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Beyond Analogy: *Perez v. Sharp*, Antimiscegenation Law, and the Fight for Same-Sex Marriage

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ABSTRACT

*Conversations about the constitutionality of prohibitions on marriage for same-sex couples invariably reduce to the question of whether a meaningful analogy can be drawn between restrictions on same-sex marriage and antimiscegenation laws. In an effort to refocus this debate, this article considers the California Supreme Court's 1948 decision in *Perez v. Sharp* and its use by advocates in recent litigation to secure marriage rights for gay and lesbian couples. Opponents of marriage rights for members of the LGBT*

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community frequently assert that dispatching *Perez* in these cases distorts the meaning of that decision and other similar precedents by drawing a false analogy between bans on interracial and same-sex marriage. Professor Lenhardt argues that, instead, *Perez*'s appearance in recent cases helps to clarify the nature of the marriage rights at stake in *Loving v. Virginia*. She also contends that the strategic use of *Perez* serves to underscore the extent to which state antimiscegenation laws established not only racial, but also gender-based identity norms.

Finally, Professor Lenhardt asserts that *Perez*'s use in recent marriage cases offers a way out of the "analogy" debate, focusing discussion on the nature and substantive effect of race and gender bars on marriage, rather than on a comparison of the groups seeking judicial redress for such restrictions. Professor Lenhardt concludes that a deeper appreciation of the extent to which state-imposed obstacles to marriage have operated to police identity, restrict opportunities for self-definition, and impede belonging can elucidate the true implications and citizenship effects of prohibitions on marriage for same-sex couples.

INTRODUCTION¹

[T]here is no redress for the serious restriction of the right of Negroes, Mulattoes, Mongolians, and Malays to marry. . . . A member of any of these races may find himself barred from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.²

Justice Roger J. Traynor, *Perez v. Sharp*

Sixty-five years ago, two California factory workers, Sylvester Davis and Andrea Pérez, committed an act that would transform the terrain of race and ethnicity in the United States. They fell in love.³ Determined to share the rest of

1. This article draws on portions of the author's book chapter, R.A. Lenhardt, *The Story of Perez v. Sharp: Forgotten Lessons on Race, Law, and Marriage*, that appears in *Race Law Stories* (Devon W. Carbado and Rachel F. Moran, eds., 2008).

2. *Perez v. Sharp*, 198 P.2d 17, 25 (Cal. 1948). *Perez* is sometime referred to as *Perez v. Moroney* or *Perez v. Lippold*, the last title being the one used in the Pacific Law Reporter. Changes in the management of the Los Angeles County Clerk's office account for the shifts. The clerk's office was run by W.G. Sharp when the California Supreme Court issued its decision in *Perez*. See Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 61 n.42 (1996) [hereinafter Pascoe, *Miscegenation Law*].

3. In an excellent article that draws on oral histories from persons associated with *Perez*, 198 P. 2d 17, Dara Orenstein movingly tells the story of Sylvester and Andrea's romance, providing valuable insights into their personal histories, the decisions that led them to challenge California law, and the race-related implications of the decision rendered in the case. See Dara Orenstein, *Void for Vagueness: Mexicans and the Collapse of Miscegenation Law in California*, 74 PAC. HIST. REV. 367 (2005); see also R.A. Lenhardt, *The Story of Perez v. Sharp: Forgotten Lessons on Race, Law, and Marriage*, in RACE LAW STORIES 341-77 (Devon Carbado & Rachel

their lives together, Sylvester, an African American just returning from service abroad in World War II,⁴ and Andrea, the daughter of Mexican immigrants,⁵ went to the Los Angeles county clerk several years later to obtain a marriage license.⁶ The county clerk, however, refused to grant them one.⁷ Sylvester and Andrea had run afoul of California's antimiscegenation law.⁸

On its face, this antimiscegenation law, which had been in effect from California's entry into the union in 1850,⁹ did not appear to apply to Sylvester and Andrea. It declared that "marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes" would be deemed illegal and void.¹⁰ Individuals of Mexican descent were nowhere mentioned in the statute. But, in California, Mexican Americans had long been regarded as white for purposes of marriage.¹¹ Andrea was a mestizo who, by all accounts, did not appear phenotypically white¹² and who, given the racial politics of

Moran, eds., 2007) [hereinafter Lenhardt, *The Story of Perez v. Sharp*] (discussing non-recognition of *Perez* and its implications in the race context). Surprisingly few legal scholars have studied *Perez* in any depth. Exceptions include RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 85-88 (2001); RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 259-66, 269 (2003); Kevin R. Johnson & Kristina L. Burrows, *Struck by Lightning? Interracial Intimacy and Racial Justice*, 25 HUM. RTS. Q. 528 (2003) (reviewing MORAN, *supra*). Outside of legal academia, I am aware of only a few scholars besides Orenstein who have focused on *Perez*. See PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW – AN AMERICAN HISTORY* 192-99 (2002); Pascoe, *Miscegenation Law*, *supra* note 1, at 61; Fay Botham, "Almighty God Created the Races": Theologies of Marriage and Race in Anti-Miscegenation Cases, 1865-1967, at 25 (2005) (unpublished Ph.D. dissertation, Claremont Graduate University) (on file with author); Mark Robert Brilliant, *Color Lines: Civil Rights Struggles on America's "Racial Frontier," 1945-1975* (Aug. 2002) (unpublished Ph.D. dissertation, Stanford University) (on file with author).

4. Orenstein, *supra* note 3, at 372, 374.

5. *Id.* at 372-73. Not insignificantly, it was unusual for African Americans and Latinos to marry in the California of the 1940s, which was marked by racial segregation. *Id.* at 374. Indeed, Andrea and Sylvester might never have met had World War II not occurred. The pressures of having to fulfill the production needs of wartime led companies that had previously declined to hire women and racial minorities to open their doors to these groups. See JOSH SIDES, *L.A. CITY LIMITS: AFRICAN AMERICAN LOS ANGELES FROM THE GREAT DEPRESSION TO THE PRESENT* 36 (2005). Lockheed Aviation, which by 1942 employed both Andrea and Sylvester, was among these companies. Orenstein, *supra* note 3, at 372 n.10. When the company loosened its hiring policies in the early to mid 1940s, it made it possible for Sylvester and Andrea to meet. See *id.* 372 n.10.

6. *Id.* at 368.

7. *Id.*

8. *Id.*

9. *Id.* at 375.

10. CAL. CIV. CODE § 60 (West 1941), *invalidated by* *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

11. Orenstein, *supra* note 3, at 369. This whiteness designation has its roots in the Treaty of Guadalupe Hidalgo, which extended American citizenship to Mexican nationals in ending the war between the United States and Mexico. See George A. Martinez, *Constructing Latcrit Theory: Diversity, Commonality, and Identity*, 33 U.C. DAVIS L. REV. 787, 788 (2000). Significantly, Mexican Americans had been deemed non-white for many other purposes. See IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* 81, 83-87 (2003).

12. Orenstein, *supra* note 3, at 403 (reporting that a brief article in *TIME* referred to Andrea

California at the time, likely received none of the social privileges associated with whiteness.¹³ Ironically, though, she was deemed to fall among those whose blood had to be protected from contamination by non-Whites.¹⁴

Devout Catholics interested in marrying in their neighborhood church,¹⁵ Sylvester and Andrea refused to resort to the strategies employed by other couples ensnared in the bramble bush of California's race regulations.¹⁶ They were unwilling to cohabitate,¹⁷ misrepresent their racial identity,¹⁸ or even to

as "olive-skinned"). When discussing the *Perez* case in which he participated years later, Sylvester Davis is said to have reflected on Andrea's categorization as white, saying "That's horse manure, that she was white." *Id.* at 394. A picture of Andrea from 1982 appears in an online journal article. See David A. Hollinger, *Amalgamation and Hypodescent: The Question of Ethnoracial Mixture in the History of the United States*, 108 AM. HIST. REV. 5 (2003), available at <http://www.historycooperative.org/journals/ahr/108.5/hollinger.html>.

13. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 345, 359. In California at this time, Latinos often faced discrimination and were frequently barred from enjoying public facilities and spaces with whites. See SIDES, *supra* note 5, at 16-18, 48-49; Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 174 (2005). Mexican American children, for example, were frequently forced to attend racially segregated public schools. See *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (invalidating the policy of segregating Mexican children from white children in public schools).

14. The contamination of white blood was a concern in race cases from early on, but became a preoccupation with the rise of the eugenics movement. See Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934*, 20 LAW & HIST. REV. 225, 275 (2002).

15. Orenstein, *supra* note 3, at 386; Pet. for Writ of Mandamus, Mem. of P. & A., and Proof of Service, at 4, *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (No. L.A. 20305).

16. Orenstein, *supra* note 3, at 386.

17. California's law prohibited only interracial marriage. It did not seek to proscribe interracial sex, as states such as Florida did in adopting prohibitions on interracial cohabitation. See *McLaughlin v. Florida*, 379 U.S. 184 (1964).

18. Attempts to "pass" or misrepresent identity were a common response by those seeking to circumvent antimiscegenation laws. See, e.g., MORAN, *supra* note 3, at 43-48 (discussing passing and efforts to circumvent antimiscegenation laws); Orenstein, *supra* note 3, at 386-87 (discussing county clerk-sanctioned efforts by Mexican women "suitably dark in complexion" to pass as non-white under California's antimiscegenation law, as well as the willingness on the part of a judge to bend racial categories in order to permit an interracial couple to marry under California law). For additional information on passing and other forms of identity manipulation, see R.A. Lenhardt, *Understanding the Mark: Race Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, n.211 (2004) [hereinafter Lenhardt, *Understanding the Mark*] (discussing passing and other forms of identity manipulation). For scholarship addressing the manipulation of racial identity in particular, see, for example, ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 44 (1963); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1811-12 (discussing efforts of racial minorities to fit into workplace environment by accepting dominant cultural norms); see also SHIRLEE TAYLOR HAZLIP, *THE SWEETER THE JUICE: A FAMILY MEMOIR IN BLACK AND WHITE* (1995) (detailing, *inter alia*, story of black family in which certain members decided to pass and live as Whites, while others continued to live as part of the African American community); JAMES WELDON JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLOURED MAN* (1961) (detailing efforts of African Americans to pass); NELLA LARSEN, *QUICKSAND AND PASSING* (Deborah E. McDowell ed., 1986) (same); GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 50 n.22, 209 n.18 (2002) (giving example of journalist Brent Staples trying to counter race-based misperceptions about himself by whistling Vivaldi). For discussions of the similarities in passing strategies employed by racial minorities and gay men and lesbians, see, for example, Angela Onwuachi-Willig,

seek a marriage license in a sister-state without an antimiscegenation law, as many others did.¹⁹ They sought legal marriage on the same terms available to all Californians. And so, with the help of a civil rights attorney named Dan Marshall,²⁰ they resolved to challenge California's antimiscegenation law.

This decision was significant, but not monumental in and of itself. Litigants had made various challenges to the application of antimiscegenation laws over the years.²¹ Relatively few, however, had sought to challenge the entire antimiscegenation apparatus. Andrea and Sylvester undertook this challenge and won.²²

On October 1, 1948, the California Supreme Court issued an opinion holding the state's antimiscegenation law unconstitutional under the Fourteenth Amendment of the U.S. Constitution.²³ Its ground-breaking decision, which marked the first time since Reconstruction that any antimiscegenation statute had been invalidated,²⁴ led to significant changes in the lives of interracial

Undercover Other, 94 CALIF. L. REV. 873 (2006); Sharon Elizabeth Rush, *Equal Protection Analogies – Identity and “Passing”*: Race and Sexual Orientation, 13 HARV. BLACKLETTER L.J. 65 (1997).

19. Some jurisdictions prohibited couples from crossing state lines to marry. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (noting that the Lovings left Virginia and went to the neighboring District of Columbia, where interracial marriage was permissible). California, however, was not one of them. In fact, the California Supreme Court determined as early as 1875 that it would recognize the validity of interracial marriages procured in other jurisdictions. See *Pearson v. Pearson*, 51 Cal. 120, 125 (1875) (holding that a marriage “valid by the law of the place where it was contracted, is also valid in this State”).

20. Marshall was a white Catholic with broad experience in litigating civil rights cases. See Orenstein, *supra* note 3, at 388-89.

21. Significantly, these challenges took a variety of forms and arose in cases concerning, *inter alia*, divorce, annulments, intestacy, and conflict of laws issues, as well as civil marriage rights. See, e.g., KENNEDY, *supra* note 3, at 232-41. Where they did not attempt to contest the overall constitutionality of interracial marriage prohibitions, such challenges typically took two forms. Most often, they involved attempts to prove or disprove an individual's membership in one of the racial groups precluded from intermarrying with Whites. See Pascoe, *Miscegenation Law*, *supra* note 2, at 44-45. In other instances, litigants endeavored to show that the racial or ethnic group of which they were a part was not among those barred from entering into marriages with white individuals. *Roldan v. Los Angeles County*, 18 P.2d 706 (1933), which Leti Volpp explored in her article, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000) [hereinafter Volpp, *American Mestizo*], provides a notable example here. In that case, Salvador Roldan successfully argued that California's antimiscegenation law did not bar his marriage to a white woman because, as a Filipino, he was not “Mongolian” within the definition of the statute. Volpp, *supra* at 821. The legislature later ensured that no similar marriages could occur by adding “Malay” as a category of individuals who could not marry Whites. *Id.* at 822.

22. Initially, Dan Marshall believed that a strategy based solely on religious grounds would be most successful, because it could circumvent some of the unfavorable race precedents that had been rendered in the antimiscegenation area. See Orenstein, *supra* note 3, at 390; see also Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 353-54. Eventually, however, it became clear that the case would be resolved on grounds of race alone. See Orenstein, *supra* note 3, at 396; Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 355-57.

23. See *Perez v. Sharp*, 198 P.2d 17, 29 (Cal. 1948).

24. During Reconstruction, several courts initially held that the prohibitions on interracial

couples in California.²⁵ But outside California, other state courts rarely relied on or even cited it.²⁶ Indeed, for years, a footnote mention in the Supreme Court's *Loving v. Virginia* decision was *Perez*'s greatest claim to fame.²⁷

But for the efforts of advocates in recent litigation to secure civil marriage rights for same-sex couples, *Perez* would have been consigned to legal obscurity. Advocates for same-sex marriage have been "loving" *Perez*. In cases such as *In re Marriage Cases*,²⁸ in which the California Supreme Court recently held that "the failure to designate the official [domestic partnership] relationship of same-sex couples as marriage violates the California Constitution,"²⁹ advocates have treated *Perez* as a landmark case that sheds light on the core meaning of marriage, perhaps even more so than *Loving* itself.³⁰ Opponents of full marriage rights for members of the LGBT community frequently attack this deployment of *Perez* and other similar cases, insisting that it distorts precedents that, at bottom, concern issues of race alone. In this article, I argue that this assertion could not be more wrong.

Far from distorting the meaning of *Loving* and other cases, the use of *Perez* in recent litigation helps to focus attention on the problems inherent in identity-based marriage restrictions in a way that *Loving* failed to do. *Loving* identifies marriage as one of the "basic civil rights of man,"³¹ but focuses principally on the white supremacist subtext of the antimiscegenation laws. *Perez*, in contrast, both engages issues of race and its social construction through such law, and develops a more fulsome account of the marriage rights with which interracial marriage bans interfered. It makes clear that the fundamental right to marry involves the freedom to marry not just anyone, but

marriage were unconstitutional in light of the newly enacted Fourteenth Amendment and the citizenship rights it extended to freedmen and women. *See Burns v. State*, 48 Ala. 195 (1872); *Ex parte Francois*, 9 F. Cas. 699 (C.C.W.D. Tex. 1879) (No. 5,047); *Hart v. Hoss & Elder*, 26 La. Ann. 90 (1874). A number of state legislatures also temporarily suspended their antimiscegenation statutes as well. *See MORAN, supra* note 3, at 77. White Southerners, however, soon moved to reinstate antimiscegenation laws designed to help restore the social structures and norms of the slavery era. *See infra* at 871.

25. *See infra* at 114.

26. *See infra* at 114.

27. 388 U.S. 1, 6 n.5 (1967).

28. 43 Cal. 4th 757 (2008).

29. *Id.* at *6. Until the California Supreme Court's decision, California reserved the official designation of marriage for opposite-sex couples. The unions of same-sex couples officially recognized by the state were called domestic partnerships. *Id.* The court held that this disparate treatment violated the right of gay men and lesbians to marry and deprived them of the guarantee of equal protection secured by the state constitution. *See id.* at *8, *9. Significantly, the Connecticut Supreme Court, in *Kerrigan v. Comm'r of Public Health* (SC No. 17716, argued May 14, 2007), now has an opportunity to render a similar decision about the constitutional effect of a comparable set of provisions. *See id.* at n.3.

30. *See Adam Liptak, Gay Marriage Through a Black-White Prism*, N.Y. TIMES, Oct. 29, 2006 at § 4, at 3.

31. 388 U.S. at 12.

the “person of [one’s] choice.”³² In this sense, *Perez*, with its emphasis on choice and self-expression, goes beyond the more limited articulation of marriage rights that appears in the Supreme Court’s decision in *Loving*.

In addition, advocates’ utilization of *Perez* in recent cases helps to highlight the often overlooked fact that antimiscegenation laws served to shape societal norms regarding gender, as well as race.³³ To be sure, interracial marriage bans worked to define the borders of racial identity and race. By now, the mechanisms employed by states in defining who, for example, was “white” or “black” for the purposes of antimiscegenation statutes are legend.³⁴ But it is also true that, for those laws, race and gender were inextricably tied.³⁵ Historians have for some time focused on the race and gender dimensions of antimiscegenation laws.³⁶ Legal scholars have also begun to consider in important ways the intersecting identities regulated by such provisions.³⁷ The strategic embrace of *Perez* in the marriage cases underscores this connection and, in doing so, promises to advance understanding about antimiscegenation laws, as well as restrictions on marriage for gay and lesbian couples.

Finally, by unearthing *Perez* and injecting it into both legal and public conversations about modern marriage, advocates have provided us with a path out of the “analogy debate” so often a part of discussions about the rights of gay men and lesbians to marry.³⁸ *Perez* gives us an opportunity to interrogate

32. *Perez*, 198 P.2d at 21.

33. In this article, I draw a distinction between the terms sex and gender. In utilizing the term gender, I refer to socially constructed roles for identity performance by men and women. In employing the term sex, I am generally referring to biological sex. For articles further explicating the relationship between these terms, see *infra* at 140 n.223.

34. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 372-73 (discussing articles on the legal definitions and tests adopted by states in attempting to define racial identity in this context).

35. See *infra* 127-40.

36. See, e.g., Lisa Lindquist Dorr, *Gender, Eugenics, and Virginia’s Racial Integrity Acts of the 1920s*, 11 J. WOMEN’S HIST. 143, 144 (1999) [hereinafter Dorr, *Gender*]; Peggy Pascoe, *Race, Gender, and Intercultural Relations: The Case of Interracial Marriage*, 12 FRONTIERS 5 (1991) [hereinafter Pascoe, *Race, Gender, and Intercultural Relations*].

37. See, e.g., MORAN, *supra* note 3, at 61-75; Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321 (2005) [hereinafter Oh, *Interracial Marriage*]; Reginald Oh, *Regulating White Desire*, 2007 WISC. L. REV. 463 (2007) [hereinafter Oh, *Regulating White Desire*]; Angela Onwuachi-Willig, *A Beautiful Lie: Exploring Rhinelander v. Rhinelander as a Formative Lesson on Race, Identity, and Family*, 96 CALIF. L. REV. 2393 (2008); Angela Harris, *Loving Before and After the Law*, 76 FORDHAM L. REV. 2821 (forthcoming June 2008).

38. The debate in law reviews on the appropriateness of analogies between antimiscegenation law and sex or gender-based restrictions on marriage has been wide-ranging. See, e.g., Stephen Clark, *Same-Sex But Equal: Reformulating the Antimiscegenation Analogy*, 34 RUTGERS L.J. 107 (2002); David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 B.Y.U. J. PUB. L. 201 (1998); Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1377-78 (2000) [hereinafter Hutchinson, *Gay Rights*]; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Josephine Ross, *Riddle for Our Times: The Continued Refusal to Apply the Miscegenation*

not just the similarities or differences in the experiences of groups that have historically had limitations placed on their right to marry, but also the fundamental nature of the right to marry and the substantive effects of state marriage regulations. I argue that, by restricting intimate choice, identity-based restrictions on civil marriage improperly limit self-definition efforts, cabin expressions of human identity and intimacy, and have a negative impact on the ability of those affected to “belong” as full members of the citizenry or broader community in which they reside.³⁹

Part I discusses the California Supreme Court’s decision in *Perez*, outlining the majority opinion drafted by then-Justice Roger Traynor, as well as the concurring opinions and dissent filed in the case. It also describes the treatment *Perez* received in the aftermath of the California Supreme Court’s decision.

Part II addresses how and why same-sex marriage advocates have used *Perez* in recent litigation. I argue that advocates’ deployment of the case, as previously discussed, uncovers important insights about *Loving*, marriage, and state efforts to regulate access to that institution.

Part III considers scholarship on the analogy often drawn between race and gender-based restrictions on marriage, and the objections of many opponents of marriage rights for gay and lesbian couples regarding the use of *Perez* and other antimiscegenation precedents in same-sex marriage litigation. I explain that, contrary to the assertions of opponents, efforts to cast decisions regarding race-based restrictions as cases about race alone are misguided. *Perez* itself makes clear the race and gender-based dimensions of antimiscegenation laws.

Part IV demonstrates how *Perez*—and the story of Andrea Pérez and Sylvester Davis’s courtship at its center—can work to advance our thinking about the meaning of marriage, an institution that has undergone dramatic changes in recent decades, and the impact of government regulation in the

Analogy to Same-Sex Marriage, 54 RUTGERS L. REV. 999 (2002) [hereinafter Ross, *Riddle*]; Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255 (2002) [hereinafter Ross, *Sexualization*]; Jane S. Schachter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994); Rebecca Schatschneider, *On Shifting Sand: The Perils of Grounding the Case for Same-Sex Marriage in the Context of Antimiscegenation*, 14 TEMP. POL. & CIV. RTS. L. REV. 285 (2004); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991); James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993); Lynn C. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the “Loving Analogy” for Same-Sex Marriage*, 51 HOW. L.J. 117, 171-76 (2007) (providing appendix listing recent law review articles supporting and opposing use of the race analogy in cases seeking marriage rights for same-sex couples).

39. Kenneth Karst introduced the term “belonging” in discussing the concept of equal citizenship. See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 3 (1989) [hereinafter KARST, *BELONGING*].

marriage context. Whether a marriage prohibition is based on gender or race, its effect is to police the identity of the individuals seeking to marry, to ensure that their intimate choices and expressions of self comport with prevailing race and gender norms. With this common perspective and an understanding of the U.S. Supreme Court's decision in *Lawrence v. Texas*,⁴⁰ we move "beyond analogy" to the recognition that identity-based restrictions that prohibit someone from marrying the "person of [his or her] choice" inflict a significant citizenship harm with constitutional dimensions.⁴¹

I

THE PEREZ OPINIONS

The county clerk who denied Andrea Pérez and Sylvester Davis a marriage license in 1947 applied Sections 69 and 60 of the California Code. Section 69 provided that "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."⁴² Section 60 further explained that "[a]ll marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."⁴³ These provisions made California one of thirty states that proscribed interracial marriages at the time.⁴⁴

The *Perez* plaintiffs' legal strategy was risky. Not only were antimiscegenation laws widely viewed as legitimate in the late 1940s,⁴⁵ but no post-Reconstruction state or federal court had yet overturned one. Largely due

40. 539 U.S. 558 (2003).

41. *Perez v. Sharp*, 198 P.2d 17, 25 (Cal. 1948).

42. CAL. CIV. CODE § 69 (West 1941), *invalidated by* *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

43. CAL. CIV. CODE § 60 (West 1941), *invalidated by* *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

44. See WALLENSTEIN, *supra* note 3, at 199.

45. The first American statute specifically targeting interracial marriage was enacted in the colony of Maryland in 1664 and soon led to the adoption of other similar statutes, particularly by states in the South. *Id.* at 3; Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 347-48. Significantly, antimiscegenation provisions had appeared in legislation adopted prior to that time. As I discuss in more detail in Part III, see *infra* at 133, a provision prohibiting sexual intimacy between Whites and Blacks was included in a matrilineal servitude statute in 1662. See Steven Martinot, *Motherhood and the Invention of Race*, 22 HYPATIA 79, 87-89 (2007).

It bears noting that California's antimiscegenation law was different in at least two respects from those that had been adopted by states in the American South, where proscriptions against interracial marriage and intimacy were long-standing, dating back to slavery. First, California's laws were more racially complex than those in effect in southern states, jurisdictions that focused primarily on relationships between Whites and Blacks. MORAN, *supra* note 3, at 17. Second, the penalty for violating California's ban on interracial marriage was not as severe as that imposed in other states. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 349. Whereas imprisonment was the likely punishment for couples in Virginia who transgressed racial lines in the area of intimacy, the sanction for a marriage in violation of Sections 60 or 69 was simply voiding the marriage. See *id.* The ramifications of voiding such marriages could, however, be far from simple, affecting issues of inheritance and property ownership, among other things. See *infra* 137-39.

to the U.S. Supreme Court's 1883 decision in *Pace v. Alabama*⁴⁶—which held that an Alabama law penalizing interracial adultery more severely than same-race adultery was not inconsistent with the Fourteenth Amendment's equal protection guarantees⁴⁷—courts were unwilling to find proscriptions on interracial marriage unconstitutional.⁴⁸ In the *Pace* Court's view, race-based distinctions in law were unproblematic when they treated individuals within specific racial categories the same.⁴⁹

It thus no doubt came as a surprise to many when, on October 1, 1948, the California Supreme Court ruled in *Andrea and Sylvester*'s favor by a 4-3 vote. Led by then-Justice Roger Traynor, who wrote the majority opinion, the Court invalidated California's antimiscegenation law and granted a writ of mandamus requiring the issuance of a marriage license to the couple. In doing so, it became the first court in the twentieth century to strike down an antimiscegenation law.⁵⁰

A. Justice Traynor's Majority Opinion

Justice Roger Traynor, a former tax professor at the University of California, Berkeley School of Law (Boalt Hall),⁵¹ was an unlikely person to author the majority opinion in *Perez*. In 1948, Traynor, who would later become Chief Justice of the court, was only in the seventh year of what would be his thirty-year tenure on the court. He had yet to write some of the opinions on issues of products liability, contract, and individual rights that would one day earn him a reputation as one of the "ablest judge[s] of his generation."⁵² There was also little to suggest that Traynor would be inclined to place himself at the vanguard of efforts to secure racial justice.⁵³

46. 106 U.S. 583 (1882).

47. *Id.* at 585. In doing so, *Pace* arguably paved the way for the separate-but-equal system of racial segregation specifically endorsed by *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding, *inter alia*, that state-enforced racial segregation on trains did not violate the Fourteenth Amendment). See PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 67 (1997); Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 350-51.

48. The Alabama statute imposed a prison term of two to seven years for interracial adultery, but imposed only a fine and up to six months imprisonment for same-race adultery. See Cheryl I. Harris, *In the Shadow of Plessy*, 7 U. PA. J. CONST. L. 867, 881 (2005).

49. 106 U.S. at 585. The Court explained that Alabama's statute passed constitutional muster because "[w]hatever discrimination made in the punishment prescribed in the two sections is 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.*

50. Orenstein, *supra* note 3, at 397.

51. BEN FIELD, ACTIVISM IN THE PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER TRAYNOR 5 (2003); Orenstein, *supra* note 3, at 395.

52. Henry J. Friendly, *Ablest Judge of His Generation*, 71 CALIF. L. REV. 1039, 1039 (1983); see also Warren E. Burger, *A Tribute*, 71 CALIF. L. REV. 1037, 1037 (1983) (describing Traynor as "a splendid judge, a fine scholar, and an effective administrator"). For a discussion of important decisions drafted by Justice Traynor post-1948, see Field, *supra* note 49, at 45-120.

53. Indeed, despite his ground-breaking opinion in *Perez*, few people associate Traynor with important decisions in the area of race. This said, I have suggested that his opinion in *Perez*

It may be that Traynor, a pragmatist committed to the “eliminat[ion] of legal rules that . . . no longer served their purpose”⁵⁴ came to his opinion in *Perez*, at least initially, less out of a commitment to race issues per se than from an appreciation of the changing role of jurists at the time. As Justice Traynor wrote, the unfortunate decisions in U.S. Supreme Court cases such as *Hirabayashi v. United States*⁵⁵ and *Korematsu v. United States*⁵⁶ were only a few years old. Courts were actively engaged in determining how to understand the idea that “[o]nly the most exceptional circumstances can excuse discrimination on th[e] basis [of race] in the face of the equal protection clause.”⁵⁷ Within this context, Traynor properly concluded that his task as a jurist was to determine whether the race-based impairment of marriage rights effected by California law could be justified.⁵⁸

The state relied heavily on the work of eugenicists in defending its antimiscegenation policy.⁵⁹ In terms that prompted Andrea and Sylvester’s attorney to question how “a servant of the people . . . [could be] bold enough to argue for the validity of a statute upon [white superiority] grounds,”⁶⁰ the state argued that interracial marriages—“especially with respect to the ‘Negro race,’ which he deemed ‘biologically inferior to the white’—produced ‘undesirable biological results.’”⁶¹ The state also argued that interracial marriages created social problems,⁶² including the “birth of interracial children who, as the offspring of parents ‘lost to shame,’ would be ‘social outcasts.’”⁶³

For his part, however, Traynor relied on new research by social scientists such as Gunnar Myrdal, Franz Boas, and Otto Kleinberg, which, as the *Perez* plaintiffs’ final brief to the court noted, discredited the research of the eugenicists cited by the state.⁶⁴ Justice Traynor thus gave little credence to the notion that California’s law was justified because it served purposes such as avoiding social tensions or “prevent[ing] the Caucasian race from being

“may well entitle [him] . . . to billing as an early critical race theorist . . .” Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 372 (citing Email from Kevin Johnson, Associate Dean for Academic Affairs & Mabie-Apallas Professor of Public Interest Law, U.C. Davis School of Law, to Robin A. Lenhardt, Associate Professor of Law, Fordham University School of Law (March 17, 2006) (on file with author).

54. FIELD, *supra* note 51, at 7.

55. 320 U.S. 81 (1943); *see also* Orenstein, *supra* note 3, at 397.

56. 323 U.S. 214 (1944).

57. *Oyama v. California*, 332 U.S. 633, 646 (1948).

58. Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 358.

59. *See* Respondent’s Supplemental Brief in Opposition to Writ of Mandate, *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (No. L.A. 20305).

60. Petitioners’ Reply Brief at 24, *Perez*, 198 P.2d 17 (No. L.A. 20305).

61. Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 355 (quoting Petitioners’ Reply Brief at 62, *Perez*, 198 P.2d 17 (No. L.A. 20305)).

62. Respondent’s Supplemental Brief in Opposition to Writ of Mandate at 78, 97-119, *Perez*, 198 P.2d 17 (No. L.A. 20305).

63. Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 355 (quoting Petitioners’ Reply Brief at 110, *Perez*, 198 P.2d 17 (No. L.A. 20305)).

64. *See, e.g.*, Petitioners’ Reply Brief at 37-44, *Perez*, 198 P.2d 17 (No. L.A. 20305).

contaminated by races whose members are by nature physically and mentally inferior to Caucasians.”⁶⁵ Likewise, he rejected completely the notion that Whites could reasonably be deemed superior to Blacks and other non-whites, commenting that “the date [sic] on which Caucasian superiority is based have undergone considerable re-evaluation by social and physical scientists in the past two decades.”⁶⁶

Indeed, Justice Traynor soon concluded, using the language of the new strict scrutiny analysis, that the state’s asserted purposes were simply not “compelling.”⁶⁷ Perhaps as a way to address what he likely regarded as Andrea’s racial mis-identification in the case, Justice Traynor also concluded, though it was not necessary to the resolution of the case, that the racial categories employed by the state were “illogical and discriminatory,” and arguably rendered the state’s statutes “void for vagueness.”⁶⁸ Among other things, he criticized the state for not explicitly stating which officials had responsibility for making determinations about racial identity or clarifying how such determinations should be made—for example, by “physical appearance,” “genealogical research,” or some other mechanism.⁶⁹ He also bemoaned the legislature’s inattention to the perplexing issue of how persons of mixed ancestry should be regarded under the statute.⁷⁰ Justice Traynor found absurd the notion under California’s statute that a “Mulatto can marry a Negro” or, for example, that “[a] person having five-eighths Mongolian blood and three-eighths white blood could properly marry another [sic] person of preponderantly Mongolian blood” under the statute, but white and black persons could not marry one another.⁷¹

For modern-day advocates of marriage rights for gay men and lesbians, however, the most important part of Traynor’s opinion is his analysis of the fundamental right to marry. At bottom, he held that the *Perez* case was not about race alone, but also about the right to marry “the person of one’s choice.”⁷²

Two factors make this particular formulation of the case noteworthy. First, it was considerably ahead of its time. The Supreme Court did not recognize marriage as a fundamental right at all until 1967 in *Loving*, when it invalidated the antimiscegenation statutes then in effect on Fourteenth Amendment

65. *Perez*, 198 P.2d at 23.

66. *Id.* at 24-25.

67. *Id.* at 27.

68. *Id.* at 26-27.

69. *Id.* at 28. For a discussion of the various mechanisms states employed in attempting to ascertain racial identity, see Harold Cohen, Comment, *An Appraisal of the Legal Tests Used to Determine Who Is a Negro*, 34 CORNELL L.Q. 246, 251 (1948) (discussing *Daniel v. Guy*, 19 Ark. 121 (1857)).

70. *Id.* at 27-28.

71. *Id.* at 23.

72. *Perez*, 198 P.2d at 25.

grounds.⁷³ Second, Justice Traynor, by framing the issue in this way, managed to avoid entirely the unfavorable precedent established by the Supreme Court's decision in *Pace v. Alabama*.⁷⁴ *Pace* took the position that race-based restrictions on interracial intimacy posed no constitutional problem, so long as Whites and Blacks were treated equally.⁷⁵ Justice Traynor—asserting that “human beings . . . [were not] “as interchangeable as trains”—dismissed the separate-but-equal understandings reflected in *Pace* as applicable primarily to cases involving access to trains and education—goods that, in 1948, prior to the decision in *Brown*, were still thought capable of being equalized even where racially segregated by law.⁷⁶ Such cases, he explained were “inapplicable.”⁷⁷ Reasoning that “the essence of the right to marry is the freedom to join in marriage with the person of one’s choice,” Justice Traynor concluded that “a segregation statute for marriage necessarily impairs the right to marry.”⁷⁸ This is so, he reasoned, because, to the individual prevented “by law from marrying the person of his choice . . . that [other] person to him may be irreplaceable.”⁷⁹

B. The Concurring and Dissenting Opinions

The *Perez* court split along several axes. Significantly, the concurring justices did not object to Justice Traynor’s articulation of the marriage rights at stake. Rather, they wrote separately to communicate their respective ideas about the best rationale for the judgment rendered in the case. Justice Edmonds, a Christian Scientist, drafted a concurrence adopting the view, urged in initial briefs filed on Andrea and Sylvester’s behalf,⁸⁰ that the case was first and foremost about the free exercise of religion under the First Amendment, not racial discrimination.⁸¹

The concurrence written by Justice Jesse W. Carter, and joined by Justice Phil Gibson, in contrast, took issue with Traynor’s contention that new social science research had somehow undermined the bases for California’s antimiscegenation provision. Challenging the idea that the validity of the state

73. See *Loving v. Virginia*, 388 U.S. 1, 1 (1967). Because *Loving* rested on dual grounds—race and marriage—some scholars argue that, for due process purposes, the first clear articulation of the fundamental nature of the right to marry did not come until the Court’s 1978 decision in *Zablocki v. Redhail*, 434 U.S. 374 (1978). See, e.g., Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 21 (2006).

74. 106 U.S. 583 (1882).

75. *Id.* at 585.

76. *Perez*, 198 P.2d at 25.

77. *Id.* at 21.

78. *Id.*

79. *Id.* at 25.

80. Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 353.

81. *Perez*, 198 P.2d at 34 (Edmonds, J., concurring); see also Orenstein, *supra* note 3, at 390. Significantly, at least one early case seeking marriage rights for gay men and lesbians seems to have involved a similar claim. See *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (rejecting, *inter alia*, the claim that the refusal to grant a marriage license to a lesbian couple violated religious freedom and imposed a punishment).

law was effectively an empirical question,⁸² Carter and Gibson asserted that, under normative principles of equality set forth in the Fourteenth Amendment, the Declaration of Independence, and the recently-enacted Charter of the United Nations,⁸³ Sections 60 and 69 had essentially never been constitutional.⁸⁴ In their minds, these provisions “violate[d] the very premise on which [the United States] and its Constitution were built”⁸⁵ Citing *Korematsu*, they emphasized that, under strict scrutiny, “[p]ressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”⁸⁶

The three justices in dissent—Justice John W. Schenk, B. Rey Schauer, and Homer R. Spence—chastised Traynor and the other members of the *Perez* majority for invalidating nearly one hundred years of California law. In doing so, they noted that twenty-nine other states had similar antimiscegenation statutes on their books and that every federal and state court to consider the issue since Reconstruction had upheld statutes prohibiting interracial sex and marriage.⁸⁷ Above all, the dissenters took issue with Justice Traynor’s contention that something more than equal treatment was required under Supreme Court precedent such as *Pace*. They gave no credence whatsoever to the idea that the fundamental right to marry included the right to marry “the person of one’s choice.” It was enough, Justice Schenk wrote at one point in his dissenting opinion, that “each petitioner has the right and the privilege of marrying within his or her own group.”⁸⁸

C. *The Aftermath of the Perez Court’s Decision*

The opinion drafted by Justice Traynor in *Perez* led to monumental changes for California marriage law.⁸⁹ Andrea and Sylvester, for their part, were able to wed in their home church after years of waiting.⁹⁰ But *Perez* did not translate into change outside of that state. There was no immediate national movement to remove antimiscegenation laws from the state codes.⁹¹ Nor did

82. *Perez*, 198 P.2d at 29-34 (Carter, J., concurring).

83. *Id.* at 34.

84. *Id.* at 29.

85. *Id.* at 34.

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

87. *Id.* at 39 (Schenk, J., dissenting).

88. *Id.* at 46. Ultimately, the dissenters opined that “[i]t is not within the province of the courts” to second-guess findings of the legislature. *Id.* at 42.

89. In the first two and half years following *Perez*, the Los Angeles County Clerk granted 455 marriage licenses to interracial couples. FIELD, *supra* note 51, at 41. These marriages did not occur immediately, however. The county clerk waited some time before beginning to issue licenses to interracial couples, fearing that the decision would be overturned by the U.S. Supreme Court. Brilliant, *supra* note 3, at 128.

90. The wedding ceremony marked the beginning of what would be more than fifty years of marriage. Orenstein, *supra* note 3, at 404, 407. Sylvester and Andrea, who died in 2002, had several children. *Id.*

91. For example, Oklahoma, Montana, and North Dakota took until 1951, 1953, and 1955

other courts feel compelled to follow *Perez*. In fact, few courts even cited it.⁹²

Those courts that referenced *Perez* did not do so approvingly. The Virginia Supreme Court, for example, mentioned *Perez* in *Naim v. Naim*⁹³—a case concerning an interracial marriage between a white woman and Chinese man that had been voided on grounds that it violated Virginia's antimiscegenation statute⁹⁴—but dismissed it as “contrary to the otherwise uninterrupted course of judicial decision.”⁹⁵ It would take until 1967, when the U.S. Supreme Court decided *Loving*, for *Perez* to get any real notice outside of California.⁹⁶ But even then, *Perez* appeared only in a footnote in *Loving*,⁹⁷ even

respectively, to remove prohibitions on interracial marriage. WALLENSTEIN, *supra* note 3, at 198. Nevada took until 1959 to eliminate provisions sanctioning interracial marriage, as did California, ironically, even though its Supreme Court had invalidated those provisions more than a decade earlier. *See id.* at 199; Orenstein, *supra* note 3, at 401. Other states took longer still. *See* WALLENSTEIN, *supra* note 3, at 253-54. Indeed, Alabama, the last state to remove antimiscegenation law provisions from its state code, did not act until 2000, over opposition from a number of legislators. *See* Jeff Amy, *Voters Strike Ban on Interracial Marriage*, MOBILE REG. (Ala.), Oct. 8, 2000, at A24.

92. This is significant given the extent to which states are said to have regularly referenced interracial marriage decisions from other jurisdictions. Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 40 (1988) (explaining that, given the small “number of miscegenation cases” decided in states, “[s]tate courts were forced to refer frequently to cases from other states”). To put this treatment of *Perez* in perspective, consider the current recognition accorded the Massachusetts Supreme Judicial Court’s 2003 decision in *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (2003), invalidating gender-based restrictions on marriage in Massachusetts, a decision that has led to marriages for thousands of gay and lesbian couples. *See* Lynn D. Wardle, *Symposium on Goodridge v. Department of Public Health: Goodridge and “The Justiciary” of Massachusetts*, 14 B.U. PUB. INT. L.J. 57, 62 (2004) (citing Christine MacDonald & Bill Dedman, *About 2,500 Gay Couples Sought Licenses in 1st Week*, BOSTON GLOBE, June 17, 2004, at A1 (noting that “[a]n estimated 2,500 marriage licenses were issued to same-sex couples in Massachusetts in the first week, following the legalization of same-sex marriage” and that the rate subsequently slowed)). Even where courts have not relied on the *Goodridge* holding, they have acknowledged it as an important case either by citing it or discussing it in some detail. *See, e.g.,* Lewis v. Harris, 188 N.J. 415, 441 (2006) (citing *Goodridge* in concluding that, even though same-sex marriage was not fundamental right, New Jersey constitution required provision of equal benefits to gay and lesbian couples, either through marriage or statutory mechanism adopted by the legislature); Hernandez v. Robles, 855 N.E.2d 1, 6, 17 n.3, 21, 26 (N.Y. 2006) (citing *Goodridge* and its dissenting and concurring opinions repeatedly, but upholding New York state prohibition on same-sex marriage); Andersen v. King County, 138 P.3d 963, 975, 979, 982-84 (Wash. 2006) (citing and discussing *Goodridge* before upholding federal Defense of Marriage statute against constitutional challenge); *see also* Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 366-67 (explaining how many state courts grappling with claims by same-sex couples have felt compelled, at least minimally, to engage *Goodridge*).

93. 87 S.E.2d 749, 753 (Va. 1955).

94. *Id.* at 750.

95. *Id.* at 753.

96. By this time the Court had already rendered a decision in *McLaughlin v. Florida*, 379 U.S. 184 (1964), which held that state laws criminalizing sexual intimacy and co-habitation by interracial couples are unconstitutional. Most commentators maintain that *McLaughlin*, though often overlooked, was an important case that arguably laid the groundwork for the decision in *Loving*. Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1169 (2006).

97. *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967). Significantly, the *Loving* plaintiffs relied

though there is a strong argument that Justice Traynor's opinion inspired some of the themes addressed in *Loving*.⁹⁸

II

"LOVING" *PEREZ* IN RECENT MARRIAGE LITIGATION

Were it not for advocates of marriage rights for gay men and lesbians,⁹⁹ the footnote mention *Perez* received in *Loving* might have been the most recognition it ever received.¹⁰⁰ In recent years, however, advocates in these cases have successfully cast *Perez* as a foundational decision, one without which discussions about the place of marriage in current society cannot be meaningfully conducted. Indeed, the briefs filed and/or oral arguments made in almost every case challenging gender-based marriage restrictions in the last ten years has featured *Perez* in some way.¹⁰¹ As a result, same-sex marriage

on *Perez* in the briefs they filed before the Supreme Court. See Brief for Appellants, *Loving*, 388 U.S. at 38.

Marriage is perhaps the most important of all human relationships. We think it clear that the 'liberty' which is protected by the due process clause of the Fourteenth Amendment includes the right to marry. Justice Traynor so held in his opinion in *Perez v. Sharp*, which invalidated California's anti-miscegenation statute.

(citations omitted). Wallenstein notes that the Lovings also cited *Perez* in the Virginia Supreme Court. Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI-KENT L. REV. 371, 425 (1994). The brief quoted directly from Traynor's decision: "'If the right to marry is a fundamental right, then it must be conceded that an infringement of that right by means of a racial restriction is an unlawful infringement of one's liberty.'" *Id.* (quoting Appellant's Petition for Writ of Error at 12, *Loving v. Virginia*, No. 6163 (Va. 1965)).

98. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 364. Warren was serving as the Governor of California at the time the decision in *Perez* was rendered. See Orenstein, *supra* note 3, at 400, 401. There is virtually no way that he was unaware of the decision, which made headline news in California and in other areas of the country. FIELD, *supra* note 51, at 40-41; Orenstein, *supra* note 3, at 400-03; Brilliant, *supra* note 3, at 148. Indeed, it makes sense that Warren would be intimately familiar with the particular aspects of Justice Traynor's majority, especially given that the opinion was so novel for the time and required some action on the part of the legislature. Orenstein, *supra* note 3, at 401. Interestingly, Dara Orenstein's article on *Perez* suggests that Warren was advised not to push the legislature to remove Sections 60 and 69 from the California Code in the wake of the California Supreme Court's decision. *Id.* As indicated above, California did not repeal its antimiscegenation law provisions until 1959, six years after Warren left the office of Governor. See *id.*; *supra* note 91.

99. Litigation concerning marriage rights for same-sex couples has been part of a larger effort to secure rights for LGBT individuals in the courts. See PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT (2000); see also Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993).

100. Elsewhere, I have advanced several theories for why *Perez* has received less attention than *Loving* in cases and scholarship on marriage and antimiscegenation law. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 365-70. Among other things I argue that the fact that *Perez*—to the extent that it involved an African American-Latino relationship rather than one that was black-white—was an anti-paradigm antimiscegenation case partially accounts for its failure to be recognized more widely. *Id.*

101. The informal survey of briefs, opinions, and oral arguments that follows in the text is based on research relating to the following 12 cases raising questions about same-sex couples'

advocates have essentially rescued *Perez* from legal obscurity.¹⁰² In this section, I explore the ways in which same-sex marriage advocates have used *Perez* in recent marriage litigation.

A. *Perez* as a Call for Judicial Bravery

The current battle for gay and lesbian marriage rights is being waged, for the most part, in state courts.¹⁰³ Because of their concern about the direction of federal equal protection and due process doctrine,¹⁰⁴ and the perceived hostility of an increasingly conservative U.S. Supreme Court to potential marriage claims, same-sex couples have generally refrained from initiating marriage-related challenges in federal court.¹⁰⁵ Instead, they have crafted a litigation

access to marriage. See *Standhart v. Superior Court*, 77 P.3d 451 (Ariz. 2004); *In re Marriage Cases*, 43 Cal. 4th 757 (2008); *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2006); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); Ruling on Plaintiffs' and Defendant's Motions for Summary Judgment, *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007); *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Conaway v. Deane*, 932 A.2d 571 (Md. Ct. App. 2007); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006). One or more plaintiffs' briefs were identified for 7 of the 12 listed here, a number that includes the major decisions rendered in this area in the last few years. *Perez* was cited and/or discussed at length in briefs in each of those cases. See, e.g., Respondents' Consolidated Reply Brief on the Merits, *In re Marriage Cases*, Case No. S147999 (California Supreme Court, 2007); Respondents' Opening Brief on the Merits, *In re Marriage Cases*, No. A110451, 149 P.3d 737 (Cal. 2006); Memorandum of Authorities in Support of All Plaintiffs' Motion for Summary Judgment and In Support of All Plaintiffs' Resistance to Defendant's Motion for Summary Judgment, *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Jan. 30, 2007); Plaintiff-Appellants' Brief, *Goodridge v. Dep't of Public Health*, No. SJC-08860, 798 N.E.2d 941 (Mass. 2003); Appellants' Brief, *Lewis v. Harris*, No. 58398, 908 A.2d 196 (N.J. 2006); Plaintiff-Appellants' Brief, *Hernandez v. Robles*, 7 N.Y.3d 338, No. 103434/04, (N.Y. 2006); Appellants' Brief, *Baker v. State*, No. 98-32, 170 Vt. 194 (Vt. 1999); Respondents' Corrected Brief, *Andersen v. King County*, No. 75934-1, 138 P.3d 963, (Wash. 2006).

102. As I indicated previously, relatively few scholars have focused on *Perez's* contributions to conversations about marriage. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3 at 342. The lack of attention paid to *Perez* in legal scholarship, particularly in the years right after *Perez* was decided, is striking. Two law review articles in 1953 and 1957 discuss *Perez*. See David Bruce Harriman, Comment, *The Void for Vagueness Rule in California*, 41 CALIF. L. REV. 523, 532 (1953); *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 94 (1957). Other references do not appear until after this time.

103. See *supra* note 101.

104. See, e.g., Lisa M. Farabee, *Marriage, Equal Protection, and New Judicial Federalism: A View From the States*, 14 YALE L. & POL'Y REV. 237, 248 (1996) (indicating that state courts may offer a broader interpretation of equal protection than federal courts in support of same-sex marriage); Justin Reinheimer, *What Lawrence Should Have Said: Reconstructing An Equality Approach*, 96 CALIF. L. REV. 505, 517-19 (2008) (discussing enhanced protection under state constitutions against due process and equality violations).

105. Mary Bonauto, Susan M. Murray & Beth Robinson, Brief: *The Freedom To Marry for Same-Sex Couples: The Reply Brief of Plaintiffs Stan Baker Et Al.* in *Baker v. State*, 6 MICH. J. GENDER & L. 1, n.150 (1999), (quoting Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 25 n.85 (1994)) [hereinafter Sunstein, *Homosexuality*]; Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L.

strategy designed to take advantage of state constitutional provisions and judicial precedent often thought to be more liberal and expansive in their protection of individual rights.¹⁰⁶ *Perez* has been at the forefront of this initiative; it serves as a virtual call for judicial bravery by judges tasked with deciding whether long-standing restrictions on marriage for gay and lesbian couples should be deemed unconstitutional.

Of course, *Loving* also plays a central role in current litigation. But, given the context in which it was decided, *Loving's* message to lower courts is comparatively muted. The U.S. Supreme Court actively avoided addressing the constitutionality of bars on interracial marriage—widely regarded as the third rail of race relations—for years,¹⁰⁷ and then only did so after they had already decided comparatively less controversial issues, such as those concerning racial segregation in public schools, parks, restaurants, hotels, housing, transportation,

REV. 591, 611-613 (2007) (describing key advantages of state courts action toward social change over federal courts). *But see*, Ariel Y. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 U. HAW. L. REV. 23, 23 (2006) (suggesting that state court decisions regarding same-sex marriage may be very disadvantageous). Some federal cases have been brought in this area. *See, e.g.*, *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239 (D. Okla. 2006) (suit involving, *inter alia*, challenge to federal DOMA statute); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005) *aff'd in part, rev'd in part*, 447 F.3d 673 (9th Cir. 2006) (same); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fl. 2005) (same); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (same); *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (decision upholding a Florida law prohibiting gay men and lesbians from adopting children).

106. *See* Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 171-72 (2006)

State . . . courts have been more progressive in providing for protection for basic needs' because state courts may supplement the federal constitutional minimum standards 'through interpretation of their own constitutional or statutory standards' States have begun to realize that their state constitutions are often more protective of civil liberties and positive rights than the Supreme Court has interpreted the U.S. Constitution to be . . . State constitutional rights may be interpreted to be broader than those in the U.S. Constitution

(quoting Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1255 (1987))

In contrast to the United States Supreme Court, state courts have been more progressive in providing protection for basic needs. An important development in recent years has been the reliance of state courts on state constitutional law principles or state statutory provisions as independent grounds for expanding protections in the area of individual rights and liberties. Federal constitutional standards provide only a minimum floor of guarantees; state courts may supplement this protection through interpretation of their own constitutional or statutory standards.

Park, *supra* at 1255-56.

107. *See* Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 846-47 (1987) (discussing Supreme Court's avoidance of antimiscegenation issues). *Naim v. Naim*, 87 S.E.2d 749, 753 (Va. 1955) was arguably a vehicle that the Court might have employed to address the constitutionality of prohibitions on interracial marriage, but the members of the Court are said to have worked hard in that case to find procedural grounds on which it could be dismissed. *See* Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119 (1998) [hereinafter Dorr, *Principled Expediency*].

and voting, among other things.¹⁰⁸ By the time the Court decided *Loving*, nearly half of the states that had antimiscegenation laws on their books when Andrea and Sylvester filed their lawsuit had repealed them.¹⁰⁹ In many respects, some of the hardest work had already been done.

The context for the California Supreme Court's decision in *Perez* was quite different. In 1948, a full majority of states had antimiscegenation provisions in effect. Additionally, all of the judicial opinions in the area had upheld these statutes against challenge.¹¹⁰ Further, public opinion was firmly against interracial marriage.¹¹¹ For judges hearing cases seeking marriage rights for gay and lesbian couples, the *Perez* context is more analogous to their situation than that of *Loving*, where the Court was asked to deliver the final blow to a discriminatory regime already in decline.¹¹²

108. See, e.g., *Boynton v. Virginia*, 364 U.S. 454 (1964) (mandating desegregation of a bus terminal restaurant); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the Civil Rights Act against constitutional challenge and mandating desegregation of public lodging); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (invalidation of a ban on interracial cohabitation); *Watson v. City of Memphis*, 373 U.S. 526 (1963) (ordering desegregation of parks without undue delay); *Taylor v. Louisiana*, 370 U.S. 154 (1962) (reversing charges of breaching the peace against protesters who were exercising their rights to sit in desegregated bus terminal waiting rooms); *Garner v. Louisiana*, 368 U.S. 157 (1961) (same, for protesters sitting at desegregated lunch counters); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (ordering desegregation of a privately owned restaurant); *Gayle v. Browder*, 352 U.S. 903 (1956) (affirming desegregation of buses); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (ordering desegregation of public schools); *Terry v. Adams*, 345 U.S. 461 (1953) (invalidation of a racial obstacle to voting); *Henderson v. United States*, 339 U.S. 816 (1950) (ordering desegregation of tables on railway cars); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950) (invalidation of segregated conditions for black student's attendance at a public university); *Sweatt v. Painter*, 339 U.S. 629 (1950) (mandating desegregation of a public law school); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (invalidation of racially restrictive covenants).

109. See WALLENSTEIN, *supra* note 3, at 253-54; Wallenstein, *Race, Marriage and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 Chi.-Kent L. Rev. 371, 436 (1994).

110. Orenstein, *supra* note 3, at 371; see also *Naim*, 87 S.E.2d at 753 (discussing an unbroken line of judicial opinions upholding antimiscegenation statutes).

111. See James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. Rev. 93, 114 (1993) (describing the "strong public sentiment" against interracial marriage at the time of both *Perez* and *Loving*); see also Field, *supra* note 51, at 21 (explaining that "[a] 1958 Gallup poll showed that 92 percent of western whites opposed miscegenation. Forty-eight percent of the adults surveyed in a 1965 Gallup poll approved of criminal antimiscegenation laws, 46 percent disapproved, and six percent had no opinion); *id.* (explaining that "[s]eventy-two percent of the adults surveyed in a 1968 Gallup poll disapproved of marriage between whites and people of color, 20 percent approved, and eight percent had no opinion"); Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 204 (2006) (noting that a 1958 Gallup poll found that one percent of white southerners, and five percent of non-southern whites, approved of marriage between blacks and whites).

112. See John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 How. L.J. 15, 16

But at the time *Loving* was decided, antimiscegenation laws were already on their way out. . . . So while the Supreme Court ruling certainly hastened th[e] demise [of antimiscegenation laws], the criminalization of interracial marriage had already suffered a cultural blow that was more wounding than the constitutional one.

See also Liptak, *supra* note 30, at 3 (quoting gay marriage opponent, Maggie Gallagher of the

By invoking *Perez*, advocates acknowledge this reality and implore judges to assume a countermajoritarian stance in favor of protecting constitutional rights, rather than public opinion.¹¹³ The lower court argument made by attorney Shannon Minter in *Woo v. Lockyer*, a case among those recently decided by the California Supreme Court in *In re Marriage Cases*,¹¹⁴ is illustrative:

In 1948, when Andrea Perez and Sylvester Davis brought a writ of action to challenge California's ban on interracial marriage, they had a lot against them. Not a single court at any level anywhere in the country had ever invalidated such a law. As the dissent [in *Perez*] noted, such laws had been in effect in this country since before our national independence and in California since our first legislative session in 1850. A majority of other states had similar laws, and several had gone as far as to amend their state constitutions to prohibit interracial marriages. In California, the law enjoyed strong, indeed overwhelming popular support. Nonetheless, the court ruled in their favor, and looking back on the decision several decades later, any other result now seems inconceivable. In ruling on their claim, the *Woo* couples ask this Court to envision how the decision in this case may be seen in future years, by those similarly detached from the passions and prejudices of our day. We believe those future generations will recognize the inherent equality of lesbians and gay men, and will agree that striking laws that exclude them from marriage was the only constitutionally correct choice.¹¹⁵

Institute for Marriage and Public Policy as saying, "When the court moved to strike down the interracial marriage laws . . . the democratic process was in the process of getting rid of these laws. What's happening now is exactly the opposite: more and more states are moving to protect marriage."). Some sources indicate that approximately 72 percent of the general public disapproves of marriage for same-sex couples. See Adam Nagourney & Megan Thee, *Young Americans Are Leaning Left, New Poll Finds*, N.Y. Times, June 27, 2007, at A1. Notably, younger Americans are said to be more supportive of marriage rights for gay men and lesbians. *Id.* (finding that 44 percentage of Americans between 17 and 29 approve of same-sex marriage, compared with 28 percentage of the general public).

113. See, e.g., Respondents' Opening Brief on the Merits at 5, *In re Marriage Cases*, No. A110451, 149 P.3d 737 (Cal. 2006) ("It is easy to see, however, what the legacy of this Court's opinion in *Perez* has been: California's leadership in enunciating what the constitutional guarantees of equal protection, due process, privacy, and free expression encompass. That noble legacy should continue."); Respondents' Corrected Answering Brief at 59, *Marriage Cases*, No. A110451, 149 P.3d 737 ("The *Perez* majority was not deterred by the dissent's citation of decisions upholding anti-miscegenation laws. . . . The majority understood that the long-standing duration of a wrong cannot justify its perpetration."); Plaintiff-Appellants' Brief at 48, *Hernandez v. Robles*, No. 103434/04, 7 N.Y.3d 338 (N.Y. 2006) ("The *Perez* decision was controversial and courageous then. Today it is recognized as clearly correct."). For a discussion about the potential for courts to facilitate social change in this context, see Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861 (2006).

114. 43 Cal. 4th 757 (2008). *In re Marriage Cases* consolidated a number of cases presenting the question addressed by the Court. See *id.* at 11.

115. National Center for Lesbian Rights, Newsflash from San Francisco Superior Court (December 22, 2004), available at <http://www.nclrights.org/site/>

Perez shows that, where precious constitutional rights are at stake, judges need not give deference to discrimination, whether supported by the legislature, tradition, public opinion, or all three.¹¹⁶ And in invoking it, advocates not only underscore that that precedent exists for the bold rulings they seek, but also remind state courts in particular that a courageous decision on civil rights grounds now may very well help to effect a significant change in doctrine later.¹¹⁷ *Loving*, in many ways, stands as a public testimony to Justice Traynor and the foresight the *Perez* Court showed in being willing to uphold Andrea and Sylvester's right to marry across racial lines.

B. Perez as a Rejoinder to Analogy and Equal Application Arguments

The deployment of *Perez* in recent marriage cases also adds substantive content to advocates' claims for gay and lesbian marriage rights. Advocates use *Perez's* "person of one's choice" language to focus attention on what gay and lesbian couples seek in current marriage cases: the recognition of a shared humanity with others whose intimate relationships are eligible to be recognized by the state. *Loving*, of course, includes language very relevant to the claims for marriage rights advanced by gay and lesbian litigants. Chief Justice Warren's assertion that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" arguably provides strong support for the extension of marriage to same-sex couples.¹¹⁸ Other aspects of the majority

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116. See Brief of Plaintiff Appellants at 29, 30 n.15, *Goodridge v. Dept. of Pub. Health*, No. SJC-08860, 798 N.E.2d 941 (Mass. 2003) (arguing that, in *Perez*, the California Supreme Court properly struck down the miscegenation law despite the popularity of these laws and a judicial history of upholding them, and arguing that *Loving* is "proof positive that constitutional rights must be vindicated despite a history of discrimination" or an unsupportive majority). Mary Bonauto, the attorney who litigated *Goodridge* has written persuasively about *Perez's* potential inspirational effect:

I draw solace from California's *Perez* case where that state's high court, in a four-to-three decision with a bitter dissent, ended race discrimination in marriage in that state. It was the first state supreme court to do so, and the existing legal precedents around the country were contrary, and the cultural landscape was inauspicious. Yet, many of us are now grateful that the court saw the issue as one of human equality and dignity and broke what had been a logjam of discrimination. A large number of states repealed their bans on interracial marriage by the time the U.S. Supreme Court decided *Loving v. Virginia* nineteen years later. While Dr. King was correct that progress is anything but inevitable, it is certainly a better bet that with determined time and effort, LGBT people will be part of constitutional history in this country, a story of the "extension of constitutional rights and protections to people once formerly ignored or excluded."

Mary L. Bonauto, *Goodridge In Context*, 40 HARV. C.R.-C.L. L. REV. 1, 68-69 (2005).

117. Email from Professor Suzanne Goldberg, Clinical Professor of Law, Columbia Law School, to R.A. Lenhardt, Associate Professor of Law, Fordham Law School (January 21, 2008) (on file with author).

118. 388 U.S. at 12. See, e.g., Respondents' Opening Brief on the Merits at 52, *Marriage Cases*, No. A110451, 149 P.3d 737 (noting that "the freedom to marry is a fundamental privacy, liberty, and associational right . . . marriage is a 'fundamental freedom' under due process and 'one of the vital personal rights essential to the orderly pursuit of happiness by free men'" (quoting *Loving*, 388 U.S. 1, 12 (1967))); Respondents' Corrected Brief at 62-63, Andersen v.

opinion in *Loving* work to reinforce assertions about the effect of identity-based restrictions on civil marriage. Consider Warren's conclusion that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."¹¹⁹ Nevertheless advocates invariably look to supplement the language of *Loving* in substantial ways, not merely with other marriage cases—for example, *Zablocki v. Redhail*¹²⁰ or *Turner v. Safely*¹²¹—decided by the Supreme Court, but with *Perez*.

A survey of relevant briefs makes clear that *Perez* gets employed to make a wide variety of substantive points.¹²² Chief among these is the argument that, as a constitutional matter, a meaningful analogy can be drawn between the antimiscegenation and same-sex marriage contexts. The claim here is not that the oppression experienced by African Americans is exactly the same as that confronted by members of the LGBT community. Rather, it is that the marriage rights sought by gay and lesbian couples are not fundamentally different.¹²³

King County, No. 75934-1, 138 P.3d 963 (Wash. 2006) (describing *Loving* as “the cornerstone of privacy and due process protection of the right to marry . . . [in which the Court] made clear that protection of the individual right of choice is inextricably interwoven with the special role of marriage”); Plaintiff-Appellants’ Brief at 50-51, *Hernandez*, No. 103434/04, 7 N.Y.3d 338 (“The *Loving* Court understood that the liberty at stake – deeply rooted in history and guaranteed to all – was the established fundamental freedom to choose with whom one will spend daily married life.”).

119. *Loving*, 388 U.S. at 12.

120. 434 U.S. 374 (1978).

121. 482 U.S. 78 (1987).

122. Briefs in recent cases have, *inter alia*, employed *Perez* in refuting claims that public opinion, history, and tradition all dictate an interpretation of marriage rights limited to heterosexual choices in life partners. See Brief of the Plaintiff-Appellants at 46-47, *Hernandez*, No. 103434/04, 7 N.Y. 3d 338 (addressing public opinion); Respondents’ Corrected Answering Brief at 59, 61, *In re Marriage Cases*, No. A110451, 49 Cal. Rptr. 3d 675 (Ct. App. 2006) (discussing history and tradition, and public opinion, respectively); see also Corrected Brief of Respondents at 42, *Anderson*, No. 75934-1, 138 P.3d 963 (discussing public opinion and significance of *Loving* on this point); Appellant’s Brief at 31-33, *Baker v. Vermont*, No. 98-32, 170 Vt. 194, 229 (Vt. 1999).

Further, *Perez* has surfaced in response to arguments about polygamy and the possibility that interpreting the Due Process Clause to reach the right to marry a person of the same sex would open the door to claims to this and other controversial social arrangements. For example, the brief submitted by the appellant in *Goodridge*—the Massachusetts Supreme Court decision that eventually led to the adoption of marriage rights for gay men and lesbians in that state—explains that the right to marry “the person of one’s choice,” recognized in *Perez*, is so clearly oriented toward monogamous romantic partners that it, by definition, would not encompass polygamous marriages. Brief of Plaintiff-Appellant’s Brief at 47, *Goodridge v. Dept. of Pub. Health*, No. SJ-08860, 798 N.E.2d 941 (Mass. 2003) (“The point is not merely semantic; the exclusivity of marriage flows from the companionate vision of marriage as two people pledging themselves to one another that the courts have long embraced.”).

123. See, e.g., Respondents’ Opening Brief on the Merits at 3, *Marriage Cases*, No. A110451, 149 P.3d 737 (“California’s marriage statutes deny lesbian and gay persons the fundamental right to join in marriage with the person of one’s choice. The freedom guaranteed by this established right to marry implicates autonomy, privacy, associational, and expressive

Loving, of course, suggests this in holding that the right to marry is among the “basic civil rights of man.”¹²⁴ But advocates in cases such as *Goodridge v. Department of Public Health*¹²⁵ and *Lewis v. Harris*¹²⁶ have still had to defend against claims that *Loving* is only a case about race and, thus, does not encompass the right to marry sought by LGBT couples,¹²⁷ and that the marriage right afforded by the Constitution extends to heterosexual marriage alone. Here *Perez*, which purports to interpret the Fourteenth Amendment rather than just California law, has been employed to good effect.

The plaintiffs in *Goodridge*, for example, emphasized that Justice Traynor “aptly observed that ‘the right to join in marriage with the person of one’s choice’ is at least as protected as the liberty rights to have offspring or send one’s child to a particular school.”¹²⁸ Other litigants have simply argued that “the right to make personal decisions central to marriage would be hollow if,” as the arguments of same-sex marriage opponents could be read to imply, “the government [could properly] dictat[e] one’s marriage partner.”¹²⁹

Perez also surfaces frequently in efforts to rebut the argument that equal application of the prohibition of same-sex marriage to both sexes renders it constitutionally legitimate.¹³⁰ Echoing the arguments of Alabama in *Pace* and

interests that lie at the very heart of personal dignity and self-determination.”) (quotations and citations omitted); Respondents’ Corrected Answering Brief at 20-22, *Marriage Cases*, No. A110451, 149 P.3d 737 (“Since *Perez*, California courts have continued to recognize marriage as a fundamental right . . . The liberty at stake in both cases – the right of every adult person to choose whom to marry – is deeply rooted in history and tradition.”).

124. 388 U.S. at 12.

125. 798 N.E.2d 941 (Mass. 2003).

126. 188 N.J. 415 (2006).

127. The plaintiff-appellants in *Goodridge* countered this argument by noting that “[i]f the Supreme Court had begun its analysis by considering whether there was a fundamental, historic right to ‘miscegenic’ or mixed-race marriages in *Loving v. Virginia* . . . its conclusions would have been very different.” Reply Brief of the Plaintiff Appellants at 22, *Goodridge*, No. SJC-08860, 798 N.E.2d 941. Like their counterparts in other cases, the *Goodridge* plaintiffs urged the recognition of the “well-established and general fundamental right to marry.” *Id.*; see also Brief of the Plaintiff-Appellants at 31-32, *Hernandez*, No. 103434/04, 7 N.Y. 3d 338; Respondents’ Corrected Answering Brief at 1, 20, *Marriage Cases*, No. A110451, 149 P.3d 737.

128. Brief of Plaintiff Appellants at 24-25, *Goodridge*, No. SJC-08860, 798 N.E.2d 941.

129. Brief of Appellants at 16, *Lewis v. Harris*, No. 58398, 908 A.2d 196 (N.J. 2006).

130. See, e.g., Respondents’ Corrected Answering Brief at 33, *Marriage Cases*, No. A110451, 149 P.3d 737 (“Although the statute ‘equally’ prohibits men and women from marrying a person of the same sex, mere equal application to different groups does not negate the injury to individuals.”); Plaintiff-Appellants’ Brief at 72-3, *Hernandez*, No. 103434/04, 7 N.Y.3d 338 (noting that *Perez* rebuffed the equal application argument by asserting that the question is not whether different racial groups are treated equally, since the right to marry belongs to individuals); Plaintiff-Appellants’ Brief at 57-8, *Goodridge*, No. SJC-08860, 798 N.E.2d 941

Critically, rather than comparing the experience of whites and persons of color as groups, the courts found that limiting an individual’s choice of whom he or she could marry based on the individuals’ races was racial discrimination . . . Just as those courts had no problem detecting a racial classification at work, so is there a sex-based classification here. The analogy to *Perez* . . . is logically and analytically irrefutable.

(emphasis in the original); Appellants’ Brief, *Baker v. State*, No. 98-32, 170 Vt. 194 (Vt. 1999) (“The court properly dismissed the suggestion that California’s anti-miscegenation laws were not

Virginia in *Loving*, the state defenders in recent marriage cases have argued that, since all men are prevented from marrying men and all women are barred from marrying women, provisions banning civil marriage for same-sex couples do not violate state and federal equal protection guarantees.¹³¹ Advocates, however, point to *Perez* to make the case that the Constitution guarantees a more robust conception of equality than such arguments suggest.¹³² In this connection, they cite Justice Traynor's insight that the right to marriage in modern society must mean the right of an individual to select the "person of one's choice" as a life partner.¹³³

C. *Perez* as a Lens on *Loving*

So far, "loving" *Perez* in the ways just described has not, in most cases, achieved the results desired by the gay and lesbian plaintiffs in recent marriage litigation. There have been some important victories however.¹³⁴ Nearly sixty

discriminatory because they . . . evenly restricted the choices of Caucasians and non-caucasians concerning who they could marry.").

131. Significantly, the logic of *Pace* was rejected by the Court in *McLaughlin* and then again in *Loving*. See *McLaughlin*, 379 U.S. 184, 289-90; *Loving*, 388 U.S. at 11 n.11.

132. See, e.g., Respondents' Corrected Answering Brief at 31, *Marriage Cases*, No. A110451, 49 Cal. Rptr. 3d 675 ("Both the California Supreme Court and the United States Supreme Court have rejected the argument that law may classify on a suspect basis, so long as it subjects different groups 'equally' to the same restriction."); Brief of the Plaintiff-Appellants at 72, *Hernandez*, No. 103434/04, 7 N.Y. 3d 338 ("The use of sex-based stereotypes to thwart a plaintiff from enjoying rights is not excused by doing the same to other individuals."). *Loving*, of course, drew the same conclusion about the equal application argument, see 388 U.S. at 11 n.11, but in terms that were arguably less provocative than Justice Traynor's assertion that people were not "interchangeable as trains." *Perez*, 198 P.2d at 25.

133. Portions of the oral argument in *Goodridge* nicely illustrate how this argument gets advanced:

COWIN: I know we have focused on Supreme Court precedence [sic], but I would be interested in your view on *Perez*, the 1948 first case to cite [sic] the miscegenation cases, is that similar or different to what is being requested here?

ATTORNEY BONAUTO: It's very similar, Your Honor. In that case, again, it was race at the heart of the choice of marital partner and the court there recognized that the right-to-marry belonged to the individual as a state court declaring that, and they also recognized that it was an affront to human dignity to deny people the choice of who they want to marry based on their race. People were not, as the court put it, interchangeable like trains. You can't simply say that a man, any old man should marry Julie Goodridge. It's Hillary Goodridge who wants to marry Julie Goodridge.

Massachusetts Citizens For Marriage, Transcript of Oral Argument, *Goodridge*, 798 N.E.2d 941 http://www.massmarriage.com/articles/060204_oral_argument.htm (last visited Feb. 21, 2008).

134. See *In re Marriage Cases*, 43 Cal. 4th 757 (2008); (holding that reserving the official status of marriage for opposite-sex unions violated the right to marry and the equal protection guarantee of the state constitution); *Goodridge*, 798 N.E.2d 941 (holding limitations of marriage for same-sex couples violate state equal protection principles); Ruling on Plaintiffs' and Defendant's Motions for Summary Judgment, *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007) (granting plaintiffs' summary judgment motion in challenge to Iowa statute limiting marriage to different-sex couples and denying defendant's summary judgment motion); see also *Lewis*, 908 A.2d 196 (declining to find fundamental right for same-sex couples to marry, but holding that such couples are entitled to same benefits received by different-sex couples who marry); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (same); *Baehr v. Lewin*, 852 P.2d 44 (Haw.

years after it recognized the constitutional right of interracial couples to marry, the California Supreme Court recently invoked *Perez* repeatedly in concluding in *In re Marriage Cases* that the unions of same-sex couples are entitled to the same official recognition currently extended to the unions of opposite-sex couples. For example, the court cited *Perez*, its focus on the “essence and substance of the right to marry,”¹³⁵ and its refusal to consider “the fact that discrimination against interracial marriage ‘was sanctioned by the state for many years’ [as] a reason to reject the plaintiffs’ claim in that case”¹³⁶ in concluding, *inter alia*, that “history alone does not provide a justification for interpreting the constitutional right to marry as protecting only one’s ability to enter into an officially recognized family relationship with a person of the opposite sex.”¹³⁷ Similarly, the Massachusetts Supreme Judicial Court relied heavily on *Perez* in invalidating Massachusetts’ restriction on same-sex marriage in *Goodridge*, as the following passage illustrates:

As both *Perez* and *Loving* made clear, the right to marry means little if it does not include the right to marry the person of one’s choice, subject to appropriate restrictions in the interests of public health, safety, and welfare . . . In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.¹³⁸

The result achieved in *In re Marriage Cases* and *Goodridge*, however, has not been replicated in other jurisdictions.¹³⁹ Nevertheless, the use of *Perez* in

1993) (declining to find fundamental right for same-sex couples to marry, but holding that statute limiting marriage to different-sex couples established sex-based classification subject to strict scrutiny).

135. *In re Marriage Cases*, 43 Cal. 4th at 824.

136. *Id.*

137. *Id.*

138. 798 N.E.2d at 958.

139. See, e.g., *Hernandez*, 855 N.E.2d 1 (holding that statutory provisions denying marriage to same-sex couples were supported by a rational basis and do not violate due process or equal protection); *Andersen*, 138 P.3d 963 (denying challenge by same-sex couples to state DOMA limiting marriage to different-sex couples); *Standhart v. Superior Court*, 77 P.3d 451 (Ariz. 2004) (holding, *inter alia*, that same-sex couples did not have a fundamental right to marry under state law); *Conaway v. Deane*, 932 A.2d 571 (Md. Ct. App. 2007) (overruling trial court decision and holding that state has legitimate interest in reserving marriage for different-sex couples); *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. 2006) (holding that civil union statute did not deny equal protection or due process to same-sex couples); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005) (holding state DOMA statute limiting marriage to different-sex couples did not violate equal protection or due process provisions of state constitution). Courts in New Jersey and Vermont have, however, concluded that gay and lesbian couples are entitled to the same state benefits afforded heterosexual marriage couples. See *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 170 Vt. 194 (1999).

recent marriage cases has been successful in other ways. In addition to positioning *Perez* as an authority to which marriage opponents must respond,¹⁴⁰ advocates have used *Perez* to raise many important questions about the meaning of *Loving* and the institution of marriage itself.

Analyses of *Loving* frequently focus on the language providing that “the racial classifications [in Virginia’s antimiscegenation statute] must stand on their own justification, as measures designed to maintain White Supremacy.”¹⁴¹ Many regard this as the “key sentence” in the case,¹⁴² critical to understanding both the Court and issues of race and equality.¹⁴³ Without disputing *Loving*’s significance as a race case, advocates effectively argue that the equal protection

140. This may be the best test of whether “loving” *Perez* has been effective as a litigation strategy. Numerous courts and/or judges have deemed it relevant to address *Perez* along with *Loving* in one way or another. With the exception of *In re Marriage Cases*, *Goodridge* and the Hawaii Supreme Court’s 1993 decision in *Baehr*, 852 P.2d 44, a good many of the citations to *Perez* appear in majority or concurring opinions concluding that marriage rights should not be extended to same-sex couples. See, e.g., *Conaway*, 932 A.2d 571; *Andersen*, 138 P.3d 963, 1001; see also *Singer v. Hara*, 11 Wash. App. 247, 255 n.8 (Wash. Ct. App. 1974) (rejecting analogy to *Loving* and *Perez* in concluding that prohibition on marriage for same-sex couples did not violate state law). For obvious reasons, the other citations to *Perez* appear in opinions dissenting in whole or part from judgments against same-sex plaintiffs. See *Hernandez*, 7 N.Y.3d at 380 (Kaye, C.J., dissenting); *Anderson*, 138 P.3d at 1022 (Fairhurst, J., dissenting); *Baker*, 170 Vt. at 242 (Johnson, J., concurring in part and dissenting in part). Ordinarily, references to a case that appears in a dissenting opinion or that is otherwise less than uniformly positive would suggest a decision’s tenuous status in case law. In this context, however, I suggest that these judicial references highlight *Perez*’s emergence as a significant marriage precedent.

141. 388 U.S. 1, 11 (1967). See, e.g., Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 713, n.198 (2005); David Chang, *Structuring Constitutional Doctrine: Principles, Proof, and the Functions of Judicial Review*, 58 RUTGERS L. REV. 777, 835 n.173 (2006); Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998); Richard Delgado, *The Current Landscape of Race: Old Targets, New Opportunities*, 104 MICH. L. REV. 1269, n.49 (2006); Randall L. Kennedy, *How Are We Doing With Loving?: Race, Law, and Intermarriage*, 77 B.U. L. REV. 815, 816-18 (1997); John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419, 463 (2000); Julie Chi-hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 336 (2007); Stephanie M. Wildman, *Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of the Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 707, 728 (2004).

142. Sunstein, *Homosexuality*, *supra* note 105, at 17 (“The key sentence in *Loving* says that ‘the racial classifications [at issue] must stand on their own justification, as measures designed to maintain White Supremacy.’”) (citing *Loving*).

143. See *id.* at 17-18

The striking reference to White Supremacy—by a unanimous Court, capitalizing both words and speaking in these terms for the only time in the nation’s history—was designed to get at the core of Virginia’s argument that discrimination on the basis of participation in mixed marriages was not discrimination on the basis of race. The Supreme Court appeared to be making the following argument. Even though the ban on racial marriage treats blacks and whites alike—even though there is formal equality—the ban is transparently an effort to keep the races separate and, by so doing, to maintain the form and conception of racial differences that are indispensable to White Supremacy.

See also Bracey, *supra* note 141, at 713, n.198; Delgado, *supra* note 141, at 1280 n.49; Powell, *supra* note 141, at 463.

dimensions of the Court's decision in that case are not as limited as some suggest and ultimately speak to the need to eliminate any identity-based obstacles to an institution as socially significant as marriage.¹⁴⁴

Even more, litigants in recent marriage cases suggest that, while the portions of *Loving* sounding in equal protection are important, attention must also be directed at the principles underlying those parts that deal with the scope of the right to marry under the Due Process Clause.¹⁴⁵ The focus on this aspect of *Loving* is a reminder that Chief Justice Warren could have ended his opinion in *Loving* with a statement about the dangers of racial classification and the illegitimacy of a white supremacist agenda, but decided instead to go further. The unmistakable message here is that the *Loving* Court's statements about marriage mean something and that courts in current cases cannot run away from their obligation to determine exactly what that meaning is.

This said, it would be wrong to understand advocates' focus on *Loving*'s due process elements as a complete endorsement of the view of marriage adopted by the Court. If anything, advocates' use of *Perez* exposes how anemic Chief Justice Warren's language is compared to Justice Traynor's wonderfully expressive statement about "the person of one's choice."¹⁴⁶ Implicitly, they suggest that *Loving* itself is lacking in its articulation of the fundamental right to marry.

Briefs filed in recent cases attempt to drill down on the meaning and significance of the right to marry in a modern society in a way that, as I discuss in Part IV, Warren's short opinion in *Loving* simply does not and perhaps could not given the era in which it was written.¹⁴⁷ For marriage to have meaning as

144. The contention is that such restrictions support race and gender-based systems of oppression. For a discussion of the extent to which systems of white supremacy, patriarchy, and/or heteronormativity intersect, see, e.g., Darren Hutchinson, *Ignoring the Sexualization of Race Heteronormativity: Critical Race Theory and Anti-Racist Politics*, 47 *BUFF. L. REV.* 1, 9-10, 19, 24 (1999) [hereinafter "*Ignoring the Sexualization of Race*"]; Gerald Torres, *Understanding Patriarchy as an Expression of Whiteness: Insights from the Chicano Movement*, 18 *WASH. U. J.L. & POL'Y* 129 (2005); Tanya Kateri Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 *J. GENDER RACE & JUST.* 182 (2001).

145. Others have also urged a focus on the due process components of *Loving*. See James E. Fleming, *Constructing the Substantive Constitution*, 72 *TEX. L. REV.* 211, 257 n.231 (1993) (taking Sunstein and others to task for, *inter alia*, focusing on the equal protection portions of *Loving* in constitutional law casebooks, but giving those relating to due process short shrift).

146. In a recent book chapter on *Perez*, I criticized portions of Justice Traynor's majority opinion addressing race. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 368. Among other things, I suggested that part of the inattention to *Perez* over the years might be explained by Traynor's failure to reject in strong terms the white supremacist agenda underlying California's antimiscegenation law, as Warren did when considering Virginia's ban on interracial marriage. *Id.* Obviously, Traynor dealt with the portions of his opinion concerning marriage in a different, far more inspirational way.

147. Chief Justice Warren may not have been free to include all of the issues that he thought relevant in deciding *Loving*, which might explain his opinion's brevity. Securing a majority of votes for the judgment was an obvious priority. See *THE SUPREME COURT IN CONFERENCE (1940-1985)* 696 (Del Dickson ed., 2001). As it was, reports indicate that Warren

one of the “basic civil rights of man,”¹⁴⁸ advocates argue that it must entail more than the freedom to choose from a category of individuals prescribed by the state. It must, they maintain, involve the authority to select “the person of one’s choice”¹⁴⁹ and, in doing so, to make a statement before one’s community that ultimately affirms the self as well as the existence and social significance of an intimate human connection achieved with another person.

III

THE RACE AND GENDER DIMENSIONS OF ANTIMISCEGENATION LAWS

By using *Perez* in their arguments, advocates have injected the case into a protracted and often virulent debate about the utility and appropriateness— from a constitutional as well as a historical perspective—of drawing an analogy between antimiscegenation laws and same-sex marriage restrictions.¹⁵⁰ Those

may have had to remove citations to satisfy other members of the Court. *See id.* (indicating that Warren omitted a reference to *Meyer v. Nebraska*, a due process case, to ensure that Hugo Black joined his opinion); *see also* Rachel F. Moran, *Loving and the Legacy of Unintended Consequences*, 2007 WIS. L. REV. 239, 242 (2007) (indicating resistance on the part of *Loving* Justices to expanding rights not enumerated in the Constitution) [hereinafter, Moran, *Loving and the Legacy*]. While a majority of the Court voted for the result in *Loving*, Justice Potter Stewart wrote separately to articulate the view that race should in no way bear on an act’s criminality. *Loving v. Virginia*, 388 U.S. 1, 13 (1967) (Stewart, J., concurring).

148. 388 U.S. at 12.

149. *See, e.g.*, Respondents’ Opening Brief on the Merits at 63, *In re Marriage Cases*, No. A110451, 149 P.3d 737 (Cal. 2006) (“The current marriage law works a serious deprivation because it denies gay people the ‘right to join in marriage with the person of one’s choice.’”); Respondents’ Corrected Answering Brief at 1, *Marriage Cases*, No. A110451, 149 P.3d 737 (“this exclusion denies Respondents the same ‘basic human right to marry a person of one’s choice’ recognized by the California Supreme Court in *Perez*”); Appellants’ Brief at 17, *Lewis v. Harris*, No. 58398, 908 A.2d 196 (N.J. 2006) (noting that *Perez* affirmed the right to choose marriage with one person who is “irreplaceable” and was a landmark ruling striking down antimiscegenation laws); Plaintiff-Appellants’ Brief at 31-2, *Hernandez v. Robles*, No. 103434/04, 7 N.Y.3d 338 (N.Y. 2006) (noting that courts have placed special emphasis on protecting the freedom to marry the spouse one chooses, since the “essence of the right to marry is the freedom to join in marriage with the person of one’s choice”).

150. *See, e.g.*, Clark, *supra* note 38; Coolidge, *supra* note 38; Hutchinson, *supra* note 38; Koppelman, *supra* note 38; Josephine Ross, *Riddle*, *supra* note 38; Schachter, *supra* note 38; Schatschneider, *supra* note 38; Strasser, *supra* note 38; Trosino, *supra* note 38; Wardle & Oliphant, *supra* note 38 at 171-76 (providing appendix listing recent law review articles supporting and opposing use of the race analogy in cases seeking marriage rights for same-sex couples). For law review articles expressing some support for an analogy to the race context, *see, for example*, Susan Freilich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97 (2005); Clark, *supra* note 38; Elizabeth B. Cooper, *Who Needs Marriage?: Equality and the Role of the State*, 8 J.L. & FAM. STUD. 325 (2006); John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999); William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853 (2001); Maya Grosz, *To Have and to Hold: Property and State Regulation of Sexuality and Marriage*, 24 N.Y.U. REV. L. & SOC. CHANGE 235 (1998); Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781, 783-84 (2005); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Koppelman, *supra* note 38; Adele M. Morrison, *Same-Sex Loving: Subverting White Supremacy Through Same-Sex Marriage*, 13

who take issue with the analogy constitute a strange collection of supporters and opponents of marriage rights for same-sex couples. For supporters, concerns about the utilization of the analogy typically focus on matters of civil rights strategy or the impact of the analogy on understandings of race and gender hierarchies. Some supporters, for example, contend, that the way the analogy gets advanced threatens civil rights advancements for racial minorities, gay men, and lesbians alike.¹⁵¹ Others maintain that the analogy obscures the

MICH. J. RACE & L. 177 (2007); Josephine Ross, *Riddle*, *supra* note 38; Ross, *Sexualization*, *supra* note 38; Sharon Elizabeth Rush, *Equal Protection Analogies – Identity and “Passing”*: *Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65 (1997); Strasser, *supra* note 38; Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61 (2000); Cass. R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059 (2004) [hereinafter Sunstein, *Liberty After Lawrence*]; Cass R. Sunstein, *Homosexuality*, *supra* note 105, at 17; James Trosino, *supra* note 38. For law review articles expressing concern about and/or opposing the analogy, see, for example, Craig M. Bradley, *The Right Not to Endorse Gay Rights: A Reply to Sunstein*, 70 IND. L.J. 129 (1994); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1484-99 (2000); Coolidge, *supra* note 38; William C. Duncan, *Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts*, 29 CAMPBELL L. REV. 29 (2006); William C. Duncan, “*The Mere Allusion to Gender: Answering the Charge that Marriage is Sex Discrimination*,” 46 ST. LOUIS U. L.J. 963 (2002); Kate Kendell, *Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 YALE J.L. & FEMINISM 133 (2005); Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653 (2004-05); Hutchinson, *Gay Rights*, *supra* note 38, at 1377-78; Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867 (2000); Schachter, *supra* note 38; Rebecca Schatschneider, *supra* note 38; Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379 (2007); Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555 (2005); Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. 439 (2006); Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221 (2005); Wardle & Oliphant, *supra* note 38; Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 631-35 (1997) [hereinafter Hutchinson, *Out Yet Unseen*]; Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1 (1996). Many who support the analogy contend that it works to the extent that interracial marriage bans and restrictions on same-sex marriage are each grounded in “an ideology of nature,” are each objected to on grounds of religion and morality as well as biology, have been widely incorporated into state statutes, and the degree to which marriage for the groups at issue has been seen as more problematic than issues of sex. See Kim Forde-Mazrui, *Live and Let Love: Self-Definition in Matters of Intimacy and Identity*, 101 MICH. L. REV. 2185, 2199-2203 (2003). Others who contend that the analogy works point, among other things, to parallels between the animus to which gay men and lesbians and racial minorities have been subjected and emphasize similarities in the types of arguments that have been advanced by those opposed to interracial unions and those against same-sex marriage. See Peggy Pascoe, *Why the Ugly Rhetoric Against Gay Marriage Is Familiar to This Historian of Miscegenation* (April 19, 2004), <http://hnn.us/articles/4708.html>; Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781, 783-84 (2005) [hereinafter Kennedy, *Marriage and the Struggle*]. For more on similarities in arguments advanced in the antimiscegenation and same-sex marriage contexts, see, for example, Ross, *Sexualization*, *supra* note 38, at 262-70 (detailing arguments).

151. See, e.g., Schachter, *supra* note 38; see also Clark, *supra* note 38 (arguing that efforts to analogize race and sex-based discrimination should “acknowledge the fundamental difference between race equality law and sex equality law”).

operation of white racism and privilege within the LGBT rights movement,¹⁵² inappropriately constructs the gay community as white and thus makes invisible the experiences of gay men and lesbians of color;¹⁵³ masks the operation of homophobia within minority communities;¹⁵⁴ and unwisely imports heterosexist norms into the fight for gay and lesbian rights.¹⁵⁵

In contrast, opponents of the recognition of marriage rights for gay and lesbian couples object to the analogy primarily due to concerns about its effects on the institution of marriage. For example, in addition to asserting that the analogy misrepresents the history of race in the United States,¹⁵⁶ many same-sex marriage opponents have argued that the analogy signals an assault on the institution of marriage and represents an attempt to undermine what many consider its essential nature and purpose: the union between a man and a woman.¹⁵⁷ One 2005 law review article called judicial opinions recognizing the

152. See, e.g., Smith, *supra* note 150; Kendell, *supra* note 150; see also Hutchinson, *Out Yet Unseen*, *supra* note 150 at 566 (urging a focus on multidimensionality as a way, *inter alia*, of understanding “the impact of racial and class oppression . . . upon sexual subordination and gay and lesbian experience”).

153. See, e.g., Carbado, *supra* note 150; Hutchinson, *Gay Rights*, *supra* note 38; Hutchinson, *Out Yet Unseen*, *supra* note 150. A 2005 article from a Canadian author writing about so-called same-sex marriage elaborates on this concept. Suzanne J. Lenon, *Marrying Citizens! Raced Subjects? Re-thinking the Terrain of Equal Marriage Discourse*, 17 CANADIAN J. WOMEN & L. / REVUE FEMME ET DROIT 405, 419 (2005)

The deployment of racial analogies to advance the ‘freedom to marry’ are a further ‘whitening practice’ because they enable the legal subject of these documents to ‘think’ itself outside of race. This is done, in one instance, by denying contemporary realities of racism and racial oppression. Racial analogies situate racial subjugation in a historical context only – something from which ‘we’ can now draw lessons for the contemporary struggle of a narrow version of gay/lesbian equality rights . . . This historical situating of racism obscures the fact that racial discrimination remains very much a part of contemporary citizenship

154. See, e.g., Smith, *supra* note 150.

155. See, e.g., Levit, *supra* note 150.

156. Significantly, a number of African American leaders have been particularly vocal on this point, publicly criticizing the contention—often made through the use of civil rights rhetoric and imagery—that the struggle for gay and lesbian rights is analogous to that waged for civil rights. See, e.g., Michael Paulson, *Black Clergy Rejection Stirs Gay Marriage Backers*, BOSTON GLOBE, February 10, 2004, at B1, available at http://www.boston.com/news/local/articles/2004/02/10/black_clergy_rejection_stirs_gay_marriage_backers/ (discussing similar position taken by African Americans in the Boston area); see also Brian Debose, *Black Caucus Resists Comparison of Gay ‘Marriage’ to Civil Rights*, WASH. TIMES, March 15, 2004, at A1 (reporting reluctance on the part of members of the Black Congressional Caucus to treat gay marriage as civil rights issue). The Reverend Jesse Jackson took issue with the drawing of this analogy in a 2004 speech delivered at Harvard Law School. See Keith Boykin, *Whose Dream: Why the Black Church Opposes Gay Marriage*, VILLAGE VOICE, March 24, 2004, at 46, available at <http://www.villagevoice.com/news/0421,boykin,53751,1.html> (“‘Gays were never called three-fifths human in the Constitution,’ he said, and ‘they did not require the Voting Rights Act to have the right to vote.’”) The fundamental concern on the part of some—though certainly not all African Americans—seems to be that the use of the analogy extends to gays and lesbians a history and perhaps a degree of public empathy to which they are not entitled.

157. A document posted on the website of the Family Research Council, a conservative non-profit, is illustrative of how this argument gets articulated. The document emphasizes that

analogy a “[b]etrayal of *Perez* and *Loving*.”¹⁵⁸ It asserts, *inter alia*, that “the *Perez/Loving* analogy advances a superficial analogy that masks a deep disanalogy . . . between the intention of *Perez* and *Loving* to protect marriage from appropriation for nonmarriage purposes and the intention of the present marriage project to make such an appropriation.”¹⁵⁹

At the crux of this last set of arguments is a belief that, in the end, *Perez* and other similar precedents are cases about race and nothing more.¹⁶⁰ Obviously, *Perez* says a great deal about race. Elsewhere, I have argued that *Perez* represents an early insight into the “cruel lunacy”¹⁶¹ of government efforts to define race through antimiscegenation laws.¹⁶² *Perez* also exemplifies early applications of strict scrutiny in the race context and serves to address the relationship between African Americans and Latinos, among other things.¹⁶³

But the contention that *Perez* does not speak to matters beyond race rests on a fundamental misunderstanding of that case and the nature of the laws it invalidated. While antimiscegenation laws like the one Andrea and Sylvester encountered when they went to the county clerk’s office seeking a marriage license were an attempt, on their face, to regulate race and racial intimacy, they also operated to define and shape other societal norms.¹⁶⁴ Importantly, bans on interracial marriage played a critical role in identifying gender roles for Whites, as well as men and women of color, in much the same way that current restrictions on marriage help to establish gender hierarchies.¹⁶⁵

A. The Historical Intersection of Race and Gender in Antimiscegenation Law

“[R]ace, sexuality, [and] gender . . . have been mutually conditioning in the production of American whiteness,” and in social structures and norms.¹⁶⁶

“[H]omosexual relationships are not marriage. That is, they simply do not fit the minimum necessary condition for a marriage to exist—namely, the union of a man and woman.” Peter Sprigg, *Questions and Answers: What’s Wrong With Letting Same-Sex Couples “Marry?”*, No. 256, available at <http://www.frc.org/get.cfm?i=IF03H01>.

158. Stewart & Duncan, *supra* note 150 at 555.

159. *Id.* at 558.

160. See Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 14 (1991) [hereinafter Hunter, *Marriage*].

161. See Randall Kennedy, Lecture, *Race Relations Law in the Canon of Legal Academia*, 68 FORDHAM L. REV. 1985, 1997 (2000) [hereinafter Kennedy, *Race Relations Law*].

162. Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3.

163. See *id.* at 370-71.

164. Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 6 (arguing that *Perez* and other antimiscegenation cases are also about gender relations); see also Dubler, *supra* note 96, at 1177 (arguing that *McLaughlin* threatened the gender norms of race relations, not simply race relations themselves).

165. Pascoe, *Race, Gender and Intercultural Relations*, *supra* note 36, at 6.

166. Martinot, *supra* note 45, at 95. In recent years, historians have done a great deal to interrogate “the interdependent ideologies supporting both racial and sexual hierarchies” in the antimiscegenation context. Dorr, *Gender*, *supra* note 36; Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 5. Legal scholars have also explored the race and gender effects of antimiscegenation laws. See, e.g., Harris, *supra* note 37, *Loving Before and After the Law*, at

The construction of Mexican Americans like Andrea Pérez as white reveals this to the extent that, as history suggests, this construction related to the desire of Anglo men to improve their prospects by marrying the daughters of wealthy Mexican landowners,¹⁶⁷ as well as to the formal effects of the Treaty of Guadalupe Hidalgo, which conferred U.S. citizenship on Mexican nationals.¹⁶⁸ One also sees this intersection on the face of early statutory prohibitions on interracial intimacy. Such provisions were “straightforwardly sex-specific.”¹⁶⁹

The first statute prohibiting interracial marriage in the United States, enacted by the colony of Maryland in 1664, was plainly gendered, requiring the enslavement of any free white woman who intermarried with a black slave¹⁷⁰:

Bee it further enacted by the Authority advice and Consent aforesaid That whatsoever free borne woman shall inter marry with any slave from and after the Last day of this present Assembly shall serve the master of such slave during the life of her husband And that all the Issue of such freeborne woemen soe married shall be slaves as their fathers were And Bee it further Enacted that all the Issues of English or other freeborne woemen that have already married Negroes shall serve the Masters of their Parents till they be Thirty years of age and noe longer.¹⁷¹

supra note 37; Angela Onwuachi-Willig, *A Beautiful Lie*, *supra* note 37; MORAN, *supra* note 3, at 61-75; Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989). *See also* Oh, *Interracial Marriage*, *supra* note 37 (arguing that pre-*Brown* policies requiring racial segregation in public schools were motivated by concerns about miscegenation and, thus, reflected both race and gender subordination efforts); *see also* Adrienne D. Davis, *The Private Law of Race & Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999) (exploring relationship between race, sex, and estate law in antebellum and postbellum South). For legal scholarship on the intersection of race and gender in law generally, *see* Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL. F. 139 (advancing theory of intersectionality that, *inter alia*, urges consideration of race and gender effects of laws); Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (same); *see also* Sheila Foster & R.A. Lenhardt, *The Racial Subject in Legal Theory*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 458 (Keith Whittington, ed., 2007) (discussing Professor Kimberlé Crenshaw’s theory of intersectionality).

167. *See* Martinez, *supra* note 11; *see also* MORAN, *supra* note 3, at 53 (discussing the treatment of Mexicans as white in areas of the Southwest).

168. *See* Martinez, *supra* note 11, at 787, 788.

169. Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 7.

170. *See* Jonathan L. Alpert, *The Origin of Slavery in the United States—the Maryland Precedent*, 14 AM. J. LEGAL HIST. 189, 195 (1970). Bans on interracial sex appeared earlier in colonial jurisdictions. *See* MORAN, *supra* note 3, at 19 (discussing 1661 Maryland and 1662 Virginia bans on interracial sex); Kopytoff & Higginbotham, *supra* note 166, at 1994 (discussing 1662 Virginia ban on interracial sex).

171. 1 PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 533 (William H. Browne ed., 1883); Alpert, *supra* note 170, at 195. New Mexico enacted a similarly gender-specific statute. Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 7. That statute “prohibit[ed] marriage between . . . ‘any woman of the white race’ and any ‘free negro or mulatto’” as late as 1857. *Id.*

Later iterations of Maryland's antimiscegenation statute were similarly gendered. For example, a 1681 statute prohibited intermarriage between white women servants and black slaves.¹⁷² A 1692 statute later expanded the ban of interracial marriage to cover all white women, whether free or consigned to indentured servitude, and free Blacks, as well as slaves.¹⁷³

As many scholars have noted, provisions such as these early statutes were first and foremost about property and race.¹⁷⁴ Linking slave status to blackness, as these statutes ultimately did,¹⁷⁵ secured a steady stream of labor for white planters.¹⁷⁶ But women were also central to the development of the slave system. Maternal identity—black and white in early years—became a critical determinant for servitude, as a 1662 matrilineal servitude statute enacted in Virginia makes very plain.¹⁷⁷ And the behaviors of white women in particular

172. *Id.* at 209-10. The 1681 Act tried to eliminate incentives for miscegenation that existed under the 1664 statute by providing that white women servants induced by their masters to enter into an interracial marriage would become free instantly and that any children borne to her during this period would also be free. *Id.* at 209.

173. *Id.* at 210. The statute, in relevant part, provided:

[A]ny free born English or white woman be shee free or Servant and shall hereafter intermarry with any negro or other Slave or any Negro made free, shall immediately upon such marriage forfeit her freedom and become a Servant during the Terme of seven years to the use and benefit of the Ministry of the Poor . . . and if he be a free Negro or Slave to whom she intermarried, he shall thereby also forfeit his freedom and become a Servant to the use aforesaid during his naturall life . . . and the issues of such women shall likewise be Servants to the use aforesaid till they arrive at the Age of one and twenty years

Id.

174. See Martinot, *supra* note 45, at 82-84; Alpert, *supra* note 170, at 197.

175. See Alpert, *supra* note 170, at 197.

176. See Martinot, *supra* note 45, at 88. Indeed, this connection became critical to the operation of the slave system. As the court in *Gobu v. Gobu*, 1 N.C. 188 (N.C. 1802), explained, Blacks were presumed to be slaves under existing law. As a result, litigation in this area frequently involved individuals trying to disprove their presumptive blackness in order to escape the atrocities of servitude. See Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535 (2004); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

177. See Martinot, *supra* note 45, at 88, 90; see also *see* Hudgins v. Wright, 11 Va. 134 (1806) (holding that presumption of slave status for Blacks could be rebutted by showing that individuals descended from Native Americans or Whites in the maternal line). Martinot explains that the focus on matrilinearity was a departure from “the fundamental English legal principle of patriarchal descent.” Martinot, *supra* note 45, at 88. He contends that the focus on maternal servitude status was symbolic of a “decision to shift . . . [the colonial] plantation labor force to Africans and move swiftly toward perpetual servitude for Africans.” *Id.*

Significantly, Virginia's matrilineal line statute included a ban on interracial sex, though this prohibition applied to both men and women. *Id.* at 87. It provided in relevant part:

WHEREAS some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free, Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shall be held bond or free only according to the condition of the mother. And that if any christian shall commit fornication with a negro man or woman, he or she so offending shall pay double the fines imposed by the former act.

Id. at 87-88.

helped to set the parameters for whiteness, cross-racial interactions, and sexual decency.¹⁷⁸ This last point is borne out by the types of punishments imposed on interracial intimacy in the seventeenth century. As Kopytoff and Higginbotham have emphasized, white women found to have violated norms regarding race and sexuality frequently received more severe punishments than white men accused of similar transgressions.¹⁷⁹ Similarly, white women bearing children out of wedlock faced steeper sanctions for babies who were mixed-race rather than white: a penalty for crossing racial lines.¹⁸⁰

Later state statutory antimiscegenation provisions generally omitted specific references to gender.¹⁸¹ But the dual nature of prohibitions on interracial intimacy remained salient throughout the darkest days of slavery and into the post-Civil War period.¹⁸²

Southern states moved quickly to establish bans on interracial intimacy in the years after the Civil War.¹⁸³ Once it was clear that the Reconstruction amendments and the Civil Rights Act of 1866 would not be a barrier to racial separation in this context,¹⁸⁴ states adopted new, more stringent prohibitions on interracial marriage,¹⁸⁵ sometimes imposing multi-year terms of imprisonment as punishment for transgressing racial lines.¹⁸⁶ A number of legislatures even moved to include antimiscegenation provisions in their state constitutions.¹⁸⁷

178. *Id.* at 90-91.

179. Kopytoff & Higginbotham, *supra* note 166, at 1995-96.

180. *Id.* at 1996 n.138. Under one early statute, a "white woman, indentured or free, who had a mulatto bastard, had to pay 15 pounds sterling or be sold into service for five years," whereas, under another provision, "if an indentured servant woman had a bastard (presumably not a mulatto), she had to give only one extra year of service to her master, in addition to a fine for fornication, which was 'five hundred pounds of tobacco and casque' or 25 lashes." *Id.*

181. Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 7. Indeed the vast majority of jurisdictions opted for gender-neutral language when drafting antimiscegenation provisions. *Id.*

182. Many states included some prohibition on interracial sex and/or marriage in their Codes during the antebellum period. See Gillmer, *supra* note 171, at 557-58 and n.21 (noting that "[v]irtually every Southern state" eventually legislated against interracial sex and marriage). But see Lenhardt, *Understanding the Mark*, *supra* note 18, at 855-56 (discussing incidence of rape of black women by slave masters during this period). Indeed, Gillmer reports that, in the South, only Mississippi, Alabama, South Carolina, and Georgia failed to adopt formal bans on interracial marriage before the Civil War. Gillmer, *supra* note 176, at 540 n.21. Wallenstein has speculated on this omission in the case of Mississippi, suggesting that such a ban might have been deemed overkill at a time when all Blacks were slaves and, thus, without the legal right to marry. Peter Wallenstein, *Reconstruction, Segregation, and Miscegenation: Interracial Marriage and the Law in the Lower South, 1865-1900*, 6 AM. NINETEENTH CENT. HIST. 57, 59 (2005). This theory would seem applicable to states such as Alabama, South Carolina, and Georgia as well.

183. See Pascoe, *Ugly Rhetoric*, *supra* note 150.

184. As previously indicated, efforts to eliminate antimiscegenation laws following the passage of such provisions were limited and fleeting. See *supra* at note 24.

185. Saks, *supra* note 92, at 44; Pascoe, *Ugly Rhetoric*, *supra* note 150.

186. Pascoe, *Ugly Rhetoric*, *supra* note 150. For example, Florida imposed a maximum term of ten years, while in Alabama the term imposed ranged from two to seven years. *Id.*

187. *Id.*; Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 49.

Here again, race was a major concern for lawmakers,¹⁸⁸ but issues of gender were arguably also on their minds. Indeed, what one author described as an “obsessive regard for the sanctity of white women” pervaded legislatures and local communities in the wake of the Civil War.¹⁸⁹

B. Antimiscegenation Laws and “Gender Role Differentiation”¹⁹⁰

As the previous section suggests, “[g]ender role differentiation” constituted one of the primary purposes of antimiscegenation laws.¹⁹¹ In the case of white women, these provisions helped to establish the white woman as the font of racial purity and virtue, a being to be honored, protected, and ultimately controlled at any cost.¹⁹² Desexualized in a way that their black female counterparts were not, the role of white women as mother assumed paramount importance in the social system of the South.¹⁹³ Lisa Lindquist Dorr’s fascinating account of the history of the Racial Integrity Act enacted by Virginia in the 1920s, which made it an offense for “a white person to marry anyone of another race,”¹⁹⁴ emphasizes this reality. Dorr explains that, in the 1920s, “[f]ears about women’s new [social] freedoms and changing [domestic] roles converged with eugenic concerns about racial order.”¹⁹⁵ She suggests that a desire to keep white women firmly locked into the role of mother and producers of pure white children, and away from black men in particular, informed the legislative debates that led to the passage of the Act.¹⁹⁶

In setting out parameters for acceptable white womanhood, antimiscegenation laws also worked to construct gender identities for other

188. Eva Saks argues that Whites wanted, through race, essentially to reestablish the social and property regimes that existed prior to the Civil War. Saks, *supra* note 92, at 47-48. Statutes prohibiting interracial marriage were essential to this process to the extent that they helped to create a group of individuals who could be collectively identified as non-white and therefore subordinate to Whites in social, economic, and political spheres. *Id.*

189. James Tosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 100 (1993). This concern explains why efforts to pass antimiscegenation laws so often coincided with “scandals over white women’s participation in interracial relationships,” the rallying cry for so many white lynch mobs. See Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 7; see also Barbara Holden-Smith, *Lynching, Federalism and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 37-39 (1996) (noting that allegations of sexual misconduct by black men upon white women was a major impetus for lynchings).

190. Linda Lindquist Dorr, *Arm in Arm: Gender, Eugenics, and Virginia’s Racial Integrity Acts of the 1920s*, 11 J. WOMEN’S HIST. 1, 146 (1999) [hereinafter Dorr, *Arm in Arm*].

191. *Id.* Professor Angela Harris employs the term “racialized gender” to discuss the role of states in shaping race and gender hierarchies through marriage. Harris, *Loving Before and After the Law*, *supra* note 37, at 2824.

192. *See id.*; see also Reginald Oh, *Regulating White Desire*, *supra* note 37, at 483.

193. Dorr, *Arm in Arm*, *supra* note 190, at 1446-49.

194. *Id.* at 144.

195. *Id.* at 149; see also Reginald Oh, *Regulating White Desire*, *supra* note 37, at 483.

196. *See* Dorr, *Arm in Arm*, *supra* note 190, at 146-49.

groups.¹⁹⁷ If white women were delicate beings free from taint and overt sexuality, black women represented the opposite. They were cast as stereotypical Jezebels: wanton, lascivious temptresses responsible for any unwanted sexual advances thrust upon them.¹⁹⁸ Black men—frequently the target of lynch mobs purporting to avenge a rape or perceived incidence of sexual impropriety—became constructed as beings of superhuman strength, so oversexed and obsessed with white women that they had to be restrained and controlled at all costs;¹⁹⁹ above all, they had to be prevented in every way from achieving a degree of romantic intimacy with white women. The remarkable story of African American 20th Century boxing sensation Jack Johnson exemplifies the staying power of this construction.²⁰⁰ As recalled in an essay by Rachel Moran, Johnson was frequently criticized for engaging in sometimes very public sexual liaisons with white women, but “was most severely condemned” and ultimately convicted of violating the Mann Act for marrying one of them.²⁰¹

In the race and gender hierarchy erected by antimiscegenation laws, only white males fared well. Cast as gentile and honorable, they possessed and exercised full dominion and power over all others. Further, they enjoyed a sexual freedom denied to white women, as well as Blacks. Violations of bans on interracial sex by white males—especially those involving the rape of black women they enslaved²⁰²—were regularly overlooked²⁰³ and, where noticed,

197. See Martinot, *supra* note 45, at 91; see also Dorr, *Arm in Arm*, *supra* note 190, at 146.

198. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 859-60. MORAN, *supra* note 3, at 64, 104; Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI-KENT L. REV. 359, 365 (1993).

199. See Roberts, *supra* note 199, at 365 (describing characterization of “brutish” black man); Dubler, *supra* note 96, at 1176 (discussing characterization of black men as “bestial” with regards to their interest in white women); N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black*, 25 CARDOZO L. REV. 1315, 1325, 1328-46 (2004) (same). For a discussion of lynching and the often unfounded allegations of rape made against black men, see Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, *supra* note 189, at 31, 37-38; Dugu, *supra* at 1326-27. See also PHILIP DRAY, *AT THE HANDS OF PERSON UNKNOWN: THE LYNCHING OF BLACK AMERICA* 63-67, 72-77 (2002) (discussing, *inter alia*, rape allegations and punishment); STEWART E. TOLNAY & E.M. BCK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930*, at 86-93 (1995) (same).

200. A recent book review by Professor Kevin Johnson provides useful insight into Johnson's life. See Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 TEX. L. REV. 739 (2006) (reviewing ESSIE MAE WASHINGTON-WILLIAMS & WILLIAM STADIEM, *DEAR SENATOR: A MEMOIR BY THE DAUGHTER OF STROM THURMOND* (2005) and GEOFFREY C. WARD, *UNFORGIVABLE BLACKNESS: THE RISE AND FALL OF JACK JOHNSON* (2004)).

201. Rachel Moran, *Love With a Proper Stranger: What Antimiscegenation Laws Can Tell Us About the Meaning of Race, Sex, and Marriage*, 32 HOFSTRA L. REV. 1663, 1674 (2004) [hereinafter Moran, *Love With a Proper Stranger*]. For more on the Mann Act, which prohibited trafficking in white women on its face, but which was interpreted early in the twentieth century to reach sexual morality more broadly, see Johnson, *supra* note 200, at 754 n.79-80, 763 n.129.

202. Lenhardt, *Understanding the Mark*, *supra* note 18 at 855-86; see also Roberts, *supra*

were often justified as the inevitable result of exposure to the sexual powers of black women.²⁰⁴ In other words, as one scholar put it, “white men turned a convenient ideological somersault to justify their own access to and violation of black women while furiously denouncing sex between black men and white women on the grounds of racial purity.”²⁰⁵

The effectiveness of interracial marriage bans in erecting gender hierarchies is also evident outside the plain text of antimiscegenation statutes or the debates surrounding them.²⁰⁶ Historian Peggy Pascoe points to two useful examples.²⁰⁷ The first concerns the results of a sociological survey involving interracial couples in the 1920s.²⁰⁸ Pascoe notes that the survey responses suggested that “individual men and women’s decisions to cross racial boundary lines were very often rooted in conceptions of gender relations” as well as race—for example, notions about which racial group’s members were likely to be the best providers or the best homemakers.²⁰⁹ To illustrate this point, Pascoe quotes an interview in which a Hawaiian woman explained the high rate of interracial marriage among women of her ethnic group: “‘The Hawaiian men,’ she said, ‘are not steady workers and good providers. The Chinese men are good to provide, but they are stingy. The white men are good providers and they give their wives more money.’”²¹⁰

Pascoe’s second example concerns judicial proceedings stemming from the enforcement of interracial marriage bans, a body of cases legal scholars have begun to explore.²¹¹ In suits for divorce, annulment, or in will contests, it was not uncommon for one party to allege that one spouse allegedly misrepresented her racial identity and had therefore induced her unwitting partner to enter into an illegal marriage.²¹² Such suits invariably pitted women of color accused of hiding their race against “their white opponents for control

note 199, at 366-67 (discussing sexual exploitation of black women by white men “before and after slavery”).

203. The willingness to overlook or ignore white male transgressions of the color line where black women were concerned may be due to the notion that interracial marriage, rather than sex, constituted the true threat to the social order. See Nancy Bentley, *Legal Feeling: The Place of Intimacy in Interracial Marriage Law*, 78 CHI-KENT L. REV. 773, 777 (2003). See also *infra* at 876-77.

204. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 859-60.

205. Dubler, *supra* note 96, at 1176-77 (quoting MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH CENTURY SOUTH* 199 (1997)).

206. See Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 7.

207. *Id.* at 7-9.

208. *Id.* at 8-9.

209. *Id.* at 8.

210. *Id.* at 9.

211. See, e.g., Onwuachi-Willig, *supra* note 37; KENNEDY, *supra* note 3, at 232-41.

212. See, e.g., Pascoe, *Miscegenation Law*, *supra* note 2, at 44-45 (discussing Kirby v. Kirby, 206 P. 405 (Sup. Ct. Ariz. 1922), an Arizona annulment case). They also demonstrate in sometimes shocking terms “the willingness of courts to invalidate [even] long-term marriages in proceedings not directly related to the marriages themselves.” Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 8.

of white men's estates[.]”²¹³

In re Monks Estate exemplifies such a suit.²¹⁴ The case, decided seven years before *Perez*, concerned the estate of Allan Bradford Monks, a wealthy white man, and Monk's marriage to Antoinette Giraudo. It was alleged that Mrs. Monks had both taken advantage of and defrauded her fragile husband, who had been committed to an institution for the mentally ill for five of the seven years preceding his death.²¹⁵ The party alleged that her marriage to Monks, which had taken place in Arizona, was invalid because she was African American, not a “French countess” as she had allegedly told her husband.²¹⁶ The Californian trial court—despite proceedings in his which Monks submitted her fingernails and heels to an anthropologist for evaluation²¹⁷—found these allegations persuasive,²¹⁸ concluding that Antoinette Giraudo Monks was “seven-eighths Caucasian blood and one-eighth Negro blood,”²¹⁹ and that her marriage was thus void. It therefore held that the will Mr. Monks executed to benefit his wife in 1930 was without force and could not supplant an earlier will he drafted.²²⁰ On appeal, Mrs. Monks objected to the lower court's conclusion that “she was of Negro descent, but contend[ed] that even if such [a] finding [was] . . . supported by credible evidence, . . . the Arizona miscegenation statute [that applied was] . . . unconstitutional as imposing an absolute prohibition against marriage upon any person of mixed Negro and Caucasian blood.”²²¹ She also argued that nothing in the record established that her husband had, in fact, been white, a prerequisite to voiding the marriage under the applicable law.²²² Nevertheless, the appellate court upheld the trial

213. Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 8.

214. 120 P.2d 167 (Cal. Ct. App. 1941).

215. *Id.* at 171, 175.

216. *Id.* at 171.

217. See Pascoe, *Miscegenation Law*, *supra* note 2, at 57.

218. 120 P.2d 167 at 174.

219. *Id.* at 172-73.

220. *Id.* at 169.

221. *Id.* at 172. Essentially, Antoinette Monks argued that, because the trial court determined that she was 7/8 white and 1/8 black—e.g., both “Negro” and “Caucasian”—that the Arizona statute at issue could be read to “prohibi[t] her from contracting any valid marriage in Arizona.” *Id.* at 172-73. In advancing this claim, Antoinette hit upon a concern that Justice Traynor articulated in the vagueness portion of his majority opinion. See *Perez v. Sharp*, 198 P.2d 17, 28 (Cal. 1948). He too was concerned about the treatment of mixed-race individuals under antimiscegenation laws. *Id.* Antoinette Monk's decision to contest her designation as “Negro” stands in stark contrast to the strategy employed by Alice Rhinelander in successfully challenging her white husband's attempt to annul their marriage on the grounds of her African American heritage. Angela Onwuachi-Willig, in her excellent treatment of the case, explains that Alice Rhinelander argued that her husband “Leonard had known of her ‘colored’ background before marriage, as evidenced by his seeing her naked body during their premarital, sexual affairs and his close relationships with her family, including her mixed-race father and her clearly colored brother-in-law.” Onwuachi-Willig, *supra* note 37 at 2399-400.

222. Similar questions had been raised about husbands in other cases. Pascoe cites the example of the Arizona case of *Kirby v. Kirby*, 206 P. 405 (Ariz. 1922). Pascoe, *Miscegenation Law*, *supra* note 2, at 44-52. Joe Kirby secured an annulment of his marriage to his wife Mayellen

court's conclusions regarding fraud and rejected the "interesting" issue of race raised by Mrs. Monks as not directly presented by the case.²²³

While we can surmise only so much from this one example, the resolution of *In re Monks Estate* tracks the pattern of disenfranchising women of color identified by Pascoe.²²⁴ At the end of her case, Antoinette was left with neither an estate nor any formal link to the man she had called her husband. Further, the opinion highlights in at least one other respect the extent to which the antimiscegenation context served as an important site for the maintenance of gender-based hierarchies.²²⁵ Assuming the veracity of the court's conclusion that Antoinette Monks engaged in racial misrepresentation, it seems clear that she "passed" not only to avoid the restrictions imposed on her because of race, but to circumvent those imposed by gender. By marrying her husband, Antoinette arguably took on the persona of a pure, respectable woman in a way that would have been unattainable had she revealed as a black, female identity. This is evident in the language the court used to discuss the case once it believed it has uncovered Antoinette's "true" identity. It was full of disdain for

on grounds that she had "negro" blood, but only after questions arose and testimony was given on his own racial lineage. *Id.* Kirby's mother was cross-examined on the question whether her "Mexican" background included Native American ancestors. *Id.* at 45. And Mayellen Kirby's attorneys argued that her husband Joe looked "Indian." *Id.* at 51. Sounding a note that resonates with the county clerk's actions in *Perez*, the trial court declined to consider questions of appearance, explaining that "Mexicans are classed as of the Caucasian race. They are descendants, supposed to be, of the Spanish conquerors of that country, and unless it can be shown that they are mixed up with some other races, why the presumption is that they are descendants of the Caucasian race." *Id.* at 51 (citation omitted).

223. 120 P.2d at 173.

224. See Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 8. I am not aware of any complete survey of cases in this area. Randall Kennedy notes that not all such suits resulted in disenfranchisement for women. See KENNEDY, *supra* note 3, at 236-241 (expressing the view that judges were sometimes sympathetic to the situation of women in such contexts); see also *id.* (discussing *Dillon v. Dillon*, 60 Ga. 204 (1910) and *Ferrall v. Ferrall*, 69 S.E. 60 (N.C. 1910), two cases in which state courts had, on grounds of fairness, rejected suits for divorce by husbands who claimed that their wives had, unbeknownst to them, misrepresented their racial identity).

225. See Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 8. I am grateful to Professor June Carbone for encouraging me to consider the decision in *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993), a California case in which a court rejected a wife's attempts to enforce against her husband's estate an oral promise he made to convey property to her in exchange for her oral promise to care for him following a stroke, concluding, *inter alia*, that the promises made by the wife, who had earlier executed a prenuptial agreement with her husband, concerned obligations she already had to care for her husband. See Martha M. Ertman, *Legal Tenderness: Feminist Perspectives on Contract Law*, 18 YALE J.L. & FEMINISM 545, 567-70 (2006). The reading of *Borelli* that suggests its holding might be explained by judicial concerns about women taking advantage of husbands whom they wed relatively late in life might also apply to aspects of *In re Monks Estate*. See Email from June Carbone, Professor of Law, University of Missouri-Kansas City School of Law, to R.A. Lenhardt, Associate Professor of Law, Fordham Law School (January 1, 2008) (on file with author). Given the substantial discussion of race during the *In re Monks Estate* trial and in the court's opinion in that case, however, my sense is that concerns about race and the efforts of Antoinette Monks to subvert her place as a black woman in society were at least as, and likely more, germane to the outcome in the case.

Antoinette Monks—newly demoted to black-female status—and what it regarded as her “fraudulent representations” with respect to her racial identity and “undue influence over decedent’s testamentary act[.]”²²⁶

In my view, this and other similar evidence of genderization, coupled with the statutory history just discussed, suggests that meaningful parallels between antimiscegenation laws and current restrictions on same-sex marriage can be drawn.²²⁷ Though operationalized—either implicitly or overtly²²⁸—through a focus on biological sex, current restrictions on marriage for same-sex couples are, in fact, concerned with the preservation of gender, socially constructed norms about the roles that men and women should carry out in society.²²⁹ The sex-specific roles of bride and groom send clear messages about “what it means to be a man and what it means to be a woman.”²³⁰ Articulating this argument in a recent online essay, Professor Richard Ford pointed to comments such as

226. *In re Monks Estate*, 120 P.2d at 174, 176.

227. See Martha Nussbaum, *Loving v. Virginia and the Literary Imagination*, 17 QUINNIPIAC L. REV. 337, 347-48 (1997) (“[H]ierarchies are not all alike, but one situation of hierarchy can illuminate another.”).

228. Congress passed the Defense of Marriage Act in 1996, which explicitly defines marriage as a union between “one man and one woman,” 1 U.S.C. §7 (1996), and provides that no state will have to recognize same-sex marriages executed in another jurisdiction. 28 U.S.C. § 1738C (1996). See also Cooper, *supra* note 150, at 338. Since then, often in response to *Goodridge*, scores of states have also moved toward sex-specific definitions of marriage, modifying the language of their marriage statutes, including sex-specific provisions regarding marriage in their constitutions, or passing state-level Defense of Marriage Acts specifically defining marriage as a union between a man and a woman. See Cooper, *supra* note 150; see also Pascoe, *Ugly Rhetoric*, *supra* note 150 (noting that many states moved to take these actions much earlier than *Goodridge* and suggesting that they did so in reaction to *Loving*’s invalidation of antimiscegenation laws). Even where no sex-specific language is employed, however, marriage statutes have been read essentially to include them. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 1 (N.Y. 2006).

229. See also Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988). For a discussion of the relationship between biological sex and gender in law and/or theory, see Tracy E. Higgins, “By Reason of Their Sex”: *Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536 (1995); Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 9; Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown and Janet Halley, eds., 2002), at 80-103 (analyzing, *inter alia*, the relationship between sex, gender, and sexuality); David Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1006-11 (2002); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender, and Sexual Orientation to Its Origins*, 8 YALE J.L. HUMAN. 161, 166-72 (1996).

Note that arguments focusing on biological sex have sometimes been advanced in the same-sex marriage context. See *Baehr v. Lewin*, 852 P.2d 44, 70 (Haw. 1993) (holding that denial of marriage license to gay couple involved classification on the basis of sex); see also *Singer v. Hara*, 522 P.2d 1187, 1190-91 (Wash. 1974) (rejecting claim that denial of marriage license to lesbian couple violated state Equal Rights Amendment provision providing that “[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex”); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (rejecting argument that, *inter alia*, restricting marriage based on the sex of the couples is “irrational and invidiously discriminatory”).

230. Josephine Ross, *Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 SMU L. REV. 1657, 1668 (2002) [hereinafter Ross, *Sex, Marriage, and History*].

“God made marriage for Adam and Eve; not Adam and Steve,” that frequently surface in debates about same-sex marriage.²³¹ He suggested that they rest ultimately not on “moral condemnation of same-sex couples but instead on the most primordial account of natural sex difference.”²³² The notion that two men might want to share a life together or to raise children, or that two women could sustain a functioning, happy household without assistance from any man, threatens the perceived social order in much the same way that the prospect of intermarriage between Blacks and Whites did in the past.

IV

THE REGULATION OF IDENTITY IN THE ANTIMISCEGENATION AND SAME-SEX MARRIAGE CONTEXTS

Proponents of the analogy will no doubt find promising the insight that bans on interracial and same-sex marriage have both worked to set norms regarding gender. It could certainly be employed to make the case that the experiences of African Americans and others in the interracial marriage context and gay and lesbian couples in the same-sex marriage context are similar in important ways.²³³ Quite apart from some of the analogy-related concerns detailed above,²³⁴ however, the question remains: what does advancing such an analogy accomplish? Does it help to elucidate fully questions about modern marriage or the right of gay and lesbian couples to access it to any appreciable degree? I argue that it does not. If anything, it obfuscates important issues that arise in this context.

The move to analogy seen in popular discussions about marriage rights for same-sex couples relies on a particular reading of the history of race and sexual orientation-based discrimination, but is informed by the Supreme Court’s Fourteenth Amendment analytical structure.²³⁵ Under the Court’s three-tiered

231. Richard Thompson Ford, *Hate and Marriage: Same-sex Marriage Setbacks May Not Be All Bad News for Gay Rights*, SLATE, July 12, 2006, <http://www.slate.com/toolbar.aspx?action=print&id=2145620>.

232. *Id.*

233. I think this holds true for other issues as well. Obviously, real differences between these groups do exist. See Randall Kennedy, *Marriage and the Struggle*, *supra* note 150, at 788. But this need not be fatal. Analogies are, by definition, inexact. See also Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1551 (2004) [hereinafter Hunter, *Sexual Orientation*] (noting that “law operates by analogy,” which “bedevils the law of sexuality.”).

234. See *supra* note 151-155.

235. Pam Karlan used the term “analogical crisis” to describe the extent to which the question of gay and lesbian rights hampers the law of sexuality and the Supreme Court’s approach to it. Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1450 (2004); see also Hunter, *Sexual Orientation*, *supra* note 233, at 1551. Karlan argues that cases such as *Lawrence* and *Romer* to some extent

involve[] regulation of particular acts in which gay people engage, and so seem[] most amenable to analysis under the liberty prong of the Due Process Clause, while in other ways [they] involve[] regulation of a group of people who are defined not so much by what they do in the privacy of their bedrooms, but by who they are in the public sphere.

analysis, a minority group merits heightened constitutional protection from discrimination only insofar as it can analogize its characteristics or claims to those already addressed by an established tier.²³⁶ The answers to these formalistic inquiries drive the court's analysis, setting, as advocates' arguments about the breadth of the right recognized in *Loving* imply,²³⁷ the level of generality at which a group's rights are conceptualized²³⁸ and the degree of scrutiny that will be applied.²³⁹

Legal scholars have criticized the court's analysis for its "rigidity" and "internal inconsistency,"²⁴⁰ because, while it highlights certain issues, it obscures many other important issues from view. In particular, the focus on matching group experiences means that the precise nature of the government policy or practice at issue often remains insufficiently explored, particularly if the policy affects a group which is only due rational basis review.²⁴¹

Karlan, *supra* at 1457. In other words, she contends that the question of gay and lesbian rights does not fit nicely into the tiered analysis the Supreme Court applies in Equal Protection and Due Process cases, a fact underscored by *Lawrence* and *Romer*, as they are both instances in which the Court departed from the rational basis review typically applied when no suspect class or fundamental right is at stake. *Id.* at 1450.

236. The first issue of course bears on the extent to which a particular group might be regarded as a suspect class for Equal Protection purposes. *See id.* at 1460; *see also* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment) (discussing race and factors relevant to suspect classification). The second goes to the question whether a right that might properly be characterized as fundamental is at stake in the Due Process context. *See* Karlan, *supra* note 235, at 1450; *see also* Maher v. Roe, 432 U.S. 464, 470 (1977) (discussing fundamental rights and the application of strict scrutiny). In both instances, affirmative answers to these questions would require the application of heightened scrutiny. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (Brennan, J., concurring in judgment and dissenting in part)

Unquestionably, we have held that a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subject to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive an alternative is available.

237. *See supra* at 863-65.

238. *See supra* note 213.

239. *Id.*

240. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CALIF. L. REV. 481, 508 (2004); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 173-74, 175-77 (1984). Significantly, Supreme Court Justices Thurgood Marshall and John Paul Stevens both expressed doubts about the utility of tiered levels of constitutional scrutiny at various points in their career. *See, e.g.,* Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring) (joining the Court's opinion but criticizing the Court's "rigidified approach to equal protection analysis"); Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (maintaining that "[t]here is only one Equal Protection Clause," and it does not direct the courts to apply different standards of review).

These concerns have paved the way for a host of proposed alternative frameworks relying on a single standard of constitutional evaluation. *See, e.g.,* Goldberg, *supra*, at 491-92 (advocating a "proposed single standard [that] consists of three inquiries that emerge from the Equal Protection Clause's fundamental opposition to laws distinguishing between classes for no legitimate purpose") (citations omitted); Shaman, *supra*, at 183 (advocating the adoption of a "unified system of judicial review").

241. This is especially true when—as here, to the extent that gay men and lesbians are unlikely to be treated as a suspect class and many jurists would regard the policy employed by

In the sections that follow, I argue that, rather than merely preserving the essential character of traditional marriage as typically alleged, identity-based restrictions on marriage—whether race or gender-based—have served primarily to police and restrain expressions of identity²⁴² and, ultimately, the range of possibilities for human intimacy.²⁴³ Section A builds upon the insight that race and gender are both implicated in anti-miscegenation laws and explores the role that state and local officials have played in the policing of race and gender identity in the United States. Section B then moves to examine the tangible effects of identity policing of this sort on the standing of gay men and lesbians in the United States.²⁴⁴ Using *Perez* as a starting point, Section B begins by asking what the right to marry means in our current context, when marriage no longer serves as the primary vehicle for childrearing, sex, or intimacy. It then considers the implications, post-*Lawrence*, of being excluded from civil marriage because of the state's interest in preserving certain identity roles or categories. I argue that casting state regulation in this area as identity policing helps to clarify the extent to which gender-based restrictions on marriage adversely affect the citizenship rights of gay men and lesbians and impair their ability to achieve full "belonging" in the broader community.²⁴⁵

states in administering marriage laws a "neutral" with respect to categories like race or gender—the level of scrutiny a court is likely to apply is relatively low, and as a result, a fair amount of deference will be accorded government actors. See *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by democratic processes. The general rule gives way, however, when a statute classifies by race, alienage, or national origin.

(citations omitted). This said, the Court has been willing to apply a "more searching form of rational basis review" in recent cases involving gay rights. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003); see also *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that the law at issue could not have served a legitimate state interest, and could only be rationalized as animus towards the targeted class); Hunter, *Sexual Orientation*, *supra* note 233, at 1551.

242. See Amy L. Brandzel, *Queering Citizenship?: Same-Sex Marriage and the State*, 11 GLQ 171, 195 (2005); Deborah A. Widiss, Elizabeth L. Rosenblatt, and Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

243. See Moran, *Love With a Proper Stranger*, *supra* note 201, at 1664.

244. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 2* (1991). Political Scientist Judith Shklar uses the term standing in discussing American citizenship. For Shklar, the attempts to secure standing or "citizenship in America . . . [constitute] a demand for inclusion in the polity, an effort to break down excluding barriers to recognition . . ." *Id.* at 3.

245. See KARST, *BELONGING*, *supra* note 39. Kenneth Karst has argued that "belonging" constitutes an integral part of equal citizenship. *Id.* at 3. In this article, I am focused on a conception of citizenship that primarily emphasizes inclusion and social acceptance rather than, for example, one focused on one's relationship to the nation state. And, in that connection, my assessment of the harms that flow from marriage exclusion are not necessarily limited to those who are formal citizens. See Jennifer Gordon and R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. Rev. 1161 (forthcoming June 2008) (discussing conception of citizenship or belonging not limited to formal citizens). For a discussion of the dimensions of

A. Marriage Regulation as Identity Policing

Feminist scholars have been especially attuned to the historic role of civil marriage in establishing gender roles and delineating men's and women's "rights and responsibilities in the polity."²⁴⁶ The extent to which the common law constructed women as subservient, without a legal identity of their own and obligated to provide "husband[s] domestic service, sexual access, affection, companionship, and care,"²⁴⁷ and portrayed men as dominant, owing "support and protection" to their wives, but also imbued with "the right to chastise [them] moderately (physically punish) . . . for misbehavior"²⁴⁸ has been well-documented.²⁴⁹ Just as important as this setting of social norms, however, is the extent to which state regulations have also served over time to reproduce and police identity norms in the marriage context. By identity policing, I mean something more than the mere articulation of a code of behavior or a preference for a particular group or physical characteristic. Instead, I refer to the active attempt on the part of the state to monitor, maintain, and manipulate identity, to patrol its borders in much the same way a police officer might guard a jurisdictional boundary or keep watch for an intruder.

In both the antimiscegenation law and same-sex marriage ban contexts,²⁵⁰ identity policing of this sort has served primarily to demonstrate that, as one scholar put it, "there are just 'two kinds[.]'"²⁵¹—for example, two races, black and white,²⁵² and two genders, male and female.²⁵³ Eva Saks helped to explain

citizenship, see Angela Harris, *Loving Before and After the Law*, *supra* note 37, at 2821; see also Linda Bosniak, *Citizenship Denationalized*, 7 INDIANA J. GLOB. & LEG. STUD. 447, 455 (2000); Leti Volpp, "Obnoxious to Their Very Nature": *Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 71-72 (2001).

246. GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 66 (2006) [hereinafter RITTER, CONSTITUTION]. See, e.g., Naomi Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law*, 2002 U. ILL. L. REV. 651 (2002) (discussing the historical importance of conformity with gender roles in divorce proceedings); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1914-16 (2000) (discussing the intersecting influences of gender, marital, and parental roles).

247. RITTER, CONSTITUTION, *supra* note 246, at 66.

248. *Id.* at 69.

249. See *id.*

250. Koppelman, *supra* note 150 (discussing policing in same-sex context as sex-based discrimination).

251. Sunstein, *Homosexuality*, *supra* note 105, at 20. See also RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS* (1996) (considering tendency toward categorization in law and exploring the law's failure to take account of bisexuals, multiracial individuals, and others with "hybrid" identities). In recognizing this, I do not mean to support the view that there are, in fact, only two kinds. I recognize, for example, that the discussion I conduct in the pages that follow arguably ignores the realities of gay and lesbian people of color whose experience transcends matters of race or sexual orientation alone. See, e.g., Carbado, *supra* note 150, at 1484-99; Hutchison, *Gay Rights*, *supra* note 38, at 1358, 1377-78; Hutchinson, *Out Yet Unseen*, *supra* note 150, at 631-35. The focus on "two kinds" is designed to trace legal accounts of race and gender difference, not to set out my own understanding.

252. See COLKER, *supra* note 251, at 3-6, 20, 121-23;. This has been true even where, as in

the perceived need for preserving these separate categories—grounded in notions of white supremacy and white patriarchy, respectively²⁵⁴—in employing the following quote:

‘The same law which forbids consanguineous amalgamation forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest.’ The taboo of too different (amalgamation/miscegenation) is interchangeable with the taboo of too similar (incest), since both crimes rely on a pair of bodies which are mutually constitutive of each other’s deviance, a pair of bodies in which each body is the signifier of the deviance of the other. Neither body can represent the norm, because each is figured as deviance from an other. (This complex of anxiety and taboo also evokes the jurisprudence of sodomy, another area of the law in which a pair of bodies constitutes deviance upon conjunction. Because they are too similar to each other, and to different from the ‘norm,’ the bodies of sodomy are legally Other.)²⁵⁵

Historically, identity policing in these contexts seeks to resist or ignore any instability in the socially constructed categories of race and gender. Consider the country clerk’s insistence in *Perez* that Andrea be treated as white for the purposes of California’s antimiscegenation statute. Also, such regulation attempts to suppress difference and individual expressions of selfhood to maintain the integrity of identity categories that are thought necessary to sustain the existing social order.²⁵⁶ The failure of many antimiscegenation statutes to take account of the existence and experience of so-called mixed-race individuals is illustrative.²⁵⁷ In the case of both race and sexual orientation, the fear is that “[m]arriage between [the relevant groups] could . . . destabilize the cultural meaning of marriage,” rendering it an institution unrecognizable from what it has traditionally been.²⁵⁸

The kind of identity policing agenda just described requires more than a mere statute or other similar statement of policy. It also requires people on the ground to enforce the boundaries, with a mandate to identify and resolve quickly any threats to the established norms. Here, the county clerks

states like California, antimiscegenation statutes meant to prohibit interracial marriage by a variety of groups, African Americans, as well as individuals of Chinese, Japanese, and Filipino descent. In such circumstances, the incorporation of a range of racial groups was still designed to create “two kinds”—white and non-white. See Deenesh Sohoni, *Unsuitable Suitors: Antimiscegenation Laws and the Construction of Asian American Identities*, 41 LAW & SOC’Y REV. 587, 612 (2007).

253. See COLKER, *supra* note 251, at 19-21, 87-119; Koppelman, *supra* note 150; Law, *supra* note 229. Colker emphasizes that the various legal constructs even suggest that there are only two types of sexuality. See COLKER, *supra* note 251, at 19-21, 39-68.

254. Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 144, at 9-10, 19, 24.

255. Saks, *supra* note 92, at 53-54 (quoting EUGENE D. GENOVESE, ROLL, JORDAN, ROLL (1974)).

256. See RITTER, CONSTITUTION, *supra* note 246, at 70.

257. See *Perez v. Sharp*, 198 P.2d 17, 28 (Cal. 1948).

258. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 741 (Cal. Ct. App. 2006) (Klein, J., dissenting).

responsible for the fairly mundane task of issuing marriage licenses have been essential.²⁵⁹ In the antimiscegenation context, county clerks served as the first line of defense against the possible erosion of racial lines.²⁶⁰ Their role was critical. Interracial marriage was seen as the ultimate offense, far worse than mere sex between the races.²⁶¹

As a result, clerks wielded significant authority for making on-the-spot determinations about the racial background of those seeking applications. They did so according to what some have referred to as a “sixth sense,” and they made their decisions pursuant to any criteria they deemed relevant, such as skin color or hair texture.²⁶² The clerk who declared Andrea Pérez white for the purposes of California’s law explained, “I don’t just sit here and look at people and say, ‘You’re white,’ or ‘You’re Negro.’ . . . I took time to study these things.”²⁶³

County clerks have served a similar role in the same-sex marriage context.²⁶⁴ Before Richard John Baker and James Michael McConnell became litigants in the first case seeking marriage rights for same-sex couples brought in the United States,²⁶⁵ they “made application to . . . Gerald R. Nelson, clerk of Hennepin County District Court, for a marriage license,” in accordance with state law.²⁶⁶ Nelson’s denial of a license to that couple foreshadowed the extent to which country clerks would again be thrust into the vanguard of efforts to reinforce identity categories.

259. See Pascoe, *Ugly Rhetoric*, *supra* note 150. Significantly, other bureaucratic officials could also be instrumental in shoring up racial boundary lines. Dorr discusses letters sent by Virginia’s Bureau of Vital Statistics in the 1920s to white women thought to have violated the state Racial Integrity Act. Dorr, *Principled Expediency*, *supra* note 107, at 153 (quoting Letter from W.A. Plecker to Mrs. Robert H. Cheatham (April 30, 1924), copy to John Powell, Box 56, JPC).

This is to give you warning that this is a mulatto child and you cannot pass it off as white. A new law passed by the last legislature says that if a child has one drop of negro blood in it, it cannot be counted as white. You will have to do something about this matter and see that the child is not allowed to mix with white children, it cannot go to white schools and can never marry a white person in Virginia.

260. See MORAN, *supra* note 3, at 5 (discussing role of county clerks in administering antimiscegenation laws); Pascoe, *Ugly Rhetoric*, *supra* note 150.

261. Forde-Mazrui, *supra* note 150, at 2188. There are, however, many reports indicating that clerks sometimes refused to enforce racial norms, granting licenses to couples whose marriage plainly violated statutory rules. See Orenstein, *supra* note 3, at 387.

262. *Id.* at 402 (quoting *Marriage Recorder Uses “Sixth Sense” to Determine Race*, L.A. SENTINEL, Dec. 23, 1948).

263. *Id.*

264. See Pascoe, *Ugly Rhetoric*, *supra* note 150; see also Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007) (discussing, *inter alia*, of the role of county clerks in shaping gender roles in the name change context). For a discussion of the role of mayors in interpreting constitutional provisions in the same-sex marriage context, see Sylvia Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Gay Marriage Equality*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2007).

265. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

266. *Id.* at 185.

What is at stake in this context is not the integrity of socially constructed categories of race, but rather the “gendered definitional boundaries of marriage.”²⁶⁷ Indeed, in some of the most public contests around same-sex marriage, county clerks have been absolutely central. As in the race context,²⁶⁸ these low-level officials, in issuing marriage licenses to same-sex couples, have sometimes been willing to ignore the existence of the categories they have been enlisted to police.²⁶⁹ For the most part, however, they have strongly resisted any efforts to bend the gender norms on which marriage statutes rely.²⁷⁰

Of course, courts have also played an important role in the policing of identity through race and gender-based restrictions on marriage.²⁷¹ In the antimiscegenation context, this identity enforcement came in the form of cases involving the direct challenges to antimiscegenation laws or, frequently, in divorces, will contests, or suits for annulment.²⁷² These proceedings served as a mechanism for both uncovering and effectively punishing individuals who had transgressed racial lines by violating antimiscegenation laws.²⁷³ Courts actively participated in the complex tasks of applying the widely divergent and conflicting rules states had for defining race,²⁷⁴ and trying to make

267. Hunter, *Marriage*, *supra* note 160, at 13.

268. See Orenstein, *supra* note 3, at 387.

269. For example, county clerks in Oregon issued approximately 3,000 marriage licenses to gay and lesbian couples. See *Li v. State*, 110 P.3d 91, 94 (Or. 2005) (holding, *inter alia*, grant of licenses was without authority). In San Francisco 2004, county clerks, at the behest of the mayor, revised official marriage license applications and certificates in order to permit same-sex couples to marry, an action that paved the way for the California Supreme Court to conclude that same-sex and opposite-sex couples could not be treated differently where full marriage rights are concerned. See *In re Marriage Cases*, 43 Cal. 4th at 785-87 (discussing procedural events leading to decision on the merits). In that same year, a clerk in Sandoval County, New Mexico granted 66 licenses to gay and lesbian couples seeking to marry before being forced to desist by the state attorney general. See Alan Cooperman, Jonathan Finer, & Fred Barbas, *Gay Couples Wed in Mass.*, WASHINGTON POST, May 17, 2004, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A32954-2004May7?language=printer>.

270. Indeed, as the *Baker* case foreshadowed, most of the cases in this context are preceded by the denial of a license by a clerk. Consider the example of *Anderson v. King County*, 138 P.3d 963 (Wash. 2006), a case that ultimately held that the Washington Defense of Marriage statute did not violate the state constitution. As one newspaper account explains, “[t]he couples took turns walking up to the license counter, where they announced their names and requested a marriage license. To each couple a clerk responded, ‘The state law prevents us from issuing you a license.’” *Gay Couples File Suit in Seattle; Mayor Joins Debate*, SEATTLE TIMES, March 8, 2004, available at http://seattletimes.nwsource.com/html/localnews/2001874209_webseattlegaymarriage08.

271. See Kenneth Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 266 (1995) [hereinafter Karst, *Myths of Identity*].

272. See, e.g., *In re Monks Estate*, 120 P.2d 167, 172 (Cal. Ct. App. 1941) (direct challenge to California statute); *Kirby v. Kirby*, 206 P. 405 (Sup. Ct. Ariz. 1922) (annulment action on grounds of alleged racial misrepresentation of spouse); *In re Paquet’s Estate*, 200 P. 911 (Or. 1921) (will challenge alleging that will of deceased bequeathing property to wife was void because marriage had violated antimiscegenation rules).

273. See Pascoe, *Race, Gender, and Intercultural Relations*, *supra* note 36, at 8; see also Karst, *Myths of Identity*, *supra* note 271, at 271, 281 (discussing role of courts in resolving disputes regarding race and racial identity).

274. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 372-73 (discussing the

determinations about the racial heritage of specific litigants.

In his majority opinion in *Perez*, Justice Traynor recognized these undertakings as vague and necessarily arbitrary.²⁷⁵ In many cases, this definitional task required a court to hear testimony and consider circumstantial evidence of a party's race. Recall the *In re Monks Estate* trial court's determination that Antoinette Monks was 7/8 white and 1/8 black. In reaching this conclusion, the court heard testimony from an anthropologist, who "testified that in his opinion [Antoinette Monks] 'was at least one-eighth Negroid;'"²⁷⁶ a physician "who had had much experience in the southern states and in Africa in his profession," who confirmed this assessment on the basis of his own opinion,²⁷⁷ and from a beauty parlor operator who allegedly provided Mrs. Monks with clandestine, after-hours service and contended that she was able to divine Mrs. Monks' African American heritage by looking at "the palms of her hands and her fingernails."²⁷⁸

wide variety of tests states applied in determining racial identity).

275. See *Perez v. Sharp*, 198 P.2d 17, 27 (1948); see also Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 359-60, (discussing Justice Traynor's vagueness holding). Significantly, Traynor raised a concern about the standards employed in policing race as early as the oral argument in *Perez*. His colloquy with the state's attorney, Stanley, evinces deep skepticism about efforts to define race at all:

Mr. Justice Traynor: What is a negro?

Mr. Stanley: We have not the benefit of any judicial interpretation. The statute states that a negro [sic] cannot marry a negro, which can be construed to mean a full-blooded negro, since the statute also says mulatto, Mongolian, or Malay.

Mr. Justice Traynor: What is a mulatto? One-sixteenth blood?

Mr. Stanley: Certainly certain states have seen fit to state what a mulatto is.

Mr. Justice Traynor: If there is 1/8 blood, can they marry? If you can marry with 1/8, why not with 1/16, 1/32, 1/64? And then don't you get in the ridiculous position where a negro cannot marry anybody? If he is white, he cannot marry black, or if he is black, he cannot marry white.

Mr. Stanley: I agree that it would be better for the legislature to lay down an exact amount of blood, but I do not think that the statute should be declared unconstitutional as indefinite on this ground.

Mr. Justice Traynor: That is something anthropologists have not been able to furnish, although they say . . . there is no such thing as race.

Transcript of Oral Argument at 3-4, *Perez*, 198 P.2d 17 (No. L.A. 20305).

276. *In re Monks Estate*, 120 P.2d at 172. It was common for courts in this context to consider many different forms of evidence, including testimony about an individual's habits, social practices (for example, whether the person "sits in the white section of public conveyances or theatres"), racial reputation in the community (for example, are they regarded as Caucasian or African American), ethnological research, and even physical evaluations. See Karst, *Myths of Identity*, *supra* note 271, at 272 (noting that "invariably courts allowed witnesses to testify to such things as skin color or hair curl, or even the breadth of a nose. The person might even be produced in court for inspection by the jury or the judge."). In one case, a judge concluded that it would be permissible to require a man alleged to be African American "to remove his shoes and show his bare feet to the jury" after hearing testimony that "the formation of the Negro's foot is peculiar." Harold Cohen, Comment, *An Appraisal of the Legal Tests Used to Determine Who Is a Negro*, 34 CORNELL L.Q. 246, 251 (1948) (discussing *Daniel v. Guy*, 19 Ark. 121 (1857)). See also George H. Cohen, *Who Is Legally a Negro?*, 3 INTRAMURAL L. REV. N.Y.U. 93, 99 (1948) (discussing evidentiary questions raised by application of racial tests).

277. *In re Monks Estate*, 120 P.2d at 172.

278. *Id.*

For courts in the same-sex marriage context, the policing of gender has involved pronouncements about the essential nature and function of marriage more often than the actual interrogation of bodies.²⁷⁹ The language employed by the Minnesota Supreme Court in *Baker v. Nelson* is both representative and instructive:

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. *Skinner v. Oklahoma ex rel. Williamson*, which invalidated Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds, stated in part: "Marriage and procreation are fundamental to the very existence and survival of the race." This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend.²⁸⁰

Even so, there have been occasions in which courts have engaged in the same sort of identity-scrutinizing and disenfranchising behavior evinced in *In re Monks Estate*. Take the example of cases involving transgendered people asserting claims based on marriage relationships.²⁸¹ *Littleton v. Prange* did not challenge prohibitions on individuals of the same biological sex from marrying

279. Feminist scholars have urged that limitations on marriage for same-sex couples reinforce stereotypes about women and men in their respective roles within marriages and other intimate relationships. See, e.g., Appleton, *supra* note 150; Mary Anne Case, "The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 CORNELL L. REV. 1447 (2000); see also Koppelman, *supra* note 150.

280. 191 N.W.2d at 186 (Minn. 1971) (citations omitted). See also, e.g., Hernandez v. Robles, 855 N.E.2d 1, 1 (N.Y. 2006) (reversing the lower court decision that a statutory ban on same-sex marriage was unconstitutional and criticizing that court for redefining traditional marriage); Lewis v. Harris, 908 A.2d 196, 212 (N.J. 2006) (referring to "marriage, the word that historically has characterized the union of a man and a woman"); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 685 (Ct. App. 2006) ("It is also beyond dispute that our society has historically understood 'marriage' to refer to the union of a man and a woman."); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) (quoting dictionary excerpts defining marriage as, *inter alia*, "the legal union of a man with a woman for life"); Singer v. Hara, 522 P.2d 1187, 1191 (Wash. 1974) (referring to *Loving* and *Perez* and holding that "[t]he operative distinction lies in the relationship which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman").

281. See *In re Ladrach*, 513 N.E.2d 828 (Ohio 1987) (holding, in a declaratory judgment action, that a male who became a post-operative female was not permitted to marry a male); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) (rejecting the contention that a wedding ceremony involving a transsexual could be regarded as a legal marriage because "[t]he law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman."). But see *In re M.T. v. J.T.*, 355 A.2d 204 (N.J. 1976) (holding that post-operative transsexual wife could recover spousal support and maintenance from her husband). Kenneth Karst has also highlighted judicial efforts to determine sexual orientation for various purposes, including compliance with military rules prohibiting expressions of gay identity. See, e.g., Karst, *Myths of Identity*, *supra* note 271, at 276-78. Loss of consortium cases involving same-sex couples provide other examples. See John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 Ky. L.J. 911 (2000-2001).

per se.²⁸² Rather, like the annulment cases and will contests discussed earlier,²⁸³ it implicated state policy regarding gender identity and marriage more indirectly. In *Littleton*, Christie Littleton, a post-operative transsexual female, filed a medical malpractice suit following the death of her husband, Jonathon Mark Littleton, to whom she had been married for seven years.²⁸⁴ The question presented was whether, as a person born a biological male, Christie Littleton, whom her doctors regarded as medically female, could properly be regarded as a spouse for the purposes of the Texas Wrongful Death and Survival Statute.²⁸⁵ After considering medical evidence and Christie's particular history, among other things, the appellate court concluded that the answer was no, affirming the trial court's grant of summary judgment in the case. It held that "as a matter of law, [] Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse."²⁸⁶

In both the antimiscegenation and same-sex marriage contexts the immediate goal of identity policing on the part of county clerks and courts has been to preserve "two kinds" by invalidating individual expressions that might threaten race or gender norms. Interestingly, the overall aim of such policing has been to shape and limit the expression of human intimacy generally, to determine who can safely be loved and who is too socially "spoiled" to be the object of anyone's affection.²⁸⁷ In many ways, marriage threatens to undermine the legitimacy of rigid identity categories more than any other phenomenon.²⁸⁸ As one scholar of antimiscegenation laws explained, "ban[s] on interracial marriage [were] an attempt to censor—to make all but unspeakable—a desire not for sex, but for marriage precisely because marital intimacy posed a more profound challenge to the racial order."²⁸⁹ Similarly, marriage bans are integral to the demonization of gay and lesbian intimacy and the strength of the social taboos in this area.²⁹⁰ Opponents of same-sex marriage fear that, in a universe

282. 9 S.W.3d 223 (Tex. App. 1999).

283. See *infra* Part III.

284. 9 S.W.3d at 224-25. For a discussion of *Littleton*, see Brandzel, *supra* note 242, at 184-85.

285. See *id.* ("Can there be a valid marriage between a man and a person born as a man, but surgically altered to have the physical characteristics of a woman?").

286. *Id.* at 231. Interestingly, the court's reasoning and focus on biological sex suggests that it would have been permissible for Christine to marry a woman. Indeed, such a conclusion would be necessary to give minimal content to Christine's right to marry. At the same time, it seems likely that, if Christine were to pursue such a marriage, the judicial concerns about gender roles latent in *Littleton* and other opinions would inevitably emerge and serve as a barrier to legal recognition.

287. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 349; Moran, *Love With a Proper Stranger*, *supra* note 201, at 1664, 1670, 1675. On social spoiling and stigma generally, see ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

288. See Bentley, *supra* note 203, at 777.

289. *Id.*

290. For more on this point, see Ross, *Sexualization*, *supra* note 38, at 262; Ross, *Sex*,

in which *Lawrence v. Texas* has already decriminalized gay and lesbian sex,²⁹¹ the removal of gender-based restrictions on marriage will lay bare once and for all the humanity of gay and lesbian couples, normalizing what has long been a stigmatized identity. This fear parallels the way in which *Loving* helped make interracial relationships more socially acceptable.²⁹² In a sense, our legal regime's recognition of a romantic union has "bec[o]me the discernible mark or seal to authenticate a domain of pure humanity."²⁹³

B. The Citizenship Implications of Marriage Restrictions on Same-Sex Couples

As scholars have noted, "[m]arriage law [has been] a primary site for the production of normative citizenship" in the United States.²⁹⁴ Thus, in policing identity in the ways described above, the states, in many ways, can be understood to be engaged in a process of determining who is and who is not a good citizen, who should and should not be welcomed as a full and constituent part of the broader community.²⁹⁵ As a historical matter, conformity with race and gender norms in marriage has been a prerequisite to inclusion.²⁹⁶ In the pages that follow, I continue to focus on state governments and the legitimacy and effects of their denial of marriage rights to gay and lesbian couples. First, however, I turn to a question advocates have sought to address in employing *Perez* in recent marriage litigation: what is the meaning of the right to marry in our current context? What does it mean for the individuals who seek to marry? In considering this issue and how *Perez* helps to explicate it, we gain a better vantage point from which to assess the effects of identity policing on gay and lesbian couples seeking to marry in a post-*Lawrence* context.

1. Perez and the Meaning of the Right to Marry

When Sylvester Davis and Andrea Pérez decided to challenge the refusal of the county clerk to grant them a marriage license, they had in mind very

Marriage, and History, *supra* note 230, at 1669-707.

291. See 539 U.S. 558 (2003). Justice Scalia raised this issue in his dissent in *Lawrence*, which recognized a liberty interest in sexual intimacy that extends to gay and lesbian couples. See *id.* at 599 (Scalia, J., dissenting)

[The Court's holding] effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned [bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity] laws can survive rational-basis review.

292. See also Dubler, *supra* note 96, at 1169 (discussing significance of eliminating bans on interracial sex in *McLaughlin*).

293. Bentley, *supra* note 203, at 781.

294. See Brandzel, *supra* note 242, at 177.

295. Brandzel, *supra* note 242, at 172.

296. *Id.* Leti Volpp provides an important example of this in her article on discussing how marriage has operated to divest American women of citizenship. Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

particular ideas about what it would mean to marry. They were not, for example, merely looking for sexual intimacy. As I indicated at the outset of this article, neither of them wanted simply to cohabit, an option that was fully available to them since California's antimiscegenation law proscribed only interracial marriage, not sex.²⁹⁷ They wanted marriage, something the U.S. Supreme Court has described as "the most important relation in life"²⁹⁸ and "an association that promotes a way of life not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects . . . an association for as noble a purpose as any . . ."²⁹⁹ But they also sought to marry in a way that honored not just their religious beliefs as Catholics, but also their aspirations as members of the community. A religious ceremony without state sanction would have been unappealing. Receiving the sacrament of marriage in their home church³⁰⁰ and in their home state was the goal.³⁰¹ For them, marriage clearly served, in part, as a vehicle for gaining civic membership.³⁰²

The conception of marriage to which Sylvester and Andrea subscribed in 1948, however, was arguably very different from ideas about marriage today.³⁰³ As Rachel Moran reminds us in a recent article commemorating the fortieth anniversary of *Loving*, marriage has changed dramatically over the years.³⁰⁴ Whereas marriage, as the U.S. Supreme Court's decision in *Zablocki v. Redhail* intimates,³⁰⁵ used to be the primary site for sexual intimacy, procreation, parenting, and economic well-being,³⁰⁶ it no longer holds this exalted position in our society.³⁰⁷ Premarital sex no longer carries the stigma it did when

297. Cf. *McLaughlin v. Florida*, 379 U.S. 184 (1964) (involving state statute prohibiting interracial cohabitation).

298. *Maynard v. Hill*, 125 U.S. 190 (1888).

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

300. Orenstein, *supra* note 3, at 386; Petition for Writ of Mandamus, Memorandum of Points and Authorities, and Proof of Service at 4, *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (No. L.A. 20305).

301. This helps to explain why the couple was also unwilling to travel to a sister state to marry, as some couples looking to circumvent antimiscegenation laws sometimes chose to do. Orenstein, *supra* note 3, at 386.

302. Marriage served a similar role for freedmen and women in the wake of the Civil War. See Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 252 (1999) (hereinafter "Becoming a Citizen").

303. Moran, *Loving and the Legacy*, *supra* note 147, at 268-69.

304. See *id.* at 268-69.

305. See Sunstein, *Liberty After Lawrence*, *supra* note 150, at 1071.

306. *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978).

307. See Moran, *Loving and the Legacy*, *supra* note 147, at 369. It bears noting that gender roles within marriage have also changed a great deal. While the incidence of domestic violence within marriage, see, e.g., Shannon Selden, *The Practice of Domestic Violence*, 12 U.C.L.A. WOMEN'S L.J. 1 (2001), among other things, certainly suggests that married women may not yet be entirely free of the subjugated role prescribed for them at common law, we have come a long

Sylvester and Andrea were dating.³⁰⁸ Nor, for example, do out-of-wedlock births.³⁰⁹ Indeed, more and more women, in particular, are raising children outside of the structure of a marital relationship.³¹⁰ Likewise, more people than ever before are choosing to divorce or never to marry at all.³¹¹ “[M]arriage accounted for 84 percent of households” in 1930, but just “49.7 percent of American households” in 2006.³¹²

In advancing claims for access to marriage, advocates for same-sex couples must and do rely on the Court’s landmark decision in *Loving*.³¹³ But, as the move toward deploying *Perez* in challenges suggests, there are ways in which the Court’s decision in *Loving* fails to offer useful insights into the contemporary meaning of civil marriage.³¹⁴ Of course, the Warren Court likely never dreamt for a moment that its judgment would be used to support claims for same-sex couples to marry.³¹⁵ As it is, it took them years to be willing to decide that race-based restrictions within different-sex marriage were unconstitutional.³¹⁶ Even more than this, though, Warren’s opinion in that case is devoid of a real discussion of the place marriage has in society. Consistent with the embrace of color-blindness started in *Hirabayashi v. United States*³¹⁷ and *Korematsu v. United States*,³¹⁸ the Court’s thoughts on race and equal protection are most prominent in the opinion.³¹⁹ A rejection of a white supremacist agenda and deep concerns about racial classifications emerge most

way from the day when Justice Bradley, concurring in the Supreme Court’s rejection of Myra Bradwell’s challenge to her exclusion from the Illinois bar on grounds of gender, maintained that “[t]he paramount destiny and mission of a woman are to fulfill the noble and benign offices of wife and mother.” *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

308. See Moran, *Loving and the Legacy*, *supra* note 147, at 269.

309. See Wendy Chavkin et al., *Sex, Reproduction, and Welfare Reform*, 7 GEO. J. ON POVERTY L. & POL’Y, 379, 388 (2000); see also Moran, *Loving and the Legacy*, *supra* note 304, at 269 (discussing rise in number of single mothers).

310. See Jane Mauldon, *Family Change and Welfare Reform*, 36 SANTA CLARA L. REV. 325, 332 (1996).

311. See Moran, *Loving and the Legacy*, *supra* note 147, at 274-76. It is estimated that approximately 40 to 50 percent of first marriages and approximately 60 percent of second marriages today end in divorce. Alan J. Hawkins, *Will Legislation to Encourage Premarital Education Strengthen Marriage and Reduce Divorce?*, 9 J.L. & FAM. STUD. 79, 81 (2007).

312. Moran, *Loving and the Legacy*, *supra* note 147, at 274

313. See *supra* at 858, 863-65.

314. See *supra* Part II.

315. See Moran, *Loving and the Legacy*, *supra* note 147, at 264.

316. See *supra* at 855.

317. 320 U.S. 81 (1943); see also Orenstein, *supra* note 3, at 397.

318. 323 U.S. 214 (1944). Of course, the term *colorblindness* was itself not at all new. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”).

319. See Moran, *Loving and the Legacy*, *supra* note 147, at 261-63 (discussing *Loving* and focus on color-blindness); see also Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 358 (discussing early development of color-blindness in Court’s cases). *But see* Moran, *Loving and the Legacy*, *supra* note 147, at 263 (noting that the *Loving* Court made a series of assumptions about race).

readily from a review of the decision in *Loving*.³²⁰

Obviously, the Court's acknowledgement that "[m]arriage is one of the 'basic civil rights of man'" cannot be overlooked. The majority clearly meant the Due Process Clause to be one of the legs on which *Loving* rested. But, at the same time, the Court's conclusion on this point cannot be easily discerned.³²¹ Chief Justice Warren talked about "the freedom of choice to marry,"³²² but omitted discussions of due process that had appeared in early drafts of his decision.³²³ All that can be said for certain is that the Court, at a minimum, endorsed a fairly traditional understanding of marriage and meant to reject race-based obstacles to its enjoyment.³²⁴

Advocates' implicit suggestion that Justice Traynor's majority opinion in *Perez* has more to offer on the question of what marriage means today has merit. Admittedly, as Moran notes, it is no more likely that Traynor wrote his *Perez* opinion with same-sex couples in mind than it is that the *Loving* Court thought about the *Goodridge* plaintiffs when it liberated Mildred and Richard Loving from their forced exile from their native Virginia.³²⁵ Still, Traynor offers an account of marriage and the problems inherent in identity-based restrictions on it that resonates today.³²⁶ In contrast to *Loving*, both the equal protection and due process dimensions of *Perez* are fairly well developed.³²⁷ Traynor's discussion of social science research on race and contention that "[h]uman beings are bereft of worth and dignity by a doctrine that would make

320. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 368 (drawing comparison between *Loving*'s strong language regarding white supremacy and *Perez*'s less normatively pronounced statement on social science and the illogic of racial categories).

321. Moran, *Loving and the Legacy*, *supra* note 147, at 268.

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

323. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 364 n.179 (discussing Chief Justice Warren's omission of references to *Meyer v. Nebraska* in his opinion); Moran, *Loving and the Legacy*, *supra* note 147, at 242, 268.

324. Moran, *Loving and the Legacy*, *supra* note 147 at 264.

325. See *id.* at 267-71.

326. See *id.* at 269 (describing *Perez* as "ahead of its time" and noting Traynor's focus on secular marriage).

327. In this sense, *Perez* achieves the kind of "double helix" Professor Laurence Tribe referred to in discussing what he described as the equality and due process- based underpinnings of the Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 580 (2003). See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004). See also William N. Eskridge, *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1186 (2000) (advocating an approach that celebrates a frequently destabilizing due process that offers marginalized Americans multiple points of challenge to traditional exclusionary and persecutory state practices at the retail level, which is complimented by an evolutive equal protection that offers such groups the possibility that, if traditional norms against them weaken, the judiciary will force the political process to clean up remaining exclusionary policies on a wholesale level.

Cass Sunstein has argued that the Equal Protection Clause, not the Due Process Clause, provides the best anchor for a claim to marriage rights for same-sex couples. See Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2111-13 (2005) [hereinafter Sunstein, *The Right to Marry*]; Sunstein, *Liberty After Lawrence*, *supra* note 150, at 1074-75.

them as interchangeable as trains” go directly to matters of equality and caste, rejecting the easy formalism of *Pace*. But they also speak to the significance of marriage and the decision to enter into it.

In refusing to conceive of marriage as something akin to trains or other facilities permitted to be racially segregated by law in 1948, Traynor recognized the extent to which marriage—in spite of the state gatekeeping function it has performed—is special, a mechanism for cementing an intimate, human association.³²⁸ His opinion acknowledges the fundamental dignity and humanity of Andrea and Sylvester, as well as the expressive content inherent in selecting—through a state-sponsored system³²⁹—the “person of one’s choice” as a life partner.³³⁰ In this sense, *Perez* is very much in line with the Court’s decision in *Turner v. Safely*,³³¹ which, in holding that prison regulations prohibiting inmates to marry in the absence of an official determination that compelling reasons for the marriage existed were unconstitutional, recognized marriages as “expressions of emotional support and public commitment.”³³² It is also arguably in line with the Court’s decision in *Lawrence v. Texas*.³³³ While *Lawrence* concerned criminal prohibitions on gay sex that reached into the private sphere, not marriage per se, many scholars have read it to be more about human “dignity and equal respect for people involved in intimate relationships,” whether they be private or public.³³⁴

Perez helps give content to “the freedom to marry”³³⁵ in the twenty-first Century; it sheds light on the public and private dimensions of modern marriage³³⁶ and the citizenship or public standing that marriage confers.³³⁷

328. See *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965). It is, however, obviously not the only way to further such an association. See *infra* at 894-95.

329. See Sunstein, *The Right to Marry*, *supra* note 327, at 2097 (arguing that, while states arguably must not offer marriage as option, once they do, they “must make it available to everyone”).

330. See David B. Cruz, “Just Don’t Call It Marriage”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001) (describing expressive content of choice to marry); Lenon, *supra* note 153, at 412 (same); Sunstein, *The Right to Marry*, *supra* note 327, at 2083-84 (same); Tribe, *supra* note 327, at 1948-49.

331. 482 U.S. 78 (1987).

332. *Id.* at 96, 98. See Sunstein, *The Right to Marry*, *supra* note 327, at 2088-89 (discussing significance of *Turner*).

333. *Lawrence v. Texas*, 539 U.S. 558 (2003).

334. See, e.g., Tribe, *supra* note 327, at 1945. But see Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1407 (2004) (expressing concern that *Lawrence* domesticates and limits “nonnormative sexualities” to the private sphere); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1581 (2006) (same). For more views on *Lawrence*, its meaning and import, see also, for example, Dubler, *supra* note 96; Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429 (2006); Edward Stein, *Introducing Lawrence v. Texas: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN’S L.J. 263 (2004); Sunstein, *Liberty After Lawrence*, *supra* note 150; Reinheimer, *supra* note 104.

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

336. See Tribe, *supra* note 327, at 1948; Sunstein, *The Right to Marry*, *supra* note 327, at

While it is undoubtedly true that we live in an age of intimacy-related “consumerism,”³³⁸ it is not yet the case that choosing to marry no longer has social or cultural significance. If nothing else, as Moran notes, it “remains far and away the single most important way in which the government recognizes and supports intimate relationships.”³³⁹ Whatever one thinks of the institution of marriage or the state’s role in it, the choice to marry still means something, perhaps even more today than it did sixty years ago, when Andrea and Sylvester won the right to wed, because people—given the many other viable options for organizing one’s intimate life now available—no longer *have* to marry to lead fulfilling, economically stable lives. Indeed, as *Perez* underscores, it may well be in the choosing—whether it occurs for love, as in Andrea and Sylvester’s case, or more practical reasons—that an individual asserts his or her individual autonomy, needs, hopes, and desires.

Deciding to marry also conveys a message about the particular relationship being formalized. For many, marriage is “the authentic marker of a serious and committed love relationship; a symbolic rite of passage into adulthood.”³⁴⁰ Even where this is not the case, though, getting married communicates something about how an individual and his or her relationship should be legally, socially, and politically regarded. For better or worse, it says something about where people stand in the community.³⁴¹

2. Identity-Policing and Constraints on Belonging

Queer theorists have bemoaned the emphasis increasingly placed on securing marriage for same-sex couples within the gay and lesbian community.³⁴² For example, Katherine Franke has argued that “[w]hat we are witnessing in the gay community . . . is a radical substitution or transformation of the nature of homosexual desire. Into the psychic space created by decriminalization [of homosexual intimacy under *Lawrence*] has rushed a desire for governance, a desire for recognition—recognition by legal and state

2096 (concluding that “the ‘right to marry’ entails both some right of intimate association in the private sphere and . . . an individual right of access to the official institution of marriage”).

337. See SHKLAR, *supra* note 244, at 2. I am indebted to Rachel Moran for encouraging me to explore more fully these dual aspects of the case.

338. Moran, *Loving and the Legacy*, *supra* note 147, at 277-78.

339. *Id.* at 274.

340. Lenon, *supra* note 153, at 412.

341. See Brandzel, *supra* note 242, at 175 (noting that “a person is ‘vested with rights and duties of citizenship’ only to the extent that he or she is ‘viewed as a member of society’”); see also *supra* at n.238 (discussing concept of standing).

342. See, e.g., Brandzel, *supra* note 242, at 192; Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006) [hereinafter Franke, *Politics*]; Michael Warner, *Beyond Gay Marriage*, in LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown and Janet Halley, eds., 2002), at 266-68; see also Symposium: *Forty Years of Loving: Confronting Issues of Race, Sexuality, and the Family in the Twentieth Century*, 76 FORDHAM L. REV. 2669 (2008) (incorporating articles expressing a range of opinions about *Loving* and, *inter alia*, the benefits and disadvantages of marriages for same-sex couples).

authority. The *de jure* refusal to all gay people to satisfy this desire has formed the basis of the new civil rights claims made on behalf of ‘the community.’”³⁴³ Her concern, shared by others, is that the social inclusion sought by advocates will be contingent upon the domestication and taming of nonnormative sexual identities.³⁴⁴ As proof of the price tag she thinks marriage is likely to carry for the LGBT community, Franke points to the experience of newly freedmen and women during Reconstruction.³⁴⁵ For these individuals, who had lacked the legal capacity to enter into marriages during slavery, “[t]he right to marry figured prominently among the bundle of rights African Americans held dear in the postbellum years.”³⁴⁶ Franke notes that legal marriage was understood to be an important vehicle for the realization of black citizenship, but argues that it proved to be a mechanism by which that citizenship was also “managed in African Americans.”³⁴⁷ Freedpersons were often severely punished for any noncompliance with the social norms and practices attending civil marriage.³⁴⁸

I do not contest the notion that, as a society, we benefit from having a variety of models and alternatives for intimate associations from which individuals can freely choose to express their essential selves.³⁴⁹ While civil unions and domestic partnerships adopted by many jurisdictions as an alternative to same-sex marriage have been properly criticized by many,³⁵⁰ one might find that, as time goes on, these legal arrangement become a desirable

343. Franke, *Politics*, *supra* note 342, at 240.

344. *Id.* Others suggest that giving gay men and lesbians access to civil marriage may transform that institution, scrubbing it of “heterosexism.” Moran, *Loving and the Legacy*, *supra* note 147, at 267; Brandzel, *supra* note 242, at 192.

345. See Katherine M. Franke, *Becoming a Citizen*, *supra* note 304, at 252.

346. *Id.*

347. *Id.*

348. *Id.* at 292-306; see also Brandzel, *supra* note 242, at 192 (discussing view that marriage opens the door to policing by the state).

349. Myriad proposals for such models have been considered. See, e.g., Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685 (forthcoming June 2008) (advocating friendship as a model for recognition of lgbt relationships); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008) (challenging the use of marriage as a mechanism for providing numerous public and private benefits); Laura A. Rosenbury, *Friends With Benefits*, 106 *MICH. L. REV.* 189 (2007) (advocating legal recognition of friendship and family care-taking arrangements); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitation Obligation*, 52 *UCLA L. REV.* 815 (2005) (discussing cohabitation); Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option*, 64 *LA. L. REV.* 403 (2004) (same); Allen M. Parkman, *The Contractual Alternative to Marriage*, 32 *N. KY. L. REV.* 125 (2005) (discussing contractual alternatives to civil marriage); Michael Warner, *Beyond Gay Marriage*, *supra* note 343, at 279-88 (advocating reforms to a range of areas affecting family and human relationships); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 *N.Y.U. REV. L. SOC. CHANGE* 277 (2004) (discussing polyamory); see also Martha Fineman, *Why Marriage?*, 9 *VA. J. SOC. POL'Y & L.* 239, 245 (arguing that “we do not need marriage to accomplish many of the societal goals or objectives we assign to it”).

350. See, e.g., Mark Strasser, *Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma*, 9 *WM. & MARY BILL RTS. J.* 1 (2000).

alternative to marriage,³⁵¹ especially if different-sex couples, who already have access to these alternatives in some places, begin to use them in large numbers as a vehicle for obtaining some of the economic benefits states now deliver through civil marriage.³⁵² It may be that other alternatives emerge as well. Some have argued, for example, that friendship be accorded legal recognition as a model for human intimacy and commitment.³⁵³ But the notion that meaningful choice among intimate associations is potentially beneficial begs the question whether it is nevertheless morally and constitutionally problematic for states to remove marriage from the array of choices open to gay men and lesbians.³⁵⁴ “[T]he opportunity to establish an officially recognized family with a loved one and to obtain the substantial benefits such a relationship may offer is of the deepest and utmost importance to any individual and couple who wish to make such a choice.”³⁵⁵ And, given this, I submit that—even at a time when the centrality of marriage as a social institution is greatly diminished³⁵⁶—restrictions on the ability of same-sex couples to select “the person of one’s choice” exact a citizenship harm.³⁵⁷ As Angela Harris suggests in a recent article, such prohibitions reflect the state’s determination that gay men and lesbians cannot properly be included in “who the People will be”, in the community of good and acceptable citizens.³⁵⁸

351. American Bar Association, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L. Q. 339 (2004). This said, it bears noting that civil unions have not always provided couples, particularly same-sex couples, with all the benefits they purportedly carry. See Alison Leigh Cowan, *Gay Couples Say Civil Unions Aren't Enough*, N.Y. TIMES (March 17, 2008), at B1 (discussing problems with civil unions in multiple jurisdictions); Robert Schwanberg, *Report: Civil Union Law Fails to Achieve Goal of Equality*, THE STAR LEDGER (February 17, 2008), at 23 (discussing problems with New Jersey civil unions).

352. For a discussion of the economic benefits civil marriage conveys, see Cooper, *supra* note 150, at 330-37.

353. See Katherine M. Franke, *Longing for Loving*, *supra* note 340, at 2685 (advocating friendship, rather than marriage, as a model for the recognition of lgbt relationships); Rosenbury, *Friends With Benefits*, *supra* note 352 (arguing for legal recognition of friendship and other care-taking arrangements).

354. I would add that, in many ways, including marriage among the intimate choices that gay men and lesbians are permitted to make might make more meaningful, rather than less, the value of the choice not to marry that Franke and others discuss. See *supra* at 156-57. To the extent that “[q]ueer gets its critical edge by defining itself against the normal,” rejecting the full option to marry would arguably only intensify the political message communicated by the choice of intimate connections other than marriage queer theorists want to preserve. Brandzel, *supra* note 242, at 190.

355. 43 Cal. 4th at 818.

356. See Stephanie Coontz, *Taking Marriage Private*, N.Y. TIMES (Nov. 26, 2007), at A23 (discussing societal changes reflecting trend away from marriage and arguing that states should no longer be permitted to regulate access to marriage).

357. See Lenhardt, *Understanding the Mark*, *supra* note 18, at 844.

358. Harris, *Loving Before and After the Law*, *supra* note 37, at 2837. In a new article, Harris explores *Loving* and the effect of race and gender-based restrictions on marriage with respect to specific dimensions of American citizenship, “the possession and enjoyment of certain political, civil, and social rights” and “active engagement in the life of the political community.”

It is undoubtedly correct that marriage does not do the same citizenship work today that it did for former slaves or for individuals like Sylvester and Andrea in the 1940s,³⁵⁹ who faced exclusion from certain public parks or facilities, as well as being prevented from marrying across racial lines.³⁶⁰ Members of the LGBT community today face a different set of constraints.³⁶¹ At the same time, in an environment in which consumerism—in the intimacy context or elsewhere—is rampant, it seems clear that a state-imposed limit on one’s ability to choose from amidst the full panoply of alternatives for ordering one’s intimate associations imposes a substantial burden.³⁶² This is particularly so when the alternative at issue is regarded as one of the “basic civil rights of man.”³⁶³ As the Massachusetts Supreme Judicial Court explained in *Goodridge*, “[w]ithout the right to marry – or more properly – the right to choose to marry – one is excluded from the full range of human experience and denied full protection of the laws for one’s ‘avowed commitment to an intimate and lasting human relationship.’”³⁶⁴

The right to choose one’s intimate associations, as a legal matter, is not unlimited.³⁶⁵ Government can, for example, regulate relationships that it regards as presumptively exploitative, such as polygamy.³⁶⁶ Where such a

Id. at 2822. With respect to the denial of specific rights, she contends that *Loving* requires the conclusion that excluding gay men and lesbians from marriage impermissibly erects of sub-class of citizens. *Id.* at 2837 She finds state regulation of this sort much less problematic where the participation dimension of citizenship is concerned, however. *Id.* at 2839-46.

359. See Email from Rachel F. Moran, Professor of Law, U.C. Berkeley School of Law, to R.A. Lenhardt, Associate Professor of Law, Fordham Law School, (Jan. 25, 2008) (on file with author).

360. See SIDES, *supra* note 5, at 16-18, 48-49 (discussing segregation of African Americans in Los Angeles of the 1940s); Ian Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 10 LA RAZA L.J. 57 (1998) (discussing exclusion of Mexican Americans from schools and other public facilities); Johnson, Hernandez v. Texas, *supra* note 13, at 174 (discussing discrimination against Mexican Americans); see also C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974) (discussing discrimination and subjugation of Jim Crow period).

361. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (upholding exclusion of gays from Boy Scouts on First Amendment grounds); Carlos A. Ball, *The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men*, 38 LOY. U.-CHI. L.J. 379, 383-84 (2007) (discussing Florida ban on adoption by gay men and lesbians); Shannon Gilreath, *Sexually Speaking: “Don’t Ask, Don’t Tell” and the Matter of Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL’Y 953 (2007) (discussing military “Don’t Ask, Don’t Tell” policy for gay men and lesbians); Jonathan Deitrich, *The Lessons of the Law: Same-Sex Marriage and Baehr v. Lewin*, 78 MARQ. L. REV. 121, 129-30 (discussing discrimination against gay men and lesbians in employment); Lu-in Wang, *The Complexities of “Hate”*, 60 OHIO ST. L.J. 799, 867-82 (1999) (discussing anti-gay bias and hate).

362. See *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 947 (Mass. 2003); see also Saks, *supra* note 92, at 50 (discussing ideal of choice in American law and importance of “sexual and marital choices” in context of race-based restrictions on marriage).

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

364. *Goodridge*, 798 N.E.2d at 947 (quoting *Baker v. State*, 744 A.2d 864 (Vt. 1999)).

365. See *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

366. Sunstein, *The Right to Marry*, *supra* note 327, at 2102-03.

threat is absent, however, government must, at a minimum, articulate a sufficiently rational basis for its actions.³⁶⁷ In a post-*Lawrence* world, where prohibitions on same-sex sexual intimacy have been decriminalized, arguments based on tradition or the need to preserve a particular kind of morality are unpersuasive.³⁶⁸ This is so, I maintain, even though what gay men and lesbians seek here is access to an institution rather than freedom from intrusive government regulation.³⁶⁹ I agree that *Lawrence* should be understood as a case in which the Court was concerned with dignity, not evidence of criminalization.³⁷⁰ The liberty interests in human expression recognized by the *Lawrence* Court, like those recognized in *Perez*, are significant.³⁷¹ Whatever one thinks of this argument, however, it seems clear that, at a minimum, limitations on marriage for same-sex couples violate important principles of dignity, fairness, and equality of treatment, ones not resolved by the notion that, under applicable law, all individuals, gay or straight, are prohibited from marrying a person of the same sex.³⁷² They essentially erect a sub-class or caste of citizens whose intimate choices cannot be celebrated or fully recognized by the state.³⁷³

Particularly where marriage restrictions relating to class status and incarceration have been invalidated,³⁷⁴ the continued restraint on the ability of gay men and lesbians to choose the "person of one's choice"³⁷⁵ is highly problematic. Effectively a punishment for non-conformity with norms regarding gender and sexuality, state bans on marriage for gay men and lesbians "represent a rejection of their personal aspirations, the non-recognition of their personhood, and the denial of their dream"³⁷⁶ Such bans impose a

367. *Lawrence*, 539 U.S. at 579-80. In *In re Marriage Cases*, the California Supreme Court, concluding that the exclusion of same-sex couples from civil marriage constituted discrimination on the basis of sexual orientation, held that restrictions on marriage for gays and lesbians should be evaluated under strict scrutiny. 43 Cal. 4th at 784, 839-44.

368. *Id.* at 559, 572.

369. Sunstein, *The Right to Marry*, *supra* note 327, at 2098-103.

370. Tribe, *supra* note 327, at 1948.

371. *See id.*

372. *See Romer v. Evans*, 517 U.S. 620 (1996); Sunstein, *The Right to Marry*, *supra* note 327, at 2111-14; *see also Brandzel*, *supra* note 242, at 176. Notably, the permanent restrictions on marriage for gay men and lesbians are not at all analogous to restrictions on, for example, age. Age restrictions do not impose a permanent bar on marriage. *See Moe v. Dinkins*, 533 F. Supp. 623 (1981) (upholding age-based restrictions on marriage).

373. Harris, *Loving Before and After the Law*, *supra* note 37, at 2837; *see also* Sunstein, *Homosexuality*, *supra* note 104, at 16. As the *In re Marriage Cases* court explained, restrictions on marriage for same-sex couples are "likely to be viewed as reflecting an official view that . . . [gay and lesbian] committed relationships are of lesser stature than the comparable relationships of opposite-sex couples." 43 Cal. 4th at 784, 839-44.

374. *See Zablocki v. Redhail*, 434 U.S. 374 (1978) (addressing constitutionality of class-based restrictions on marriage); *Turner v. Safely*, 482 U.S. 78 (1987) (addressing constitutionality of restriction on marriage based on incarceration).

375. *Perez v. Sharp*, 198 P.2d 17, 21 (Cal. 1948).

376. Lenon, *supra* note 153, at 411.

stigma,³⁷⁷ communicating the message that gay men and lesbians are not part of us.³⁷⁸ Ultimately, they work to exclude gay men and lesbians from what Kenneth Karst has described as “belonging,”³⁷⁹ respect, full acceptance, and equal inclusion in the broader community.³⁸⁰

CONCLUSION

This article has sought to untangle and reconcile a number of love stories: one involving Sylvester Davis and Andrea Pérez; another that features advocates fighting for the rights of gay and lesbian couples to marry; and those of all gay and lesbian couples. Despite what *Perez*'s non-recognition might ordinarily suggest, this “lost” case³⁸¹ has the potential significantly to advance our thinking about race, gender, and marriage.³⁸²

Perez certainly helps to explicate some of the parallels that exist between the experiences of people affected by both antiscegenation and same-sex marriage bans. My goal in this article, however, has been to move conversations about both antiscegenation laws and limits on same-sex marriage “beyond analogy,” to a place focused less on the extent to which those advancing claims for justice can be fit easily into familiar racial or gender categories than on the nature of the actual injustice at stake.

377. See Laura Smart & Daniel M. Wegner, *The Hidden Costs of Hidden Stigma*, at 220-42, in *THE SOCIAL PSYCHOLOGY OF STIGMA* (Todd F. Heatherton, et al., eds., 2000); see also Lenhardt, *Understanding the Mark*, *supra* note 18, at 805-47 (discussing problem of stigma in the race context). It may be that not everyone affected by these state bans will experience exclusion from marriage as a personal injury. See Franke, *Longing for Loving*, *supra* note 344 (arguing that *Lawrence* and current period of non-regulation of lgbt intimate relationships should be seen as an opportunity, rather than an injury). This does not, however, diminish the significance of the harm for those who do or address the larger question of whether the government can constitutionally treat individuals in this way.

378. Note that, as in the race context, gay men and lesbians have developed numerous coping mechanisms to manage any stigma experienced as a result of their treatment in the broader society. See, e.g., Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 896-97 (2006) (discussing incidence of passing among Blacks, gay men and lesbians); Carol T. Miller & Brenda Major, *Coping with Stigma and Prejudice*, at 243-66, in *THE SOCIAL PSYCHOLOGY OF STIGMA* (Todd F. Heatherton, et al., eds., 2000) (same); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (articulating theory of covering).

379. See Karst, *supra* note 37.

380. See Tribe, *supra* note 327, at [21] (discussing concept of “respect” in connection with *Lawrence*); see also Brandzel, *supra* note 242, at 176.

381. See Kennedy, *Race Relations Law*, *supra* note 161, at 1997.

382. Elsewhere, I have noted that *Perez* could be extremely useful in helping scholars think about cross-racial interactions, not only in the area of romance and intimate relations, but also in terms of political and economic coalition building between African Americans and Latinos on a range of issues, including racial equality, work, education, and immigration. See Lenhardt, *The Story of Perez v. Sharp*, *supra* note 3, at 370-71. For a discussion of conflict and solidarity between African Americans and Latino immigrants in the context of work, see Jennifer Gordon and R.A. Lenhardt, *Rethinking Work and Citizenship*, *supra* note 245 (forthcoming June 2008); see also Jennifer Gordon and R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2515-2518 (2007) (addressing possibilities for solidarity between “longtime citizens of color and new immigrants”).

Current discourse on marriage rights lacks an awareness of the state's affirmative role in shaping group and individual identity (as well as expressions of human intimacy) through its laws and policies. A close look at the purpose and effects of government identity-policing in both the antimiscegenation and same-sex marriage contexts can lead to productive changes in the debate about the place of marriage in modern society and the citizenship rights of gay men and lesbians. This is particularly true when one considers that the identity-policing the government has carried on in these areas is neither equal nor neutral.³⁸³ Ultimately, it serves as an important tool for separating out the "bad" citizens from the "good," for placing gay men and lesbians firmly on the margins of society.³⁸⁴

The California Supreme Court's recent, *Perez*-informed decision in *In re Marriage Cases* suggests that this harsh reality is becoming more and more difficult to ignore. I am optimistic that this decision also signals that the expansive understanding of marriage and citizenship that I advance in this Article will one day become widely accepted. But, even if this view never carries the day, it is my hope that, at a minimum, the suggestions for reframing the debate about marriage that I offer here will help to pave the way for more open and honest assessments of the true implications and citizenship costs of race and gender-based impediments to the selection of "the person of one's choice" for marriage.³⁸⁵

383. See *supra* Part IV.

384. Brandzel, *supra* note 242, at 172.

385. *Perez v. Sharp*, 198 P.2d 17, 21 (Cal. 1948).