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Same-Sex *Loving*: Subverting White Supremacy Through Same-Sex Marriage

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SAME-SEX *LOVING*: SUBVERTING WHITE SUPREMACY THROUGH SAME-SEX MARRIAGE[†]

Adele M. Morrison*

This Article marks the 40th anniversary of Loving v. Virginia—the landmark decision that responded to the question of the constitutionality of anti-miscegenation laws by firmly stating that the fundamental right to marry could not be restricted by race—by taking up the issue of the case’s applicability in the context of same-sex marriage. The invocation of Loving has generally been in a manner that invites comparisons between interracial and same-sex marriage. Pro same-sex marriage arguments that utilize this comparison—which has come to be known as the “Loving Analogy”—include the decision’s freedom of choice and antidiscrimination elements, but rarely incorporate the Supreme Court’s antisubordination message, as articulated through its anti-white supremacy stance. This Article seeks to rectify that. It argues that same-sex marriage subverts White supremacy by undermining heterosupremacy, countering notions of White superiority, and, because of the very existence of interracial same-sex couples, striking society “color-blind,” thus rendering race temporarily invisible. This Article reaches the conclusion that same-sex marriage is a civil rights issue that works against heterosupremacy and White supremacy and that Loving v. Virginia is indeed a case that can and should be extended to sanction same-sex marriage and support Lesbian and Gay couples.

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"The right to marry whoever [sic] one wishes is an elementary human right compared to which "the right to attend an integrated school, the right to sit where one pleases on a bus, the right to go into any hotel or recreation area or place of amusement, regardless of one's skin or color or race" are minor indeed. Even political rights, like the right to vote, and nearly all other rights enumerated in the Constitution, are secondary to the inalienable human rights to "life, liberty, and the pursuit of happiness" proclaimed in the Declaration of Independence; and to this category the right to home and marriage unquestionably belongs."¹

INTRODUCTION: *LOVING* (AND) SAME-SEX MARRIAGE RIGHTS

In the landmark 1967 civil rights case, *Loving v. Virginia*,² the United States Supreme Court determined, in part, that anti-interracial marriage laws were discriminatory because they were "[based on] invidious racial discrimination . . . [and] . . . designed to maintain white supremacy."³ Forty years later, *Loving* has become a cornerstone of social, political, and legal arguments in support of civil marriage rights for same-sex couples.⁴ Same-sex marriage advocates most commonly

1. Hannah Arendt, *Reflections on Little Rock*, DISSENT 6, No. 1, Winter 1959, reprinted in SAME-SEX MARRIAGE: PRO AND CON 145 (Andrew Sullivan ed., 2004).

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

3. *Id.* at 11.

4. See *Baker v. State*, 170 Vt. 194, 216 (Vt. 1999); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *In re Marriage Cases*, 49 Cal.Rptr.3d 675, 699 (Cal. 2006); See also WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE (1996)

invoke *Loving* in two ways: 1) Arguing that restricting marriage to only one man and one woman⁵ is similar to barring Whites from marrying non-Whites;⁶ thus, barring two people of the same sex from marrying, violates the proposition that the fundamental right to marry is fully realized only if one can marry a person of her⁷ choice.⁸ 2) Contending that denying civil marriage rights to same-sex couples is sex or sexual orientation discrimination, which parallels the race discrimination found unconstitutional in *Loving*.⁹ However, when advocates invoke *Loving* to support comparing same-sex marriage to interracial marriage¹⁰—a comparison that has come to be known as the “Loving analogy”¹¹—rarely do they note that the opinion contains an antisubordination message,¹²

(applies *Loving* to argue that barring same-sex marriage is sex-discrimination, sexual orientation discrimination and violates substantive due process); SAME-SEX MARRIAGE: PRO & CON, 88–90 (Andrew Sullivan ed., 2004) (includes *Loving* as one of eight cases determined to be key in the arguments for and against same-sex marriage).

5. See Defense of Marriage Act, 1 U.S.C.A. § 7 (1996) [hereinafter DOMA].

6. See, e.g., *Loving*, 388 U.S. at 4–5, nn.3–4; Va. Code Ann. §§ 20–54 (1960 Repl.Vol.) (prohibiting marriage between Whites and non-Whites and declaring such marriages void *ab initio*).

7. I use female pronouns throughout this Article. These references are intended to encompass both male and female unless indicated otherwise.

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

9. See *infra* Part I.B.2. (discussing sex discrimination and sexual orientation discrimination arguments).

10. For the purposes of this Article I will not add the qualifier “mixed-sex” to the term “interracial marriage,” unless specific to the context. See, e.g., *infra* Part II.C (discussing interracial mixed-sex and interracial same-sex couples). This is because marriage, as generally understood, is defined and legally recognized as a union between two people of differing sexes or genders. It is because of this understanding that qualifiers such as “same-sex” are necessary. See *infra* Part I.A.3 (discussing the debate around defining marriage). This unspoken understanding that the word marriage, standing alone, indicates heterosexuality is a subtle aspect of heteronormativity. (See *infra* note 163 and accompanying text (defining heteronormativity)). The term interracial, has also been used to modify the term marriage because, as discussed herein, marriage was socially constructed and legally recognized only if it was intraracial.

11. See *infra* Part I.A.1 (defining the *Loving* analogy and discussing the debate surrounding it).

12. In this context, antidiscrimination is utilized to discuss laws and policies that are specific to those individuals prevented from accessing civil marriage rights based on race, gender or sexual orientation. Whereas, antisubordination addresses groups who are kept in a subordinate status through, for example, limiting access to marriage rights. See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (stating that the anti-subordination perspective seeks to eliminate power disparities through the development of laws and policies that directly redress those disparities); See RICHARD DELGADO AND JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 145 (2001) (“Discrimination: Practice of treating similarly situated individuals differently because of race, gender, sexual orientation, appearance or national

articulated in the Supreme Court's rebuke of White supremacy.¹³

This Article focuses on the antistatutory aspects of *Loving* and the Court's anti-White supremacy determination, arguing for their applicability in the same-sex marriage context. It specifically asserts that same-sex marriage subverts White supremacy and therefore should be an additional invocation of *Loving* in the fight for same-sex marriage rights. Further, this Article contends that accepting and including lesbian and gay relationships in society in general and sanctioning same-sex marriage in particular, extends and expands upon the *Loving* decision represented herein by three principles: 1) freedom of choice, 2) antidiscrimination, and 3) antistatutory. While the argument does assert the applicability of the *Loving* analogy, it does not assert that racism and heterosexism are the same, nor does it compare or rank oppressions.¹⁴ The effort here is to argue that indeed gay rights are civil rights. With this in mind, this Article argues that extending full marriage rights to couples whose partners are the same sex, in the way *Loving* extended full marriage rights to interracial couples, benefits not only Lesbian, Gay, Bisexual and Transgender (LGBT)¹⁵ persons but people of color as well.

These three *Loving* principles, specifically as they relate to race, are more fully defined as follows: 1) freedom of choice means that marriage is a fundamental right that is only fully realized by being able to marry the person of one's choice regardless of race;¹⁶ 2) antidiscrimination stands for the idea that prohibiting interracial couples from marrying constitutes race discrimination;¹⁷ and 3) the antistatutory principle means that maintaining White supremacy,¹⁸ and thereby subordinating non-Whites,¹⁹

origin."); See generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (differentiating between antidiscrimination and antistatutory).

13. *Loving*, 388 U.S. at 11 (internal citation omitted).

14. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 36 (South End Press Classics 2d ed. 2000)(1984) ("Suggesting a hierarchy of oppression . . . evokes a sense of competing concerns that is unnecessary."); see Catherine Smith, *Queer as Black Folk*, 2007 WIS. L. REV. (forthcoming, 2007) (asserting that an argument which categorizes homophobia and heterosexism as "the same as" racism, serves to divide rather than unite subordinated groups).

15. This Article uses LGBT as an inclusive term for sexual minorities and communities consisting of lesbian, gay, bisexual, transgender, questioning and/or queer identified people.

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

17. *Id.*

18. ROBERT JENSEN, *THE HEART OF WHITENESS: CONFRONTING RACE, RACISM AND WHITE PRIVILEGE* 3-4 (2005) (defining white supremacy as "an ideology of the inherent superiority of White Europeans over non-Whites[.]").

19. Throughout this paper, I refer to non-Whites and people of color interchangeably. While much of my argument is generalizable to the racial and racialized ethnic and religious groups, in the twenty-first century United States, some of it is not. Thus, examples used herein will be situated in a Black/White context because of the particular lived

(more specifically Blacks),²⁰ is not a legitimate reason to bar persons from marrying. There are analogous principles grounding the arguments supporting same-sex marriage: 1) freedom of choice means that the fundamental right of marriage extends to all citizens, and “person of one’s choice” includes a person of either sex, regardless of the gender of the individual exercising the right;²¹ 2) antidiscrimination stands for the principle that prohibiting two persons of the same sex from marrying is discrimination based on sex or sexual orientation;²² and 3) an antisubordination principle means that heterosupremacy²³ is also not a legitimate reason to bar persons from marrying.²⁴ These principles, as they relate to same-sex marriage, clearly correspond to and mirror the *Loving* decision’s articulated principles. This Article argues that the comparison between interracial marriage and same-sex marriage is valid because of legal and social similarities between antimiscegenation and anti-same-sex marriage laws and the structural commonalities and social impacts of white supremacy and heterosupremacy.²⁵

Part I of this Article summarizes the debate around comparing interracial marriage and antimiscegenation laws to same-sex marriage and laws barring such unions. It introduces the *Loving* analogy, discusses its uses and addresses the definition of marriage, which, though not

experiences of Blacks in the United States (including my own), especially as it relates to *Loving*, interracial marriage and comparisons to same-sex marriage. In addition, while a discussion of the specifics as to the way race works within and upon other racial and racialized ethnic groups in the context of marriage and intimate relationships is important, it is beyond the scope of this work.

20. In this Article, “Black” and “White” are capitalized when each refers to a specific cultural or ethnic group within the United States of America. I use “Black” rather than “African American” to ensure that persons living in the United States, who are not Americans of African descent but who are perceived to be, or constructed as “Black” are included in this discussion.

21. See *infra* Part I.B.1.

22. *Infra* note 94 and accompanying text (discussing the sexual orientation discrimination argument).

23. As used herein, “heterosupremacy” is constructed by combining the prefix “hetero” from heterosexual with “supremacy,” meaning domination. It is defined as the position that heterosexuals and heterosexuality are superior to lesbian, gay and bisexual persons and non-heterosexuality. See, e.g., Sumi Cho, *Understanding White Women’s Ambivalence Towards Affirmative Action: Theorizing Accountability in Coalitions*, 71 UMKC L. REV. 399, 415 n.86 (2002) (discussing factors in the break down of coalitions, including how coalitions comprised predominantly of people of color fail to “recognize the claim of [an LGBT based] identity group and thus break down over heterosupremacy”); David Cruz, *“Just Don’t Call it Marriage”: the First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 969 n.237 (2000) (discussing heterosupremacy in a First Amendment context and referring to it as “one group in U.S. society being superior to another”).

24. See *infra* Part II.B. (for a discussion of the *Loving* principles).

25. See *supra* note 18 (defining white supremacy) and note 23 (defining heterosupremacy).

specifically mentioned in *Loving*, is central to the debate. An illustration of how the three principles—freedom of choice, antidiscrimination and anti-subordination—work in the interracial and same-sex marriage contexts, follows. The section concludes by contending that the Court's rebuke of white supremacy is a vital aspect of the *Loving* analogy and, as such, should be more fully incorporated into pro same-sex marriage arguments.²⁶

Part II, entitled "Living Loving," endeavors to explain how same-sex relationships challenge White supremacy. To do so it is necessary to broaden the discussion to include non-marital intimate relationships because they are the majority of same-sex relationships. This section initially addresses the subordinating ideologies of White supremacy and heterosupremacy, the manner in which they are interconnected and interdependent, and how they mutually enhance each other. The argument is that even though interracial mixed-sex marriages may fulfill *Loving's* choice and antidiscrimination principles, they also manage to help maintain White supremacy by supporting heterosupremacy.²⁷ Conversely, these subordinating ideologies work to allow same-sex marriage to counter heterosupremacy and thus subvert White supremacy. This section further explains how interracial heterosexual couples also help reinforce White supremacy by enabling assumptions of White superiority, while same-sex relationships do not. Finally, this section posits that society views interracial same-sex relationships differently than interracial mixed-sex relationships. Society is struck "color-blind"²⁸ by interracial same-sex relationships and race is rendered temporarily invisible. As a consequence, some same-sex couples—those who are interracial—directly counter not only heterosupremacy but White supremacy as well.

The Article ends by focusing on same-sex marriage as a civil rights issue. This section recaps the assertion that same-sex marriage expands the *Loving* decision's antisubordination message, and argues that *Loving* can and should be extended to support the determination that full marriage rights are fundamental to ensuring all persons move out of positions of subordination and gain full civil rights. Finally, reasoning that because it is unlikely that the state will end its sanctioning of marriage, this section concludes that it is important that all subordinated groups recognize that

26. Though this Article argues that extending marriage rights to same-sex couples will be a net positive in the struggle against all forms of discrimination and oppression, I am not necessarily pro-marriage. This means that I do not necessarily support the states privileging one particular adult intimate relationship over others, and allocating benefits based upon those privileged relationships.

27. See *infra* Part II, Section 1.

28. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1895) (Harlan, J., dissenting) ("There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

society as a whole benefits if adults in intimate relationships are allowed full access to marriage regardless of their race, sex, gender, or sexual orientation and work together to achieve this result.

I. A LOVING COMPARISON: INTERRACIAL AND SAME-SEX MARRIAGE

"[T]he right to marry is the right to join in marriage with the person of one's choice . . ."²⁹

"To deny this fundamental freedom on so unsupportable a basis . . . is surely to deprive all the State's citizens of liberty . . ."³⁰

"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 . . ."³¹

A. "Our Right to Lov(e)"ing:³² *The Debate Over Analogy, Utilization and Definition*

This part of the Article divides the debate surrounding *Loving* and same-sex marriage into three major components: 1) whether the analogy between interracial marriage and same-sex marriage is accurate;³³ 2)

29. *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948) (en banc).

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

31. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003).

32. Borrowed from, *OUR RIGHT TO LOVE: A LESBIAN RESOURCE BOOK* (Ginny Vida ed. 1978).

33. See, e.g., Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781, 789 (2005) (Advocating the *Loving* analogy to show that the same, or similar, arguments once used to prohibit interracial marriage are used today to prohibit same-sex marriage and emphasizing that marriage is as much of a fundamental right now as it was at the time of *Loving*); Mark Strasser, *Loving, Baehr, and the Right to Marry: On Legal Argumentation and Sophistical Rhetoric*, 24 NOVA L. REV. 769, 770 (2000) (using the analogy to show the importance of the use of marital laws for discriminatory purposes and denial of fundamental rights). But see, e.g., David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 204 (1998) (stating that the *Loving* Analogy is a political argument rather than a sound legal argument since marriage will have to be redefined in order for same-sex marriage to be legalized); Dale M. Schowengerdt, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex "Marriage"*, 14 REGENT U. L. REV. 487, 497, 501 (2002) (arguing against the power and usefulness of the analogy outside of a political realm. The analogy is "hollow" when examining equal protection and it is "inapposite" to state marriage laws); Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 441 (2001) (arguing that the theoretical similarities between race and gays and lesbians does not alone compel the analogy of *Loving*).

whether gays and lesbians have a right to “use” *Loving* to support legal, political, moral, and social arguments for same-sex marriage;³⁴ and 3) whether the definition of marriage itself is restricted to one man and one woman.

1. The “Loving Analogy”

The term “Loving analogy” is used in this Article in a general sense to refer to the similarities and differences between interracial and same-sex relationships in social and political contexts. It is also used in a legal context to refer to the doctrine produced by the decision itself. When addressing the Loving analogy in the legal arena, this work maintains that the *Loving* court’s due process declarations about the fundamental right to marry and freedom of choice,³⁵ as well as the equal protection holding denouncing invidious racial classifications,³⁶ are both key aspects of pro same-sex marriage arguments. The *Loving* court also pronounced that White supremacy is not a legitimate governmental interest:

There is patently no legitimate overriding purpose independent of invidious racial discrimination that justifies this classification. The fact that Virginia prohibits only interracial marriages involving White persons demonstrates that the racial classifications must stand on their own justification, as measures

34. See, e.g., *Andersen v. King County*, 138 P.3d 963, 1037, (Wash. 2006) (Bridge, J., dissenting) (“both the plurality and the concurrence are too quick to reject the *Loving* analogy.”); see also Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, *supra* note 33, at 789 (noting that “The *Loving* analogy is a heuristic device that acknowledges the distinctions but underscores the similarities between prohibitions on interracial marriage and prohibitions on same-sex marriage,” and that it can and should be used in such a way in order to support same sex marriage). But see Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 557 (2005) (arguing *Perez* and *Loving* “restored to marriage the integrity of its institutional purposes and logic” and this accomplishment “is now being betrayed” by the use of these cases to justify same-sex marriage); Deb McCown, *Black Pastors Assail Gay Analogy*, THE WASH. TIMES, May 18, 2004, at A16 (quoting Bishop Paul Morton, Baptist Church leader, “[Y]ou insult African Americans when you say that this is a civil rights issue.”).

35. *Loving*, 388 U.S. at 12 (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival[.]” (citing *Skinner v. State of Oklahoma*, 316 U.S. 535, 541, (1942)) (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”)).

36. *Loving*, 388 U.S. at 10 (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.” (internal citations omitted)).

designed to maintain *White Supremacy*. We have consistently denied the constitutionality of measures, which restrict the rights of citizens on account of race. 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.(Citations omitted.)(Emphasis added).³⁷

This works considers that statement to be equally as vital as the others used to support the pro same-sex marriage position.³⁸

The absence from pro-same sex marriage discourse of the Court's statement denouncing white supremacy³⁹ may be due to LGBT marriage—rights advocates' failure to comprehend fully that bans on same-sex marriage have a racial component—as manifested in the existence of LGBT persons of color and interracial same-sex couples who wish to marry.⁴⁰ Same-sex marriage rights advocates may have limited knowledge of the realities of the lives of LGBT people of color. For example some 14%, or 85,000 same-sex couples who self-identified on the 2000 US Census were Black same-sex couples. Other census based studies assert that “[p]roposed anti-gay marriage state and federal constitutional amendments will disproportionately harm Black same-sex couples and

37. Loving, 388 U.S. at 11–12.

38. See also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 960 (Mass. 2003) (“The plaintiffs challenge the marriage statute on both equal protection and due process grounds.”); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006) (noting that plaintiffs presented both due process and equal protection claims); *Andersen v. King County*, 138 P.3d 963, 968 (Wash. 2006) (plaintiffs presented both due process and equal protection claims); *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006) (plaintiffs presented both due process and equal protection claims); Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 573–76 (2007) (discussing same-sex marriage, substantive due process and equal protection, in the context of defining marriage).

39. Loving, 388 U.S. at 12.

40. I have determined from personal knowledge and plaintiff profiles as presented by Lamda Legal and the American Civil Liberties Union (ACLU) that several same-sex marriage cases have interracial couples in the plaintiff group. See *Andersen v. King County*, 138 P.3d 963 (Wash. 2004) (eight same-sex couples wanted to be in a civil marriage); *City and County of San Francisco v. State*, 128 Cal. App. 4th 1030 (Cal. Dist. Ct. App. 2005) (twelve same-sex couples petitioned for marriage licenses in California); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (five same-sex couples petitioned for marriage licenses in New York); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (seven same-sex couples petitioned for marriage licenses in New Jersey); see also, *Deane v. Conaway*, No. 24-C-04-005390 (Md. Cir. Ct. Jan. 20, 2006) (Lawsuit was filed on behalf of nine same-sex couples and a man whose partner recently passed away charging that a state law denying same-sex couples the right to marry violates the Maryland Constitution); *Samuels v. New York State Dept. of Health*, 811 N.Y.S.2d 136 (N.Y.A.D. 2006) (13 couples throughout New York were denied the right to marry in the state); <http://www.lamdalegal.org>; <http://www.aclu.org> (providing plaintiff profiles).

their families because they are already economically disadvantaged compared to Black married opposite-sex couples, as well as compared to White same-sex couples."⁴¹ More fundamentally, there may be a lack of understanding of how subordination is maintained by interconnected race and sexuality based oppression.⁴² This limited comprehension and lack of understanding leads to truncated arguments, which may translate into fewer successes in legal and political arenas.⁴³ This Article suggests a way to include people of color, their issues and experiences, and asserts that it may be beneficial in future arguments on the side of advancing same-sex marriage rights.

2. Using *Loving*

Those who argue that same-sex marriage rights advocates should not "use" *Loving* to further their cause generally assert that race and racism are too different from sexual orientation and homophobia to warrant a comparison.⁴⁴ Though, as noted above, direct comparisons may

41. ALAIN DANG & SOMJEN FRAZER, NAT. GAY AND LESBIAN TASK FORCE POLICY INST. & NAT. BLACK JUSTICE COAL., *BLACK SAME-SEX HOUSEHOLDS IN THE UNITED STATES: A REPORT FROM THE 2000 CENSUS* 5 (2d. ed. 2005), available at <http://www.thetaskforce.org/downloads/reports/reports/2000BlackSameSexHouseholds.pdf> (discussing the disproportionate impact of same-sex marriage bans of Black LGBT couples).

42. See *infra* Part II.A.

43. The numbers of states that limit access to marriage to couples consisting of one man and one woman vastly outweigh the number of states with any form of legal recognition of same-sex couples. See generally Human Rights Campaign, *Maps of State Laws and Policies*, available at <http://www.hrc.org/issues/5594.htm> (follow "Proposed Constitutional Amendments Limiting Marriage," "Statewide Marriage Prohibitions," and "Relationship Recognition in the U.S." hyperlinks) (maps and lists detailing the laws regarding recognition or lack thereof, for same-sex relationships). Together the maps and lists show that one state issues marriage licenses to same-sex couples, five states provide the equivalent of spousal rights at the state level through civil unions or domestic partnerships and three states and Washington D.C. provide some state rights comparable to spouses, for a total of 10 states granting any state-wide rights to same-sex couples. Compare with the 45 states with constitutional amendments or statutes restricting marriage to one man and one woman. (last visited October 10, 2007). (Also on file with author).

44. See Lynn D. Wardle, *Legal Claims for Same-sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 752-53 (1998) (arguing that race is unrelated to any legitimate purpose for regulating marriage because it is not a behavioral characteristic whereas sexual orientation is a behavioral characteristic directly relevant to the state's interests in regulating marriage); DL Foster, *Lets Just Call A Spade A Spade: Black and Gay Not the Same*, available at <http://www.witnessfortheworld.org/cm03.html> (last visited October 6, 2007); Christopher Curtis, *Jesse Jackson: Gay Marriage Rights Are Not Civil Rights*, GAY.COM/PLANETOUT.COM NETWORK, Feb. 17, 2004, available at <http://www.planetout.com/news/article.html?date=2004/02/17/6> (last visited October 6, 2007). But see generally Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 566 (1997) [hereinafter D.L. Hutchinson,

prove unproductive or divisive,⁴⁵ that does not mean that there are no similarities and differences⁴⁶ in the marriage context that warrant examination.

Critics further assert that that *Loving* was a case strictly about race and miscegenation.⁴⁷ As such, the case belongs only to the Civil Rights Movement era, standing as one of its major victories.⁴⁸ *Loving* was indeed a victory for the Civil Rights Movement because it struck down laws supporting racial discrimination aimed at Blacks, countered the doctrine of white supremacy⁴⁹ and rendered obsolete the legal status of the “one-drop rule”⁵⁰ limitation of rights based on ancestry. However, it was also a victory for privacy, marriage, and family, rights advocates⁵¹ since it

Unseen] (arguing that sexual orientation and race and issues facing LGBT persons and people of color are much more complex than simple comparisons between the two would lead one to expect and calling for the creation of a “multidimensional gay and lesbian discourse;” A discourse that would include identities along multiple axes); Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 875–76 (2006) (discussing the inaccuracy the idea that gays, lesbians, and bisexuals can pass for heterosexual, thus finding that comparing the struggle LGBT persons have to the struggle blacks have because of their visible skin color may be valid.)

45. See *Supra* note 14 and accompanying text.

46. KEITH BOYKIN, *ONE MORE RIVER TO CROSS: BLACK AND GAY IN AMERICA*, 30–84 (1996) (asking the question “Are blacks and gays the same?” and responding that there are “similarities but differences too.”).

47. See *Coolidge, supra* note 33, at 208 (citing *Baehr v. Lewin*, 74 Haw 530 (1993) (Heen, J. dissenting) (internal citations omitted)); *Schowengerdt, supra* note 33, at 497 (stating “In short *Loving* was about invidious racial discrimination.”); see generally Stewart & Duncan, *supra* note 34 (arguing the what *Loving* did was to counter a white supremacist anti-miscegenation “marriage project.”).

48. Nadine Strossen, *In the Defense of Freedom and Equality: The American Civil Liberties Union, Past, Present, and Future*, 29 HARV. C.R.-C.L. L. REV. 143, 148 (Winter 1994).

49. See *supra* note 18 (defining white supremacy).

50. RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 21 (2001) (explaining that the one-drop rule is “defined as black any person with traceable African ancestry”).

51. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (including *Loving* to identify a right of “constitutional protection to personal decisions”); *Bowers v. Hardwick*, 478 U.S. 186, 210–11 n.5 (1986) (Blackmun, J., dissenting) (arguing that *Loving* is analogous to this case because both cases had laws in effect criminalizing conduct, yet in *Loving* the Court determined those laws to be discriminatory); *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 805 (9th Cir. 1996) (arguing that the reliance on the status and history of laws prohibiting assisted suicide of terminally ill patients is inappropriate and that *Loving’s* anti-miscegenation laws would still be in effect if the Court relied on history and current status of such laws); *Wessmann v. Gittens*, 160 F.3d 790, 795 n.1 (1st Cir. 1998) (using *Loving* in a challenge to a school policy which used race as a determinative factor in school admissions); *Frandsen v. County of Brevard*, 800 So. 2d 757, 758 (Fla. Dist. Ct. App. 2001) (differentiating the race classifications in *Loving* from sex classifications in an equal protection challenge to a county ordinance prohibiting female breast exposure but not the male breast); *Young Women’s Christian Ass’n of Princeton, NJ v. Kugler*, 342 F. Supp. 1048, 1079 (D.N.J. 1972) (Garth, D.J., concurring in part dissenting in part)(invoking *Loving* in

articulated the fundamental right to marry⁵² and nationalized the *Perez v. Lippold* concept of marrying “the person of one’s choice.”⁵³

With its anti-white supremacy position, *Loving* was also a victory for the antisubordination principle itself.⁵⁴ *Loving* helped to render visible the fact that white supremacy was an ideology that law, politics, social convention, and individual and group effort kept in place; not happenstance or “god’s will.”⁵⁵ The Court showed that, in the context of race and intimate relationships, white supremacy was a predominant social ideology and was sanctioned by the state.⁵⁶ After identifying white supremacist ideology as real and invidious,⁵⁷ the Court then determined that the state’s actions in perpetuating white supremacy were constitutionally impermissible.⁵⁸

Loving can be a very useful analogy when addressing all forms of subordination. If other subordinated groups, including those with LGBT members, are able to render visible the ways in which they are being subordinated, and are also able to show that the oppression is occurring with either governmental support or through governmental inaction, it should follow that, by applying *Loving*, such actions would also be impermissible.

While it is true that *Loving* was a Civil Rights Movement victory, it also stands as a case supporting civil rights. In other words, even though *Loving* was a milestone for civil rights attached to the movement for Black equality, it was also important for civil rights in the more generic sense. These general civil rights⁵⁹ are applicable to many social, cultural, racial,

support of a broader concept of privacy in a challenge to New Jersey’s abortion statutes); *Manlove v. Town of Hymera*, No. TH01-0171-C-T/H, 2002 U.S. Dist. LEXIS 14722, at *5 (S.D. Ind. June 18, 2002) (comparing the right to choose whom to date with the right to choose whom to marry as established in *Loving*).

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

53. *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948) (en banc) (expanding the definition of family and extending the benefits and burdens of marriage to those who had been excluded).

54. See *supra* note 12 (defining antisubordination).

55. *Loving*, 388 U.S. at 3 (citing the lower court’s opinion addressing racial segregation “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.”).

56. *Id.* at 11.

57. See *Id.* at 11–12 & n.11 (indicating that the statute in question has no legitimate purpose separate from racial discrimination and pointing out the title of the Virginia statute, “An Act to Preserve Racial Integrity,” referred only to the “White race”).

58. *Id.* at 12.

59. BLACK’S LAW DICTIONARY 1487 (4th ed. 1968) (defining civil rights in the context of constitutional law as “such [rights] as belong to every citizen of the state or country, or in a wider sense, to all its inhabitants, and are not connected with the organization or administration of government.”).

and ethnic groups and social movements. Case law establishing and expanding the rights of the individual or group, both when precedent and when not, becomes a part of the public domain, to be built upon or expanded by those who agree and see themselves as similarly situated. *Loving* has been invoked repeatedly in contexts of equal protection and due process jurisprudence, privacy rights, and sex discrimination, among others.⁶⁰ Today, *Loving* is a key component of the marriage rights debate. This Article asserts that same-sex marriage is specifically related to the issues addressed in *Loving* because same-sex marriage embodies and extends its principles of freedom of choice, antidiscrimination, and antisubordination.

The specific debate over what *Loving* means is separate from the question of what sort of resource *Loving* can be and for whom. As a Supreme Court decision, *Loving* is a landmark opinion that is part of the nation's jurisprudential foundation.⁶¹ This precedent setting decision can be a resource for anyone who wants to use it to make a legal argument or a political statement or simply as a rhetorical tool. Groups may disagree about the contexts in which *Loving's* holdings may apply or may argue that it is being misinterpreted, or even misused. However, to say that *Loving* cannot be used at all because one group disagrees with the usage by another, is counter to the very purpose of legal precedents and reasoning by analogy. *Loving* is far more than a Civil Rights Movement victory. Though it is a vital part of Black history and culture, it is arguably just as vital to all United States history and culture. Thus, *Loving* should be available to all who feel its findings resonate with them.

3. *Loving* and Defining Marriage

The debate over the definition of marriage in the context of *Loving* and same-sex marriage centers around whether the language from *Perez v. Lippold* that was nationalized in *Loving*—"to marry the person of one's choice"⁶²—is gender neutral. Those who oppose same-sex marriage generally argue that by using the term "marry," the Court was referring to a

60. See *supra* note 51 and accompanying text.

61. See *Chen v. Ashcroft*, 381 F.3d 221, 230 (3d Cir. 2004) (stating that American laws recognize marriage as a fundamental right and citing to *Loving*); *Ex Parte Morales*, 212 S.W.3d 483, 502 (Tex. 2006) (stating that *Loving* and other cases determined that there cannot be unnecessarily "unconstitutional infringement upon the marital relationship"); *Lewis v. Harris*, 908 A.2d 196, 228 (N.J. 2006) (stating that there is "universal agreement" that there is a "fundamental right to marriage rooted in the traditions, history and conscience of our people," founded in part by *Loving*); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (finding that *Loving* is the leading decision on the right to marry). see also www.westlaw.com (*Loving v. Virginia* "citing references check" produces a "showing [of] 6781 documents"). (Last visited May 23, 2007).

62. *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948) (en banc); See *Loving*, 388 U.S. at 12.

union between one man and one woman.⁶³ Consequently, “person” must mean anyone of the “correct” gender or opposite sex.⁶⁴ This argument is typically articulated in the following way: extending marriage rights to same-sex couples changes the fundamental right itself by reshaping the institution of marriage because “marriage” is a union between one man and one woman.⁶⁵ The “anti” argument purports that regardless of how the relationship is characterized, the union of two people of the same sex is not a marriage and, therefore, *Perez* really determined that the nature of the fundamental right to marry is the freedom to choose the one person of the opposite sex with whom one wants to join in union.

Those supporting gay marriage rights assert that it is circular to argue that what gays want is not marriage.⁶⁶ The circular argument is the following: gay people want to get married but the relationship they want to enter into is not a marriage since only people of different genders can get married; therefore, since what gay people want is not a marriage, they cannot get married because a marriage is not what they can do.⁶⁷ This

63. See DOMA, *supra* note 5 (defining marriage as “only a legal union between one man and one woman as husband and wife”); see also *supra* note 43 for a hyperlink to listing of state laws).

64. This Article does not intend to include transsexuals who are married to individuals of the same biological or birth, sex of their non-transsexual spouse (e.g., a female-to-male transsexual married to a non-transsexual female) in the category of same-sex couples because they identify as different genders and may identify as a heterosexual couple. However, society and most current state laws consider these marriages to be same-sex and thus void ab initio. See, e.g., *Kantaras v. Kantaras*, 884 So. 2d, 155, 155 (Fla. Dist. Ct. App. 2004). (“[Determining] whether a postoperative female-to-male transsexual person can validly marry a female under the current law of this state . . . We hold that the law of this state does not provide for or allow such a marriage; therefore, we reverse the final judgment and remand for the trial court to declare the marriage of the parties void ab initio.”).

65. *Baker v. Nelson*, 191 N.W.2d 185, 185–86 (Minn. 1971) (finding that persons of the same sex are not authorized to get married because Minnesota employs a common usage definition of the term marriage as restricted to a union between two members of the opposite sex); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 974–75 & n.3 (Mass. 2003) (Spina, J., dissenting) (arguing there was no equal protection violation because there was no person denied access to “the institution marriage” being a “civil union of a single man and a single woman”); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) (finding “appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined”).

66. See, e.g., *Jones*, 501 S.W.2d at 589; see also SAME-SEX MARRIAGE: PRO & CON, *supra* note 4, at 90 (editor Andrew Sullivan describes *Jones* with the following language: “The Court of Appeals of Kentucky sets out the classic legal argument: Marriage by definition involves a man and a woman. End of discussion.” This is, as Sullivan titles the section, “The Definitional Argument.”).

67. See, e.g., *Jones*, 501 S.W.2d at 589 (“A license to enter into a status or a relationship which the parties are incapable of achieving is a nullity. If the appellants had

argument, however, winds its way around a path to answering a contrived question. The circular argument induces a response to the question of whether two people of the same sex can marry, but the “real” question is whether it is in the State’s power to extend marriage rights to couples of the same gender. As courts in same-sex marriage cases have noted, the answer to the “real” question is “yes” because, by having created civil marriage in the first place, the State has defined marriage and continues to define it.⁶⁸ Defining marriage both determines its parameters and procedures as well as who is allowed access to the institution,⁶⁹ and it is the State’s responsibility under its regulatory powers, to do so.⁷⁰

While civil marriage is a social institution, it is also a legal one and law determines the benefits and burdens that attach to it. This is exemplified in the court’s articulation in *Goodridge* that “While only the parties can mutually assent to marriage,”⁷¹ the government determines “who may marry and what obligations, benefits and liabilities attach to civil marriage.”⁷² Marriage’s parameters are State constructed and thus the State can—directly or indirectly—discourage or encourage, restrict or allow, or outright bar or specifically sanction persons in their quest to obtain or exercise a right to marry.⁷³ The State determines which relationships, and thus the people in them, are worthy of its blessings. Leaving same-sex couples out, suggests that they, and LGBT people in general, lack worth

concealed from the clerk the fact that they were of the same sex and he had issued a license to them and a ceremony had been performed, the resulting relationship would not constitute a marriage.”).

68. See *Goodridge*, 798 N.E.2d at 952–53, 965–66; *Baker*, 744 A.2d at 869, 883–89.

69. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 2 (2000) (noting that “In the form of the law and state enforcement, the public sets the terms of marriage, says who can and cannot marry[.]”). The state has determined that individuals are barred from marrying persons too close to them in consanguinity or affinity. Those who are already married are banned from marrying again prior to dissolution. States set age limits on who may marry without parental consent. See *In re Black*, 283 P.2d 887, 888 (Utah 1955) (addressing the ban on polygamy); *Moe v. Dinkins*, 533 F. Supp. 623, 625 (S.D.N.Y. 1981) (addressing the issue of age and marriage); *Singh v. Singh*, 569 A.2d 1112, 1113 (Conn. 1990) (addressing the ban on incestuous marriage); .

70. 55 C.J.S. *Marriage* § 4 (2007) (“The legislature of each state has the power to control and regulate marriages within its jurisdiction . . . The courts have jurisdiction over the marriage relation, its incidents, and its ultimate consequences, only as such jurisdiction is conferred by statute.”) (internal citation omitted).

71. *Goodridge*, 798 N.E.2d at 954.

72. *Id.*

73. See generally 55 C.J.S. *Marriage* § 4 (2007) (stating that the state’s power to control marriage is only limited by the Fourteenth Amendment).

and they are excluded from a host of benefits.⁷⁴ Thus, LGBT communities have strong reasons to fight for access to marriage.⁷⁵

The definition of marriage—socially and at common law—has traditionally been specific to a union between a man and a woman.⁷⁶ However, lack of specificity on the *Loving* Court's behalf leaves room for existing language to include persons of the same gender in that definition. Furthermore, this Article advances the opinion that determining that marriage rights are gender neutral invokes *Loving*, in that the Court's decision manifested a broader reading of earlier definitions concerning those who could and could not access the fundamental right to marry.⁷⁷ Therefore allowing same-sex couples access to marriage is a logical continuation of *Loving's* increased inclusivity.⁷⁸ In sum, a definitional argument against same-sex marriage is that marriage has always had one consistent definition and therefore can never be redefined. However, the courts in some same-sex marriage cases determined that the State could define marriage in an expanded way—as a union between two consenting adults—as the court did in *Loving* when it included persons of different races as those eligible to marry each other.

B. *What's It All About? The Loving Principles*

This part of the Article separates the *Loving* analogy into three major components, each addressing one of the *Loving* principles. Section

74. See *Infra* note 154 (listing over 1000 benefits, rights and privileges of marriage).

75. See, e.g., Thomas B. Stoddard, *Why Gay People Should Seek The Right To Marry*, OUT/LOOK 8–12 (1989), reprinted in WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 818–20 (1997) (stating that “[Marriage] is the centerpiece of our entire social structure . . . Lesbians and gay men are now denied entry into this ‘noble’ and ‘sacred’ institution. The implicit message is . . . [g]ay relationships are some how less significant, less valuable.”).

76. BLACK'S LAW DICTIONARY 992 (8th ed. 2004) (defining marriage as the “legal union of a couple husband and wife”). See also HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 1 (2000) (“Throughout most of American history, marriage has meant ‘the legal union of man and woman, as husband and wife, for life.’”).

77. See Cott, *supra* note 69, at 4–8 (introducing the ways in which groups have been excluded at various times from civil marriage); see generally STEPHANIE COONTZ, MARRIAGE, A HISTORY (2005) (discussing how the construction of traditional marriage and those who are included as being able to be married has changed over time).

78. See COONTZ, *supra* note 77, at 256 (describing the state of anti-interracial marriage laws prior to *Loving*); RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 214–80 (2003) [hereinafter KENNEDY, INTERRACIAL INTIMACIES] (discussing the enforcement of and the response to antimiscegenation laws); MORAN, *supra* note 50, at 112 (“Before *Loving*, antimiscegenation statutes made clear that race was an immutable status presumptively relevant to marital choice.”); MARIA P. P. ROOT, LOVE'S REVOLUTION: INTERRACIAL MARRIAGE 36–7 (2001) (discussing interracial relationships prior to *Loving*).

one addresses the freedom of choice principle and relates the *Loving* analogy to the issues of marriage as a fundamental right, and an individual's freedom to choose whom to marry. This section considers whether these principles work the same way in the differing contexts of race and sexuality. Section two is centered on the antidiscrimination principle and compares sex and sexual orientation discrimination to racial discrimination. Section three discusses the antisubordination principle. The focus is on the *Loving* Court's anti-White supremacy stance and how it applies in the same-sex marriage context.

1. *Loving* (is) Freedom of Choice

Loving reasserted the Court's determination in *Perez v. Lippold*⁷⁹ that the fundamental right to marry meant choice.⁸⁰ The court in *Perez* stated that "[T]he essence of the right to marry is freedom to join in marriage with the person of one's choice. . . ."⁸¹ The freedom of choice principle is employed in the pro same-sex marriage context to argue that if the decision to marry indeed does mean to marry the person of one's choosing, then it should not be limited based on any identity-based characteristics such as race, gender or sexual orientation. Opponents of same-sex marriage may consider the above-referenced *Perez* quote incomplete without the following phrase: "[A] segregation statute for marriage necessarily impairs the right to marry."⁸² The argument is that the complete sentence supports the contention that both the *Perez* and *Loving* holdings only related to race and not gender or sexual orientation.⁸³ However, *Perez* states that since the fundamental right to marry is about choosing whom to marry, then a law forbidding interracial marriages violates the Constitution.⁸⁴ The main point of these statements is that the fundamental right, like others in the privacy realm,⁸⁵ is in the decision-making; in this

79. *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948) (en banc).

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

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

82. *Id.*

83. See Coolidge, *supra* note 33, at 237 (specifically stating that the "courts of Virginia . . . turned a case about marriage into a case about race". Further determining that *Loving* represents "the triumph of marriage over racism" in particular not over lack of choice in general); Schowengerdt, *supra* note 33, at 497; Spindelman, *supra* note 33, at 432-40; Stewart & Duncan, *supra* note 34, at 575; Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 75-83 (1996) (stating the *Loving* analogy fails because the focus of *Loving* is the divisions of race which is different than the divisions created by sexual orientation).

84. *Perez*, 198 P.2d at 18-19, 21.

85. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding that a state law banning use of contraceptives among married persons is an unconstitutional infringement on the right to marital privacy); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)

situation deciding if, when and whom to marry. The *Loving* decision nationalized the *Perez* “freedom to choose whom to marry” determination but did not specifically state that making those decisions was limited to choices based on race. Thus, the freedom of choice principle is applicable in the same-sex marriage context because, arguably, the right attaches to the choosing itself, not to the identity of the person an individual is choosing to marry.⁸⁶

2. *Loving* (is) Antidiscrimination

LGBT marriage-rights advocates also argue that anti-same-sex marriage laws discriminate based on sex. *Loving* has been invoked to analogize the race-based discrimination of antimiscegenation laws to this sex-based discrimination.⁸⁷ Pro gay marriage advocates further insist that, since both race and sex are subject to heightened scrutiny under the U.S. Constitution, the restrictions should fail constitutional muster.⁸⁸ This anti-discrimination argument asserts that the court struck down antimiscegenation laws because they discriminated based on race, even if the restrictions were facially neutral. According to the statute in question in *Loving*, both Whites and non-Whites could be sentenced to jail, and both Mildred Jeter and her husband Richard Loving were banished from the State of Virginia for 25 years.⁸⁹ Therefore, the argument continues, courts should certainly strike down laws mandating that marriage licenses should be given only to couples consisting of one man and one woman.⁹⁰

(ruling that a Texas statute criminalizing sexual conduct between persons of the same sex is an unconstitutional intrusion into the personal and private life of the individual); *Roe v. Wade*, 410 U.S. 113, 166 (1973) (determining the right to privacy found in the Bill of Rights encompasses a woman’s decision whether to terminate her pregnancy).

86. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003) (“Without the right to marry—or more properly the right to choose to marry. . .”).

87. See generally ESKRIDGE, *supra* note 4, at 162–72 (specifically addressing the sex discrimination argument in the context of same-sex marriage); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199–201 (1994); Toni Lester, *Protecting the Gender Nonconformist from the Gender Police—Why the Harassment of Gays and Other Gender Nonconformists is a Form of Sex Discrimination in the Light of the Supreme Court’s Decision in Oncale v. Sundowner*, 29 N.M. L. REV. 89, 103 (1999) (explaining that failing to conform to sexual stereotypes about how “real men” and “real women” act results in harassment and different treatment of gay and lesbians and this makes it sex discrimination).

88. See ESKRIDGE, *supra* note 4, at 162–72. See also, Koppelman *supra* note 87, at 199–201; Lester, *supra* note 87, at 103.

89. *Loving v. Virginia*, 388 U.S. 1, 2–4 (1967) (discussing the facts of the case).

90. See The Human Rights Campaign *supra* note 43, <http://www.hrc.org> (follow “Marriage” hyperlink under “Get Informed” then follow each state hyperlink) (last visited October 6, 2007) (providing the text of all state statutes relating to same-sex marriage definitions and marriage protection amendments; listing the states that have passed a law

These laws, by specifically stating that marriage is restricted to one man and one woman, fail to be even facially neutral. In those states with equal rights amendments as part of their constitutions,⁹¹ because sex based discrimination triggers the highest scrutiny, anti same-sex marriage laws should fail state constitutional muster. This is what transpired in Hawaii where the Court found that the law violated the state constitution's Equal Rights Amendment.⁹²

Though the sex-discrimination argument has been most commonly invoked, an argument has also been made comparing the racial discrimination in *Loving* to sexual orientation discrimination.⁹³ To date, there is no binding precedent classifying gays, lesbians, and bisexuals as, in Equal Protection parlance, "suspect,"⁹⁴ as in the case of race, or "semi-suspect," as when gender is at issue. However, the *Goodridge* plaintiffs argued that sexual orientation should be treated similarly to sex or race⁹⁵ and that laws that discriminate based on sexual orientation should also be subjected to heightened scrutiny.⁹⁶ Though the Supreme Judicial Court did not use

defining marriage as between a man and a woman and refusing to honor same-sex marriages from other jurisdictions in response to the federal DOMA).

91. Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1202-04, 1288-93 (2005) (twenty-two states have added equal-rights amendments (ERAs) to their constitutions and all twenty-two prohibit all discrimination based on sex. Thirteen states prohibit discrimination based on race, national origin or creed: Alaska, California, Connecticut, Florida, Hawaii, Louisiana, Massachusetts, Montana, New Hampshire, Rhode Island, Texas, Virginia, Wyoming. Three states, Florida, Louisiana and Rhode Island, prohibit discrimination based on physical handicaps).

92. *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993). Subsequently the case was rendered moot by an amendment to the Hawaii Constitution. See Haw. Const. Art I § 23 (allowing the legislature to "reserve marriage for opposite sex couples.")

93. See *Hernandez v. Robles*, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting) ("Limiting marriage to opposite-sex couples undeniably restricts gays and lesbians from marrying their chosen same-sex partners whom 'to [them] may be irreplaceable' and thus constitutes discrimination based on sexual orientation."); Michael Dorf, *Identity Politics and the Second Amendment*, 73 FORDHAM L. REV. 549, 561-62 (2004) (proposing that *Loving* states that laws prohibiting marriage based on one's race are race-based classification and subject to strict scrutiny, therefore same-sex marriage prohibitions are laws restricting marriage on the basis of sexual orientation and are thus sex based distinctions); ESKRIDGE, *supra* note 4, at 172-82 (explaining the sexual orientation discrimination argument); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 27 (1994) (arguing that "the ban on same-sex relations will be seen as having much the same relationship to male supremacy as did the ban on mixed marriages to White Supremacy" therefore *Loving* will be a key case in the fight against sex discrimination and sexual-orientation discrimination).

94. But see *Watkins v. U.S. Army*, 847 F.2d 1329, 1352-53 (9th Cir. 1988), *vacated en banc*, 875 F.2d 699 (9th Cir. 1989) (the panel determined that sexual orientation was a suspect classification).

95. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 960-62 (Mass. 2003).

96. *Id.*

heightened scrutiny when evaluating the constitutionality of Massachusetts's marriage law,⁹⁷ it did determine that individuals were being denied access to marriage based on sexual orientation.⁹⁸

What about the *Loving* analogy? Is sexual orientation comparable in any way to race? The argument contending that there are similarities turns on comparing not race and sexual orientation themselves but resulting discriminatory effects. It is the discrimination based on sexual orientation that is analogous to the discrimination based on race, deemed by the *Loving* Court to be illegitimate.⁹⁹ The claim is that just as there was "patently no legitimate overriding [governmental] purpose" for barring access to marriage based on race,¹⁰⁰ there are no legitimate purposes to restricting access to marriage based on sexual orientation.¹⁰¹

Therefore, even though no statute specifically bars LGBT people from marrying—the state does not prevent a lesbian from marrying as long as she marries a man yet she is barred from marrying another lesbian—the result is discrimination based on sexual orientation. Though this argument is also related to sex discrimination—it is discrimination based on sex because a woman can marry a man but a man cannot marry a man—sexual orientation is implicated because of the modern construction of marriage being based on love between a couple.¹⁰² As Professor Holning Lau has noted, "a gay couple can never get married even though a gay individual can."¹⁰³ This is because the union between a person who is homosexually oriented and one who is heterosexually oriented cannot truly fulfill the purpose of the socially constructed and legally sanctioned "love-based"¹⁰⁴ marriage even if the pair is able to meet the marriages

97. *Id.* at 961 (deciding that strict scrutiny did not apply strict scrutiny because the statute did not survive the rational basis test).

98. *Id.* at 958 (determining that "individuals [were being denied] access to . . . the institution of marriage—because of a single trait. . . sexual orientation here.").

99. *See supra* note 93 and surrounding text (discussing sexual orientation discrimination arguments).

100. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

101. *See supra* note 93 and surrounding text (discussing the sexual orientation discrimination arguments).

102. *See* COONTZ, *supra* note 77, at 242–43, 247, 278, 306 (discussing the evolution of the 'love-pattern' in mate selection and stating that over the past two hundred years, Americans began to see marriage as a personal and private relationships that should fulfill their emotional and sexual desires. As a result, love is the main reason for marriage.). *See also*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) ("Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.").

103. Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1321 (2006).

104. COONTZ, *supra* note 77, at 8, 242–43 (discussing the love-based marriage).

contractual requirements.¹⁰⁵ The law has come to recognize the intimacy necessary for there truly to be a marriage;¹⁰⁶ therefore, a wedding that takes place between a lesbian and a man, or two heterosexual women, does not truly result in a marriage.¹⁰⁷ Comparably, under antimiscegenation laws, neither Whites nor non-Whites were barred from marrying, but both were prohibited from marrying someone outside their racial category (White or non-White).¹⁰⁸ Yes, a White person could marry another White person, but if the union was not between her and the person of her choice, it was not truly a marriage either. Thus, there is an applicable analogy between the racial discrimination barred in *Loving* and discrimination based on sexual orientation. The State bases marriage restrictions on the issues of identity so that individuals are barred not from access to marrying altogether, but from truly being married.

3. *Loving* is Anti-White Supremacy

This Article contends that adopting either the freedom-of-choice principle or the antidiscrimination principle, or both, leaves the pro same-sex marriage argument incomplete. By failing to include *Loving's* antisubordination principle, as articulated through the Courts anti-White supremacist language, same-sex marriage advocates limit possibly

105. See 52 Am. Jur. 2d *Marriage* § 4 (2000) (stating that marriage is sometimes characterized as a contract analogous to a partnership agreement, sometimes characterized as a three-party contract between a man, a woman and the state, and sometimes characterized as a personal relation which arises from a civil contract. However some jurisdictions follow the view that the rights and obligations of marriage do not rest upon contract, but upon the general law of the state, or that marriage is a contract as well as a status or legal condition.)

106. See *Goodridge*, 798 N.E.2d at 948 (declining to deny civil marriage to same-sex individuals since the Massachusetts state constitution forbids the creation of second-class citizens, and stating that the exclusive commitment of two individuals to each other nurtures love and mutual support, and brings stability to society).

107. See 41 C.J.S. *Husband and Wife* § 6 (1991) (stating that inter-spousal obligations arising out of the marriage contract "include sympathy, confidence, and fidelity, in addition to comfort, love, companionship, and affection . . . when a man and woman marry they contract toward each other obligations of mutual respect, fidelity and support").

I am not asserting that variations of couples or groups of people cannot or do not have relationships consisting of the attributes of marriage included in 41 C.J.S. § 6. My point here is simply that even though the legal definition of what is included in the marriage contract has expanded, it still presupposes sexual orientation symmetry. Because LGBT same-sex couples have this symmetry, as do heterosexual mixed-sex couples, they too can and should be included within the definition of those who may legally marry. A fuller discussion of the fluidity and multiple continuums of constructed sexual identities is beyond the scope of this paper.

108. See *Loving v. Virginia*, 388 U.S. 1, n.11 (1967) (citing the Virginia antimiscegenation law).

successful alternative arguments and undermine the *Loving* analogy itself. Moreover, by failing to address White supremacy, such advocates do not attend to the argument that the *Loving* decision was specifically limited to striking down antimiscegenation laws based solely on racial animus and therefore designed to support the doctrine of White supremacy.¹⁰⁹ This failure to extend an antisubordination message leaves the pro same-sex marriage argument vulnerable to the charge that the *Loving* analogy is invalid.¹¹⁰

Though the *Loving* Court specifically articulated that maintaining White supremacy was not a constitutionally protected interest of the State of Virginia or any state, and further, that the State could not restrict who could marry based on that doctrine,¹¹¹ the result has not been the eradication of White supremacy. Though *de jure*¹¹² white supremacy may have diminished in our culture, *de facto*¹¹³ white supremacy has not.¹¹⁴ In fact, it remains tenaciously intact and helps to maintain a system of subordination of which heterosupremacy is also a part.¹¹⁵ Nevertheless, the *Loving* decision's anti-white supremacy holding can be viewed as foundational in the work to develop antisubordination jurisprudence and counter the dominant/subordinate paradigm. So too is the *Goodridge* decision's extension of marriage rights to same-sex couples a monumental step forward on the path to equality.

Part II of this work seeks to show that the arguments in favor of same-sex marriage are connected to *Loving* not only through the established freedom of choice and antidiscrimination principles, but also through its antisubordination principle. Part II further asserts that this third principle of antisubordination provides support for the position that LGBT relationships should be legally sanctioned and that extending mar-

109. See *Id.* at 11–12 (discussing white supremacy and racial animus). See also Stewart & Duncan, *supra* note 34, at 579 (“*Loving* stands for the proposition that racial classifications are not grounds for denying the right to marry[.]”).

110. *Goodridge*, 798 N.E.2d at 974–78 (Spina, J. dissenting).

111. *Loving*, 388 U.S. at 11.

112. BLACK'S LAW DICTIONARY 458 (8th ed. 2004) (defining *De jure* as “Existing by right or according to law[.]”).

113. *Id.* (defining *De facto* as “1. Actual; existing in fact; having effect even though not formally or legally recognized . . . 2. Illegitimate but in effect . . .”).

114. See IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 197–202 (1996); KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 35; cf. MORAN, *supra* note 50, at 194 (explaining that minorities often self-segregate in choosing where to live); BELL HOOKS, *Overcoming White Supremacy*, in *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 113 (1989) [hereinafter HOOKS, *White Supremacy*] (arguing that Whites “cannot recognize the ways their actions support and affirm the very structure of racist domination and oppression[.]”).

115. See *infra* Part II.A.

riage rights to LGBT persons specifically continues and expands upon the *Loving* Court's anti-white supremacy stance.

II. LIVING LOVING: INTERRACIAL RELATIONSHIPS, SAME-SEX RELATIONSHIPS, ANTISUBORDINATION, AND WHITE SUPREMACY

"[I]t is important for us to remember that the struggle to end white supremacy is a struggle to change a system, a structure."¹¹⁶

"... the straight mind develops a totalizing interpretation of history, social reality, culture, language, and all the subjective phenomena at the same time ... The consequences of this tendency toward universality is that the straight mind cannot conceive of a culture, a society where heterosexuality would not order not only all human relationships but also its very production of concepts ..."¹¹⁷

Loving has afforded interracial couples access to civil marriage.¹¹⁸ When a White person and person of color marry, each is exercising his or her fundamental right to choose a partner,¹¹⁹ and each is specifically countering racial discrimination by making that choice regardless of the other person's race. Thus, the interracial mixed-sex couple clearly has a relationship grounded in two out of three of *Loving's* principles—freedom of choice and antidiscrimination.¹²⁰ A mixed-sex interracial couple may cross the "color line"¹²¹ when they marry. However, though it may seem counterintuitive, because of the intersectionality¹²² of race, gender and sexuality

116. HOOKS, *White Supremacy*, *supra* note 114, at 119.

117. MONIQUE WITTIG, *The Straight Mind*, in *THE STRAIGHT MIND AND OTHER ESSAYS* 27–28 (1992), *quoted in* KISS & TELL (GROUP OF ARTISTS), *HER TONGUE ON MY THEORY: IMAGES, ESSAYS AND FANTASIES* 59 (1994).

118. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

119. *Id.* at 12.

120. *See supra* Part B.I-II (defining and discussing the freedom of choice and antidiscrimination principles).

121. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (1903) ix (New American Library edition 1969) ("[T]he problem of the twentieth century is the problem of the color-line.")

122. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1244–45 (1991) (applying the concept of intersectionality to examine violence against women of color. Crenshaw advocates analyzing such violence as a function of both gender and race)). Intersectionality has been expanded and is a foundational principle of Critical Race Theory; *see* DELGADO AND STEFANCIC, *supra* note 12, at 149 (defining intersectionality as, "[b]elief that individuals and classes often have shared or overlapping interest or traits.").

based oppression, their union does not fully embrace the anti-white supremacy principle.¹²³

This section considers the ways interracial mixed-sex relationships support, and same-sex relationships challenge, white supremacy. Three postulates relating to how white supremacy influences and is influenced by intimate relationships ground this inquiry. The claims are applied to mixed-sex interracial couples and to same-sex couples. Each postulate is then used to illustrate the idea that same-sex marriage can subvert white supremacy.

The three postulates are the following: 1) Heterosupremacy and white supremacy are interconnected aspects of a subordinating¹²⁴ power structure and thus each serves to support the other. 2) The intersection of identities, i.e., race, gender and sexual orientation, makes it possible for relationships to either support or challenge concepts of white superiority.¹²⁵ 3) Relationships, by being normative or non-normative,¹²⁶ can serve to either increase or decrease of the visibility of race.¹²⁷

The postulates as applied to mixed-sex interracial couples and the ways they support white supremacy are as follows: 1) By choosing to access a social and legal institution that is nearly absolutely heterosexually exclusive, interracial mixed-sex couples are heteronormative¹²⁸—an element of heterosupremacy—and thus, part of a social structure comprised of interconnected subordinations.¹²⁹ 2) Because one of the persons in the couple is White, in the cases of White/non-White interracial coupling,¹³⁰ the couple continues to perpetuate ideas of white superiority based on the presumption that a person of lower racial status is marrying up.¹³¹ 3) Because of the race and gender dynamics operating on an interracial heterosexual couple, race is actually magnified rather than minimized in that the couple is normative by being mixed-sex but non-normative by being mixed race. This is a difference, which serves to accentuate the races of the individuals within the couple. In effect, the postulates, as applied to mixed-sex interracial couples which result in heteronormativity, white

123. See *supra* Part I.B.3.

124. See *infra* Part II.A.

125. See *infra* Part II.B.

126. *Infra* note 173 (defining normative). In this context normative couples are those that, on some level, conform to cultural expectations by being intraracial or heterosexual.

127. See *infra* Part II.C.

128. See *infra* note 164 (defining heteronormative).

129. See *infra* Part II.A.

130. A discussion of “marrying-up” in the context of couples consisting of two individuals from different racial minorities is beyond the scope of this Article.

131. *Infra* note 203 and accompanying text (discussing marrying up).

superiority, and racial magnification, serve to help maintain white supremacy.¹³²

Conversely, the postulates as they relate to how same-sex relationships subvert white supremacy are: 1) by their very existence, same-sex relationships counter heteronormativity which, in turn, undermines heterosupremacy and subverts all interconnected subordinations. 2) Same-sex couples challenge conceptions of white superiority based on a narrow, but socially pervasive perception of LGBT identity as a white cultural construct¹³³ and homosexuality as a detrimental lifestyle.¹³⁴ 3) Interracial same-sex couples, as the most non-normative, have a particularized impact on racial visibility. Identifiable same-sex interracial couples may render society "color-blind," lessening the visibility of race and the notability of racial difference. The postulates as applied to same-sex couples indicate that non-heteronormativity, undermining white superiority and rendering society color-blind serve to subvert white supremacy and to further *Loving's* antisubordination principle. This strengthens the validity of the *Loving* analogy¹³⁵ and arguments supporting its use in advocating for same-sex marriage.

132. Cf. Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 1 (1991) [hereinafter D.L. Hutchinson, *Heteronormative*] (discussing the notion that some theorists fail to understand that "systems of oppression do not stand in isolation").

133. See, e.g., BOYKIN, *supra* note 46, at 101 ("[B]lack straight people . . . see homosexuality as a white issue. . ."); Sharon P. Holland, "Home" is a Four-Letter Word, in BLACK QUEER STUDIES: A CRITICAL ANTHOLOGY 4 (E. Patrick Johnson & Mae G. Henderson, eds., 2005) (stating, "[H]omosexuality was effectively 'theorized' as a 'White disease' that had 'infected' the black community."); Earl Ofari Hutchinson, *My Gay Problem, Your Black Problem*, in THE GREATEST TABOO: HOMOSEXUALITY IN BLACK COMMUNITIES 4 (Delroy Constantine-Simms ed. 2000) [hereinafter E.O. Hutchinson, *My Gay Problem*] (noting that "leading afrocentrists swore 'homosexuality is a deviation from afrocentricity'").

134. Compare George A. Rekers, *An Empirically Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody by any person residing in a Household that includes any Homosexually-Behaving Member*, 18 ST. THOMAS L. REV. 325, 359 (2005) (listing reasons why homosexuals should not be legally recognized parents, including as one reason that "Homosexual behavior is widely disapproved by the majority of the U.S. population."); with, Lydia Saad, *Tolerance for Gay Rights at High-Water Mark: Public evenly divided over whether homosexuality is morally acceptable or wrong*, GALLUP NEWS SERVICE, May 29, 2007, <http://galluppoll.com/content/Default.aspx?ci=27694&VERSION=p> (finding that public tolerance for gay rights is at the high-water mark of attitudes recorded over the past three decades; with only 37% of people polled believing that "homosexual relations between consenting adults should not be legal," 39% believing that homosexuality should not be considered an acceptable lifestyle 49% believe that homosexual relations are morally unacceptable).

135. See *supra* Part I.A.1 (defining the *Loving* analogy).

A. Interconnected Subordinations: Heterosupremacy and White Supremacy

This section first addresses the ways in which heterosupremacy and white supremacy are interconnected and fundamental to the perpetuation of the dominant/subordinate social structure. Several theories support the premise that oppressive ideologies, including heterosupremacy and white supremacy, are interconnected. For example, interest convergence theory posits that gains will come for subordinated groups when their interests converge with those of dominant groups.¹³⁶ Intersectional theory specifically shows that subordinations are interconnected, by demonstrating the manner in which subordinating ideologies are differently operationalized depending on the multiple identities of the subordinated group.¹³⁷ Multi-dimensional theory posits that sex, race, and class inequality are not “separable, mutually exclusive, or even conflicting phenomena.”¹³⁸ Symbiosis theory shows how “systems of subordination” are mutually beneficial to each other; specifically stating that in fact “it is difficult, perhaps impossible, to eliminate one form of subordination without attacking the entire edifice of interlocking oppressions.”¹³⁹ I apply these critical theories to support the notion that if there can be interconnectivity between dominant and subordinate groups there similarly is interconnectivity between dominant ideologies. This interconnection is what allows mixed-sex interracial relationships to assist in the perpetuation of white supremacy while same-sex relationships contribute to its subversion. Through subordination’s intersectionality,¹⁴⁰ multi-dimensionality,¹⁴¹ and symbiosis¹⁴² both forms of oppression, racism and heterosexism,¹⁴³ “converge”¹⁴⁴ and support a particular group’s dominance. In this case, Whites and heterosexuals help maintain an elevated status for each group and the status differences create power imbalances.¹⁴⁵ For ex-

136. Derrick A. Bell Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (describing convergence in the context of blacks as the subordinate group, whites as the dominant group, and racial equality as the interest at stake).

137. See generally, Crenshaw, *supra* note 122, at 1241.

138. D. L. Hutchinson, *Unseen*, *supra* note 44, at 566.

139. Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 307 (2002).

140. Crenshaw, *supra* note 122, at 1249 (“Intersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment.”).

141. See D.L. Hutchinson, *Unseen*, *supra* note 44, at 566 (1997).

142. See Ehrenreich, *supra* note 139, at 307.

143. See *Infra* note 163 (defining heterosexism).

144. See Bell, *supra* note 136, at 523.

145. Haney Lopez, *supra* note 114, at 197–99.

ample, racial oppression serves to support white racial dominance and helps to maintain an attitude of white superiority, which in turn helps perpetuate a minority underclass.¹⁴⁶ Similarly, heterosexism and homophobia¹⁴⁷ support heteronormativity¹⁴⁸ and limit LGBT persons' access to social, legal and political power.¹⁴⁹

Dominant and subordinate identities exist along many axes. Grouping the most dominant characteristics together constructs a force that subordinates those without the specified characteristics, i.e., racial whiteness and "hetero" sexuality. Professor Francisco Valdes has referred to this dominant force as "Euroheteropatriarchal elites."¹⁵⁰ This label speaks to the racialized, sexualized, gendered, and classed aspects of the dominant, subordinate binary and their interconnectedness.

The most dominant group is composed of those who possess all the traits or adhere to all the ideologies of the Euroheteropatriarchal elite and, in turn, reap the most benefits.¹⁵¹ Meanwhile, those in-grouped by virtue of a single aspect of their identity, or by one part of the ideology, are able

146. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* ix-xii (Basic Books ed. 1992) (discussing his continued belief that racism is permanent); Haney Lopez, *supra* 114, at 200-02 (relating examples of how important Whiteness is to White people, so much so that they will not give it up); Jensen, *Supra* note 18, at 4-7 (listing ways in which Blacks continue to be disadvantaged); ROBERT C. SMITH, *RACISM IN THE POST-CIVIL RIGHTS ERA: NOW YOU SEE IT, NOW YOU DON'T*, 105-07, 119-39 (State Univ. of N.Y. Press 1996) (discussing the formulation and permanence of a Black underclass and its connection with racism).

147. *Infra* note 163 (defining homophobia and heterosexism).

148. *Infra* note 163 (defining heteronormativity).

149. See The National Center For Lesbian Rights (<http://www.NCLrights.org>); Human Rights Campaign, (<http://www.HRC.org>); Lambda Legal, (<http://www.LambdaLegal.org>); American Civil Liberties Union, Lesbian and Gay Rights Project (<http://www.ACLU.org>); for lists of issues relating to LGBT communities and cases that are being addressed. (Examples of how LGBT people are limited include the following: exclusion from Federal Hate Crimes Legislation; exclusion from laws prohibiting discrimination in housing and employment, based on sexuality or gender identity; being barred from openly serving in the Military due to the "Don't Ask Don't Tell Policy;" barred from adopting children in the State of Florida (and effectively in other states due to non-sexual-orientation-specific laws which bar non-married or single people from adopting), gay men being excluding from the Boy Scouts of America; and LGBT youth being institutionalized).

150. Francisco Valdes, *Outsider Scholars, Legal Theory and Outcrit Perspectivity: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831, 841 (1999) [hereinafter Valdes, *Outcrit*]; see also Valdes, *Identity Maneuvers in Law and Society: Vignettes of Euro-American Heteropatriarchy*, 71 UMKC L. REV. 377 (2002) (adding in the word "American" after "Euro").

151. See generally JENSEN, *supra* note 18 at 3-14 (discussing the benefits of white supremacy and white privilege).

to access partial benefits.¹⁵² For example, White women—even though disadvantaged because they are women—access some racial benefit by being White.¹⁵³ Similarly, interracial heterosexual couples, while possibly disadvantaged by virtue of being interracial, are able to access marriage benefits¹⁵⁴ by being heterosexual and thus a state-sanctioned couple. Moreover, a White gay male couple, though disadvantaged by being a homosexual couple, and therefore barred from marrying, has access to racial and gender privilege.¹⁵⁵ Though some LGBT individuals and couples have access to varying types of privilege, the rights and benefits of marriage, extended to interracial mixed-sex couples through *Loving*, continue to be denied to most same-sex couples at the State level¹⁵⁶ and all gay and lesbian couples at the Federal level.¹⁵⁷

While white supremacy and heterosupremacy independently work against each subordinating principle's particular target group—people of color and LGBT persons, respectively—they also each work separately and together to oppress the other group as well. White supremacy itself supports racism within LGBT communities in a number of ways. LGBT persons of color may be excluded from gay bars or clubs based on their race.¹⁵⁸ A gay White man may be branded a “dinge queen”¹⁵⁹ or “rice

152. See, e.g., Ehrenreich, *supra* note 139, at 307 (arguing that “singly burdened” White women are “clearly privileged” compared to their black counterparts).

153. *Id.*

154. See, Letter from U.S. General Accounting Office to Sen. Bill Frist (Jan. 23, 2004) (identifying over 1000 federal provisions in which marital status is a factor in determining benefits, rights and privileges). See also, Religious Tolerance, *Legal and Economic Benefits of Marriage*, available at http://www.religioustolerance.org/mar_bene.htm (last visited March 2, 2007) (enumerating the rights and benefits of marriage including various property rights, parental rights, health care rights, decision making power, legal rights, and financial benefits such as inheritance rights, insurance access and tax exemptions).

155. See generally Ehrenreich, *supra* note 139, at 256–59 (introducing “symbiosis theory” by explaining that it includes the thesis that individuals can sometimes be dominant and sometimes be subordinate).

156. Massachusetts is currently the only state, which recognizes marriage between same-sex couples as a result of the Massachusetts Supreme Court decision in *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 969 (Mass. 2003) (“[B]arring 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.”).

157. DOMA *Supra* note 5. The act further states that it does not require that states recognize same-sex marriage legalized in other states. See also *supra* note 154 (for a more comprehensive listing of federal benefits of marriage and sources).

158. See Paul E. Pratt, *HRC Finds Castro Bar Proprietor Discriminates*, SAN FRANCISCO OBSERVER ONLINE EDITION, May 4, 2005, available at http://news.sfoobserver.com/news/view_article.html?article_id=1f15e17d7b3bed9d7c38a3fa612571be (last visited Mar. 1, 2007) (reporting that a popular gay bar in San Francisco “discriminate[d] in employment and public accommodations on the basis of race”).

159. See Brad Sears, *Diff'rent Strokes*, VILLAGE VOICE, June 28, 2005, at 28 (“Come to think of it, given my friends’ reactions to my partners, I can’t say the LGBT community

queen,”¹⁶⁰ for being in a relationship with a Black or Asian man. Such labels embody racist stereotypes of people of color. National LGBT organizations may include “progressive” groups or causes in their coalition building but fail to address issues of importance to communities of color.¹⁶¹ Additionally, and most seriously, racialized aspects of some gay bashings may be relegated to the margins, if acknowledged at all.¹⁶²

In turn, heterosupremacy is an oppressive force within communities of color. These communities, like society as a whole, can be homophobic, heterosexist and heteronormative.¹⁶³ Homophobia may be verbally expressed by one person of color in response to another’s coming out as gay.¹⁶⁴ Heterosexism may come in the form of “black intellectuals

goes easy on interracial couples. Or maybe I just don’t understand the more positive nuances of ‘dinge queen.’ Even friends who haven’t directly criticized my partner choices hardly let them go unnoticed. Most dismissively generalize that I’m ‘into black men’ on a sample of one.”).

160. See PAUL BAKER, *FANTABULOSA: A DICTIONARY OF POLARI AND GAY SLANG* 186 (2002) (“2. a gay man who likes Asians. Derogatory.”); DONALD F. REUTER, *GAY 2 ZEE: A DICTIONARY OF SEX, SUBTEXT AND THE SUBLIME* 177 (2006) (“A white boy greatly attracted to Asian men”).

161. See Kate Kendell, *Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 *YALE J.L. & FEMINISM* 133, 133–35 (2005) (noting that if LGBT people of color were more visible in the LGBT rights movement, the black community’s negative reaction to analogies between then San Francisco Mayor Gavin Newsome and past civil rights leaders might have been more moderated); see also Press Release, National Center for Lesbian Rights (Nov. 8, 2006) (celebrating many of the results of the 2006 elections, including the defeat of “the most draconian anti-abortion measure ever proposed; decrying the anti-marriage measures that passed but not mentioning the anti-affirmative action law in Michigan). (Copy on file with author.)

162. See D. L. Hutchinson, *Unseen*, *supra* note 44, at 567–69 (arguing that the murder of Julio Rivera, a gay Puerto Rican man, could be “characterized as an act of ‘racist-homophobia,’ rather than a ‘gay’ bashing”—which is the way LGBT activists viewed the crime, referring to it as “the Gay Howard Beach”).

163. MAGGIE HUMM, *THE DICTIONARY OF FEMINIST THEORY* 119, 123 (2d ed. 1995) (defining homophobia as “the fear of homosexuality in oneself or others” and heterosexism as “the unconscious or explicit assumption that heterosexuality is the only ‘normal’ mode of sexual and social relations.”); Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 *TEMP. L. REV.* 31, 34–5, n.16 (2002) (“Heteronormativity” is defined as “the view that heterosexuality is ‘the elemental form of . . . association, as the very model of intergender relations, as the indivisible basis of . . . community, and as the means of reproduction without which society wouldn’t exist.’” (quoting Michael Warner, *Introduction to Fear of a QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* xxi (Michael Warner ed., 1993))).

164. See *Retired NBA Star Hardaway Says He Hates “Gay People”*, ESPN.COM NEWS SERVICES, FEB. 16, 2007, available at <http://sports.espn.go.com/nba/news/story?id=2766213> (last visited May 12, 2007). (Tim Hardaway an African American former professional basketball player “said on a radio show . . . ‘You know, I hate gay people . . . I am homophobic. I don’t like it. It shouldn’t be in the world or the United States.’” Hardaway was responding to a question asked “a week after [John] Amaechi (Who is Black) became the first former NBA player to say he was gay.”).

associating homosexuality with the community's decline."¹⁶⁵ Heteronormativity may require LGBT persons to be closeted in order to be welcomed within the community. As author bell hooks related in *Homophobia in Black Communities*, the level of required closetedness may vary but still has a negative impact.

Sheer economic necessity and fierce white racism, as well as the joy of being there with the black folks known and loved, compelled many gay blacks to live close to home and family. That meant however that gay people created a way to live out sexual preferences within the boundaries of circumstances that were rarely ideal no matter how affirming. In some cases, this meant a closeted sexual life.¹⁶⁶

Finally, with issues such as same-sex marriage being so controversial, heterosupremacy can manifest itself not only as support for white supremacy but also white supremacist organizations.¹⁶⁷

Challenging either white supremacy or heterosupremacy will necessarily influence the other form of oppression. This is evident from the ways in which white supremacy functions within LGBT communities and the ways in which heterosupremacy operates within communities of color. Additionally, each form of oppression targets the communities themselves in that racism targets people of color and heterosexism and homophobia target the LGBT community. Failure to work against one helps ensure the other's continued strength.¹⁶⁸ Thus, a failure to adhere to

165. BOYKIN, *supra* note 46, at 157.

166. See BELL HOOKS, *Homophobia in Black Communities*, in TALKING BACK *supra* note 114, at 120–21 [hereinafter HOOKS, *Homophobia*]; see also, Walter Naegle, *Biography, Bayard Rustin (1912–1987)*, *Brother Outsider: The Life of Bayard Rustin*, available at <http://www.rustin.org/biography.html> (last visited May 22, 2007) ("As a gay man, relatively open for his time, Bayard Rustin experienced anti-gay prejudice in addition to racial discrimination. Because of his sexual orientation as well as his controversial political positions, he was often relegated to a behind-the-scenes role in various campaigns ... [However Mr. Rustin] was the Deputy Director and chief organizer of the 1963 March on Washington for Jobs and Freedom which, at that time, was the largest demonstration in the nation's history.").

167. See, e.g., Natalie Y. Moore, *Black Republicans: A Turn in the Culture Wars*, Feb. 10, 2006, available at <http://www.opendemocracy.net/xml/xhtml/articles/3256.html> (last visited March 1, 2007) ("Many of these pastors simply abandon traditional civil rights issues. Gregory Daniels, a pastor in Chicago and ardent Bush supporter, made headlines two years ago when he declared that if the Ku Klux Klan opposed gay marriage, he'd ride with them.").

168. Cf. Barbara Smith, *quoted in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 61 (Cherrie Moraga & Gloria Anzaldua eds., 1981) (stating that the reason that racism is a feminist issue is that the practice of feminism is free to all women,

an anti-heterosupremacy principle serves to help maintain white supremacy.

Fundamentally, the racism at the core of white supremacy and the heterosexism and homophobia at the core of heterosupremacy are interconnected and interdependent.¹⁶⁹ The dominant/subordinate social structure, used to maintain the power and control of the Euroheteropatriarchal elite depend on both. As Professor Valdes writes:

[Euroheteropatriarchy] signifies the commingling and conflation of various supremacies: white supremacy, Anglo supremacy, male supremacy, and straight supremacy. This term, therefore, seeks to capture the interlocking operation of dominant forms of racism, ethnocentrism, androsexism, and heterocentrism—all of which operate in tandem in the United States and beyond it to produce identity hierarchies that subordinate people of color, women, and sexual minorities in different yet similar and familiar ways. In this way, Euroheteropatriarchy also encompasses issues of language, religion, and other features of “culture” and community that help to produce and sustain hierarchical social and legal relations. Euroheteropatriarchy therefore denotes a specific form of subordination in a specific context, which encompasses and enforces white racism and Anglo ethnocentrism, as well as androsexism and heterosexism, normatively, politically, and legally.¹⁷⁰

Racism, heterosexism, and homophobia connect (along with classism, sexism, and other subordinating ideologies) to form the base of Euroheteropatriarchal elitism that maintains the white supremacy that continues to exist today.¹⁷¹ The conclusion is that the State sanctioning of same-sex marriage challenges white supremacy by legitimizing and supporting intimate relationships, which are, by their very existence, counter hegemonic and anti-subordinating. I use examples of both marriage and non-marital relationships because I believe that the underlying debate is

including women of color, and that anything less is not feminism, but merely “female self-aggrandizement”).

169. Supporting the general proposition that “isms’ are interdependent and interconnected, See generally Crenshaw, *supra* note 122 (discussing the connection between racism and sexism); Ehrenreich, *supra* note 139, at 257 (discussing how when those defined as “singularly burdened individuals compensate for the powerlessness they experience by using their privileged positionality to subordinate others, they often actually end up reinforcing the very systems that oppress them.”); D.L. Hutchinson, *Unseen*, *supra* note 44 and accompanying text (discussing this interconnectedness and the theoretical underpinnings).

170. Valdes, *Outcrit*, *supra* note 150, at 840–41.

171. See *Id.* at 840.

about the relationships themselves. Though the specific argument set forth in this Article is about formal legal recognition of same-sex relationships through civil marriage, subordinating systems work on non-marital relationships in the same way they do on marital ones. I further argue that there is a parallel between how those opposing same-sex marriage view all LGBT relationships and how those who opposed interracial marriage viewed all interracial relationships in that both oppositional groups believe such relationships to be “illicit sex”, “contrary to God’s will,” or unnatural.”¹⁷² The contention is that while heterosexual marriages, as exemplars of heteronormativity, may reinforce the status quo of white supremacy, same-sex intimate relationships challenge white supremacy by being non-normative.¹⁷³

B. *Intersecting Identities and White Superiority*

Intimate interracial relationships can be destabilizing to the system of subordination in that they have the potential to upset the white dominant/minority subordinate status quo by seemingly raising the status of one group while lowering the status of the other. Paradoxically, when it comes to heterosexual interracial relationships, they are both destabilizing to, yet reinforcing of, white supremacy. One reason this paradox exists may stem from the public perception that a person of color is choosing to involve herself with a White person to better herself.¹⁷⁴ This perception stems from White racial idealism,¹⁷⁵ the notion that “white is best.”

172. Peggy Pascoe, *Why the Ugly Rhetoric Against Gay Marriage is Familiar to this Historian of Miscegenation*, George Mason University, HISTORY NEWS NETWORK, April 19, 2004, available at <http://hmn.us/articles/4708.html> (last visited May 25, 2007); See also JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS* 295 (1988) (noting that “[n]ot only homosexuality, but race too, served as a dividing line separating ‘good’ sexual mores from ‘bad’ . . .”); ROOT *supra* note 78, at 36–7 (discussing similarities of language when talking about interracial and LGBT sexuality).

173. Norm, *KEY CONCEPTS IN CULTURAL THEORY* 261–62, (Andrew Edgar & Peter Sedgwick eds., 1999) (“A norm is a rule that governs a pattern of social behaviour,” either the ideal behavior or the “behaviour that is desired or prescribed.” To be normative is to construct or adhere to the norm, to be non-normative is to be the opposite.).

174. See MORAN, *supra* note 50, at 104–05; RENEE C. ROMANO, *RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA* 56 (2003) (discussing the “exchange theory” which posits that lower-class white women would marry upper-class black men thus exchanging a higher racial status for a higher economic status on the part of the women and vice versa on the part of the men); see also KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 25 (noting the fear that “the negro will be endeavoring to usurp every right and privilege. . .”), at 281–338 (discussing the benefits of passing for white including being accepted into white society).

175. KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 34 (discussing white “racial idolatry” and black inferiority).

White racial idealism can be perpetuated generationally by the continuation of the idea that children of any White/non-White interracial union are better than children of color with very little or no White ancestry because they have “white blood” and are thus of higher cultural status.¹⁷⁶ The idea that the addition of any White blood leads to higher cultural status exists even though children are still most often identified with, and socially, legally and politically, categorized as being, the same race as their of-color parent—especially if that parent is Black.¹⁷⁷ Regardless, the perception is that these biracial children are one step or generation closer to whiteness or at least are closer to being able to pass for White.¹⁷⁸ For Blacks, passing for White has historically been, and continues to be, advantageous.¹⁷⁹ Passing has meant access to rights and privileges reserved for the racially dominant class.¹⁸⁰ Those who cannot

176. See DEVON ABBOTT MIHESUAH, *INDIGENOUS AMERICAN WOMEN: DECOLONIZATION, EMPOWERMENT, ACTIVISM* 89 (2003) (stating that if part of a child's heritage and ancestry includes a dominant racial group, then that child may view that race as the superior race); MARIA P. P. ROOT, *Resolving “Other” Status: Identity Development of Biracial Individuals*, in *AMERICAN FAMILIES: A MULTICULTURAL READER* 442–43 (Stephanie Coontz et al. eds., 1999) (“Once the child comprehends that there is a concept of superiority by color, she or he may attempt to achieve acceptance by embracing membership in the ‘hierarchically superior’ racial group of their heritage[.]”); Norman Yetman, *Prejudice, Discrimination, and Racism*, in *RACE, ETHNICITY, AND GENDER: SELECTED READINGS* 12 (Joseph F. Healey & Eileen O’Brien eds., 2004) (“African Americans are still considered inferior people; otherwise, they would be as well-off as whites.”); Sharon E. Rush, *Identity Matters*, 54 *RUTGERS L. REV.* 909, 914 (2002) (“Whites continue to be the dominant race because on some level of consciousness, Whites believe their fundamental identity as a race includes being superior to all other races.”).

177. See KENNEDY, *INTERRACIAL INTIMACIES* *supra* note 78, at 34; MORAN, *supra* note 50, at 105; ROOT, *supra* note 78, at 81.

178. KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 283 (“Passing is a deception that enables a person to adopt specific roles or identities from which he or she would otherwise be barred by prevailing social standards. The classic racial passer in the United States has been the ‘white Negro,’ an individual whose physical appearance allows him to present himself as ‘white’ but whose ‘black’ lineage (typically only a very partial black ancestry) makes him a Negro according to dominant racial rules.”).

179. See KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 281–338 (defining passing and discussing the historical and contemporary advantages of being able to do so); *see also*, ROOT, *supra* note 78, at 141 (discussing how “‘Passing’ as white . . . was another strategy for subverting and renegotiating race and the privileges and access that go with whiteness.”); HANEY LOPEZ, *supra* note 114, at 192 (describing passing as the “ability of some individuals to change race at will”); HANEY LOPEZ, *supra* note 114, at 199 (relating the “presumptions of worth” that come with being perceived as white).

180. See HANEY LOPEZ, *supra* note 114, at 198–99 (discussing the high value placed on whiteness); KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 286–97 (relating “passing stories” that exemplify numerous advantages a person would get from being perceived as white); MORAN, *supra* note 50, at 47 (“Individuals with any African ancestry traditionally were barred from all of the privileges associated with white identity. Passing became a way for some blacks to circumvent the color line without directly challenging it.”).

pass however may still be able to improve their situations through an interracial relationship. The idea is that a person of color is somehow bettering herself and her children by forming a family with a White person and she herself is thus able to move up—towards whiteness—through this interracial intimate relationship.¹⁸¹

Conversely, society still views Black as inferior and the White person is “slumming” or lowering herself by being involved with a Black person.¹⁸² However, because of the exoticization of the sexuality of people of color,¹⁸³ society may understand why a White person might choose to be sexually involved with a person of color. Interracial sexual relationships can be constructed as Whites seeking a “walk on the wild side,”¹⁸⁴ as suffering from “jungle fever”¹⁸⁵ or as simply situationally necessary.¹⁸⁶ Though understandable, especially if limited to short-term sex, crossing the color line¹⁸⁷ is still a matter of the White person lowering her standards, and thus her status, within a White-dominated society.¹⁸⁸

Having a relationship, even one that is limited to being sexual, with someone of a lower racial status has historically meant being branded a criminal or ostracized from one’s own race.¹⁸⁹ The social construction of Whites who are intimately involved with non-Whites may still result in the White person being shunned by family, friends and community. A person who is perceived as less White according to social constructs means

181. See, e.g., MARITA GOLDEN, *DON’T PLAY IN THE SUN: ONE WOMAN’S JOURNEY THROUGH THE COLOR COMPLEX* 3 (2004) (“This society measures progress for the negro by how fast he can turn white.” (quoting James Baldwin)); see also, MORAN, *supra* note 50, at 114–15.

182. See generally KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 34.

183. MORAN, *supra* note 50, at 114–15.

184. The phrase was coined from one of three sources, each of which refers to prostitution and homosexuality. LOU REED, *WALK ON THE WILD SIDE* (RCA Records 1972); *WALK ON THE WILD SIDE* (Columbia Pictures 1962); NELSON ALGREN, *A WALK ON THE WILD SIDE* (1956).

185. This phrase is slang and denotes Black/White interracial relationships. See GEORGE A. YANCEY, *Debunking the Top Stereotypes About Interracial Couples*, in *JUST DON’T MARRY ONE: INTERRACIAL DATING, MARRIAGE AND PARENTING* 44 (George A. Yancey & Sheryllyn Whittum Yancey eds., 2002); *JUNGLE FEVER (40 ACRES & A MULE)*, 1991).

186. See, e.g., D’EMILIO & FREEDMAN, *supra* note 172, at 13–14 (noting that White men would “take black wives or mistresses” because of the absence of White women in the Colonial South).

187. See DuBOIS, *supra* note 121, at ix.

188. See KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 34 (“White racial narcissism began the destructive spiral and is far more potent than black reactions, which are essentially defensive and compensatory responses to white aggression.”).

189. See MORAN, *supra* note 50, at 19 (noting that punishment could be banishment or a jail sentence).

that the individual is more closely related to the person of color's subordinate racial status than to the dominant White racial status.¹⁹⁰

Both Whites and Blacks may be branded as "traitors to their race".¹⁹¹ However, the White partner is viewed as "lower[ing] the social status of whites",¹⁹² and, as such, is relegated to a subordinated racial status much closer to that of her non-White partner. Further, the White person is risking producing children who will not be White.¹⁹³ Even if her offspring are referred to as biracial, they are still not White¹⁹⁴ and therefore, the children serve to weaken white supremacy by potentially raising the status of persons of color.¹⁹⁵ This mixing of white and black to create biracial children is the idea of creating a mongrel race that the State of Virginia wanted to prevent.¹⁹⁶ The prevention efforts existed because any racial identity that was not purely white was inferior and threatening to white supremacy.¹⁹⁷

This is not to say that interracial heterosexual relationships deliberately continue to maintain white superiority, but rather that the popular perception of interracial different-sex relationships, within of-color and White communities, is that whiteness has an element of superiority.¹⁹⁸ This attitude of white superiority is reflected in the sense that people of color have married up when they marry Whites, whereas Whites have married down.¹⁹⁹ By marrying a White woman, a Black man is seen as

190. See ROMANO, *supra* note 174, at 52–53.

191. YANCEY, *supra* note 185, at 49.

192. ROMANO, *supra*, note 174, at 53.

193. See KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 367–68 (explaining that the children of slaves were black regardless of whether the father was a free White man or not. "By treating as unambiguously 'black' the human products of interracial sexual unions, authorities strove—usually successfully—to thwart any inclination toward interracial parenting."); see also ROOT, *supra* note 78, at 81 (stating that racial construction assigns children a non-White status); YANCEY, *supra* note 185, at 47 ("[S]ome argue that White partners [in interracial marriages] should be discouraged from having interracial children because then those children will be kids of color.").

194. See KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 367–68; see also ROMANO, *supra* note 174, at 53; ROOT, *supra* note 78, at 81 (stating that racial construction assigns children a non-White status); Yancey, *supra* note 185, at 47.

195. See KENNEDY *INTERRACIAL INTIMACIES*, *supra* note 78, at 158; Yancey, *supra* note 185, at 50.

196. *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (citing *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749 (Va. 1955)) ("The State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride'").

197. See, KENNEDY *INTERRACIAL INTIMACIES*, *supra* note 78, at 18–20, 23–24; ROOT, *supra* note 78, at 81.

198. See JENSEN, *supra* note 18, at 13–14; KENNEDY *INTERRACIAL INTIMACIES*, *supra* note 78.

199. See *infra* note 203 and accompanying text (discussing marrying up and marrying down).

reclaiming his manhood, which White society stole.²⁰⁰ Conversely, a White man marrying a Black woman does not have the same social impact²⁰¹ because of the unfettered access to Black women that White men have had historically.²⁰² While women tend to marry up socioeconomically, when a White woman marries a Black man she has married down in the context of racial, and thus social, status. However when a Black woman marries a White man, she has racially, and therefore socially, married up.²⁰³

The social construction of homosexuality serves to limit the possibility of LGBT persons of color accessing the equivalent of marrying up. Not only is marriage itself barred, but the combination of public perception of non-heterosexuals, namely that they have both an undesirable identity and inferior way of living, leads to the construction of LGBT persons as inferior to their heterosexual counterparts.²⁰⁴ Not only is ho-

200. Cf. D'EMILIO & FREEDMAN, *Supra* note 172, at 105, 202–203, 216–221; FRANTZ FANON, *BLACK SKIN WHITE MASKS* 63–82 (1967); KENNEDY *INTERRACIAL INTIMACIES*, *supra* note 78, at 122–23; ROOT, *supra* note 78 at 36–37; Gala Oliver, *Sister Outsider Revisited*, *CURVE*, Vol. 11 (Feb. 2001) (“The myth basically says that Black women not only dominate the Black family, but are in cahoots with the White power structure to disempower Black men.”). Throughout history, even the hint of a relationship, real or imagined, between a Black male and White female has been met with extremely disproportionate violence. See generally DORA APEL, *IMAGERY OF LYNCHING: BLACK MEN, WHITE WOMEN AND THE MOB* (2004) (exploring lynching of black men by white mobs); see also MAMIE TILL-MOBLEY AND CHRISTOPHER BENSON, *DEATH OF INNOCENCE: THE STORY OF THE HATE CRIME THAT CHANGED AMERICA* (2005) (discussing the case of Emmett Till, a black teenager who was murdered for allegedly whistling at a White woman, as an example of the disproportionate violence directed toward black men).

201. See generally R. Richard Banks & Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage*, 11 *MICH. J. RACE & L.* 115 (2005) (discussing the issues and statistics of marriage and African American men and women).

202. See ELDRIDGE CLEAVER, *SOUL ON ICE* 102 (1968) (“[W]hat has been happening for the past four hundred years is that the White man, through his access to black women, has been pumping his blood and genes into the blacks, has been diluting the blood and genes of the blacks . . .”); MICHELE WALLACE, *BLACK MACHO AND THE MYTH OF THE SUPERWOMAN* 12 (1979) (“[B]lack women had for many years been overtly and covertly available to white men. . .”).

203. One important note: there is an interracial marriage “gender gap” in Black mixed-sex marriage rates. See, e.g., Steve Sailer, *Interracial marriage gender gap grows*, *UPI PRESS INTERNATIONAL* (Mar. 14, 2003) (“African American men had white wives 2.65 times more often than black women had white husbands. In other words, in 73 percent of black-white couples, the husband was black. (This interracial gender gap is even sharper among black-white couples who cohabit without being married. Five times as many black men live with white women as white men live with black women.)”).

204. See REKERS, *supra* note 135; see also Michelle Davies, *Correlates of Negative Attitudes Toward Gay Men: Sexism, Male role norms and male sexuality*, 41 *JOURNAL OF SEX RESEARCH* 259 (2004) (“Whilst many people believe that lesbians and gay men deserve the same civil rights as the heterosexual population, they still hold very negative attitudes toward gay people and their sexual behaviour.”); Larry Kramer, *To: Straights From: Gays Subject: Hate*, *L.A. TIMES*, Mar. 20, 2007 at A19 (asserting that “Gays are hated.”); Bernard

mosexuality viewed negatively, but it is also perceived as being White, meaning that being a lesbian or gay man is seen as an attempt to identify with part of White culture.²⁰⁵ The idea of claiming an identity based on one's sexuality, announcing it to friends and family and then parading it for all to see, is considered something "White people do."²⁰⁶ Further, members of communities of color, specifically those in Black communities, have asserted that in the absence of white racism and white supremacy, there would be no LGBT Blacks.²⁰⁷ More blame is heaped on White culture by those who maintain that LGBT Whites have lured, or at the very least encouraged, people of color into being LGBT.²⁰⁸ Being turned into a homosexual or a bisexual and thus becoming White identified renders one racially inauthentic.²⁰⁹ The idea that gay is White is also perpetuated by both White-dominated LGBT communities and popular culture as a whole.²¹⁰ Individuals that represent LGBT communities in popular culture and media are White lesbians, gays and bisexuals.²¹¹

E. Whitley, Jr., *Gender-role Variables and Attitudes Toward Homosexuality*, 45 *SEX ROLES: A JOURNAL OF RESEARCH* 691, 691 (2001) ("Prejudice against lesbians and gay men is widespread in American society").

205. BOYKIN, *supra* note 46, at 90 (quoting Dr. Ron Simmons, addressing the issue of whether LGBT Blacks should refer to themselves as "gay." Dr. Simmons says, "I can appreciate the issue over whether or not we should call ourselves 'gay' as African people because basically it is a white cultural term that white people created."); *id.* at 157 ("Homophobic black intellectuals tend to view homosexuality in the black community either as an outgrowth of white racism or as a by-product of the breakdown of the black family").

206. See, e.g., Gina Dent, *Black Pleasure, Black Joy: An Introduction*, in, *BLACK POPULAR CULTURE* 3 (Gina Dent, ed. 1992), (describing "that notorious black manifesto—we will not have our business put in the streets.").

207. BOYKIN, *supra* note 46, at 156–57; Henry Louis Gates Jr. *Forward in THE GREATEST TABOO*, *supra* note 133, at xiv.

208. E.O. Hutchinson, *My Gay Problem*, *supra* note 133, at 4 ("Homosexuality was a perverse contrivance of white males and white females that reflected the decadence of white America"); see also HOOKS, *Homophobia*, *supra* note 166, at 123 (discussing the verbalization that "white people were encouraging black people to become homosexuals[.]").

209. ROOT, *supra* note 78, at 37; Greg Conerly, *Are you Black First or are you Queer?* in *THE GREATEST TABOO*, *supra* note 133, at 9 ("[S]ome heterosexual blacks will see all black lesbians as denying their blackness, because to them homosexuality is something they associate with white culture[.]").

210. See, e.g., Kate Kendell, *Race, Same-sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 *YALE J.L. & FEMINISM* 133, 135 (discussing the lack of visibility of "queers of color").

211. See, e.g., television programs including *Will and Grace*, *Ellen*, *Queer as Folk*, and *Queer Eye for the Straight Guy* (portraying LGBT storylines or with prominent LGBT cast members who are all or mostly White). In addition, the entertainers, celebrities and athletes who have come out as LGBT are almost exclusively White. Consider Ellen DeGeneres, Rosie O'Donnell, Lance Bass, Melissa Etheridge, kd lang, Elton John, Alexis Arquette and Martina Navratilova. I do not claim that there are no LGBT celebrities or personalities of color, but the majority are White and they figure more prominently in media and popular culture. Compare the careers of RuPaul, B.D. Wong, Wilson Cruz (all

The effect of this public construction of homosexuality as both White and deficient is to undermine the very idea of white superiority. If the public perceives gay as White, and they also perceive gay as inferior, then same-sex couples counter white superiority. Thus, the LGBT person of color who is in a same-sex relationship with a White person cannot be “marrying up” because the White partner, though individually of a higher racial status when compared with her partner of color has a diminished racial status by virtue of her sexual orientation. The White partner slides down the racial hierarchy while the partner of color, already at the bottom, simply remains there.

While heterosexual interracial intimate relationships can reinforce the concept of white superiority, same-sex intimate relationships can challenge it. Ongoing attitudes that support white superiority and notions of marrying up or marrying down permeate the culture and thus effect all relationships whether legally sanctioned through marriage or not. These attitudes further the ways in which interracial mixed-sex marriage supports white supremacy. By including same-sex couples in those who are able to access marriage, marrying up or down will lose some of its racialization in society at large because, through generally negative attitudes towards homosexuality, White LGBT people and LGBT people of color are constructed as more racially equal, both rendered to a low racial social status.

Diminishment in the white-is-superior viewpoint also affects attitudes about the racial status of children. LGBT couples who become parents may have fewer concerns about their children’s racial ancestry given that many lesbians and gays adopt or use alternative reproductive technology to create their families²¹² and thus may have less genealogical information to access.²¹³ This may mean that the question of whether the

actors), Margaret Cho (comedian), professional athletes Greg Louganis, John Amachi and Esera Tuaolo. The television shows that feature lesbian or gay people of color are generally on cable, including *Noah’s Arc* (featuring the lives of Black gay men on the LOGO Channel) *Six Feet Under*, *The Wire*, and *The L Word*.

212. See generally Dang & Frazer, *supra* note 41, at 22–26 (reporting facts on children in Black same-sex households and noting that Black same-sex households also have a number of biological children from previous relationships); Carl T. Hall, *Gays, lesbians seeking parenthood increasingly turn to infertility clinics*, S.F. Chronicle, May 6, 2007, at A1 (discussing the increasing numbers of gay men and lesbians using assisted reproductive technology to become parents); Gary J. Gates and M.V. Lee Badgett of the Williams Institute and Kate Chambers and Jennifer Macomber of the Urban Institute, *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, 7–11, 15–16 (March 2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf> (last visited May 29, 2007) (providing estimates of the statistics relating to the numbers of adopted and fostered children with lesbian and gay parents).

213. See HANEY LOPEZ, *supra* note 114, at 192 (Discussing the conceptualization of ancestry: “Ancestry seems to be a biological concept, yet it is instead largely a social one . . . Identifying one’s ancestry then, involves a large degree of choice, where this choice

children have any White ancestry is minimized. Further, even though same-sex marriage is completely sanctioned in this country—of-the-future, homosexuality will probably still be viewed as inferior to heterosexuality and will probably still be perceived as a White cultural construction. Therefore, if an LGBT person of color marries a White person of the same sex, one still cannot accuse her of trying to better herself because she has entered into a union, which, though state sanctioned, continues to be perceived unfavorably and rendered to a lower social status. Regardless, even with negative societal attitudes, granting same-sex marriage rights would legitimize and support intimate relationships that subvert attitudes of white superiority—necessary to maintain white supremacy—which in turn conforms with and advances *Loving's* antisubordination principle.

C. Struck "Color-Blind": (Non)Normative Relationships

Turning to the third and final postulate; this section explores how interracial same-sex relationships add a specific and direct challenge to white supremacy that interracial mixed-sex relationships do not and that intraracial same-sex relationships do only indirectly. Same-sex interracial couples live at the intersection of racism and heterosexism, and therefore provide examples of how white supremacy and heterosupremacy each support the other.²¹⁴ These couples, as individuals and as a pair, experience racism, heterosexism and bias against interracial relationships.²¹⁵ The prejudices these couples face can manifest in a number of ways, from the micro aggressions²¹⁶ of daily life in a Euroheteorpatriarchal elitist world, to verbal and physical abuse.²¹⁷ Additionally, the discrimination may take the

turns at least partially on the social significance of one line of decent versus another.”). The less information one has, I argue, the more choice one has.

214. Cf. Crenshaw, *supra* note 122, at 1244 (discussing the intersectionality of race and gender). Here I apply it in the context of race and sexual orientation. This is not to say there is no gender dynamic at work, but a discussion of how gender interacts with race and (homo)sexual orientation is beyond the scope of this Article.

215. BOYKIN, *supra* note 46, at 106–110, (discussing dynamics of and responses to interracial same-sex relationships); D. MERILEE CLUNIS & G. DORSEY GREEN, *LESBIAN COUPLES* 131–42 (1988) (discussing the impact of racism on lesbian couples); cf. KENNEDY, *INTRARRACIAL INTIMACIES*, *supra* note 78, at 109–10 (discussing three “camps” of African Americans when it comes to Black/White interracial marriage. The “third camp repudiates interracial marriage on the ground that black participation in it constitutes an expression of racial disloyalty; implies disapproval of fellow blacks; impedes the perpetuation of black culture; weakens the African American marriage market; and fuels racist mythologies, especially the fiction that blacks lack pride of race.” (endnote omitted)).

216. DELGADO & STEFANCIC, *supra* note 12, at 1–2, 151.

217. Press Release, FBI, FBI Releases its 2005 Statistics on Hate Crime (Oct. 16, 2006) (on file with author) (noting that an analysis of the 7,160 single-bias incidents by

form of exclusion from community because of one's own race or the race of one's partner or because of sexual orientation. Families of origin may reject someone if she comes out as homosexual²¹⁸ or if she couples with someone of another race.²¹⁹ These biases and prejudices may lead to actions that help perpetuate heterosupremacy and white supremacy. Even though positive opinions about interracial relationships are expanding in society at large,²²⁰ positive attitudes would not necessarily extend to same-sex interracial relationships because of the same-sex nature of the relationships. This section posits that, as viewed by the dominant culture, the sexual orientation of the individuals and the same-sex nature of an interracial lesbian or gay couple serve to override the races of each member of the pair, rendering their race invisible or at the very least, "see through." Consequently, when exposed to interracial same-sex couples, society is, in essence, struck "color-blind." Because it cannot see past the sameness of the genders in the presumed homosexual couple, race becomes secondary.²²¹

Interracial same-sex intimate relationships where the parties are not closeted and are thus more visibly same-sex and interracial, present the most significant challenge to white supremacy, much more so than different-sex interracial relationships that were specifically decriminalized in

bias motivation revealed that 54.7 percent were motivated by a racial bias, 17.1 percent were triggered by a religious bias, 14.2 percent were motivated by a sexual-orientation bias, and 13.2 percent of the incidents were motivated by an ethnicity/national origin bias); see generally NAT. COAL. OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, BISEXUAL AND TRANSGENDER VIOLENCE IN 2006 2 (2007) (reporting incidences of violence directed at members of LGBT communities).

218. See, e.g., BOYKIN, *supra* note 46, at 23–25; HOOKS, *Homophobia*, *supra* note 166, at 120.

219. See BOYKIN, *supra* note 46, at 106–07; HOOKS, *Homophobia*, *supra* note 166, at 124; PAUL C. ROSENBLATT ET AL., MULTIRACIAL COUPLES: BLACK & WHITE VOICES 107–16 (1995).

220. See MORAN, *supra* note 50, at 112 ("Loving arguably has transformed attitudes toward intermarriage. In 1991, a Gallup Poll found for the first time that more Americans approve of interracial marriage than disprove of it." (endnote omitted)); YANCEY, *supra* note 185, at 43 (noting that even though there is still hostility directed at interracial couples, "overt support for interracial families has never been as high as it is today."); Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriage*, POPULATION BULLETIN, JUNE 2005, AT 3–4 (discussing changing attitudes towards interracial marriage and multiracial families and children); Zhenchao Qian & Daniel T. Lichter, *Crossing Racial Boundaries: Changes of Interracial Marriage in America, 1990–2000* (presented Apr. 2004) (noting the "rapid increase of interracial marriage in the 1980's" led some to conclude there was improvement in race relations, but authors recognized that rates of interracial marriage remain low "accounting for less than three percent of all marriages in 2000.").

221. See William Eskridge, *Outsider-Insiders: The Academy of the Closet*, 71 CHI.-KENT L. REV. 977, 978–81 (1996) [hereinafter Eskridge, *Outsider*]; see also *infra* note 224 and accompanying text (for a discussion of the concept of totalizing).

Loving,²²² and even more so than same-sex intraracial relationships. One reason may be that visible same-sex couples allow individuals within society, and society as a whole, which “is both anxious about and obsessed with sexuality,”²²³ to make sexual orientation into what Professor William Eskridge has called “a totalizing feature.”²²⁴ Because of the totalizing of sexual orientation, this single characteristic overwhelms other characteristics such as race.²²⁵ While it is actually race that initially called attention to the couple, regardless of the races of those in a same-sex relationship, sexual orientation is highlighted.

The manner in which sexual orientation becomes a visible characteristic and the way interracial same-sex couples incite social color-blindness are connected. It is the very fact that the couples are interracial that calls particularized attention to the sameness of the genders and the homosexual orientation. The foregrounding of interracial homosexuality may be so overwhelming as to strike the viewer temporarily “color-blind”—unable to or disinclined to notice race. It is the visibility of the interracialness of two women or two men that first draws attention to the same-sexness and the same-sexness that renders their sexual orientation extremely visible. As Professor Eskridge notes, once sexual orientation is revealed it becomes an individual’s total package such that other characteristics, such as race, can become secondary.²²⁶

There is one caveat to this color-blindness, though it only occurs if an observer perceives that the interracial same-sex pair is part of an intimate, physical, emotional relationship. This is necessary for the sexuality to become totalizing to the point of rendering race nearly invisible. The inability to perceive interracial relationships of any sort resulting from social and geographical segregation,²²⁷ as well as ongoing

222. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a law criminalizing the intermarriage of a White person and a black person as violating the central principle of equality of the Fourteenth Amendment).

223. Eskridge, *Outsider*, *supra* note 223, at 978.

224. *Id.* at 979 (describing the “totalizing feature of sexual orientation” in the case of legal scholars. “Disclosure of sexual preference” may overwhelm a scholar’s ideas, generating a “loss of credibility and the diminishment of influence.”); *see also*, William Eskridge, *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1334 (2000), [hereinafter Eskridge, *No Promo Homo*] (“As it did with race, law’s stigma helped create homosexuality as a totalizing and naturalized identity trait, yet then contributed to the normative and descriptive destabilization of that trait as a regulatory category.”).

225. Eskridge, *Outsider*, *supra* note 222, at 980.

226. *Id.* at 979–80.

227. See BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE 3–4 (1997) (“There is still a great deal of social segregation in our communities. Consequently, most of the early information we receive about “others” . . . does not come as a result of first hand experience.”); HANEY LOPEZ, *supra* note 114, at 132 (discussing ongoing segregation in the

racism²²⁸ limit opportunities for cross racial interaction. Thus society may be interracial-relationship blind, meaning that the first assumption by both Whites and persons of color is that people of different races are not even together.²²⁹ Therefore at first glance, an interracial pair may not be identified as knowing each other, let alone perceived as being a couple. However, if a second look is taken and the interracial same-sex pair is understood as an intimate, romantic, sexual or dating couple, then the "color-blindness" strikes because of the disconcerting nature of the "gayness" of the relationship dynamic.²³⁰ The perception of the individuals' race in the same-sex couple—the interracialness of the two men or two women—recedes and for a time only their sexuality is evident.²³¹

While interracial same-sex couples may render society color-blind, interracial heterosexual relationships magnify the race of each member of the couple. The mixed-sex interracial couple is normative at least along the axis of gender and sexual orientation. There is nothing unusual about seeing a man and a woman as a couple. It is the interracial aspect of the pair that is out of the ordinary and thus the fact that the individuals are of different races becomes the couple's most noticeable characteristic. Therefore, instead of rendering an observer color-blind, interracial mixed-sex couples heighten the observer's perception of race.

The children of interracial mixed-sex couples also serve to magnify race. Rather than creating color-blindness, there are still categories for

United States and its impact on each racial group's understanding of racial differences); see also DAVID K. SHIPLER, *A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA*, 23–54 (describing voluntary segregation in modern-day schools).

228. See JENSEN, *supra* note 18, at 4 (noting "[White supremacist ideology] has justified legal and extralegal exploitation of every non-white immigrant group, and is used to this day to rationalize the racialized disparities in the distribution of wealth and well-being in this society.").

229. This is a frequent occurrence in my own life. Regularly, when my White partner and I check-in at the host stand at a restaurant she is addressed first and asked "one for dinner?" We have been on public transportation and have been asked, with incredulity in the asker's voice, "Are you two friends?" See Mary R. Jackman and Marie Crane, "Some of My Best Friends Are Black. . .": *Interracial Friendship and Whites' Racial Attitudes*, 50 *THE PUBLIC OPINION QUARTERLY*, 459, 460 (1986) (noting the "rarity of interracial friendship").

230. See, e.g., Lisa Kahaleole Chang Hall, *Bitches in Solitude: Identity Politics and Lesbian Community*, in *SISTERS, SEXPERTS AND QUEERS: BEYOND THE LESBIAN NATION*, 218, 228 (Arlene Stein ed., 1993) ("[There are questions] unaskable of the majority of the straight world, unfamiliar with the basic context of gayness. Unacculturated straight people are usually too caught up with in the shock of relatively simple homosexuality itself—the fact of girls with girls and boys with boys . . .").

231. See *supra* note 40 (noting that there are interracial plaintiff couples in some several same-sex marriage cases. However the issue of their interraciality is rarely discussed, maybe because it is deemed irrelevant when the issue is sexuality).

those who are “mixed-race,” “multiracial” and “biracial.”²³² These categories emphasize race or color and reinforce the one-drop rule.²³³ The offspring of interracial relationships tend to be classified as belonging to a particular race according to the color of their skin.²³⁴

“Color-blindness” is tied to same-sex marriage in that marrying, as a public act, brings visibility to the races and sexes of the couple. A ceremonial marriage requirement is for the pair to present themselves together in front of an official to validate them as a couple.²³⁵ The act of marrying calls attention to the interracial same-sex couple as fundamentally non-normative.²³⁶ Society cannot be “interracial relationship blind” when a couple chooses to marry. Thus by marrying, the interracial same-sex couple has rendered clearly visible both their interracialness and their status as a same-sex intimate couple, which in turn serves to strike society, at least temporarily, color-blind.

The color-blindness inspired by interracial same-sex couples may seem like a negative; however, some considered color-blindness to be a social good because it supposedly invokes equal treatment of the races.²³⁷ The failure to see or care about the races of two individuals because one is so overwhelmed by their sexual orientation may not initially seem like a good worth attaining. It nevertheless challenges white supremacy by temporarily balancing White and non-White parties as equally “queer.”²³⁸ Color-blindness also manages to bring visibility to LGBT people, which, through exposing more people to others who are lesbian or gay, can work to counter heterosupremacy. Through simply being visibly same-sex and interracial, these relationships further *Loving’s* anti-white supremacist message by helping to mute the race of an individual and making it possible for her other characteristics to be considered. Thus color-blindness,

232. See Press Release, U.S. Census Bureau, Racial and Ethnic Classifications Used in Census 2000 and Beyond (Apr. 12, 2000) (on file with author) (reporting the changes to the racial categories as including a sixth racial category as “Some Other Race” and “allow[ing] respondents to check one or more races to which they self identify”); see also AMERISTAT POPULATION REFERENCE BUREAU, RACE AND ETHNICITY IN THE CENSUS: 1860 TO 2000, (Feb. 2000) (providing a history of racial and ethnic categories in the census from 1860).

233. MORAN, *supra* note 50, at 2 (defining the one-drop rule as “any trace of African ancestry makes [someone] black.”).

234. DELGADO & STEFANCIC, *supra* note 12, at 153 (2001) (“Race: Notion of a distinct biological type of human being, usually based on skin color or other physical characteristics.”).

235. See 55 C.J.S. *Marriage* § 30 (1998) (Solemnization).

236. *Supra* note 173 (defining normative).

237. Cf. Haney Lopez, *supra* note 114, at 176–77 (discussing color-blind constitutionalism and race blindness).

238. I use this word intentionally for the double meaning of “odd” as well as the reclaimed name for people who self-identity as LGBT.

resulting from seeing same-sex couples, which came to one's attention because of the interracialness of the pair being perceived, manages to subvert white supremacy. It does so by putting both parties in a same-sex interracial relationship on the same level as one another. White is not dominant and of-color is not subordinate.

CONCLUSION: *LOVING COUPLES*.²³⁹
EXTENDING CIVIL (MARRIAGE) RIGHTS

*My husband, Martin Luther King Jr., understood that all forms of discrimination and persecution were unjust and unacceptable for a great democracy. He believed that none of us could be free until all of us were free, that a person of conscience had no alternative but to defend the human right of all people. . . . Gays and lesbians and their families are not loopholes to be closed. They are human beings to be affirmed and treated equally. . . . The civil rights movement that I believe in thrives on unity and inclusion, not division and exclusion. All of us who oppose discrimination and support equal rights should stand together to resist every attempt to restrict civil rights in this country.*²⁴⁰

Through this examination of the Loving Analogy and its applicability in the same-sex marriage context, this work suggests that the discriminatory, anti-freedom-of-choice, and heterosexist nature of gender and sexual orientation based marriage restriction laws,²⁴¹ are comparable to the discriminatory, rights-restricting and racist nature of the antimiscegenation laws struck down only 40 years ago.²⁴² After exploring the similarities between the social, political and legal struggles of same-sex and interracial couples, it seems that indeed laws barring same-sex marriage will eventually become a relic of history, as have antimiscegenation laws.

It was 1948 when the state of California struck down its antimiscegenation law.²⁴³ Nineteen years later, in 1967, the U.S. Supreme Court brought forth to the nation as a whole, the fundamental truth, articulated by the *Perez* Court, that, "the right to marry is to join in marriage with

239. A thank you goes to Rashmi Goel for this phrase.

240. The International Gay and Lesbian Association, *Coretta Scott King Urges No Vote on Prop 22*, available at http://www.ilga.info/Information/moved_interested_entertained/coretta_scott_king_urgens_no_vote.htm (quoting Coretta Scott King) (last visited Feb. 26, 2006).

241. See *supra* Part I.B 2 and accompanying text. (discussing marriage restrictions based on sex and sexual orientation).

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

243. *Perez v. Lippold*, 198 P.2d 17, 17 (Cal. 1948) (en banc).

the person of one's choice."²⁴⁴ In 2003, the Supreme Judicial Court of Massachusetts extended the right to marry to same-sex couples.²⁴⁵ If history repeats itself and nineteen years pass, 2022 may be the year that marriage rights are extended to all same-sex couples in the United States.

This Article has argued that the sanctioning of same-sex marriage continues what *Loving* started—challenging white supremacy and dismantling subordinating ideologies in the context of intimate relationships. The aspects of the analogy outlined in Part I are essentially what *Loving* stands for or against: 1) for the freedom to marry the person of one's choice,²⁴⁶ 2) against discrimination in the exercising of the right to decide whom to marry,²⁴⁷ and 3) against governmentally sanctioned subordination, especially in the form of white supremacy.²⁴⁸ Same-sex marriage specifically extends each of these previously articulated principles by broadening individuals' marriage choices to include persons of the same sex, allowing for the exercise of a fundamental right without regard for gender or sexual orientation, and challenging notions of heterosupremacy and white supremacy. This leads one to conclude that it is the predictable and correct outcome for these principles articulated in *Loving* to be applied in the context of same-sex marriage. These *Loving* principles, freedom of choice, antidiscrimination, and antisubordination arguably appear in two other Supreme Court cases extending the rights of LGBT persons: *Lawrence v. Texas*²⁴⁹ which applied the freedom of choice principle to choosing with whom, including homosexuals, to have intimate relations,²⁵⁰ and *Romer v. Evans*²⁵¹ which incorporated both the anti-discrimination and anti-subordination principles into its decision that laws could not be enacted if they were based on animus and that gays and lesbians could not be relegated to a particularly disadvantaged status.²⁵² Also same-sex marriage has been extended to citizens of Belgium, Canada, South Africa, Spain and The Netherlands based on Constitutions and Charters comparable to the

244. *Id.* at 19; see also, *Loving*, 388 U.S. at 12 (articulating "that the freedom of choice to marry not be restricted . . .").

245. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

246. *Loving*, 388 U.S. at 12; *Perez*, 198 P.2d at 19; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

247. *Loving*, 388 U.S. at 12; *Perez*, 198 P.2d at 21.

248. *Loving*, 388 U.S. at 11.

249. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a Texas sodomy law).

250. *Id.* at 567.

251. *Romer v. Evans*, 517 U.S. 620 (Colo., 1996) (striking down an amendment to the Colorado Constitution which prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination).

252. *Id.* at 632.

U.S. Constitution's Bill of Rights.²⁵³ Though it has been suggested that the same-sex relationship recognition to come may be something short of marriage,²⁵⁴ Professor Tom Grey, who in a 1980 article predicted that the U.S. Supreme court would "[find] fornication and sodomy laws . . . unconstitutional,"²⁵⁵ envisions a time when same-sex relationships will be . . .

. . . recognized as legitimate . . . Not because they need it for their happiness (though they may), but because society needs it to avoid the insecurity and instability generated by the existence in its midst of a permanent and influential subculture outside the law. Effective regulations of the family and community life of gay people will require that laws which symbolically claim their sexual identity illegitimate in the eyes of the larger society must be eliminated.²⁵⁶

Further, if one considers the determination by the Massachusetts Supreme Judicial Court that civil unions would not perform the functions of marriage, it follows that the State must include same-sex couples under its marriage laws.²⁵⁷

It is not just that interracial marriage and same-sex marriage are comparable, but that, by challenging heterosupremacy, undermining attitudes of white superiority and rendering society color-blind, same-sex marriage actually responds to *Loving's* specific race based aspects, including the determination that white supremacy is neither compelling nor legitimate.

In the forty years since the *Loving* decision, the number of interracial (mixed-sex) relationships has increased.²⁵⁸ On the surface, these

253. See, Paul Axel-Lute, *Same-Sex Marriage: A Selective Bibliography*, available at <http://law-library.rutgers.edu/SSM.html#foreign> (providing access to summaries of same-sex marriage law in foreign jurisdictions).

254. See, e.g., Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 97 (1980) (using the language "something like marriage").

255. *Id.* But note however, it was twenty-three years after Professor Grey published his prediction that the U.S. Supreme Court determined sodomy laws to be unconstitutional in *Lawrence v. Texas*.

256. *Id.*

257. *In re Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 (Mass., 2004) arguably his prediction applies to civil marriage as well. *But see* McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 2833 (1964) (striking down a Florida law that penalized interracial fornication). Only three years passed between this Supreme Court decision and the *Loving* decision. *Lawrence* was decided in 2003 and the U.S. Supreme court has yet to hear a case addressing same-sex marriage.

258. William H. Frey, *Charticle*, THE MILKEN INSTITUTE REVIEW 7–10 (Third Quarter 2003) (reporting a rise in the number of mixed-race marriages, up from "one in 23" in 1990 to "one in 15" in 2000); *That's a Family! Statistics on US Families*, available at http://www.womedia.org/taf_statistics_print.htm ("There are more than 4.5 million

relationships may appear to strike a blow to white supremacist attitudes, but in reality, their heterosexual nature supports attitudes of heterosupremacy and white superiority as well as serving to magnify race: therefore, they also help support, rather than undermine, white supremacy. Even if there are more interracial relationships now than in the days before *Loving*, the full potential of the *Loving* decision has yet to be realized. Sanctioning same-sex marriage and supporting LGBT relationships would be a further step toward implementing all of that for which *Loving* stands.

Loving was, and continues to be, about more than marriage. It stands for the principle that white supremacy is not a legitimate or compelling governmental interest.²⁵⁹ It spelled the diminishment of dictating racial categories through the “one-drop rule”²⁶⁰ and determined that animus cannot be the reason for a law’s existence.²⁶¹ The *Loving* decision also looked toward a time when work toward racial harmony would begin, by endorsing the viewpoint that allowing people to marry whomever they wanted would promote racial harmony by promoting better personal and intimate relationships through friendships, extended families, and children. Author Renee Romano explains:

The old segregationist fear that integration would lead to “race mixing” was well-founded. Meaningful integration allows blacks and whites to meet, to transcend the cultural and historical legacies that hinder healthy relationships, and to marry if they so choose. There is no question that interracial love will become more common and even more accepted as racial barriers erode in American society, but it will take more than love to break down those barriers. Old hierarchies must be dismantled for new attitudes about interracial love and marriage to flourish.²⁶²

married and unmarried couples in the United States who are mixed racially or ethnically) (citation omitted); Table MS-3. *Interracial Married Couples: 1980 to 2002*, available at <http://www.census.gov/population/socdemo/hh-fam/tabMS-3.pdf> (table showing numbers of interracial marriages for each year from 1980 through 2002).

259. *Loving*, 388 U.S. at 11.

260. See *Id.* at 5 n.4 (citing Section 1–14 of the Virginia Code defining colored persons as “every person in whom there is ascertainable any negro blood . . .”).

261. *Id.* at 12.

262. ROMANO, *supra* note 174, at 287–95; See also KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 78, at 35 (“genuine, loving interracial intimacy” is a “positive ideal.”); ROOT, *supra* note 78, at 3 (“Although not intended as a political tool, each interracial marriage helps to change long-held assumptions and social conventions.”).

Same-sex marriages will also promote racial harmony, because they challenge subordination.²⁶³ The sanctioning of same-sex relationships only furthers the anti-white supremacist message of *Loving v. Virginia* and takes another step down the road to racial equality.

Recognizing that there is a legitimate connection between interracial and same-sex marriage should encourage communities of color, specifically Black communities, to embrace same-sex marriage as a civil rights issue.²⁶⁴ It should also compel LGBT communities to include issues specific to LGBT people of color as part of marriage rights activism.²⁶⁵ Communities of color need to deal specifically with issues of homophobia and LGBT communities must work against racism. These communities and the issues they face are interconnected and interdependent.²⁶⁶ Countering subordination should be a common goal of all subordinated communities. There are out interracial same-sex couples who, whether seeking access to marriage or not, are living challenges to subordination by openly loving someone who is of the same gender as well as a different race.

Once the centrality of interracial same-sex couples is acknowledged, the movement for marriage equality can influence antiracist work and the potential of *Loving* can be truly realized. Interracial same-sex couples are gap bridgers and can bring together of-color and LGBT activists who understand that inserting discrimination against gays and lesbians into the law, through statutes or constitutional amendments, begins a slippery slope to backtracking on other civil rights gains. Same-sex marriage fully completes the determination of marrying the "person of one's choice,"²⁶⁷ it fundamentally undermines white supremacy, which, as *Loving* articulated, is not a compelling reason to bar marriage.²⁶⁸

263. See *supra* Part II.B. (defining and discussing subordination).

264. See *supra* note 241 (Coretta Scott King endorsing same-sex marriage); See also Julian Bond, *Is Gay Rights a Civil Rights Issue? A Symposium Leaders Debate Same-sex Marriages and Gay and Lesbian Rights*, *Ebony* July, 2004, at 142 (Civil Rights Leader, Board Chairman NAACP stating "ARE gay rights civil rights? Of course they are. 'Civil rights' are positive legal prerogatives—the right to equal treatment before the law. These are rights shared by all—there is no one in the United States who does not—or should n[ot]—share in these rights." (emphasis in the original)); Harvard Educational Review, *Cornell West On Heterosexism and Transformation: An Interview*, in *DANGEROUS LIAISONS: BLACKS, GAYS, AND THE STRUGGLE FOR EQUALITY*, 290–305 (Eric Brant ed., 1999) (discussing his belief in a connection between LGBT rights and communities and rights for Blacks and other minorities).

265. See, e.g., <http://www.freedomtomarry.org> (providing examples of how LGBT marriage rights activists are beginning to acknowledge and forefront people of color and their issues).

266. See generally *supra*, Part II.A (discussing the connection between heterosupremacy and white supremacy).

267. *Perez v. Lippold*, 198 P.2d 17, 19, 21, 31. (Cal. 1948)(en banc).

268. *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

The most basic argument for equal marriage rights is that all of society benefits from the civil sanctioning of couples. The reasons the State initially “created” marriage, namely to privatize caretaking and create social order by dispersing the burdens and responsibilities through offering benefits and rights,²⁶⁹ are only enhanced when more people have access to it. Through fulfilling freedom of choice, countering discrimination, and challenging white supremacy, same-sex marriage makes the culture stronger. Expanding access to the fundamental civil right of marriage to include all couples who care to partake in it is to embrace *Loving* to its fullest.

269. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (stating that civil marriage was a creation of the government and is regulated through the state police power); *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993) (stating that regulating marriage is exclusively a power of the state and this “power to regulate the marriage relation includes the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties. . .”).