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# The Loving Analogy: Race and the Early Same-Sex Marriage Debate

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# The *Loving* Analogy: Race and the Early Same-Sex Marriage Debate

The American legal system is based in precedent and legal scholars often rely upon a series of analogies in order to discuss and conceptualize the expansion of equal protection to minority groups. In the early legal discourse surrounding same-sex marriage scholars, activists, and lawyers often relied on drawing legal and social parallels between *Loving v. Virginia* (1967) and early same-sex marriage cases such as *Baehr v. Lewin* (2003). The arguments of the sameness of race and sexuality were extremely controversial in legal discourse, though effective in courts. Numerous scholars published articles in the years surrounding the *Baehr* case disputing similarities and differences between race and sexuality in law and society. The questions scholars raised were as follows: How should the *Loving* decision be interpreted and should it apply to same-sex couples? How was race used to carve out space in American legal structure for lesbian, gay, and bisexual (LGB) rights?[1] What was the impact of the "*Loving* analogy"—as it came to be known—in legal, political, and social contexts for LGB people as well as people of color?

Ultimately the *Loving* analogy was successful in making progress in the courts to extend the protections of marriage to same-sex couples in some cases, culminating in the national legalization of same-sex marriage in the landmark case *Obergefell v. Hodges* (2015). But the analogy proved to be quite problematic outside of the courtroom. Liberal scholars either supported the use of the sameness argument because they accepted the analogous experiences of LGB people and people of color or saw the *Loving* analogy as a necessary argument to put forth in order to extend legal protection originally grounded in race. Conservative scholars rejected the conflation of miscegenation and same-sex marriage struggles by highlighting the differences between racial and sexual minorities, moralizing the debatet, and arguing for a strictly racial characterization of the *Loving* decision. Finally, some queer and black scholars argued that the social implications of the *Loving* analogy have had harmful effects for the social understandings of race and sexuality, while others argue that marriage is an inherently racist and heterosexist institution for which LGB people of color should not be advocating. There is little discursive history written about the *Loving* analogy in the early marriage equality movement, but in exploring this history we can see the effects of race law upon the legal regulation of marriage. Furthermore, by understanding the legal and cultural effects of the sameness argument in the early 1990s, scholars and lawyers today can amend the argument

[1] I use lesbian, gay, and bisexual here because same-sex marriage plays out very differently in discussion of trans people. For the sake of brevity and focus, and because the scholarship of the early same-sex marriage debates marginalizes or ignores trans individuals, this paper will focus on cisgender sexual minorities.

(or abandon it entirely) in order to ensure that they are relying on the most effective sociolegal strategy today.

## Constructing the Analogy

In *Loving v. Virginia* the Court struck down anti-miscegenation laws stating, "there can be no doubt that the restricting of the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[2] Because the law was restrictive based on racial classifications the majority applied heightened scrutiny under equal protection jurisprudence, resulting in the decriminalization of interracial marriage. The Court went on to address the issue of due process deciding that, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness among men...the freedom to marry or not to marry a person of another race resides within the individual and cannot be infringed by the state."[3] Combining the heightened scrutiny jurisprudence of due process and equal protection claims, the Court decided that not only must racially restrictive laws fulfill a compelling state interest, but also that any law concerning the right to marry must receive the same level of scrutiny.

Nearly thirty years after the Supreme Court struck down bans on mixed-race marriages three same-sex couples took their challenge to Supreme Court of Hawaii. The plaintiffs argued that the equal protection and fundamental rights due process precedents set in *Loving* should be applied to same-sex couples. In *Baehr v. Lewin* (1993) the Court decided that same-sex marriage bans violated Hawaii's Equal Protection Clause due to sex-based discrimination, remanding the case to a lower court to ensure that the state had compelling enough interest to withstand heightened scrutiny.[4] In this decision the Court gave legitimacy to the *Loving* analogy by applying the same equal protection jurisprudence to same-sex couples that was afforded to mixed-race couples in *Loving*. Paradoxically, The Hawaiian Supreme Court recognized "the state's acknowledged stewardship over the institution of marriage, the extent of permissible state regulation of the right of access to the marital relationship is subject to constitutional limitations or constraints."[5] Thus the Court incorporated the *Loving* analogy into law, but did

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

[3] Ibid.

[4] *Baehr v. Lewin* (1993).
*Baehr* was interpreted through the Hawaiian constitution which required strict scrutiny for laws that discriminated on the basis of sex, at the time federal constitutional jurisprudence was still developing intermediate scrutiny for sex based discrimination, see: *United States v. Virgina* 518 U.S. 515 (1996), *Craig v. Boren*, 499 U.S. 190 (1976). For commentary on Baehr v. Lewin see Chauncey Why marriage, From the closet to the alter, Deitrich "The lessons of the Law: Same-Sex Marriage and Baehr v. Lewin." Wolfson "Why Marriage Matters" Frank "Law and the Gay Rights Story"

[5] *Baehr v. Lewin* (1993).

not extend marriage rights to same-sex couples by mitigating the due process claim. Though the case did not result in an immediate shift in the jurisprudence of marriage, *Baehr* gave credibility to the *Loving* analogy and resulted in the opportunity to assert this precedent in the courts.

## A Tale of Two Precedents: Due Process and Equal Protection

Much of the legal discourse surrounding the thirtieth anniversary *Loving,* which roughly coincided with the first successful claims for same-sex marriage, surrounded the characterization and application of *Loving v. Virginia*. The decision rested on two areas of analysis; first, the Court decided that racially based restrictions violated the Equal Protection Clause of the Fourteenth Amendment. In interpreting this part of the decision, many scholars argued that *Loving* should be classified as a racially specific case that applied the *Brown v. Board of Education* (1954) desegregation rationale to marriage.[6] However, some legal commentators noted that the Court also looked at the case through a due process lens, applying strict scrutiny to the anti-miscegenation statue for two reasons: the racial basis of the law which upheld white supremacy as well as the restriction of marriage, a fundamental human right. The characterization of the *Loving* decision as either pertaining to race or marriage was an important factor shaping how legal scholars conceptualized the *Loving* analogy and its role in the same-sex marriage debates.

The main distinction between liberal and conservative views of the power and validity of the *Loving* analogy centered on how the case should be classified, and what legal precedent it set. Liberal commentators tended to view the *Loving* decision as a combination between equal protection of all protected categories (i.e. race, sex, national origin, alienage, and nonmarital parentage) and the due process protection of the fundamental right to marriage.[7] In this view liberal proponents of legalizing same-sex marriage viewed the loving analogy as a legitimate precedential assertion that was legal justification for same-sex marriage. These scholars employed the *Loving* analogy to make claims based in sex-based discrimination and assert that same-sex marriage bans should receive heightened scrutiny.[8] Using *I Love Lucy* as an example, Andrew Koppleman explained the sex-based discrimination ideology as follows: if Lucy loves Ricky,

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[6] Michael F. Higginbotham, *Race Law: Cases, Commentary, and Questions Third ed*. (Durham: Carolina Academic Press, 2010), 494. David Orgon Coolidge, "Playing the *Loving* Card: Same-Sex Marriage and the Politics of Analogy," *B.Y.U Journal of Public Law* 12 (1998), 217-230. Robert A. Destro, "Law and the Politics of Marriage: *Loving v. Virginia* after 30 Years Introduction," Catholic University Law Review 47 (1998): 1213-1218.

[7] Kenji Yoshino, "The New Equal Protection," *Harvard Law Review* 124 (2011), 756-757.

[8] I use the term "heightened" scrutiny because it was unclear what scrutiny sex-based discrimination would require at the time of *Baehr* and varied state to state. See note 4.

they may marry. But if Lucy loves Ethel, she is denied marriage strictly on the basis of sex.[9] In order to tie this to the *L*oving analogy, he then argued, "miscegenation laws discriminated on the basis of race…in order to maintain white supremacy. Similarly sodomy laws discriminate on the basis of sex…in order to impose traditional sex roles."[10] This argument would allow the courts to apply heightened scrutiny, as they did in *Baehr*, relying on the jurisprudence of sex-based discrimination. This argument proved to be strategically important because an equal protection claim based in sexual orientation would receive only rational review.

In his dissent in *Bowers v Hardwick* (1986), which affirmed anti-sodomy statutes, Justice Blackmun commented on the *Loving* analogy and sex discrimination claims in LGB rights litigation. Voicing the liberal analysis of the *Loving* analogy, Blackmun wrote that "the parallel between *Loving* and this case is almost uncanny," citing the sodomy and anti-miscegenation laws' religious justifications and widespread similar regulations.[11] The cases differed legally, however, as *Loving* involved the due process claim to marriage rights whereas *Bowers* involved sex acts, which did not receive due process protection in the *Bowers* case. Marriage equality cases provided a space where equal protection and due process could converge to incorporate same-sex couples into the jurisprudence put forth by *Loving v. Virginia.* Thus, liberals argued, racial arguments for equal protection and challenging white supremacist laws pertaining to marriage gave an example and legitimate legal framework for the recognition of same-sex marriage.

Conservative pundits vehemently opposed the liberal validation of the *Loving* analogy and wrote extensively on the topic throughout the 1990s. Indeed, in November 1997 The Catholic University of America, the Howard University School of Law, and the J. Reuben Clack School of Law at Brigham Young University sponsored a conference called "Law and the Politics of Marriage: *Loving v. Virginia* After 30 Years."[12] Out of this conference came a flood of articles and scholarship that denounced the *Loving* analogy as "unpersuasive," "superficial," and "inapposite."[13] Conservatives typically relied on the characterization of the *Loving* decision as exclusively racial and based in equal protection, ignoring or dismissing the due process arguments of marriage as a fundamental human right. For example, Robert Destro maintained that the

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[9] Andrew Koppleman, "Why Discrimination against Lesbians and Gay Men is Sex Discrimination," *New York University Law Review*, 69 (1994): 197.
[10] Koppleman, Andrew "The miscegenation analogy: Sodomy law as sex discrimination" *The Yale Law Journal* 98 (1988): 147.
[11] *Bowers v. Hardwick*, 487 U.S. 211 n.5 (Blackmun, J., dissenting).
[12] Destro, "Law and the Politics of Marriage," 1218.
[13] Richard F. Duncan, "From *Loving* to *Romer:* Homosexual Marriage and Moral Discernment," *Brigham Young University Journal of Public Law* 12 (1998): 240-251.

argument that *Loving* could be applied to what he called "homosexual 'marriage'" strayed from the fundamentally racial aspect of the case.[14] Another scholar argued that the decision in *Loving* was aimed at erasing the white supremacist vestiges of eugenics and promoting integration, to appropriate the equal protection jurisprudence of the case and apply it to same-sex marriage was antithetical to the intent of the *Loving.* In fact, he claimed that mixed-sex marriages resulted in an effective integration of the sexes.[15] In this line of reasoning, mixed-sex marriages maintained the intent of the *Loving* decision by promoting integration of the sexes, treating both equally, whereas same-sex marriages are innately segregationist, the very characteristic that the *Loving* decision overturned. These claims maintained that race-based classifications are different and irreconcilable with sex-based discrimination while focusing on equal protection jurisprudence. At the same time, instead of relying on an equal protection analysis of *Loving*, some conservative scholars directly disputed the due process claim to marriage and the meaning of the *Loving* analogy as a whole.

Though many conservative commentators relied upon the omission of a definitive decision on the due process claims to same-sex marriages in *Baehr* to deny application of strict scrutiny to same-sex marriage, one scholar used the due process claim to strengthen his counter-argument to the *Loving* analogy. David Orgon Coolidge discussed the *Loving* analogy as an inappropriate politicization of the legal debate. He equated the use of the analogy to "playing the race card" in other debates. Coolidge argued that invoking the right of interracial couples to marry in the early same-sex marriage debate was "playing the loving card," that is to say proponents who used the analogy were employing a politically charged tactic that was an inexact parallel.[16] In Coolidge's argument, the analogy "invoke[d] race, civil rights, and the freedom to marry while simultaneously painting one's opponents as the Bull Connors of the 1990s."[17] In this analysis proponents of the *Loving* analogy were drawing on existing tensions and an emotionally charged issue in order to evoke civil rights-based sympathy and disarm opponents. Coolidge denounced the analogy as "a subtle way of telling people that they are no different than a bunch of Jim Crow racists, and ought to be ashamed of themselves—so ashamed that they should get out of the way and leave the *definition of marriage* to the courts."[18] In this analysis one can see that in Coolidge's view, those who were against same-sex marriage were protecting the definition of marriage rather than maintaining heterosexual dominance.

[14] Destro, "Law and the Politics of Marriage," 1216-1222.
[15] Duncan "Homosexual Marriage and moral Discernment," 243-244.
[16] Coolidge, "Playing the *Loving* Card," 201-205.
[17] Ibid, 201.
[18] Ibid, 205. Emphasis added

Indeed, Coolidge's primary concern was the definition of marriage, and he used this technical argument to strike down the due process claims central to the *Loving* analogy. He reasoned that while *Loving* extended the existing legal institution of marriage to interracial couples, the legalization of same-sex marriage would require a redefinition of the institution of marriage altogether.[19] His view of same-sex marriage as a radical departure from the traditional legal definition meant that same-sex couples were not fighting for marriage but something else entirely, and that something was not protected under due process jurisprudence. This point was underscored by the fact that Coolidge referred to same-sex marriage by placing "marriage" in quotation marks, as if to question or even mock the idea that marriage could be extended to same-sex couples. In this way, conservative scholars were able to call upon the definition of marriage in order to reject due process claims to same-sex marriages. However, the *Loving* analogy was not confined to law reviews or the courtroom; though much of the discourse surrounding the *Loving* analogy was entrenched in legal interpretation and meaning, there were social arguments surrounding the controversial use of the analogy.

## Morality and Critiques of the *Loving* Analogy

Though much of the discourse comparing and contrasting race and sexuality took place in strictly legal discussions, law exists within social context and often gives institutional power to social norms and understandings. Race and sexuality are sociolegal fictions, themselves; that is to say that they are social constructions that are validated and given meaning by law.[20] Therefore legal theorists often discussed social norms, specifically morality, when considering the parallels and discrepancies of race and sexual orientation. Liberal commentators tended to cite similarities between the moral dissidents of mixed-race and same-sex couples. Josephine Ross, for example, compared the two in order to lend credibility to the *Loving* analogy. She began her analysis by citing cases of the sexualization of interracial couples at the time of the *Loving* case to that of same-sex relationships in the early 1990s.[21] Ross explained that this sexualization meant that the love of mixed-race couples in the 1970s was seen as pornographic and inherently tied to subversive sex, which was mirrored by same-sex relationships in the early 1990s, thus devaluating those relationships and their love. Furthermore, Ross argued, parents and outsiders reacted to same-sex

[19] Ibid, 220.
[20] Michael Foucault, *The History of Sexuality* (New York: Random House, 1990), Higgenbotham *Race Law: Cases, Commentary, and Questions,* 2-99, Siobhan B. Somerville, *Queering the Color Line: Race and the Invention of Homosexuality in American Culture* (Durham: Duke University Press, 2000).
[21] Josephine Ross, "The Sexualization of Difference: A comparison of Mixed-Race and Same-Gender Marriage," *Harvard Civil Rights-Civil Liberties Law Review* 37 (2002): 255-288.

couples and mixed-race couples in similar ways. In both situations studies showed that parents often asked what they did wrong and mourned the real or perceived loss of familial status. Outsiders influenced both mixed-race and same-sex couples by reacting with real or threatened violence, resulting in "closeted" relationships.[22] Liberal proponents of the *Loving* analogy lent credibility to the parallels between racial and sexual discrimination in the courtroom by comparable lived experiences of racism and heterosexism.

Conservative commentators, however, used similar social applications to invoke morality in order to discredit the *Loving* analogy. These arguments implicitly relied upon the idea that race is a social classification forced upon someone through a structure of legal taxonomies whereas sexuality is either pathological, chosen, or the result of moral failings. Richard F. Duncan argued that "*Loving* is a case in which public morality triumphed over social pathology."[23] His view was that the social and legal manifestations of white supremacy were a moral failing; the Court overcame this failing by striking down racialized measures criminalizing mixed-race marriages. However, individuals who were morally flawed were appropriating the jurisprudence put forth in *Loving*. Duncan warned "The legacy of *Loving* is threatened today by those who seek to use the courts to accomplish a radical and dangerous agenda—the reordering of marriage to reflect the alleged equal *goodness* of homosexuality and heterosexuality."[24] Notice his underlying judgment that heterosexuality is good and homosexuality is not, thus moralizing the argument. Therefore, Duncan argued that while *Loving* was a moral triumph over social perversion, the *Loving* analogy was an immoral appropriation of this righteous ruling resulting in a moral threat to society and law.

The societal ideal of sexual choice rather than identity had legal ramifications as well. The Ninth Circuit Court's Decision in *High Tech Gays v Defense Industrial Security Clearance Office* (1990) was a clear example of the legal consequences of perceived sexual choice. The Court stated, "Homosexuality is not an immutable characteristic, it is *behavioral and hence fundamentally different from traits such as race, gender or alienage*…The behavior or conduct of such already recognized classes is irrelevant to their identification."[25] This jurisprudence legitimized moral judgments of homosexuality as a character flaw or immoral behavior and codified it into law. When judges dismissed sexual identity and promoted the idea of behavior, they rejected any possibility of equal

[22] Ross, "The Sexualization of Difference," 274-278.
[23] Duncan "Homosexual Marriage and Moral Discernment," 239.
[24] Ibid. Emphasis added.
[25] *High Tech Gays v. Defense Industrial Security Clearance Office* quoted in Walther Frank *Law and the Gay Rights Story: The Long Search for Equal Justice in a Divided Democracy* (New Brunswik: Rutgers, 2014), 104. Emphasis added.

protection jurisprudence extending to LGB people. Further, when equal protection was denied to LGB people on moral grounds, it inhibited the use of the *Loving* analogy, and rendered it obsolete in court. Though many liberal and conservative commentators were discussing the impact of social understandings on law, many leftist queer, and black scholars argued that the employment of the analogy in the court room had detrimental social implications.

## Is The *Loving* Analogy Racist?

Often, while white lawyers, scholars, and LGB individuals employed the *Loving* analogy to further the marriage equality struggle, radical queer and black scholars denounced this trend as a harmful appropriation and a specifically white goal.[26] When discussing the pitfalls of the *Loving* analogy as employed in the early 1990s many queer and black scholars pointed to the fact that the comparison had very problematic effects on the public perception of the intersections of race and sexuality. Some leftist commentators argued that the analogy was overly simplistic because it ignored intersectionality while others argued that marriage itself was a racist institution that LGB people should not fight for. These critiques appeared in multiple law reviews, though they were marginalized by the normative, legalistic debates outlined above.

One of the major critiques leftist scholars put forth was that the *Loving* analogy construed racial minorities and sexual minorities as mutually exclusive groups, erasing queer people of color entirely. For example, one queer legal scholar argued, "Specifically, the comparative approach marginalizes (or treats as nonexistent) gays and lesbians of color, leading to a narrow construction of the gay and lesbian community as largely upper-class and white."[27] This characterization of the LGB community as largely white reinforced the mutually exclusive categories of racial minorities and sexual minorities while simultaneously ignoring those who identified with both groups. Not only was this construction a misrepresentation, but it also resulted in harmful ideologies, which perpetuated racism and heterosexism, to permeate conversations of race and sexuality.

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[26] I use the term "queer" to describe these scholars as that identity and the field of Queer Theory is often more radical and leftist, separating from the liberal/conservative dichotomy used by many white LGB commentators. For more on Queer Theory and its radical approaches against mainstream gay rights see *Against Equality: Queer Revolution Not Mere Inclusion,* ed. Ryan Conrad (Oakland: AK Press) 2014, *That's Revolting: Queer Strategies for Resisting Assimilation,* ed. Mattilda Bernstein Sycamore (Berkeley: Soft Skull Press) 2004, and Cathy J. Cohen "Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?" *GLQ: A Journal of Lesbian and Gay Studies* 3 (1997):437-456.

[27] Darren Laenard Hutchinson, "'Gay Rights' for 'Gay Whites?'?: Race, Sexual Identity, and Equal Protection Discourse," *Cornell Law Review* 85 (2000): 1360.

The construction of mutually exclusive categories of race and sexuality led to harmful assumptions by straight people of color and white LGB people. Queer legal scholar, Catherine Smith argued, that the assertion of sameness between people of color and LGB people had two negative consequences. First, the analogy allowed "white LGBT people to deny the white privilege and racism of white people generally and of themselves as members of the white majority."[28] The *Loving* analogy, therefore, ignored the fact that many LGB people benefitted from their white privilege, instead creating the idea that all forms of oppression (racism, sexism, heterosexism, etc.) were experienced in the same way. Second, it ignored the fact that straight people of color could be homophobic and experience heterosexual privilege, preventing empathetic connections between straight people of color and white LGB people. In this view, the *Loving* analogy, in fact, alienated people of color from supporting LGB rights as it placed them in direct opposition to the gay community. Smith argued that a conversation about the *Loving* analogy "descends into a sameness-difference debate, reinforces white racism, and overlooks heterosexist and sexist stereotypes."[29] Though the *Loving* analogy was important in the courtroom, the social impact of the argument was detrimental to the possible alliance of straight people of color and white LGB people to fight systematic oppression as a whole. Though some queer commentators were discussing the pitfalls of using the sameness argument, others were saying that marriage equality itself was more problematic than the rhetorical tools gay rights advocates employed to achieve it.

Black queer radicals sometimes argued that same-sex marriage as a goal was a racist objective that white LGB people used to obtain more systematic privilege. Scholars often argued that same-sex marriage privileged a white supremacist version of family over the traditional and cultural definition claimed by many black families. For example Mattie Udora Richardson cited the historical trend of casting black families as pathological and dysfunctional, focusing on the1965 Department of Labor assessment known as the Moynihan Report.[30] Richardson states, "Marriage has been used against African American people, held as an impossible standard of two-parent nuclear household that pathologizes the extended families that are integral to African ancestral and African American cultural lives."[31] Same-sex marriage would only maintain this privileged ideal of family including only two people and their children, excluding the black family of extended kin networks by assimilating same-sex couples to a white, heterosexist definition of family. The fact that marriage equality had moved to the forefront of

[28] Catherine Smith "Queer as Black Folk?" *Wisconsin Law Review* 379 (2007): 389.
[29] Smith "Queer as Black Folk?" 391.
[30] Kenyon Farrow, "Is Gay Marriage Anti-Black???" in Against Equality: Queer Revolution Not Mere Inclusion, ed. Ryan Conrad, (Oakland: AK Press, 2014): 113.
[31] Ibid, 114.

the LGB rights movement showed a great disparity between the needs queer people of color and those of the white gay people in positions of power.

Because of the institutional advantage that white LGB people claimed and the false straight-black/gay-white dichotomy, most LGBT organizations were overwhelming white. Therefore, organizations such as the Human Rights Campaign and the Log Cabin Republicans focused strictly on LGB rights, ignoring the effects of racism on queer people of color. One scholar noted, "With some exceptions, white LGBT organizations and advocates often ask much of black people without doing much to confront racism."[32] This alienated queer people of color by showing that the LGB community was fighting for their white brothers and sisters and leaving queer people of color outside the mainstream movement. Thus, not only was the *Loving* analogy detrimental to societal understandings of race and sexuality, but white LGB people employed the comparison to achieve an inherently white supremacist end.

## The Legacy of the *Loving* Analogy

The debate over the *Loving* analogy did not end with the new millennium, but continues to permeate same-sex marriage discourse today. Indeed, in the oral arguments before the United States Supreme Court in *Obergefell v. Hodges,* which challenged the constitutionality of state same-sex marriage bans, both sides of the bar drew upon the *Loving* analogy. For example, Justice Kagan asked the respondents, "Now, the right to marry. We had *Loving*...We just said there's a right to marry, that is fundamental and that everybody is entitled to it unless there is some good reason for the state to exclude [them]. So why shouldn't we adopt the exact same understanding here?"[33] In this question Justice Kagan was invoking the same due process arguments as liberal commentators of the 1990s. She then went on to dismiss the characterization of the *Loving* decision as strictly racial, instead invoking an individual liberty argument. She asked the respondent "And in, indeed, *Loving* was exactly what this case is. It's a case which shows how liberty and – and equality are intertwined, wasn't it?"[34] Though the liberty and equality argument was less discussed in the early *Loving* analogy discourse, this demonstrates the continued invocation of the comparison in order to extend protections to same-sex couples. The incorporation of individual liberties and their entanglement to equality in this employment of the *Loving* analogy demonstrated that it was evolving to become more effective in the legal sphere. Throughout the oral arguments *Loving* was invoked ten times between the parties, the justices asked about its applicability, the petitioners called upon it as precedent as earlier liberal scholars had done, and the respondents countered this point with similar arguments as those used by conservatives in the 1990s.

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[32] Smith "Queer as Black Folk?" 393.
[33] Justice Elena Kagan, *Obergefell v. Hodges* oral arguments. April 28, 2015. 75.
[34] Ibid.

The decision of the Court in *Obergefell v. Hodges,* penned by Justice Kennedy, ultimately declared same-sex marriage legal in all states. In the majority opinion, Kennedy drew upon *Loving* to support the due process jurisprudence that claimed marriage as a fundamental right.[35] Similarly, the Court put forth that, "*Loving* did not ask about a 'right to interracial marriage,'" but "about the right to marry in its comprehensive sense.'"[36] In employing the *loving* analogy in this manner Kennedy ensured that this case was not considered to claim a right to same-sex marriage, but a right for same-sex couples to marry. He, therefore, disarmed the argument that there was no guarantee to "gay marriage" or that marriage between two people of the same sex was not "marriage" at all. As the opinion progressed to address the equal protection issue at hand, Kennedy took up the *Loving* analogy again, stating "In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples."[37] Therefore, in the decision that effectively delegitimized bans on same-sex marriage, the majority opinion employed both of the key precedential arguments of the *Loving* analogy. In doing so the decision recounted many of the rhetorical and legal strategies of liberals in the early marriage equality debate.

The dissenters, on the other hand, pointed to the inconsistencies between *Obergefell* and *Loving.* Chief Justice Roberts, joined by Justice Scalia and Justice Thomas, maintained that same-sex marriage was not marriage at all, quoting *Loving* itself, because, "We later described marriage as 'fundamental to our very existence and survival,' an understanding that necessarily implies a procreative component."[38] Such rhetoric was quite different from earlier conservative condemnations of same-sex marriage. Conservatives in the early debate claimed that homosexuality was not an identity, but an immoral choice. The conservative jurisprudence in the 2015 *Obergefell* decision did not take up the question of immorality or choice and instead relied on the definition of marriage as a procreative union. Though the exact points of disagreement shifted over two decades, the need to weaken or disprove the *Loving* analogy remained an important legal issue. Thus the *Loving* analogy continues to permeate American legal culture through equal protection and due process jurisprudence in discussions surrounding same-sex marriage.

The American legal structure relies upon the use of precedent and analogy, especially in the area of extending equal protection and due process rights to underrepresented groups. The use of analogy can be a powerful tool to carve out

[35] *Obergefell v. Hodges* 576___ U.S. (2015), 11.
[36] Ibid, 18.
[37] Ibid, 19-20.
[38] *Obergefell v. Hodges* 576___ (2015), Justice Roberts Dissenting, 7.

space for minority classes to gain protected status, as is the case with the *Loving* analogy. Conservative and Liberal legal scholars often debated the classification of *Loving* as equal protection of race or fundamental rights due process in order to discuss its applicability to the same-sex marriage cases in the early 1990's. By considering race and sexuality concrete legal categorizations, these arguments strengthened the sociolegal fictions of race, sexuality, and marriage. The legalistic debates centered on the validity of the sameness argument in the courtroom, but conversations about the social implications of the analogy permeated the *Loving* discourse as well.

Because law and society are deeply intertwined and influence one another, many commentators were discussing the validity of the *Loving* analogy in the social sphere. While legal scholars argued about precedent, legalistic taxonomies, and the interpretation of the *Loving* decision, others were concerned with the effects that the analogy had on social ideologies of race and sexuality. Conservative scholars argued that sexuality and race could not be compared due to the moral implications of homosexuality and highlighted behavior over identity. This social understanding permeated the jurisprudence of same-sex marriage decisions. Queer and black scholars, however, argued that the analogy had harmful effects for straight people of color, white LGB people, and queer people of color. In this view, the use of analogy, while sometimes effective in the courts, was inappropriate and had adverse social effects. Finally, some queer black commentators claimed the goal of marriage equality itself was racially restrictive and served to assimilate queer people of color to an exclusively white family ideal.

The *Loving* analogy carved out space in equal protection and due process jurisprudence to subsume LGB people and same-sex couples under existing legal protections. The comparison also conflated race and sexual minority struggles and shaped public understandings of race, sexuality, and the law. The arguments surrounding the analogy reveal the contentious debates that permeated legal and social discourse, while also providing an example of the deep connectedness between the law and society. The *Loving* analogy is a controversial but integral part of LGB legal history and continues to be a vital tool in the same-sex marriage jurisprudence today.

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