traditionalist opponents of same-sex marriage."); Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1272 n.15 (2011) (finding the *Loving* analogy persuasive and arguing that laws banning same-sex marriage present "sex discrimination in a deeper sense: hostility to homosexuality is fundamentally about policing sex roles, and sex stereotyping is the principal evil at which sex equality doctrine takes aim"); Christopher R.

argue that laws forbidding interracial marriages are different from and should not be equated with laws prohibiting same-sex marriages. On that view, same-sex marriage is factually and conceptually distinguishable from the same-race marriage mandate invalidated by *Loving*.⁹

This Essay's discussion of the posited *Loving* analogy focuses on the recent decisions by the United States Courts of Appeals for the Fourth, Sixth, Seventh, Ninth, and Tenth Circuits addressing the issue of the constitutionality of state-law prohibitions of same-sex marriage.¹⁰ Part II examines the Supreme Court's *Loving* decision. Can *Loving* properly be invoked by those claiming the right to marry a person of the same sex, the issue considered in Part III? Or, as considered in Part IV, is *Loving* an inapt analogy, a disanalogy, that does not lend support to the

Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1127 (2014) (arguing that antimiscegenation laws assumed and "did not cause the theory of white supremacy. . . . Similarly, gender-specific marriage laws are based on—or supported because of—the assumption of female submission and inferiority"); Rachel Moran, *Loving and the Legacy of Unintended Consequences*, 2007 WIS. L. REV. 239, 271 (noting that "the same-sex marriage debate so far has drawn primarily on *Loving*'s analysis of race and subordination"); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 162 (1988) ("If the *Loving* analogy is taken seriously, it follows that the equal protection clause forbids the denial of marriage licenses to gay couples . . .").

9. See Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 26 (2003) (noting that the *Loving* analogy is "preposterous"); David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 204 (1998) ("[T]he *Loving* analogy' has been of vital political utility to the advocates of same-sex marriage precisely because it is more about politics than law," and "those advocating 'same-sex marriage' are . . . 'playing the *Loving* card'"); Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239, 241 (1998) ("The so-called '*Loving* Analogy' is a problem for those defending marriage laws, but not an insurmountable problem. Prohibiting interracial marriages is one thing; recognizing that marriage is an equal partnership between one man and one woman is something quite different."); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 62, 76 (describing why the argument for same-sex marriage is distinguishable from that in *Loving*); Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117, 120 (2007) (arguing that the *Loving* analogy for same-sex marriage illegitimately attempts to use a cultural icon for political purposes).

10. See *supra* note 1 and accompanying text (listing cases).

claim that states may not constitutionally forbid marriages between male-male and female-female couples?

Answers to the foregoing questions often depend on the framing of and the level of generality at which the query is posed. An analogy operating at a low level of generality¹¹ would regard *Loving* solely as a case about interracial marriage bans and facilitates distinguishing *Loving* from the specific claim made in the cases challenging same-sex marriage prohibitions. Alternatively, and as I prefer and conclude, framing the question presented in *Loving* and the same-sex marriage cases at a high level of generality—can states constitutionally deny the right to marry based on traditional views and prejudices regarding the characteristics of the individuals seeking to exercise that right?—renders *Loving* a useful and authoritative analogy supporting same-sex marriage plaintiffs.

II. *Loving v. Virginia*

In 1958 two residents of Caroline County, Virginia¹²—Mildred Jeter, an African-American woman, and Richard Perry Loving, a white man—traveled to and were married in Washington, D.C. Returning to Virginia to live as husband and wife, they were arrested, indicted, and convicted of violating two sections of Virginia law criminalizing interracial marriages. One section prohibited a “white person and colored person” from leaving Virginia “for the purpose of being married” with the intent to “return to and reside” in the Commonwealth and “cohabitating as man and wife.”¹³ The other section provided that

11. See Emily Sherwin, *Judges as Rulemakers*, 73 U. CHI. L. REV. 919, 929 (2006) (“The rules and reasons courts cite in support of analogies tend to operate at a low level of generality.”).

12. See RACHEL MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 95 (2001) (discussing *Loving*).

13. *Loving v. Virginia*, 388 U.S. 1, 4 (1967) (quoting VA. CODE ANN. § 20-58 (1960)). State law defined “white person” as a person having “no trace whatever of any blood other than Caucasian,” and also deemed as white “persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood . . .” *Id.* at 5 n.4 (quoting VA. CODE ANN. § 20-54 (1960)). The exception for persons with one-sixteenth or less of the blood of the American Indian “is apparently accounted for . . . by ‘the desire of all to recognize as an

“[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” punishable by imprisonment of “not less than one nor more than five years.”¹⁴

The trial judge sentenced the Lovings to one year in jail; that sentence was suspended so long as the couple left Virginia and did not return for twenty-five years. In handing down this sentence the judge made the following statement:

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.¹⁵

Suing the Commonwealth, the Lovings contended that Virginia’s antimiscegenation laws violated the Equal Protection and Due Process Clauses of the Virginia and United States Constitutions. The Virginia Supreme Court of Appeals upheld the interracial marriage ban, opining that challenges like the Lovings’ “are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separate powers of government is to adjudicate, and not to legislate.”¹⁶

On appeal to the United States Supreme Court, the Lovings argued that the “broad guarantees of the Fourteenth Amendment . . . were open-ended and meant to be expounded in light of changing times and circumstances.”¹⁷ Virginia responded that the “desirability, character and scope of a policy of

integral and honored part of the white race the descendants of John Rolfe and Pocahontas.” *Id.* (quoting Walter Plecker, *The New Family and Race Improvement*, 17 VA. HEALTH BULL., EXTRA NO. 12 at 25–26 (1925)). “Colored person” was defined as any person “in whom there is ascertainable any Negro blood.” *Id.* (quoting VA. CODE ANN § 1-14 (1960)).

14. *Id.* at 4 (quoting VA. CODE ANN § 20-59 (1960)). Virginia’s antimiscegenation regime also automatically voided all marriages between a white and colored person with no court proceeding required. *See id.* (discussing VA. CODE ANN § 20-57 (1960)).

15. *Id.* at 3 (quoting trial judge) (internal quotation marks omitted).

16. *Loving v. Virginia*, 147 S.E. 2d 78, 82 (Va. 1966), *rev’d*, 388 U.S. 1 (1967).

17. Brief for Appellants at 30, *Loving*, 388 U.S. 1 (1967) (No. 395).

permitting or preventing such alliances” falls within “the exclusive province of the legislature of each State . . . a province which the judiciary may not, under well settled constitutional doctrine, invade.”¹⁸ The Commonwealth argued that if the Court questioned its judgment and wisdom in this area “it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view.”¹⁹

Additionally, and significantly, Virginia expressed its concern about procreating interracial couples. The Commonwealth’s brief to the Court quoted the following passage from a decision by the Louisiana Supreme Court:

[A] state statute which prohibits interracial marriage or cohabitation between members of different races we think falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened . . . with a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.²⁰

In the oral argument before the Supreme Court, Virginia’s counsel, R. D. McIlwaine III, advised the Justices that Virginia’s ban served “a legitimate legislative objective of preventing the sociological and psychological evils which attend interracial marriages.”²¹ McIlwaine also urged that the framers of the Fourteenth Amendment intended that “a law which equally forbade the members of one race to marry members of another race, with the same penal sanction on both, did treat the

18. Brief and Appendix of Appellee at 50, *Loving*, 388 U.S. 1 (1967) (No. 395).

19. *Id.* at 41.

20. *Id.* at 35 (quoting *State v. Brown*, 108 So. 2d 233, 234 (La. 1959) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954))).

21. Transcript of Oral Argument at 20, *Loving*, 388 U.S. 1 (1967) (No. 395).

individuals of both races equally.”²² Questioning that view, one of the Justices remarked that while the “prohibition is the same . . . it’s the common sense and pragmatics of it that it’s the result of the old slavery days, the old feeling that the white man was superior to the colored man, which was exactly what the Fourteenth Amendment was adopted to prevent.”²³

Issuing its decision in June 1967, the Court, noting that Virginia was then one of sixteen states prohibiting interracial marriages,²⁴ struck down the Commonwealth’s law. Speaking for a unanimous Court, Chief Justice Earl Warren rejected the Commonwealth’s argument that the equal protection mandate was satisfied “so long as white and Negro participants were similarly punished.”²⁵ He noted that this equal application theory of the Fourteenth Amendment was at one time recognized in *Pace v. Alabama*.²⁶ That theory was disapproved in *McLaughlin v. Florida*,²⁷ wherein the Court struck down a Florida law prohibiting cohabitation by “[a]ny negro man and white woman, or any white man and negro woman, who are not married to each other.”²⁸ *Pace* thus “represents a limited view of the Equal

22. *Id.* at 27.

23. *Id.* at 33.

24. Interestingly, the number of states allowing interracial marriage at the time of the Court’s 1967 ruling in *Loving*—thirty-four—is comparable to the thirty-five states “now positioned to recognize same-sex marriage.” DeBoer v. Snyder, 772 F.3d 388, 435 (6th Cir. 2014) (Daughtery, J., dissenting), *cert. granted*, 83 U.S.L.W. 3315 (2015).

25. *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

26. 106 U.S. 583 (1883). In *Pace*, the Court rejected an equal protection challenge to a state criminal law’s penalty enhancement for adultery and fornication engaged in by black–white couples. The Court reasoned that punishing different-race couples more harshly than same-race couples engaging in the same conduct did not violate the Equal Protection Clause because the more severe punishment was “directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.” *Id.* at 585.

27. 379 U.S. 184 (1964).

28. FLA. STAT. ANN. § 798.05 (1962). Interestingly, Connie Hoffman and Dewey McLaughlin, the couple challenging the Florida law, were married. “[T]hey were afraid to submit their marriage certificate at trial for a very simple reason: the penalty for interracial marriage was ten years in jail, while the penalty for cohabitation was ‘only’ one year.” 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 296 (2014).

Protection Clause which has not withstood analysis in the subsequent decisions of this Court.”²⁹ As the *McLaughlin* Court made clear, the equal protection inquiry and analysis “does not end with a showing of equal application among the members of the class defined by the legislation.”³⁰ Courts must instead ask and answer the question whether statutory classifications arbitrarily or invidiously discriminate against those covered by and those excluded from the law.³¹

The “clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States,” Chief Justice Warren wrote in *Loving*.³² Heeding this purpose, and subjecting Virginia’s statutory ban to the “most rigid scrutiny,”³³ he concluded that Virginia’s antimiscegenation law violated the Equal Protection Clause. No “legitimate overriding purpose independent of invidious racial discrimination” justified the racial classification, and Virginia’s limitation of the interracial marriage ban to marriages involving whites revealed that the law was “designed to maintain White Supremacy.”³⁴ The Chief Justice had “no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”³⁵

Moreover, the Court held that Virginia deprived the Lovings of their liberty without due process of law. “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,”³⁶ and marriage is “fundamental to our very existence and survival.”³⁷

29. *McLaughlin*, 379 U.S. at 188.

30. *Id.* at 191.

31. *See id.* (“The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose . . .”).

32. *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

33. *Id.* at 11 (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

34. *Id.*

35. *Id.* at 12.

36. *Id.*

37. *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

Opining that the freedom and decision “to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State,”³⁸ Chief Justice Warren observed that the at-issue law denying “this fundamental freedom . . . deprive[s] all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”³⁹

III. Analogy?

Does *Loving v. Virginia* provide a helpful and authoritative analogy for the proposition that anti-same-sex marriage laws violate the Constitution? Affirmative answers to this question can be found in recent decisions invalidating same-sex marriage bans.

In *Kitchen v. Herbert*,⁴⁰ the Tenth Circuit invalidated Utah’s constitutional and statutory provisions recognizing marriage as only the legal union between a man and a woman.⁴¹ Judge Carlos F. Lucero’s opinion for a majority of the three-judge panel noted *Loving’s* conclusion that Virginia’s prohibition of interracial marriages violated the Due Process Clause.⁴² He observed that, while *Loving* involved a “naturally procreative” opposite-sex couple, in a case decided thirty years later the Supreme Court described *Loving* as a right-to-marry and not as a right-to-procreate case.⁴³ Judge Lucero also considered Utah’s assertion that its constitutional provision prohibiting same-sex marriage merely defined marriage, and the state’s effort to contrast “the traditional definition of marriage with the anti-miscegenation laws invalidated in *Loving*.”⁴⁴ Citing *United States v. Windsor*,⁴⁵ Judge Lucero declined to defer to the state’s definition.⁴⁶

38. *Id.*

39. *Id.*

40. 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S.Ct. 265 (2014).

41. See UTAH CONST. art. I, § 29 (“Marriage consists only of the legal union between a man and a woman.”); UTAH CODE ANN. § 30-1-4.1(a) (2013) (“It is the policy of this state to recognize as marriage only the legal union of a man and a woman . . .”).

42. See *Kitchen*, 755 F.3d at 1209.

43. *Id.* at 1209–10 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

44. *Id.* at 1216 (internal quotation marks omitted).

Now consider *Bostic v. Schaefer*,⁴⁷ the Fourth Circuit's recent decision striking down Virginia's same-sex marriage ban.⁴⁸ In his opinion for the court Judge Henry F. Floyd described *Loving* as a case involving and protecting the fundamental right to marry, a right encompassing the right to same-sex marriage.⁴⁹ "Over the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms. . . . [I]n *Loving v. Virginia*, the Supreme Court invalidated a Virginia law that prohibited white individuals from marrying individuals of other races."⁵⁰ *Loving* did not define the claimed right as "the right to interracial marriage," Judge Floyd stated, but instead spoke "of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right."⁵¹ Virginia argued that *Loving* involved the marriage of an opposite-sex couple and could not be used to conclude that the Supreme Court would protect the choice to enter into a same-sex marriage. Not persuaded by that argument, Judge Floyd, citing and relying on the Court's post-*Loving* decisions,⁵² had "no reason to suspect that the Supreme Court would accord the choice to marry

45. 133 S.Ct. 2675 (2013). The holding in *Windsor* demonstrates "that a provision labeled a 'definition' is not immune from constitutional scrutiny," Judge Lucero saw "no reason to allow Utah's invocation of its power to define the marital relation . . . to become a talisman, by whose magic power the whole fabric which the law had erected . . . is at once dissolved." *Kitchen*, 755 F.3d at 1215–16 (internal quotation marks and citations omitted).

46. *Kitchen*, 755 F.3d at 1216.

47. 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S.Ct. 308 (2014).

48. See VA. CONST. art. I, § 15-A ("That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions."); VA. CODE ANN. § 20-45.2 (1997) ("[M]arriage between persons of the same sex is prohibited" and "[a]ny marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable").

49. See *Bostic*, 760 F.3d at 375, 376.

50. *Id.* at 376 (internal citation omitted).

51. *Id.*

52. See *id.* at 377 (discussing *Lawrence v. Texas*, 539 U.S. 558 (2003) and *United States v. Windsor*, 133 S.Ct. 2675 (2013)).

someone of the same sex any less respect than the choice to marry an opposite-sex individual who is of a different race”⁵³

The Seventh Circuit employed *Loving* as an anti-tradition analogue in *Baskin v. Bogan*.⁵⁴ Indiana and Wisconsin, defending their respective prohibitions of same-sex marriage, argued that the traditional limitation of marriage to different-sex couples was a valid basis for the same-sex marriage bans. Writing for the court, Judge Richard A. Posner said that the States’ argument “runs head on into *Loving* . . . since the limitation of marriage to a person of the same race was traditional in a number of states when the Supreme Court invalidated it.”⁵⁵ Declaring that tradition per se is not a legal ground for discrimination, he quoted Oliver Wendell Holmes Jr.’s comment that it is “revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”⁵⁶ In Judge Posner’s view, “if no social benefit is conferred by a tradition *and* it is written into law *and* it discriminates against a number of people and does them harm beyond just offending them, it is not a harmless anachronism; it is a violation of the equal protection clause, as in *Loving*.”⁵⁷

In *Latta v. Otter*,⁵⁸ the Ninth Circuit held that same-sex marriage prohibitions in Idaho and Nevada violated the Equal Protection Clause. In a concurring opinion Judge Stephen Roy Reinhardt addressed the States’ argument that gays and lesbians denied the right to marry individuals of the same sex are “still

53. *Id.*

54. 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S.Ct. 316 (2014).

55. *Baskin*, 766 F.3d at 666. For Judge Posner, Virginia’s antimiscegenation regime was less severe than Wisconsin’s same-sex marriage ban. Virginia “did not forbid members of any racial group to marry, just to marry a member of a different race. . . . In contrast, Wisconsin law . . . prevents a homosexual from marrying any person with the same sexual orientation, which is to say . . . any person a homosexual would want or be willing to marry.” *Id.* at 667.

56. *Id.* at 666–67 (quoting Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)); *see also* *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”).

57. *Baskin*, 766 F.3d at 667.

58. 771 F.3d 456 (9th Cir. 2014).

free to marry individuals of the opposite sex.”⁵⁹ That argument was rebutted by *Loving*. Judge Reinhardt concluded:

Mildred Jeter and Richard Loving were not barred from marriage altogether. Jeter was perfectly free to marry a black person, and Loving was perfectly free to marry a white person. They were each denied the freedom, however, to marry the person whom they chose—the other. The case of lesbians and gays is indistinguishable. A limitation on the right to marry another person, whether on account of race or for any other reason, is a limitation on the right to marry.⁶⁰

Idaho and Nevada argued further that because “man–woman” and “genderless” marriages are mutually exclusive, permitting the latter would destroy the former.⁶¹ Judge Reinhardt did not agree. *Loving* declared that Virginia’s antimiscegenation laws deprived not only the Lovings but “*all the State’s citizens* of liberty without due process of law.”⁶² Thus, he reasoned, telling Virginians that they could not marry a person of a different race violated the constitutional rights of other citizens who were already in a same-race marriage or did not seek to enter into an interracial marriage.⁶³ “When Idaho tells Idahoans or Nevada tells Nevadans that they are not free to marry the one they love if that person is of the same sex, it interferes with the universal right of *all the State’s citizens*—whatever their sexual orientation—to control their destiny.”⁶⁴

In a separate concurring opinion in *Latta*, Judge Marsha Siegel Berzon addressed the States’ contention that their same-sex marriage bans did not violate the Equal Protection Clause because men as a class and women as a class were treated equally. She noted, correctly, that this equal application theory and justification were rejected in *Loving*. An “even-handed state purpose” restricting an individual’s “rights, choices, or opportunities” solely because of race violates the Equal Protection

59. *Id.* at 478 (Reinhardt, J., concurring).

60. *Id.*

61. *Id.*

62. *Id.* (internal quotation marks and citation omitted); see *supra* note 38 and accompanying text.

63. See *id.*

64. *Id.* at 479. (internal citation and quotation marks omitted).

Clause “even if members of all racial groups are identically restricted with regard to interracial marriage.”⁶⁵ Similarly, a sex-based restriction of a person’s rights, choices, or opportunities violates the Clause even though both men and women are identically limited by same-sex marriage prohibitions.⁶⁶

In striking down Virginia’s antimiscegenation laws, *Loving* held that the Commonwealth could not constitutionally classify by race those persons who would and would not be allowed to enter into marriage. While this interpretation and application of the Constitution’s Equal Protection and Due Process mandates occurred in the context of a challenge to mandated same-race marriages, one can extract from the Court’s decision the general principle that state definitions of marriage specifying certain characteristics excluding individuals from entering into that institution are subject to constitutional challenge and scrutiny. This principle and the *Loving* analogy have been understandably invoked by those seeking judicial recognition and protection of the right to marry a person of the same sex.

IV. Disanalogy?

Consider now the view that *Loving* is not an analogue supporting judicial recognition of a right to same-sex marriage.

In *DeBoer v. Snyder*,⁶⁷ the Sixth Circuit upheld against constitutional challenge same-sex marriage prohibitions in Michigan,⁶⁸ Ohio,⁶⁹ Kentucky,⁷⁰ and Tennessee.⁷¹ Judge Jeffrey S. Sutton’s opinion for the court concluded, among other things, that there was no fundamental right to enter into a same-sex

65. *Id.* at 483 (Berzon, J., concurring).

66. *See id.*

67. 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3315 (2015).

68. *See* MICH. COMP. LAWS § 551.1 (2012) (noting that marriage is “inherently a unique relationship between a man and a woman”).

69. *See* OHIO CONST. art. XV, § 11 (recognizing marriage as only “a union between one man and one woman”).

70. *See* KY. CONST. § 233A (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky.”).

71. *See* TENN. CONST. art. XI, § 18 (recognizing only marriages between one man and one woman as valid).

marriage. Asking “whether our nation has treated the right as fundamental and therefore worthy of protection under substantive due process,”⁷² he remarked that this “requirement often is met by placing the right in the Constitution, most obviously in (most of) the guarantees in the Bill of Rights. But the right to marry in general, and the right to gay marriage in particular, nowhere appear in the Constitution. That route for recognizing a fundamental right to same-sex marriage does not exist.”⁷³ Nor did the claimed right to same-sex marriage “turn[] on bedrock assumptions about liberty” as the “first state high court to redefine marriage to include gay couples did not do so until 2003 in *Goodridge [v. Department of Public Health]*.”⁷⁴

Turning to *Loving*, Judge Sutton wrote that the Court’s 1967 holding that marriage is a fundamental right “confirmed only that ‘opposite-sex marriage’ would have been considered redundant, not that marriage included same-sex couples. *Loving* did not change the definition.”⁷⁵ The Court’s statement that marriage is “fundamental to our very existence and survival” referred to “the procreative definition of marriage.”⁷⁶

Had a gay African-American male and a gay Caucasian male been denied a marriage license in Virginia in 1968, would the Supreme Court have held that Virginia had violated the Fourteenth Amendment? No one to our knowledge thinks so, and no Justice to our knowledge has ever said so. The denial of the license would have turned not on the races of the applicants but on a request to change the definition of marriage.⁷⁷

72. *DeBoer*, 772 F.3d at 411; *see also id.* (“[T]he test is whether the right ‘is deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

73. *Id.*

74. *Id.*; *see Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

75. *DeBoer v. Snyder*, 772 F.3d 388, 411 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3315 (2015).

76. *Id.*; *see supra* notes 37–39 and accompanying text (recounting the *Loving* Court’s discussion of marriage as a fundamental right).

77. *DeBoer*, 772 F.3d at 411.

Thus, he concluded, “*Loving* addressed, and rightly corrected, an unconstitutional eligibility requirement for marriage; it did not create a new definition of marriage.”⁷⁸

One can agree that forty-six years ago the Supreme Court would have ruled against the hypothetical same-sex couple posited by Judge Sutton. But that agreement does not foreclose the argument that today anti-same-sex marriage laws violate the Constitution. Post-*Loving* Supreme Court rulings⁷⁹ and the decisions of the Tenth, Fourth, Seventh, and Ninth Circuits discussed in the preceding Part provide a jurisprudential backdrop for the contemporary consideration and analysis of the same-sex marriage issue.⁸⁰ Conjuring up and focusing on an imaginary case circa 1968 does not acknowledge and avoids the need to grapple with current case law recognizing the same-sex marriage right.

As for Judge Sutton’s conclusion that *Loving* did not create a new definition of marriage, it is true that *Loving* said nothing about same-sex marriage; this is not surprising as that issue was not before the Court. But *Loving* did effect a definitional change in the sixteen states that banned interracial marriage. In outlawing state mandates recognizing as valid only those marriages occurring between persons of the same race, the Court made clear that marriage could not be defined in racial and racist terms. The traditional definition of marriage as the union of persons of the same race was no longer valid. As a legal, moral, and practical matter, the Court’s invalidation of Virginia’s antimiscegenation regime redefined that which constituted a legally cognizable marriage in that state.

Dissenting judges in the Tenth and Fourth Circuits’ same-sex marriage rulings did not subscribe to the *Loving* analogy. In *Bishop v. Smith*,⁸¹ the Tenth Circuit held unconstitutional

78. *Id.*

79. *See, e.g.*, *United States v. Windsor*, 133 S.Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003).

80. *DeBoer*, 772 F.3d at 430 (Daughtrey, J., dissenting) (“These four cases from our sister circuits provide a rich mine of responses to every rationale raised by the defendants in the Sixth Circuit cases as a basis for excluding same-sex couples from contracting valid marriages.”).

81. 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S.Ct. 271 (2014).

Oklahoma's same-sex marriage prohibition.⁸² Judge Paul J. Kelly Jr. opined that the state's definition of marriage as the union between one man and one woman was "benign, and very much unlike race-based restrictions on marriage invalidated in *Loving*."⁸³ He rejected the argument that those denying the right to same-sex marriage "might just as easily have argued that interracial couples are by definition excluded from the institution of marriage.' . . . But, as far as I can tell, no one in *Loving v. Virginia* . . . could have argued that racial homogeneity was an essential element of marriage."⁸⁴

Contrary to Judge Kelly's supposition, a racial homogeneity argument was made in *Loving*. As previously noted, Virginia contended that antimiscegenation laws fell within the police power of states interested in the posited purity of the races and concerned about the propagation of "half-breed children."⁸⁵ Consequently, racial homogeneity in marriage was deemed by the state to be an essential element of marriage. *Loving's* rejection of this essentiality argument provides analogical support for those who contend that states have wrongfully and unconstitutionally deemed sexual heterogeneity to be an essential feature of marriage.

The *Loving* analogy was also rejected by Judge Paul V. Niemeyer in *Bostic v. Schaefer's* invalidation of Virginia's same-sex marriage ban.⁸⁶ "*Loving* simply held that race, which is completely unrelated to the institution of marriage, could not be the basis of marital restrictions. To stretch *Loving's* holding to say that the right to marry is not limited by gender and sexual orientation is to ignore the inextricable, biological link between marriage and procreation that the Supreme Court has always recognized."⁸⁷ In Judge Niemeyer's view, the antimiscegenation law "struck down in *Loving* . . . had no relationship to the

82. See OKLA. CONST. art. 2, § 35 ("Marriage in this state shall consist only of the union of one man and one woman.").

83. *Bishop*, 760 F.3d at 1113 (Kelly, J., dissenting).

84. *Id.* (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1216 (10th Cir. 2014)).

85. See *supra* notes 18–20 and accompanying text.

86. 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S.Ct. 308 (2014); see *supra* notes 47–53 and accompanying text.

87. 760 F.3d at 392 (Niemeyer, J., dissenting) (internal citations omitted).

foundational purposes of marriage, while the gender of the individuals in a marriage clearly does.”⁸⁸

This *Loving* disanalogy argument fails. To reiterate, Virginia unabashedly promoted and sought to maintain white supremacy via the criminalization of interracial marriages and the procreation of state-labeled mixed-race and half-breed children. As the Virginia Supreme Court of Appeals declared in 1955, the Commonwealth enacted the interracial marriage ban to avoid the supposed problem of the propagation of “a mongrel breed of citizens.”⁸⁹ Thus, the preservation of racial hierarchy was an integral and undeniable feature of Virginia’s conception of the “right” kind of marriage (whites only) and the procreation of the “right” kind of (full-breed white) children. Given these facts and white-supremacist realities, Judge Niemeyer’s suggestion that the interracial marriage prohibition had no relationship to what he understands to be the foundational purposes of marriage is incorrect.

V. Conclusion

Loving held that Virginia’s antimiscegenation regime violated the equal protection and due process rights of persons who wished to enter into different-race marriages. The Court’s decision protected the constitutional rights of Mildred Jeter and Richard Perry Loving and invalidated the Commonwealth’s antimiscegenation regime. Those who challenge same-sex marriage prohibitions analogously maintain that states have unconstitutionally infringed the rights of those who seek to marry the person of their choice. Like the Lovings, “[t]hey contend that . . . popular prejudices, nourished by deeply entrenched mythologies, were translated into laws or policies that have wrongly prevented or impeded couples from marrying.”⁹⁰ On that view, definitions of marriage excluding different-race and same-sex couples, grounded as they are on racial and gender

88. *Id.*

89. *Naim v. Naim*, 87 S.E. 2d 749, 756 (Va. 1955), *vacated*, 350 U.S. 891 (1955) (per curiam).

90. *Kennedy*, *supra* note 8, at 789.

classifications and in racist and heterosexist norms, implicate and deny rights protected by the Equal Protection and Due Process Clauses. If this is correct, *Loving's* invalidation of antimiscegenation laws provides a pertinent analogy supporting same-sex marriage claims. Having granted certiorari in *Deboer*,⁹¹ the Supreme Court will perhaps address and take sides in the *Loving* analogy or disanalogy debate.

91. See *Bourke v. Beshear*, No. 14-574, 2015 WL 213651 (Jan. 16, 2015) (granting certiorari in several related cases, including *DeBoer*).