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Beyond Racial Precedents: *Loving v. Virginia* as an Appropriate Legal Model and Strategy for Same-Sex Marriage Litigation

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Beyond Racial Precedents:
Loving v. Virginia as an Appropriate Legal Model and Strategy for Same-Sex Marriage Litigation

An Honors Thesis prepared as a requirement for the designation of

Honors Scholar

by

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May 1, 2010

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PREFACE

This project could not have been completed without the aid and dedication of others. First, I express gratitude to my friends and family who have supported me through the process in one way or another directly or indirectly. I also wish to acknowledge all the past and present faculty members and instructors of the University of Connecticut Department of Political Science who have spurred my interest in this discipline: Thomas Noggle, Professor David Yalof, Professor Elizabeth Hanson, Professor Robert Freysinger, Professor Garry Clifford, Professor Howard Reiter, and Daniel Stockemer. I would like to thank Professor Kristen Kelly for her help on a seminar paper that inspired segments of this thesis, and Professor Jeffrey Dudas for his assistance in running the Senior Seminar and as the Departmental Honors advisor. And most of all, I would like to thank my thesis advisor, Professor Charles Venator Santiago, for all of the time and effort he put into critiquing my work and providing valuable insight into my project. Professor Venator made the focus of my project clear when I felt I was struggling, and I certainly could not have completed the project without his guidance and assistance.

I sincerely hope that this thesis helps us to better understand the complex relationship between race and sexual orientation in this country. There are people all over the world who suffer oppression because of some or several immutable characteristics, and there should be no rest until one day, there truly is equal protection for all.

This thesis is dedicated to all who suffer oppression, in any way, shape, or form.

Beyond Racial Precedents: *Loving v. Virginia* as an Appropriate Legal Model and Strategy for Same-Sex Marriage Litigation

ABSTRACT:

This thesis explores how LGBT marriage activists and lawyers have employed a racial interpretation of due process and equal protection in recent same-sex marriage litigation. Special attention is paid to the Supreme Court's opinion in *Loving v. Virginia*, the landmark case that declared anti-miscegenation laws unconstitutional. By exploring the use of racial precedent in same-sex marriage litigation and its treatment in state court cases, this thesis critiques the racial interpretation of due process and equal protection that became the basis for LGBT marriage briefs and litigation, and attempts to answer the question of whether a racial interpretation of due process and equal protection is an appropriate model for same-sex marriage litigation both constitutionally and strategically. The existing scholarly literature fails to explore how this issue has been treated in case briefs, which are very important elements in any legal proceeding. I will argue that through an analysis of recent state court briefs in Massachusetts and Connecticut, *Loving* acts as logical precedent for the legalization of same-sex marriage. I also find, more significantly, that although this racial interpretation of due process and equal protection represented by *Loving* can be seen as an appropriate model for same-sex marriage litigation constitutionally, questions remain about its strategic effectiveness, as LGBT lawyers have moved away from race in some arguments in these briefs. Indeed, a racial interpretation of Due Process and Equal Protection doctrine imposes certain limits on same-sex marriage litigation, of which we are warned by some Critical Race theorists, Latino Critical Legal theorists, and other scholars. In order to fully incorporate a discussion of race into the argument for legalizing same-sex marriage, the dangers posed by the black/white binary of race relations must first be overcome.

The time may come, far in the future, when contracts and arrangements between persons of the same sex who abide together will be recognized and enforced under state law. When that time comes, property rights and perhaps even mutual obligations of support may well be held to flow from such relationships. But in my opinion, even such a substantial change in the prevailing mores would not reach the point where such relationships would be characterized as "marriages". At most, they would become personal relationships having some, but not all, of the legal attributes of marriage. And even when and if that day arrives, two persons of the same sex, like those before the Court today, will not be thought of as being "spouses" to each other within the meaning of the immigration laws. For that result to obtain, an affirmative enactment of Congress will be required.[1]

[1] Chief Judge Irving Hill, in *Adams v. Howerton*, 486 F. Supp. 1119, 1125 (1980)

INTRODUCTION

Few issues have created more passion and division among the American public than the current debate surrounding the legalization of same-sex marriage. Growing out of the gay rights movement, the movement to legalize same-sex marriage has gained popularity over the past decade as the perceived chief goal of the gay rights movement. This movement has inspired hundreds of rallies around the country, including large marches in Washington,[2] as well as intense debate among many Americans.

This debate has enormous political, legal, and social implications within the United States; the debate has called into question the citizenship of gay and lesbian individuals, and whether they can be considered full members of society if not eligible for all the benefits of marriage provided to others.[3] These questions of citizenship bring up debates over equality and the equal rights provisions of the U.S. and state constitutions. Do opposite-sex marriage laws violate constitutional equal protection guarantees by prohibiting same-sex couples from marrying? Indeed, these political, legal, and social implications became more notable after the Massachusetts Supreme Court decision in 2003 that declared same-sex marriage legal in that state. The issue of same-sex marriage was extremely salient in the 2004 presidential election; some scholars assert that the proposed constitutional amendments to ban same-sex marriage on the ballot in several states may have cost the election for Democratic candidate Senator John

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[2] See Roehr, Bob. "National Equality March Draws 100,000 to DC. (cover story)." *Bay Area Reporter*, October 15, 2009: 1, 12. The article reports that about 100,000 LGBT people and their supporters joined the National Equality March on October 11, 2009 in District of Columbia (DC) that calls for action to correct the second-class citizenship of gays.

[3] See Concannon, Liam. "Citizenship, Sexual identity and social exclusion: Exploring issues in British and American social policy." *International Journal of Sociology and Social Policy* 28, no. 9-10 (2008): 326-339.; Edgar, Gemma. "Engaging with the State: Citizenship, Injustice, and the Problem with Queer." *Gay and Lesbian Issues and Equality Review* 4, no. 3 (December 2008): 176-187.

Kerry by turning out the Christian right in greater numbers.[4] Moreover, recent state court decisions on the legality of same-sex marriage have great effects on the legal rights and benefits of those in same-sex relationships as couples, as well as on the social acceptance of their relationships. Married couples are entitled to many legal benefits like tax deductions and easier access to medical coverage for both individuals. Debates over civil partnerships and civil unions have focused on whether these civil unions go far enough in extending these legal benefits to same-sex couples, and whether they encourage the same level of social acceptance of same-sex unions as marriages have.[5]

The same-sex marriage and gay rights debates can be viewed as one strand of the larger civil rights movement in America. The civil rights movement has involved battles of equality and acceptance both legally—through debates of due process and equal protection—and socially for many historically disadvantaged groups. These groups have been disadvantaged based on their race, religion, national origin, gender, and sexual orientation, to name a few, and have employed due process and equal protection arguments in their struggles for relief and redress. The differing factors causing the disadvantages of these groups invite comparisons between these groups in their civil rights experience. In this thesis, I focus on the relationship between race and sexual orientation in the context of the civil rights movement, specifically the impact of race on the same-sex marriage debates that have grown out of the gay rights movement.

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[4] See Lewis, Gregory B. "Same-Sex Marriage and the 2004 Presidential Election." *PS: Political Science and Politics* (American Political Science Association) 38, no. 2 (April 2005): 195-199.; Campbell, David E., and J. Quin Monson. "The Religion Card: Gay Marriage and the 2004 Presidential Election." *Public Opinion Quarterly* 72, no. 3 (Fall 2008): 399-419.

[5] See Brandzel, Amy L. "Queering Citizenship? Same-Sex Marriage and the State." *GLQ: A Journal of Lesbian and Gay Studies* 11, no. 2 (2005): 171-204.; Edgar, Gemma. "Engaging with the State: Citizenship, Injustice, and the Problem with Queer." *Gay and Lesbian Issues and Equality Review* 4, no. 3 (December 2008): 176-187.; Shainker, Andrew J. "Civil Partnerships Vs. Full Marriage Rights." *Echo Magazine*, February 19, 2009: 28.

This thesis explores how Lesbian, Gay, Bisexual, and Transgender (LGBT) marriage activists and lawyers, specifically the organization Gay and Lesbian Advocates and Defenders (GLAD), have employed the Supreme Court's opinion in *Loving v. Virginia*,[6] the landmark case that declared anti-miscegenation laws unconstitutional, in recent same-sex marriage litigation. By exploring the use of a race-based interpretation of the Due Process and Equal Protection Clauses in same-sex marriage case briefs, this thesis critiques the racial interpretation of due process and equal protection as applied to same-sex marriage litigation and attempts to answer the question of whether *Loving*, the legalization of interracial marriage, is an appropriate model for same-sex marriage litigation both constitutionally and strategically. The existing scholarship fails to look at case briefs and instead relies on court opinions and the similarity of arguments between racial and same-sex marriage debates. Thus, I will argue that through an analysis of the appellant briefs submitted in two recent state court opinions, a racial interpretation of due process and equal protection can act as precedent for the legalization of same-sex marriage. More importantly, however, I find that although a racial case like *Loving* can be seen as an appropriate model for same-sex marriage litigation logically and constitutionally, questions remain about its strategic effectiveness. I suggest that as evidenced by these briefs, same-sex marriage legal activists should take care in how they approach race in their arguments. Activists have tried to stay away from race in their arguments, but in particular instances still need to scale back their racial interpretation of due process and equal protection doctrine as applied to same-sex marriage litigation. The danger of using this racial interpretation of Fourteenth Amendment doctrine is inherent in the Black/White binary model of civil rights discourse, which argues that racial minorities, specifically blacks, represent the model minority group and that all other

[6] 388 U.S. 1 (1967)

minority groups must compare their experience of oppression to that of blacks to be eligible for certain civil rights.[7]

Chapter I explores the history behind the gay rights movement and the same-sex marriage debates and their relation to miscegenation. The context of this project is provided in a discussion of the current state of same-sex marriage in the United States. Chapter II details the scholarly literature on this topic, explains the importance of examining case briefs, and provides an overview of the project methodology. Chapters III and IV examine the appellant briefs submitted in two recent state court opinions dealing with same-sex marriage, *Goodridge v. Department of Public Health*[8] and *Kerrigan v. Commissioner of Public Health*,[9] respectively. These chapters provide an analysis of the racial arguments included in the briefs, through the plaintiffs' claims of Due Process, Equal Protection, and their treatment of the definitional argument that consumes the same-sex marriage debate. Chapter V attempts to summarize and highlight my findings by tying together the briefs submitted in both cases. I find a sort of evolution in how the plaintiffs in the two cases treat the potential limitations on the use of *Loving* as precedent for same-sex marriage litigation, and suggest that their use of a racial interpretation of due process and equal protection in both cases may reflect a growing recognition of the dangers imposed by the black/white binary model of race relations. I find that my conclusions

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[7] For an overview of the black/white binary, see Perea, Juan F. "The Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought." *California Law Review* 85, no. 5 (October 1997): 1213.; Moran, Rachel F. "Neither Black Nor White." *Harvard Latino Law Review 2*, Fall 1997: 61-99.; Delgado, Richard, and Jean Stefancic. *Critical Race Theory: An Introduction.* New York: New York University Press, 2001.; Kim, Janine Young. "Are Asians Black: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm." *Yale Law Journal* 108 (1998-1999): 2385.; Alcoff, Linda Martin. "Latino/As, Asian Americans, and the Black-White Binary." *The Journal of Ethics* 7, no. 1 (2003): 5-27. For a discussion of the dangers imposed by the binary on same-sex marriage litigation, see Hutchinson, Darren Leonard. "Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse." *Connecticut Law Review 29*, Winter 1997: 561.; Schacter, Jane S. "The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents." *Harvard Civil Rights-Civil Liberties Law Review* 29 (Summer 1994): 283.; Kendell, Kate. "Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies." *Yale Journal of Law and Feminism 17*, 2005: 133-137.

[8] 440 Mass. 309 (2003)

[9] 289 Conn. 135 (2008)

represent the scholarship of Darren Hutchinson and Jane Schacter, who have argued for an approach to same-sex marriage litigation that does not force a comparison of LGBT and African-American oppression.[10] I also suggest that the plaintiffs look to the scholarship of Professor William Eskridge[11] and employ his historical approach to combating certain arguments against same-sex marriage. I conclude by suggesting possibilities for further research.

[10] See Hutchinson, Darren Leonard. "Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse." *Connecticut Law Review 29*, Winter 1997: 561.; Schacter, Jane S. "The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents." *Harvard Civil Rights-Civil Liberties Law Review* 29 (Summer 1994): 283.

[11] William Eskridge is Professor of Law at Yale Law School. For his examination of same-sex unions throughout world history, see Eskridge, William N. Jr. "A History of Same-Sex Marriage." *Virginia Law Review 79*, 1993: 1419, 1507.

I. HISTORY AND CONTEXT

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[12]

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification…There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause… These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.[13]

When exploring any research question, a thorough understanding of the historical debates surrounding the research topic is essential in order to provide background and frame the current debate in an historical context. This chapter explores the historical foundations that led to the use of equal protection and due process claims in same-sex marriage litigation. First, I will document the history of miscegenation laws in the United States. I will then cover the history of the Gay Rights Movement in the United States, including early same-sex marriage litigation and court decisions. In the final section, I will provide context for this project by discussing more recent same-sex marriage litigation and where the same-sex marriage debate stands today. This chapter provides an overview of the history of how the Equal Protection Clause and Due Process clause of the Fourteenth Amendment have been used in court opinions dealing with interracial marriage and same-sex marriage, and provides context for my investigation into the use of a racial interpretation of these clauses in recent same-sex marriage litigation. I find that the equal protection and due process arguments employed in same-sex marriage litigation emerged from miscegenation arguments, and that the emergence of these arguments from a racial history framed current debates over the appropriateness of the use of race in same-sex marriage litigation.

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[12] Virginia Trial Judge Leon Bazile, as quoted by the Supreme Court in *Loving v. Virginia*, 388 U.S. 1, 3
[13] Chief Justice Earl Warren, in *Loving v. Virginia*, 388 U.S. 1, 11-12

A. Miscegenation

This section addresses the history of interracial marriage in the United States, including an overview of court decisions that eventually made anti-miscegenation laws unconstitutional. These court decisions concerning interracial marriage included equal protection and due process arguments that then emerged in court decisions concerning same-sex marriage later in the 20th century. The history of miscegenation law helps to frame the current debate over same-sex marriage by providing a historical foundation of the central arguments surrounding the same-sex marriage debate and by showing how these arguments emerged from racial debates.

Many states in the United States had legal restrictions on interracial marriage in the 18th, 19th, and early 20th century. In 1776, seven out of the 13 original colonies that had declared their independence had laws barring interracial marriage. These early laws were often defended with racist interpretations of the bible.[14] Northern states gradually abolished slavery after America's independence, but anti-miscegenation laws were still enforced in many of these states. As the United States expanded westward, all new slave states as well as some new free states enacted laws banning interracial marriage. Some southern states temporarily repealed or left unenforced their anti-miscegenation laws during the Reconstruction era, but these laws were reenacted and enforced once again along with Jim Crow laws after white conservative Democrats took power after Reconstruction. Several northern and western states permanently repealed their anti-miscegenation laws during the 19th century.[15]

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[14] The story of Noah's curse on his son Ham became a biblical justification for American slavery and segregation, as Ham came to be known as the ancestor of black Africans. See Haynes, Stephen R. *Noah's Curse: The Biblical Justification of American Slavery.* New York: Oxford University Press, 2002.

[15] For data showing the dates that anti-miscegenation laws were enacted and repealed for each state as well as the specific text and statute titles of these laws, see: Loving Day. *Legal Map: Accessible Version.* 2009. http://www.lovingday.org/legal-map-accessible (accessed February 9, 2010). For the interactive map, see http://www.lovingday.org/legal-map.

Three federal constitutional amendments to ban interracial marriage throughout the country were introduced in Congress; none were ever enacted. In 1871, Representative Andrew King of Missouri proposed an amendment because he feared the fourteenth amendment banning slavery would eventually be extended to ban interracial marriage. In December of 1912, Representative Seaborn Roddenbury of Georgia introduced a similar amendment. Roddenbury's amendment was more severe, however, as it included the "one-drop rule," which meant that anyone with any trace of African blood was barred from marrying a white spouse. In 1928, Senator Coleman Blease of South Carolina proposed an amendment that was even more severe; his amendment required that Congress set a punishment for interracial couples who attempted to get married and for people who officiated an interracial marriage.

In *Pace v. Alabama*,[16] the United States Supreme Court ruled that anti-miscegenation laws were constitutional, and did not violate the Fourteenth Amendment to the U.S. constitution. The court found that both races were treated equally, because both whites and blacks suffered equal punishment for violating laws against interracial marriage and interracial sex. The plaintiffs argued that Section 4189 of the Code of Alabama violated the Equal Protection Clause of the Fourteenth Amendment because it imposed a more severe penalty on interracial couples who marry or live in adultery or fornication together than does Section 4184 of the same code, which imposed a penalty on any man or woman who live together in adultery or fornication.[17] The Court found no discrimination against a specific race in the two sections of the Alabama Code in question:

> There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the

[16] *Pace v. Alabama*, 106 U.S. 583 (1883)

[17] The penalty for same-race couples living together in adultery or fornication was a $100 fine and possible imprisonment or hard labor for no more than six months (See Code of Alabama, Section 4184). The penalty for mixed-race couples who married or lived together in adultery or fornication was imprisonment or hard labor at least 2 and no more than 7 years (See Code of Alabama, Section 4189).

> same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is 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.[18]

By framing an offense committed by two people of the same race, whether white or black, as separate from an offense committed by two people of different races, the Court justified the difference in the severity of punishment between the two offenses and found no discrimination against a specific race. The punishment for the first offense was the same for white couples as it was for black couples, and the punishment for the second offense was the same for both people involved in the relationship, whether white or black. We see here the equal application theory of equal protection at work: Because the punishment was equally applied to both races, the Court was able to rule that no discrimination against a specific race was present, and thus the law was upheld. We will see this equal application argument in later same-sex marriage cases, used in defense of anti-same-sex marriage statutes.

In 1948, the California Supreme Court in *Perez v. Sharp*[19] ruled California's anti-miscegenation statute unconstitutional. The petitioners, a white woman and black man, were denied a marriage license by the County Clerk of Los Angeles County based on Civil Code, Section 69: "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." The petitioners argued that this statute denied their free exercise of religion as guaranteed by the constitution because they were not able to "participate fully in the sacraments of that religion."[20] The Court, stating that the First Amendment's religion clauses were "encompassed in the concept of liberty in the Fourteenth

[18] 106 U.S. 583, 585 (1883)
[19] *Perez v. Sharp*, 32 Cal.2d 711 (1948)
[20] *Ibid*., 713

Amendment," cited *Skinner v. Oklahoma*,[21] in which marriage was determined a fundamental right. Wrote the Court:

> Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry. It must therefore be determined whether the state can restrict that right on the basis of race alone without violating the equal protection of the laws clause of the United States Constitution.[22]

Citing several previous opinions regarding racial discrimination, including *Yik Wo v. Hopkins*,[23] *Yu Cong Eng v. Trinidad*,[24] *Hill v. Texas*,[25] and *Hirabayashi v. United States*,[26] the Court concluded that "a state law prohibiting members of one race from marrying members of another race is not designed to meet a clear and present peril arising out of an emergency."[27] The Court addressed the equal application argument presented in support of anti-miscegenation laws (also employed by the U.S. Supreme Court in *Pace*). The argument, of course, is that the anti-miscegenation laws do not discriminate against any racial group because it applies equally to people of all races; just as whites are prohibited from marrying blacks, blacks are prohibited from marrying whites. "The decisive question, however," wrote the Court,

> is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals…In construing the equal protection of the laws clause of the Constitution, the United States Supreme Court has declared that the constitutionality of state action must be tested according to whether the rights of an individual are restricted because of his race.[28]

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[21] *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The Court in *Skinner* called marriage "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."
[22] *Perez*, at 715
[23] 118 U.S. 356 (1886). *Yik Wo v. Hopkins*, in which the denial of permits to Chinese laundry business owners was challenged, was the first time a law that was race-neutral on its face but administered in a discriminatory manner was ruled a violation of the Equal Protection Clause.
[24] 271 U.S. 500 (1926)
[25] 316 U.S. 400 (1942)
[26] 320 U.S. 81 (1943)
[27] *Perez*, at 716
[28] *Perez*, at 716, internal citations omitted.

The Court discussed several prior cases in which separate but equal facilities were ruled as non-discriminatory, such as travel on trains,[29] because they adequately furnished all individuals with "substantially equal treatment"[30] in spite of separate facilities. However, the Court found that this ruling was "clearly inapplicable to the right of an individual to marry. Since the essence of the right to marry is the freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry."[31] The Court also found no public interest or matter of legitimate concern to the state that requires the prohibition of interracial marriage. For example, the state has a legitimate interest in prohibiting people infected with dangerous transmittable diseases from marrying; however, any statute proscribing such a prohibition "must be based on tests of the individual, not on arbitrary classifications of groups or races, and must be administered without discrimination on the grounds of race."[32] The sections of the California Civil Code in question were not motivated by a state interest in preventing the transmission of disease or any other legitimate concern; rather they "make race and not disease the disqualification…By restricting the individual's right to marry on the basis of race alone, they violate the equal protection of the laws clause of the United States Constitution."[33]

The Court also examined the history of the arguments in support of the sections of the California Civil Code in question to determine whether there are "exceptional circumstances"[34] to justify the prohibition of mixed-race marriage. The Court found that the arguments in support of the statutes included the assumption that other races are inferior to the Caucasian race, and that mixed-race marriages are "unnatural" and lead to undesirable offspring that are "inferior" to

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[29] See *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151 (1914)
[30] *Perez*, at 717
[31] *Ibid*.
[32] *Ibid*., at 718
[33] *Ibid*.
[34] *Ibid*., at 719

the offspring of same-race marriages.[35] And the respondent in *Perez* tried to justify the statutes in question by arguing that "the prohibition of intermarriage between Caucasians and members of the specified races prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians."[36] The Court found the argument that non-Caucasians are physically inferior to Caucasians to be "without scientific proof," and furthermore "fails to take account of the physical disabilities of Caucasians and… variations among non-Caucasians."[37] In response to the claim that other races are mentally inferior to Caucasians, the Court found that "there is no certain correlation between race and intelligence," there have been intelligent and mentally inferior individuals in all races, and "the Legislature has not made an intelligence test a prerequisite to marriage."[38] Note that the Court again appealed to an analysis of the individual over the generalization of an entire race based on stereotypes or differences often due to environmental factors. The respondents argued that people wishing to intermarry often come from the "dregs of society," would produce children that would be a burden to the community, and also that interracial marriage would result in racial tension within the community. The Court found that there is no law that prohibits marriage among members of the "dregs of society, while also noting that this term cannot be defined and could not be defined on the basis of race alone. It rejected the respondents' claim of the adverse effects of interracial marriage on progeny, noting that the respondents relied on *Buck v. Bell*,[39] a case which dealt with the mentally ill and is not applicable here. The Court also cited *Buchanan v. Warley*,[40] in which the U.S. Supreme Court ruled that although preservation of the public

[35] *Scott v. State*, 39 Ga. 321, 324 (1869)
[36] *Perez*, at 722
[37] *Perez*, at 723
[38] *Perez*, at 724
[39] 274 U.S. 200 (1927)
[40] 245 U.S. 60, 81, (1917), addressing racial segregation in residential areas.

peace was desirable, "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." Race tension cannot be stopped by keeping laws that segregate by race and were influenced by the same racial prejudices that caused the race tension in the first place, argued the Court. In this case, "A member of any [race]…may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable."[41] The Court therefore concluded that "careful examination of the arguments in support of the legislation in question reveals that 'there is absent the compelling justification which would be needed to sustain discrimination of that nature.'"[42] Furthermore, found the Court, "the fact alone that the discrimination has been sanctioned by the state for many years does not supply such justification."[43]

The Court also stated that any law that regulates a fundamental right, such as marriage, must be clear in its purpose for regulating that right. It argued that the statute in question is "too vague and uncertain to be upheld as a valid regulation of the right to marry"[44] because the "legislature has made no provision for applying the statute to persons of mixed ancestry."[45] In summarizing its opinion, the Court stated the following:

> In summary, we hold that sections 60 and 69 are not only too vague and uncertain to be enforceable regulations of a fundamental right, but that they violate the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups.[46]

In 1967, the U.S. Supreme Court ruled in *Loving v. Virginia*[47] that prohibitions on interracial marriage were unconstitutional. This ruling effectively voided the remaining laws that prohibited miscegenation in seventeen states; all of them were southern states and they included

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[41] *Perez*, at 725
[42] *Perez*, at 727, citing *Oyama v. California*, 332 U.S. 633 (1948)
[43] *Perez*, at 727
[44] *Perez*, at 731
[45] Ibid., at 729
[46] *Ibid*., at 731-732
[47] *Loving v. Virginia*, 388 U.S. 1 (1967)

all the former slave states plus Oklahoma. Like the California Supreme Court did in *Perez*, here the U.S. Supreme Court rejected the equal application argument and found that laws prohibiting interracial marriage violated both the equal protection and due process clauses of the Fourteenth Amendment.

The plaintiffs in *Loving* were convicted of violating sections 20-58 and 20-59 of the Virginia Code, which prohibited marriage between a white person and a non-white person under penalty of one to five years in prison and subjected any couple who left Virginia to be married and then returned to the state to this same penalty.

The Court acknowledged the state's reliance on *Pace v. Alabama* to support its equal application argument, but rejected this reasoning and cited its opinion in *McLaughlin v. Florida*,[48] which had rejected equal application in the case of interracial cohabitation. Wrote the Court:

> Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose.[49]

The Court also found that the state's purpose in upholding the anti-miscegenation statute was clearly directed at maintaining white supremacy, calling the statute in question "obviously an endorsement of the doctrine of White Supremacy."[50] Also, "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."[51] The Court cited the opinion of the Supreme Court of Appeals of Virginia, which had affirmed the

[48] *McLaughlin v. Florida*, 379 U.S. 184 (1964)
[49] *Loving*, at 8
[50] *Ibid*., at 7
[51] *Ibid*., at 11

plaintiffs' conviction and relied on its prior opinion in *Naim v. Naim*[52] where the preservation of Virginia citizens' racial integrity and the prevention of "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride" were deemed legitimate purposes of the state.[53] The Virginia Supreme Court of Appeals had also reasoned that marriage should be regulated exclusively by the state without federal intervention, and relies on *Maynard v. Hill*[54] and the Tenth Amendment. But, argued the Supreme Court in *Loving*, the State did not claim that "its powers to regulate marriage are unlimited notwithstanding…the Fourteenth Amendment,"[55] and that it cannot do so considering the opinions in *Meyer v. Nebraska*[56] and *Skinner v. Oklahoma*.[57] The state argued instead, as paraphrased by the Supreme Court, that "the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree."[58] The state concluded from this reasoning that because the statutes in question punish equally both the white and black participants in an interracial marriage, "these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race."[59] The state advanced a second argument, which assumed the validity of the equal application theory; the state argued that if the Fourteenth Amendment did not prohibit anti-miscegenation laws because of their reliance on a racial classification, then "the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages." The state argued that the scientific

[52] *Naim v. Naim*, 197 Va. 80 (1965)
[53] *Loving*, at 7 (citing *Naim*, Va. 80, at 90)
[54] *Maynard v. Hill*, 125 U.S. 190 (1888)
[55] *Loving*, at 7
[56] 262 U.S. 390 (1923)
[57] 316 U.S. 535 (1942)
[58] *Loving*, at 7-8
[59] *Loving*, at 8

evidence was in doubt and therefore, the Supreme Court should defer to the wisdom of the state legislature regarding its policy toward interracial marriages.

The Supreme Court in *Loving* rejected the state's equal application argument, noting that the Fourteenth Amendment had traditionally required "a very heavy burden of justification" for statues containing racial classifications. The court admitted that equal application may be enough to justify statutes involving non-racial discrimination, including *Railway Express Agency, Inc. v. New York*[60] and *Allied Stores of Ohio, Inc. v. Bowers*,[61] in which the court had "merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures."[62] However, in *Loving*, the burden of justification was so high because it involved a racial discrimination that equal application is inapplicable.

The state refers to statements made in the Thirty-ninth Congress during the passage of the Fourteenth Amendment to argue that the Framers of the Amendment did not intend for the Amendment to make state laws that prohibit miscegenation unconstitutional. However, the Court argued, these statements "pertained to the passage of specific statutes, and not to the broader, organic purpose of a constitutional amendment."[63] Furthermore, the Court referred to three prior cases in which statements made in Congress during the passage of the Fourteenth Amendment were considered. In *Brown v. Board of Education*,[64] the Court called these statements "inconclusive [at best]," adding that "the most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.'"[65] On the other hand, "Their opponents…were antagonistic to

[60] 336 U.S. 106 (1949)
[61] 358 U.S. 522 (1959)
[62] *Loving*, at 9
[63] *Ibid*.
[64] 347 U.S. 483
[65] *Ibid*., 489

both the letter and the spirit of the Amendments, and wished them to have the most limited effect."[66] The Court also relied on its opinions in *Strauder v. West Virginia*[67] and *McLaughlin v. Florida*, and concluded the following:

> We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished.[68]

The Court cited *McLaughlin* again to note that it rejected the reasoning in *Pace v. Alabama* that supported equal application: "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court."[69] Citing a long list of precedent, the Court stated that "the clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[70] It required that the Court consider, for all classifications, whether the statute in question "constitute[s] an arbitrary and invidious discrimination."[71]

There is no question, the Court found, that "Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races."[72] Because this classification involved race, it was subject to the "most rigid scrutiny,"[73] and, in order to be upheld, "must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[74] The Court noted that two of its members previously stated in *McLaughlin* that they "cannot conceive of a

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[66] *Ibid.*
[67] 100 U.S. 203
[68] *Loving*, at 10
[69] *Loving*, at 10, citing *McLaughlin*, at 188
[70] *Loving*, at 10
[71] *Ibid.*
[72] *Loving*, at 11
[73] *Korematsu v. United States*, 323 U.S. 214, 216 (1944)
[74] *Loving*, at 11

valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense."[75] Thus, the Court concluded here that because the purpose of these anti-miscegenation statutes was clearly to maintain white supremacy since the statutes only prohibited interracial marriage involving white people,

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification…There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

The Court also found that the statutes in question violated the plaintiffs of liberty without due process because "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[76] It cited *Skinner* and *Maynard*, which called marriage "one of the 'basic civil rights of man,' fundamental to our very existence and survival."[77] The Court referred to a "freedom of choice to marry," which cannot be restricted by invidious racial discriminations, and stated that this freedom to marry or not marry a person of another race "resides with the individual, and cannot be infringed by the state."[78]

The U.S. Supreme Court's opinion in *Loving v. Virginia* rendered unenforceable all remaining state restrictions on interracial marriage. However, South Carolina and Alabama did not formally amend their constitutions to remove language prohibiting interracial marriage until 1998 and 2000, respectively. 62 percent of voters in South Carolina and 59 percent of voters in Alabama voted to remove this language from their respective constitutions.[79] Approval of interracial marriage by Americans has risen gradually in the past 50 years and since the *Loving*

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[75] *McLaughlin*, at 198
[76] *Loving*, at 12
[77] *Loving*, at 12, citing *Skinner*, at 541
[78] *Loving*, at 12
[79] "Alabama Removes Ban on Interracial Marriage." *USA Today*. November 7, 2000. http://www.usatoday.com/news/vote2000/al/main03.htm.

opinion, according to Gallup polls.[80] A June 2007 poll indicated 77 percent approval for marriage between a white person and a black person and 17 percent disapproval, which is the highest overall approval and lowest overall disapproval since Gallup started the poll in September 1958 (The 1958 poll indicated a mere 4 percent approval and 94 percent disapproval). Blacks still approve of interracial marriage at a higher rate (85 percent) than whites, a trend that has been apparent since blacks were first included in this poll in 1968.

A history of miscegenation in the United States shows a reliance on due process and equal protection arguments. Court opinions in cases like *Pace v. Alabama*, *Perez v. Sharp*, and *Loving v. Virginia* were based on these arguments and whether restrictions against interracial marriage violated due process and equal protection provisions of the U.S. and state constitutions. Due process and equal protection claims for the legalization of same-sex marriage emerged from this history, as we will see in the next section.

B. The Gay Rights Movement and Early Same-Sex Marriage Litigation

This section highlights the major events of the gay rights movement and the early wave of same-sex marriage litigation. An exploration of the historical foundations of the gay rights movement provides background to the origins of the same-sex marriage movement. A look at the first wave of same-sex marriage litigation reveals the emergence of race-based due process and equal protection arguments applied to same-sex marriage debates. This history sets up a view of the evolution of race-based Fourteenth Amendment interpretations from early to more recent same-sex marriage litigation. This history also highlights a major difference between miscegenation debates and early same-sex marriage debates: the emergence of the definitional

[80] For the poll results, see: Carroll, Joseph. "Most Americans Approve of Interracial Marriages". *Gallup.* Gallup News Service. August 16, 2007. http://www.gallup.com/poll/28417/most-americans-approve-interracial-marriages.aspx (accessed February 14, 2010).

argument against same-sex marriage, which has become a central component of recent LGBT marriage debates, litigation, and court decisions.

The first major event that gave a public voice to the LGBT rights movement was the founding of the Scientific-Humanitarian Committee in Berlin in 1897[81]. This committee published literature and advocated legal reform in Germany, Austria, and the Netherlands, and their founder[82] opened the Institute for Sexual Science in 1919, which specialized in sex research. This committee's work resulted in some degree of freedom for gays and lesbians in the Weimar Republic, although Hitler's rise to power put a stop to their work. Other organizations formed in the early 20th century that gave some voice to gays and lesbians included the British Society for the Study of Sex Psychology[83] and the Society for Human Rights in the United States.[84]

Gay and lesbian political activity was still not very visible despite the work of these organizations, but this began to change during World War II. During the war and its aftermath, many more young people came to the cities and more visibility was achieved by the movement. Many additional organizations were formed, including the Culture and Recreation Centre[85] in Amsterdam, and the Mattachine society[86] and the Daughters of Bilitis[87] in the United States. A national gay periodical, *ONE: The Homosexual Magazine*, began publication in 1953. In 1954 the Los Angeles Postmaster declared the October issue of *ONE* obscene and undeliverable and

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[81] gay rights movement. (2009). In *Encyclopædia Britannica*. Retrieved December 05, 2009, from Encyclopædia Britannica Online: http://www.britannica.com/EBchecked/topic/766382/gay-rights-movement

[82] The founder of the Scientific-Humanitarian Committee was Magnus Hirschfeld, who in 1928 sponsored the World League of Sexual Reform.

[83] The British Society for the Study of Sex Psychology was founded in 1914 by Edward Carpenter and Havelock Ellis for educational purposes.

[84] The Society for Humans Rights was established in 1924 by Henry Gerber and chartered by the state of Illinois.

[85] Founded in 1946.

[86] The Mattachine society was the first major male organization; it was founded in 1950-1951 was Harry Hay. Its name was supposedly derived from a medieval French society of masked players, the Société Mattachine, as representative of the public masking of homosexuality.

[87] The Daughters of Bilitis were founded in 1955 by Phyllis Lyon and Del Martin in San Francisco, this group was a leading women's organization; the name comes from the Sapphic love poems of Pierre Louys, *Chansons de Bilitis.*

the Ninth Circuit Court of Appeals agreed[88]; however, the Supreme Court reversed the Circuit Court's decision[89], citing *Roth v. United States*[90], in the first explicit Supreme Court ruling on homosexuality.

A routine raid by two detectives and several police officers of the Stonewall Inn in New York's Greenwich Village on the night of June 27, 1969 set off rioting in what is now considered one of the major milestones in the gay rights movement.[91] As police escorted patrons out of the bar, a crowd of angry onlookers gathered on the street outside the inn and battled with police, using coins, beer bottles, and sticks[92]. Although the Stonewall Riots did not solely initiate the gay rights movement, this event "ultimately came to symbolize the overthrow of decades of official harassment, repression, and degradation"; it also "changed history and breathed life into the then dormant and internally conflicted homophile movement."[93] Stonewall did mark the beginning of the modern, more national gay rights movement in the U.S.[94]

One year after the Stonewall Riots, in June 1970, a march was organized in New York City to commemorate the Riots. Gay Pride is now celebrated around the world every year in June. Shortly after the riots, gay organizations began to spring up in New York, California, and

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[88] *One, Incorporated v. Olesen*, 241 F.2d 772 (1957)
[89] *One, Inc. v. Olesen*, 355 U.S. 371 (1958)
[90] *Roth v. United States*, 354 U.S. 476 (1957)
[91] For a detailed description of the events that occurred the night of the Stonewall Riots, see D'Emilio, John. *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970.* 2. Chicago: University of Chicago Press, 1983, 231-233. See also Truscott IV, Lucian. "Gay Power Comes to Sheridan Square." *The Village Voice*, July 3, 1969: 1. Accessed through the online edition of a 1994 Columbia University Library Exhibit in conjunction with the 25th anniverary of the Stonewall riots: http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/voice_19690703_truscott.html.
[92] Arriola, Elvia A. "Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality before the 1969 Stonewall Riots." *Columbia Journal of Gender and Law* 5 (1995-1996): 33.
[93] *Ibid*.
[94] *Ibid*., 34

around the country.[95] A new age of political and legal activism has begun for the gay rights movement, particularly legal activism concerning marriage.

The movement to legalize same-sex marriage has become a major element of the gay rights movement. The first such litigation effort resulted in *Baker v. Nelson*,[96] a Minnesota Supreme Court opinion which ruled that Minnesota law did not allow same-sex couples to marry, and furthermore that the failure to allow same-sex couples to marry did not violate the constitution. The court was not persuaded by the petitioners' dual argument that prohibition of same-sex marriage denies a fundamental right based on the ninth amendment, and deprives them of liberty and property without due process and equal protection through the fourteenth amendment. The court also rejected the petitioners' reliance upon *Loving v. Virginia*[97]: "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[98] An appeal of *Baker* to the U.S. Supreme Court was dismissed for want of a federal question. The next case that dealt with same-sex marriage took place in 1971. In *Anonymous v. Anonymous*, [99] the New York Supreme Court decided a case in which a marriage was performed for two males where one of the males was thought to be a female. The male thought to be a female (the defendant) later underwent an operation to have his reproductive organs removed, and sent the medical bills to the petitioner. The court declared that no marriage could legally have taken place between the plaintiff and the defendant based on the definition of marriage as the union of one man and one woman: "The law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract

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[95] For an overview of how certain gay organizations were started in New York in the weeks following Stonewall, see chapter 12 (page 209) of: Carter, David. *Stonewall: The Riots that Sparked a Gay Revolution.* New York: St. Martin's Press, 2004.
[96] *Baker v. Nelson*, 191 N.W.2d 185 (1971)
[97] *Loving v. Virginia*, 388 U.S. 1 (1967)
[98] *Baker*, at 187
[99] *Anonymous v. Anonymous*, 67 Misc.2d 982 (1971)

between a man and a woman."[100] A 1973 Kentucky appellate court opinion[101] defined marriage as the union of one man and one woman, and stated that the purpose of marriage was to found and maintain a family, making same-sex marriage impossible by definition. *Jones v. Hallahan* relied heavily on the Minnesota court's decision in *Baker* and the New York court's opinion in *Anonymous*. The court refused to authorize the issuance of a marriage license to a couple who were both female because what they proposed was not a marriage. Additionally, it found "no constitutional sanction or protection of the right of marriage between persons of the same sex."[102] The 1974 Washington appellate court opinion *Singer v. Hara*[103] found that it was "apparent from a plain reading of our marriage statutes that the legislature has not authorized same-sex marriages"[104] and that "same-sex relationships are outside of the proper definition of marriage."[105] Because what the appellants proposed was not marriage, stated the court in *Singer*, an argument to analogize *Loving* and *Perez* to same-sex marriage was inapplicable. In 1982, the Ninth Circuit Court of Appeals in *Adams v. Howerton*[106], in affirming the decision of the district court[107], found that Congress rationally intended to deny preferential status to the spouses of homosexual marriage, perhaps "because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores."[108] Furthermore, "Congress's decision to confer spouse status … only upon the parties to heterosexual marriages has a rational basis and therefore comports with

[100] *Ibid*., at 984
[101] *Jones v. Hallahan*, 501 S.W.2d 588 (1973)
[102] *Ibid*., at 590
[103] 11 Wash. App. 247 (1974)
[104] *Ibid*., 249
[105] *Ibid*., 254
[106] *Adams v. Howerton*, 673 F.2d 1036 (1982)
[107] *Adams v. Howerton*, 486 F.Supp. 1119 (1980)
[108] *Adams v. Howerton*, 673 F.2d 1043 (1982)

the due process clause and its equal protection requirements."[109] The district court's opinion had relied on *Baker*, *Anonymous*, *Hallahan*, and *Singer* as precedent in affirming that marriage by definition is a union of a man and a woman, and therefore same-sex marriage is impossible. Because the "unvarying legal concept and definition" of marriage required persons of different sexes, "there can be no equal protection or due process violation when persons of the same sex attempt to bring themselves within the meaning of the term 'marriage' or 'spouse.' Whatever classification may be involved is thus reasonable and proper." [110] *Howerton* also placed great emphasis on the importance of heterosexual marriage for procreation and perpetuation of the human race: "It seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised."[111] The court went on to say that the state has chosen the "least intrusive alternative available to protect the procreative relationship"[112] and that this classification is narrowly tailored to serve a compelling state interest.

An examination of the history of early same-sex marriage litigation shows that race-based due process and equal protection interpretations were used in these debates, but that courts routinely rejected petitioners' reliance on such interpretations based on the traditional definition of marriage as a union of one man and one woman. The emergence of these race-based interpretations in the first wave of same-sex marriage litigation helps to frame my examination of more recent litigation in a historical context and show how the application of race-based interpretations of due process and equal protection to same-sex marriage litigation has evolved since 1970. This history also shows the origins of the definitional argument, how the treatment of

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[109] *Ibid*.
[110] *Adams v. Howerton*, 486 F.Supp. 1124 (1980)
[111] *Ibid*.
[112] *Ibid*., 1125

this argument has evolved over time, and sets the stage for my suggestion of a better approach to the definitional argument.

C. Recent Same-Sex Marriage Litigation (1990-2010) and the State of Same-Sex Marriage Today

This section provides an overview of same-sex marriage litigation between 1990 and 2010 and context for the debate by explaining the state of same-sex marriage today. In recent court opinions regarding same-sex marriage, those same race-based interpretations that were present in the first wave of litigation and court opinions have been used again. However, unlike in the first wave when courts rejected petitioners' reliance on cases like *Loving* and *Perez* as precedent to legalize same-sex marriage, many of these recent opinions have accepted racial arguments to advance same-sex marriage. This section also looks at two cases central to the gay rights movement that do not explicitly involve marriage, but that highlight the importance of due process and equal protection arguments to both LGBT rights and same-sex marriage debates. This final section of chapter I serves to introduce my examination of the use of race-based interpretations of due process and equal protection in same-sex marriage litigation by LGBT advocates, in order to see how these racial arguments have been employed in case briefs and how these arguments can be further improved.

Hawaii was the first state in which a court ruled in favor of same-sex marriage. The Hawaii Supreme Court ruled in its 1993 opinion *Baehr v. Lewin*[113] that the state's refusal to grant marriage licenses to same-sex couples was discriminatory. The Court found that this practice violated the equal protection clause of the Hawaii constitution based on gender discrimination, and that classifications by gender are subject to strict scrutiny under the Hawaii constitution. Thus, the statute in question was presumed to be unconstitutional "unless Lewin, as an agent of

[113] 74 Haw. 530 (1993)

the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights."[114] Lewin argued that the appellants could form a marriage not because of state-sanctioned discrimination that may violate the equal protection clause, but because "of their biologic inability as a couple to satisfy the definition of the status to which they aspire,"[115] a position that the Court rejected as "circular and unpersuasive."[116] Lewin relied primarily upon four court decisions to support his argument: *Baker v. Nelson*, *Jones v. Hallahan*, *Singer v. Hara*, and *De Santo v. Barnsley*.[117] The Hawaii Court rejected his use of these opinions. In *Baker*, the Minnesota court ruled that current state statutes did not authorize same-sex marriage, which the Hawaii Court also found, and that the United States constitution was not violated. "Apparently, no state constitutional questions were raised and none were addressed,"[118] observed the Hawaii Court; thus, *Baker* was distinguishable from *Baehr*. Similarly, it found *De Santo* to be distinguishable from *Baehr*, as *De Santo* "held only that common law same-sex marriage did not exist in Pennsylvania, a result irrelevant to the present case."[119] The appellants in *De Santo* did claim a violation of equal rights under Pennsylvania's Equal Rights Amendment, but this was denied by the appellate court because the issue had not been raised in the trial court. In *Jones*, the Hawaii court found it significant that "the appellants' equal protection rights—federal or state—were not asserted in Jones, and, accordingly, the appeals court was relieved of the necessity of addressing and attempting to distinguish the

[114] *Ibid*., 580
[115] *Ibid*., 565 (citing *Lewin*'s answering brief at 21)
[116] *Ibid*., 565
[117] 328 Pa. Super. 181 (1984)
[118] *Baehr*, at 565
[119] *Ibid*., at 566

decision of the United States Supreme Court in *Loving*."[120] The Hawaii Court found the Loving opinion to be vital to the same-sex marriage issue, stating the following:

> The facts in *Loving* and the respective reasoning of the Virginia courts, on the one hand, and the United States Supreme Court, on the other, both discredit the reasoning of Jones and unmask the tautological and circular nature of Lewin's argument that HRS § 572-1 does not implicate article I, section 5 of the Hawaii Constitution because same sex marriage is an innate impossibility. Analogously to Lewin's argument and the rationale of the *Jones* court, the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, and, in effect, because it had theretofore never been the "custom" of the state to recognize mixed marriages, marriage "always" having been construed to presuppose a different configuration. … [T]rial judges are [not] the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.[121]

In *Singer v. Hara*, the Washington appellate court did not dispute that the Fourteenth Amendment's Equal Protection Clause required strict judicial scrutiny for sex discrimination. However, it still did not declare Washington's anti-miscegenation laws unconstitutional based on the same reasoning in *Jones*, that the nature of marriage excluded same-sex couples from the institution. The Hawaii Court "reject[ed] this exercise in tortured and conclusory sophistry."[122]

While finding that Hawaii's refusal to grant marriage licenses to same-sex couples violated the state's Equal Protection Clause, the Court rejected the appellants' due process claim that they have a right to same-sex marriage:

> We do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.[123]

Although it rejected the due process claim, the Court vacated the decision of the circuit court and remanded the case, ordering that "in accordance with the 'strict scrutiny' standard, the burden will rest on Lewin to overcome the presumption that HRS § 572-1 is unconstitutional by

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[120] *Ibid*., at 567
[121] *Ibid*., at 569-570
[122] *Ibid*., at 571
[123] *Ibid*., 556-557

demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights."[124] In *Baehr v. Miike*[125] the Hawaii Court again ruled on this issue, declaring that the defendant was unable to prove that there was a compelling state interest behind his refusal to issue marriage licenses to same-sex couples, and that therefore his refusal was unconstitutional. In 1998, however, Hawaii voters approved a state constitutional amendment that gave the Hawaii legislature the power to ban same-sex marriage, and the legislature passed a bill that did so.

In 1996, Congress passed and President Bill Clinton signed into law the Defense of Marriage Act,[126] which stated that no state would be required to legally recognize a same-sex marriage that was performed in another state, and that the federal government defined marriage as the union of one man and one woman. It is interesting to note that President Clinton, who in 1996 declared himself opposed to the legalization of same-sex marriage,[127] appears to have changed his opinion on this issue based on recent remarks in 2009.[128] President Barack Obama's 2008 campaign platform included a full repeal of the Defense of Marriage Act,[129] but the Justice Department filed an amicus brief supporting the constitutionality of DOMA in 2009.[130] The Justice Department stated that it was merely continuing its standard practice of defending existing law.[131] President Obama did actively campaign on the pledge to end the military's

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[124] *Ibid*., 583
[125] 80 Haw. 341 (1996)
[126] Defense of Marriage Act, H.R. 3396 (1996)
[127] Clinton, Bill, interview by J. Jennings Moss. *The Advocate* (June 25, 1996): http://web.archive.org/web/20050208184130/http://www.advocate.com/html/stories/824/824_clinton_710.asp.
[128] Tracey, Michael. "Bill Clinton Backs Same-Sex Marriage ." *The Nation.* July 14, 2009. http://www.thenation.com/doc/20090720/tracey (accessed February 15, 2010). See also
[129] Obama for America. "Barack Obama Supports the LGBT Community." *BarackObama.Com.* 2008. http://www.barackobama.com/pdf/lgbt.pdf (accessed February 15, 2010).
[130] *Smelt v. United States of America,* Case No. SACV09-00286, Defendants' Motion to Dismiss and Memorandum of Points and Authorities in Support Thereof (June 11, 2009).
[131] Deutch, Linda, and Lisa Leff. "Obama Admin Moves to Dismiss Defense of Marriage Act Challenge." *Huffington Post.* June 12, 2009. http://www.huffingtonpost.com/2009/06/12/obama-defends-antigay-def_n_214764.html (accessed February 15, 2010).

"Don't Ask, Don't Tell," policy, and in his State of the Union Address on January 27, 2010, he announced that he would work with Congress and the military during 2010 to "finally repeal the law that denies gay Americans the right to serve the country they love because of who they are."[132]

Two recent U.S. Supreme Court cases that do not deal explicitly with same-sex marriage but have been influential in several recent state court opinions regarding same-sex marriage include *Romer v. Evans*[133] and *Lawrence v. Texas*.[134] In *Romer*, the Court used an equal protection argument to strike down an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination. Justice Kennedy, writing for the majority, concluded that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do…Amendment 2 violates the Equal Protection Clause."[135] Amendment 2, he wrote, was a "status-based enactment" which had no "relationship to legitimate state interests," and was "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."[136] The state argued that Amendment 2 put gays and lesbians in the same position as all other citizens because it "does no more than deny homosexuals special rights."[137] The Court rejected this argument and found that the amendment actually "imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint."[138] The Court also found that Amendment 2 failed rational basis review because it "impos[ed] a broad and

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[132] Obama, Barack. "2010 State of the Union Address." Washington, D.C., January 27, 2010. http://stateoftheunionaddress.org/2010-barack-obama.
[133] 517 U.S. 620 (1996)
[134] 539 U.S. 558 (2003)
[135] *Romer*, at 635
[136] *Ibid.*
[137] *Ibid.*, at 626
[138] *Ibid.*, at 631

undifferentiated disability on a single named group, [which was] an…invalid form of legislation," and because it "lack[ed] a rational relationship to legitimate state interests."[139]

In *Lawrence*, Justice Kennedy used a due process argument to strike down a Texas law that banned sodomy between two males, while Justice O'Connor, in concurring, argued that the Fourteenth Amendment's Equal Protection Clause should be controlling instead of the substantive component of the Due Process Clause. Justice Kennedy's opinion found an individual liberty and privacy interest, stemming from substantive due process, to engage in private conduct. In overruling *Bowers v. Hardwick*,[140] the Court relied on Justice Stevens' dissenting opinion in Bowers and argued that his opinion should be controlling here:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.[141]

Justice O'Connor noted in her concurring opinion that the Texas laws made sodomy a crime only if the participants engaging in sodomy were of the same sex, while sodomy between opposite sex partners was not a crime. Thus, "Texas treats the same conduct differently based solely on the participants," and "those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in [sodomy]." This law, she argued, "makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction."[142] Texas argued that this discrimination served a legitimate state interest in promoting morality. But Justice O'Connor rejected this argument, stating that "moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection

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[139] *Ibid*, at 632
[140] 478 U.S. 186 (1986)
[141] *Lawrence*, at 577-578 (citing *Bowers*, Justice Stevens dissenting, at 216)
[142] *Ibid*., at 581

Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law."[143] She found no legitimate state interest in a law that distinguished between heterosexuals and homosexuals as applied to private, consensual conduct, and thus concluded that it failed rational basis review. She added that her opinion did not mean "other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review;" marriage laws, for instance, that distinguished between heterosexuals and homosexuals had other reasons to be upheld "beyond mere moral disapproval of an excluded group."[144]

The first state to legalize same-sex marriage was Massachusetts in 2003, following the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*.[145] The California Supreme Court struck down a statewide ban on same-sex marriage in 2008 in *In Re Marriage Cases*[146] based on an equal protection and due process analysis and strict scrutiny, but California voters passed Proposition Eight on Election Day 2008, which established a state constitutional amendment banning same-sex marriage. Also in 2008, the Connecticut Supreme Court declared a statewide ban on same-sex marriage unconstitutional through equal protection and due process analysis based on intermediate scrutiny in *Kerrigan v. Commissioner of Public Health*.[147] The Iowa Supreme Court in the 2009 case *Varnum v. Brien*[148] ruled that barring same-sex marriage violates the Equal Protection Clause of the state's constitution; like the Connecticut Supreme Court, it employed intermediate scrutiny to arrive at its opinion. In the same month that *Varnum* was decided, the Vermont legislature overrode the governor's veto of a

[143] *Ibid*., at 583
[144] *Ibid*., at 585
[145] 440 Mass. 309 (2003)
[146] 43 Cal. 4th (2008)
[147] 289 Conn. 135 (2008)
[148] 763 N.W.2d 862 (2009)

bill that legalized same-sex marriage. In May 2009, the Maine legislature passed and the governor signed into law a bill that legalized same-sex marriage, but Maine voters voted to repeal the law on Election Day 2009. In June 2009, the New Hampshire legislature passed and the governor signed into law a bill that legalized same-sex marriage.

As of May 2010, same-sex marriage is legal in and granted by five states: Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire. 30 states have passed constitutional amendments banning same-sex marriage, and twelve states have statutes that prohibit same-sex marriage. New York, Rhode Island, and New Mexico all do not allow same-sex marriage, but have no specific prohibition of such a marriage. New York recognizes same-sex marriages performed in other countries. Several states that prohibit same-sex marriage by either statute or constitutional amendment also allow same-sex civil unions that grant rights similar to marriage or some form of limited rights.

We will see many of these arguments used in interracial marriage litigation and past same-sex marriage litigation in our examination of the case briefs in *Goodridge* and *Kerrigan*; Indeed, modern due process and equal protection claims in same-sex marriage litigation originally emerged in debates over interracial marriage that eventually resulted in *Loving v. Virginia*. By first discussing these past cases, we will find a sort of historical evolution between how specific racial arguments were treated in the past and how they have been used in more recent cases. And an exploration of cases like *Perez* and *Loving* will allow us to more fully understand how and why same-sex marriage advocates employ a racial interpretation of due process and equal protection in same-sex marriage litigation. The literature review, which I present next, explores the scholarly treatment of these historical race-based debates as applied to LGBT marriage litigation, and sets the stage for the main focus of this project.

II. LITERATURE REVIEW

The existing scholarly literature on the use of race in the same-sex marriage legal debate fails to examine case briefs, and mostly relies on court opinions and the general similarities and differences between interracial marriage arguments and same-sex marriage arguments. But there is no discussion of how LGBT advocates have actually employed racial arguments in same-sex marriage cases, specifically in the briefs, and that is how I intend to contribute to the literature.

An examination of the existing scholarly literature reveals a broad range of perspectives concerning the use of a racial interpretation of the Fourteenth Amendment's Equal Protection and Due Process clauses to advance same-sex marriage litigation. Although the literature varies greatly, three major and distinct arguments are evident. One school of thought supports the use of a racial interpretation of Fourteenth Amendment clauses to advance same-sex marriage litigation, while a second perspective argues that a racial interpretation as applied to same-sex marriage litigation is an invalid legal analogy and thus should not be accepted by courts. A third argument rests on a critique of marriage from within the queer community, which consists of the belief that using a racial analogy to promote the legalization of same-sex marriage is a poor strategy because a racial comparison reinforces the stereotype of gays as white, affluent, and a politically powerful minority. The scholars that comprise this third argument disagree over whether and when an allusion to racial civil rights issues should be used to promote same-sex marriage litigation, but they agree that this racial comparison is potentially harmful to the gay rights and same-sex marriage movements as it imposes certain risks. As I have mentioned, the literature surrounding this issue focuses on court decisions and elements of similarity between racial minorities and sexual orientation minorities, with little discussion of how same-sex

marriage activists actually employ racial elements in their arguments. But I will outline the three major perspectives in the existing literature, because these perspectives will be important in my examination of case briefs later on when I look to see how these arguments have been used in the briefs. I also explore the importance of case briefs in the American legal system; this is vital to my project, as its major contribution to the scholarly literature is an examination of racial approaches to same-sex marriage litigation through case briefs. Lastly, I provide the project methodology, in which I explain specifically how I will undergo the project and contribute to the existing scholarly literature.

A. A Racial Interpretation of the Fourteenth Amendment as Applied to Same-Sex Marriage Litigation Provides an Appropriate Model

The literature that supports a racial interpretation of the Equal Protection and Due Process clauses as appropriate precedent to advance same-sex marriage litigation relies on *Loving v. Virginia*. These scholars find that the use of the Equal Protection Clause in *Loving* for the purpose of rejecting racial discrimination is an appropriate legal model for same-sex marriage cases for the purpose of rejecting discrimination on the basis of gender and sexual orientation. They contend that race and sexual orientation (and thus miscegenation and same-sex marriage) are similar enough as characteristics of minority groups to be legally comparable, and therefore the legalization of interracial marriage is appropriate precedent for the legalization of same-sex marriage. Several of these scholars argue that the Equal Protection and Due Process arguments in *Romer v. Evans* and *Lawrence v. Texas* also provide precedent for same-sex marriage litigation.

Trosino finds that and miscegenation same-sex marriage can and should be compared.[149] In comparing interracial marriage to same-sex marriage, the he notes that gay couples face similar legal obstacles to those faced by interracial couples in the 1960s. He finds that arguments supporting prohibitions on interracial and gay marriage are unfounded, and outlines these arguments: those against the legalization of interracial marriage include white supremacy, the protection and sanctity of white womanhood, the prevention of mixed-race offspring, and a feared loss of political power and sexual power over white women. Those arguments against the legalization of same-sex marriage include the beliefs that homosexuality is unnatural, same-sex marriage would encourage homosexuality, and same-sex marriage provides a confusing environment in which to raise children. All of these arguments against same-sex marriage, argues Trosino, are based on the beliefs that homosexuality is wrong and that heterosexuality is superior to homosexuality. He concludes that many of the arguments against miscegenation and same-sex marriage are "strikingly similar",[150] and that the courts should legalize same-sex marriage based in large part on the legal history of interracial marriage. Although Trosino focuses on the social dimension of this issue in examining the similarities of these arguments, the similarities exposed set the framework for an equal protection argument. These arguments help to show that gays and lesbians can be considered a "discrete or insular minority" on the basis of sexual orientation with a history of discrimination and relative political powerlessness, just as blacks are a discrete or insular minority on the basis of race because of their history of discrimination and political powerlessness. These aspects of both minority groups are part of the criteria for a suspect class under equal protection claims.

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[149] Trosino, James. "American Wedding: Same-Sex Marriage and the Miscegenation Analogy." *Boston University Law Review 73*, January 1993: 93-120.
[150] *Ibid.,* 120

Eskridge calls the similarities in the prohibitions against interracial and same-sex marriage "clear. Virginia and other states relied on precisely the same definitional (marriage has never included different-race couples), morality-based (God ordained this), and pragmatic (people would be upset) arguments to prohibit different-race marriages that states now invoke to prohibit same-sex marriages."[151] White supremacy is the ideology that underlay interracial marriage prohibitions just as homophobia is the ideology that underlies same-sex marriage prohibitions, and both ideologies "rest upon hate and fear."[152] Eskridge argues that same-sex marriage can be legalized based on the Equal Protection argument in *Loving*. Because the prohibition against same-sex marriage is a facial gender classification, he argues, it triggers heightened scrutiny just as the racial classification did in *Loving*. This gender classification cannot survive intermediate scrutiny because the "[state] justifications for prohibiting same-sex marriage rest upon an ideology of homophobia and rigid gender stereotypes."[153] Eskridge states that this prohibition may also deprive people of a fundamental right to marry under the Due Process clause, although he admits that *Loving* is primarily an Equal Protection argument with a very brief Due Process statement at the end; arguing for the legalization of same-sex marriage based on the Due Process argument in *Loving* alone is difficult.

Opponents of same-sex marriage often argue that marriage is traditionally defined as a union of one man and one woman; indeed, early same-sex marriage litigation efforts resulted in court decisions that rejected the use of *Loving* as precedent based on this "traditional definition" argument. Eskridge also attempts to show that historically, marriage has not always been defined in this way and that same-sex unions have had significance in many cultures. Through a detailed compilation of the history of marriage in many cultures and periods of world history, he finds

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[151] Eskridge, William N. Jr. "A History of Same-Sex Marriage." *Virginia Law Review 79*, 1993: 1419, 1507.
[152] *Ibid*., 1507
[153] *Ibid*., 1507-1508

that same-sex unions have been a "valuable human institution for most of human history and in most known cultures."[154] The claim that the traditional definition of marriage is a union of one man and one woman is an important argument to counter for advocates of interracial marriage as a model for same-sex marriage litigation; if marriage truly is defined as a union of one man and one woman, then it becomes much easier to argue that the *Loving* decision should have little impact on same-sex marriage. The legalization of marriage between two persons of different races would not change the definition of marriage from a union of two persons of opposite gender to a union of two persons regardless of gender. This definitional argument also exposes another similarity in the arguments against both interracial marriage and same-sex marriage: opponents of interracial marriage argued that marriage was traditionally intended for same-race couples and many courts used biblical citations to support this argument, just as opponents of same-sex marriage argue that marriage was traditionally intended for opposite-sex couples and cite bible verses and religion beliefs to support their argument.

In a later article, Eskridge builds upon his earlier arguments.[155] He argues that the reasons underlying the "analytically weak" arguments against gay marriage are cultural rather than logical or analytical. "The arguments are so weak that they smack of prejudice more than reason, and their appeal is certainly strong among homophobes,"[156] he writes. He discusses the definitional argument, the defense of marriage argument, and the stamp of approval argument which includes the argument that gay marriage will promote homosexuality in children. In analyzing several court opinions starting with *Loving* and citing *Baehr v. Lewin*, *Zablocki v.*

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[154] Eskridge, William N. Jr. "A History of Same-Sex Marriage." *Virginia Law Review 79*, 1993: 1419, 1422.
[155] Eskridge, William N. Jr. "Three Cultural Anxieties Undermining the Case for Same-Sex Marriage" *Temple Political and Civil Rights Law Review* 7 (1997-1998), 307.
[156] *Ibid*., 310-311

Redhail, and *Turner v. Safley*, he attempts to show that legal precedent allows for the legalization of same-sex marriage because the courts have applied strict scrutiny to marriage cases.

More recent scholarship has examined the Supreme Court's rulings in *Romer* and *Lawrence* and their implications for same-sex marriage legalization. Emond argues that the equal protection analysis employed by Justice Sandra Day O'Connor in her *Lawrence v. Texas* concurrence, if applied in the same way to a law barring same-sex marriage, would render the law unconstitutional.[157] The analysis used by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*,[158] he argues, is "very similar to the searching form of rational review that Justice O'Connor suggested in *Lawrence*."[159] Reinheimer, in an attempt to develop a substantive, gender-conscious approach to same-sex marriage grounded in equal protection doctrine, finds that "the proscription of same-sex marriage operates to maintain unconstitutional gender inequality to the detriment not only of LGBTQ…persons, but also of women as a group."[160] He discusses extending the *Loving* analogy to fully incorporate its use of equal protection into same-sex marriage cases, and concludes that applying the race-based equal protection argument in Loving to same-sex marriage litigation shows that because same-sex marriage prohibitions discriminate on the basis of sex, they are subject to intermediate scrutiny under the Equal Protection Doctrine. In a later article, Reinheimer extends his discussion of *Loving*'s Equal Protection argument and its application to same-sex marriage litigation to include *Lawrence*. He argues that the miscegenation analogy is "both compelling and appropriate in the

[157] Emond, Robert. "Does the Equal Protection Analysis in Lawrence Make Bans on Same-Sex Marriage Unconstitutional?" *Thomas Jefferson Law Review*, 2004: 447.
[158] *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003).
[159] Emond, 447.
[160] Reinheimer, Justin. "Same-Sex Marriage Through the Equal Protection Clause: A Gender Conscious Analysis." *Berkeley Journal of Gender, Law & Justice*, 2006: 213.

context of sodomy statutes."[161] He argues that the due process analysis employed in *Lawrence* that focused on an individual liberty and privacy interest, although used so that legislatures could not amend the law to simply apply to all persons and thus making it constitutional, actually blunts the movement for same-sex marriage and poses dangers like increased sexual abuse. Indeed, *Lawrence* has received attention in recent court opinions about same-sex marriage, but the courts have hardly relied upon it in declaring that equal rights in the form of civil unions or marriage must be applied to same-sex couples. Justice O'Connor's concurrence in *Lawrence* also ignores the facial sex discrimination, notes Reinheimer, and focuses on discrimination based on sexual orientation. He advocates for a different equality approach to *Lawrence* that, he argues, will pave the way toward same-sex marriage. The equality approach he suggests is a sex equality approach derived from the court's reasoning in *Loving*, which rejected the equal application theory as part of the "separate but equal" doctrine: "Just as it was clear to the *Loving* Court that it was sophistry to claim an anti-miscegenation law constituted equal treatment, so a few courts have found that same-sex marriage prohibitions do in fact discriminate on the basis of sex."[162] *Loving* was also about sex discrimination, he argues, because anti-miscegenation laws served to reinforce gender stereotypes in relationships by preserving white womanhood: "[white men] were…concerned about black men having sex with white women, and losing their own sexual access to black women."[163] By applying the equal protection analysis from *Loving* to *Lawrence*, *Lawrence* becomes a major force in the movement to legalize same-sex marriage.

Polk argues that Montana's marriage amendment that banned same-sex marriage is unconstitutional based on both the equal protection analysis in *Romer* and the due process

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[161] Reinheimer, Justin. "What Lawrence Should Have Said: Reconstructing an Equality Approach." *California Law Review* 96 (April 2008): 505.
[162] *Ibid.*, 544
[163] *Ibid.*, 540

analysis in *Lawrence*.[164] If the Supreme Court's analysis and decisions in *Romer* and *Lawrence* are applied to the Montana marriage amendment, she writes, the amendment should be found unconstitutional. Barrett discusses the importance that recent state court decisions have placed on children of same-sex couples, and analyzes this as a new approach to legalizing same-sex marriage.[165] He argues that only recently, the same-sex marriage debate has evolved into a debate that centers not only on the rights of the couple in a same-sex relationship, but also on the rights of the children who live with the couple. Barrett "advance[s] the possibility that this repeated deference to…the child, will open up a challenge to anti-gay marriage laws and constitutional amendments that has not previously been considered: an Equal Protection challenge based on a child's right to presumed legitimacy at birth."[166]

There has also been a great deal of scholarship on civil unions, namely whether civil unions for same-sex couples would satisfy an equal protection claim by providing similar legal rights to same-sex relationships as is provided to heterosexual marriages, or if the term "marriage" must be applied to guarantee equal protection under the law.[167] This literature often touches on the notion that civil unions are "separate but equal," which draws comparison to the landmark racial segregation case *Brown v. Board of Education*.[168] Yan argues that the New Jersey constitution's equal protection clause requires recognition of same-sex marriage.[169] He critiques the New Jersey Supreme Court's opinion in *Lewis v. Harris*,[170] in which the court held

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[164] Polk, Lisa M. "Montana's Marriage Amendment: Unconstitutionally Denying a Fundamental Right." *Montana Law Review* 66 (2005): 405.
[165] Barrett, S.J. "For the Sake of the Children: A New Approach to Securing Same-Sex Marriage Rights?" *Brooklyn Law Review* 73 (2008): 695.
[166] *Ibid*., 696-697
[167] See Isaak, Misha. "'What's in a Name?': Civil Unions and the Constitutional Significance of 'Marriage'." *University of Pennsylvania Journal of Constitutional Law* 10 (March 2008): 607.
[168] *Brown v. Board of Education*, 347 U.S. 483 (1954)
[169] Yan, Matthew K. ""What's in a Name?": Why the New Jersey Equal Protection Guarantee Requires Full Recognition of Same-Sex Marriage." *Boston University Public Interest Law Journal*, 2007: 179.
[170] *Lewis v. Harris*, 188 NJ 415 (2006).

that the state constitution required committed same-sex couples to receive the same statutory rights as married couples, and asserts that a proper application of New Jersey equal protection case law would have guaranteed full marriage rights to same-sex couples under the New Jersey constitution. Howenstine provides another discussion of civil unions and the equal protection clause,[171] arguing that Romer advances gay rights and civil unions for same-sex couples but not necessarily marriage. His argument is that because Class I anti-gay partnership laws (which bar any and all same-sex partnership rights) demonstrate a desire to harm a politically unpopular group (gays), these laws are subject to heightened rational basis review like the type of review employed in *Romer v. Evans*. Howenstine writes that these laws are invalid under a more searching form of rational basis review because "their expansive scope exceeds any rational relation to legitimate governmental interests in marriage and the family."[172] Additionally, he argues, class II anti-gay partnership laws which are more narrowly tailored to prohibit only comprehensive partnership benefits like marriage, "more closely approximate the disputed interests underlying the decision to bar same-sex couples from marrying."[173] The literature on civil unions is particularly important to the Connecticut same-sex marriage case, *Kerrigan v. Commissioner of Public Health*, because same-sex civil unions had already been legalized by the Connecticut state legislature at the time the case was argued. *Kerrigan*, then, was essentially a debate over whether civil unions satisfied the plaintiffs' equal protection and due process claims. The scholarship that advocates using a racial interpretation of the Fourteenth Amendment as was used in *Loving* to advance same-sex marriage litigation focuses on the Equal Protection clause; although a few scholars include a due process argument, it is always coupled with a more

[171] Howenstine, David W. "Beyond Rational Relations: The Constitutional Infirmities of Anti-Gay Partnership Laws Under the Equal Protection Clause." *Washington Law Review*, 2006: 417.
[172] *Ibid*., 419
[173] *Ibid*., 419-420

confident Equal Protection argument. These scholars also reject the usefulness of *Lawrence* in advancing same-sex marriage litigation, often arguing that Justice O'Connor's concurrence or a variation of her concurrence would be more useful than would Justice Kennedy's opinion. However, in many ways, this focus on Equal Protection reflects *Loving*, which relied mostly upon an Equal Protection argument and in which the inclusion of a Due Process argument at the end appears as a mere side note to the rest of the opinion. These scholars agree that the core component of Loving, the Equal Protection argument, provides an appropriate legal model for same-sex marriage legalization, and encounter no problems with a racial interpretation of the Equal Protection clause as applied to same-sex marriage.

B. A Racial Interpretation of the Fourteenth Amendment is Not an Appropriate Model for Same-Sex Marriage Litigation

Another school of thought argues that interracial marriage and same-sex marriage are not similar and are not legally comparable; these scholars assert that *Loving* is not appropriate precedent for same-sex marriage litigation today, and that the Warren Court's decision in *Loving* does not logically impel the legalization of same-sex marriage. Although the number of scholars in this camp is small compared to the number who find compelling legal similarities between *Loving* and same-sex marriage litigation, the literature in this area is focused and persuasive. Using two main arguments, this literature counters constitutional claims for the legalization of same-sex marriage, and argues that major differences exist between mixed-race and same-sex marriage.

Wardle counters the two main constitutional claims for the legalization of same-sex marriage, the substantive due process claim and the equal protection claim.[174] She argues that there is no fundamental right to same-sex marriage; the constitutionally recognized fundamental right to marriage, she writes, does not apply to same-sex couples based on history, experience, precedent, and the fact that the nature and meaning of marriage is exclusively heterosexual. Furthermore, she argues that the constitutional zone of privacy does not extend to same-sex marriage. In countering the equal protection claim for same-sex marriage, she states that these arguments are flawed. She bases this assertion on a lack of scientific evidence that shows that homosexual behavior is immutable and that biological immutability would not advance this claim anyway. She also argues that both race and homosexual behavior and gender and homosexual behavior are not equivalent legal categories, and rejects the *Loving* analogy. She attempts to show that homosexual couples are not a discrete and insular minority, and concludes that "no sound basis exists for constitutionalizing the same-sex marriage issue, either in fundamental rights doctrine or in equal protection doctrine."[175] By eliminating the constitutional issues, Wardle aims to encourage more debate on the policy issues and arguments surrounding same-sex marriage.

Wilkins also counters the two major constitutional claims for same-sex marriage.[176] While acknowledging that most literature on this topic finds that laws giving preference to heterosexual marriage are irrational and subject to strict scrutiny, Wilkins argues the following:

> With due respect, and knowing that the opinion expressed in this essay is in the decided academic minority, the current consensus is seriously flawed…Laws preferring heterosexual marriage are not subject to strict scrutiny. Statutory and other legal preferences for heterosexual marriage do not intrude upon a fundamental right nor are they based on a suspect classification. Moreover, even if strict scrutiny is invoked, marriage survives judicial analysis

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[174] Wardle, Lynn D. "A Critical Analysis of Constitutional Claims for Same-Sex Marriage." *Brigham Young University Law Review* 1996 (1996): 1.
[175] *Ibid*., 5
[176] Wilkins, Richard G. "The Constitutionality of Legal Preferences for Heterosexual Marriage." *Regent University Law Review* 16 (2003-2004): 121.

because it furthers the most imperative of all governmental interests: "the very existence and survival of the human race." Current statutory and other legal preferences for heterosexual marriage, therefore, are plainly constitutional.[177]

Other opponents of the use of *Loving* as precedent for same-sex marriage litigation engage the social dimension in arguing that there are major differences between mixed race and same-sex couples. Coolidge argues that using the *Loving*/same-sex marriage analogy to support the legalization of same-sex marriage is primarily a political use rather than a legitimate legal argument, and therefore should have no basis in the legal debate surrounding gay marriage. He writes that when proponents of same-sex marriage use the *Loving* analogy to support their cause, they are playing "'the race card' of the marriage debate" (201). The author lays out several "problems" (217) with this analogy; these problems with the analogy show that the two issues and cases are "fundamentally different" (217). He focuses on the *Loving* and *Baehr* cases, and notes several differences between these two cases. First, the contrast between Virginia's and Hawaii's laws, specifically cohabitation laws; interracial couples were forbidden to cohabit in Virginia, while in Hawaii same-sex couples were free to cohabit, make private contractual promises, and receive institutional recognition.[178] Second, Coolidge compares the two states: while the state of Virginia was a "hotbed of racial polarization,"[179] Hawaii "is hardly a hotbed of anti-gay sentiment."[180] Looking at the specific marriage laws in each state, Coolidge finds that Virginia's anti-miscegenation laws stemmed from slavery and a "zealous campaign…aimed at 'improving' society."[181] If a black person and white person married, it was considered a felony.

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[177] *Ibid*., 125 (internal quotation omitted)
[178] Coolidge, David Orgon. "Law and the Politics of Marriage: Loving v. Virginia After Thirty Years: Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy." *Brigham Young University Journal of Public Law 12*, 1998: 201.
[179] *Ibid*., 217
[180] *Ibid*., 218
[181] *Ibid*., 219

Hawaii's marriage law, however, is "positive, not prohibitory"[182] in that it "imposes no penalties or other sanctions upon them…[R]elationships are not disturbed…by the law."[183] There were other states in which the Lovings could marry, but same-sex couples could not marry in any state when *Baehr* was heard. Coolidge argues that while southern anti-miscegenation laws ran counter to the "Western tradition of marriage law,"[184] the *Baehr* decision ran counter to this tradition; the traditional definition of marriage as a union between one man and one woman is again important. Yet another difference is the disagreement over the pursuit of legal marriage within the gay community; there was little disagreement during *Loving* among the African-American community. In *Baehr*, the plaintiffs created a huge public education campaign than ever existed during *Loving* to teach the public about their cause, and *Baehr* occurred at the beginning of a legal revolution while *Loving* was "the end of a process of constitutional and popular deliberation stretching over decades."[185] Many gay and lesbian legal advocates were surprised by the *Baehr* decision; Lambda Legal did not join the plaintiffs until after the 1993 decision, as it exercised caution, as did other groups, in which cases it litigated and where as a matter of strategy. Although there was considerable public attention given to the *Loving* decision, the court's ruling was somewhat expected: "The ruling…is important from the historical standpoint, but few observers had entertained any serious doubts as to what the court would do on the issue... The decision was in line with many others on racial matters that have been handed down in recent years."[186] Coolidge also examines amicus briefs from the Japanese-American Citizens League and the Roman Catholic Church, which each submitted briefs in both the *Loving* and *Baehr* cases; both groups supported interracial marriage, but they disagreed on *Baehr*. A theme

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[182] *Ibid*., 219
[183] *Ibid*., 219
[184] *Ibid*., 220
[185] *Ibid*., 226
[186] *Ibid*., note 101 (citing "A Day in Court," *Richmond Times-Dispatch*, June 13, 1967, at A12).

of Coolidge's article is the argument that those who support the *Loving* analogy seek to undermine democracy by subverting the majority will of the people. He also refers to slavery and employs the argument that the oppression of black minorities was much more severe than the oppression of gays ever was.

Wagner argues that anti-miscegenation laws were mostly viewed as racial laws rather than marriage laws and should not influence the current legal debate over same-sex marriage.[187] In arriving at this conclusion, Wagner employs an imaginary analogy between banking law and marriage law to show that "the correctness of *Loving v. Virginia* does not logically compel the correctness of *Goodridge v. Department of Public Health*".[188] This analogy, he writes, is based on "the claim that sexual difference is no more relevant to the nature and purpose of marriage than is racial sameness,"[189] and that using *Loving* as a model for same-sex marriage litigation would be "socially disastrous".[190]

The scholars that disagree that a racial interpretation of the Equal Protection and Due Process clauses should influence same-sex marriage litigation employ the definitional argument and avoid core constitutional issues by focusing on differences between *Loving* and same-sex marriage cases, and racial minorities and sexual minorities. They also appeal to outdated beliefs about the purpose of marriage in arguing that marriage is essential to the survival of the human race because of its reproductive benefits.

C. The Dangers of a Racial Analogy

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[187] Wagner, David M. "Marriage and Banking: Examining Miscegenation Laws to Test the Proposition that Loving v. Virginia Leads to Goodridge v. Department of Public Health" *Florida Coastal Law Review* 7 (Fall 2005), 389.
[188] *Ibid*., 390
[189] *Ibid*.
[190] *Ibid*., 420

Perhaps the most interesting perspective on the interracial/same-sex marriage analogy comes from Law and Society literature and gay rights activists and queer theorists who oppose legalizing marriage for same-sex couples for a variety of reasons. The arguments here rest on the belief that this racial analogy would do more harm than good for the gay rights movement, and this belief has enormous implications for the application of a racial interpretation of the Equal Protection and Due Process clauses to same-sex marriage litigation. It must be noted that these scholars do not specifically answer the question of whether the racial interpretation in Loving can or should be applied to same-sex marriage litigation; rather, their discussion of the interconnections, or non-interconnections, between minorities with differing characteristics like race and sexual orientation reveal possible limitations to using racial cases like *Loving* as precedent for same-sex marriage litigation.

Foster questions the rise of legal marriage to the top of the gay rights agenda.[191] She argues that this increased push for same-sex marriage has nothing to do with the materialism of marriage; rather, it lies in the symbolism of marriage as an institution. She examines the importance of the symbolism of marriage through the lens of Critical Race Theory and previous civil rights struggles of other oppressed groups and states the importance of particular strategies at specific points in a group's civil rights struggle. Foster asks who will benefit from the legalization of gay marriage and what the overall costs will be for the movement, and poses the possibility that the gay rights movement may eventually make the same mistakes the African-American and feminist rights movements made in that they favored strategies that would achieve rights largely affecting privileged members of that group.

[191] Foster, Sheila Rose. "The Symbolism of Rights and the Cost of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage." *Temple Political and Civil Rights Law Review 7*, 1997-1998: 319.

Kendell suggests that gays fear their own history and identity will not resonate enough with Americans, so they display imagery of the black civil rights struggle. She argues that gays should not use black civil rights analogies until white gays fight the stereotype of white/gay privilege.[192] Gays are largely displayed in popular culture as white and economically privileged, and the use of a black civil rights analogy only reinforces this view; this harms the gay rights movement overall. She alludes to Hutchinson's argument in discussing the "intersectionality of oppression,"[193] and discusses the invisibility of queers of color in the movement. She calls the depiction of the gay rights movement in popular culture "wrong" and "fundamentally counter-productive and undermining to [gay] liberation."[194] She also writes of the need to fight for equality for all, "not just for queers, and not just when it comes to the right to marry."[195]

Another aspect of literature relevant to this issue is Latino Critical theory, which began with the purpose of avoiding the "Afro-centrism" of Critical Race Theory, its initial tendency to focus on black racial issues instead of issues of other races and other oppressed peoples. Phillips discusses the initial reluctance of the Critical Race Theory Workshop to accept principles that the fight against the oppression of gays is important, and the "excruciatingly long time [it took] for the…Workshop to reflect a strong stance against heterosexism."[196] The seventh point of the Workshop's "Tenets of Critical Race Theory," first discussed in the second workshop, stated an embracement of the "larger project of liberating all oppressed people."[197] The issue for many was "whether gay men and lesbians are 'oppressed people,' and if so, whether their liberation

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[192] Kendell, Kate. "Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies." *Yale Journal of Law and Feminism 17*, 2005: 133-137.
[193] *Ibid*., 135
[194] *Ibid*., 136
[195] *Ibid*., 137
[196] Phillips, Stephanie L. "Mapping Intellectual/Political Foundation and Future Self Critical Direction: The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History." *University of Miami Law Review 53*, July 1999: 1247.
[197] *Ibid*., 1250

had anything to do with the fight against racial oppression."[198] It took eight years after the second conference when the seventh point was introduced for the Workshop to fully embrace principles that the fight against the oppression of gays and lesbians is important and that it should be "an integral part of the antiracist struggle."[199] Phillips states that Critical Race Theory Workshops now understand that "racism is inextricably linked to oppression on the bases of gender and sexuality."[200]

An important issue also discussed in Latino Critical Legal Theory is the notion of a "black/white" civil rights model, the idea that the United States civil rights model is based overwhelmingly on race and thus favors black minorities. Moran discusses how the legacy of a "Black-White model" of race relations helps to account for the limited success of Latinos and non-blacks as well as other oppressed groups in achieving civil rights.[201] The Civil Rights model is rooted in the African-American experience as a reaction to the harmful effects of slavery, whereas the Latino and non-blacks are considered "white immigrants" who were not subject to slavery and thus are ineligible for some of the same civil rights that blacks have achieved. "White" immigrants were often expected to assimilate by learning English and adopting particular American customs in order to prevent discrimination; "officials doubted that Latinos were entitled to civil rights protections because like earlier generations of White immigrants, they could achieve inclusion through acculturation and assimilation."[202] Many groups argued that "a history of disadvantage and discrimination rendered them sufficiently like Blacks to merit special protection"[203] under civil rights laws. It is this almost-forced comparison to the black

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[198] *Ibid.*
[199] *Ibid.*
[200] *Ibid.*, 1254
[201] Moran, Rachel F. "Neither Black Nor White." *Harvard Latino Law Review 2*, Fall 1997: 61-99.
[202] *Ibid.*, 71
[203] *Ibid.*, 70

experience of slavery in America to determine if groups are eligible for the civil rights model that delays many oppressed groups from achieving civil rights; almost no experience of any group in American history is comparable to the experience of slavery. In a way, the level or severity of past oppression determines the eligibility of oppressed groups to be considered for civil rights protection under the Black-White civil rights model. Moran argues that "Latinos need to build coalitions with other civil rights groups to forge effective reforms."[204] She also states that "some Latinos have questioned the normative centrality of race under the civil rights model. They have insisted on treating race as one of a number of relevant personal characteristics that shape opportunity."[205]

A similar discussion of the black/white binary can be found in the writing of Juan Perea, who explores several leading works on race to show that the black/white paradigm of race not only exists in American legal culture and society, but that it limits racial discourse and operates to exclude Latinos/as and other non-black minorities from full membership in society.[206] He defines the race paradigm as "the conception that race in America consists, either exclusively or primarily, of only two constituent racial groups, the white and the black."[207] When race scholars speak or write as though the black and white races are the only races that matter for the purposes of discussion of racial issues and solutions, they invoke this paradigm into racial discourse. Furthermore, when scholars merely acknowledge the existence of other races within a discourse that mainly focuses on the white and black races, they also invoke this paradigm because they fail to examine the distinct "voices", "histories", and "real presence"[208] of these other races. By

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[204] *Ibid*., 87
[205] *Ibid*., 88
[206] Perea, Juan F. "The Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought." *California Law Review* 85, no. 5 (October 1997): 1213.
[207] *Ibid*., 1219
[208] *Ibid*.

examining these other races, like Latinos/as, Asian-Americans, Native Americans, and others through an analogy to the black and white races or "real" races, argues, Perea argues, scholars restate the black/white paradigm of race.

Victor Romero also explores the interconnections between race and sexual orientation in the context of binational same-sex marriages and the United States Supreme Court.[209] He finds that although there are many similarities between the Lovings and same-sex couples today and progress has been made in the form of *Romer v. Evans* and *Lawrence v. Texas*, a more recent Supreme Court decision, *Rumsfeld v. Forum for Academic and Institutional Rights*,[210] may have less positive consequences for the gay rights and same-sex marriage movements. This recent case, he argues, "should give gay rights advocates pause, suggesting that race and sexual orientation may be doomed to follow separate, and hardly ever analogous, paths."[211]

The overall position of Latino Critical Legal theory appears supportive of using race and sexual orientation together to fight discrimination and to advance civil rights if the black/white binary can be bypassed. The arguments show numerous interconnections between various oppressed identities and that by working together, these different oppressed groups could more easily achieve civil rights for all. The difficulty, of course, is getting past this Black/White model of civil rights discourse that currently restricts the ability of non-black and non-racial minorities in achieving civil rights.

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[209] Romero, Victor C. (2010). Loving Across the Miles: Binational Same-Sex Marriages and the Supreme Court. In e. K. Maillard & R. Cuison Villazor, *Loving in a Post-Racial World: Rethinking Race, Sex, and Marriage.* Cambridge University Press.
[210] *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006)
[211] Romero, Victor C. (2010). Loving Across the Miles: Binational Same-Sex Marriages and the Supreme Court. In e. K. Maillard & R. Cuison Villazor, *Loving in a Post-Racial World: Rethinking Race, Sex, and Marriage.* Cambridge University Press.

Schacter advances the scholarship on the black/white paradigm by fully extending it into the gay rights debates.[212] She argues that because the "African American experience…represents the paradigm for thinking about American civil rights law,"[213] what Schacter calls the "Discourse of Equivalents" is used by opponents of gay rights to force a comparison of the experience of gays and lesbians with the experience of African Americans in order to legitimize civil rights for gays. Schacter argues that the Discourse of Equivalents invokes two main themes: the gay and lesbian experience as insufficiently like the experience of already-protected groups like racial minorities, women, and religious groups; and sexual orientation as an aspect of identity is insufficiently like other already-protected aspects of identity like race, gender, religion, and national origin. Both themes form the argument by gay rights opponents that because of the differences between gays and blacks in their historical experience of oppression and their type of identity, gays and lesbians do not qualify for the protection of civil rights laws.

Schacter argues that our civil rights discourse should not be based on sameness. In other words, in order to be eligible for civil rights, a particular group's experience should not need to be the same or even similar to another group's experience. In doing so, says Schacter, we enter into an "oppression contest," which leads us to accept "the idea that there is only so much freedom to go around and that socially oppressed groups must fight over these putative spoils."[214] Schacter devises a more appropriate test of the legitimacy of a particular group's civil rights claim. To determine if the extent to which a group has been oppressed merits civil rights protection, we must first look to the specific experiences of gays and lesbians, and then consider whether "social subordination and stigmatization subject gay men and lesbians…to systematic

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[212] Schacter, Jane S. "The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents." *Harvard Civil Rights-Civil Liberties Law Review* 29 (Summer 1994): 283.
[213] *Ibid*., 292
[214] *Ibid*., 300

exclusion and disadvantage at the hands of dominant groups."[215] Schacter describes this test as a higher level of generality than a mere comparison of historical levels of oppression.

Hutchinson discusses the multidimensionality of oppression and argues for more discussion of race within the dialogue of gay and lesbian legal theory.[216] "Racial, class, and sexual subordination are interrelated" he writes. But responses to sexual subordination tend to focus on gays and lesbians of privileged race and class (white and well-off as opposed to non-white and poor), and "consequently, gay and lesbian legal theory and political discourse fail to reflect the complexity of gay and lesbian experiences and exclude people of color and the poor from equality debates."[217] Hutchinson also argues that analogies between racial minorities and gays and their struggles to achieve civil rights portrays racial minorities and gays as two separate groups, while ignoring and making invisible those who do not fit into either group, such individuals who are black and gay. This analogy, he argues, masks the importance of the multidimensionality of oppression.

Hutchinson shows that for gays, even trying to win the "oppression contest" is futile, and that they should steer away from this discourse. He cites Andrew Sullivan, who argues that the intensity of oppression against gays and lesbians is actually more severe than slavery because, although gays and lesbians have never been enslaved, slaves "were occasionally allowed the right to marry…[but] because [homosexuals] haven't even been deemed eligible for the institution of marriage in the first place[,] they have always been, from one particular perspective, beneath slaves. And they still are."[218] This argument, Hutchinson writes, "distorts"

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[215] *Ibid*., 298
[216] Hutchinson, Darren Leonard. "Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse." *Connecticut Law Review 29*, Winter 1997: 561.
[217] *Ibid*., 583
[218] *Ibid*., 631 (citing Sullivan, Andrew. *Virtually Normal: An Argument About Homosexuality.* New York: Vintage Books, 1995, 154-155)

the brutality of slavery, and ignores the severely limited rights of slave marriages. And by comparing gay and lesbian oppression to slavery and asserting that it is more severe, Sullivan only reinforces slavery as the most severe form of oppression and reinforces blacks as most deserving of civil rights protection. Hutchinson attempts to advance a new discourse for gay and lesbian civil rights claims:

> Gay and lesbian legal theorists and political activists should advocate sexual equality by addressing the many harms sexual subordination causes. These harms require legal and political remedies for their own sake—without reference to the rights and injuries of black heterosexuals…Multidimensionality provides a more effective framework for discussing these harms…[It] portrays these harms without diminishing—but rather, acknowledging and emphasizing—the importance of race and other sources of empowerment and disempowerment.[219]

This new discourse asserts that gay and lesbian civil rights activists should refrain from comparing their civil rights experience with that of blacks; instead, they must focus on the many individual harms that are specific to gays and lesbians. An inclusion of specific racial discrimination suffered by gay racial minorities will help to advance this discourse without forcing a comparison. We will gain a greater understanding of how racism affects gays and lesbians and how heterosexism affects gays and lesbians, and we avoid the harms imposed by comparing forms of oppression between varying minority groups. After an examination of the plaintiffs' briefs in *Goodridge* and *Kerrigan*, I will show how Hutchinson's new discourse of civil rights fits well with Schacter's new legitimacy test for gay and lesbian civil rights, and that the evolution of race-based arguments as applied to same-sex marriage from the *Goodridge* brief to the *Kerrigan* brief nicely reflects both Hutchinson's and Schacter's arguments.

D. The Importance of Case Briefs

[219] *Ibid*., 633-634

The existing scholarly literature on this topic provides little examination of the *Loving* analogy as a strategy of lawyers in modern same-sex marriage cases, and no examination of briefs submitted in these cases. A look at these briefs would show how LGBT activists have used the racial interpretation of the Equal Protection and Due Processes clauses in *Loving* as a strategy in same-sex marriage cases, and that is how I intend to contribute to the scholarly literature. By looking at the relationship between race and sexual orientation through the lens of case briefs and state court opinions dealing with same-sex marriage, we would achieve a greater understanding of whether the use of *Loving* as a strategy in same-sex marriage cases is wise and beneficial.

But why examine case briefs? If the existing scholarship failed to look at briefs on this particular topic, does that not suggest that briefs are trivial and that nothing of significant value can be gained from them? To the contrary, rather; briefs are an extremely important element of court proceedings, and an examination of briefs provides perhaps the best picture of how activists employ certain arguments in litigation. I believe that the existing scholarship has erred in its failure to study briefs in same-sex marriage litigation.

Professor Laura Hatcher has argued that amicus briefs have played important roles in various court cases. Her discussion is reflective of the role of briefs in the litigation strategy of the Gay and Lesbian Advocates and Defenders (GLAD), a non-profit legal advocacy organization, in same-sex marriage cases.[220] She discusses the emergence of several nonprofit law firms devoted to conservative causes, including the Pacific Legal Foundation (PLF), and

[220] GLAD represented the plaintiffs and wrote the briefs for *Goodridge v. Department of Public Health* and *Kerrigan v. Department of Public Health*.

notes that the amicus brief is its "primary litigation strategy."[221] Additionally, the PLF "claims its work has impacted many areas of law…[and its] litigation activity has expanded well beyond its initial narrow scope."[222] There are now many conservative legal interest groups[223] that sumbit amicus briefs in cases around the country as the primary litigation strategy to advance their causes. Hatcher also writes of the importance of examining briefs, because "amicus briefs as well as case law have provided insights into the workings of property rights advocacy and changes occurring in U.S. constitutional law."[224]

And the importance of the appellant briefs in various types of litigation has been expressed by many, including Carol C. Berry, Judge Herbert C. Goodrich, and Supreme Court Justice Thurgood Marshall. The importance of appellant briefs is relevant to my thesis because I will look at GLAD's appellant briefs in two state supreme court cases. Berry describes the brief as "the most important component of a successful appeal. It gives the judges the first and, many times, the last impression of the merits of the case."[225] Berry argues that the brief has grown more significant throughout the years because of the changing nature of our legal system. Oral arguments are now much shorter than they were in the past, and many circuit courts now only hear oral arguments in exceptional In fact, "[the brief] may be the only vehicle by which the advocate presents his or her argument."[226] The quality of the brief also often determines whether oral argument is justified and will be allowed.

Judge Herbert C. Goodrich views the importance of briefs similarly:

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[221] Hatcher, L. J. (2005). Economic Libertarians, Property, and Institutions: Linking Activism, Ideas, and Identities among Property Rights Advocates. In A. Sarat, & S. A. Scheingold (Eds.), *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice* (pp. 112-146). Stanford, CA: Stanford University Press., at 125.
[222] *Ibid*.
[223] See *Ibid*., at 126. Some of the groups discussed by Hatcher include the National Legal Center for the Public Interest, the Mountain States Legal Foundation, and the Southeastern Legal Foundation.
[224] *Ibid*., at 115
[225] Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument* 66 (3d ed. 2003)
[226] *Ibid*.

> It is hard to overstate the importance of the brief on an appeal. Oral argument will be discussed later. It is important too. But it is made only once in nearly all instances and it is inevitable that some of its effect will be lost in the interval between the time the argument is made and the court opinion appears. But the brief speaks from the time it is filed and continues through oral argument, conference, and opinion writing. Sometimes a brief will be read and reread, no one knows how many times except the judge and his law clerk.[227]

Judge Goodrich here alluded to the often long interval between oral arguments and the writing and release of the opinion, which Supreme Court Justice Thurgood Marshall noted directly:

> Regardless of the panel you get, the questions you get, or the answers you give, I maintain it is the brief that does the final job, if for no other reason than that the opinions are often written several weeks and sometimes months after the argument. The arguments, great as they may have been are forgotten. In the seclusion of his chambers the judge has only his briefs and the law books. At that time your brief is your only spokesman.[228]

Considering prominent judges like Judge Goodrich and Justice Marshall view the brief as the most important instrument for advocates in appeals, it is strange that scholars have neglected the brief in the literature dealing with race and same-sex marriage litigation. By exploring racial arguments as used in briefs as the central element of this project, I believe am contributing to, expanding, and even improving the existing scholarship in a significant way.

E. Methodology

I argue that although cases like *Loving* or *Perez* may be an appropriate legal model for same-sex marriage litigation, a racial interpretation of due process and equal protection is not the best strategy for such litigation because it actually imposes certain limits on the same-sex marriage movement. To explore this argument, I will examine the appellant briefs submitted with two recent state court opinions by GLAD, *Goodridge v. Department of Public Health*, and *Kerrigan v. Commissioner of Public Health*. I have chosen to look at these two cases because

[227] *Ibid*. (citing Herbert G. Goodrich, *A Case on Appeal—A Judge's View*, in A Case on Appeal 1, 10-11 (1967)). (Judge Goodridge served on the United States Court of Appeals for the Third Circuit).
[228] *Ibid*. (citing Thurgood Marshall, The Federal Appeal, in Counsel on Appeal 141, 146 (Arthur A. Charpentier ed., 1968)).

they are two of only three states where same-sex marriage is currently legal as a result of state court decisions, and time constraints and the scope of this project prevented an examination of all three. *Goodridge* was decided in 2003, *Kerrigan* was decided in 2008, and *Varnum v. Brien* was decided in 2009. I felt the two older cases would represent the most original uses of a racial approach to same-sex marriage, as it is possible that *Varnum*, with two recent state court opinions as precedent, borrowed heavily from the arguments used in *Goodridge* and *Kerrigan*. More time certainly would have allowed me to look at *Varnum* as well, and I certainly suggest that any scholar looking to expand upon my work take a look at *Varnum* as it would definitely add to our understanding of the evolution of this racial interpretation in same-sex marriage cases.

In looking at *Goodridge* and *Kerrigan*, I will first introduce the case and set the context by explaining the facts of the case. I will then look at each way a racial interpretation of due process and equal protection has been used by GLAD through three different aspects of the brief: the due process claims, the equal protection claims, and the treatment of the definitional argument against same-sex marriage. I will note each way the plaintiffs use a racial argument, and highlight those arguments I think are most important and most demonstrative of the problems of using a racial interpretation of due process and equal protection as applied to same-sex marriage litigation. In *Goodridge*, I highlight four specific racial arguments in the brief that demonstrate the limits of a racial interpretation of due process and equal protection as applied to same-sex marriage litigation. In *Kerrigan*, I highlight six racial arguments that demonstrate these limits. In the concluding chapter, I compare my findings in both briefs to show an evolution of the use of these racial arguments from *Goodridge* to *Kerrigan*. I find that the racial arguments in both briefs show that by moving away from race, same-sex marriage advocates can bypass the dangers and limitations imposed by the black/white binary more easily and make a stronger

argument for same-sex marriage. While certain racial arguments in both briefs could be improved, including the treatment of the definitional argument by employing the scholarship of Professor Eskridge, certain arguments demonstrate that GLAD may have learned to move away from race in the time between the two cases. Notably, the different treatment given to the history of oppression suffered by racial minorities and the LGBT community in each brief signals this shift.

III. THE MASSACHUSETTS CASE: GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH (2003)

We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.[229]

Goodridge v. Department of Public Health (2003) provides the first example of this project. An examination of the Brief of the Plaintiffs-Appellants reveals how the plaintiffs used a racial interpretation of the Fourteenth Amendment's Due Process and Equal Protection Clauses in this case. The plaintiffs' use of race throughout the brief shows that although the racial interpretation may provide a logical legal model for same-sex marriage claims, certain aspects of that racial interpretation impose limits on same-sex marriage litigation. The plaintiffs' use of race throughout the brief also reflects various same-sex marriage scholarship discussed in chapter II.

The plaintiffs employed a racial interpretation of equal protection and due process arguments and rely on *Loving v. Virginia* heavily in the brief. In arguing that same-sex couples should be allowed to marry and that a prohibition on same-sex marriage violates both individual liberty interests and equality interests, the plaintiffs used *Loving* to argue that marriage is a fundamental right for all people, and that it applies to same-sex couples just as it does to mixed-race couples. *Loving* was also used to support the Equal Protection argument. Just as prohibitions on mixed-race marriage were found to be an unconstitutional racial discrimination because they violated Equal Protection guarantees, the plaintiffs argued, prohibitions on same-sex marriage should be ruled unconstitutional based on equal protection grounds because they constituted sex or sexual orientation discrimination. Calling the "analogy to *Perez* and *Loving*…logically and analytically irrefutable," the plaintiffs attempted to show that the mode of analysis relied upon in *Loving* was the same mode of analysis present in *Goodridge*. Although much of the plaintiffs'

[229] Chief Justice Margaret H. Marshall, in *Goodridge v. Department of Public Health*, 440 Mass. 309, 344

racial interpretation of the Equal Protection and Due Process clauses as applied to the same-sex marriage debates was indeed logical and legitimate, I find four major aspects of the brief that suggest that a racial interpretation of due process and equal protection is not the best strategy and that, in fact, same-sex marriage advocates should avoid race as much as possible. The first important aspect of the brief that I highlight shows the plaintiffs avoiding the issue of race, and reflects the third major perspective of the scholarly literature discussed in chapter II. This perspective, again, consists of Critical Race theorists, Latino Critical Legal theorists, and Queer theorists who have found limitations imposed on the same-sex marriage and gay rights movements by the use of a racial interpretation of due process and equal protection to advance same-sex marriage. Meanwhile, the other three major aspects I highlight show that the plaintiffs still need to take caution in how they approach a racial interpretation to same-sex marriage to avoid the problematic impacts of the black/white binary. These three aspects reflect a different perspective of the scholarship discussed in chapter II, the argument that a racial interpretation of due process and equal protection is a legitimate and logical legal model for same-sex marriage litigation, and should be used as part of an argument to advance same-sex marriage. Overall, I find that the *Goodridge* brief represents the view in the literature that a racial interpretation should be used to advance same-sex marriage; most of the racial elements of the brief fail to address the limitations imposed by applying these racial interpretations to same-sex marriage litigation.

To frame my examination of the racial analysis used in the brief in the context of the procedural history and rulings of the case, I first provide a summary of the facts of the case. I then explore each way that race is used throughout the brief, and highlight the four most significant aspects of the racial interpretation as they arise. I analyze each racial interpretation for

its applicability to same-sex marriage litigation, its effectiveness in advancing pro-same-sex marriage legalization arguments, and its treatment by the Massachusetts Supreme Judicial Court in the opinion. I have organized my approach to focus on three main aspects of the brief: the Due Process claims, the Equal Protection claims, and claims against the traditional definition of marriage argument.

A. Facts of the Case

Seven couples sought to obtain marriage licenses from a city or town clerk's office in the state of Massachusetts in March or April of 2001. Each couple's application for a marriage license was rejected because each couple consisted of two people of the same sex, and Massachusetts did not recognize same-sex marriage.

On April 11, 2001, the seven couples, represented by the Gay and Lesbians Advocates and Defenders (GLAD) filed suit in Superior Court, seeking a judgment that the state's practice of denying marriage licenses to same-sex couples violated several articles, including the liberty, freedom, equality, and due process provisions of the Massachusetts constitution. The defendant, the Massachusetts Department of Public Health, represented by the Attorney General, admitted its practice of denying marriage licenses to same-sex couples, but argued that this practice did not violate any Massachusetts law and that the plaintiffs were not entitled to any relief. A Superior Court judge ruled in favor of the state, finding that the plain wording of the text of the Massachusetts constitution could not be construed as recognizing same-sex marriage, that the state's practice of denying marriage licenses to same-sex couples did not violate the liberty, freedom, equality, or due process provisions of the Massachusetts constitution, that the Massachusetts Declaration of Rights did not guarantee a fundamental right to marry a person of

the same sex, and that the state's prohibition of same-sex marriage rationally furthered the state's legitimate interest in safeguarding procreation.

The plaintiffs appealed the ruling of the Superior Court, and the Massachusetts Supreme Judicial Court granted direct appellate review. The Supreme Court ruled in favor of the plaintiffs, declaring that the state may not "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry"[230] and that the state had "failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples."[231] The Court held that the state did not have a rational basis to deny marriage licenses to same-sex couples on the grounds of equal protection and due process.

B. A Racial Analysis

What follows is an analysis of the racial arguments used in the brief. I have organized this analysis into three sections: due process, equal protection, and the definitional argument. Within each section, I analysis the use of racial precedent and analogies in the context of the broader constitutional or definitional claim.

i. Fundamental Right

The plaintiffs, represented on the brief by GLAD, argued that there was a fundamental right to marriage enshrined in the constitution, and that the "Application of the Marriage Laws by the Defendants Directly and Substantially Burdens the Plaintiffs' Rights to Marry."[232] GLAD argued that alleged state interests in biological procreation, childbearing, and the conservation of resources carried no weight here, that the needs of gays for self-determination and family privacy

[230] *Goodridge v. Department of Public Health*, 440 Mass. 309, 312 (2003)
[231] *Ibid*.
[232] Brief of Plaintiffs-Appellants, 33, *Goodridge v. Department of Public Health*, 440 Mass. 309, 312 (2003)

were the same as non-gays, and that "doomsday speculation" about polygamy was unfounded. In using *Loving*, GLAD wrote that "It is beyond question that the right to marry is fundamental, and within the rights of liberty and privacy, and as such, may not be abridged by the state without a compelling state interest."[233]

GLAD then showed that this fundamental right to marry extended to all, citing *Zablocki*: "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."[234] They cited *Turner v. Safley*,[235] in which marriage rights were extended to prisoners, as an example. In an attempt to understand the liberty and privacy underpinnings" of *Loving* and *Turner*, the plaintiffs detailed the history of cases before *Loving* that placed the right "to marry" as a liberty interest "essential to the orderly pursuit of happiness by free men." These cases, including *Meyer*, *Perez*, *Skinner*, and *Pierce*, established 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."[236] To the plaintiffs, it was

> clear why the California Supreme Court struck its miscegenation law in 1948 under the 14th Amendment even though miscegenation laws were commonplace at the time, no court had ever declared a miscegenation law unconstitutional, such laws were popular, and *Plessy v. Ferguson* was still the law of the land.[237]

Because the "Constitution protects against unwarranted state interference with 'personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,'"[238] GLAD stated that "the right to marry without the freedom to marry the person of

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[233] *Ibid*., 23 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967), which stated that "marriage is 'one of the vital personal rights essential to the orderly pursuit of happiness by free men' under due process clause of 14th Amendment.") (internal citations omitted)
[234] *Ibid*., 24 (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978))
[235] 482 U.S. 78 (1987)
[236] Brief of Plaintiffs-Appellants, 24-25, *Goodridge v. Department of Public Health*, 440 Mass. 309, 312 (2003)
[237] *Ibid*., 29
[238] *Ibid*., 25 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992))

one's choice is no right at all"[239] and that state intrusion into these areas of personal decision imposed an "intolerable indignity" on an individual. There are human values at stake in these personal decisions that protect the family, argued GLAD, and court opinions showed that we cannot restrict these human values to a traditional "nuclear" family.[240]

It is here that I would like to highlight my first major finding in GLAD's application of a racial interpretation to same-sex marriage litigation, that GLAD attempted to move away from race in its brief. GLAD admitted that "*Loving* arose in the context of racial discrimination," and, to justify the applicability of a racial discrimination case to a sexual orientation/gender discrimination case, argued that "prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals." GLAD cited decisions like *Zablocki* and *Turner* to show that *Loving* was still powerful precedent for same-sex marriage cases because its relevance to marriage was equal to its relevance to racial discrimination. I find that GLAD actually moved away from race in this instance by citing cases like *Turner*. The fact that GLAD admitted *Loving* was a racial case may not seem a wise argument, given the popular argument of same-sex marriage opponents that the traditional definition of marriage is the union of a man and a woman. After all, if *Loving* is more about race than it is about marriage, it is easier to argue that it does not apply to same-sex marriage litigation because it recognized the right of people to marry another person regardless of race, but did not recognize a change in the institution of marriage.[241] But by citing additional like *Turner* to show that this fundamental right

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[239] *Ibid.*
[240] *Ibid.*, 28
[241] In Justice Cordy's dissent, he argues that the majority erroneously assumes that the definition of marriage includes two people of the same sex. The plaintiffs' argument that there is a fundamental right to marry a person of the same sex is grounded in several cases, including *Turner*, *Zablocki*, *Loving*, *Griswold*, and *Skinner*, and Justice Cordy explains why none of these cases establish a fundamental right to marry a person of the same sex. These cases, he argues, deal with the "'fundamental' nature of the institution of marriage as it has existed and been understood in this country, not as the court has redefined it today" (at 116). He argues that the fundamental right to marriage in these cases is based on the interest of each individual in procreation: "in *Loving v. Virginia*…the Court

to marry extended to prisoners and people other than racial minorities, GLAD attempted to show that it is the central holding about marriage in *Loving* that matters and applies to same-sex marriage litigation. Other cases applied the general right to marry on specific disadvantaged groups, therefore *Loving* does apply to same-sex marriage litigation because *Loving* applied the general right to marry to interracial couples. Because GLAD made *Loving* more about marriage than about race, it actually moved away from the issue of race to advance it argument about same-sex marriage.

The Massachusetts Court's opinion invoked *Loving* to help establish marriage as a fundamental right. "Civil marriage has long been termed a 'civil right,'" the court wrote, and cited from *Loving*: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[242] Here, the Court used *Loving* in the same way as the plaintiffs; it recognized the plaintiffs' argument in the brief that *Loving* helped to establish marriage as a fundamental right. The court rejected the state's argument that this case dealt with the rights of couples, instead arguing that it dealt with the rights of individuals. "The rights implicated in this case are at the core of individual privacy and autonomy,"[243] the court wrote. Another passage from *Loving* was cited: "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."[244]

The court also invoked *Loving* and *Perez* to reflect upon the long history of anti-miscegenation laws and to show that the right to marry must include the right to marry someone

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implicitly linked marriage with procreation in describing marriage as 'fundamental to our very existence'" (at 117, citing *Loving v. Virginia*, 388 U.S. 1, at 12). This allows him to conclude that "because same-sex couples are unable to procreate on their own, any right to marriage they may possess cannot be based on their interest in procreation, which has been essential to the Supreme Court's denomination of the right to marry as fundamental" (at 118).

[242] *Ibid*., 23-24
[243] *Goodridge*, 34, Footnote 15.
[244] *Ibid*. (citing *Loving v. Virginia*, 388 U.S. 1, 12)

of one's choice. The Court then compared the interracial marriage cases with the same-sex marriage case:

> 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.[245]

Because "history" yielded to a better understanding of negative qualities of discrimination in *Perez* and *Loving* regarding interracial marriage, argued the Court, here the opponents of same-sex marriage must yield to a better understanding of discrimination suffered by same-sex couples in their inability to legally marry. The Court also made the point that individuals are deprived of a fundamental right because of only one trait in both cases, and that that is a fundamental point of comparison between the interracial marriage cases and the same-sex marriage case. Rather than follow the plaintiffs' route in citing several cases that extend that the distinction of marriage in *Loving* as a fundamental right to all people and not just racial minorities, the court focused on the individual choice aspect of marriage. For the court, it is the necessity that marriage be an individual choice (the right to choose to marry) which justified the applicability of *Loving*, a racial discrimination case, to same-sex marriage litigation. The plaintiffs did use this as an important part of their argument, but the court chose to make this central and more important than the plaintiffs' reliance on several other cases to counter the argument that *Loving* is not applicable because it arose in the context of racial discrimination. This is not to say the court completely ignored the plaintiffs' citation of cases like *Turner* and *Zablocki*, however. Citing *United States v. Virginia*,[246] the *Goodridge* court called "the history of constitutional law…'the story of the extension of constitutional rights and protections to people once ignored or

[245] *Goodridge*, 37-38 (internal citations omitted)
[246] 518 U.S. 515 (1996)

excluded.'"[247] These extensions also applied in the area of civil marriage, the court wrote, and were demonstrated by decisions in *Turner*, *Loving*, and *Perez*. The court summarized the many changes to marriage over the years: "As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm."[248] The court simply chose not to use this argument as the main factor in its Due Process argument.

The *Goodridge* court discussed the Department of Public Health's argument that the "*Loving* decision did not profoundly alter the by-then common conception of marriage because it was decided at a time when antimiscegenation statutes were in 'full-scale retreat.'"[249] The plaintiffs had countered this argument by highlighting the importance of *Perez*, and noting that it was decided "even though miscegenation laws were commonplace at the time, no court had ever declared a miscegenation law unconstitutional, such laws were popular, and *Plessy v. Ferguson* was still the law of the land." The court found that the Department's argument ignored *Perez*, a successful constitutional challenge to an anti-miscegenation statute decided nineteen years earlier, and a precursor to *Loving*. The court described the racial situation in 1948: "racial inequality was rampant and normative, segregation in public and private institutions was commonplace, the civil rights movement had not yet been launched, and the 'separate but equal' doctrine of *Plessy v. Ferguson* was still good law."[250] An anti-miscegenation attitude did not deter the Supreme Court of California in *Perez* from declaring anti-miscegenation laws unconstitutional. By distinguishing *Perez*, the *Goodridge* court showed here that although *Loving* may have been decided at a time when most anti-miscegenation statues had already been repealed, *Perez* (which accomplished essentially the same thing as *Loving* but on a smaller scale)

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[247] *Goodridge*, 339 (citing *United States v. Virginia,* 518 U.S. 515, 557 (1996))
[248] *Ibid*., 339
[249] *Ibid*., 37, Footnote 16
[250] *Ibid*.

was decided when most states did still legally prohibit interracial marriage and when racism and segregation were much more common.[251] The Department of Public Health tried to make this argument to show that *Loving* was not appropriate precedent for the legalization of same-sex marriage, because directly prior to the Massachusetts Supreme Court ruling in *Goodridge*, no state legally allowed same-sex marriage. But a look at *Perez* shows that that was one of the first steps toward *Loving*, and at the time of *Perez* miscegenation was widely rejected by most states and the general public.

A second major finding I make is also a major problem with the racial interpretation of Due Process applied to same-sex marriage which GLAD failed to address. A common argument made by same-sex marriage opponents is that *Loving* is not applicable to same-sex marriage litigation because while *Loving* was decided after most states recognized interracial marriages, very few states currently recognize (and at the time of *Goodridge*, no states recognized) same-sex marriage.[252] GLAD attempted to counter this argument by citing *Perez*, which was decided several years earlier when many states still had prohibitions against interracial marriage. GLAD argued that because of the long line of precedent recognizing the right to marry a person of one's choice, it was clear why the *Perez* court ruled against anti-miscegenation laws "even though miscegenation laws were commonplace at the time, no court had ever declared a miscegenation law unconstitutional, such laws were popular, and *Plessy v.*

[251] In 1947, the year before *Perez* was decided, interracial marriage was legal in only 18 states, while illegal in 30 states. In 1966 the year before *Loving* was decided, interracial marriage was legal in 33 states and illegal in only 17 states. For additional date, see Loving Day. *Legal Map: Accessible Version.* 2009. http://www.lovingday.org/legal-map-accessible (accessed February 9, 2010). For the interactive map, see http://www.lovingday.org/legal-map.

[252] For more on this argument, refer back to my Literature Review where I discuss the scholarship of David Orgon Coolidge. Coolidge argues that racial cases like *Loving* do not apply to same-sex marriage litigation partly because of the difference in the number of states that legally recognized interracial marriage when *Loving* was decided compared to the number of states that currently recognize same-sex marriage.

Ferguson was still the law of the land."[253] However, there are clear differences between *Perez* and *Goodridge* to be easily exploited by same-sex marriage opponents. *Perez* was the first court to strike down anti-miscegenation laws, so in that respect it is more applicable to *Goodridge* than is *Loving*. But when *Perez* was decided, several states (mostly northern states) legally recognized interracial marriage and had already lifted their bans through the legislature. At the time of *Goodridge*, no state recognized same-sex marriage, although the Hawaii state supreme court was the only other court to rule bans on same-sex marriage unconstitutional. This difference poses two challenges. First, it disputes the notion that the circumstances around *Perez* were similar to the circumstances around *Goodridge* in that they were (or would be, in the case of *Goodridge*) both the first states to recognize interracial and same-sex marriage, respectively. Second, it gives ammunition to opponents of same-sex marriage who argue that marriage for those of the same sex should be legalized through legislative, "democratic" means rather than through the courts. If many states accomplished the legal recognition of interracial marriage through the legislature, then the same can and should apply in the case of same-sex marriage. The court accepted the GLAD's argument, and restated it almost verbatim in its opinion. However, the court also did not take into account the major differences between *Perez* and *Goodridge*.

ii. Equal Protection

GLAD, in the *Goodridge* brief, also used a racial interpretation of Equal Protection to argue that constitutional equality guarantees are violated by restricting same-sex couples from marrying. They used an analogy to *Loving* and *Perez* to reject the equal application argument of the defendants; the following excerpt from the brief illustrates this argument:

> An examination of *Perez v. Sharp* and *Loving v. Virginia* demonstrates that "sex" is the forbidden variable by which the defendants administer the marriage laws. The facile defense offered by the defendants is that men and women are equally disadvantaged, since neither can marry someone of the same

[253] Brief of Plaintiffs-Appellants, 29, *Goodridge v. Department of Public Health*, 440 Mass. 309, 312 (2003)

> sex, so there is no discrimination here. In both *Perez* and *Loving*, the courts rejected the notion that miscegenation laws effected no racial discrimination simply because both whites and persons of color were equally disabled from marrying each other. Equal application of the law to whites and blacks did not eradicate the racial classification at work even though on a group level, there was symmetry in the options of white and black persons.
>
> 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 forbidden by the 14th Amendment.
>
> 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* and *Loving* is logically and analytically irrefutable.[254]

Table 1 shows charts used in the brief to justify the analogy described above between the interracial marriage cases and the same-sex marriage case. Essentially, the equal protection argument presented in GLAD's brief required us to analyze marriage rights as applied not to groups, but to individuals; because *Loving* viewed these rights as applied to individuals and found an unconstitutional discrimination based on race, this brief argued that marriage rights should again be analyzed as applied to individuals and that this analysis uncovered an unconstitutional discrimination based on sex.

GLAD also used a racial interpretation of equal protection to reject the opinion of the trial court and the defendants' argument that the classification at issue here was between couples, specifically same-sex and opposite-sex couples, and not between individuals, and therefore constitutional. GLAD relied upon *McLaughlin v. Florida*, in which a criminal statute that prohibited unmarried interracial couples from living together or "habitually occupy[ing] the same room at night"[255] while imposing no penalty for similarly situated same-race couples was ruled unconstitutional. GLAD wrote:

> The ability to identify a racial classification when the statute "treats the interracial couple made up of a white person and a Negro differently than it does any other couple", is no different from the ability to identify a sex-based classification when a statute is applied to treat a couple made up of a man and a man differently from a couple made up of a woman and a man.[256]

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[254] Brief of Plaintiffs-Appellants, 57-58, *Goodridge v. Department of Public Health*, 440 Mass. 309, 312 (2003) (internal citations omitted)
[255] *McLaughlin*, at 186
[256] Brief of Plaintiffs-Appellants, 61, *Goodridge v. Department of Public Health*, 440 Mass. 309, 312 (2003) (internal citations omitted)

GLAD concluded that there was a sex-based classification under Article I of the Massachusetts constitution. This reliance upon *McLaughlin* makes sense, but I think that GLAD should have noted additional non-racial cases to support its argument. It is too easy to argue that *McLaughlin* should not apply because it was a racial case that did not even involve marriage. GLAD should focus its argument on highlighting unequal treatment as the central issue in *McLaughlin* and then showing how the central principle of unequal treatment applied to interracial couples living together. As it did in its due process argument when it cited other cases that first found a general right to marry and then applied that general right to many different groups of people and not just based on race, GLAD here should note cases that first found a general violation of unequal treatment, and then show how that unequal treatment was found to apply to particular groups, again, not based solely on race.

In arguing that sexual orientation was a suspect class under the Massachusetts constitution and that therefore sexual orientation-based restrictions were subject to strict scrutiny, GLAD used race to show that gays and lesbians shared the same characteristics as other groups considered to be suspect classes: "gay people share a history of persecution comparable to that of blacks and women and that [o]utside of racial and religious minorities, ... no group ... has suffered such pernicious and sustained hostility."[257] GLAD called the persecution suffered by gays and lesbians "comparable" to that suffered by blacks, but also conceded that the persecution suffered by gays and lesbians was perhaps not as severe as that suffered by blacks.

The historical comparison of oppression between racial minorities and sexual minorities is the third aspect of the brief I will highlight. I find this to be the second major, and perhaps the most consequential, problem in GLAD's brief. By bringing up and admitting the difference in

[257] *Goodridge*, Brief of Plaintiffs-Appellants, 90-91 (citing *Garcia*, 77 Cal. App. 4th at 1276, 1279) (internal quotations omitted)

the histories of these two minority groups, GLAD highlighted the debate over the level of severity of oppression suffered by various civil rights groups. I find that it is quite difficult to argue, which GLAD did not attempt, that the discrimination and oppression suffered by the LGBT community or any other group is worse the slavery suffered by blacks. The Black/White Binary paradigm of the American Civil Rights movement, as discussed by various scholars,[258] holds that the level of severity of oppression determines the extent to which a particular minority or oppressed group is eligible for civil rights. Because blacks suffered most severely, they are granted civil rights for which other groups, like Asian-Americans, Latinos, or the LGBT community may not be deemed eligible. GLAD argued that the oppression suffered by blacks and the LGBT community is "comparable," contrary to what many same-sex marriage opponents argue, and thus concluded that the history of these two groups is not so different that it is impossible to compare. But GLAD conceded that oppression suffered by blacks was more severe, which, under the Black/White civil rights model, invites a comparison and rebuke that therefore gays and lesbians may not be eligible for certain civil rights, like the choice of marriage, that racial minorities were deemed eligible for. A stronger argument by GLAD is desperately needed. GLAD's argument here can best be seen in Justice Greavey's concurring opinion, in which he wrote:

> The equal protection infirmity at work here is strikingly similar to (although, perhaps, more subtle than) the invidious discrimination perpetuated by Virginia's antimiscegenation laws and unveiled in the decision of

[258] See, among others: Hutchinson, Darren Leonard. "Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse." *Connecticut Law Review 29*, Winter 1997: 561.; Moran, Rachel F. "Neither Black Nor White." *Harvard Latino Law Review 2*, Fall 1997: 61-99.; Delgado, Richard, and Jean Stefancic. Critical Race Theory: An Introduction. 2001 New York University Press, New York.; Perea, Juan F. "The Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought." *California Law Review* 85, no. 5 (October 1997): 1213.; Chang, Robert S. "Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space." *Asian Law Journal* 1 (1994): 1.; Kim, Janine Young. "Are Asians Black: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm." *Yale Law Journal* 108 (1998-1999): 2385.; Valdes, Fransisco. "Foreword: Under Construction - LatCrit Consciousness, Community, and Theory." *California Law Review* 85, no. 5 (October 1997): 1104.; Alcoff, Linda Martin. "Latino/As, Asian Americans, and the Black-White Binary." *The Journal of Ethics* 7, no. 1 (2003): 5-27.

> *Loving v. Virginia*, *supra*…. That our marriage laws, unlike antimiscegenation laws, were not enacted purposely to discriminate in no way neutralizes their present discriminatory character.[259]

However, the majority opinion of the court failed to mention any comparison between the distinct histories and levels of oppression suffered by blacks and the LGBT community; this could indicate the court believes that either this issue bears no relevance to the case, or so much as mentioning it would detract from the argument and keeping silent about it would be best. In any case, GLAD should stay away from a historical comparison between racial oppression and sexual oppression.

iii. Definitional Argument

GLAD again used a racial analysis to counter the definitional argument that marriage should not be extended to same-sex marriage because the traditional definition of marriage is a union between a man and a woman. A passage from *Jones v. Hallahan* illustrates the definitional argument: "[A]ppellants are prevented from marrying ... by their own incapability of entering into a marriage as that term is defined."[260] GLAD again employed the Supreme Court's decision in *Loving*, this time to argue against the definitional argument. Recent courts like the Warren Court in its *Loving* decision rejected this reasoning as "circular and unpersuasive," argued GLAD, because "it fails to address whether the prohibition itself is discriminatory and constitutionally permissible."[261] *Loving* found this reasoning circular and unpersuasive by rejecting the "idea that a marriage between a white person and person of color was not a true marriage."[262]

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[259] *Goodridge*, at 346-347
[260] 501 S.W.2d 588, 589
[261] *Goodridge*, Brief of Plaintiffs-Appellants, 66
[262] *Ibid*. (citing *Loving*, 388 U.S. 1, 3)

This use of a racial analysis to counter the definitional argument against same-sex marriage appears mostly successful, as the court rejected the reliance on the traditional definition of marriage to oppose same-sex marriage. However, the majority opinion by Justice Marshall did not fully incorporate the GLAD's racial analysis of the definitional argument. The court admitted that the decision "marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries."[263] But the court did not reject this reasoning as circular and unpersuasive. Rather, the court appealed to the possible effects of the legalization of same-sex marriage on 'traditional' opposite-sex marriage, which, it concluded, were not negative. The plaintiffs sought to be married, but they did not seek to "undermine the institution of civil marriage."[264] Legalizing same-sex marriage may change the traditional definition of marriage, "but it does not disturb the fundamental value of marriage in our society."[265] The court did use a racial analogy in its decision, but it was quite different than that used in *Loving* and, subsequently, by GLAD in the brief: "Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race."[266]

GLAD's argument, which cited *Loving*'s rejection of the traditional definition argument as circular and unpersuasive, was actually better seen in Justice Greaney's concurring opinion than in the majority opinion:

> To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide. This case calls for a higher level of legal analysis. Precisely, the case requires that we confront ingrained assumptions with respect to historically accepted roles of men and

[263] *Goodridge*, at 57
[264] *Ibid.*
[265] *Ibid.*
[266] *Ibid.*, 58 (Internal citations omitted)

> women within the institution of marriage and requires that we reexamine these assumptions… to ensure that the governmental conduct challenged here conforms to the supreme charter of our Commonwealth.[267]

Furthermore, argued Justice Greaney, justification of the prohibition of same-sex marriage through this definitional argument and an accusation that the plaintiffs are trying to change the institution of marriage "terminates the debate at the outset without any accompanying reasoned analysis."[268] It is clear that Justice Greaney's concurrence more closely parallels the argument in *Loving* than does the majority opinion and GLAD's argument in the brief. In the same way that *Loving* rejected the definitional argument because it was circular and unpersuasive as applied to the interracial marriage debate, here the definitional argument was rejected by GLAD and Justice Greaney as circular and unpersuasive as applied to the same-sex marriage debate.

GLAD's treatment of the definitional argument is the fourth aspect of the brief I would like to highlight, and the third major problem I find with the racial analysis used in the brief. The fact that the court used a different approach to reject the definitional argument perhaps illustrated its recognition of the problematic aspect of the GLAD's treatment of this argument. I suggest hat GLAD use a different approach, that of Professor Eskridge, who argues that there really is no 'traditional' definition of marriage as a union of a man and a woman. GLAD should have detailed the history of marriage as Professor Eskridge does, and showed that marriage has not always, in every case and society, been considered an exclusively opposite-sex institution. I do not think that this argument should replace the argument GLAD used in the brief. Rather, Professor Eskridge's historical debate should compliment GLAD's existing argument. An explanation of the historical dimensions of marriage throughout world history, by highlighting same-sex marriage in other cultures, would illuminate the debate surrounding the definitional argument against same-sex marriage. It is possible for the definitional argument to appear as

[267] *Ibid*., 80 (internal citations omitted)
[268] *Ibid*., at note 5

circular and unpersuasive because it is not entirely true, whereas the GLAD merely argued that it is circular and unpersuasive because it does not thoroughly engage the issues. By incorporating Professor Eskridge's work into its brief, GLAD could have logically argued that (1) the definitional argument against marriage is an invalid argument because it ignores the core debate surrounding same-sex marriage and therefore is circular and unpersuasive, and (2) assuming that the definitional argument is not circular and unpersuasive and fully examining the argument on its content, the argument is wrong because marriage has not always been historically defined as the union of a man and a woman. GLAD should complement the *Loving* approach to the definitional argument with a historical exploration of same-sex marriage in other cultures in an attempt to prove the definitional approach wrong.

iv. Conclusion

Although a racial interpretation of the Equal Protection and Due Process clauses does make sense as applied to same-sex marriage litigation, there are major problems with this interpretation that are made clear in this brief. I have highlighted four examples of this racial interpretation in the brief that I think are most important and illustrate the problems of a racial interpretation of due process and equal protection as applied to same-sex marriage litigation. These examples demonstrate that same-sex marriage advocates would be best served to steer clear of race in their arguments. The first example I discussed shows GLAD as wisely avoiding a focus on race, while the other three examples are racial interpretations containing problematic dimensions that GLAD failed to adequately address. These examples also show that GLAD

relied too heavily on a perspective of the scholarly literature that fails to recognize the dangers imposed by the black/white binary.

First, GLAD admitted that *Loving* arose in the context of racial discrimination, but then cited several other cases to show that it applies to same-sex marriage litigation. GLAD cited these other cases to reinforce the notion that *Loving* is more about marriage than race, and thus should apply to same-sex marriage. By focusing on *Loving* as a case about the fundamental right to choose to marry rather than a racial case and extending the argument to include non-racial cases, GLAD avoided race as much as possible. This first example I highlight here best reflects the third perspective in the literature that was discussed in chapter II, including the arguments made by Professors Hutchinson, Schacter, Moran, Kendell, and others that same-sex marriage advocates should consider strategies other than racial precedents because of the dangers imposed by the black/white binary.[269] But it is unclear whether GLAD purposely steered away from race in this particular instance or that they reacted to this literature, as there was no clear pattern of avoiding race in this brief.

Second, a comparison between the number of states that had legalized interracial marriage and the popularity of such marriage at the time of *Perez* and *Loving* with the current state of same-sex marriage in the United States may not have been the best strategy. Although *Perez* may seem more similar to same-sex marriage cases than *Loving*, there is still a major difference between *Perez* and same-sex marriage cases; other states had legalized interracial marriage when *Perez* had decided, while no states had legalized same-sex marriage before

[269] See Hutchinson, Darren Leonard. "Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse." *Connecticut Law Review 29*, Winter 1997: 561.; Schacter, Jane S. "The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents." *Harvard Civil Rights-Civil Liberties Law Review* 29 (Summer 1994): 283.; Kendell, Kate. "Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies." *Yale Journal of Law and Feminism 17*, 2005: 133-137; Moran, Rachel F. "Neither Black Nor White." *Harvard Latino Law Review 2*, Fall 1997: 61-99.

Goodridge. GLAD would be wise to consider avoiding this particular argument, or at least consider a different debate on the relevance of the legal and popular state of interracial marriage at the time of *Perez* and *Loving* to the legitimacy of a racial interpretation of the Equal Protection and Due Process clauses as applied to same-sex marriage litigation. This argument by GLAD best reflects arguments by the first perspective presented in the literature review; scholars like Trosino also look at the similarities in the circumstances surrounding both interracial marriage and same-sex marriage and argue that racial precedent makes sense for same-sex marriage litigation because circumstances are so similar.[270]

Third, GLAD rejected the definitional argument against same-sex marriage with the argument from *Loving*, that this argument is circular and unpersuasive. This argument could be stronger, and I suggest that GLAD compliment this with a discussion of the historical importance of same-sex marriage in different cultures. I recommend that GLAD use to use Professor Eskridge's scholarship, which moves away from racial precedent by taking a historical approach of same-sex unions throughout world history.

Fourth, GLAD compared the historical oppression of blacks and women to the LGBT community and admitted that LGBT oppression is not as severe as was black oppression. This comparison was not a wise aspect of the argument, as it reinforced the idea of the black/white model of civil rights discourse and may harm the gay rights movement. GLAD should reconsider and refine their approach to the differing levels of severity in the oppression suffered by blacks and members of the LGBT community so that this difference does not inflame the black/white binary. I recommend that GLAD use the work of Professors Hutchinson and Schacter, who have

[270] See Trosino, James. "American Wedding: Same-Sex Marriage and the Miscegenation Analogy." *Boston University Law Review 73*, January 1993: 93-120.

argued for an approach to same-sex marriage litigation that does not force a comparison of LGBT and African-American oppression.[271]

Overall, GLAD's racial interpretation of due process and equal protection employed in this brief to advance same-sex marriage litigation relied too heavily on scholarship that fails to recognize the dangers imposed by the black/white binary. As a result, GLAD failed to address these dangers in most of its racial arguments. I find that GLAD should look toward the scholarship of Critical Race, Latino Critical, and Queer theorists who recognize and concoct solutions to the dangers imposed by the black/white binary.

We continue our examination of the use of a racial interpretation of due process and equal protection as applied to same-sex marriage litigation by moving onto our second example, *Kerrigan v. Commissioner of Public Health*, in chapter IV.

[271] See Hutchinson, Darren Leonard. "Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse." *Connecticut Law Review 29*, Winter 1997: 561.; Schacter, Jane S. "The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents." *Harvard Civil Rights-Civil Liberties Law Review* 29 (Summer 1994): 283.

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It is instructive to recall in this regard that the traditional, well-established legal rules and practices of our not-so-distant past…barred interracial marriage…Like these once prevalent views, our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection. Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so. In accordance with these state constitutional requirements, same sex couples cannot be denied the freedom to marry.[272]

Kerrigan v. Commissioner of Public Health (2008) provides a second example. The plaintiffs' brief in this case shows how the plaintiffs employed a racial interpretation of the Fourteenth Amendment's Equal Protection and Due Process clauses and applied it to same-sex marriage litigation. The plaintiffs' use of race throughout the brief shows that although the racial interpretation provides a logical legal model for same-sex marriage claims, certain aspects of that racial interpretation may impose limits on same-sex marriage litigation. In order to frame my examination of the racial analysis used in the brief in the context of the procedural history and rulings of the case, I provide a summary of the facts of the case. I then explore each way that race is used throughout the brief while highlighting six uses I find most significant, and analyze each racial interpretation for its applicability to same-sex marriage litigation, its effectiveness in advancing pro-same-sex marriage legalization arguments, and its treatment by the Connecticut Supreme Court in the opinion. As in chapter III, I have organized my approach to focus on three main aspects of the brief: the Due Process claims, the Equal Protection claims, and claims against the traditional definition of marriage argument.

Although the plaintiffs used a racial interpretation of the equal protection and due process clauses, including arguments in *Loving* and *Perez*, effectively to show that interracial marriage

[272] Justice Richard N. Palmer, in *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 262-263

may act as an appropriate legal model for same-sex marriage litigation, I find six examples of problematic aspects of the application of this racial interpretation to the same-sex marriage debate. It is these problematic aspects of the racial connection to same-sex marriage which allow me to conclude that a racial interpretation of the Fourteenth amendment may not be the best approach to same-sex marriage litigation. The plaintiffs failed to address two of the six problematic racial arguments used in the brief. However, I find that the other four examples actually represent a wise use of race by the plaintiffs; interestingly enough, these approaches actually signal a shift away from race as the more effective approach in same-sex marriage litigation.

Unlike the *Goodridge* brief, GLAD's racial interpretation of due process and equal protection in *Kerrigan* brief best reflects the scholarship of Critical Race, Latino Critical, and Queer theorists who recognize and devise solutions to the dangers imposed by the black/white binary on same-sex marriage litigation. Although two of the examples I highlight show a reliance on scholarship that does not recognize these dangers, the other four examples demonstrate a move away from race and a reflection of literature that does recognize the dangers, like the work of Hutchinson and Schacter.[273] After examining the briefs in both *Goodridge* and *Kerrigan*, I find an evolution from one perspective of the scholarship to another; although we cannot be certain that GLAD consciously made a decision to move away from race based on the scholarship of Hutchinson and Schacter, there is a clear reflection of this scholarship in four of the examples I highlight in *Kerrigan* brief. I agree with GLAD's move away from race in this brief; I think that the arguments by Hutchinson and Schacter that recognize and attempt to create

[273] See Hutchinson, Darren Leonard. "Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse." *Connecticut Law Review 29*, Winter 1997: 561.; Schacter, Jane S. "The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents." *Harvard Civil Rights-Civil Liberties Law Review* 29 (Summer 1994): 283.

a way around the dangers inherent in the black/white binary represent the most logical criticism and solution to the problems resulting from using a racial interpretation of due process and equal protection to advance same-sex marriage litigation.

A. Facts of the Case

Eight couples sought to obtain marriage licenses in the town of Madison, CT. Dorothy Bean, the Deputy Town Clerk for the town of Madison, denied them marriage licenses because each couple was of the same sex. The eight couples, represented on the brief by Gay and Lesbian Advocates and Defenders (GLAD), commenced action against the defendants, Dorothy Bean in her official capacity as Deputy and Acting Town Clerk of the town of Madison, and J. Robert Galvin in his official capacity as the Commissioner of the Connecticut Department of Public Health. The plaintiffs sought a judgment declaring that the state's prohibition of marriage for same-sex couples violated due process and equal protection provisions of the Connecticut constitution. The plaintiffs did not make any claims under the U.S. Constitution. The plaintiffs also sought an order directing Bean to issue marriage licenses to each couple and the Department of Public Health to register the marriages once they were performed.

While the plaintiffs' action was pending in the trial court, the Connecticut Legislature passed a law establishing civil unions for same-sex couples, which conferred on same-sex couples in a civil union the same rights as married couples. The parties in this case then narrowed the issue to whether the civil union law and its prohibition of same-sex marriage passed muster under the state constitution. The trial court ruled in favor of the defendant state, finding that the civil union law rendered a traditional constitutional analysis unnecessary because the plaintiffs could no longer argue that the state's laws treated same-sex couples differently than opposite-sex couples. Furthermore, the trial court ruled that the establishment of civil unions did

not create a "lesser status" for same-sex couples. The plaintiffs appealed to the Connecticut Supreme Court, which reversed the judgment of the trial court and ruled in favor of the plaintiffs. The Court found that the "trial court improperly determined that the distinction between civil unions and marriage is constitutionally insignificant merely because a same sex couple who enters into a civil union enjoys the same legal rights as an opposite sex couple who enters into a marriage,"[274] and that Connecticut's "statutory scheme governing marriage impermissibly discriminates against gay persons on the basis of their sexual orientation."[275]

B. A Racial Analysis of the Case Brief

What follows is an analysis of the racial arguments used in the brief. As in chapter III, I have organized this analysis into three sections: due process, equal protection, and the definitional argument. Within each section, I analysis the use of racial precedent and analogies in the context of the broader constitutional or definitional claim.

i. Due Process

Gay and Lesbian Advocates and Defenders, representing the plaintiffs in *Kerrigan v. Commissioner of Public Health*, used a racial interpretation of due process doctrine in the *Kerrigan* case brief to support their due process argument for same-sex marriage. GLAD cited the U.S. Supreme Court's opinion from *Loving* to establish marriage as a civil right, and in criticizing the trial court's opinion, wrote that "More importantly, the trial court viewed marriage as merely a word and ignored its multidimensional significance as an institution with profound social and cultural importance and deep personal meaning, and to which access is considered a

[274] *Kerrigan v. Commissioner of Public Health,* 289 Conn. 135, 147-148 (2008)
[275] *Ibid.,* 148

civil right."[276] In citing *Loving* to establish the institution of marriage as a recognized civil right, GLAD used legitimate precedent and a landmark court decision to frame the argument around marriage; they did not note the racial aspect of *Loving* in this particular argument.

However, GLAD then expanded their Due Process argument. As they did in the *Goodridge* brief, GLAD cited other cases in addition to *Loving* to help frame the debate around marriage. By citing *Zablocki* and *Turner*, GLAD hoped to show that "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court affirm that the right to marry is of fundamental importance for all individuals"[277] and that the "liberty interest underlying the right to marry is enjoyed by all citizens; this case challenges the deprivation to gay people of a fundamental right enjoyed by all Americans."[278] Although GLAD cited a passage from *Zablocki* admitting that *Loving* arose in the context of racial discrimination, I find that the next portion of their argument was specifically framed to reject assertions that cases like *Loving* do not apply to same-sex marriage litigation because race was more central to the case than was marriage. For instance, GLAD wrote the following:

> Indeed, in Loving, the U.S. Supreme Court did not determine whether there was a fundamental, historic right to "miscegenic," or mixed-race marriages. The Court in Zablocki did not ask whether there was a fundamental right for the poor to marry, nor did the Turner Court assess whether there was a fundamental right to "inmate marriage." In these cases, only after acknowledging the well-established and general fundamental right to marry did the Supreme Court consider the application of the right in the context of the state's denial of marriage to a particular class of people.[279]

GLAD went through case by case to show that in each case, the fundamental, historic, and more general right to marry was more important to the Court than was the application of that general right to marry to a particular class of people or minority group. In *Loving*, the Court first established the general right to marry, and then conferred that general right to mixed-race

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[276] *Kerrigan v. Commissioner of Public Health,* 289 Conn. 135 (2008), Brief of the Plaintiffs-Appellants, 13-14 (Citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)) (Internal citations omitted)
[277] *Ibid*., 39 (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978))
[278] *Ibid*., 39
[279] *Ibid*., 40

couples. In *Zablocki*, the Court first cited the recognized general right to marry, and found that it applied regardless of whether a person had child support obligations. In *Turner*, the Court again first cited the general right to marry, and then ruled that this general right to marry applied to prisoners. GLAD's logic follows that the general right to marry should apply to same-sex couples because the general right to marry has been found to apply to these other groups regardless of their different situations or characteristics from typical married couples. There may not be a fundamental right to same-sex marriage, but that is not what GLAD argued; rather, the general right to marry as applied in previous court decisions also applies to same-sex couples. GLAD's essential point here appears to be that all of these previous cases apply to same-sex marriage litigation because they are all premised on the established general right to marry. Thus, *Loving* and *Perez* do apply to same-sex marriage litigation because although they arose in the context of racial discrimination, they deal with the more important aspect of a general right to marry, and then with the less important aspect of applying that general right to a specific group. Race is not important, marriage is important. This is the first major aspect of GLAD's brief in Kerrigan that I want to highlight; like in Goodridge, GLAD tried to avoid race in its discussion of marriage as a fundamental right. Essentially, *Loving* acts as better precedent for same-sex marriage litigation when race is taken out of the picture, at least as far as the due process argument is concerned. And the Connecticut Supreme Court agreed with GLAD's due process argument, writing that "the civil union law entitles same sex couples to all of the same rights as married couples except one, that is, the freedom to marry, a right that has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women] and fundamental to our very existence and survival."[280]

[280] 289 Conn. 135, 139 (internal quotations and citations omitted)

ii. Equal Protection

GLAD also used a racial interpretation of equal protection doctrine in the *Kerrigan* case brief to support their equal protection argument for same-sex marriage. *Kerrigan* differs from *Goodridge* in that same-sex civil unions were legal in Connecticut before *Kerrigan* was decided by the Connecticut Supreme Court, while civil unions were not legal in Massachusetts before *Goodridge* was decided. Thus, the Connecticut court was forced to determine whether civil unions, which granted the same legal rights of married, opposite-sex couples to same-sex couples, except the title "marriage," satisfied constitutional equal protection guarantees. As such, GLAD needed to argue that civil unions did not satisfy the constitutional guarantee of equal protection: "This is one of those occasions when the Court must emphasize that equality under the Constitution cannot be realized through separation… The trial court improperly concluded that the Plaintiffs had sustained no 'legal harm' because the difference between 'marriage' and 'civil union' is 'inconsequential' and equality is not 'affected by… names.'"[281] Thus, GLAD argued, "the trial court misapplied the basic tenets of equal protection law." Additionally, they argued, the trial court improperly treated marriage as a mere word, when it is in fact a very significant institution in our society.

GLAD criticized and rejected the trial court's use of the term "legal harm" to describe equal protection standards. They cited Connecticut Supreme Court precedent showing that "treatment" is the correct term for equal protection principles: *Franklin v. Berger*,[282] stating that equal protection guarantees "the uniform treatment of persons standing in the same relation to the governmental action questioned;" and *City Recycling, Inc. v. State*,[283] which requires that we examine whether the statute in question "treat[s] persons standing in the same relation to it

[281] Brief of Plaintiffs-Appellants' Brief, 13-14, *Kerrigan v. Commissioner of Public Health,* 289 Conn. 135 (2008)
[282] 211 Conn. 591, 594 (1989)
[283] 257 Conn. 429, 452-53 (2001)

differently." GLAD, in arguing that the name of an institution can, in fact, create a discriminatory classification, employed a racial interpretation of the Equal Protection clause. They wrote: "No court would immunize from constitutional review a law mandating that state-recognized unions of mixed-race or mixed-religion couples be called 'civil unions,' as long as those couples were granted the same protections as 'married' couples."[284] The *Loving* decision allowed GLAD to use this racial interpretation; because allowing civil unions yet restricting legal marriage for interracial couples would create a discriminatory classification based on race, so allowing civil unions yet restricting legal marriage for same-sex couples creates a discriminatory classification based on gender or sexual orientation.

The second important aspect of GLAD's brief in Kerrigan that I want to highlight deals with civil unions and Plessy v. Ferguson,[285] and was not part of the *Goodridge* brief. GLAD called civil unions a "mark of inferiority"[286] for same-sex couples that resulted from the state's action and not merely from the plaintiffs' subjective feelings, as the state's defense argued. Indeed, GLAD noted that the trial court's reasoning "conjure[d] up a long-repudiated notion from *Plessy v. Ferguson*."[287] In upholding separate facilities for blacks, the Supreme Court in *Plessy* used the same reasoning:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[288]

GLAD used a racial interpretation of the Fourteenth Amendment to show that civil unions for same-sex couples do not satisfy Equal Protection standards; GLAD's argument concerning civil

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[284] Brief of Plaintiffs-Appellants' Brief, 14-15, *Kerrigan v. Commissioner of Public Health,* 289 Conn. 135 (2008)
[285] *Plessy v. Ferguson*, 163 U.S. 537 (1896)
[286] Brief of Plaintiffs-Appellants' Brief, 19, *Kerrigan v. Commissioner of Public Health,* 289 Conn. 135 (2008)
[287] *Ibid*.
[288] *Ibid*. (citing *Plessy v. Ferguson*, 163 U.S. 537, at 551 (1896))

unions reflects the scholarly work of Yan and Isaak.[289] I find the racial argument as applied in this particular case to same-sex marriage to be quite logical. Same-sex couples and the LGBT community are separated from opposite-sex couples and the heterosexual community because LGBT couples are restricted from the institution of marriage. While civil unions provide comparable legal rights to marriage, they lack the historical and cultural significance possessed by marriage. As such, civil unions are a second-class institution compared to marriage. This separation is similar to the separate facilities provided to whites and blacks at the time of *Plessy v. Ferguson*, and the defendants' arguments are the same. The Court in *Plessy* agreed with the defendants' argument that the state, in granting separate facilities based on race, did not place a mark of inferiority on blacks. Rather, blacks only felt inferior because it created a mark of inferiority and placed it on themselves.

Although GLAD made a correct and logical point in noting the similarity in argument between *Plessy* and the defendants in *Kerrigan*, I think they should have gone further. Rather than restrict the argument to a racial comparison, GLAD should have reached for additional cases based on non-racial minority characteristics as they did at other points in the brief. The danger of relying solely on the Court's reasoning in *Plessy* to argue that civil unions do not satisfy Equal Protection can be seen the in the work of scholars like Coolidge (arguing that racial and same-sex marriage cases are fundamentally different)[290] and Wagner (arguing that

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[289] See Yan, Matthew K. ""What's in a Name?": Why the New Jersey Equal Protection Guarantee Requires Full Recognition of Same-Sex Marriage." *Boston University Public Interest Law Journal*, 2007: 179., arguing that the New Jersey constitution's equal protection clause requires recognition of full marriage, rather than just civil unions, for same-sex couples. See also Isaak, Misha. "'What's in a Name?': Civil Unions and the Constitutional Significance of 'Marriage'." *University of Pennsylvania Journal of Constitutional Law* 10 (March 2008): 607., arguing that the civil unions do not satisfy equal protection guarantees and that full marriage must be applied. Isaak also draws a comparison to the "separate but equal" doctrine overturned by *Brown v. Board of Education*.

[290] Coolidge, David Orgon. "Law and the Politics of Marriage: Loving v. Virginia After Thirty Years: Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy." *Brigham Young University Journal of Public Law 12*, 1998: 201

miscegenation laws were mostly viewed as racial laws rather than marriage laws).[291] Even scholars who use racial cases to find that the term "marriage" must be applied to guarantee equal protection for same-sex couples go further than a mere discussion of the similarity of the defendants' arguments in *Plessy* and same-sex marriage litigation.[292] GLAD must take care in how they approach a racial interpretation of Equal Protection as applied to same-sex marriage litigation. This civil union argument is also limited by the definitional debate; because GLAD did not go far enough in rejecting the definitional argument, their racial argument against civil unions still falls victim to the argument that racial cases do not apply because marriage is a union of a man and a woman. By relying on additional cases that ruled against separate facilities or institutions based on gender, prisoner status, etc., I think GLAD's argument would be stronger and less prone to assertions that race does not apply to same-sex marriage litigation.

GLAD used a racial interpretation of the Equal Protection Clause in a similar fashion in a discussion of the level of scrutiny with which to examine this classification. The plaintiffs argued that the exclusion of same-sex couples from marriage was subject to strict scrutiny because it discriminated on the basis of sex. They also argued that it was subject to strict scrutiny or, at the very least, intermediate scrutiny, because it also discriminated on the basis of sexual orientation. They wrote that "the state subjects the Plaintiffs to 'segregation or discrimination' by denying each one the ability to marry his or her chosen spouse because of sex."[293] For example, if a woman wanted to marry a woman, the only difference between her choice of spouse and a man (whom she would be eligible to marry) is sex. Thus, stated GLAD,

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[291] Wagner, David M. "Marriage and Banking: Examining Miscegenation Laws to Test the Proposition That Loving v. Virginia Leads to Goodridge v. Department of Public Health." *Fla. Coastal L. Rev.* 7 (2005): 389.
[292] See Isaak (drawing a comparison between same-sex marriage litigation and the "separate but equal" doctrine overturned by Brown v. Board of Education). While GLAD only discusses the argument in Plessy, Isaak at least extends the argument to include a discussion of Brown and how it overturned Plessy.
[293] *Ibid.*, 24

> It is…undisputed that a man cannot do what a woman can (marry a man) and a woman cannot do what a man can (marry a woman). It is "because of" sex that each individual is outside the definition of marriage. Individuals are plainly "separated" from equal access to a civil institution because of sex.[294]

GLAD then used race as a point of comparison. Discrimination based on sex "stands on the same footing as" discrimination based on race, they argued. They continued: "Section 20 no more permits the denial of marriage based on sex or the separate designation of same-sex relationships as civil unions than it permits the denial of marriage based on race or the separate designation of mixed-race relationships as civil unions."[295]

A racial interpretation was again applied to GLAD's same-sex marriage litigation concerning the equal application debate, and this is the third major point I will highlight. GLAD cited a great deal of federal and state precedent to support an equal protection claim, that "the exclusion of same-sex couples from marriage is an impermissible, sex-based classification."[296] The precedent from other state courts was cited to show that there is a sex-based classification in heterosexual marriage laws. Excerpts from *Baehr v. Lewin*,[297] *Baker v. State*,[298] and *Goodridge* were presented. GLAD addressed the decisions of courts that have found that marriage laws do not discriminate based on sex, and state that these decisions were based on the "simplistic view…that a legal restriction is not 'because of' sex if it applies equally to all persons who wish to marry."[299] The equal application argument, as used in cases such *Anderson v. King Country,*[300] is the view that both sexes are treated identically because neither men nor women may marry a person of the same sex. The decisions reached through this argument are "plainly wrong," argued GLAD, "because they disregard U.S. Supreme Court precedent that has forcefully rebuffed this

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[294] *Ibid*.
[295] *Ibid*., 24-25
[296] *Ibid*., 29
[297] 852 P.2d 44, (Haw. 1993)
[298] 744 A.2d 864, (Vt. 1999)
[299] *Kerrigan*, Brief of the Plaintiffs-Appellants, 29
[300] Anderson v. King County, 138 P.3d, (Wash. 2006)

'equal application' defense as a justification under the Fourteenth Amendment."[301] GLAD then cited several cases dealing with racial discrimination that rejected the equal application argument, notably *McLaughlin v. Florida*, 379 U.S. 184 (1964) and *Loving v. Virginia*. *McLaughlin* essentially rejected the court's previous ruling in *Pace v. Alabama*, 106 U.S. 583 (1883), which had upheld a statute prohibiting adultery between mixed-race couples. The court ruled in *McLaughlin* that "*Pace* represents a limited view of the Equal Protection Clause… Judicial inquiry under the Equal Protection Clause…does not end with a showing of equal application among the members of the class defined by the legislation."[302] *Loving* "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of invidious racial discriminations."[303] Because these cases dealing with racial discrimination rejected equal application as an adequate means to justify racial classifications under Equal Protection doctrine, GLAD argued, equal application must also be rejected as an adequate means to justify classifications based on gender or sexual orientation under Equal Protection doctrine. GLAD's use of a racial interpretation of the Equal Protection Clause to reject equal application was quite logical, and was supplemented by a counter argument to the assertion that racial cases are inapplicable to same-sex marriage litigation.

Indeed, GLAD directly confronted the argument that *Loving* and *McLaughlin* are "inapplicable because the fourteenth amendment was concerned with race discrimination." This assertion, GLAD argued, was "illogical and misses the point."[304] It stated the following:

> The exclusion of same-sex couples from marriage involves a sex-based classification for the same reason that Loving involved a racial classification -- the exclusion 'violates the central meaning of the Equal

[301] *Kerrigan*, Brief of the Plaintiffs-Appellants, 29
[302] *Ibid*., 30 (citing *McLaughlin v. Florida*, 379 U.S. 184, 188-191 (1964))
[303] *Ibid*., 30 (citing *Loving v. Virginia*, 388 U.S. at 8 (1967))
[304] *Ibid*., 29

> Protection clause' because it 'proscribes generally accepted conduct if engaged in by members of different [sexes].'[305]

GLAD also directed us to *Roberts v. Jaycees*,[306] which stated that "stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." And, "state equal protection provisions that prohibit sex-based classifications, such as Section 20, equally abhor race-based and sex-based classifications."[307] GLAD essentially argued that we should ignore the racial component to cases like *Loving* and *McLaughlin*, and focus on the fact that there is discrimination based on an impermissible classification. Just because *Loving* and *McLaughlin* were based on racial discrimination does not mean that the central components of their decisions should not apply to same-sex marriage litigation. Again, it appears that GLAD tried to steer clear of race to maintain the applicability of these racial cases to *Kerrigan*; a racial interpretation of Equal Protection here includes keeping a distance from race as a factor. GLAD also, like in the *Goodridge* case brief, argued that the equal application defense should be rejected because constitutional rights are individual, not group rights.

The fourth aspect of GLAD's racial argument in the case brief that I want to highlight used race in a different way to supplement its equal protection argument. In response to the state's argument that the uniformity of its marriage laws with those of other states is a rational basis and therefore serves as a justification for barring legal marriage between same-sex couples, GLAD stated that states have always had different rules regarding marriage eligibility with respect to various characteristics. GLAD wrote that "historically, states have…had dramatically

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[305] *Ibid*., 30, internal citations omitted
[306] 468 U.S. 609, 625 (1984)
[307] *Kerrigan,* Brief of Plaintiffs-Appellants, 30

different laws based on race and ethnicity, remarriage after divorce, and competency."[308] Therefore, "insisting on uniformity for only one aspect of the State's marriage eligibility laws is irrational."[309] In addition to race, GLAD also mentioned other characteristics including "age, consanguinity and physical condition."[310] Again, this mention of other characteristics appears to have been an attempt to leave the race-sexual orientation connection out of the picture. By grouping race with various other characteristics of minority groups, GLAD fought the notion that racial discrimination cases do not apply to same-sex marriage litigation. Yes, *Loving* and *McLaughlin* were racial discrimination cases, but the central holdings still apply to any discrimination case, no matter the characteristic.

GLAD dedicated a large part of their brief to a discussion of the history of invidious discrimination, oppression, and harsh treatment endured by gays and lesbians. Interestingly, however, GLAD did not mention the history of oppression suffered by blacks. This is an important difference from the *Goodridge* brief, in which GLAD noted that blacks have suffered more severely than gays and lesbians, and is the fifth significant aspect of GLAD's racial argument in *Kerrigan* that I highlight here. In the *Kerrigan* case brief, the closest GLAD came to a comparison is their very brief citation of *Roberts v. Jaycees* in a footnote: "stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."[311] But this citation was not part of GLAD's discussion of LGBT oppression, and deals with current oppression anyway. This is another significant move away from race. GLAD noted

[308] *Ibid*., 51 (internal citations omitted)
[309] *Ibid*.
[310] *Ibid*.
[311] See Kerrigan, Brief of Plaintiffs-Appellants, at 30 (citing Roberts v. Jaycees 468 U.S. 609, 625 (1984)).

many aspects of the "harsh oppression and systematic discrimination against gay people in our law and culture over the last century"[312]:

> Until 1961, it was a crime in every state for lesbians and gay men to engage in intimacy with loved ones. Indeed, it was not uncommon for police to raid gay establishments and arrest people on such charges as disorderly conduct merely for congregating and socializing. Until the 1970s, lesbians and gay men were widely regarded as mentally ill and sexual and moral perverts. Lesbians and gay men have been subject to widespread employment discrimination (including by the federal government) and are among the most frequent victims of hate crimes. In spite of progress, significant stigma associated with lesbian and gay people remains today.[313]

This is a long and clear history of oppression detailed by GLAD. Had GLAD supplemented this with a discussion of the history of racial discrimination suffered by blacks in the United States, including slavery, the oppression suffered by the LGBT community would have paled in comparison. I think GLAD realized this, and tried a different approach. In leaving the history of black racial discrimination out of the argument, a compelling and disturbing picture of LGBT oppression was presented. GLAD wanted to present LGBT oppression as unique and disturbing because it has harmed people, not because it was more or less severe than other forms of oppression. I think this was a wise approach for GLAD, because it stayed away not only from race, but from the dangers imposed by the Black/White Binary. The Connecticut Supreme Court, in its decision, agreed with GLAD's assessment of the historical oppression suffered by LGBT individuals: "gay persons…face virulent homophobia that rests on nothing more than feelings of revulsion toward gay persons and the intimate sexual conduct with which they are associated."[314] Although the court did note that racial and religious minorities have suffered more than homosexuals, it framed this statement to reflect the severity of LGBT oppression, stating that "*only* racial and religious minorities have suffered more intense and deep-seated than

[312] *Ibid*., at 7
[313] *Ibid*., 7-9
[314] 289 Conn. 135, 199

homosexuals" (emphasis added),[315] and adding that gays and lesbians face "unique challenges"[316] to their social integration.

iii. Definitional Argument

GLAD confronted the definitional argument against same-sex marriage by appealing to the racial interpretation of Equal Protection from *Loving*. GLAD first criticized the reasoning typically employed to advance the definitional argument against same-sex marriage:

> The tautology—that marriage must remain a heterosexual only institution because marriage has been a heterosexual institution – vitiates the equality and liberty guarantees and thwarts the process of constitutionalism itself. The Connecticut Constitution would be an "atrophied" and "static" document, frozen in time, if citizens could be treated unequally solely based on legislators' personal beliefs about a past history of exclusion.[317]

GLAD's rejection of the tautology used to promote the definitional argument was simple enough; it used the same reasoning as the *Loving* court did in rejecting the definitional argument against interracial marriage. However, GLAD extended the argument by specifically citing rejections of this particular tautology by past courts. It noted the finding by the Massachusetts Supreme Judicial Court in 2003 that "[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."[318] It also noted the U.S. Supreme Court's decision in *Lawrence*, which stated that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."[319]

It is worth noting that in rejecting the definitional argument, GLAD did not rely upon *Loving* directly. Rather, it relied upon other cases that specifically concern LGBT discrimination and same-sex marriage that had already used the reasoning in *Loving* to reject the definitional

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[315] *Ibid*., 200-201
[316] *Ibid*., 201
[317] *Kerrigan*, Brief of the Plaintiffs-Appellants, 55
[318] *Ibid*. (citing *Goodridge*, 798 N.E.2d at 961 n.23)
[319] *Ibid*. (citing Lawrence, 539 U.S. at 577-78). This statement reiterated Justice Stevens' dissenting opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

argument as applied to LGBT rights litigation. Furthermore, GLAD did not limit its discussion of past cases rejecting the definitional argument to racial cases. For example, it referred to United States v. Virginia,[320] to show that the historical exclusion of women from certain professions based on stereotypical beliefs represents "impermissible grounds to deny equal opportunity to women."[321] It is clear that once again, GLAD sought to steer clear of race. It attempted to establish a clear precedent of court opinions that have already used the reasoning in *Loving* in that particular way, and it noted discrimination based on characteristics other than race to show that for many types of discrimination, the definitional argument has been rejected.

However, like in the *Goodridge* brief, I find GLAD did not go far enough in rejecting the definitional argument against same-sex marriage, and this is the sixth major aspect of the GLAD's racial argument that I highlight. GLAD's argument attacked the reasoning of the definitional argument as flawed and illogical, and noted a judicial precedent that has rejected this reasoning in various discrimination cases. However, GLAD's brief could be stronger if it showed that the assertion that marriage is, by definition, a union between a man and a woman, is false. I suggest that GLAD explore the historical argument advanced by Professor Eskridge, and note that same-sex unions have been an important aspect of many cultures and civilizations in world history. A discussion of Professor Eskridge's argument, coupled with an attack on the logic of the definitional argument, would create a much stronger brief.

C. Conclusion

GLAD used a racial interpretation of the Fourteenth Amendment's Due Process and Equal Protection Clauses to advance its same-sex marriage litigation on three grounds: due

[320] 518 U.S. 515, at 544
[321] *Kerrigan*, Brief of Plaintiffs-Appellants at 55, note 62

process, equal protection, and a rejection of the definitional argument against same-sex marriage. While GLAD's racial interpretation as applied to same-sex marriage litigation appears logical and effective—and in most cases I agree that a very strong argument is made—there remain problems with applying racial issues and cases to same-sex marriage litigation. GLAD's treatment of race as applied to same-sex marriage litigation in the *Kerrigan* brief shows that while racial cases like *Loving* may serve as a logical legal model for same-sex marriage litigation, there are major problems inherent in this argument that forced GLAD to move away from race as much as possible.

The main problem I find with GLAD's brief is that it did not go far enough in confronting the definitional argument against same-sex marriage. GLAD should use Professor Eskridge's historical exploration of same-sex unions in an attempt to prove the definitional claim false. Additionally, GLAD's racial approach toward rejecting civil unions was lacking; a discussion of other non-racial cases that have rejected the "separate but equal" doctrine is necessary in order to move away from race and assertions that race does not apply to the same-sex marriage debate. This racial argument is too reflective of scholars like Isaak who employ racial precedent to argue that civil unions for same-sex couples do not satisfy an equal protection guarantees.[322]

Most of the other racial approaches in this brief were stronger, and I agree with these other approaches because they appear to have limited the negative impact of the black/white binary on the same-sex marriage debate. Interestingly enough, these stronger approaches all aim to avoid race to a certain extent. In admitting that *Loving* arose in the context of racial discrimination, GLAD quickly pointed out several other non-racial cases dealing with the

[322] See Isaak, Misha. "'What's in a Name?': Civil Unions and the Constitutional Significance of 'Marriage'." *University of Pennsylvania Journal of Constitutional Law* 10 (March 2008): 607.

fundamental right to marry. This showed that the central holding of *Loving* applied to the same-sex marriage debate while essentially leaving race out of the picture. In confronting the argument that the equal application debates in *Loving* and *McLaughlin* are not applicable to same-sex marriage litigation, GLAD emphasized the marriage aspects of these two cases rather than the racial aspects. In rejecting the state's argument that uniformity of marriage is a rational basis, GLAD steered away from race by noting several other non-racial examples of how different marriage laws have been historically, state by state. And, perhaps most importantly, GLAD did not compare LGBT oppression with black racial oppression. This allowed LGBT oppression to stand on its own as oppression, regardless of how severe it was compared to other forms of oppression against other minority or disadvantaged groups in United States history. This closely reflects the scholarship of Hutchinson and Schacter, who argue for a new approach to same-sex marriage litigation that does not rely on a comparison between LGBT and black racial oppression. This close reflection of Hutchinson and Schacter's work indicates that GLAD may have actually relied on this scholarship in the development of the racial arguments in their *Kerrigan* brief, and that the reflection of the scholarship in this brief may be more than a mere coincidence. I believe this also shows an evolution away from race between the Goodridge brief and the Kerrigan brief, an idea which I explore in more detail in chapter V.

V. EVOLUTION FROM GOODRIDGE TO KERRIGAN: THE BLACK/WHITE BINARY, CONCLUSIONS, AND SUGGESTIONS FOR FURTHER RESEARCH

So what can we make of these findings? What does our examination of two case briefs from recent same-sex marriage court opinions reveal about the effectiveness and appropriateness of using interracial marriage and a racial interpretation of Due Process and Equal Protection doctrine as a model for same-sex marriage litigation? And can our findings from each brief be logically integrated to form one thesis?

First of all, I have found that same-sex marriage proponents and organizations like GLAD are able to make strong, clear, and logical arguments supporting that legalization of same-sex marriage based precedent set by interracial marriage cases like *Loving v. Virginia*. There are certainly similarities between the debate over miscegenation in the 1960s and the debate over same-sex marriage today, and race was a factor in discrimination, and still is in many aspects of our society, just as sexual orientation is certainly a factor in discrimination and has been for many years. Many of GLAD's arguments in both the *Goodridge* and *Kerrigan* briefs echoed the arguments of the numerous scholars who employ a racial element in support of same-sex marriage.[323] And the fact that a significant majority of scholars who research in this area

[323] I discussed in the Literature Review the large collection of scholarship that advocates that race-based cases like *Loving* and *Perez* provide legitimate precedent for the legalization of same-sex marriage. This scholarship includes: Eskridge, William N. Jr. "A History of Same-Sex Marriage." *Virginia Law Review 79*, 1993: 1419, 1507; Eskridge, William N. Jr. "Three Cultural Anxieties Undermining the Case for Same-Sex Marriage" *Temple Political and Civil Rights Law Review* 7 (1997-1998), 307; Howenstine, David W. "Beyond Rational Relations: The Constitutional Infirmities of Anti-Gay Partnership Laws Under the Equal Protection Clause." *Washington Law Review*, 2006: 417; Isaak, Misha. "'What's in a Name?': Civil Unions and the Constitutional Significance of 'Marriage'." *University of Pennsylvania Journal of Constitutional Law* 10 (March 2008): 607; Polk, Lisa M. "Montana's Marriage Amendment: Unconstitutionally Denying a Fundamental Right." *Montana Law Review* 66 (2005): 405; Price, Deb, "Civil Rites: Arguments Against Same-Sex Marriage Mirror Those that Kept the Races Apart," *Detroit News*, April 18, 1997, at E1; Reinheimer, Justin. "Same-Sex Marriage Through the Equal Protection Clause: A Gender Conscious Analysis." *Berkeley Journal of Gender, Law & Justice*, 2006: 213; Reinheimer, Justin. "What Lawrence Should Have Said: Reconstructing an Equality Approach." *California Law Review* 96 (April 2008): 505; Trosino, James. "American Wedding: Same-Sex Marriage and the Miscegenation Analogy." *Boston University Law Review 73*, January 1993: 93-120; Yan, Matthew K. ""What's in a Name?": Why the New Jersey Equal Protection Guarantee Requires Full Recognition of Same-Sex Marriage." *Boston University Public Interest Law Journal*, 2007: 179.

support the use of a racial interpretation of Due Process and Equal Protection doctrine as an appropriate legal model for same-sex marriage litigation suggests that it may actually be quite easy to make a strong argument to legalize same-sex marriage based on interracial marriage precedent.

But using race does impose certain limits on same-sex marriage litigation, and this is clear from my examination of the briefs. Looking generally at the cases, the state supreme courts of Massachusetts and Connecticut both ruled in favor of the plaintiffs GLAD represented, but we must look specifically at the arguments used in the briefs to see the limits imposed. While some of GLAD's arguments openly exposed these limits as major weaknesses, it is clear that in some arguments, even though the limits are exposed, GLAD actually worked to prevent the limits by moving away from race. Some of these arguments are the same in both cases, while some are approached quite differently, and may mark a shift in how race is approached and applied to same-sex marriage litigation. I highlight here what I feel are the four most important racial arguments made in the briefs.

A common argument advanced by anti-same sex marriage scholars like Coolidge and Wagner is that *Loving* arose in the context of racial discrimination and therefore does not apply to the same-sex marriage debate because race was more central to Loving than was marriage. In the briefs for both *Goodridge* and *Kerrigan*, GLAD focused on marriage cases that did not involve racial minorities. GLAD moved away from race to show that the central holding about marriage in *Loving* did, in fact, apply to same-sex couples because it applied to everyone.

The racial approach taken to reject the definitional argument against same-sex marriage was similar in both the *Goodridge* and *Kerrigan* briefs, although in both cases GLAD failed to

go far enough. GLAD rejected the definitional argument as "circular and unpersuasive," just as Loving rejected the definitional argument against interracial marriage. As mentioned earlier, I suggest in both briefs that GLAD supplement their attacks on the reasoning of the definitional argument with Professor Eskridge's discussion of the historical significance of same-sex unions. This would make GLAD's argument stronger; in addition to attacking the reasoning, they could add that 'even assuming the argument is logical, it is clearly false because the traditional definition of marriage has not always been a union between a man and a woman.'

Several arguments are approached differently in the two briefs; some are present in one but not the other. For example, in the *Kerrigan* brief, GLAD rejected the state of Connecticut's argument that the uniformity of the state's marriage laws to other states' marriage laws is a rational basis. This was not mentioned by GLAD in the *Goodridge* brief, probably because Massachusetts did not make an argument about the uniformity of its marriage laws with other states. In the *Kerrigan* brief, however, GLAD steered away from race by noting several non-racial cases, in additional to racial cases, in which marriage laws were shown to have a history of being very different from state to state.

The most significant shift from the *Goodridge* brief to the Kerrigan brief centers around the historical oppression suffered by both blacks and LGBT individuals; debates about the comparison of the severity of oppression suffered by different minority groups have been central in the literature on the Black/White Binary and Latino Critical Legal Theory, including work by Juan Perea, Rachel Moran, Darren Hutchinson, and Jane Schacter. In the Literature Review, I noted that a comparison between the two briefs would reveal an evolution in GLAD's use of a racial interpretation of due process and equal protection that reflects Hutchinson's and Schacter's arguments. In the *Goodridge* brief, GLAD discussed the history of LGBT discrimination, and

openly compared it to discrimination suffered by other groups, like blacks and women; GLAD admitted that LGBT oppression was not as severe as black oppression. I think this was a terrible strategy, as an open admittance that black oppression is more severe than LGBT oppression only reinforces and furthers ingrains the black/white binary into our civil rights discourse and risks a more difficult process of achieving rights for the LGBT community, as a comparison to black oppression is then forced to justify one's eligibility for civil rights. However, in the *Kerrigan* brief, GLAD provided a detailed account of oppression suffered by gays and lesbians, but did not include an account of black oppression. There was no admittance that black oppression was more severe than LGBT oppression, no comparison to black oppression, not even a mention of black oppression or slavery. This was quite a significant shift in approach from the *Goodridge* brief to the *Kerrigan* brief, and I think it symbolized a growing recognition of the dangers imposed by the black/white binary and, more generally, the limits imposed by applying a racial interpretation of the Due Process and Equal Protection Clauses on same-sex marriage litigation. GLAD, in the *Kerrigan* brief, appears to have followed the views of Professor Hutchinson, who wrote that

> Gay and lesbian legal theorists and political activists should advocate sexual equality by addressing the many harms sexual subordination causes. These harms require legal and political remedies for their own sake—without reference to the rights and injuries of black heterosexuals…Multidimensionality provides a more effective framework for discussing these harms…[It] portrays these harms without diminishing—but rather, acknowledging and emphasizing—the importance of race and other sources of empowerment and disempowerment.[324]

Hutchinson believes, and I agree, that harms to sexual minorities should stand on their own without being compared to more severe racial oppression. And Hutchinson's new discourse fits well with Schacter's test[325] to determine the legitimacy of civil rights claims: "[whether] social subordination and stigmatization subject gay men and lesbians…to systematic exclusion and

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[324] Hutchinson, Darren Leonard. "Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse." *Connecticut Law Review 29*, Winter 1997: 561, 633-634.

[325] For a full discussion of Schacter's civil rights claims legitimacy test, see Schacter, Jane S. "The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents." *Harvard Civil Rights-Civil Liberties Law Review* 29 (Summer 1994): 283.

disadvantage at the hands of dominant groups."[326] Hutchinson discusses what we must address in our discourse ("the many [specific] harms sexual subordination causes") in order to subject gay and lesbian experiences to this test. Many of the harms specific to gays and lesbian that are rooted in sexual subordination, like marriage and parental rights restrictions, housing and employment discrimination, and the closet, do clearly represent systematic exclusion and disadvantage at the hands of dominant groups. By keeping a comparison to the African-American civil rights experience out of the picture, we rid ourselves of a racial analogy that imposes enormous limits on the ability of gays and lesbians to achieve civil rights appropriate to their needs. GLAD in the *Kerrigan* brief highlighted only gay and lesbian oppression, so that this oppression could stand by itself as harmful and deserving of redress and relief without the requirement of meeting a certain standard of severity.

Because racial precedents impose dangers to the same-sex marriage movement, a case like *Romer v. Evans* also deserves some attention and consideration as a possible alternative solution. *Romer*, as discussed in chapter I, dealt with discrimination against individuals based on sexual orientation, and obviously was not a racial case like *Loving* or *Perez*. *Romer* has been perceived as a victory for the gay rights movement by many gay rights advocates and scholars. But *Romer* has not been very widely cited beyond *Lawrence v. Texas* because of its anomalous nature. Justice Kennedy, in writing the majority opinion in *Romer*, treated the Colorado Amendment struck down by the Court as a unique law that dehumanized gays and lesbians. In doing so, he eliminated the need to look at issues of strict scrutiny and avoided the question of whether gays and lesbians are a suspect class.[327] Looking at *Romer* from this perspective, one must question the authority of this decision as applied to later same-sex marriage litigation and

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[326] *Ibid*., 298

[327] See Hasian, Marouf A., Jr., and Trevor Parry-Giles. "'A Stranger to its Laws': Freedom, Civil Rights, and the Legal Ambiguity of Romer v. Evans (1996)." *Argumentation and Advocacy* 34, no. 1 (Summer 1997): 27.

consider its limited reach and potentiality to extend to other LGBT legal concerns. Nonetheless, I feel as though a further and more thorough investigation into the use of *Romer* in recent same-sex marriage litigation would present a better understanding of *Romer*'s role in and implications for such litigation. Perhaps there is a way in which *Romer* could be used more productively and effectively than cases like *Loving* because it avoids the dangers imposed by the black/white binary.

Although I certainly believe my findings to be accurate and significant, I must confess that my research, although thorough and exhausting, is but a small speck within the universe of potential future research that could add to and expand upon my own. I hope I have added to the existing scholarly literature in a meaningful way by examining appellants' briefs of same-sex marriages cases to explore how LGBT activists have used interracial marriage and race in general as an appropriate legal model for same-sex marriage litigation, and whether the use of a racial interpretation of the Fourteenth Amendment's Due Process and Equal Protection Clauses as applied to same-sex marriage litigation is a wise strategy. I only regret that the limited scope and resources of this project prevented me from pursuing other interesting and potentially significant aspects to various civil rights and legal debates that sprang up along the way. For example, I became interested by various debates within the LGBT community concerning the importance of marriage legalization on the gay rights agenda, as well as certain historical debates about marriage. These debates all have many dimensions, and volumes could be added to the volumes of literature that already exist.

I also believe my conclusions could be developed further; for example, further research could generate more effective strategies in combating the limits to a racial interpretation I have exposed here. I suggest, particularly, a similar examination of the appellant brief submitted by

Lambda Legal Defense and Education Fund in *Varnum v. Brien* to see how Lambda Legal employed a racial interpretation of due process and equal protection and to what extend it considered the limitations of a racial analogy in the brief. It would be interesting to see if Lambda Legal continued GLAD's apparent practice of moving away from race. Or perhaps there is a way to use interracial marriage as a precedent for the legalization of same-sex marriage without exposing the dangers of the black/white binary? Perhaps someone can develop an effective method to fulfill Professor Hutchinson's desire for more discussion of race within the dialogue of gay and lesbian legal theory without portraying blacks and gays as two separate groups and without masking the multidimensionality of oppression. Or perhaps the journey that should be shared by race and sexual orientation in the arena of marriage rights is condemned to a less fortunate fate, as Professor Victor C. Romero suggests: "the hardships faced by gay and lesbian couples who want to legitimize their relationships through state-recognized marriage mirror the struggles of interracial couples during the heyday of the Civil Rights Movement…[but] race and sexual orientation may be doomed to follow separate, and hardly ever analogous, paths."[328]

[328] Romero, Victor C. (2010). Loving Across the Miles: Binational Same-Sex Marriages and the Supreme Court. In e. K. Maillard & R. Cuison Villazor, *Loving in a Post-Racial World: Rethinking Race, Sex, and Marriage.* Cambridge University Press.

TABLES AND FIGURES

Table 1
Charts from GLAD Brief
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	Choice of **same-sex** partner permitted?	Choice of **opposite-sex** partner permitted?	Choice of **female** partner permitted?	Choice of **male** partner permitted?
Men	No	Yes	Yes	No
Women	No	Yes	No	Yes[33]

	Choice of **different-race** spouse permitted?	Choice of **same-race** spouse permitted?	Choice of **white** spouse permitted?	Choice of **black** spouse permitted?
Whites	No	Yes	Yes	No
Blacks	No	Yes	No	Yes[34]

For the original version of this chart, see Brief of Plaintiffs-Appellants at 59, *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003) (No. SJC-08860).

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