

## Marriage and Identity — Interracial or Same-Sex — in Historical Perspective

In 1941 a South Carolina judge wrote that his state had “a sound public policy which gives to every person of age and discretion, white or black, male or female, the right of marriage to another of the same race and of the opposite sex.” Rarely before the 1970s were the two kinds of heterodox marriage linked, interracial and same-sex, but perhaps that was because same-sex marriage was never in the news, while interracial marriage had been a social and legal issue in America for three hundred years.

In 1967, in a case from Virginia, the Supreme Court struck down state laws that banned interracial marriage. Large numbers of people, black and white, continued to find other people’s interracial sex or marriage discomfiting, but the law had changed, the legal restriction had vanished, and people, whatever their identities, views, or behavior, simply went on with their lives.

The Supreme Court spoke eloquently of the “right to marry.” The facts of the case, and the arguments being presented, related solely to race, for Mr. and Mrs. Loving, he white and she not, had been convicted of violating a law that, defining their marriage as interracial, made it not only null but also a felony.

Three years later, a same-sex couple in Minnesota argued on the basis of the Loving decision that they should not be denied a marriage license. In the past 35 years, couples across the country have mounted similar arguments. In recent years, relying on their state constitutions, some have won. Hawaii and Alaska each responded to a court decision favoring same-sex couples by changing the constitution to undo the decision. Various other states have acted preemptively, as the Virginia marriage amendment seeks to do.

Many recent questions regarding same-sex marriages echo similar situations

interracial couples found themselves in, in a great many states over a very long time. In fact, the history of interracial marriage and the law provided a basis for predicting the issues, and the responses, that would arise regarding same-sex couples.

Once same-sex couples began tying the knot in Massachusetts, the question was no longer an abstraction: Would other states have to respect such marriages? Miscegenation statutes varied as to whether they permitted recognition of an out-of-state interracial marriage, and state courts varied in their interpretation of the law, but Virginia not only refused to permit interracial marriages to be contracted in Virginia, it also outlawed efforts at evasion where a couple went out-of-state to marry and then returned (as the Lovings did). Moreover, it exercised the authority to refuse to recognize the marriage of mixed-race couples that moved into Virginia and tried to bring their lawful marriages with them.

Some states placed miscegenation provisions in their constitutions. Virginia never did. Virginia supporters of a marriage amendment seek to slot a parallel provision into the bill of rights — where individual rights are normally guaranteed against state intrusion.

Laws against “interracial marriage” were always an arbitrary enterprise. States could enact such laws, or repeal them, and they could big or small penalties for infractions. States differed in their definitions of “white.” Often the definition was changed, such that some Virginians, legally white in 1909, became legally black in 1910, and another group experienced a similar reclassification in 1924 with the introduction of the “one-drop” rule of nonwhite racial identity. Countless couples, in the 19th century and the 20th, argued that miscegenation laws did not apply to them because they in fact shared a racial identity, or because the statute as written did not apply to their combination of identities.

That particular issue arises less often regarding gender, but it can, and it will. In 1999 a Texas judge wrote, in a case about “a person named Christie Lee Littleton,” a widow who

had brought a wrongful death suit against a negligent doctor: “Is Christie a man or a woman? There is no dispute that Christie and Jonathon went through a ceremonial marriage ritual. If Christie is a woman, she may bring this action. If Christie is a man, she may not.” The binary world of the Virginia marriage amendment will not on its face accommodate cases of ambiguous gender identity, or in this case where a person has undergone a sex-change operation to secure a new identity.

Whatever one thinks of the Virginia marriage amendment — its intent, its language, its effects, its advisability, or its constitutionality — it echoes a related though different past, a past of not very long ago.

Peter Wallenstein, professor of history at Virginia Tech, is the author of *Tell the Court I Love My Wife: Race, Marriage, and Law — An American History*.