Understanding Historical Limitations Placed Upon Minority Groups in American History

Unit/Lesson New Jersey Student Learning Standards (NJSLS):

6.1.12.A.1.b Analyze how gender, property ownership, religion, and legal status affected political rights.
6.1.12.A.5.b Analyze the effectiveness of governmental policies and of actions by groups and individuals to address discrimination against new immigrants, Native Americans, and African Americans.
RH.11-12.1. Accurately cite strong and thorough textual evidence, (e.g., via discussion, written response, etc.), to support analysis of primary and secondary sources, connecting insights gained from specific details to develop an understanding of the text as a whole.
RH.11-12.2. Determine the theme, central ideas, information and/or perspective(s) presented in a primary or secondary source; provide an accurate summary of how key events, ideas and/or author's perspective(s) develop over the course of the text.

Brief Summary of Cultural Compentencies Related to the Unit/Lesson:

What makes this lesson culturally relevant?

Comparative analysis of histories of marriage discrimination within the Asian-American, African-American, LGBT, and disabled populations throughout American history for the purpose of understanding the various identities of American and how each has encountered obstacles to equal protection before the law.

Lesson Overview:

Essential Question(s)	Many people think of democracy as being the most "fair" type of government, but is that necessarily the case? How can a set of laws favor one particular group in society? How can one recognize or identify situations of systemic inequality? Why might democratic societies pass laws that favor majority groups at the expense of minority groups?
Enduring Understanding(s)	LGBT people, like other minority groups before them, have encountered structural obstacles in the form of codified laws that have limited their ability to enjoy the full protections of citizenship as dictated by the United States Constitution.

Potential Misconceptions	That all members of a democracy benefit equally from its power structure and have equal access to rights and privileges.

Learning Plan, Experiences, Instruction and Learning Activities:

	The Teacher will…
W What is expected? ● List the intentional learning objectives on the board	**Students will be able to:** ● Analyze and explain the impediments placed before various populations of Americans as pertains to marriage; ● Analyze and explain the logic used to overturn statutes that were employed to ban same-sex marriage; *Today we will be working on...*
H How will we hook (Introduce this to) the students? ● Activate thinking ● Consider the language you will use to introduce the lesson (See example in the table)	**Link to Engagement** *Recently, we…* ● *Talked about the enduring principles in the Preamble to Constitution and goals outlined for citizens of the nation.* *Turn and talk to a partner about…* ● *What the language of the Declaration of Independence and Constitution are meant to tell us about the nature of inclusion within American society and what imbalances do you know about in our society?* *You are really beginning to understand how the government of the United States has excluded minority groups in society. Today, we're going to dig deeper with a new focus on a concept called disenfranchisement. For the purposes of today's lesson, disenfranchisement can be defined as "being deprived of a right of privilege." This focus is...*
E What equipment, resources, or materials are needed?	Materials for this lesson include….(materials listed below will be made by us) ● Article about the Fourteenth Amendment and its importance ● Summaries of landmark cases ● Chart of anti-miscegenation laws ● Film Clips from *Loving* and *Freeheld* ● Portion of *Backstory* podcast titled "Malays, Not Mongolians" ● Graphic Organizer

R How will we rethink or revise our thinking throughout the lesson? ● What learning is confirmed? ● What misconceptions are uncovered? ● What is your new thinking?	Use questions such as the following to help students confirm or revise their current understandings: ● In a democratic government, is everyone actually equal? ● Does everyone have equal access to rights and privileges? ● If not, why do specific imbalances occur? Are those done on purpose?
E How will students self-evaluate and reflect on their learning?	Students should be able to both complete the provided graphic organizer with specific information about historical disenfranchisement of each group and craft a statement synthesizing what they have learned about this trend in American history.
T How will we tailor learning to varied needs, interests, and learning styles?	Students will be assigned to a group/task according to their preferred learning style and modality.
O How will we organize the sequence of learning during the lesson?	**Scaffold the Instruction** (1) Model Teacher will summarize and interpret an article about the Fourteenth Amendment and lead a discussion about its importance. (2) Guided Practice The graphic organizer will allow students to arrive at their own interpretations of the Fourteenth Amendment for the purpose of applying it to the case study populations named in the lesson plan. (3) Independent Practice Student analyses of the provided materials, which will also be recorded in the provided organizer.

Check for Understanding

(Formative evidence such as conferencing, group Q/A, teacher observation, exit-slip, etc.)	• Student summaries of the main ideas from *Loving* and *Obergefell*. • Written analysis of the ways in which the logic of the Fourteenth Amendment was pivotal in shaping the Court's decisions in both *Loving* and *Obergefell*.
Quiz/Test (optional): (attach copy of assessment)	
Performance Task/Project: (attach rubric)	• Class seminar about the implications of the use of state laws as tools of oppression of vulnerable minorities throughout American history. • Students will write a reflection about the ways in which American history has repeated itself in the use of statutes to ensconce structural discrimination in various eras of history.
Other:	

Supplemental Resources:

- https://www.glsen.org/educate/resources/curriculum
- GLSEN Guide for Best Practices

Section 1 of the Fourteenth Amendment provides:

> 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.

Excerpt from *Loving v. Virginia (1967)* Decision:

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U. S. 81, 320 U. S. 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States,* 323 U. S. 214, 323 U. S. 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they

"cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense."

McLaughlin v. Florida, supra, at 379 U. S. 198 (STEWART, J., joined by DOUGLAS, J., concurring).

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. [Footnote 11] 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.

II

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma,* 316 U. S. 535, 316 U. S. 541 (1942). *See also Maynard v. Hill,* 125 U. S. 190 (1888). 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.

Excerpt from the *Obergefell v. Hodges (2015)* Decision:

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U. S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U. S. 374, 384 (1978) , which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U. S. 78, 95 (1987) , which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, *e.g., M. L. B. v. S. L. J.*, 519 U. S. 102, 116 (1996) ; *Cleveland Bd. of Ed.v. LaFleur*, 414 U. S. 632 640 (1974); *Griswold*, *supra*, at 486; *Skinnerv. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942) ; *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923)...

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U. S. 810 , a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e.g.*, *Lawrence*, 539 U. S., at 574; *Turner*, *supra*, at 95; *Zablocki*, *supra*, at 384; *Loving*, *supra*, at 12; *Griswold*, *supra*, at 486. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g.*, *Eisenstadt*, *supra*, at 453 454; *Poe*, *supra*, at 542 553 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also *Zablocki*, *supra*, at 384 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning

contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki*, *supra*, at 386.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge*, 440 Mass., at 322, 798 N. E. 2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*, 570 U. S., at ___ ___ (slip op., at 22 23). There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving*, *supra*, at 12 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

THE EQUAL PROTECTION CLAUSE
By Brian Fitzpatrick and Theodore M. Shaw

Ratified as it was after the Civil War in 1868, there is little doubt what the Equal Protection Clause was intended to do: stop states from discriminating against blacks. But the text of the Clause is worded very broadly and it has come a long way from its original purpose. For example, despite its reference to "state[s]," the Clause has been read into the Fifth Amendment to prevent the federal government from discriminating as well.

Near the end of the nineteenth century, the Court considered whether racial segregation by the government violated the Constitution. If people were separated into different facilities by race, but those facilities were purportedly equally suitable, did that constitute discrimination? Historians have debated whether the Fourteenth Amendment was intended to end such segregation, but in Plessy v. Ferguson (1896), the Court ruled by a 7-1 vote that so-called "separate but equal" facilities (in that case, train cars) for blacks and whites did not violate the Equal Protection Clause. The decision cemented into place racist Jim Crow-era laws. In a famous dissent, Justice John Marshall Harlan disagreed, stating "[o]ur Constitution is color-blind . . . ." Plessy remained the law of the land until 1954, when it was overruled in Brown v. Board of Education. The Supreme Court unanimously overruled the reasoning of Plessy and held that separate schools for blacks and whites violated the Equal Protection Clause. Brown was a decisive turning point in a decades-long struggle to dismantle governmentally imposed segregation, not only in schools but throughout American society. Brown was a turning point, but it was not the end of the struggle. For example, it was not until 1967 in Loving v. Virginia that the Supreme Court held that laws prohibiting interracial marriages violated Equal Protection.

Although the original purpose was to protect blacks from discrimination, the broad wording has led the Supreme Court to hold that all racial discrimination (including against whites, Hispanics, Asians, and Native Americans) is constitutionally suspect. These holdings have led to an ongoing debate for the last several decades over whether it is unconstitutional for governments to consider the race of blacks, Hispanics, and Native Americans as a positive factor in university admissions, employment, and government contracting. We will address this question in our separate statements.

The Supreme Court has also used the Equal Protection Clause to prohibit discrimination on other bases besides race. Most laws are assessed under so-called "rational basis scrutiny." Here, any plausible and legitimate reason for the discrimination is sufficient to render it constitutional. But laws that rely on so-called "suspect classifications" are assessed under "heightened scrutiny." Here, the government must have important or compelling reasons to justify the discrimination, and the discrimination must be carefully tailored to serve those reasons. What types of classifications are "suspect"? In light of the history of the Equal Protection Clause, it is no surprise that race and national origin are suspect classifications. But the Court has also held that gender, immigration status, and wedlock status at birth qualify as suspect classifications. The Court has rejected arguments that age and poverty should be

elevated to suspect classifications.

One of the greatest controversies regarding the Equal Protection Clause today is whether the Court should find that sexual orientation is a suspect classification. In its recent same-sex marriage opinion, Obergefell v. Hodges (2015), the Court suggested that discrimination against gays and lesbians can violate the Equal Protection Clause. But the Court did not decide what level of scrutiny should apply, leaving this question for another day.

Like many constitutional provisions, the Equal Protection Clause continues to be in flux.