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Talking Black and Sleeping White... Talking White and Sleeping Black: A Socio-Legal Examination of Interracial Marriage in America

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A Socio-Legal Examination of Interracial Marriage in America

by

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FORWARD

This thesis concerns two of the most important social factors in the United States: race and marriage.

In the U.S., the dominant, although in no way only, racial distinction is between African Americans and Caucasian Americans. For the purposes of this paper, the term Black will be used interchangeably with African American, and the term White will be applied to all Caucasian Americans. I chose to use the terms White and Black when discussing race in America, particularly in regard to interracial marriage, because the majority of the race-based distinction was drawn from skin color, despite the suggestion that race could be measured by blood composition or through the empirical approach of tracing racial heritage by ancestry. Thus, the terms White and Black draw attention to not only the racial distinction between these two groups, but also what this social barrier was based upon: color.

Similarly, I have decided to capitalize both the terms Black and White, since both are being used for the same function - to identify a racial group in America - and as my own way of attempting to show that while racial distinctions exist in American society, at the heart of it we are all people and should all be recognized as such and, therefore, be given equal value. Likewise, I will use the terms miscegenation, interracial marriage, Black-White marriage, and intermarriage interchangeably to discuss any marriage involving one Caucasian and one African American.

When discussing interracial marriage, I will largely be dividing society between White and Black, and between North and South. This means that I will refer to “White society” and to “Southerners” as socio-racial groups numerous times throughout this

thesis. However, this is not to overlook the fact that these divisions are fluid, and that these terms are being employed simplistically; there were Whites, in both the North and South, who supported or desired to have their own interracial marriage, and there were Southerners who supported the legalization of intermarriage. Not all Whites, nor all Southerners, opposed interracial marriage, just as not all Blacks or Northerners supported intermarriage. However, for the most part, the opposition to intermarriage was stronger in the South than the North, and was more staunchly opposed by White men than any other gendered racial group. For this reason, and because numerous primary and secondary sources provided evidence of this divide, I will be simplifying the complex socio-racial climate into North-South and Black-White binaries.

In the words of historian Peggy Pascoe,

> Between 1864 and 1967, lawmakers are their supporters routinely called laws that banned interracial sex and marriage 'anti-miscegenation' laws; they did so in order to signal their belief that sex and marriage between people of different races was a distinctly different phenomenon than sex and marriage between people of the same race.[…] I will use 'miscegenation' to mark that particular racist belief […].
>
> By using the term 'white supremacy,' I hope to suggest that the concept of whiteness carried vexed meaning, not just for Whites and Blacks but for all the groups […] despite wide differences in their individual racial formations and specific structures of oppression. […] Finally, to show the pervasiveness of racial categories then and now, I have departed from the usual grammatical practice and decided to capitalize the words 'Black' and 'White' as well as more routinely capitalized words […]. My hope here is to show 'Black' Americans as a group of men and women with a wide variety of skin colors and backgrounds rather than to let the word 'black' slide into physical description. And by capitalizing 'White,' I hope to help mark the category that so often remains unmarked, and taken for the norm, when the fact is that, in American history, to be 'White' is often an aspiration as well as an entitlement.[1]

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[1] Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford: Oxford University Press, 2009), 13-14.

In embracing her ideology, I incorporated my own viewpoint and decided to use certain terms rather than others, and to use grammar to indicate a particular viewpoint. For the ease of the reader, this forward was created with the intention of explaining my terminology, as was the appendix included at the end of my thesis, defining certain terms used throughout my paper.

To logically advance my overall argument, my thesis is divided into three chapters. Each chapter focuses on a single court case and the socio-political circumstances surrounding that case. Beyond the primary case, other court cases or social movements that contribute to the understanding of the primary case will be included in the chapter. The chapters are organized chronologically to show progressive change over time regarding race relations and interracial marriage in the United States. Similarly, while each chapter will focus on the over-arching issue of interracial marriage and racial tensions in American society, each of the chapters will also bring interrelated social and political issues to light, specific to the timing and social climate surrounding that case.

"We don't do interracial weddings" – Beth Bardwell, 2009[1]

INTRODUCTION

THE NEW PECULIAR INSTITUTION

In October 2009, Beth Humphrey and Terence McKay of Hammond, Louisiana applied for a marriage license. The marriage license was granted by the parish court clerk, yet the local justice of the peace, Keith Bardwell, refused to perform the wedding ceremony or to sign the license, thereby refusing to validate their marriage. Why had the couple been refused? Beth Humphrey is White and Terence McKay is Black. When interviewed by the press about his decision to refuse the couple, Bardwell defended his actions, and admitted that he did not approve of interracial marriages because he feared for the welfare of any children that might be born from such a union.[2] Meanwhile, both the national press and government officials in Louisiana denounced Bardwell's actions as archaic and reminiscent of a time when interracial marriage was illegal in the United States. By November, Keith Bardwell had resigned and faced a federal discrimination lawsuit. The uproar over the 2009 Bardwell incident demonstrates the longevity of racism in American society, and the importance of the institution of marriage to individuals and the state. Racism, specifically racist attitudes directed against Blacks by Whites, has been displayed in various forms since the founding of the United States and the arrival of the

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[1] "Louisiana Justice Who Refused Interracial Marriage Resigns," *CNN*, 3 November 2009, accessed 20 September 2012, http://edition.cnn.com/2009/US/11/03/louisiana.interracial.marriage/; hereafter referred to as "Louisiana Justice," 2012.

[2] "Louisiana Justice," 2012; "Interracial Couple Denied Marriage License By Louisiana Justice of the Peace," *Huffington Post*, 18 March 2010, accessed 25 September 2012, http://www.huffingtonpost.com/2009/10/15/interracial-couple-denied_n_322784.html; "JP Refuses to Marry Couple," *Hammondstar.com*, 15 October 2009, accessed 25 September 2012, http://www.hammondstar.com/articles/2009/10/15/top_stories/8847.txt.

first African slaves in the 17th century. Yet none of the institutionalized representations of racism lasted as long as the legal barriers against interracial marriage.

As an integral part of American society, marriage has a special standing in the United States. Socially, financially, and institutionally, the marriage union is given special status and grants spouses unique privileges, such as tax benefits, and certain financial and medical rights. Due to this immense importance, local communities, states, and the federal government have regulated marriage closely. In the quest for the preservation of the elusive "traditional marriage" – a lasting marriage between one man and one woman from similar backgrounds and social standing – legal barriers were created to ban certain people from joining together in marriage.[3] However, this idea of a traditional marriage is flawed since the institution of marriage is constantly evolving. The progressive legal changes made to the definition of marriage, and to the availability of marriage to different forms of couples, indicates this evolution over time.

Most historians who study marriage agree that marriage has a progressive history: first becoming an institution subject to formal regulation, then given a recognized definition, and finally being restructured multiple times in order to suit the given social climate. In the words of historian Elizabeth Abbott, "As the cultural and political meanings of marriage evolve, public policy incorporates them into new laws and regulations," meaning that what a "marriage" actually is depends on the time, place, and people involved.[4] In this thesis I refer to three historians– Elizabeth Abbott, Nancy Cott, and Stephanie Coontz – all of whom have written on the evolution of marriage in general,

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[3] Stephanie Coontz, *Marriage, A History: How love conquered marriage* (New York, NY: Penguin Group, 2005), 1-11; hereafter referred to as *Marriage, A History*.
[4] Abbott, Elizabeth. *A History of Marriage* (Toronto, Canada: Penguin Group, 2010), 379; hereafter referred to as *A History of Marriage*.

and an additional historian – Peggy Pascoe – who has written specifically on the intersection of race and marriage in the United States. At the core of their arguments, all four historians agree that the institution of marriage is not stoic; marriage is a social and political right that is constantly subject to change.

There have been numerous forms of marriage over the centuries, each with varying levels of social endorsement and state regulation. In ancient Greece, the community commonly accepted homosexual relationships so long as the couple conformed to gender norms, with one man, usually the younger of the two, assuming the feminine role.[5] In many nations, polygamous marriage has been widespread and socially accepted; for a time, even the early Mormon community in the United States practiced polygamy, albeit not with state sanction. [6] However, the U.S. government quickly demonized homosexuality and polygamy, outlawing these forms of marriage in favor of heterosexual, singular marriage. Bans against homosexuality or sodomy came to the U.S. from 16th century English law, while polygamy was formally outlawed in 1862 with the Morrill Anti-Bigamy Act and the 1882 Edmunds Act.[7] Common-law marriage was

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[5] Abbott, *A History of Marriage*, 269.
[6] Abbott, *A History of Marriage*, 23-24; Coontz, *Marriage, A History*, 60.
[7] According to the Edmunds Act, which outlawed polygamy, "every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the Uniteei [*sic*] States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years" Information from: "The Edmunds Act," *Bancroft Library, Internet Archive*, 2007, accessed 18 February 2013,http://www.archive.org/stream/edmundsactreport00unitrich/edmundsactreport00unitrich_djvu.txt; To summarize, "the Morrill Anti-Bigamy Act of 1862 prohibited polygamy in the territories. It also limited the value of the land that the LDS church could own, among other things." Information from: "1852-1890: Opposition to LDS Church's Practice of Polygamy," *Utah State History, Utah.gov*, 2013, accessed 18 February 2013, http://www.ilovehistory.utah.gov/time/stories/polygamy.html.

socially accepted in many nations, including the United States, until the late 1900s, and was often considered to be a legally valid marriage after a certain number of years. [8] What is colloquially referred to as "living in sin," or a couple sharing a residence in the absence of formal marriage, has evolved from common-law marriage and, although it lacks legal recognition, has gained extensive social acceptance in the past few decades.[9] Despite some restrictions, the overall institution of marriage, meaning the social importance placed on the marriage contract, endured. More and more, the institution of marriage became regulated by the state, as evidenced by the formal outlawing of homosexual marriage, polygamy, and interracial marriage by either the state or federal government.

Possibly the most enduring and state sanctioned structure of marriage is patrimony. For centuries, laws have favored the husband over the wife, and relegated wives to the status of property within marriages. Many women were subjected to the physical abuse of their husbands, and reduced to almost entire dependence upon men for financial support. For example, until 1974, women in the United States were not able to have a credit card in their name without a male cosigner.[10] Beyond financial oppression, women also had difficulty gaining parental rights over their own children in the case of separation or divorce.[11] Most women faced significant stigmatization if they did not marry, but became the property of their husband if they did.[12] These women were

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[8] Abbott, *A History of Marriage,* 66.
[9] Coontz, *Marriage, A History*, 271-272, 279. See Appendix C.
[10] "NFCC Examines History of Women and Credit," *Nation Foundation for Credit Counseling*, accessed 20 September 2012, http://www.nfcc.org/consumer_tools/consumertips/womencredit.cfm.
[11] Abbott, *A History of Marriage*, 213-218.
[12] Coontz, *Marriage, A History*, 187.

subjected to the physical, financial, and sexual whims of their husbands, and were largely unprotected by the law. It was not until the 20th century that women in the United States began gaining rights, legally equivalent to those of men.

Historians, such as Stephanie Coontz and Elizabeth Abbott, have attempted to chronicle the past and present development to the institution of marriage. One of the topics discussed in-depth in American marriage history is the significance of interracial marriage. In general, the examination of interracial marriage is sociopolitical, with sociologists and political scientists writing on the topic alongside historians. However, this is not to suggest that research ignores the historical components inherent in the study of interracial marriage. Rather, history is incorporated into the research done by most authors who write on the legalization of interracial marriage. Besides the history of the court cases, legislation, and individuals involved in interracial marriages, another important aspect to consider in examining interracial marriage history is the social context. This is an especially important factor to include when discussing interracial marriage in the United States, which has a notorious reputation for intense and enduring racism and racial tension in society.

I propose that the most noteworthy transformation undergone by the institution of marriage in the past 50 years is the legalization of interracial marriage; I exclusively examine Black-White marriage because this form of interracial marriage was subject to the longest lasting and most stringent miscegenation laws. Miscegenation laws date back to the importation of the first African slaves to the colonies, even before the American Revolution or the formation of the United States of America.[13] As property, slaves were

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[13] Abbot, *A History of Marriage*, 333; Pascoe, *What Comes Naturally*, 20.

not entitled to have their marriages recognized by the state or their owners. Often, slaves would conduct their own marriage ceremonies, which were not legally binding and went largely ignored. Likewise, slave owners had the right to sell slaves at any time, regardless of their familial status, which often separated husbands from wives and children from parents. However, since the child's status of "slave" was inherited through the mother, White slave owners tended to encourage sex between slaves because any children produced, whether through relations between slaves or between White slave owners and female slaves, became property of the slave owner.[14] The power structure of slave society basically guaranteed White slave owners sexual access to their female slaves without the need for consent or the fear of punishment. Interracial relationships in this era often began when White men took sexual advantage of Black women.[15] Thus, sex was encouraged while marriage went unrecognized.

Miscegenation (sometimes referred to as anti-miscegenation), a term coined in 1863 to refer to interracial marriage, became widespread in the Reconstruction era as a conservative reaction to the new freedom of African Americans and as a way to preserve the racially based social hierarchy.[16] Miscegenation laws prohibited the marriage of Whites to members of various racial and ethnic groups. These laws were formed on the legal presumption that race can be quantified. Most states that enacted miscegenation laws based legislation on a percentage of non-White ancestry. At the most extreme, states based race on the "one drop rule," which deemed every individual with any Black

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[14] Peggy Pascoe, *What Come Naturally: Miscegenation law and the making of race in America* (Oxford: Oxford University Press, 2009), 25-26; hereafter referred to as *What Comes Naturally.*
[15] Pascoe, *What Comes Naturally*, 12, 31-32, 177; Cott, *Public Vows: A History of Marriage and the Nation* (U.S.A.: Harvard University Press, 2002), 35, 58; hereafter referred to as *Public Vows*.
[16] Pascoe, *What Comes Naturally,* 27-31.

ancestry whatsoever to be racially and legally classified as African American.[17] Some liberal states would allow an individual to have up to 1/8th of non-White heritage and still be considered White, but anyone with 1/8th or more of non-White blood was automatically classified as a member of the race most predominant in their ancestry.[18] Many states also enacted miscegenation laws broad enough to prevent marriage between any White and anyone who was not also classified as White, including banning marriages between Whites and "Ethiopian or black race, Malay or brown race, Mongolian or yellow race, or the American Indian or red race."[19] At one time, at least 30 states had miscegenation laws, with higher estimates reaching close to 40 states, and in 1967 thirteen states still had such laws enacted.[20]

The general prohibition against interracial relationships came from a social stigmatization of interracial sex due to a fear of race mixing. This fear centered on maintaining the purity of the White race by protecting White women from what was deemed to be the sexually deviant Black male population.[21] White men could engage in sexual relations with Black female slaves since the children would be illegitimate, and because any children produced followed the mother's bloodline and were classified as Black and, therefore, as slaves.[22] Yet, in the case of a White woman and Black man, any children produced through their union would legally be considered Black, but would not automatically become slaves since the mother would be a free White. Thus, this would

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[17] Pascoe, *What Comes Naturally*, 116-123.
[18] Cott, *Public Vows*, 43.
[19] Pascoe, *What Comes Naturally*, 91.
[20] Pascoe, *What Comes Naturally,* 118; Douglas Martin, "Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68," *The New York Times*, 6 May 2008.
[21] Pascoe, *What Comes Naturally*, 86.
[22] Pascoe, *What Comes Naturally*, 26-27.

create free Blacks, which the White population feared.[23] This gendered sexual inequity was largely based on the entitlement of White men in the United States through the consolidation of all political and social power in their hands, but was also due to the sexualization of interracial relationships.[24]

According to Peggy Pascoe, all interracial relationships, regardless of the actual level of commitment between the couple, were classified as sexual relationships, devoid of commitment, social approval, or legal sanction.[25] By sexualizing all interracial relationships, the state could demean the importance of the relationship and withhold state recognition.[26] Miscegenation laws reinforced the sexualization of interracial relationships by forcing all interracial couples into the category of fornication, or illegal sexual fraternization. This stigma was often increased by the stigmatization of engaging in coitus outside of marriage, since marriage was not a right extended to interracial couples. Thus, every interracial couple faced legal repercussions and social shaming due to the mere existence of their relationship.

It was only with the rise of the Civil Rights Movement that interracial couples began to challenge miscegenation laws in courts across the nation, all the way up to the United States Supreme Court. The social setting after World War II created a general awareness among Americans of the inequality and racism inherent in miscegenation law. Beginning with the Asian "war-brides" American soldiers brought back to the states and extending to the returning Black soldiers with girlfriends or fiancées of another race, miscegenation laws were slowly being challenged by calls for equality in the realm of

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[23] Pascoe, *What Comes Naturally*, 51-54.
[24] Pascoe, *What Comes Naturally*, 24-27.
[25] Pascoe, *What Comes Naturally*, 12, 86.
[26] Pascoe, *What Comes Naturally*, 12.

marriage.[27] Once organizations such as the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU) endorsed the fight to overturn miscegenation laws, there was little to stop the progression toward a federal overturning of intermarriage bans.

The legislation associated with interracial marriage provides insight into the historical, social, and legal context of the miscegenation debate, as well as providing a framework for the temporal process of legalization. Although the social opinions of interracial marriage were vastly important, the strength of the argument for legalization rests with the law. Cott, Coontz and Pascoe imply that the majority of the legal debate over interracial marriage has to do with wording and intent within the U.S. Constitution, specifically, the 5th and 14th Amendments of the Constitution.[28] These amendments guarantee due process and equal protection respectively, as well as full faith and credit.[29] Another key component of the 14th Amendment is the extension of citizenship rights to African Americans, who had previously been denied formal citizenship. In fact, the 5th and 14th Amendments, in combination with specific legal issues each case also introduced and along with equal application of the law, were used in every miscegenation case discussed in this thesis as legal reasoning to overturn the prohibition on intermarriage. My thesis goes further, showing that legislation was progressively enacted to attain equality under the law for African Americans, and that this legislation was a consequence

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[27] Pascoe, *What Comes Naturally*, 206.
[28] "5th Amendment," *Cornell University Law School*, accessed 12 September 2012, http://www.law.cornell.edu/wex/fifth_amendment;
"14th Amendment," *Cornell University Law School*, accessed 12 September 2012, http://www.law.cornell.edu/constitution/amendmentxiv.http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html. See Appendix A.
[29] Full faith and credit implies supra-state recognition of public acts, records, and judicial proceedings.

of the precedent set by the 5th and 14th Amendments, as well as from precedent set by each successive miscegenation trial.

Elizabeth Abbott, in *A History of Marriage*, and Stephanie Coontz, in *Marriage, a History*, both examine the history of the institution of marriage from the 17th century to the present. Coontz questions the entire use of the term "traditional" in regard to marriage, arguing that what is assumed to be a traditional marriage never truly existed since marriage is constantly subject to social and legal changes. Abbott approaches marriage from a multinational and social perspective, arguing that there is no single definition of marriage, or a true "traditional" form of marriage, since marriage laws and requirements change from one society to the next. In *Public Vows: A History of Marriage and the Nation*, Nancy Cott studies marriage from an American social perspective, and discusses the ways in which society and the government have both protected and infringed upon the institution of marriage, all in the name of uniformity. In her book, *What Comes Naturally*, Peggy Pascoe discusses the history of marriage in regard to interracial marriage, approaching the topic from a socio-legal perspective by discussing the social conditions surrounding each successive piece of legislation in the realm of miscegenation.

Abbott, Coontz – and to some extent Pascoe and Cott – state that marriage is a constantly evolving institution. Pascoe advanced the argument further by stating that miscegenation was an example of the transformative nature of marriage, and was also a sexualization of race. Pascoe showed that much of the reasoning behind bans on intermarriage stemmed from a fear of the White community towards, and an aversion to, interracial sex. While I agree with these historians, especially in regard to their

conclusion that marriage is always changing, and that there is no true "traditional" marriage or a suitable singular definition, I see interracial marriage as a pivotal transformation to not only the institution of marriage, but also the American social and legal conceptions of marriage, race, and sexuality.

I am building on this historiography in five key ways. I argue that: the legalization of interracial marriage was representative of the liberalization of American society, intermarriage could have only been legalized at that specific historical time, legal precedent was one of the key factors in the decision to legalize interracial marriage, bans on intermarriage were created and maintained to preserve the social power of White males, and that the legalization of intermarriage has set a precedent for the legalization of same-sex marriage today. I complicate these ideas by introducing a new perspective on how interracial marriage has changed the institution of marriage by focusing on the precise legal precedent it utilized to legalize intermarriage, and the precedent it established in regard to same-sex marriage. Similarly, I elucidate that interracial marriage could only have been legalized at a particular historical moment, once American society was ready for the accompanying transformation to the former definition of marriage, and once the law had progressed to a point that made overturning miscegenation legally feasible. In this way, I demonstrate that there could not have been a legalization of interracial marriage if there had not been a concurrent liberalization of American society.

Interracial marriage demonstrates how social and legal forces intersect to defy the notion of a "traditional" marriage, thereby transforming and redefining the institution. The combination of social and legal factors resulted in alterations to, the institution of marriage, namely the legalization and recognition of interracial marriages. The specific

legal precedents established throughout the interracial marriage debate, particularly the legal significance of *Pace v. Alabama* and *Perez v. Sharp*, and the precise social timing of *Loving v. Virginia* in 1967 enabled the legalization of interracial marriage and established precedent for the legalization of same-sex marriage today.

In order to show the progressive nature of marriage since 1883, I examine the legalization process for interracial, specifically Black-White, marriage through three specific court cases, all of which advanced the right to marry, regardless of race. These cases demonstrate how both the law and the definition of marriage can be transformed due to the democratic process and concurrent changes in social perception. Each case marks a discrete point of change in the socio-political climate regarding marriage. In these moments, law and society interact to question the legal standing of interracial marriage, and the result of each case indicates a significant change in the perception and definition of the institution of marriage.

The three case studies presented in my thesis will be *Pace v. Alabama* (1883), *Perez v Sharp* (1948), and *Loving v. Virginia* (1967). While previous historians, like Pascoe and Cott, have discussed these three cases in relation to the history of marriage, my assessment looks at each case individually, as discrete points in time in which the definition of marriage was challenged and changed. It also examines how all three ceases interacted and built off of one another to ultimately transform the legal definition of marriage in the United States. By looking at the cases from this perspective, I highlight the legalities of the interracial marriage debate, such as precedent and constitutional rights, while also looking at the influence a progressive liberalization of American society had on the legalization process. All three cases present formal challenges to what

was the accepted definition of marriage, and each also demonstrates the evolution of that definition over time.

Chapter one examines the case of *Pace v. Alabama*.[30] This case was decided by the United States Supreme Court in 1883 and found that the ban on interracial marriage was not unconstitutional since both individuals in the proposed union, White and Black, were equally affected. Due to the ban limiting marriage for both races, according to the court, miscegenation laws were not in violation of the Equal Protection Clause of the United States Constitution. *Pace v. Alabama* also established that marital sex between Blacks and Whites was a felony, whereas extramarital sex between the two was only a misdemeanor. This discrepancy reaffirmed that, while any racial mixing was viewed negatively, interracial marriage was viewed as a threat to the institution of marriage and to the White race particularly. This case shows the initiation of the transformation of marriage because, although the court found in favor of miscegenation laws, the fact that the case was even presented to the court indicates that interracial marriage was a pressing social issue as early as the post-emancipation era. This chapter will address the case brief of *Pace v. Alabama* and will also discuss the distinction between interracial sex and interracial marriage, which illustrates the underlying social significance of the institution of marriage to Americans.

[30] U.S. Supreme Court Pace v. State of Alabama, 106 U.S. 583 (January 29, 1883). Accessed from http://www.lovingday.org/pace-v-alabama; hereafter referred to as *Pace v. Alabama*. See Appendix A.

Chapter two focuses on *Perez v. Sharp* (1948), which reversed the decision of *Pace v. Alabama* at the state level.[31] *Perez* declared that bans on interracial marriage violated the 14th Amendment of the U.S. Constitution and therefore could not be legally be enacted. However, the Supreme Court of California, rather than the United States Supreme Court, decided this case, and thus the decision was only applicable in the state of California, stressing the difference between state and federal law. Despite this case being decided at the state level, it set a precedent for the legalization of interracial marriage in other states, and for eventual federal legalization. This chapter also discusses the introduction of new legal arguments since *Perez*, unlike previous miscegenation cases, utilized the argument that prohibiting marriage violated the 1st Amendment right to freely practice religion as well as violating the 5th and 14th Amendments. Finally, this chapter highlights that interracial marriage was largely a Black-White marriage debate, since Andrea Perez was not, technically, White and, therefore, her marriage did not pose as great of a threat to White social supremacy.

Chapter three centers on the decisive case in the process of legalization for interracial marriage – *Loving v. Virginia* (1967).[32] The decision of *Loving v. Virginia* recognized the fundamental right to marriage for all, regardless of race or sex. The idea of marriage as a fundamental right led to the unanimous Unites States Supreme Court decision (9:0) in favor of removing all miscegenation laws, across state lines, thereby

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[31] Traynor, Roger R. "Majority Opinion, *Perez v. Sharp* (1948)." Published through the *Organization of American Historians (OAH) Magazine of History, Vol 18, No 4* (July 2004): 34 – 36. See Appendix A.

[32] *Loving v. Virginia*. "Loving v. Virginia, 388 U.S. 1 (1967) 388 U.S. 1 Loving et ux. v. Virginia. Appeal from the Supreme Court of Appeals of Virginia. No. 395." (Argued 10 April 1967. Decided 12 June 1967): 1-6. Accessed 27 January 2012; hereafter referred to as *Loving v. Virginia*. See Appendix A.

legalizing interracial marriage at the federal level. A key component of *Loving* was the time period. The social climate of the 1960s, in a reflective post-war and active an Civil Rights Movement fervor, favored the legalization of interracial marriage, and many people in the United States viewed legislative action like the *Loving* case to be a crucial step towards racial and social equality. This chapter discuss the social forces that enabled the overturning of miscegenation as well as the legal reasoning used, and especially emphasizes that both were products of the culmination of past social events and legal cases.

To confirm that marriage is *constantly* evolving, I present the same-sex marriage debate as the present day equivalency to the interracial marriage debate. Due to the comparative qualities shared by these two legal battles, my epilogue will focus on the first known case of a same-sex marriage, that of Jack Baker and Michael McConnell (1971), and on the case *Baehr v. Miike* (1999; also known as *Baehr v. Lewin*, 1993) which was the first same-sex marriage case to reach the United States Supreme Court. The debate over the legalization of same-sex marriage currently taking place mirrors the historical debate surrounding interracial marriage in many ways. There are many legal barriers and social stigmas attached to same-sex marriage, much like the arguments against interracial marriage that were used in the past. The same-sex marriage debate also shows the continuing transformation of the institution of marriage when subjected to social and legal pressure. Yesterday's battle was interracial marriage, the right to marry whomever we choose, regardless of the socio-political stigma; today's battle is same-sex marriage, which, yet again, questions the right to marry whomever we choose, regardless of the socio-political stigma. The legalization of interracial marriage established a

precedent for the legalization of same-sex marriage, and the social climate today seems to favor federal legalization of same-sex marriage, much as it did for interracial marriage in 1967.

Marriage has a unique standing in American society, which results in more intensive and longer-lasting state regulation. The underlying purpose of this regulation was to ensure that all marriages performed by the state were also sanctioned by the state. The role of the state in regulating and defining marriage was slowly established as communal bonds gave way to centralized government. The development of state regulation led to the necessity of legally defining "marriage," and eventually led to the debate over the legality of interracial marriages. Until the late 20th century, most states did not sanction interracial marriage on the premises of maintaining racial purity and preventing the procreation of mixed race children.[33] The interplay of the importance of the institution of marriage and aggressive racism led to the creation of formal bans on intermarriage beginning in the Reconstruction era, and the persistence of miscegenation laws in the United States until the 1960s.

In reality, marriage is not stable; the notion of a "traditional" marriage is flawed from conception in the sense that there is no one single form of marriage that has subsisted without reforms; the legal structure and social significance of marriage have always been open to legislative reform and social interpretation. Interracial marriage is one example of how the institution of marriage has changed over time, but it is an example that encompasses critical American social and legal reasoning. In this thesis, by examining the socio-political significance of interracial marriage in the United States, I

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[33] Pascoe, *What Comes Naturally*, 8.

will trace the transformation of the federal definition and the social conception of marriage, beginning in 1883 with the U.S. Supreme Court case *Pace v. Alabama* and ending in 1967 with the federal legalization of intermarriage. Although *Pace* did not bring about a change to the legal standing of interracial marriage, and, in fact, became the precedent used to maintain miscegenation bans, it was an early challenge to miscegenation law and indicated that there was a social need for a reexamination of interracial marriage law, effectively instigating the legalization process for intermarriage, eventually culminating in *Loving v. Virginia*.

"The framework of miscegenation laws had grown so strong that its constitutionality was assured and its naturalness assumed."[1]

"The Pace decision crowned the Supreme Court's endorsement of the post-war judicial defense of miscegenation law. […] judicial avoidance of civil rights claims was made easier by the fact that it was Black men and White women […] who stood before the court."[2]

CHAPTER ONE:

SEXUALIZING MISCEGENATION AND THE INTRODUCTION OF CONSTITUTIONAL RIGHTS

In 1881, Tony Pace and Mary Cox, both residents of Grove Hill, Alabama, were arrested for violating an Alabama statute prohibiting interracial fornication and cohabitation. During their trials, the prosecution rested on testimonies of White neighbors, likely the same individuals who reported Pace and Cox to the authorities in the first place. Pace's attorney originally attempted to argue that the state needed to prove Pace and Cox were living together, rather than having occasional sex, since the statute was limited to prohibiting cohabitation. Pace's attorney wanted the jury to be aware of the limitations of the statute, since it restricted the charges the defendants could be tried for, but the court overlooked this legal stipulation.[3] Both Pace, an African American man, and Cox, a White woman, were found guilty of "living in fornication and adultery," and sentenced to two years imprisonment.[4] They were sentenced in two separate trials, and

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[1] Peggy Pascoe, *What Come Naturally: Miscegenation law and the making of race in America* (Oxford: Oxford University Press, 2009), 74; hereafter referred to as Pascoe, *What Comes Naturally.*
[2] Pascoe, *What Comes Naturally,* 69.
[3] Pascoe, *What Comes Naturally,* 65.
[4] Pascoe, *What Comes Naturally,* 65.

both faced more serious charges than same-race couples accused of the same crime.[5] However, Pace went on to appeal his conviction on the grounds that the Alabama prohibition on interracial cohabitation and marriage was unconstitutional.

After the initial trial in Grove Hill, Pace's case was taken on by John Tompkins, a White attorney, who worked the case pro bono and largely financed Pace's state and federal appeals himself. Tompkins, after an anticipated loss at the state level, began his appeal to the U.S. Supreme Court. Possibly the most unique facet of the *Pace* trial, in regard to miscegenation law, is that Tompkins never challenged Alabama's right to ban interracial marriage. Rather than challenge miscegenation, which specified marriage, Tompkins argued that the state violated the equal protection clause through its unequal punishment depending on the racial composition of the couple.[6] Tompkins did not directly challenge Alabama law, conceding that the state had the right to ban interracial marriage and to arrest people who committed fornication and adultery outside of marriage, but he did propose that the state law violated the 14th Amendment due to the inequitable punishment, dependent on race, for the same crime.

The legal argument in *Pace* centered on the inequitable application of the law. The fact that miscegenation laws did not allow interracial couples to marry forced any interracial couple in Alabama to live in a state of fornication, rather than in a state-recognized marriage union. The Alabama miscegenation

> Code declares that 'if any White person and any negro, or the descendent of any negro to the third generation, inclusive, though one ancestor of each generation was a White person, intermarry or live in adultery or

[5] Pascoe, *What Comes Naturally,* 65.
[6] Pascoe, *What Comes Naturally,* 66.

> fornication with each other, each of them must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than nor more than seven years.[7]

This legislation allowed for someone with 1/8th or less Black ancestry to marry someone White, but barred anyone with more than 1/8th Black ancestry from marrying anyone with less than 1/8th Black blood. Those couples falling outside of these measurements were not allowed to marry, and were thus relegated to the status of living in fornication.

Within the issue of fornication, Tompkins argued that Alabama's miscegenation laws violated the 14th Amendment of the United States Constitution in regard to equal protection of the laws. According to Tompkins, the law inequitably punished interracial couples for a crime many same-race couples committed.

> The statue of Alabama provides that 'if any man and woman live together in adultery and fornication, each of them' shall be liable to a specified punishment. Another statute provides a greater punishment to each one 'if any White person and any Negro intermarry or live in adultery or fornication with each other.'[8]

The clear difference in punishment prescribed for the same crime - living together in adultery or fornication - depending on the racial composition of the couple, either same race or interracial, was at the core of Tompkins defense. If a difference based solely on race existed, then the statute violated the 14th Amendment's Equal Protection Clause and could not legally be enforced, thereby granting recognition to the cohabitation and common-law marriage of Pace and Cox.

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[7] U.S. Supreme Court Pace v. State of Alabama, 106 U.S. 583 (29 January 1883). Accessed from http://www.lovingday.org/pace-v-alabama; hereafter referred to as "Pace v. Alabama." See Appendix A.

[8] "Validity of State Statute Forbidding Intermarriage of Races, Supreme Court of the United States, Jan. 29, 1883," *The Albany Law Journal, 27(11)*, 17 March 1883.

The U.S. Supreme Court, however, ruled to uphold the convictions, and stated that Alabama's miscegenation laws did not violate the 14th Amendment because the law equally applied to both races. Following a "separate but equal" ideology, the U.S. Supreme Court stated: "Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether White or Black, is the same."[9] Since both Cox, who was White, and Pace, who was Black, were punished equally, the U.S. Supreme Court found no constitutional violation and ruled that each race was being treated equally. The court decided that the difference in punishment rested, not on the race of the individuals, but on the difference in the crimes committed – one simply being adultery or fornication, the other being interracial adultery or fornication. The fact that these were two separate crimes attests to the inherent racism in law; since the dominant social group was White and they controlled the political and legal structures of 19th century America, a crime was deemed to be worse when it involved a mixed race couple.

Until the mid 20th century, racial classifications were based socially on an individual's skin color, and legally on an individual's blood composition. Race was determined by how much non-White ancestry someone had, or their racial blood composition. Having 1/8th non-White ancestry was the high end for the amount of non-White blood someone could have before they were legally classified as belonging to a race other than White. In the most conservative states, the "one-drop" rule was

[9] "Pace v. Alabama," 1883.

enforced.[10] In these states, a person who had any non-White ancestry whatsoever could not be legally considered White.[11] Most miscegenation laws were based on this blood measurement principle. Even though there was no empirical way to measure someone's racial ancestry through blood composition, this pseudo-scientific standard was applied in order to "prove" someone's race. By the 1/8th rule, a person needed to have only one great-grandparent who was Black to be legally classified as Black. This principle, and the theory of being able to measure someone's race through blood composition, became incredibly important since the American social structure was largely based on race, and being able to classify oneself as White, rather than Black, ensured huge socio-legal benefits.

Moreover, some people who had more than 1/8th non-White ancestry were able to "pass" as White in society based solely on their skin color, even though they would legally be considered to be of color.[12] Passing happened more often than was recognized by many Americans. It was not rare for lighter skinned African Americas to pass as White men and women, which led to the realization that skin color is not a reliable measure of ancestry. Regardless of the inaccuracy of this measurement standard, social distinctions were made, fist and foremost, on the basis of skin tone. British professor J.W. Gregory noted that, "Colour is often used as if it were the essential racial distinction, as it

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[10] "Important Law Decisions: Mixed marriages at the South," *New York Times*, 9 July 1877. (hereafter referred to as "Important Law Decisions."); "Sentences for miscegenation," *New York Times*, 28 February 1884; Pascoe, *What Comes Naturally*, 120-122.
[11] Pascoe, *What Comes Naturally,* 142.
[12] "White Man is Held as Negro," *Los Angeles Times*, 13 June 1922; "Important Law Decisions," 1877.

is easily observed; but it is so variable that it is not an adequate criterion of race."[13] Simply appearing to be White or Black did not accurately predict the actual racial heritage of an individual. Passing was a serious concern for the White community, especially in regard to marriage.[14] If society could not distinguish between the races, then racial mixing through interracial marriage was bound to occur. This fear drove many people to accuse others of being Black, and led states to create laws that closely defined race and to create procedures for identifying non-Whites. Race became legally entirely dependent on ancestry. Publically, race was still defined primarily by skin color. However, individual racial identification was not considered a valid measure of race, meaning that even if someone identified as a member of the White community, if they had 1/8th Black blood, they were Black. These laws ranged from one-drop to 1/8th Black ancestry, in more lenient states, to classify individuals according to race. Regardless of the impracticality and unscientific basis of the blood measurement principle or of judgments based on skin color alone, numerous states created laws based on these classifications and applied these laws to marriage. Some states simplified their laws by barring all non-Whites from marrying Whites, while other states created laundry lists of the specific races that could not marry Whites. Either way, between 1913 and 1948, 30 out of the then 48 states in the U.S. had banned marriage between Whites and Blacks (to varying degrees of racial ancestry).[15]

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[13] J. W. Gregory, "The Colour Bar: Mixed Marriages and the Colour Bar," *Spectator (147)*, 75. 18 July 1931; hereafter referred to as "The Colour Bar," 1931.
[14] Pascoe, *What Comes Naturally*, 141.
[15] "Our Miscegenation Law is a Maze," *Washington Post,* 2 January 1949; hereafter referred to as "Our Miscegenation," 1949.

Blood measurements of race were instigated primarily to clarify miscegenation laws, and miscegenation laws were created to prevent racial mixing. The need to regulate marriage to prevent racial mixing "made racial classification seem to be imperative – that is, in order to determine who could and couldn't marry, it was first necessary to identify every person's race quickly and correctly."[16] The idea of corrupting White racial purity was central to the reasoning behind miscegenation law.[17] In order to prevent racial mixing or the corruption of White racial purity, states used blanket bans on interracial marriages based on racial blood measurements, like those mentioned above.

Mixed race individuals became the grey area of miscegenation law. Because they could be classified as White, they could not marry anyone who was non-White, but because they could also be considered Black, they could not marry anyone who was White; effectively, the laws barred mixed race individuals from getting married.[18] This was an example of the inequity in application of the law that Tompkins strove to overturn. Although the classification of Pace's race was never questioned, nor was that of Cox, their sentences were indicative of the ingrained racial inequality still present in law, despite the supposed equality of citizens. The effective exclusion of mixed race individuals from legal marriage and the structural purpose of miscegenation laws to maintain a social hierarchy favoring Whites while simultaneously disadvantaging Blacks were, Tompkins argued, constitutional violations, specifically violations of the 5th and 14th Amendments.

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[16] Pascoe, *What Comes Naturally*, 111.
[17] Pascoe, *What Comes Naturally*, 140-148, 180-184.
[18] Pascoe, *What Comes Naturally*, 120-124.

The 14th Amendment granted citizenship to former slaves, and also guarantees due process and equal protection of the law.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[19]

The Equal Protection Clause, contained within the 14th Amendment, requires each state to guarantee equal protection of the laws to all citizens living within its jurisdiction.

> In other words, the laws of a state must treat an individual in the same manner as others in similar conditions and circumstances. […] The equal protection clause is not intended to provide "equality" among individuals or classes but only "equal application" of the laws. The result, therefore, of a law is not relevant so long as there is no discrimination in its application.

In the Reconstruction era, this clause was primarily used to overturn legislation that had previously maintained the sub-citizen status of Blacks. Equal protection came to be commonly regarded as "equal application," meaning that each law should equally apply to all citizens, regardless of race. However, the U.S. Supreme Court did not see this clause extending far enough to cover the right to marry for interracial couples, since, they believed, miscegenation law was equally applied to both Blacks and Whites, even in the Alabama statute.

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[19] "14th Amendment," *Cornell University Law School*, accessed 12 September 2012, http://www.law.cornell.edu/constitution/amendmentxiv; hereafter referred to as "14th Amendment". See Appendix A.

However, the exact intentions of the Equal Protection Clause were unclear. Although the Supreme Court ruled that the 14th Amendment was not being violated by Alabama's miscegenation statute, even the *Pace* decision acknowledged that the Equal Protection Clause was meant to ensure that there was no discrimination in punishment among citizens.

> Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offence, to any greater or different punishment.[20]

A liberal interpretation of the 14th Amendment supported Tompkins' argument that laws such as Alabama's miscegenation statute did violate the civil rights of American citizens. The application of this principle should have resulted in an overturning of miscegenation legislation, but the Supreme Court was not willing to introduce, and the American public was not yet willing to accept, the radical concept of interracial marriage openly applied at the federal level.

The 5th Amendment of the United States Constitution guarantees the right to due process.[21] Due process is essentially the concept of fundamental fairness, which means due process is violated if a practice goes against some fundamental principle of justice that is ingrained in society and tradition. In the case of *Pace*, Tompkins suggested that

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[20] "Pace v. Alabama," 1883.

[21] "The guarantee of due process for all citizens requires the government to respect all rights, guarantees, and protections afforded by the U.S. Constitution and all applicable statutes before the government can deprive a person of life, liberty, or property. Due process essentially guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding." Information from: "5th Amendment," *Cornell University Law School*, accessed 12 September 2012, http://www.law.cornell.edu/wex/fifth_amendment; hereafter referred to as "5th Amendment." See Appendix A.

miscegenation violated the American principle of equality for all citizens. Traditionally, the United States had not had equality between the races, but the idea of equality, in itself, is an essential component of American society. Given the granting of equal citizenship to Blacks in the 14th Amendment, logically the 5th Amendment would then guarantee due process and the principle of fundamental fairness to Blacks as well as Whites.

Legally, Tompkins presented a compelling case in favor of Pace. According to the 14th Amendment, Pace had full citizenship rights, and could not be denied equal protection of the law. Under this equal protection, the government was required to apply all laws equally, meaning that any law applied to Pace, in his prosecution or his defense, must also be applicable to all other citizens, White and Black. Both due process and equal protection also stipulated that Pace must receive a fair trial, and that his punishment could not differ from that of others accused of the same crime. Bearing all of these legal provisions in mind, Pace's arrest and sentence violated both his 14th and 5th Amendment rights. Unfortunately for Pace, it was the perspective of the Supreme Court that the punishment of Cox, a White woman accused of the same crime, satisfactorily showed that his constitutional rights were not being violated. Despite all of the legal reasoning, social norms outweighed Pace's constitutional rights, leading to the Court's decision against him.

Alabama state law banned both fornication and cohabitation without formal marriage. These laws applied to all residents of Alabama, regardless of race, yet were widely ignored and unenforced. It seems that the occasions when cohabitation laws were enforced were instances like that of Pace and Cox - when White racial purity was

threatened - that police intervened.[22] To have any Black ancestry decreased an individual's social standing and limited their legal rights. Moreover, White women were viewed as the property of White men, and were idealized as the vessels of White racial purity.[23] If the purity of White women was socially questioned, then the racial ancestry of any White man or woman could be questioned. Thus, any White woman with a Black man posed a threat to the entire racial purity of White America through the creation of mixed race children, free Blacks, and the sexual access of Black men to White women.

For White America, mixed-race individuals posed a threat to social order. If mixed children existed, this suggested that either White men or White women, or both, were accepting African Americans as their social equals and possible sexual or marital partners. Similarly, the existence of biracial children blurred the racial division between Black and White, metaphorically and literally blending the races together into one social group. To a certain degree, mixed children of White men were overlooked because White male privilege ensured sexual access for White men to women of all races. However, when White women were involved with Black men, or when White men attempted to legitimate their relationship with a Black woman, community or family members intervened to prohibit such unions and the prevent the possible production of mixed race children.[24]

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[22] Generally, when White men took advantage of sexual access to Black women there was little said or done to prohibit their actions, unless a White man attempted to legitimate such a relationship through marriage. However, a Black man and a White woman having a sexual relationship was viewed as a threat to the socio-racial hierarchy in American society, and thus prompted state or police interference. Pascoe, *What Comes Naturally*, 12, 190.

[23] Renee C. Romano, *Race Mixing: Black-White Marriage in Postwar America* (Cambridge, Massachusetts: Harvard University Press, 2003), 5; hereafter referred to as *Race Mixing*.

[24] In the *Pace* case, it is not clear who reported the couples to the authorities, but it can be assumed that a community member reported their relationship. However in the *Perez* case, her father vocally opposed their union, and in the *Loving v. Virginia* case (see chapter three) the

When *Pace v. Alabama* reached the U.S. Supreme Court, Tompkins argued that Alabama's miscegenation law violated the 14th Amendment of the Constitution because it did not equally protect African Americans' right to marry.[25] The U.S. Supreme Court decided that Alabama's law was constitutional because it applied the law equally to both races – Whites could not marry Blacks and Blacks could not marry Whites.[26] However, the court failed to see the distinction that Blacks were not equally protected. When states enacted miscegenation law, usually the marriages between Whites and Blacks that had previously been performed were not immediately voided in the eyes of the state. However, the state could now prosecute these couples for illegal cohabitation, as was the case for Tony Pace and Mary Cox. Nonetheless, many states did invalidate interracial marriages performed before miscegenation law was enacted.[27] Miscegenation laws were only enforced to ensure the maintenance of a racial hierarchy privileging Whites, and the classification system used to define who was too Black to be considered White was created solely to ensure racial purity.[28]

The society in which Pace and Cox were arrested was not conducive to overturning their convictions. The South in the post-Civil War era was particularly wary of any challenge to the supremacy of Whites. Reconstruction introduced many new laws into Southern states, promoting the rights and freedom of former slaves. Changes in the

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sheriff received a tip that the couple was cohabitating and had obtained a marriage license in Washington, D.C., prompting their arrest.

[25] Pascoe, *What Comes Naturally*, 65-68.

[26] "*Pace v. Alabama*," 1883.

[27] "Virginia's Marriage Laws: A colored man kills his White wife to escape prosecution," *New York Times,* 31 May 1879. This article discusses the newly enacted law against intermarriage and how interracial couples, previously left alone by the state, are now facing criminal charges and having their marriages invalidated.

[28] Pascoe, *What Comes Naturally,* 40-46.

legal codes prompted Whites to fear that there would be a shift in the social hierarchy, and led to a fear of interracial sex in particular. This panic over interracial sex stemmed from the belief that Black men were likely to pursue White women, who would then give birth to mixed-race children. These children, neither White nor Black, would not be accepted by either race and would become outcasts who lacked social standing and threatened proper social order.[29] It was also a fear that White women, if allowed, would accept Black husbands, and that White men would legitimate relationships with Black women by taking them as wives, thereby allowing White society to accept African Americans as their social equals.[30] To preserve their place at the top of the social hierarchy, Whites instigated laws, such as those created to ban interracial marriage. These laws served, in particular, to preserve racial purity and protect White women from Black men, who were portrayed as hyper-sexualized through the sensationalized White media.[31]

Much of the liberal view of the late 19th and early 20th centuries was characterized by dismissal. Many people simply dismissed interracial marriage as being so infrequent and inadvisable as to not pose any threat to racial purity. It was believed that the men of each race largely preferred the women of their respective race more so than those of any other race. However, it was also generally accepted that the religious, cultural, and social differences between Whites and Blacks led to unpleasant and disadvantageous marriages, so much so that these marriages were too rare to be paid any attention to. Yet, if an

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[29] Romano, *Race Mixing*, 2003, 45, 73.
[30] Pascoe, *What Comes Naturally*, 5, 169, 179.
[31] Thomas F. Dixon Jr., *The Birth of a Nation*, film, directed by D.W. Griffith (1915; U.S.A.: David W. Griffith Corp, 1915).

interracial marriage transpired, despite all advice against it, the marriage was "not to be tolerated."[32]

Many Whites, especially White men, so vehemently and violently opposed interracial relationships, that they took it upon themselves to enforce miscegenation statutes. In 1885 in South Carolina, White men sought out interracial couples and mixed families, and systematically whipped and beat them until they agreed to leave the area or end their relationship. The regulators attacked primarily White men and women who were consorting with Blacks, both White women living openly with Black men and White men with Black mistresses. According to the *New York Times*, this renegade band attacked an estimated ten families in a matter of weeks, and defended their actions by stating that the government was ineffective at prohibiting such violations of social norm and law.[33] This demonstrated the public opposition to interracial relationships, especially in the South.

There were two overarching social reasons to uphold miscegenation law: sexual access and interracial offspring. The concept of sexual access was broken down into access for White men to Black women, and the protection of White women from Black men. According to the *Chicago Defender*, "Negro women are considered to be the legitimate prey of White men, and there is nothing said about it or nothing done to prevent it."[34] White men, even after the abolition of slavery, had little fear of being reprimanded for having sexual relations with Black women. Because of the lack of social

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[32] "Miscegenation," *Los Angeles Times*, 18 April 1909.
[33] "Whipped by Regulators," *New York Times*, 12 September 1885; hereafter referred to as "Whipped," 1885.
[34] "Slavery – Black and White," *Chicago Defender,* 14 Dec 1912; hereafter referred to as "Slavery," 1912.

and political power held by Blacks, and Black women in particular, White men also had little to no fear of punishment for aggressive sexual acts perpetrated against Black women. "[It] has always been a common divertissement for White men to make conquests of poor and friendless colored girls," and these conquests were chiefly made possible through inequity in the law regarding civil rights, such as the right to marry. [35]

Those with liberal social outlooks, or conservative family values, suggested that, "Marriage is in itself a contract between individuals of whatever race, and […] it would be far better to have it protected by the laws […] than to have the promiscuous cohabitation of the races."[36] Yet, besides maintaining the desired monopoly on sexual access, White men also faced social stigma if they attempted to legitimize their relationship with a Black woman. In a case in 1930, a Virginia police sergeant and his Black wife faced legal ramifications. When Sergeant Emil E. Umlauf attempted to legitimize his relationship with a Black woman through marriage, both he and his wife, although acquitted of formal charges, were forced to leave their home county or face new indictments.[37] While White men valued their sexual access to Black women, society did not accept the formal recognition or legitimization of such unions through marriage. In his sentencing, the judge told Umlauf, "'it was a mistake nature to endow you with the greater advantage and outlook that it gives to a White man,'" and reportedly reduced Umlauf to tears. [38] Overall, White men were hesitant to relinquish their sexual access to minority women, but they were even more reluctant to the possibility of Black men

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[35] "Slavery," 1912.
[36] "Slavery," 1912.
[37] "Judge Lectures Acquitted Mixed Marriage Pair," *Norfolk New Journal and Guide*, 10 May 1930; hereafter referred to as "Judge Lectures," 1930.
[38] "Judge Lectures," 1930.

gaining sexual access to White women, and therefore upheld the social norm of prohibiting all interracial marriages. If blanket bans on interracial marriage occasionally resulted in denying a White man his right to marry, as in the case of Umlauf, White society viewed this as a very small sacrifice in order to preserve racial purity and social order.

Another instance of White resistance to interracial relationships was that of the infamous African American boxer, Jack Johnson. Johnson was a well-respected boxer in spite of his race; Johnson was both idolized and resented by Black boxers, and was both respected as an athlete and trivialized as an exception by White boxers. Once he had established a name for himself in boxing, he was able to challenge White fighters, and, as many of the prominent White fighters of the time did, to refuse to box with fellow Black men.[39] However, Johnson generated anger among White Americans for two reasons: his prowess in the ring showed the ability of Blacks to defeat Whites, and because he notoriously associated with White women. In order to challenge Johnson's rising social status and his boxing victories, White American scandalized his relationships, claiming he was a polygamist and that he violated the law by marrying a White woman.[40] These accusations were serious enough to initiate legal action against Johnson, despite his social prominence and wealth, demonstrating to the Black community that no amount of fame or affluence could shelter those who decided to engage in interracial relationships.

The second aspect of social concern, the children produced through interracial unions, was both feared and stigmatized by White society. To overcome this threat, two

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[39] "Big Darkies Coming Next: Johnson and Martin agree to meet this month," *Los Angeles Times*, 18 September 1904.
[40] "Jack Johnson's Wife," *Washington Post*, 10 February 1912.

concepts were introduced to discourage interracial procreation. The first was the idea that these children would be inherently inferior to pure-race children. In 1931, it was suggested that, "When they are markedly dissimilar [in the case of interracial relationships] the progeny are usually handicapped by some deficiency."[41] Scientific data circulated in the 19th and early 20th centuries reported that mixed-race offspring were mentally and physically inferior to children produced through same race procreation. In the case of interracial individuals who were markedly superior to those of pure racial ancestry, social scientists explained away these anomalies by stating that, "The mothers of the United States mulattos have been chosen, generation after generation, from the most attractive and intelligent Negro women; and the high quality of their children is the result of a long process of sexual selection."[42] This ideology also reflects the sexual exploitation by White men of Black women, and entirely disregards the possibility that some interracial children are the product of sexual encounters between Black men and White women.

The other issue of social concern regarding interracial children was the stigma such children would face in society. "[The] illegitimate child of White and colored parents is the butt of special discrimination by both the Negro and the White castes."[43] It was suggested, and often true, that the offspring of interracial couples were not accepted by White nor Black society. This social stigma, and the harsh realities of being Black in White America led some mixed race individuals to attempt to pass as White in society. However, other mixed race individuals chose to renounce their White heritage in order to

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[41] "The Colour Bar," 1931.
[42] "The Colour Bar," 1931.
[43] Kingsley Davis, "The Family: The Forms of Illegitimacy," *Social Forces (18),* 1939/1940.

more closely identify with Black culture. Due to the supposedly unhealthy and socially unacceptable children produced through interracial unions, the law and society seemed to agree that, "intermarriage between the […] human races should be avoided as far as possible."[44]

The constitutionality of miscegenation legislation was challenged from the introduction of such legislation in the late 19th century, and affected many interracial couples.[45] Although *Pace v. Alabama* upheld the status quo, it was a landmark case for the legalization process of interracial marriage. *Pace* quickly became the case cited across the nation whenever miscegenation laws were challenged. By referencing the 5th and 14th Amendments, *Pace* changed the focus of miscegenation from race to citizenship rights. Whether intended or not, Tompkins initiated the use of constitutional rights to overturn miscegenation legislation. Although he argued against unequal punishment of interracial sex, rather than directly challenging the legality of miscegenation, Tompkins' rationale came to be regarded as the most noteworthy challenge to miscegenation law until 1948. While *Pace* served as the precedent for upholding miscegenation law, it was also the earliest and most significant challenge to miscegenation law at the federal level. Eventually, *Pace* came to be viewed as a symbolic warning of how constitutional rights can be disregarded in the case of race. This case also presented a formal challenge to the Reconstruction era definition of marriage, suggesting that interracial marriage should be

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[44] "The Colour Bar," 1931.
[45] "Virginia's Marriage Laws: A colored man kills his White wife to escape prosecution," *New York Times,* 31 May 1879; "The Legality of Miscegenation," *New York Times*, 25 November 1879; "Whipped," 1885; "Miscegenation in Virginia: An unsuccessful appeal against the state law," *New York Times*, 15 May 1879; "Sentences for Miscegenation," *New York Times*, 28 February 1884; "Important Law Decisions: Mixed marriages at the South," *New York Times*, 9 July 1877; "Intermarriage of Races." *Washington Post*, 9 February 1890.

regarded in the way intraracial marriage was, and advanced the idea that marriage is a right of citizens that cannot be granted or denied on the basis of race.

"Where interracial marriage has been prohibited by law as in many States in the United States the laws are based on social and political grounds."[46]

"[…] the demon of prejudice of the White race against the Negro has manifested itself."[47]

[46] "The Colour Bar," 1931.
[47] "Slavery," 1912.

"Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry."[1]

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."[2]

CHAPTER TWO:

RELIGIOUS FREEDOM AND RACIAL EQUALITY IN MARRIAGE

Andrea Perez and Sylvester Davis met while working in the defense industry in Los Angeles in the 1940s. They fell in love and decided to get married.[3] When Perez told her family of the impending nuptials, her father stopped speaking to her; this was only the beginning of the challenges, both social and legal, the couple faced. [4] Despite friends and family members on both sides attempting to talk the couple out of marriage, Perez and Davis persisted and, in 1947, went to obtain a marriage license. Under the legal code in place in California in 1947, marriage license applications required each applicant to state their race. At the time, Hispanic Americans were grouped into the racial category of "White." Therefore, on their application, Perez listed her race as White and Davis listed his as Black. However, under California state law, Perez, a White woman, could not marry Davis, a Black man. While Perez did not consider herself to be White, the law and

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[1] George A. Winkel, "'Stand up and sound off!' Supreme Court of California case: Perez v. Sharp," *The Multiracial Activist*, 1999, http://www.multiracial.com/government/perez-v-sharp.html; hereafter referred to as "Stand up and sound off!" 1999. See Appendix A.
[2] "Stand up and sound off!" 1999.
[3] Pascoe, *What Comes Naturally,* 207.
[4] Pascoe, *What Comes Naturally,* 205.

society, including Perez's father, classified her as White, and limited her marriage options accordingly.

Across the U.S., ancestry was traced in nearly every court case of interracial marriage to prove whether the accused was innocent, White enough, or guilty, being of a non-White race, and California was no different.[5] In California in 1948, the legal code banned marriages between Whites and "negroes, Mongolians, members of the Malay race, or mulattoes," and even required that every marriage license list the race of both spouses.[6] The case of Perez and Davis came down to questions of race. Was Perez White? Was Perez non-White? Could she legally marry Davis, a Black man? Unlike previous cases, however, the court was not questioning the racial composition of the couple – Perez admitted she was Hispanic American and Davis admitted he was Black – only the legal classifications of race were under question. It came down to a question of whether Hispanic Americans should be considered White, barring Perez from marrying Davis, or if they should be placed in a separate racial category, opening new marriage opportunities.

One of the primary reasons for the creation and preservation of miscegenation law was the institution of slavery. Prohibiting state-sanctioned marriages between Whites and Blacks preserved the racial hierarchy necessary to enforce slavery.[7] Yet these laws

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[5] "Mixed Marriage Faces Top Court in Mississippi," *Norfolk New Journal and Guide*, 25 December 1948, hereafter referred to as "Mixed Marriage," 1948; "Wed to White Girl, Gets 5-Year Term," *New York Times*, 19 December 1948, hereafter referred to as "Wed to White Girl," 1948; "Wife Engages Miscegenation Case Attorney," *Washington Post*, 31 December 1948, hereafter referred to as "Wife Engages," 1948; "Virginia Miscegenation Case is Dismissed by Police Court," *Washington Post*, 4 February 1949, hereafter referred to as "Virginia Miscegenation," 1949.

[6] Pascoe, *What Comes Naturally,* 207-208.

[7] "Our Miscegenation Law is a Maze," *Washington Post,* 2 January 1949; hereafter referred to as "Our Miscegenation," 1949.

continued to function even after slavery and the Jim Crow era had ended, and even existed in states like California, with no history of slavery. Under California's legal code, Perez and Davis were not eligible for a marriage license.

> State miscegenation law permits White persons to marry only other Whites, and defines the term: 'Persons of the White or Caucasian race who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins.'[8]

Definitions like this barred many couples from marrying, not just Perez and Davis. At the time, California was one of 30 states (out of the total 48 states that comprised the United States in 1948) that had some form of miscegenation law in place.[9] Depending on the state, "The definition of 'Negro' in these laws ranges from 'one-fourth or more Negro blood' to 'persons with any trace of Negro blood whatsoever.'"[10] The lack of clarity on who was considered non-White, and the tendencies of these classifications to alter according to state laws, created confusion in society regarding who could and could not marry, and limited the rights of those individuals who wished to marry interracially.

However, post World War II society was vastly different than that of the *Pace* era, and even different from 20th century American society before the on-set of the war. War brought social change through the equalizing role of the soldier.[11] Both Black and White men fought in the military and, although this did not erase racial distinction, it lessened the ability of White Americans to demean Americans of other racial groups, since they had served the country side by side. Moreover, the atrocities of genocide perpetrated by

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[8] "Georgia Bias Halts White Californian," *Atlanta Daily World*, 26 March 1955; hereafter referred to as "Georgia Bias," 1955.
[9] "Our Miscegenation," 1949.
[10] Joseph Golden, "Social Control of Negro-White Intermarriage," *Social Forces (36)*, 1958; hereafter referred to as "Social Control," 1958.
[11] Pascoe, *What Comes Naturally*, 199-204.

the Nazis in the name of Aryan (in other words, White) purity were viewed as a result of racial and ethnic discrimination, and became a symbol of what Americans should strive to avoid. In America after Hitler, calls for racial purity were no longer acceptable, stripping miscegenation laws of much of their previous reasoning.[12]

Beyond the war, America was facing great social transformation through the Civil Rights Movement. Developing in the early 20th century and beginning to dramatically expand in the late 1950s, the Civil Rights Movement built off of ideas of equality generated in the aftermath of warfare and grievous human rights violations, and the Civil Rights Movement particularly crusaded for equal rights for African Americans. Coming out of World War II, the United States had become acutely aware of the terrible consequences of racism, evidenced by the Holocaust. Given this horrendous example, American society had to reassess its social structure and the inequities in all areas of life: economic, political, legal, and social, that African Americans faced simply due to their race and the underlying White supremacy of the nation. This reassessment came to fruition through the Civil Rights Movement, which began with a rational and peaceful, yet powerful, push by the African American community for equality, but grew to encompass both Black and White participants.[13] The Civil Rights Movement was, like *Perez v. Sharp*, a product of post-WWII society, but it was also evidence of the changing social perspective towards race relations in the United States.

One of the organizations that became renowned for working for social reform was the National Association for the Advancement of Colored People (NAACP). The

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[12] Pascoe, *What Comes Naturally*, 203.
[13] Julian Bond, Episode 6: "Bridge to Freedom," *Eyes on the Prize*, documentary (1987; U.S.A.: Blackside, 1988.), http://www.youtube.com/watch?v=JERxreFsfP8.

NAACP officially began in 1909 under the leadership of Black intellectuals such as W.E.B. DuBois. At first, the NAACP was hesitant to join the crusade to end miscegenation laws since previous efforts to overturn miscegenation laws had failed (i.e. *Pace v. Alabama*) and because the NAACP saw need for reform in other areas as more critical than ending miscegenation, such as ending segregation in American schools.[14] In the end, the NAACP decided not to involve itself in the *Perez* case. However, there were other organizations involved in the campaign to end miscegenation, such as the American Civil Liberties Union (ACLU), which often worked alongside the NAACP in civil rights cases.[15] The NAACP was primarily concerned with overcoming racial barriers in areas other than marriage, for example the desegregation of schools, while the ACLU was active in challenging existing miscegenation laws.[16] It was in the post-war climate that these organizations, among others, decided to grasp the liberalizing social attitude and harness its drive in order to, yet again, challenge the legality of miscegenation law.

On October 1, 1948, the California Supreme Court declared that miscegenation law was unconstitutional because it violated the 14th Amendment of the United States Constitution. In the *Perez* decision, the court split into two opinions that, although concurring, were based on separate legal arguments for validating interracial marriage. The first opinion was based on the same argument that had been proposed in *Pace*: that miscegenation laws violated the principles of due process and equal protection under the 14th Amendment. The second opinion was directed against miscegenation laws on the basis that such laws violated the principle of religious freedom, covered under the 1st

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[14] Pascoe, *What Comes Naturally*, 202-204.
[15] Pascoe, *What Comes Naturally*, 191.
[16] Pascoe, *What Comes Naturally*, 172-173.

Amendment of the Constitution. Regardless of reasoning, both decisions agreed that miscegenation law was unconstitutional, effectively outlawing miscegenation legislation for the entire state of California.

Despite the fact that Perez was legally White and therefore – according to California law – could not marry Davis, there were two extenuating circumstances to *Pace v. Sharp* that prompted the court to rule in favor of Perez and Davis. The first of these was the use of the argument for religious freedom by Marshall. One of the founding principles of America was the right to religious freedom, which has traditionally been a widely valued and closely protected right. Within the Constitution, "two clauses in the First Amendment guarantee freedom of religion. […] The free exercise clause prohibits the government, in most instances, from interfering with a person's practice of their religion."[17] The case of Perez and Davis was unique from previous miscegenation cases because they were both Catholic, and had already received sanction for their marriage from their church before applying for a marriage license. While planning their wedding, Perez and Davis decided to hold their ceremony at their local church, St. Patrick's Catholic Church.[18] It was in this setting that they approached a fellow parishioner and attorney, Dan Marshall, who also oversaw the Catholic Interracial Council, for help in obtaining a marriage license.[19]

Unlike previous lawyers who had attempted to overturn miscegenation legislation, Marshall approached the *Perez* case from a freedom of religion standpoint. Realizing that citing violations of the 5th and 14th Amendments alone would not be enough to overturn

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[17] "1st Amendment," *Cornell University Law School*, accessed 12 September 2012, http://www.law.cornell.edu/wex/first_amendment. See Appendix A.
[18] Pascoe, *What Comes Naturally,* 206.
[19] Pascoe, *What Comes Naturally,* 206.

California's statute against interracial marriage, as indicated by *Pace v. Alabama*, Marshall expanded his argument to include a 1st Amendment violation. Perez and Davis wanted to practice the Catholic sacrament of marriage, and the state of California was prohibiting them from freely practicing their religion through the enforcement of miscegenation legislation. Marshall argued that by prohibiting their marriage the state was actively denying both Perez and Davis the right to freely practice the sacrament of marriage, fundamental to their faith. In effect, Marshall argued that California's miscegenation law was unconstitutional because it violated the 1st Amendment right to free practice of religion.

The race of Andrea Perez and Sylvester Davis was the second circumstance that differed from previous miscegenation cases. Technically, neither Perez nor Davis was White. Perez, although legally classified as White, was actually Hispanic. Many members of the Hispanic population agreed with this classification since it awarded them certain social and political privileges denied to other minorities, but, in this case, it actually restricted Perez's rights. Miscegenation laws were originally intended to keep the White race pure through the protection of White women; because Perez was not White, the extent to which the White community felt the need to enforce miscegenation in her case was not as strong as it might have been had she been a non-Hispanic White. A reduced perceived threat to the White race may have contributed to the court finding in favor of Perez and Davis.

As was the case in the *Pace* decision, the decision of the California Supreme Court in *Perez v. Sharp* exemplified the influence society has over the law. In the years between *Pace* and *Perez*, Americans largely viewed interracial marriage as "'inadvisable

on social and cultural grounds.'"[20] Although racial mixing continued to be viewed as unnatural, White men still enjoyed unrestricted sexual access to both women of both races, outside of the formal state sanction of marriage, while Black men faced persecution if they consorted with White women.[21] The legislation in place reflected the social values of White America, particularly of White men; these values were embodied in the legalized segregation of many American schools, the socialized segregation of the suburbs, also known as "White flight," and the romantic segregation of the races that was enforced through miscegenation legislation. According to a sociological journal article published in 1958, "whether or not this system of segregated living is expressed in legislation, it is public sentiment which gives meaning to, and which enforces, the system,"[22] and public sentiment, until *Perez v. Sharp*, ultimately appeared to oppose interracial marriage.

The social timing of the *Perez* case was determinative of the outcome of the trial. In the immediate aftermath of World War II, using race or ethnicity to differentiate between and legally segregate citizens generated unease due to the recently associated stigma of Nazism. Pre-World War II, individuals in an interracial couple often did not believe, or reported not to believe, that their partner had non-White ancestry.[23] Post-World War II, interracial couples more often reported not caring about the racial heritage

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[20]"Social Control," 1958.
[21] Pascoe, *What Comes Naturally*, 12; D. L. McGuire, "'It was like all of us had been raped': Sexual violence, community mobilization, and the African American struggle," *The Journal of American History*, December 2004.
[22]"Social Control," 1958.
[23] "Wife Engages," 1948.

of their spouse; they simply wanted the right to marry.[24] There was also a marked legal shift in the use of race in regard to marriage. Before World War II, race had often been used as a means to achieve a divorce. One or the other spouse simply had to claim that the other had non-White blood, and be able to show some evidence to support their claim, and their marriage was declared void. After World War II, couples often supported their partner, regardless of race, and sought legally recognized, state-sanctioned marriage, regardless of racial ancestry. Most of the post-war miscegenation cases were due to family members or neighbors reporting interracial couples that lived together or attempted to marry. It became increasingly rare for race to be used as a reason for divorce.

In a 1947 survey conducted at Los Angeles City College, students reported varying degrees of acceptance towards interracial marriage. Responses ranged from outright rejection, to philosophical responses such as, "'the cultural, religious, and social differences of the two races can't be reconciled… miscegenation is impractical,'" all the way to admiration for the individuals who overcome social mores and decide to marry across racial boundaries.[25] One young woman stated, "'It takes courage to set precedents [be the first to marry interracially] and I wouldn't dare.'"[26] The mere thought that interracial marriage, the most staunchly opposed threat to one of the most sacred social institutions in the United States, could be accepted was indicative of the progress society had made towards racial equality in the 65 years since *Pace v. Alabama*.

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[24] "Wife Engages," 1948; "The Crime of Being Married," *LIFE Magazine*, 18 March 1966 (reprinted 2012).
[25] "The People Think," *Los Angeles Sentinel*, 9 January 1947; hereafter referred to as "The People Think."
[26] "The People Think," 1947.

Perez v. Sharp was significant for two primary reasons. *Perez* was the first case in the 20th century to overturn a miscegenation law on the basis that these laws violated constitutionally protected rights. This set a precedent for the invalidation of miscegenation laws across the nation. Of secondary importance was the distinction that *Perez* brought to light between state law and federal law. Although *Perez* had abolished miscegenation from the legal code of California, numerous other states continued to ban interracial marriage and society still deemed interracial relationships to be, for the most part, unacceptable.

As indicated by *Pace v. Alabama*, "the United States courts have no jurisdiction over questions of marriage. The opinion [of the U.S. Circuit Court of Virginia] holds that the laws of marriage are at the sovereign control and will of each State, unaffected by any provision of any article of the Constitution of the United States."[27] This decision speaks to the assumed autonomy of each state, and their right to independently regulate marriage. Since there was no federal law on interracial marriage, states had the ability to create and enforce their own legislation on the matter. States very much valued the ability to regulate their own marriage laws, especially in the South, where miscegenation was used to maintain the racially based social hierarchy in the century following Reconstruction. This distinction between state and federal law was underscored in *Perez v. Sharp* since California overturned the state miscegenation statute, but there was no subsequent overturning of state miscegenation laws at the federal level. Thus, other states could continue to deny marriage licenses and prosecute interracial couples that violated miscegenation laws. The logic behind these bans was based on "White supremacy.

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[27] "Miscegenation in Virginia: An unsuccessful appeal against the state law," *New York Times*, 15 May 1879.

Twenty-nine and a half [miscegenation being outlawed in only half of Colorado] states of the Union have laws forbidding the marriage of Whites with Negroes, or a certain degree of Negro strain."[28] Although California had outlawed bans on interracial marriages, other states, such as Virginia, still had miscegenation laws in place; America was not yet ready to uniformly accept interracial marriage.

Another important aspect to note is that interracial marriage was so staunchly opposed that, "The State custom of honoring the laws of other States usually does not apply to miscegenation."[29] This means that some states would not even recognize interracial marriages that had been legally performed in another state, even though tradition dictated supra-state recognition of contracts made legally, like marriage, regardless of which state it had been executed in. This resistance on behalf of states to accept intermarriages demonstrates that the diverse national views had, thus far, made a uniform federal law on miscegenation impossible, but the changing social climate in the post-WWII era was more conducive to widespread social reform in regard to race relations, as indicated by *Perez v. Sharp*.

Many of the states that still had miscegenation laws in place went so far as to include miscegenation legislation in the state constitution, thus effectively creating an enduring uniform ban throughout the state that would also serve to impede the process of overturning such laws, if they were challenged.[30] Until 1949, approximately 30 states had miscegenation laws in place to prevent interracial marriages, and six of these states had

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[28] J. A. Rogers, "Rogers Says: Great Comedy Found in Marriage and Divorce Laws of this Country," *Norfolk New Journal and Guide*, 25 December 1948; hereafter referred to as "Rogers Says," 1948.
[29] "Our Miscegenation," 1949.
[30] "Our Miscegenation," 1949.

bans against interracial marriage written into their state constitutions.[31] Yet, there was a growing impatience with the regulation of marriage by individual states. The confusion over who could and could not marry, where they could marry, and where their marriage would be legally recognized drove some people to call for a federal mandate on marriage. One such person, the influential Jamaican-American author, J.A. Rogers, stated, "I believe that every citizen who is not an outright moron will feel that America ought to have a uniform marriage and divorce law."[32] Such a law, yet to be created, would quell the confusion miscegenation legislation had dispersed throughout the nation.

In California, even after the *Perez* decision, Rosamond Rice, the head of the Los Angeles County marriage license bureau and the official who had first refused to issue Perez and Davis a marriage license, continued to try to prevent interracial marriages. She persisted in having couples report their races on marriage licenses, as had been required by law before the *Perez* decision, in an attempt to deny licenses to interracial couples, even though such actions were now illegal.[33] Although ultimately ineffective in eliminating interracial marriage, Rice was successful in rejecting some applicants before being forced to concede to California's new law. Rice's inability to accept the *Perez* decision illustrates the deeply rooted prejudice against interracial marriage, and the persistence of racism, even in light of social and legal reforms.

Perez, although influential, was by no means a nationwide reform of interracial marriage. As of 1948, Mississippi had not recognized a single interracial marriage, and continued to convict interracial couples that did manage to marry. In the case of Davis

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[31] "Our Miscegenation," 1949.
[32] Rogers, "Rogers Says," 1948.
[33] Pascoe, *What Comes Naturally,* 207, 211.

Knight, the charge of miscegenation managed to bring his race into question when nothing else had. Knight had served as a White man in the United States Navy during World War II, and had married a White woman. While the state listed Knight as a White man in his military service records and had accepted him as a White soldier, it refused to accept his marriage, which led to Knight being charges with violating miscegenation law. Knight's trial largely focused on tracing his racial ancestry and determining the race of his great-grandmother, who was suggested to have been a "Negro," which would legally define Knight as Black.[34] When it was decided that Knight's great-grandmother had, in fact, been Black, Knight was found guilty, received a five-year sentence of incarceration in a state penitentiary, and his marriage was invalidated.

Willie E. Purcell, a former member of the U.S. Army, had more luck when he was charged with miscegenation in 1949 in Virginia. Purcell was accused of being Black by his mother-in-law, who was displeased with his marriage to her daughter. Police dismissed the case upon receiving confirmation that he was White in the form of a birth certificate and his Army discharge papers.[35] In another example of the persistence of miscegenation legislation in the nation, a White male resident of San Francisco was told in 1955, long after the *Perez* decision had been handed down, that if he married his fiancée, who was of Japanese descent, and then moved to Georgia, Georgia would not recognize his marriage as valid, even though it would have been legally performed in California.[36] While this man, unlike Knight and Purcell, was not in the armed forces, he was a White male, supposedly a member of the highest social group, and was still

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[34] "Wed to White Girl," 1948; "Mixed Marriage," 1948.
[35] "Virginia Miscegenation," 1949.
[36] "Georgia Bias Halts White Californian," *Atlanta Daily World*, 26 March 1955.; hereafter referred to as "Georgia Bias."

impeded in his effort to marry a non-White woman. In the cases of Knight and Purcell, the United States has accepted them as White men when they were volunteering their lives to the military, but, despite their service, these men were still persecuted once they attempted to marry White women.

The prosecution of members of the U.S. armed forces, like Knight and Purcell, and, more generally, of White men involved in interracial relationships, demonstrates the extent to which the White population, overall and especially in the South, feared and despised interracial marriage. By 1954, the *Atlanta Daily World* noted, "the olny [*sic*] case where a miscegentic [*sic*] marriage has been held valid […] is a California case [*Perez v. Sharp*]."[37] Even in the wake of *Perez*, roughly 30 states still had miscegenation laws in place, and each of these states denied the right to marry to interracial couples according to varying classifications of "Black" and "White". Yet, *Perez* was a step forward in the evolution of marriage in regard to race. In effect, the *Perez* decision redefined marriage, creating a space for racial mixing in the realm of marriage, even if only at the state level. In a sense, *Perez v. Sharp* constructed a place for racial freedom, where anyone of any race could freely marry anyone of their choosing, without the concern that the state would deem their union invalid on the basis of race. However, it was gradually becoming clear that "'you can't legislate miscegenation. More tolerance will be required of people. Theoretically, it's [interracial marriage is] the best way to break down prejudice.'"[38] This student, quoted anonymously, gave an accurate assessment of the state of the nation in regard to interracial marriage. Changing the law,

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[37] "High Court Asked to Reject Petition on Marriage Issue," *Atlanta Daily World*, 6 October 1954; hereafter referred to as "High Court."
[38] "The People Think," 1947.

alone, would not be enough to transform the nation; there must also be a corresponding change in the social conception of race and the opinion towards intermarriage to bring about a lasting change.

The issue of interracial marriage was brought to the footsteps of the Supreme Court multiple times, and with an increasing frequency, between 1948 and 1967. Only months after the Supreme Court had ruled to desegregate schools in the landmark *Brown v. Board of Education* (1954) case, Linnie Jackson asked the Court to rule on her case.[39] Jackson was convicted of marrying a White man in Alabama and sentenced to a two-year prison term.[40] However, both the Alabama Supreme Court and the U.S. Supreme Court refused to hear her case. The federal government was not yet willing to overrule the states' power on the issue of miscegenation. According to *The Washington Post*, "Court rulings to date have approved State miscegenation statutes. Federal courts have been most reluctant to rule on the subject. The closest the United States Supreme Court has come to ruling on the constitutionality of such laws was in *Pace v. Alabama* in 1882 [*sic*]."[41] However, by the end of the 1950s, popular opinion was favoring the right of individuals to choose who they want to marry. It became a commonly accepted notion that, "'marriage is something more than a civil contract, subject to regulation by the state. It is a fundamental right of free men.'"[42] This sentiment insinuated that citizens had a right to marry whomever they chose, without fearing state infringement on this right.

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[39] "Brown v. Board of Education on Topeka (No. 1)," *Cornell University Law School*, accessed 17 February 2013, http://www.law.cornell.edu/supct/html/historics/USSC_CR_0347_0483_ZS.html; hereafter referred to as "Brown v. Board," 1954. See Appendix A.
[40] "High Court," 1954; "Marriage Law Attack Fails," *New York Times*, 23 November 1954.
[41] "Our Miscegenation," 1949.
[42] Golden, "Social forces," 1958.

"[…] California has repealed its law. This is the first instance of repeal of a state law on miscegenation […]."[43]

[43] "Social Control," 1958.

"She is Negro, he is white, and they are married."[1]

"'Tell the Court that I love my wife and it is just unfair that I can't live with her in Virginia.'" – Richard Loving[2]

"Loving v. Virginia may well become the next big landmark in civil rights."[3]

"race is constitutionally irrelevant"[4]

CHAPTER THREE:

WHERE LOVE AND SOCIAL CHANGE COLLIDE

He was White, she was Black, and they were in love. Richard Loving and Mildred Jeter grew up in the same small town of Central Point in Caroline County, Virginia, a place that, unlike the majority of the South, generally overlooked interracial relationships due to the "easy-going tolerance on the race question."[5] Richard and Mildred kept company for almost a decade and were high school sweethearts who decided to marry in 1958, once Mildred became pregnant. Mildred, unaware that she and Richard could not marry in Virginia due to her race, followed her fiancée to Washington, D.C., where Richard knew they could legally marry. Upon returning to Caroline County, the status of their relationship was no longer something that could be ignored by the community: a White man had married a Black woman, and this newly official union could not be

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[1] "The Crime of Being Married," LIFE Magazine, 18 March 1966, reprinted 2012; hereafter referred to as "The Crime of Being Married."
[2] Jean M. White, "Virginia's Racial Marriage Curbs Called 'Slavery Laws' Before Court," *The Washington Post*, 11 April 1967; hereafter referred to as "Virginia's Racial Marriage," 1967.
[3] "The Crime of Being Married," 1966.
[4] Anthony Lewis, "Court Considers Race Marriages," *The New York Times*, 15 October 1964; hereafter referred to as "Court Considers Race Marriages," 1964.
[5] "The Crime of Being Married," 1966.

tolerated. Unbeknownst to the Lovings, someone in their community anonymously reported their recent nuptials to the authorities of Caroline County.

In the middle of the night, the county sheriff and two deputies charged into the Loving's home and entered their bedroom, demanding to know why the couple was sharing a bed. When Richard pointed to the marriage certificate hanging proudly on the wall and Mildred said, "I'm his wife," Sheriff R. Garnett Brooks, simply stated that their marriage certificate was "no good here," in Virginia. The Lovings were promptly arrested.[6] Under the Virginia Racial Integrity Act of 1924, it was illegal for any White and non-White to marry, thereby invalidating the Loving's marriage, even though it had been legally performed in Washington, D.C. [7] The Lovings faced persecution for both circumventing state law by traveling to D.C. to marry then returning to Caroline County to reside, and violating state law by living as man and wife.[8]

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[6] Robert A Pratt, *Mixed Race America and the Law: A Reader* (ed. Kevin Johnson), (New York: New York University Press, 2003), p. 56-59.

[7] The Virginia Act to Preserve Racial Integrity stated that, "4. No marriage license shall be granted until the clerk or deputy clerk has reasonable assurance that the statements as to color of both man and woman are correct.
If there is reasonable cause to disbelieve that applicants are of pure white race, when that fact is stated, the clerk or deputy clerk shall withhold the granting of the license until satisfactory proof is produced that both applicants are "white persons" as provided for in this act.
The clerk or deputy clerk shall use the same care to assure himself that both applicants are colored, when that fact is claimed.
5. It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this act, the term "white person" shall apply only to the person who has no trace whatsoever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this act." Information from: "An Act to Preserve Racial Integrity," *Racial Integrity Act of 1924*, http://www2.vcdh.virginia.edu/encounter/projects/monacans/Contemporary_Monacans/racial.html.

[8] "Supreme Court Rules in Favor of Interracial Marriage," *News in History*, 12 June 2012; hereafter referred to as "Supreme Court Rules," 2012.

Although Richard was able to post his own bail, the Sheriff and the Caroline County court would not allow him to post bail for his pregnant wife, and Mildred was forced to spend several nights in jail before she could be released on bail.[9] At their sentencing, a "local judge handed down a years' sentence but suspended it if they agreed to leave the state immediately and stay away for 25 years," and not return together to the state of Virginia.[10] In, perhaps, the most notorious statement from the local trial, the judge who originally sentenced the Lovings, Leon M. Bazile, wrote in his 1958 decision, "'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.'"[11] With this statement, the Lovings were forced to leave their extended family and hometown, effectively banished from the state of Virginia.

The Lovings and their three children lived in Washington, D.C. for five years, visiting family in Virginia only occasionally. However, in 1963 the Lovings returned to Virginia together to visit Mildred's family, and were promptly rearrested. Unlike their last sentence, which they had tacitly accepted, upon this arrest Mildred wrote to then-Attorney General Robert Kennedy requesting assistance for their appeal; Kennedy directed Mildred to contact the ACLU, who agreed to work with the Lovings to contest their sentence. From the ACLU, Philip Hirschkop and Bernard Cohen agreed to represent Richard and Mildred. Hirschkop and Cohen, like previous miscegenation attorneys, decided to base their appeal on the due process and equal protection clauses of the 14th

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[9] Douglas Martin, "Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68," *The New York Times,* 6 May 2008.
[10] "The Crime of Being Married," 1966.
[11] "The Crime of Being Married," 1966.

Amendment; they began constructing a case arguing that the Loving's protected civil rights had been violated by the state of Virginia.[12] After their second arrest, Richard and Mildred could only continue living in Virginia under a temporary federal court order, which protected them from being arrested yet again while their case was argued in the Virginia state Supreme Court.[13] Thus, the legality of the Loving's marriage was put on trial; however, their appeal was quickly rejected at the state level and advanced to the federal Supreme Court. By 1966, the *Loving v. Virginia* trial and its impending decision were national news with *The New York Times*, *The Washington Post*, and *LIFE Magazine* covering the trial, and the entire nation was expecting a long awaited federal ruling on the legality of interracial marriage.

In the historic Supreme Court decision in favor of upholding the Loving's marriage, Chief Justice Earl Warren stated, "'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.'"[14] Going further, and stretching this decision to apply to all states, Warren stated in the majority opinion that:

> Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. […] To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the 14th Amendment, is surely to deprive all the state's citizens of liberty without due process of law […] 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.[15]

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[12] "The Crime of Being Married," 1966.
[13] John P. Mackenzie, "Miscegenation Ruling Asked of High Court," *Los Angeles Times*, 30 July 1966; John P. Mackenzie, "High Court Asks Virginia to Answer Miscegenation Law Attack," *The Washington Post,* 21 October 1966, hereafter referred to as "High Court," 1966.
[14] "Supreme Court Rules," 2012.
[15] "Top Court Voids Intermarriage Bans," *Evening Times* (Trenton, NJ), 12 June 1967.

Interestingly, the Lovings later noted that they hadn't experienced "any hostility in the community during their protracted court battle," which had lasted almost a decade. The lack of active social sanctions against their legal struggle indicated that the staunch opposition to intermarriage which, in the past, would have resulted in threats, beatings, or even lynching was now being, more or less, accepted by society.[16] The U.S. Supreme Court decision – best summarized by Warren's statements recognizing the right to marry whomever one chooses, regardless of race, and acknowledging the racism inherent in miscegenation legislation – was also indicative of the growing social acceptance of interracial marriage. From their arrest in 1958 to the decision of their infamous trial in 1968, the Lovings encountered little to no social hostility, and in 1968 the Loving's desire and right to be married became legally recognized. In this sense, the *Loving v. Virginia* case perfectly represents the collision of social change and legal alterations necessary to finally overturn bans against interracial marriage.

In the post-*Pace* and pre-*Loving* era, segregation of the races was largely upheld due to a fear that interaction between the races, especially at a young age, would promote interracial dating, sex, and marriage. This fear was exponentially increased with the 1954 U.S. Supreme Court decision in *Brown v. Board*, which desegregated American schools, thereby increasing interaction between the races.[17] Desegregation of schools introduced young White men and women to young Black men and women, and there was a very strong threat perceived by White society that this increased interaction would result in

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[16] "Mixed Marriage Decision Lifts 'Great Burden,'" *Springfield Union* (Springfield, MA), 13 June 1967; See Appendix C.

[17] Arthur Krock, "Miscegenation Debate: Pressure Rises for Supreme Court Review of Mixed Marriage Bans," *The New York Times*, 8 September 1963; hereafter referred to as "Miscegenation Debate," 1963.

interracial friendships and increased interracial dating, particularly between White girls and Black boys.[18] Despite this fear, schools were federally desegregated in 1954, indicating a liberalizing change in socio-racial attitudes.[19] Thus, voting rights, civil rights, and education had all been brought to a level of equality, at least legally, overcoming long-established racial barriers.[20]

However, legal and social reforms had not yet extended into the realm of interracial dating and marriage. Intermarriage was not often viewed as the most important right sought by Blacks, but it was a right that represented true social equality and the overcoming of long-standing social barriers that were based solely on race and the maintenance of White social power. The Dred Scott case of 1857[21] acknowledged that, "this country's attitude towards Negroes [is] indicated by the antimiscegenation statutes, which put 'a stigma of the deepest degradation upon the whole [African American] race.'"[22] This indicated that intermarriage was actually as important right for African Americans, since legalizing Black-White marriage would indicate that this "degradation" had been lifted. For White society, sex and marriage between the races still posed the greatest threat to the established social hierarchy, which placed White men in the

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[18] Romano, *Race Mixing,* 169, 172, 174.
[19] See Appendix C.
[20] "Recess Reading: An Occasional Feature from the Judiciary Committee, The Civil Rights Act of 1964," *The United States Senate Committee on the Judiciary*, accessed 17 February 2013, http://www.judiciary.senate.gov/about/history/CivilRightsAct.cfm; hereafter referred to as "Civil Rights Act of 1964." See Appendix A.
[21] The Dred Scott decision was made in March 1857, and "declared that all blacks -- slaves as well as free -- were not and could never become citizens of the United States. The court also declared the 1820 Missouri Compromise unconstitutional, thus permitting slavery in all of the country's territories." Information from: "Historical Document: Dred Scott case: the Supreme Court decision, 1857," *PBS*, accessed 17 February 2013, http://www.pbs.org/wgbh/aia/part4/4h2933.html.
[22] Anthony Lewis, "Race, Sex And the Supreme Court," *The New York Times*, 22 November 1964; hereafter referred to as "Race, Sex And the Supreme Court," 1964.

privileged social position, because of the resultant mixed race offspring and the social equality implied by interracial couples. As reported in the *New York Times* in 1964, "[the fear of interracial] sex is a fundamental factor in Southern racial attitudes," and this persistent fear still posed the greatest hurdle in overcoming racial inequalities. [23]

There was a certain stigma associated with interracial marriage that cannot be understood without first examining the social structure which supported the continued dominance of White men in American society. Two issues central to this comprehension are the value of White purity and the subordination of women to men. These two concepts are best projected onto the issue of interracial marriage in the statement: "The White Southerner who thinks nothing of illicit intercourse with a Negro girl would rebel at the idea of marrying her. Sex is sex and caste is caste. … he [the White Southern man] is free to approach Negro women but a racial wall is built around white women."[24] Published in the *New York Times* in 1964, this statement summarizes centuries-old established thought on how American society should be structured and maintained. The racial hierarchy of White over Black and the sexual hierarchy of men over women are both encompassed in this statement. The finer point is that White men feared the sexual power of Black men more than anything else.[25] The sexual access of Black men to White women could corrupt the purity of White women and the White race as a whole, and also had the ability to produce biracial children. Mixed race children had the power to diminish the social hierarchy constructed by White men, since the racial dividing lines would become blurred by their very existence. In fact, it became widely recognized in the

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[23] "Race, Sex And the Supreme Court," 1964.
[24] "Race, Sex And the Supreme Court," 1964.
[25] Pascoe, *What Comes Naturally*, 190-191, 180, 175, 66.

1960s that "the truth is that only social disapproval really inhibits marriage between whites and Negroes now," since race was, by this time, viewed as a socially constructed concept by part, although by no means all, of American society.[26]

The South continued to oppose interracial marriage due to the "underlying fear of compulsory Federal equal rights laws," which were viewed as imminent in the wake of legalizing interracial marriage.[27] For many White Southerners, interracial fornication and marriage were the precursors to social equality, and, often, the terms were even used interchangeably.[28] There was an underlying belief of Southern Whites that if the races were allowed to mix, fornicate, and marry, then there were no longer clear socio-racial distinctions between Blacks and Whites, therefore depriving Whites of their traditional social standing above Southern Blacks.[29] However, confusion over the regulations surrounding interracial marriage in each state, whether banned or permitted, increased the demands for a uniform national policy on marriages between Blacks and Whites, one way or the other. Similarly, while racial distinctions existed in the North, especially de facto racial prejudice, the idea of socio-racial equality was not as deeply ingrained and there was even participation of White and Black Northerners in Civil Right Movement activities aimed at overturning racist legislation in the South.[30] The South could no longer keep itself segregated from the rest of the nation, as indicated by the *Brown v. Board*

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[26] "Race, Sex And the Supreme Court," 1964.
[27] "Miscegenation Debate," 1963.
[28] Renee C. Romano, *Race Mixing: Black-White Marriage in Postwar America* (Cambridge, Massachusetts: Harvard University Press, 2003), 17.
[29] Pascoe, *What Comes Naturally*, 5, 8, 179.
[30] Julian Bond, Episode 6: "Bridge to Freedom," *Eyes on the Prize*, documentary (1987; U.S.A.: Blackside, 1988.), http://www.youtube.com/watch?v=JERxreFsfP8.

decision, and the national call for a federal ruling on interracial marriage was finally loud enough to drown out the objections of the South.

According to the *New York Times*, in 1963, 19 states still banned interracial marriage.[31] As suggested in 1948 by *Perez v. Sharp*, the Roman Catholic Church did not formally oppose interracial marriage. In principle, most organized religions defend the sanctity of marriage; the Roman Catholic Church includes marriage in the sacraments, sanctifying the union and encouraging all church members to marry. By 1963, the National Catholic Council for Interracial Justice stated that, "Interracial marriage is completely compatible with the doctrine and canon law of Roman Catholicism."[32] According to the statement, "'Races do not marry […] Nations do not marry. Classes do not marry. Only persons marry.' […] the right to decide to marry and whom to marry resides with the individual […] and neither the family nor the state may abridge this right."[33] Thus, these 19 states based their persistent denunciation and rejection of interracial marriage on something other than religion, since no religion, not even the dominant Catholic and Christian religions in the United States, opposed intermarriage in doctrine. This removed two of the traditional arguments against interracial marriage: that God was against it, and that it was unnatural and immoral. If no established religion, outright and as a whole, opposed intermarriage, then there was little evidence left to support these arguments.

The developing national view towards interracial marriage was reflected in the *New York Times* when the paper stated in 1963 that, "it is inevitable that interracial

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[31] George Dugan, "Catholics Uphold Biracial Couples," *The New York Times*, 18 November 1963; hereafter referred to as "Catholics Uphold Biracial Couples," 1963.
[32] "Catholics Uphold Biracial Couples," 1963.
[33] "Catholics Uphold Biracial Couples," 1963.

marriages will become as acceptable as inter-faith marriages are today," implying not only the legalization of intermarriage, but also the general acceptance of mixed race marriages by American society. The *Times* went even further, stating that the opposition to interracial marriage stemmed from "a 'fiction of ethnic superiority … invented by the white Southerner' because he feels threatened economically and physically," but, even beyond that, White Southern men feared the loss of control over the female body and the loss of their location at the top of the social hierarchy.[34] This fear was clearly articulated by Anthony Lewis, a prominent liberal intellectual for the *New York Times*, when he reiterated in an article published in 1964 that:

> 'the whole system of segregation and discrimination' is designed to prevent eventual interbreeding of the races. 'Every single measure is defended as necessary to block 'social equality' which in its turn is held necessary to prevent intermarriage. … Sex becomes in this popular theory the principle around which the whole structure of segregation of the Negroes – down to disenfranchisement and denial of equal opportunities in the labor market – is organized.'[35]

Nonetheless, the fear of socio-racial equality was not universal and the social current in 1960s America was transformative: redefining gender norms and expectations, forming new social groups, and especially working towards a new construction of race relations.

The legalization of Black-White marriages was considered by some American social reformers of the 1960s to be the most significant goal in the movement for racial equality. Since interracial sex and marriage evoked the most emotion in Whites, especially White Southerners, interracial marriage was the longest and most staunchly opposed step towards racial equality in the South.[36] It was suggested by Anthony Lewis

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[34] "Miscegenation Debate," 1963.
[35] "Race, Sex And the Supreme Court," 1964.
[36] "Court Considers Race Marriages," 1964.

in *The New York Times* – and most likely accurate to state – that, "'what white people really want is to keep the Negroes in a lower status. Intermarriage itself is resented because it would be a supreme indication of social equality.'"[37] Due to the intense opposition to intermarriage, there had not been a significant, precedent establishing case of interracial marriage to reach the Supreme Court since *Pace v. Alabama* in 1883. For the most part, the U.S. Supreme Court simply refused to hear cases involving the question of interracial marriage. Simply put, the government wanted to ignore the issue. It was not until 1964 that a case involving an interracial couple in Florida managed to reach the Supreme Court, and, furthermore, indicated that attitudes towards interracial marriage were changing. According to the *New York Times*, "McLaughlin v. Florida, as the case is called, could indicate the answer to the basic question of a state's constitutional power to make racial difference a factor in regulating sexual conduct."[38] *McLaughlin v. Florida* quickly became the beacon of hope for a federal decision on the national question of interracial marriage.

The story of this case centered on Connie Hoffman, a White woman, and Dewey McLaughlin, a Black man, who were arrested in 1962 for violating a Florida statute prohibiting interracial habitual cohabitation. Although Hoffman and McLaughlin were not formally married, they wanted to reside together without the infringement by the state on their living arrangement or sexual exploits.[39] Florida law prohibited their cohabitation, formal marriage, and even impeded their ability to plead common law marriage, since that legal loophole was denied to interracial couples as well. Even though the court ruled

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[37] "Race, Sex And the Supreme Court," 1964.
[38] "Race, Sex And the Supreme Court," 1964.
[39] Pascoe, *What Comes Naturally*, 159-163.

in favor of Hoffman and McLaughlin, stating that the Florida law was unequal and based solely on racial prejudice, the court refused to comment on the implicit implications for interracial marriage. Hence, the state of Florida had to allow McLaughlin and Hoffman to cohabitate, but the Supreme Court did not issue a statement on the legal status of interracial marriage, since only cohabitation, not marriage, had been an issue in the case.[40] Nevertheless, *McLaughlin v. Florida* set an enormous precedent for the decision in *Loving v. Virginia* since, as was shown in the *McLaughlin* decision, the states could no longer "'conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offence.'"[41] Given this precedent, *Loving v. Virginia* was well set to address each social and legal reason that had been given to ban intermarriage in the past, and to provide legal reasoning as to why these arguments no longer proved valid.

The first issue addressed in the *Loving* trial was, "whether the constitutional rights of the individual override the state's right to control marriages under the state's police powers."[42] Hirschkop and Cohen argued that the Constitutional rights guaranteed to all American citizens, particularly equal protection and due process contained within the 14th Amendment, were more influential than the right of the state to regulate marriage. Their defense centered on the argument that this state regulation inherently violated the civil rights of American citizens, namely African Americans, who wanted to marry interracially. In the *Loving* case, Justice Potter Stewart remarked that, "It is simply not

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[40] Lee M. Miller, "Constitutionality Of Miscegenation Statutes - McLaughlin v. Florida, 25 Md. L. Rev. 41 (1965)", *University of Maryland Francis King Carey School of Law,* Maryland Law Review, http://digitalcommons.law.umaryland.edu/mlr/vol25/iss1/5. See Appendix A.
[41] "Miscegenation Ruling Asked of High Court," 1966.
[42] "The Crime of Being Married," 1966.

possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor," and that, "the purpose of the equal protection clause is to guarantee that Negro citizens are treated the same as white citizens."[43] Furthermore, during the trial, the state of Virginia "[contended] that, because its [Virginia's] miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race." However, the U.S. Supreme Court rejected this reasoning because, according to the decision delivered by Chief Justice Warren,

> There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. Over the years, this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classification embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the 14th Amendment, is surely to deprive all the state's citizens of liberty without due process of law. The 14th Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.[44]

Thus, in 1967, the U.S. Supreme Court ruled against the state of Virginia and in favor of an interracial couple, and implied that all anti-miscegenation laws across the country were unconstitutional.[45] By legalizing interracial marriage, the court recognized, as suggested by *The New York Times*, that, "'this whole system of segregation and

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[43] "Bad Marriage Law Revoked, 9-0," *Plain Dealer* (Cleveland, OH), 13 June 1967; hereafter referred to as "Bad Marriage," 1967.
[44] "Excerpts From Supreme Court's Ruling on Virginia's Ban on Miscegenation," *New York Times*, 13 June 1967.
[45] "The Crime of Being Married," 2012.

discrimination' is designed to prevent eventual inbreeding of the races,"[46] rather than being based on any scientific, religious, rational or moral reason. Through *Loving v. Virginia*, the United States Supreme Court officially rejected the antiquated and inherently racist logic that had upheld miscegenation laws in the past.

In 1966, even before the end of the trial, the *Los Angeles Times* published an article on the implications of the results of the Lovings versus the state of Virginia. In the article, the author, John Mackenzie, noted that the legislation being filed by the ACLU on behalf of Richard and Mildred Loving was broad enough to not only overturn miscegenation law in Virginia, but in the other 15 states with such legislation in place as well.[47] Immediately after the *Loving* decision, the 15 other states with active miscegenation laws – Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia – all faced the repercussions of a federal refutation of miscegenation, namely that they could no longer legally prohibit interracial couples from marrying.[48] In 1967, one day after the *Loving* decision was handed down, then-State Attorney General Daniel McLeod recognized that this decision appeared "to knock South Carolina's laws right off the books," and that the miscegenation legislation in place in South Carolina would, in the absence of a test case, most likely remain in place, but would be unenforced. McLeod stated that the *Loving* decision would actually "help South Carolina in a way," because this decision reduced the legal confusion around

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[46] Fred P. Graham, "The Law: Miscegenation Nears Test in High Court," *The New York Times,* 13 March 1966; hereafter referred to as "The Law," 1966.
[47] "Miscegenation Ruling Asked of High Court," 1966; "High Court," 1966.
[48] "Top Court Voids Intermarriage Bans," *Evening Times* (Trenton, NJ), 12 June 1967.

intermarriage between Whites and Blacks, and, more generally, Whites and non-Whites.[49]

In the aftermath of the trial, statements, decisions, reactions, and implications of *Loving v. Virginia* were all the hype in national newspapers. The *Plain Dealer* of Cleveland, Ohio noted, one day after the conclusion of the trial, that "so explicit is the Constitution on the matter [of interracial marriage], it is surprising that the ban enforced by 16 states could have lasted as long as it did," especially in light of the fact that the "14th Amendment requires that the freedom of choice to marry must not be restricted by racial discriminations."[50] This article not only supported the Supreme Court's decision, but also noted the irrationality that such laws had remained in place for as long as they had, and, furthermore, recognized that it was racial discrimination, not legal reasoning, that had created and maintained miscegenation legislation. In 1967, shortly after the *Loving* decision, the *Evening Times* of Trenton, New Jersey, noted that miscegenation laws were simply "relics of government-sponsored discrimination," which were "harsh barrier[s] to the 'pursuit of happiness' promised in the Declaration of Independence."[51] Although such an argument – that miscegenation violated the right to pursue happiness as guaranteed in the Declaration of Independence – was never used in court to overturn miscegenation law, the *Evening Times* makes a valid point which, when accompanied by the argument for freedom of choice in marriage, is a persuasive reason to keep the government out of the personal choice and rights of individual citizens in regard to

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[49] "Race Laws 'Knocked Off Books' – McLeod," *Augusta Chronicle* (Augusta, GA), 13 June 1967.
[50] "Bad Marriage," 1967.
[51] "Relic of Discrimination," *Evening Times* (Trenton, NJ), 14 June 1967.

marriage.[52] Meanwhile, *The Washington Post* remarked that the miscegenation law of Virginia had been "denounced as 'white supremacy,'" by the Supreme Court and that the Lovings' attorneys had labeled miscegenation legislation as: "'slavery laws, pure and simple.'"[53] So quickly had the public and legal tide turned in favor of interracial marriage and the right to marry whomever one loves, despite their race, that it becomes hard to recall that only moments before this decision nearly a third of the nation had outlawed such marriages. In the wake of *Loving v. Virginia*, it was possible to say that, "the legal foundations of racial discrimination in this country have been washed away in the Supreme Court," and to believe it.[54] *Loving v. Virginia* was the culmination of the Civil Rights Movement, the social liberalization undergone by Americans in the post WWII era, and the reflection of new social values through the law.

The *New York Times* suggested that the *Loving* decision was simply Chief Justice Warren completing "the process that he set in motion with his opinion in 1954 that declared segregation in public schools to be unconstitutional."[55] The implication of this statement is that the *Brown v. Board of Education* Supreme Court case initiated the federal push for racial equality in the Civil Rights era, and that Warren was instrumental in this egalitarian movement. The *New York Times* had immediately recognized the consequences of the wording used by Warren in *Loving* decision. Publishing an article the following day entitled "Justices Upset All Bans On Interracial Marriage: 9-to-0 Decision Rules Out Virginia Law – 15 Other States Are Affected," the *Times* noted that

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[52] "Declaration of Independence," *Independence Hall Association*, 2012, accessed 10 December 2012, http://www.ushistory.org/declaration/document/.
[53] "Virginia's Racial Marriage," 1967.
[54] "Race, Sex And the Supreme Court," 1964.
[55] "Justices Upset All Bans On Interracial Marriage: 9-0n Decision Rules Out Virginia Law," *The New York Times*, 13 June 1967, hereafter referred to as "Justices Upset," 1967.

the decision of the Supreme Court on June 12, 1967 effectively outlawed all bans on interracial marriages on a national scale, since "the wording [of the decision] was sufficiently broad and disapproving to leave no doubt that the antimiscegenation laws of 15 other states are also now void."[56] As a result of *Loving v. Virginia*, interracial couples were able to legally marry in states that had banned such unions for hundreds of years. In many cases, the first few couples to marry in each of these predominantly Southern states were deemed newsworthy. Such stories began as early as the same month of the *Loving* decision and continued as late as the following decade, depending on the state.[57] Thus, it appeared that Chief Justice Warren had accomplished his never stated but often assumed goal of bringing racial equality into U.S. law and putting it into action socially.

Following the federal invalidation of anti-miscegenation legislation, some states began to work towards eradicating centuries-old laws based in racism. The most challenging hurdle to overcome was revising state constitutions for those states that had written miscegenation statutes into their state constitutions. Repealing a law was one thing, but having to pass a new amendment overturning a law that had been in place for decades, if not centuries, was an entirely different and much more challenging process. In Maryland, the effort to repeal a 300-year old law against intermarriage was challenged by a grassroots campaign. This campaign consisted of postcards being sent to the Maryland Senate with messages and signatures that "were purportedly those of pastors of Negro churches in each senator's district," who vocally opposed overturning the law. Messages contained traditional opposition reasoning, such as the message stating that interracial

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[56] "Justices Upset," 1967.
[57] "Virginia, Ban Struck Down, Has an Interracial Wedding," *The New York Times*, 13 August 1967; "Tennessee Issues License For Interracial Marriage," *The New York Times,* 12 January 1968; "Mississippi Allows a Mixed Marriage," *The New York Times*, 3 August 1970.

marriage "'is against God's Will … it is EVIL.'" However, "Negro legislators said they had heard of none of the churches," and Senator Royal Hart stated that these postcards were "'obviously phony as hell,'" while Senator Verda Welcom said, "'this was the work of a white man – we know who he is.'"[58] Whether White or Black, amendment or not, the *Loving* decision had effectively invalidated Maryland's miscegenation law, and all others, it was simply a matter of principle when it came to removing it from the state's constitution. It was upholding this principle – that miscegenation was antiquated, racist, and illegal – in action and belief, that allowed for American society to come to accept interracial marriage as marriage, plain and simple.

Remembered on the 45th anniversary of the *Loving* decision, LIFE Magazine recognized the 1967 Supreme Court decision to be the moment that "codified the right of men and women to simply love whom they choose."[59] Due to the *Loving* decision, "the legal standard is freedom to associate," regardless of race, and that standard has remained intact since 1967.[60] "[At] one time or another 38 states had [antimiscegenation statutes]. All prohibited marriages between whites and Negroes,"[61] by 1966 that number had dwindled to 16, and in 1967 the number was officially reduced to zero under federal law. The social climate and legal circumstances had, at long last, collided and profoundly reshaped American society in regard to race relations. Moreover, the law had finally caught up to a liberalizing concept of American race relations, and the faction of society

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[58] Richard Homan. "Marriage Law Repeal Passed By Md. Senate," *The Washington Post*, 10 February 1967.
[59] "The Crime of Being Married," 2012.
[60] "Race, Sex And the Supreme Court," 1964.
[61] "The Law," 1966.

outside of the norm was ultimately forced to comply with the majority or face legal repercussions.

> *"The Supreme Court ruled unanimously today that states cannot outlaw marriages between whites and nonwhites."*[62]

[62] "Justices Upset," 1967.

CONCLUSION

LOVE AND RACE IN A "POST-RACIAL" AMERICA

January 11, 1968, Memphis, Tennessee:

> "A licenses for an interracial marriage was issued today to James Edward Todd, a white sailor, and Floria Marquita Mayhorn, a Negro. […] Tennessee has issued only one other license for an interracial marriage since Reconstruction. That was last July, when Herman A. McDaniel, a Negro, and Joyce Prescott, a white woman, were married in Nashville. Their marriage was nullified two months later when McDaniel was jailed […]."[1]

In 103 years, Tennessee had only issued two marriage licenses to interracial couples, indicating the pervasive resistance to state recognition of intermarriage.

August 3, 1970, Jackson, Mississippi:

> "A 24-year-old white civil rights law clerk and a young black woman from a poor rural south Mississippi county were married here today, toppling a legal barrier against interracial marriage that had been on the books for more than 100 years. It was believed to be the first such wedding in Mississippi."[2]

In this instance, the couple had to come "Armed with a marriage license issued two days ago under a Federal Court order," in order to be granted their marriage in Mississippi because "the Southern National party, a segregationist group, [had] secured an injunction from a state judge in northern Mississippi barring issuance of the license to the couple, along with another interracial couple." When the groom was interviewed, he stated that his marriage "was 'not anything really different than what's been happening for years in Mississippi. The only thing that is new is this is the first time the state of Mississippi has ever sanctioned it."[3] Even more telling of the Southern resistance to intermarriage, this

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[1] "Tennessee Issues License For Interracial Marriage." *The New York Times.* 12 January 1968.
[2] "Mississippi Allows a Mixed Marriage." *The New York Times*. 3 August 1970; hereafter referred to as "Mississippi Allows," 1970.
[3] "Mississippi Allows," 1970.

union, the first of its kind in Mississippi, didn't occur for an additional two years after the *Loving* decision.

December 10, 1970, Alabama:

> "The Justice department Thursday sued the State of Alabama and an Alabama judge who refused to issue a marriage license to a white Army Sergeant and a Negro woman. […] The action is the first time the government has ever attacked anti-miscegenation laws."[4]

By 1970, in the wake of federal legalization of interracial marriage, states could no longer get away with denying the right to marry to Black-White couples. Since the *Loving* decision, the federal government now had the legal recourse to sue the state or other individuals who attempted to deny interracial couples their right to marry.

October, 2009, Tangipahoa Parish, Louisiana:

> "Bardwell [Justice of the Peace] said he asks everyone who calls about marriage if they are a mixed race couple. If they are, he does not marry them […]. 'I've been a justice of the peace for 34 years and I don't think I've mistreated anybody,' Bardwell said. 'I've made some mistakes, but you have to. I didn't tell this couple they couldn't get married. I just told them I wouldn't do it.'"[5]

What these examples demonstrate are both the changes made to the institution of marriage and the opposition to these changes. Society progressed enough to reform the institution of marriage, thereby legally permitting interracial marriages. With the *Loving* decision in 1967, questions surrounding the legal status of intermarriage should have been settled. However, these quotes clearly show that interracial marriage was still

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[4] "Racial Wedding Ban Hit." *Atlanta Daily World*. 10 December 1970.
[5] "Interracial Couple Denied Marriage License By Louisiana Justice of the Peace." *The Huffington Post*. 18 March, 2010, updated 25 May 2011; "Louisiana Justice Who Refused Interracial Couple Resigns – CNN.com." *CNN.com*. 3 November 2009*;* Ellzey, Don. "JP refuses to Marry Couple." *hammondstar.com*. 15 October 2009. Accessed 25 September 2012.

resisted by many Southern Whites, and that intermarriages were not, instantaneously, becoming more frequent.[6] Immediately following the legalization of interracial marriage, the first few couples who were granted marriage licenses, especially in Southern states, were deemed news-worthy and announcements of their marriage were published in national newspapers, like the *New York Times* and *Atlanta Daily World*. The media frenzy surrounding interracial marriages that were performed in the immediate post-*Loving* years indicate that these unions remained rare, as shown by the fact that in January of 1968, Tennessee had granted only two interracial marriage licenses, and in 1970 Mississippi had still granted only one.

A legal understanding of the legalization process for interracial marriage can only be understood through a comprehension of four key underlying issues: the law as written compared to legal interpretation, codified law versus social custom, state law versus federal law, and the importance of precedent. The social climate that allowed for a restructuring of the national legal code in regard to interracial marriage was distinct to the historical time periods in which each of the three cases discussed took place. Both the legal precedent and the social climate culminated into one final case, *Loving v. Virginia*, that came at the right time both socially and politically.

The law as written is much different than interpretations of the law. In many cases, past and present, arguments have been made for and against court cases based on a decision to either read the law as written or to apply an interpretation to the legal code. The debate between law as written and legal interpretation rests largely on the ideological debate over the intentions of the Founding Fathers when they wrote the legal codes,

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[6] See Appendix C.

particularly the Constitution and Bill of Rights. There are instances when people believe that the law should be upheld, as written, as well as instances when they will argue that the law is open to interpretation. Most likely, the law is interpretive; people can chose to read into the law things that may or may not actually be there. In the case of interracial marriage, legal interpretations were employed throughout the debate. The first interpretation, in *Pace*, argued that the founding fathers never envisioned interracial marriage as a realistic form of marriage, and it was, therefore, not protected in the same ways as intraracial marriages. Later, however, the law was interpreted as written, both in *Perez* and *Loving*, necessitating the legalization of interracial marriage, and the recognition of marriage as a protected civil right of American citizens, regardless of race.

Then there is the difference between codified law and social law. Even if something is codified – organized into a recognized system of rules – that does not mean that what is explicitly stated in the law is what is actually going to be recognized by and practiced in society. The best example of this discrepancy is de facto segregation and discrimination, such as White realtors only selling Black families homes in specific, predominantly Black, areas. This practice was socially recognized and tacitly accepted due to social conceptions of race, regardless of the technical legality of the actions of these realtors.[7] In the case of interracial marriage, this difference is best exemplified by Rosamond Rice, who attempted to continue the socially accepted custom of denying interracial couples the right to marry despite the *Perez* decision, which had illegalized such actions in the state of California.

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[7] Marc Seitles, "The Perpetuation of Residential Racial Segregation in America: historical discrimination, modern forms of exclusion, and inclusionary remedies," *Journal of Land Use and Environmental Law* (1996), accessed 22 February 2013, www.law.fsu.edu/journals/landuse/vol141/seit.htm.

Similarly, there is an important difference between state and federal law. States have, historically, had the power to create and enforce their own laws, but are simultaneously subject to federal mandates. This has created tension between those who support states' right to regulate their own laws, and others who support having a singular, unified federal legal code that would apply to all 50 states. This was a crucial issue in the interracial marriage debate because of the socio-racial divide between the North and South. Northern states often allowed interracial marriages to be performed, or at least recognized interracial marriages if they had been performed legally in another state. In the South, however, these marriages were banned and went unrecognized. For Black-White couples, obtaining a valid marriage license was an issue, but the granting of recognition to their union was a separate and very important issue that confused and complicated the lives of numerous interracial couples. By crossing a state line, a couple could go from being married to being un-wed and in violation of the law. This could also affect the benefits coupes received; if they went from a state that recognized intermarriage to one that did not, they often lost all of the legal benefits that accompany a formal marriage. Eventually, this confusion, and to some extent resentment generated due to this confusion, built up and resulted in a social call for a singular, unified, recognized, federal ruling on the legality of interracial marriage, hence *Loving v. Virginia*.

The final detail that must be understood in order to recognize why interracial marriage was ultimately legalized is the role of legal precedent. Precedent can have a powerful impact on the outcome of a court case. It reestablishes a legal reason for a particular decision, and lends validity to that decision. For example, from 1883 until 1948, *Pace v. Alabama* was used as the legal precedent to uphold bans on intermarriage.

However, after the 1948, *Perez v. Sharp* became the precedent, upholding an idea of a constitutional right to marriage guaranteed to all citizens. This precedent was referenced in *McLaughlin v. Florida* in 1964, leading to a decision in favor of the plaintiffs that the law against interracial cohabitation was unconstitutional. After 1964, this duo precedent of *Perez* and *McLaughlin* was used, in combination with the literal interpretation of the Constitution, to support the *Loving v. Virginia* decision, which legalized interracial marriage nationally.

Socially, the most important factor in the legalization process for interracial marriage - besides understanding the influence of White privilege and patriarchy on the American social structure – is historical timeframe. Each case must be viewed individually as a product of the time in which it was tried, and also cumulatively as the slow progression of law and society towards the acceptance of interracial marriage. Each of the three interracial marriage cases discussed in detail, *Pace v. Alabama*, *Perez v. Sharp*, and *Loving v. Virginia*, were representative of the American social attitude towards intermarriage at a particular moment, and under very specific circumstances. However, each case also built off of the previous case and indicated the growing acceptance of Black-White marriage by American society.

Pace v. Alabama, decided in 1883, was a product of the Reconstruction era. In the post-Civil War South, there was a deep-rooted unease for the new freedom of African Americans, and a strong aversion to the interaction of the races in any form, let alone through a sexual relationship or state-sanctioned union.[8] This social stigma and the persistence of racist ideology towards African Americans, despite the 14th Amendment

[8] Pascoe, *What Comes Naturally*, 46; Abbott, *A History of Marriage,* 67.

granting equal citizenship to Blacks, explains why the court found in favor of the state, upholding Alabama's miscegenation law. Although the constitutionality of the ban was questionable, the social climate of the late 19th century was not conducive to a redefining of the institution of marriage. In this way, *Pace* reflected social attitudes through law, and interpreted the law to maintain the social norms of that particular time.

In 1948, when *Perez v. Sharp* was decided, the United States was embarking on a tumultuous social transformation. World War II had resulted in a profound reassessment of American race-relations. The Holocaust had demonstrated the horrendous and immense power of active social stigma against a group based on predetermined characteristics, which effectively shocked America out of much of the racist haze that had encompassed society before the war.[9] Similarly, WWII had necessitated the participation of African American soldiers in combat, which produced two important changes. The first change came from abroad; Black soldiers were able to more freely interact with European White women, fostering ideas of the social acceptance of interracial relationships.[10] Secondly, the risk of life and the trauma of combat was the same for all soldiers, regardless of race, which increased demands for social equality on the home front. African American soldiers felt that if they risked their lives, alongside their White counterparts, for their country that nonetheless suppressed their rights and treated them as second-class citizens, they were entitled to the same rights and to be treated with the same respect as White Americans.[11] The repercussions of WWII lead to the liberalization

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[9] Pascoe, *What Comes Naturally*, 203.
[10] Pascoe, *What Comes Naturally,* 197-199.
[11] Pascoe, *What Comes Naturally*, 199-201; Cott, *Public Vows*, 180.

of American society, which progressed into the rise of the Civil Rights Movement in the 1950s and the ensuing call for racial equality.

Finally, *Loving v. Virginia* was presented to the court in the midst of the Civil Rights Movement and at the height of 20th century American social liberalism. The Civil Rights Movement called for racial equality by law and in social practice; spurred forward by the progressively liberal ideology pervading America in the 1960s, the movement resulted in the federal desegregation of schools in 1954, Civil Rights Act of 1964, and the federal outlawing of bans on interracial marriage in 1967.[12] If it had not been for the precedent set by such cases as *Perez v. Sharp* and *McLaughlin v. Florida*, and the specific social climate of the Civil Rights era, the United States Supreme Court may have ruled against the Lovings, rather than in their favor, and interracial marriage may never have been legalized. The decision in this case was the culmination of all previous miscegenation cases, built-up frustration surrounding intermarriage bans, and the perfect storm of social forces resulting from the post-World War II socio-political inclination towards peace, progress, and equality. Society had been progressively changing, and the law had finally caught up to the new liberal current, in regard to American race relations, with the Supreme Court decision in *Loving v. Virginia*.

Besides explaining why miscegenation laws were created and maintained, and in addition to discussing what I consider to be the three most important court cases in the legalization of interracial marriage, this thesis also aimed to discuss the evolutionary nature of marriage. Historically, marriage unions have, over time, became increasingly subjected to social control and, eventually, required formal state-sanction. This control

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[12] "Brown v. Board," 1954; "Civil Rights Act of 1964"; See Appendix A.

tended to dictate that the man and woman to be married were of suitable compatibility: socioeconomically equivalent, comparable education, and from similar familial backgrounds, including being of the same race. Over time, marriage has been redefined numerous times, allowing for more socioeconomic diversity within couples and more independence from familial and social sanction in selection of a marriage partner.[13] From a private decision to a socially controlled custom; from a bond formed on promises between two people to a state-regulated institution; from forever to the legalization and rapid increase in divorce; and from similar backgrounds to marrying whomever one loves; marriage is not, nor has it ever been, a singular entity.

The intense opposition to interracial marriage primarily stemmed from White supremacy and the patriarchy of society. White men believed themselves above all others; they were legally, fiscally, and often physically in charge of White and Black women, and Black men. Put simply, White men were at the top of the American social hierarchy by a wide margin, and intended to remain unencumbered by the demands of women or Blacks for equal social and legal rights. This determination to maintain social superiority resulted in one social custom remaining in place and legally enforced: the ban on Black-White marriage. When reduced to the basics, White men feared that, if intermarriage were legalized, they would: lose their unfettered sexual access to Black women, encounter competition for the sexual attention of White women, and experience a reduced social standing of the White race due to racial amalgamation. They also greatly feared that they would become the social equivalent, or even subordinate, of Black men. However, by the 1960s, social action such as the Civil Rights Movement indicated a

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[13] Abbott, *A History of Marriage*, 25; Coontz, *Marriage, A History*, 25, 111-112.

general change in social perceptions, and helped to bring about the legalization of interracial marriage, but only in combination with strong legal precedent, a restructuring of the definition of marriage, and a socio-legal build-up through each successive case about interracial marriage. The legalization of intermarriage was a substantial redefining of marriage as an American institution; it symbolized the newfound social and legal equality of Blacks to Whites, something that had been denied and opposed for centuries.

By now, four points should be clear. First, marriage is an ever-evolving institution. Secondly, that the legalization of interracial marriage was brought about by the progressive liberalization of social attitudes towards race. Thirdly, that this social liberalization was expressed through each successive court decision made in regard to interracial marriage, and that intermarriage would never have been legalized if not for the precedent set by, and a specific interpretation of, the law. A final point worth noting is that interracial marriage was banned primarily to maintain the social prestige and power of White men over African Americans, both men and women, and White women.

Regardless of the attempts of the U.S. legal system to create a uniform definition, marriage is a transformative institution subject to change according to the social climate. Miscegenation laws were a combination of the social factors of race, gender, and sexuality, taken together and then subjected to the socio-legal sanctions of a particular historical period. It was the combination of these three factors into the sexualization of race, the enforcement of White male superiority in society, and the idea of racial purity to maintain the existing social hierarchy that, I argue, both created the need for and maintained the use of miscegenation laws throughout the United States from the 18th century until 1967. Each of the three cases I presented in this thesis mark discrete points

of change in the socio-political climate regarding marriage. In these moments, law and society interacted to question the legal standing of interracial marriage, and the result of each case indicated a significant change in the perception and definition of the institution of marriage. The specific legal precedents established throughout the interracial marriage debate and the precise social timing of *Loving v. Virginia* enabled the legalization of interracial marriage, marking a momentous transformation to the traditional conception of this institution as well as indicating a significant social liberalization in regard to American race relations.

"*It [the right to marry] is a right that, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights."*[1]

"Therefore, the precise question is whether we will extend the present boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, we are being asked to recognize a new fundamental right…"[2]

EPILOGUE

THE LOVE THAT BINDS US:

OVERCOMING THE SAME-SEX MARRIAGE DIVIDE BY EXAMINING THE PAST

Although legally separate from the issue of interracial marriage, the social debate over the legalization of same-sex marriage closely mirrors that of the debate over interracial marriage more than half of a century ago.[3] In both cases, the opposition was rooted in religion, conservative social values, and issues of child welfare. Yet, in both cases, the supporting contingent referenced the rights of individuals, the unalterable circumstances of these couples, the freedom of choice in marriage, and equality for all citizens. Claims such as the one I am suggesting, that there are overwhelming similarities between interracial and same-sex marriage in regard to the legal and social issues at

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[1] "*Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44(1993)," University of Massachusetts. Accessed 29 January 2013. *people.umass.edu/leg450/Cases%20and%20statutes/Baehr.pdf;* hereafter referred to as "*Baehr v. Lewin,*" 1993. See Appendix A.

[2] "*Baehr v. Lewin*," 1993.

[3] In a very similar circumstance, the U.S. Supreme Court case of *Lawrence v. Texas* (2003), a homosexual couple was reported to authorities and arrested for violating a Texas anti-sodomy law. In order to make the arrest, the police entered the house without making themselves known to the couple, much like the Caroline County sheriff who arrested the Lovings. Information from: "Lawrence v. Texas (02-102) 539 U.S. 558 (2003)," *Cornell University Law School*, accessed 20 February 2013, http://www.law.cornell.edu/supct/html/02-102.ZS.html. See Appendix C.

stake, have already been applied to the same-sex marriage debate by those in favor of legalization, and are used as precedent for the legalization of same-sex marriage.[4]

One of the primary reasons marriage is still a significant social and legal classification is because marriage provides certain legal benefits that are only granted to spouses. Joint tax filing, tax benefits, health care rights and the power to make health-related decisions, access to and rights over children, citizenship rights (in some cases), and many other valuable – socially and monetarily – rights. These benefits are exclusive to marriage, and sought after by many couples that are committed to each other and a shared life.[5] These rights are only extended to same-sex couples in certain states, and are still limited in their actual usefulness since some states refuse to recognize these rights for same-sex couples entirely.

There are three main arguments used to maintain bans on same-sex marriage. In no particular order, the first is the argument based on religion and the Will of God; secondly, the argument of the socio-legal definition of marriage; and finally the debate over the welfare of children involved in these unions. Many people, especially those affiliated with a conservative political or religious organization, maintain that homosexuality is against the will of God and unnatural. In this ideology, people contend that "If God had intended for same-sex couples to marry, he would have made Adam and

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[4] Coontz, *Marriage, A History*, 256; Abbott, *A History of Marriage*, 279; Pascoe, *What Comes Naturally*, 288, 298-300.
[5] "*Baehr v. Lewin*," 1993; *"Baehr v. Miike*, No. 20371, 199 Haw. Lexis 391 (Haw. Dec. 9, 1999)," *Journal of Gender, Social Policy & the Law*, accessed 29 January 2013, www.wcl.american.edu/journal/genderlaw/08/**baehr**.pdfjavascript:void(0), hereafter referred to as "*Baehr v. Miike*," 1999.

Steve, not Adam and Eve."[6] Arguments such as this are also applied to the socio-legal definition of marriage. Those against same-sex marriage propose that allowing such marriages would erode the value of traditional, heterosexual marriage, and that the term "marriage" itself only implies a union between one man and one woman. Finally, one of the strongest arguments against permitting same-sex marriage is the welfare of children raised in these households. Many same-sex marriage opponents suggest that children raised in a homosexual household are stigmatized, social disadvantaged, or, more radically, that they are predisposed to homosexual tendencies through exposure to such couples.[7] As this thesis has demonstrated, all three of these arguments were also used to create and maintain legal bans on intermarriage from the 18th century until the *Loving v. Virginia* decision in 1967 erased these legal barriers.

Similarly, the patriarchal and heteronormative social structure of the United States preserves prohibitions on same-sex marriage, much as these same social aspects were used to continue the dominance of White men over Black men and women in the case of intermarriage. Although both some men and women oppose same-sex marriage, it is the inherent heteronormativity of American society that forms the basis for this stigmatization of homosexuals.[8] The traditional social construct of family and the difference emphasized in American culture between masculine and feminine create a social atmosphere that has, in the past, been less conducive to the granting of equal rights and recognition to same-sex couples.

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[6] "From Legal Rights to Equal Rights, Arguments for the Preservation of 'Traditional' Marriage: Then and Now," *Vermont Freedom to Marry*, 4 February 2013, accessed 20 October, 2012, http://www.vtfreetomarry.org/; hereafter referred to as "From Legal Rights to Equal Rights," 2013.
[7] "From Legal to Equal Rights," 2013.
[8] Abbott, *A History of Marriage*, 279.

More recently, bans on same-sex marriage are encountering legal and social resistance, mainly from an increasingly vocal LGBTQ community and allies, indicating that society is coming to recognize the fundamental right to marry extends to all citizens, regardless of sexual orientation. Similarly, the law is coming to recognize the same right. In *Baehr v. Miike*, the Hawaii Supreme Court Justice Goldberg stated that, "judges 'determining which rights are fundamental' must look not to 'personal and private notions,' but to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) … as to be ranked as fundamental.'"[9] This quote suggests that the law must look beyond personal views about sexuality in order to acknowledge the rights guaranteed to Americans and ensure that these rights are applied as necessitated by law.

To counter the "traditional" marriage standpoint, there are three main arguments in favor of same-sex marriage that have developed recently and gained power among supporters of same-sex marriage. First are the unalterable circumstances of individuals in these relationships, second is the guaranteed freedom of choice in marriage granted to all citizens, and finally the equality under and equal application of the law for all citizens. The second and third reasons are, in fact, largely based the precedent set by the legalization of interracial marriage. Recently, it is becoming accepted to state that sexual orientation is an unalterable circumstance; that it is not a choice to be gay or straight, but, rather, it is a biological predisposition, much like skin color. If one cannot control their sexual orientation, then it is not just to restrict their definition of love through

[9] "*Baehr v. Lewin*," 1993.

heteronormative constructs and to take from them the ability to formally recognize this bond.

The reasoning of unalterable circumstances thus relates to back to the second argument that every citizen is guaranteed the right to marry whomever they chose. This "right," as it is now recognized to be, stems from the *Loving v. Virginia* case, which established the ability to marry as an inherent right of American citizens, guaranteed through the Constitution. And, the second argument is intrinsically linked with the third: that all laws must be equally applied to citizens and that all citizens are viewed as equal under the law. This argument was used in every case of interracial marriage examined in this thesis, and it is similarly used to advance the right to marry for same-sex couples today. The precedent established by the legalization of interracial marriage and the U.S. Supreme Court decisions made in those cases created a persuasive argument in favor of the legalization of same-sex marriage, one that cannot simply be ignored because the thought of homosexual marriage is unappealing to some social, political, religious, or otherwise structured viewpoints; 46 years ago, it was interracial marriage that was considered to be unappealing.

Finally, the social movement for equality and human rights taking place today is reminiscent of the Civil Rights era social climate, creating a setting that is probably, once again, conducive to socio-legal change. Much like the movements for racial equality, there are organizations giving voice to the Queer community today and calling for social and legal change. Gay and Lesbian Advocates and Defenders (GLAD), the International Gay and Lesbian Human Rights Commission (IGLHRC) – which has worked closely with the United Nations – and the ACLU are all organizations that promote humanitarian

rights for everyone, despite gender identification or sexual orientation. Similarly, the Queer community is becoming more active, with national movements such as the Day of Silence and Pride Parades, which increase awareness and promote equal rights for the Queer identifies community. National movements and social currents such as this are reminiscent of the national movements that took place to reform race relations in America, and suggest that there is a similar reform of sex and gender relations taking place in the United States today. However, much like the slow progression towards legalizing intermarriage, the changes taking place today in regard to same-sex marriage are the result of a long socio-legal process, one that began to really take hold in the second half of the 20th century.

As was recognized in *Loving v. Virginia*, individuals have a right to marry, even if that right is not explicitly stated in the Constitution. Three years after the *Loving* decision, one of the first nationally recognized attempts to have this right recognized in the case of same-sex marriage occurred. In 1970, Jack Baker (born Richard John Baker, 1942) and Michael McConnell (born James Michael McConnell, 1942) applied for a marriage license in Hennepin County, Minnesota. At the time, Minnesota law did not ban two men from receiving a license that would recognize their marriage, and the law as written implied that recognition be granted to any legal matter brought before the court that was not formally denied. Thus, the court could not formally deny the marriage license to the couple since there was no legal reason to do so, but ignored the law as written and still refused to issue it. By 1971, Baker and McConnell re-filed in Blue Earth County, and, this time, the waiting period expired before the couple was formally denied; this led to a de facto granting of their marriage license. On September 3, 1971, Reverend Roger Lynn

solemnized their marriage. Technically, this made Baker and McConnell one of the earliest married same-sex couples in the United States.

However, this marriage was not legally recognized since McConnell and Baker had found a loophole that allowed them to circumvent the intentions of the law. Therefore, in August of 1971, McConnell formally adopted Baker, who legally changed his name to Pat Lynn McConnell. Adoption allowed the couple to file joint taxes, share a last name, and defend their legal bond as a couple. Since the adoption was a recognized, legal contract binding them together, Baker's adoption served to earn the couples many of the same rights a legally recognized marriage would have. From 1973 until 2004, Baker and McConnell continuously filed joint taxes, only ceasing when federal laws were amended in 2005 to limit adoption ages to children until 19 years of age.[10] Despite the legal change, Baker and McConnell continued to live as if they were married.

Two decades after the marriage (legally recognized of not) of Baker and McConnell, the question of same-sex marriage yet again made national news. In Hawaii in 1990, three separate couples filed for marriage licenses, and all three were denied on the grounds that same-sex couples could not be issued marriage licenses in Hawaii. Two of the couples were comprised of two women, and one couple was two men; these three couples jointly sued the state of Hawaii and the Hawaii Department of Health (represented by the state health director, John C. Lewin) in a case that became known as *Baehr v. Miike*.[11] In the case, Lewin, the director of the DOH of Hawaii and defendant-

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[10] "Jack Baker (activist)," *Wikipedia*, 19 February 2013, accessed 20 February 2013, http://en.wikipedia.org/wiki/Jack_Baker_%28activist%29.

[11] *Baehr v. Miike* (1999) is also known as *Baehr v. Lewin* (1993); I will be referring to this case as *Baehr v. Miike* for consistency, to avoid confusion, and because that was the name used for the final U.S. Supreme Court decision on the case in 1999.

appellee, argued that these couples did not have the right to marry because they could not satisfy the requirements of marriage: namely that they were not one man and one woman, and that they could not produce children, in the traditional sense, through their union.[12] The law stipulated that, in order to win their case, the plaintiffs had to prove "a narrowly-drawn compelling state interest to avoid unnecessary abridgements of constitutional rights."[13] In 1991, the case was dismissed on the grounds that the plaintiffs failed to state a claim against the defendant for which relief can be granted. However, the court recognized that, "the applicant couples are free to press their equal protection claim. If they are successful, the State of Hawaii will no longer be permitted to refuse marriage licenses to couples merely on the basis that they are of the same sex."[14] Thus, the couples amended their claim and re-filed their case.

In 1993, the Circuit Court of Hawaii reconsidered the case and found in favor of the plaintiffs: the original ruling against them had been unconstitutional.[15] The Circuit Court found that the denial of these marriage licenses had been "unconstitutional insofar as it is construed and applied by the DOH [Hawaii Department of Health] to justify refusing to issue a marriage license on the sole basis that the applicant couple is of the same sex."[16] Although the Circuit Court found that the couples had been "denied the licenses solely on the grounds that the three couples were of the same sex," which was unconstitutional, the Hawaii legislature quickly passed an amendment to the Hawaii Constitution, which reserved the right of the state to deny marriage to same-sex couples,

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[12] "*Baehr v. Lewin*," 1993.
[13] "*Baehr v. Miike*," 1999.
[14] "*Baehr v. Lewin*," 1993.
[15] "*Baehr v. Miike*," 1999.
[16] "*Baehr v. Lewin*," 1993.

thereby circumventing the decision of the Court.[17] Upon amending the constitution, the Hawaii Supreme Court stated,

> we [Supreme Court of Hawaii] do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize is would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions.[18]

Against this new amendment, the plaintiffs' arguments became moot, and the right to marry was restricted to "be between two people of the opposite sex."[19] Largely in response to cases such as *Baehr* where same-sex couples pursued the right to marry, Congress passes an act similar to that of Hawaii's new amendment, the Defense of Marriage Act (DOMA, 1996), which federally defined marriage as a union of one man and one woman.[20] By defining marriage, the federal government created a legal reason to ban same-sex marriage, and the means to enforce such a prohibition.

However, by the time *Baehr v. Miike* reached the Hawaii Supreme Court, there had been numerous legal precedents established, largely through the legalization process of interracial marriage, regarding the right to marry. For example, by the 1990s it was recognized, even in Hawaii, that:

> a state may not "deny to any person within its jurisdiction the equal protection of the laws." […] "(n)o person shall … be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry. […] The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]." So 'fundamental' does the United

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[17] "*Baehr v. Miike*," 1999.
[18] "*Baehr v. Lewin*," 1993.
[19] "*Baehr v. Miike*," 1999.
[20] *Defense of Marriage Act*, "Hearing before the Subcommittee on the Constitution of the Committee of the Judiciary, House of Representatives, One-Hundred and Fourth Congress, Second Session, on H.R. 3396: Defense of Marriage Act," (15 May 1996): 1-247; hereafter referred to as DOMA, 1996. See Appendix A.

> States Supreme Court consider the institution of marriage that it has deemed marriage to be "one of the 'basic civil rights of (men and women).'"[21]

Despite this recognition, these couples were not extended the fundamental right to marry. Regardless of the outcome, *Baehr v. Miike* had a similar impact on the national view towards same-sex marriage as *Perez v. Sharp* had for interracial marriage. Even though the court had found in favor of the plaintiffs, the national standard of heterosexual marriage had ultimately been upheld. Yet, the case marked a momentous political and social shift towards the consideration of same-sex marriage as legally valid and towards marriage as an inherent right of all citizens, regardless of sexual orientation.[22]

It is hard to distinguish whether *Baehr v. Miike* set a precedent for same-sex marriage, or if it helped to solidify the federal definition of 'marriage' as a union between one man and one woman. Nevertheless, *Baehr* brought the issue of equality for homosexuals to the forefront of 21st century American politics. Until 1996, there was no officially recognized federal definition of marriage, but under DOMA, marriage became defined as, and therefore restricted to, a heterosexual union.[23] Had *Baehr v. Miike* not catapulted legal challenges to same-sex marriage bans into the socio-political consciousness of the nation, perhaps DOMA would not have, necessarily, restricted marriage in the same way. However, this is yet another reason to link *Baehr v. Miike* to the interracial marriage court cases of the past; had *Pace v. Alabama* not pushed interracial marriage law into the social agenda and had *Perez v. Sharp* not established legal precedent for overturning intermarriage bans, perhaps interracial marriage would still be illegal today.

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[21] "*Baehr v. Lewin*," 1993.
[22] "*Baehr v. Miike*," 1999.
[23] DOMA, 1996.

At one time, there were 40 states that banned interracial marriage.[24] Today, that seems shocking and inherently racist. As of January 2013, there are only 9 states that allow same-sex marriages, meaning there are 41 states which deny the right to marry to same-sex couples.[25] Many of the same arguments made against interracial marriage from the 18th to mid-20th centuries are the same as those used to discriminate against same-sex couples by denying them the right to marry today. In both cases, people who argued against these marriages stated that these marriages were against God's will, were immoral and unnatural, the children would be physically or mentally disabled and at a social disadvantage, and the traditional values of marriage would be violated. However, these arguments were overcome in regard to interracial marriage, establishing a strong legal precedent for legalizing same-sex marriage. When examined concurrently, the reasoning behind bans on same-sex marriage can clearly be seen to be based on the same reasoning that was used to maintain miscegenation laws; this same reasoning was ultimately proven faulty in the *Loving v. Virginia* trial. Hence, the reasoning behind same-sex marriage bans cannot, based on socio-legal historical precedent, constitutionally be maintained, leading to the conclusion that same-sex marriage will eventually be legalized, much like interracial marriage was 46 years ago.

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[24] Brent Staples, "Loving v. Virginia and the Secret History of Race," *The New York Times*, 14 May 2008.
[25] "Same-sex Marriage in the United States," *Wikipedia*, 19 February 2013, accessed 20 February 2013, http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States.

APPENDIX A

LEGISLATIVE APPENDIX

United States Constitutional Law

1. 5th Amendment to the U.S. Constitution

The 5th Amendment, in regard to this thesis, is most significant in its guarantee of life, liberty, and property, as well as the guarantee of due process of the law. Due process has been interpreted to mean that each citizen is guaranteed to a recognition and protection of individual rights, and that citizens are guaranteed a fundamentally fair application of the law.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, […] nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[12]

2. 14th Amendment to the U.S. Constitution

The 14th Amendment granted citizenship to African Americans, and also guarantees equal protection of the law under the Equal Protection Clause within the Amendment.

> **A.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

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[1] "U.S. Constitution 5th and 14th Amendments." *findUSlaw*. 2012, accessed 16 March 2012. http://finduslaw.com/us-constitution-5th-14th-amendments#1.

[2] In reference to this paper, the 5th Amendment is most applicable due to the Due Process clause contained within it, which is guaranteed to all U.S. citizens and has been referenced in numerous U.S. Supreme Court cases as justification for extending rights to citizens who were formally denied such rights (i.e. *Loving v. Virginia*).

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[3]
> **B.** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article"[4]
>
> **C.** The 14th Amendment was "ratified on July 9, 1868, and granted citizenship to 'all persons born or naturalized in the United States,' which included former slaves recently freed. In addition, it forbids states from denying any person 'life, liberty or property, without due process of law' or to 'deny to any person within its jurisdiction the equal protection of the laws.' By directly mentioning the role of the states, the 14th Amendment greatly expanded the protection of civil rights to all Americans and is cited in more litigation than any other amendment."[5]

3. Equal Protection Clause

The Equal Protection Clause guarantees all citizens equal protection of the law. This is more aptly referred to as the equal application clause, since it is more a guarantee that the law must be equally applied to all citizens, regardless of race, sex, etc.

> "The Equal Protection Clause of the 14th amendment of the U.S. Constitution prohibits states from denying any person within its jurisdiction the equal protection of the laws. In other words, the laws of a state must treat an individual in the same manner as others in similar conditions and circumstances. The equal protection clause is not intended to provide 'equality' among individuals or classes but only 'equal application' of the laws. The result, therefore, of a law is not relevant so long as there is no discrimination in its application. By denying states the ability to discriminate, the equal protection clause of the Constitution is crucial to the protection of civil rights."[6]

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[3] Section 1 of the 14th Amendment thereby granted citizenship to former slaves and guaranteed equal protection of the law to all citizens of the United States, former slaves included, regardless of their race.
[4] "Constitution of the United States, Amendments 11-27." *National Archives.* Accessed 16 March 2012. http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html.
[5] "Primary Documents in American History - 14th Amendment to the U.S. Constitution." *The Library of Congress.* 13 April 2011, accessed 16 March 2012. http://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html.
[6] "Equal Protection." *Cornell University Law School, Legal Information Institute*. 19 August 2010, accessed 16 March 2012. http://www.law.cornell.edu/wex/Equal_protection.

The distinction made here between equality and equal application is crucial to this paper. The Equal Protection Clause guarantees equal application of the law, which is not the same as guaranteeing equality to all. This distinction is used both to support and to refute interracial and same-sex marriage bans. For instance, courts have argued that Equal Protection has not been violated because (a) marriage was denied to people of both races in an interracial marriage situation, and (b) marriage was denied to people of both genders in the case of same-sex marriages (meaning denied to both lesbian and gay male couples). However, the broader interpretation of Equal Protection has led to the U.S. Supreme Court ruling that the 14th Amendment was indeed violated by such policies (i.e. *Loving v. Virginia*).

4. Full Faith and Credit Clause

The Full Faith and Credit Clause implies the supra-state recognition of contracts legally made in any of the U.S. states.

> "Under the U.S. Constitution's Full Faith and Credit Clause (Article IV, Section 1), states are expected to recognize the public acts, records, and judicial proceedings of every other state."[7]

This implies that states must recognize (though not necessarily be required to grant) all marriages legally performed in any of the other states or U.S. territories or possessions.

U.S. Supreme Court Rulings (in chronological order)

1. *Pace v. Alabama* (1883)

[7] "Defense of Marriage of 1996." *The Free Dictionary by Farlex*. 2012, accessed 16 March 2012. http://legal-dictionary.thefreedictionary.com/Defense+of+Marriage+Act+of+1996.

Pace v. Alabama was the first case that established precedent on how to proceed in miscegenation cases. Upheld the state of Alabama's right to ban interracial marriages on the precedent that both the White and Black individuals were being treated equally (both were banned from marrying one another).

> Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether White or Black, is the same.[8]

2. *Perez v. Sharp* (1948)

1948 ruling by the Supreme Court of California that found the bans against interracial marriage were unconstitutional, and therefore could not be upheld. This became one of the cases to establish precedent for the eventual decision in *Loving v. Virginia*, which federally overturned intermarriage bans. Although this case only overturned the bans in California, as opposed to overturning miscegenation laws nationwide, it was still a significant socio-legal indicator of the progressive acceptance of intermarriage by America.[9]

3. *Brown v. Board of Education* (1954)

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[8] "U.S. Supreme Court Pace v. State of Alabama, 106 U.S. 583 (29 January 1883). Accessed from http://www.lovingday.org/pace-v-alabama.

[9] "U.S. Supreme Court PACE v. STATE, 106 U.S. 583 (1883)," *FindLaw*, accessed 10 September 2012, http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=106&invol=583; "Pace v. Alabama," *The Loving Day*, accessed 10 September 2012, http://www.lovingday.org/pace-v-alabama

Used the 14th Amendment and Equal Opportunity to justify the desegregation of public schools. Claimed that segregation on basis of race alone was not justified under the constitution[10]

In *Brown v. Board* it was decided that,

> Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment -- even though the physical facilities and other "tangible" factors of white and Negro schools may be equal.[11]

4. Civil Rights Act (1964)

The Civil Rights Act of 1964 was meant to guarantee equal protection for African Americans in regard to career and employment selection processes. It also aimed to erase some of the social and socio-legal barriers in place that discriminated against minorities, and gave Whites preferential treatment or selection.

> In 1964 Congress passed Public Law 82-352 (78 Stat. 241). The provisions of this civil rights act forbade discrimination on the basis of sex as well as race in hiring, promoting, and firing.[…] In the final legislation, Section 703 (a) made it unlawful for an employer to 'fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's race, color, religion, sex, or national origin.' The final bill also allowed sex to be a consideration when sex is a bona fide occupational qualification for the job. Title VII of the act created the Equal Employment Opportunity Commission (EEOC) to implement the law."[12]

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[10] "Brown v. Board of Education, 347 U.S. 483 (1954) (USSC+)." *The National Center for Public Policy Research, The Supreme Court of the United States*. 17 May 1954, accessed 16 March 2012. http://www.nationalcenter.org/brown.html.

[11] "Brown v. Board of Education on Topeka (No. 1)," *Cornell University Law School*, accessed 17 February 2013, http://www.law.cornell.edu/supct/html/historics/USSC_CR_0347_0483_ZS.html

[12] "Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission." *The National Archives*. Accessed 21 March 2012. http://www.archives.gov/education/lessons/civil-rights-act/.

> "The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex or national origin. Passage of the Act ended the application of "Jim Crow" laws, which had been upheld by the Supreme Court in the 1896 case *Plessy v. Ferguson*, in which the Court held that racial segregation purported to be "separate but equal" was constitutional. The Civil Rights Act was eventually expanded by Congress to strengthen enforcement of these fundamental civil rights.[13]

5. McLaughlin v. Florida (1964)

McLaughlin v. Florida established precedent for the ruling in *Loving v. Virginia* three years later. Like the Lovings' case, this case involved police entering the home of an interracial couple and placing them under arrest for violating a Florida ban on cohabitation. However, this case did not discuss interracial marriage. Since the couple was not married, and because the U.S. Supreme Court wanted to avoid dealing with a federal ruling on interracial marriage, given that the Civil Rights Act was also in the legislative process at this time and was viewed as a more important ruling than the *McLaughlin* decision, the Supreme Court ruled solely on the principle of interracial cohabitation. The court, however, did find in favor of the plaintiffs and declared the Florida law unconstitutional.

> The appellants, a Negro man and a white woman, were convicted of violating a Florida statute which proscribed cohabitation between Negro and white persons who are not married to each other. The Florida Supreme Court upheld the conviction. On appeal to the Supreme Court of the United States, the appellants claimed: (1) The statute was invalid as a denial of equal protection of the laws since it applied only to members of certain races, and (2) they were denied due process and equal protection of the laws because a Florida law prohibiting interracial marriage prevented them from establishing the defense of common law marriage. The appellants thus hoped to reach the issue of whether the state's prohibition of interracial marriage contravened the fourteenth amendment. The

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[13] "Recess Reading: An Occasional Feature from the Judiciary Committee, The Civil Rights Act of 1964," *The United States Senate Committee on the Judiciary*, accessed 17 February 2013, http://www.judiciary.senate.gov/about/history/CivilRightsAct.cfm

Supreme Court, basing its decision on the single issue of equal protection (appellants' first claim), set aside the conviction and invalidated the cohabitation statute. Finding this claim to be dispositive of the case, the Court refrained from expressing any view as to the constitutionality of the law prohibiting interracial marriages.[14]

6. *Loving v. Virginia* (1967)

Mr. Chief Justice Warren delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

[…]There is patently no legitimate overriding purpose independent of invidious racial discrimination which 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 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.[15]

[…]Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.[16] To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. 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.

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[14] Lee M. Miller, "Constitutionality Of Miscegenation Statutes - McLaughlin v. Florida, 25 Md. L. Rev. 41 (1965)", *University of Maryland Francis King Carey School of Law,* Maryland Law Review, http://digitalcommons.law.umaryland.edu/mlr/vol25/iss1/5.

[15] The primary reasoning behind the decision of the court in *Loving v. Virginia* was violation of the Equal Protection Clause, and to some extent the Due Process Clause, of the 14th Amendment.

[16] This statement provides legal precedent for the federal legalization of same-sex marriage (as argued by same-sex marriage proponents).

These convictions must be reversed.

It is so ordered.[17]

7. *Baehr v. Lewin* (1993)

See *Baehr v. Miike* (1999).

8. *The Defense of Marriage Act* (D.O.M.A.) (1996)

> The Defense of Marriage Act (Sept. 21, 1996) is a federal law that denies federal recognition of same-sex marriages and authorizes states to refuse to recognize same-sex marriages licensed in other states.
>
> […]The text of DOMA is very brief and contains only two provisions. The first provision states that no state, territory, or Indian tribe shall be required to legally recognize a 'relationship between persons of the same sex that is treated as a marriage under the laws of another state, territory, or Indian tribe.' This language tells these jurisdictions that the Full Faith and Credit Clause has no application to same sex marriages.
>
> The second provision directs the federal government to follow a definition of the word *marriage* that means 'only a legal union between one man and one woman as husband and wife.' Likewise, the word *spouse* is defined as a 'person of the opposite sex who is a husband or a wife.' These definitions are meant to preclude a same-sex couple that has been married in a state from being eligible for federal benefits such as married Income Tax status and Social Security survivor benefits. In effect, DOMA bars federal recognition of same-sex marriages through the use of these definitions.[18]

9. *Baehr v. Miike* (1999) (Also known as *Baehr v. Lewin,* 1993)

This case was brought to the Hawaii Supreme Court after three couples jointly sued the Hawaii Department of Health after being refused marriage licenses on the grounds that each of the three couples were same-sex couples. The court ruled that it was unconstitutional to deny these citizens the right to marry based on sex alone. However,

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[17] "The Loving Decision (12 June 1967)." *Association of Multi-Ethnic Americans.* 2006, accessed 16 March 2012. http://www.ameasite.org/loving.asp.
[18] "Defense of Marriage of 1996." *The Free Dictionary by Farlex*. 2012, accessed 16 March 2012. http://legal-dictionary.thefreedictionary.com/Defense+of+Marriage+Act+of+1996.

the Hawaii legislature quickly passed an amendment to the Hawaii Constitution that outlawed same-sex marriage, effectively circumventing the decision of the court. The couples re-filed and in 1999 it was decided that the state had the right to limit or prohibit marriage as long as the constitutional rights of citizens were not violated, and that no violation had taken place in this instance.

> a state may not "deny to any person within its jurisdiction the equal protection of the laws." […] "(n)o person shall … be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry. […] The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]." So 'fundamental' does the United States Supreme Court consider the institution of marriage that it has deemed marriage to be "one of the 'basic civil rights of (men and women).'"[19]

10. *Lawrence v. Texas* (2003)

> In *Lawrence v. Texas*, the Supreme Court, in a 6-3 decision, declared unconstitutional a Texas law that prohibited sexual acts between same sex couples. Justice Anthony Kennedy, writing for the majority, held that the right to privacy protects a right for adults to engage in private, consensual homosexual activity. […The court's prior ruling was found to be] unconstitutional on equal protection grounds because it prohibits sexual acts between same sex couples that are allowed between opposite sex couples. […] 'When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.' [Justice Kennedy][20]

11. Respect for Marriage Act (introduced to the 111th Congress, 2009; introduced to the 112th Congress, 2011; passage pending)

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[19] "*Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44(1993)," University of Massachusetts. Accessed 29 January 2013. *people.umass.edu/leg450/Cases%20and%20statutes/Baehr.pdf.*

[20] Chemerinsky, Erwin. "*Lawrence v. Texas." Duke Law – Supreme Court Online.* Accessed 16 March 2012. http://www.law.duke.edu/publiclaw/supremecourtonline/commentary/lawvtex.

This act would repeal the Defense of Marriage Act (1996) and would require states to grant recognition to any marriage legally performed in a U.S. possession, territory, or state, or performed outside of the U.S. if it could have been legally performed in the U.S. under federal law. However, this act does not require states to grant same-sex marriage, and does not suggest federally legalizing same-sex marriage either.

> To repeal the Defense of Marriage Act and ensure respect for State regulation of marriage. […]For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into […].[21]

> (a) For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State.
> (b) In this section, the term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.[22]

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[21] "H.R.1116 -- Respect for Marriage Act (Introduced in House - IH)." *The Library of Congress, the U.S. House of Representatives, Respect of Marriage Act.* 16 March 2011, accessed 16 March 2012. http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.1116:.

[22] "Respect for Marriage Act." *Wikipedia The Free Encyclopedia.* 18 March 2012, accessed 21 March 2012. http://en.wikipedia.org/wiki/Respect_for_Marriage_Act.

APPEDDIX B

TERMINOLOGY APPENDIX

1. Heteronormative –

- "denoting or relating to a world view that promotes heterosexuality as the normal or preferred sexual orientation"[23]
- "Heteronormativity is the cultural bias in favor of opposite-sex relationships of a sexual nature, and against same-sex relationships of a sexual nature. Because the former are viewed as normal and the latter are not, lesbian and gay relationships are subject to a heteronormative bias."[24]

2. Interracial –

- For the purposes of this thesis, the term "interracial" refers to a dyadic, sexual or romantic relationship between two individuals, one of which is Caucasian American and the other African American.

3. Marriage –

- "the word 'marriage' means only a legal union between one man and one woman as husband and wife"[25] (as defined by the federal government of the United States in the Defense of Marriage Act, 1996)

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[23] "Heteronormative." *Oxford Dictionaries*. 2012, accessed 16 March 2012. http://oxforddictionaries.com/definition/heteronormative.
[24] Head, Tom. "Civil Liberties – Heteronormativity." *About.com*. 2012, accessed 16 March 2012. http://civilliberty.about.com/od/gendersexuality/g/heteronormative.htm.
[25] "1 USC § 7 – Definition of 'Marriage' and 'Spouse'." *Cornell University Law School, Legal Information Institute*. 21 February 2011, accessed 16 March 2012. http://www.law.cornell.edu/uscode/text/1/7.

4. Miscegenation –

- "a mixture of races; *especially* **:** marriage, cohabitation, or sexual intercourse between a white person and a member of another race"[26]
- "Cohabitation, sexual relations, marriage, or interbreeding involving persons of different races, especially in historical contexts as a transgression of the law."[27]

5. Same-Sex –

- In the context of this thesis, the term "same-sex" refers to two individuals who are of the same biological sex, regardless of their gender or sexuality identification (two biological males or two biological females).
- The term will most often be used in reference to a same-sex dyadic, sexual or romantic relationship between two individuals, usually in reference to formal marriage and civil unions.

Spouse –

- "the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife"[28] (as defined by the federal government of the United States in the Defense of Marriage Act, 1996)

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[26] "Miscegenation." *Encyclopedia Britannica, Merriam-Webster Online Dictionary.* 2012, accessed 16 March 2012. http://www.merriam-webster.com/dictionary/miscegenation.
[27] "Miscegenation." *The Free Dictionary by Farlex*. 2012, accessed 16 March 2012. http://www.thefreedictionary.com/miscegenation.
[28] 1 USC § 7 – Definition of 'Marriage' and 'Spouse'." *Cornell University Law School, Legal Information Institute*. 21 February 2011, accessed 16 March 2012. http://www.law.cornell.edu/uscode/text/1/7.

APPENDIX C

INDICATORS OF CHANGE IN THE SOCIAL CONCEPTION OF RACE

This appendix provides brief summaries of articles and government documents which lend support to the statements made in this thesis that the United States exhibited a liberal socio-legal shift in regard to interracial marriage and race, which resulted in a greater acceptance of interracial relationships and mixed-race individuals. There are seven references included.

1. Garcia, Matt. "Social Movements, the Rise of Colorblind Conservatism and What Comes Naturally." *Frontiers: A Journal of Women Studies, Vol 31, No 3* (2010): 49-56.

The author, Matt Garcia focuses on how *Loving v. Virginia* influenced the rise of colorblind ideology in the U.S. Garcia notes that colorblindness is most often used by conservatives to legitimate individual responsibility, rather than state aid or recognition. Garcia cites *Loving v. Virginia* as well as other texts and an interview to support this argument.

2. Golebiowska, Ewa A. "The Contours and Etiology of Whites' Attitudes Toward Black-White Interracial Marriage." *Journal of Black Studies, Vol 38, No 2* (2007): 268 – 287.

Golebiowska states that the purpose of this article is to investigate the significance of racial stereotypes on whites' opposition to interracial, specifically Black-White, marriage. Golebiowska begins by noting that overcoming legal barriers does not necessarily mean that the overall social opinion has changed. She uses a national survey,

the 2000 GSS, to assess Caucasian American's attitudes toward interracial marriage. Golebiowska also uses a survey that specifically asks if respondents would be okay with a family member entering into an interracial marriage. She found that whites are hesitant to accept such a union in their own family, and that there is still a preference for marrying within one's own race. Yet, intergroup contact and social factors can and do influence this attitude, with a trend towards acceptance of interracial marriages. Golebiowska also found a decline in negative stereotypes about African Americans, but that belief in such stereotypes, if present, reduces acceptance of interracial unions.

3. Humes, Karen R., Nicholas A. Jones & Roberto R. Ramirez. "Overview of Race and Hispanic Origin 2010." *2010 Census Briefs, United States Census Bureau*, *C2010BR-02* (March, 2011): 1-24. Accessed 27 January 2012.

In the United States census, "race" is divided into 6 different categories that respondents can choose from: White, Black or African American, American Indian or Alaskan Native, Asian, Native Hawaiian or Other Pacific Islander, and Some Other Race (starting on the 2000 census). Each of the six categories is also specifically defined. Beginning in 2000, respondents were able to mark more than one category for race, indicating Two Or More Races or "In Combination" racial mixtures. Although this is a recent change in the census, this new ability to indicate a mixed racial ancestry indicates that the federal government recognizes that racial mixing is a common occurrence, and one that must be taken into account for an accurate assessment of the U.S. population. Ethnicity is basically divided into Hispanic Origin and Non-Hispanic, and is then combined with race categories to indicate, even more specifically, someone's racial and ethnic composition.

4. Jacobson, Cardell K. & Bryan R. Johnson. "Interracial Friendship and African American Attitudes about Interracial Marriage." *Journal of Black Studies Vol. 36, No. 4* (March, 2006): 570-584. Accessed 27 January 2012. http://www.jstor.org/stable/40034771.

The authors of this article hypothesize that having more close contact, and especially having friendships with, members of another racial group improves the in-group's perception of interracial marriages between members of their own group and members of another race. They look specifically at how African Americans perceive interracial marriage, whereas most studies focus on the Caucasian American perception of these relationships. By examining a 2000 national survey conducted by the *New York Times*, they concluded that, more than any of the other factors they controlled for, friendship with members of another race is the most (positive) influential pressure on perception of interracial marriages. In laymen terms, having at least one, if not more, close friendship with a person of a different race implies that the individual will have a more positive opinion of interracial relationships and interracial marriage. The authors note that although approval ratings are high overall, the number of interracial marriages is disproportionately small compared to the population. One reason given as to the low marriage rate between races is the control over partner selection exerted by the African American community. The authors propose that men, people with higher educational attainment, and people with more intergroup contact will be more likely to approve of interracial marriages. This article offers support for the increased social acceptance of interracial relationships because there have been increasing interracial interaction and friendships sine the Civil Rights Movement of the mid to late 1960s; following the logic

of Jacobson and Johnson, this increase would lead to an increased acceptance of interracial marriage.

5. Johnson, Bryan R. and Cardell K. Jacobson. "Contract in Context: An Examination of Social Setting on Whites' Attitudes Towards Interracial Marriage." *Social Psychology Quarterly, Vol 68, No 4* (2005): 387 – 399.

This article examines the role of intergroup contact on perception of and attitude toward interracial marriages. Jacobson and Johnson propose that increase contact between group members, in the right settings, promotes acceptance of interracial relationships. They also take into account the role of society in determining individual's attitudes. Jacobson and Johnson found a significant influence of age, political stance, education level, and intergroup contact on attitudes. They also found that white approval of interracial marriage has increase over time. They used a national survey conducted by the *New York Times* via telephone interviews to analyze attitudinal change.

6. Monahan, Thomas P. "An Overview of Statistics on Interracial Marriage in the United States, with Data on Its Extent from 1963-1970." *Journal of Marriage and the Family Vol. 38, No. 2* (May 1976): 223-230. Accessed January 27, 2012. http://www.jstor.org/stable/350382.

Monahon discusses how, since the onset of the Civil Rights Movement, reference to race and color had begun to be removed from many public records. This makes tracking the statistics on interracial marriage difficult. Monahan examines the interracial marriage statistics in the years immediately following the legalization of interracial marriage, due to *Loving v. Virginia* (1967-1970), and looks specifically at which gender of the marriage unit is the non-Caucasian race. He notes that interracial

marriages, in general, are continuously increasing over time, and that African American men are more likely to marry outside of their own race except for in the South of the U.S., where African American women are the most likely to marry outside of their own race. However, the article only breaks the groups into "Negro", "White", and "Other Race", significantly limiting the accuracy and amount of information provided. Even then, Monahan notes that the number of interracial marriages is disproportionately small compared to the population. Significant to note is that the District of Columbia was the only district in the U.S. to have a higher than 1% interracial marriage rate prior to 1967, and that the majority of interracial marriages were Caucasian men and African American women.

7. U.S. Census Bureau. "Population." *U.S. Census Bureau, Statistical Abstract of the United States* (2011): 1-62. Accessed 27 January 2012.

This subsection of the information section of the 2010 U.S. Census discusses the population of the U.S. in particular reference to both race and the category of marriage. It provides definitions that the federal government uses to assess census results as well as numerous tables that statistically chart the census results, including results on race and interracial marriage. It goes into more detail about how the 2000 census differed from previous censuses in regard to race and ethnicity. In particular, the 2000 census was the first to allow respondents to mark multiple race groups and to identify as Some Other Race. The 2000 census also offered 15 distinct racial categories as well as added space to elaborate or create a unique racial category. This change indicates a raising awareness of race and ethnicity as part of an individual's identity, the increasing awareness and

acceptance of multiple racial and ethnic compositions, and shows that both race and ethnicity are still an important marker is American society.

APPENDIX D

Richard and Mildred Loving, and their three children, in 1965

Photos by Grey Villet from "The Crime of Being Married," LIFE Magazine, 18 March 1966.

ANNOTATED BIBLIOGRAPHY

Chapter One: Pace v. Alabama

U.S. Supreme Court Pace v. State of Alabama, 106 U.S. 583 (January 29, 1883). Accessed from http://www.lovingday.org/pace-v-alabama.

This is the decision of the court in the *Pace v. Alabama* U.S. Supreme Court case, and the reasoning behind that decision. According to the court, the Alabama statute which proscribes different punishments for the crime of living in "adultery or fornication" depending on the racial composition of the couple does not violate the 14th Amendment. The court stated that because each person in the couples, whether same race or interracial, are punished equally under this law, the difference in the punishments is based no the crime itself, not on race. This decision conveniently overlooked that the difference between the punishments was inherently based on race, since the only difference between the crimes was the race of the individuals accused.

Chapter One and Two: Between the Cases

Gregory, J. W. The Colour Bar: Mixed Marriages and the Colour Bar. *Spectator (147)*, 75. 18 July 1931.

This article begins by stating that color alone is not an adequate criterion to determine race. The author proceeds to state that the mixing of races tends to result in progeny that are "handicapped by some deficiency." Gregory appears surprised to report that some of the mulattoes in the United States have shown high intelligence and physical

abilities, but quickly compensates for this contradiction by stating that the (Black) women chosen by (White) men are the most attractive and intelligent of their race, and have passed on these superior qualities to their children via the long process of sexual selection preformed by White men. The author concludes that these are the exceptions and that, "intermarriage between the three human races should be avoided as far as possible," due to the "production of types [children] inferior to both parent stocks." In order to ensure there is no unfavorable racial mixing, Gregory proposes spatial segregation of the races.

Judge Lectures Acquitted Mixed Marriage Pair. *Norfolk New Journal and Guide*. 10 May 1930. p.A1

This article discussed the 1930 acquittal of an interracial couple in Virginia. Emil E. Umlauf, a White former sergeant of police, and his "colored" wife were acquitted of violating the 1924 Virginia Racial Integrity Act, but were ordered to leave the city or face being arrested again. The judge, on ordering the couple to vacate the city, told Umlauf that, "It was a mistake of nature to endow you with the greater advantage and outlook that it gives to a white man." In the post-*Pace* and pre-*Perez* era, especially in the South, Whites felt confident in their ability to prohibit interracial marriage under law. There had been no successful challenge to miscegenation law and no reason for this judge to feel that he was, in any way, prohibited from banning the couple from his jurisdiction. Although this case received statewide attention, the focus of this attention

was on the outrage exhibited by the community towards Umlauf for marrying a colored woman. There was even an attempt to further charge the couple by proving that they had left Virginia with the intention to get married and return (which would violate Virginia's Racial Integrity Act); however this endeavor proved unsuccessful. The article, in no way, reported that the laws prohibiting interracial marriage or any of the legal actions taken against the couple were unusual or unconstitutional.

Slavery – Black and White. *Chicago Defender* (14 Dec 1912).

This article discussed the negative reactions of White American to the marriage of Jack Johnson, a Black man, and Lucile Cameron, a White woman. The article is clearly biased against White society and the persecution of Johnson. The author stated that any negativity towards the marriage, which was performed in full accordance with the law, stemmed from the prejudice of Whites. The author also acknowledged that White men enjoyed sexual access to Black women, but reserve sole access to White women. The article ends by stating that it would be better for marriage between the races to be recognized than to have illegitimate offspring of such unions, since interracial sex is bound to occur regardless of the legal stance of interracial marriage.

Chapter Two: Perez v. Sharp

Georgia Bias Halts White Californian. *Atlanta Daily World*, p. 1, col. 1. 26 March 1955.

This article recounts the legal impediment faced by a White man who wanted to marry a Japanese woman and move to Georgia. Georgia

state law prohibited Whites from marrying anyone considered to be non-White. This article brings into question the right of a White man to marry anyone of his choosing. This was the particular legal conundrum that miscegenation law could not overcome. White men presumed to have the right to marry whomever they chose, yet miscegenation law, intended to "protect" White women, also limited the right of White men. The tone of this article indicates indignation towards the state for limiting a White American man's right to marry.

Golden, Joseph. "Social Control of Negro-White Intermarriage." *Social Forces (36)*, p. 267. 1957/1958.

This article begins by recognizing that any segregation, even if written into the law, is primarily enforced by, and given power through, public sentiment. Golden notes that the definition of Black varies from state to state, and that punishments for interracial marriage vary similarly. Furthermore, Golden insinuates that these classifications lack scientific evidence by stating that California repealed its miscegenation legislation, *Perez v. Sharp*, in light of recent scientific and sociological publications. In this overturning, the California court states that, "marriage is something more than a civil contract, subject to regulation by the state. It is a fundamental right of free men." However, Golden does state that interracial marriage violates sexual mores, and that society and the family have an obligation to prohibit, as far as possible, interracial marriages since they are "inadvisable on social and cultural grounds."

"High Court Asked to Reject Petition on Marriage Issue." *Atlanta Daily World*, p. 3 col. 7. 6 October 1954.

This news article covers the request of the state of Alabama for the U.S. Supreme Court to deny Linnie Jackson a review of her conviction for marrying a White man. This request is based on the 1883 decision in *Pace*, as well as the 1901 revision to the Alabama constitution which provided that the state may never authorize or legalize any marriage between anyone colored and anyone White. According to the author, the only miscegenation case to date that had been held valid was that of *Perez v. Sharp*, and the article attests that Alabama claims *Perez* was settled on unsound legal theory.

"Mixed Marriage Faces Top Court in Mississippi." *Norfolk New Journal and Guide*. 25 December 1948.

This article discusses the trial of a Black man who was sentenced to five years imprisonment for marrying a White woman. The trial traced the ancestry of the accused in order to prove that, per the blood quantum rule, the defendant had Black ancestry. This classified him as a "Negro," the therefore legally unable to marry anyone White. Tracing someone's ancestry to prove that they have Black heritage was a common way to invalidate an interracial marriage, and was highly effective, especially in the South.

Rogers, J. A. "Rogers Says: Great Comedy Found in Marriage and Divorce Laws of this Country." *Norfolk New Journal and Guide*. 25 December 1948.

In this article, Rogers discusses his opinion of U.S. marriage law, particularly the practice of leaving legislation up to the individual discretion of states, rather than having uniform federal laws. Rogers states that the numerous and drastically varying marriage laws are confusing, and often contradict those of other states. Rogers goes further than the issue of states' rights by noting that the reason for the differences in the realm of interracial marriage is White supremacy. Rogers believes that uniform marriage law will not be achieved because that would require either the end to, or the spread of, miscegenation law, with each side opposing the imposition of the other.

"Stand Up and Sound Off, Supreme Court of California Case: *Perez v. Sharp*." *The Multiracial Activist*. 1999. Accessed 16 September 2013. http://www.multiracial.com/government/perez-v-sharp.html.

This document is composed of select excepts from the decision of U.S. Supreme Court Justice Roger Traynor in the *Perez v. Sharp* decision, as well as concurring opinions from fellow justices. All of the decisions discuss statements made and precedent relied on throughout the trial. Previous Supreme Court cases, as well as the Constitution, were referred to throughout the decision to lend support to the decision of the court.

"The People Think." *Los Angeles Sentinel*. 9 January 1947

This article discussed a study undertaken at Los Angeles City College, which polled Black and White students of both genders on their opinion of interracial marriage. Students of both races and genders split on

the issue. Some students cited morality and the intention of God; others stated that there were too many social and cultural differences. Yet, some students believed that intermarriage could promote greater acceptance and understanding between the races, and that the resulting children would ease the racial line. This article shows how the post World War II era was marked by social liberalization, particularly in regard to race.

Traynor, Roger R. "Majority Opinion, *Perez v. Sharp* (1948)." *Organization of American Historians (OAH) Magazine of History, Vol 18, No 4* (July 2004): 34 – 36.

Justice Roger R. Traynor gave the majority opinion in the 1948 California Supreme Court case *Perez v. Sharp*, which recognized the bans on interracial marriage violated the 14th Amendment of the U.S. Constitution. In his majority opinion, acknowledging the right of the couple to marry, Traynor cited that although it was the right of states to regulate marriage, limiting someone's choice of partner due to race thereby limited their right to marry, which is a right protected under the 14th Amendment. However, there were many extenuating circumstances that aided Traynor in making his decision. To begin, the couple was a Hispanic American woman and an African American man, so neither partner was Caucasian, and the court may have seen their union as less threatening than if the woman had been white. Secondly, the couple had the support of the Catholic Church in their union, and limiting their right to marry was, therefore, also infringing on their right to have a Catholic service and their right to free practice of religion. Finally, Traynor cited state's rights to support the majority opinion, which kept the decision within California and did not threaten

the "sanctity" or marriage of any other state. However, it was instances such as this that eventually prompted the U.S. Supreme Court to legalize interracial marriage in the 1967 *Loving v. Virginia* case.

Chapter Three: Loving v. Virginia

"An Act to Preserve Racial Integrity," *Racial Integrity Act of 1924*, http://www2.vcdh.virginia.edu/encounter/projects/monacans/Contemporary_Monacans/racial.html.

This source is the text from the Act to Preserve Racial Integrity, passed by the General Assembly of Virginia in 1924. This act effectively banned all interracial marriages in the state of Virginia, and established guidelines for ensuring that no White married a non-White. This act was the legislation that led to the arrest of Richard and Mildred Loving, thereby beginning the *Loving v. Virginia* trial.

"Bad Marriage Law Revoked, 9-0." *Plain Dealer*. 13 June 1967. Cleveland, OH.

This article clearly supported the decision of the Supreme Court in the *Loving* case, stating that the Constitution is so explicit on the freedom to marry without regard to race that, "it is surprising that the ban enforced by 16 states could have lasted as long as it did." The article seems to unquestionably accept the decision of the Court and to apply the *Loving* decision to all other states, recognizing that miscegenation was now federally outlawed. "It is simply not possible for a state law to be valid under our Constitution which makes the criminality of (an) act depend upon the race of the actor" [Justice Potter Stewart].

"Excerpts From Supreme Court's Ruling on Virginia's Ban on Miscegenation." *New York Times*. 13 June 1967.

This article accompanied the previous article in the June 13 *New York Times*, and summarized the United States Supreme Court's ruling in the *Loving v. Virginia* case by restating select statements made at the trial and in the historic *Loving* decision.

"Justice Upset All Bans On Interracial Marriage: 9-0n Decision Rules Out Virginia Law." *New York Times*. 13 June 1967.

Unlike other articles covering the *Loving* decision, the *New York Times* notes that "the wording [of the decision] was sufficiently broad and disapproving to leave no doubt that the antimiscegenation laws of 15 other states are also now void." The *Times* also stated that "Chief Justice Warren completed the process that he set in motion with his opinion in 1954 [*Brown v. Board of Education*]," suggesting that it was largely due to Chief Justice Warren's influence that discriminatory laws were being overturned at the federal level. The author further states that "racial classifications in state laws are constitutionally odious even if the punishments are even-handed," hence the decision to overturn miscegenation law via the *Loving* case. The author does not indicate a stance on miscegenation, but focuses on Warren and the repercussions of the *Loving* decision.

Loving v. Virginia. "Loving v. Virginia, 388 U.S. 1 (1967) 388 U.S. 1 Loving et ux. v. Virginia. Appeal from the Supreme Court of Appeals of Virginia. No. 395."

(Argued 10 April 1967. Decided 12 June 1967): 1-6. Accessed 27 January 2012.

Loving v. Virginia was the 1967 U.S. Supreme Court case that legalized interracial marriage at a federal level. Until 1967, states had reserved the right to legalize or ban interracial marriages, and to decide whether to acknowledge interracial marriages performed in other states. After *Loving v. Virginia*, states were required to legally allow interracial couples the right to marry, and were required to acknowledge interracial marriages performed in other states, thereby granting interracial marriage a legal standing equivalent to intraracial marriage. This document is a summary of the proceedings and results of this trial. It discusses the background of the couple, their situation in Virginia, their pursuit of the case at a federal level, and the implications of the decision of this case. Considered a landmark case in U.S. history, especially in reference to race-relations within the U.S., this document will serve as the basis for much of the evidence reported in support of liberalized ideas of interracial marriages in the U.S. since 1967.

"Mixed Marriage Decision Lifts 'Great Burden.'" *Springfield Union*. 13 June 1967. Springfield, MA.

This brief article focuses on the reactions of the Lovings to the court decision upholding their marriage and overturning the Virginia miscegenation law. The author notes the reactions of both Mildred and Richard, both of whom express great relief that their legal battle is over, and that the legality of their marriage was recognized. Furthermore, the article noted that Richards stated that he and Mildred did not encounter

any hostility from their community during the decade that their case was tried through the local, state, and federal courts.

"Race Laws 'Knocked Off Books' – McLeod." *Augusta Chronicle*. 13 June 1967. Augusta, GA.

This article, although published in Georgia, discusses the reaction of the South Carolina Attorney General, Daniel R. McLeod, to the decision in the *Loving* case. McLeod stated that this decision would appear to overrule the South Carolina law banning interracial marriages, but that the law would likely remain on the books and simply be unenforced, unless a test case caused revision of the law. According to the author, McLeod believed the *Loving* decision would help South Carolina because it would erase the confusion concerning exactly who can and cannot get married. McLeod does not seem to oppose interracial marriage, and appears unconcerned about the result of the *Loving* case.

"Relic of Discrimination." *Evening Times*. 14 June 1967. Trenton, NJ.

This article clearly views miscegenation laws as discriminatory and supports the decision of *Loving*, but also states that, "Relatively few people, of course, are involved in such marriages," indicating a belief that Americans should be allowed to marry whomever they chose, but that they typically chose to marry within their own race. The author seems torn between social norms against interracial marriage and the American ideals of equality and freedom. From the tone of the article, I interpret the author

as supportive of what *Loving* represented, but somewhere between indifferent and disapproving of the reality of interracial marriage.

"The Crime of Being Married." LIFE Magazine. 18 March 1966. Reprinted 2012.

On the 45th anniversary of the *Loving v. Virginia* decision LIFE reprinted the original story they had published in 1966 covering the Loving's story, along with a new introduction and photographs of the Lovings that had not yet been published. The original article focused on the story of the couple, rather than on the trial. The article discusses the unique case of Caroline County, the Lovings hometown, where very little distinction was made between the races. When the article was published in 1966, LIFE speculated that, "*Loving v. Virginia* may well become the next big landmark in civil rights." The Lovings were not prepared for the opposition they had encountered when they married since Caroline County residents "have grown accustomed to the [Lovings] marriage," and they generally encountered hostility only from those outside of the local community. According to LIFE, "The State [Virginia] insists that the 14th Amendment exempts anti-miscegenation statutes from its coverage, and that there is no constitutionally protected right of a free choice of a spouse in marriage." The 1966 LIFE article suggests that the case comes down to the question of constitutional rights, free choice in marriage, and the question of state rights versus federal regulation. Overall, the LIFE article seems to have a liberal tone that most previous articles lacked,

highlighting the right of individuals to choose to marry whomever they love.

"Top Court Voids Intermarriage Bans." *Evening Times*. 12 June 1967. Trenton, NJ.

This article discusses the decision of the *Loving* case with a very factual tone. The author does not refer to Mildred Loving by name, referring to her only as the "Negro wife" of the "white construction worker, Richard P. Loving." The article notes that the decision was 9-0 to overturn the Virginia miscegenation law, but notes that 15 other states (Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Caroline, Oklahoma, South Carolina, Tennessee, Texas and West Virginia) also have miscegenation bans. The author does not discuss the implications of *Loving* for these states. The article reports excerpts from the Warren opinion (opinion of Chief Justice Earl Warren), including his statement that, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. […] 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."

Epilogue

Defense of Marriage Act. "Hearing before the Subcommittee on the Constitution of the Committee of the Judiciary, House of Representatives, One-Hundred and Fourth Congress, Second Session, on H.R. 3396: Defense of Marriage Act." (15 May 1996): 1-247. Accessed 27 January 2012.

The Defense of Marriage Act was an act that was presented to the United States Congress in May 1996. It was not an act that wanted to limit same-sex marriage for anti-homosexual reasons, but rather was enacted in order to defend the principle of states' rights over the rights of the federal government in regard specifically to same-sex marriage legislation. It established that states have the right to decide policies towards same-sex unions on a state-by-state basis. D.O.M.A. also stipulates that the federal government cannot demand that all states legalize same-sex marriage or be forced to recognize same-sex marriages performed in other states. It largely focuses on a case of same-sex marriage in Hawaii where the couple was allowed to marry and was formally recognized as married in Hawaii, but not in all states. Although it seems that the opinion of many on the committee is in support for same-sex marriage, they have to place states' rights above their personal opinions on the issue, and above the power of the federal government.

Respect for Marriage Act. "H. R. 3567: To repeal the Defense of Marriage Act and Ensure Respect for State Regulation of Marriage." *One-Hundredth and Eleventh Congress, First Session* (15 September 2009): 1-3. Accessed 27 January 2012.

The Respect for Marriage Act was proposed in 2009 as the act to be used in place of the Defense of Marriage Act. It promotes a federal-level use of same-sex marriage in the sense that a marriage considered valid in the state in which it was performed must be considered valid in the other states of the U.S. This would deviate from the previously established norm of states' rights superseding federal jurisdiction in the case of same-sex marriages. However, it does not require that

every state legalize same-sex marriage, and does not federally legalize same-sex marriage. This act is directed more at rectifying the legal issues that arise when a marriage is only considered legally valid in some states. Because crossing state borders is not difficult, it becomes complicated for a couple to know if their marriage will still be considered valid, and can greatly limit their mobility. This act would rectify this issue by guarantying recognition to all marriages legally performed, regardless of which state they were performed in.

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Elizabeth Abbott examined marriage as an institution, across national borders and cultural divides. She particularly focuses on the argument that marriage is not a stable concept and cannot simply be defined as a "union between one man and one woman." Marriage is transformative, and Abbott provides ample examples of how marriage has changed throughout history. She emphasizes the changing role of women in marriage, the different forms of marriage (arranged, self-marriage, state-sanctioned marriage, etc.), and social influences on the institution of marriage, such as community involvement, church and state regulation, familial involvement, and children.

Coontz, Stephanie. *Marriage, A History: From obedience to intimacy or how love conquered marriage.* Viking, New York: 2005.

Stephanie Coontz argues that there is no "traditional" marriage, and she goes through centuries, nations, and cultures to provide evidence for her claim. She particularly focuses on the male-female, husband-wife dynamic, and how it

has transformed within the marriage relationship. Furthermore, Coontz brings the past and the present realities of marriage to a head, by showing how the institution has changes in specific ways, citing the revolutions of women in the workforce, voting rights, and the introduction of birth control. Coontz brings a somewhat feminist, or at least female-centric, tone to the study of marriage.

Cott, Nancy. *Public Vows: A History of Marriage and the Nation.* Harvard University Press, Cambridge: 2000.

Nancy Cott focuses on how marriage is not a private union between two people, but is actually a public institution, very much subject to social and government regulation. Focusing on marriage in the United States, Cott examines how the traditional conception of marriage, and the regulations in place to uphold this definition, stems from Judeo-Christian principles and English common law. However, Cott continues on to show how the changes in American law and society over centuries transformed the definition of marriage; in sum, Cott reveals how the state and federal governments have regulated and, in many ways, controlled what is considered to be a "private" choice in order to sculpt the moral and social standards of the nation. In this way, she focuses much of the attention on the legislation and legal issues in marriage, but she also discusses social influences on the institution of marriage.

Pascoe, Peggy. *What Comes Naturally: Miscegenation Law and the Making of Race in America.* Oxford University Press, New York: 2009.

Peggy Pascoe, in her examination of marriage, focuses exclusively on miscegenation in America. She traces the origins, logic behind, and

transnational repercussions of interracial marriage bans, shedding light on one of the most ingrained and longest lasting regulations on the institution of marriage. Pascoe discusses intermarriage between Caucasian Americans and Americans of nearly every other ethnic and racial composition, looking and the social and legal influences and prohibitions on their marriages. She goes further, looking at how White Supremacy, sexuality, and gender all influenced miscegenation law. Pascoe investigates intermarriage in the U.S. from both a social and legal stance, and discusses some of the legislation that was influential in the overturning of intermarriage bans, as well as examining the social forces that allowed for this transformation to the institution of marriage.

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