VOLUME 59 | 2014/15

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Loving v. Virginia as a Civil Rights Decision

59 N.Y.L. Sch. L. Rev. 175 (2014–2015)

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Loving v. Virginia, the unanimous U.S. Supreme Court decision that invalidated state laws restricting interracial marriage, marked the tail end of the civil rights cases of the 1950s and '60s.[1] *Loving* was not issued until 1967, more than a decade after the Court's decision in *Brown v. Board of Education*, holding racial segregation of public schools unconstitutional.[2] At the time of the 1963 March on Washington, nineteen states still had laws prohibiting interracial marriage,[3] and federal jurisprudence upholding these laws had remained the same since 1883.[4]

Civil rights litigators waited so long to launch an attack on state anti-miscegenation statutes in federal court because interracial marriage seemed at once so trivial and so controversial. Trivial because it involved interpersonal relationships rather than the weighty public rights to equal education, voting, and employment. But challenging the marriage laws also struck at the bedrock of racism: Classifying human beings into supposedly biological races that should be kept apart. Some civil rights advocates, as well as justices on the Warren Court, feared that attacking anti-miscegenation too soon was doomed to fail and would threaten the implementation of recent civil rights victories because white Southerners' loathing of racial intermingling was so basic to their dogma of racial separation.[5] After all, a primary reason for segregated schooling was to foreclose the interracial intimacy that might be sparked in integrated classrooms.[6] Moreover, prior to *Loving*, state control over marriage was absolute.[7]

Loving was the capstone of the Court's blow to the Jim Crow regime. As the Court stated, it struck down the Virginia law because it was a measure "designed to maintain White Supremacy."[8] Yet subsequent decades have faded the understanding of *Loving* as a civil rights decision. While *Brown* became the emblem of the end to *de*

1. 388 U.S. 1, 9–10 (1967).

2. 347 U.S. 483, 495 (1954).

3. Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage, and Law—An American History 204 (2002) ("[I]n 1962, Arizona repealed its miscegenation law, and Utah and Nebraska followed the next year. That left 19 states . . . .").

4. *Id.* at 173, 180; *see also* Pace v. Alabama, 106 U.S. 583, 583, 585 (1883) (upholding a law that punished proscribed interracial sex more harshly than proscribed sex with someone of the same race).

5. *See* Wallenstein, *supra* note 3, at 201–14 ("[I]nterracial marriage was often what opponents of change voiced as their central concern.").

6. *See* Reginald Oh, *Defining the Voices of Critical Race Feminism: Interracial Marriage in the Shadows of Jim Crow*, 39 U.C. Davis L. Rev. 1321, 1324 (2006) (interpreting school segregation as a form of anti-miscegenation); Herbert Ravenel Sass, Mixed Schools and Mixed Blood 8–9 (1956) *reprinted in* Herbert Ravenel Sass, *Mixed Schools and Mixed Blood*, Atlantic, Nov. 1956, at 48 ("[T]he elementary public school is the most critical of those areas of activity where the South must and will at all costs maintain separateness of the races."); Gene Sherman, *South's Most Deep-Rooted Fear: Inter-Racial Marriage*, L.A. Times, Jan. 17, 1961, at 2 ("Miscegenation is a deep-rooted fear and unquestionably one of the foremost concerns of the Southern citizen.").

7. *See* John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 How. L.J. 15, 32–33 (2007) (noting that *Loving* ended unlimited state control over marriage that had been established by the Court in *Maynard v. Hill*, 125 U.S. 190, 205 (1888)).

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

jure segregation, *Loving* fell into relative obscurity. In his recent book, *The Civil Rights Revolution*, constitutional law scholar Bruce Ackerman denies that *Loving* "deserves a central place in the civil rights canon."[9] The same-sex marriage movement revived the decision to stand for the right to marry the partner of one's choice.[10] In 2007, on the occasion of the fortieth anniversary of the *Loving* decision, Mildred Loving commented:

> I am proud that Richard's and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all. That's what *Loving*, and loving, are all about.[11]

Today, *Loving* is remembered more for protecting the right to marry than for toppling the final pillar of the *de jure* racial caste system in the United States. Moreover, to the extent that federal courts rely on *Loving* as a civil rights decision, they have largely distorted its reasoning, as well as its significance to the struggle to end racism and white domination.[12]

This article aims to revive *Loving* as a civil rights decision, and to stress the continuing importance of its recognition of the relationship between racial classifications and white supremacy. Part I places the Lovings' lawsuit in the context of the litigation agenda that helped institute the civil rights revolution. Jim Crow restrictions on marriage implemented the combined white supremacist and eugenicist ideologies of an innate racial hierarchy that called for racial separation. Both civil rights lawyers and U.S. Supreme Court justices delayed tackling state anti-miscegenation laws for strategic reasons. But they understood these laws as part of the Jim Crow segregationist system that the civil rights movement was dismantling and kept their abolition as an eventual goal.

Part II analyzes the *Loving* decision as a challenge to racism and white supremacy as much as the validation of marriage rights—and the entangled relationship between the two in the Court's constitutional reasoning. Just as bans on interracial marriage were an essential part of the segregationist regime, eliminating them was an integral chapter in the series of civil rights decisions issued by the Warren Court. A central

9. Bruce Ackerman, We the People, Volume 3: The Civil Rights Revolution 291 (2014) (examining how the civil rights movement, federal civil rights legislation, and *Brown* transformed the U.S. Constitution).

10. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va. L. Rev. 1419, 1504 (1993) ("*Loving v. Virginia*, the principal case establishing the due process right to marry, also provides the best analogy for gaylaw's view that the practice of excluding lesbian and gay couples from state-sanctioned marriage should be abruptly rather than gradually ended."); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1951 (2004) (referring to same-sex marriage as *Loving*'s "overdue companion ruling for gays and lesbians in America"). *See generally* William N. Eskridge, Jr., The Case for Same-Sex Marriage 153–67 (1996); Loving v. Virginia, 388 U.S. 1 (1967), *reprinted in* Same-Sex Marriage: Pro and Con 88–90 (Andrew Sullivan ed., 2004) (1997).

11. Mildred Loving, *Loving for All*, Freedom to Marry (June 12, 2007), http://www.freedomtomarry.org/page/-/files/pdfs/mildred_loving-statement.pdf.

12. *See generally infra* notes 154–64.

question in *Loving* was whether the Court would extend the holding in *Brown* from the realm of public education to state laws regulating marriage.[13] By applying *Brown*'s prohibition of racial separation to the private sphere of marriage, formerly seen as the exclusive domain of states' power, the Court radically confirmed a constitutional mandate for federal intervention in all aspects of the nation's racial regime.

Part III evaluates how federal courts have interpreted the civil rights dimension of *Loving* in the decades that followed. I argue that key U.S. Supreme Court decisions have perverted the central lesson of *Loving*. Rather than link racial classifications to political subordination (as the *Loving* Court did), subsequent Court opinions have wrongly relied on *Loving* to do just the opposite.[14] *Loving* has been misused to support a colorblind approach to the Fourteenth Amendment that treats the government's use of race to eliminate the contemporary vestiges of Jim Crow as contemptible as the Jim Crow classifications designed to enforce white rule.

Finally, Part IV explains why the lessons of *Loving* as a civil rights decision are especially important in today's supposedly "post-racial" society. A new biopolitics of race is resuscitating the notion of biological racial classifications underlying the anti-miscegenation laws that *Loving* struck down. Genomic science and gene-based biotechnologies are promoting race-consciousness at the molecular level at the very moment the Court and many policymakers believe race-consciousness is no longer necessary at the social level. I conclude that it is more urgent than ever to understand race as a political system that determines individuals' status and welfare, and for federal courts to implement, uphold, and enforce strong race-conscious remedies for the lasting legacy of slavery that the Fourteenth Amendment was intended to abolish and civil rights activists fought to eradicate.

I. THE LOVING LAWSUIT IN THE CIVIL RIGHTS AGENDA

On June 2, 1958, Richard Loving, a twenty-four-year-old white bricklayer, drove from Caroline County, Virginia with eighteen-year-old Mildred Jeter, his part-Negro, part-Cherokee childhood sweetheart, to wed in Washington, D.C. because they were barred by law from marrying in their home state.[15] Many of the blacks and whites in the county had mixed ancestries that included Cherokee.[16] Outside of officially segregated spaces, residents of different racial backgrounds "freely socialized, worked side by side (Richard's father worked for a black landowner) and occasionally fell in love."[17] The Lovings returned to Virginia to live with Mildred's parents as a married couple. Five weeks later, the newlyweds were awakened in their bedroom by the county sheriff and two deputies who arrested them for unlawful cohabitation. The Lovings'

13. *See infra* notes 67–73.

14. *See infra* notes 154–64.

15. Robert A. Pratt, *The Case of Mr. and Mrs. Loving: Reflections on the Fortieth Anniversary of Loving v. Virginia*, *in* Family Law Stories 7–8, 14 (Carol Sanger ed., 2008); *see also* Susan Dominus, *The Color of Love*, N.Y. Times, Dec. 28, 2008, at A21.

16. Dominus, *supra* note 15; Simeon Booker, *The Couple That Rocked Courts*, Ebony, Sept. 1967, at 78–80.

17. Dominus, *supra* note 15.

marriage certificate, the sheriff said, was not recognized in the State of Virginia.[18] The Lovings were indicted by a grand jury for trying to evade the ban on interracial marriage.[19] They pleaded guilty and, on January 6, 1959, Judge Leon M. Bazile suspended their one-year sentence "on the condition that the [couple] leave the State and not return to Virginia together for [twenty-five] years."[20]

The Lovings' lawsuit challenging their conviction must be placed in the context of the litigation agenda that helped implement the civil rights revolution. By the time the American Civil Liberties Union (ACLU) brought the case before the U.S. Supreme Court, state anti-miscegenation laws had long been challenged by the National Association for the Advancement of Colored People (NAACP) and considered a potential target for the civil rights litigation campaign led by its Legal Defense and Education Fund. These laws were part of the Jim Crow segregationist apparatus, along with laws enforcing segregation in education, housing, employment, and public accommodations, and denying voting and other political rights.

A. Anti-Miscegenation Laws and the Segregationist Regime

Laws banning interracial marriage were a key part of the segregationist edifice dismantled by the civil rights movement.[21] Indeed, legal barriers to interracial intimacy were essential to establishing the political order that separated human beings into races, subordinated blacks to the rule of whites, and policed the boundaries between them.[22] Legal regulation of sex and marriage hardened the lines between the racial categories that emerged in the U.S. colonies. The statutes the Lovings violated had a long pedigree in Virginia that originated in slavery.[23] Virginia was the first colony to punish interracial sex when, in 1662, the legislature amended its prohibition of all fornication to impose heavier penalties if the guilty parties were "[N]egro[es]" and "Christian[s]."[24] In 1691, the Virginia Assembly beefed up its laws against racial mixing by making it a crime for Negro, mulatto, and Indian men to marry or "accompany" a white woman.[25] Just as significant as laws policing interracial sex was a

18. Pratt, *supra* note 15, at 14.

19. *Id.* at 15; Loving v. Virginia, 388 U.S. 1, 3 (1967).

20. *Loving*, 388 U.S. at 3.

21. *See generally* Wallenstein, *supra* note 3, at 201–14; Peggy Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 246–84 (2009) (explaining the legal attacks on miscegenation laws from *McLaughlin v. Florida* to *Loving v. Virginia*). For a description of federal immigration, citizenship, and military laws and regulations that restricted interracial marriages in the decades before 1967, see Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. Rev. 1361 (2011).

22. *See* Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L.J. 1967, 1967–68 (1989).

23. *Id.* at 2020–21; Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 Chi.-Kent L. Rev. 371, 372 (1994).

24. Kopytoff & Higginbotham, *supra* note 22, at 1967, 1993–94.

25. *Id.* at 1995; Wallenstein, *supra* note 23, at 390.

Virginia statute passed in 1662 that gave children born to black mothers and fathered by white men the status of slave.[26] This law permitted slaveholders to profit from their sexual exploitation of enslaved women.[27]

By shielding whites from marriage by all non-whites, Virginia aimed to preserve white racial purity; the 1691 statute left Negroes, mulattos, and Indians free to marry each other. Moreover, prior to the Civil War, the miscegenation laws punished only whites, both to protect slaveholders' commercial investment in enslaved blacks and to compel whites to preserve the purity of their bloodlines.[28] White people were held out as a privileged race that should protect itself from contamination by inferior races. Interracial marriage would "undermine the very basis of the caste order" by permitting non-whites to gain membership to the privileged caste, defined solely by its whiteness.[29] Anti-miscegenation laws ensured that black men, women, and children would not benefit from the privileges of legal marriage to a white person. As W.J. Cash explained in *The Mind of the South*, whites passed these laws to protect "the right of their sons in the legitimate line, through all the generations to come, to be born to the great heritage of white men."[30] In America's racial order, only white people were supposed to enjoy the valuable powers, privileges, and benefits conferred by white identity.[31]

The anti-miscegenation laws at the time the Lovings were arrested were part of the Jim Crow legal regime that took hold after the Civil War and officially separated blacks from whites in every aspect of social life—from schools to hospitals, buses, restaurants, hotels, swimming pools, and drinking fountains. From 1874 to 1913, at least twelve states and territories passed legislation against interracial marriage.[32] At

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26. A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process; The Colonial Period 42–45 (1978); *see also* Paul Finkelman, *The Crime of Color*, 67 Tul. L. Rev. 2063, 2082–83 (1993) (noting that the 1662 Virginia act entitled "Negro womens [sic] children to serve according to the condition of the mother" specified a mechanism for determining a person's legal race).

27. Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 22–33 (First Vintage Books 1999) (1997); *see also* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 Stan. L. Rev. 221 (1999) (discussing tort, trusts and estates, and other legal doctrines that collaborated with rules of rape and reproduction in enslaved women's sexual exploitation).

28. Kopytoff & Higginbotham, *supra* note 22, at 1968, 2000–01; Randall Kennedy, Interracial Intimacies: Sex Marriage, Identity, and Adoption 220 (2003); Reginald Oh, *Regulating White Desire*, 2007 Wis. L. Rev. 463, 476–77 (2007).

29. Oh, *supra* note 28, at 474 ("To permit intermarriage would be to give the hybrid offspring the legal status of its father, and would soon undermine the very basis of the caste order." (quoting Kingsley Davis, *Intermarriage in Caste Societies*, 43 Am. Anthropologist 376, 389 (1941))).

30. W.J. Cash, The Mind of the South 116 (1941); *see also* Davis, *supra* note 27, at 282–83 ("How wealth is transferred . . . proves significant in marking a group's location in our culture.").

31. *See* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1726 (1993) ("White identity conferred tangible and economically valuable benefits and was jealously guarded as a valued possession, allowed only to those who met a strict standard of proof.").

32. *See* Wallenstein, *supra* note 3, at 160 figs.7 & 8 (showing that thirty states had anti-miscegenation regimes in place by 1913, while at least eighteen states had anti-miscegenation regimes in place in 1874).

the anti-miscegenation regime's peak, from 1913 to 1948, thirty states prohibited sexual and marital relationships between blacks and whites.[33] Some states also banned these relationships between Native Americans and whites, and Asians and whites.

Segregating people according to race required stricter enforcement of the borders delimiting whiteness. The legal apparatus regulating marriage included both race-based prohibitions and the racial classifications needed to implement them.[34] The effort to legislate the superior political status of whites, and the inferior political status of non-whites, necessitated legal specifications for those categories.[35] State laws banning interracial marriage had to stipulate a test for Negroes, Mongolians, Indians, and other racialized groups who were barred from marrying whites. In other words, the legal construction of racial categories was a means of implementing the white supremacist regime. Defining the Negro race as varying degrees of African ancestry was not determined by nature, but was necessitated by the state's interest in banning interracial relationships and other forms of racial mixing ultimately aimed at upholding white domination.

The statutes at issue in *Loving* were part of the Racial Integrity Act of 1924, a "comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages."[36] The act made it a crime for a "white person" to marry anyone other than another "white person," defined as having "no trace whatever of any blood other than Caucasian," and prevented officials from issuing marriage licenses until they were satisfied that the applicants' statements as to their race were correct.[37] The law also required local and state registrars to keep certificates of "racial composition" for everyone born in the state.[38] Violations of the marriage ban were felonies punishable by one- to five-years imprisonment.[39]

The Jim Crow regime emerged at the same time as eugenics was taking hold as mainstream science in the United States.[40] American scientists embraced the theory

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33. *Id.* at 160 fig.8.

34. Pascoe, *supra* note 21, at 134.

35. *Id.*

36. Loving v. Virginia, 388 U.S. 1, 4 (1967).

37. *Id.* at 6–7.

> *Intermarriage prohibited; meaning of term "white persons."*—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 chapter, the term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian. . . .

Id. at 5 n.4 (quoting Va. Code Ann. § 20-54 (1960 Repl. Vol.)).

38. *See id.* at 6–7.

39. *Id.* at 4 (quoting Va. Code Ann. § 20-59 (1960 Repl. Vol.)) ("*Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.").

40. *See* Gregory Michael Dorr, Segregation's Science: Eugenics and Society in Virginia 3–4 (2008).

that intelligence and other personality traits are genetically determined (and therefore inherited), and launched a campaign to remedy America's social problems by stemming biological degeneracy.[41] The eugenicists advocated the rational control of reproduction in order to improve the nation's mental, moral, and physical health through selective breeding. In reality, eugenics enforced social judgments about race, class, and gender, cloaked in scientific terms.[42] The scientific theory of genetic hierarchy supported the desire by white Anglo Saxons to maintain control over an exploited workforce of Southern black sharecroppers and urban factory workers from southern and eastern Europe. They were also obsessed with preventing "race suicide" and preserving their racial purity.

Eugenicists saw two main problems with racial miscegenation. First, race mixing diluted the Anglo Saxon racial stock, which was seen to be the superior gene pool that should be expanded by positive eugenic programs. The Racial Integrity Act expressed eugenicists' worry that mating between whites and anyone with any trace of Negro ancestry would deteriorate the white race. Second, eugenicists believed that people of different races were so distinct that if they mated, the genes coming from each parent would create abnormalities in their offspring. Whites and Negroes were at opposite ends of the racial classification scheme, so their mixing was supposed to cause the most havoc.

On the same day in March 1924, the Virginia legislature enacted two laws that jointly promoted the state's eugenicist and racist agendas.[43] Virginia's anti-miscegenation law, the Racial Integrity Act, implemented the Jim Crow racial separation scheme by discouraging the reproductive intermingling of people who were believed to be naturally divided by race. The trial judge who sentenced the Lovings explained the law's rationale:

> Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[44]

Of course, people of different races had been mixing in Virginia for centuries, as Thomas Jefferson's sexual relationship with his slave Sally Hemings illustrates.[45] Since the founding of the colony, Virginia officials saw a need to pass punitive laws in an effort to stem voluntary and coerced sexual intermingling that occurred across racial

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41. *See* Daniel J. Kevles, In the Name of Eugenics: Genetics and the Uses of Human Heredity 83–84 (First Harvard Univ. Press 1995) (1985).

42. *See generally* Stephen Jay Gould, The Mismeasure of Man (1981) (explaining that social prejudice influences scientific research to produce results that conform to scientists' prejudices).

43. Act of Mar. 20, 1924, ch. 371, 1924 Va. Acts 534 (preserving racial integrity); Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (providing for the sexual sterilization of inmates of state institutions in certain cases).

44. Loving v. Virginia, 388 U.S. 1, 3 (1967).

45. *See* Lerone Bennett, Jr., *Miscegenation in America*, Ebony, Oct. 1962, at 96. *See generally* Annette Gordon-Reed, Thomas Jefferson and Sally Hemings: An American Controversy 1 (1997).

lines. Thus, the trial judge relied on an assumed natural order rooted in racist ideology to obscure the state's imposition of a white supremacist order on human interactions.

Along with the Racial Integrity Act, which the Lovings violated, lawmakers passed "An act to provide for the sexual sterilization of inmates of state institutions in certain cases," authorizing the forced sterilization of people confined to government asylums because they were "feeble-minded." This compulsory sterilization law was the subject of the 1927 case, *Buck v. Bell*, in which the Court, in an opinion by Justice Oliver Wendell Holmes, upheld its constitutional validity.[46]

Walter Ashby Plecker, Virginia's first registrar of vital statistics, embodied the state's dual racial integrity and eugenicist mission.[47] His Bureau of Vital Statistics put in place the administrative procedures necessary to implement the state's anti-miscegenation laws. The administrative apparatus, composed of midwives and doctors who reported births, undertakers who reported deaths, and marriage license clerks, ensured that the racial identities of all Virginians were accurately recorded, and that the prohibition against intermarriage was strictly enforced.[48] Eugenic science confirmed Plecker's "greatest surprise and shock" at "the great amount of racial intermixture going on quietly and steadily" and steeled his resolve to protect the white race from the "terrible calamity" caused by births of mulatto children.[49] Plecker corresponded with Harry Hamilton Laughlin, superintendent of the Eugenics Record Office and well-known lobbyist for the movement.[50] Thus, eugenic science went hand in hand with Jim Crow restrictions on marriage, together implementing the white supremacist ideology of an innate racial hierarchy that called for racial separation.

B. Movement Priorities, Litigation Strategy, and the Assault on Anti-Miscegenation Laws

Civil rights activists were well aware of the role anti-miscegenation laws played in supporting the racial order. In 1910, the renowned sociologist and civil rights leader W.E.B. DuBois wrote in *The Independent*, "I believe that all so-called 'laws against intermarriage' are simply wicked devices to make the seduction of women easy and without penalty, and should be forthwith repealed."[51] DuBois articulated one of the main arguments blacks made against these laws: They shielded white men's sexual exploitation of black women.[52] In its early years, branches of the NAACP waged a concerted assault to defeat anti-miscegenation laws in state

46. 274 U.S. 200, 208 (1927).

47. Dorr, *supra* note 40, at 137, 147–48; Pascoe, *supra* note 21, at 140–43.

48. Pascoe, *supra* note 21, at 143–45.

49. *Id.* at 140–41.

50. *See generally* Philip Reilly, *The Virginia Racial Integrity Act Revisited: The Plecker-Laughlin Correspondence: 1928–1930*, 16 Am. J. Med. Genetics 483 (1983) (contextualizing and reporting the correspondence between Plecker and Laughlin from 1928–1930).

51. Pascoe, *supra* note 21, at 169.

52. *Id.* at 179.

legislatures across the country.[53] From 1913 to 1929, as these bills were introduced in the North, "[t]he NAACP met every attempt with firm resistance, mounting at least twenty-nine separate campaigns in northern state legislatures, and lobbying against fourteen proposals for laws designed to cover Washington, D.C."[54] In the early years of the civil rights movement, however, marriage restrictions were yet to become a priority on the civil rights litigation agenda.[55]

Historian Peter Wallenstein's account of correspondence between a local attorney and the NAACP suggests why the organization and its allies delayed making interracial marriage the focus of its campaign in the federal courts.[56] In 1944, a federal judge in Oklahoma denied a black man, William Stevens, an inheritance from his deceased wife, Stella Sands, because she was a "full-blood Creek Indian."[57] Under Oklahoma law, their marriage was void, and therefore did not revoke the will that Sands had created prior to their union. Stevens's attorney, A.L. Emery, wrote a letter to NAACP Special Counsel Thurgood Marshall asking for help to appeal the decision to the Tenth Circuit Court of Appeals.[58] Marshall indicated that the NAACP had contemplated a challenge to state interracial marriage bans, replying that "this is most certainly the type of case we are vitally interested in and it will be a pleasure to serve with you."[59] But the organization's enthusiasm for litigating the matter soon waned in the face of strategic considerations. Marshall and his colleagues feared that the strength of federal case law supporting state anti-miscegenation laws predicted "a great likelihood and danger of creating an unfavorable Appellate Court precedent."[60] The NAACP sent Emery financial contributions to support his advocacy for Stevens, but declined to launch its own legal challenge to Oklahoma's statute. The Tenth Circuit affirmed the district court decision disinheriting Stevens on the basis of his race.[61]

Shortly after the Court issued its 1954 decision in *Brown*, NAACP President Walter White told a reporter that the organization had "always opposed" anti-miscegenation laws "on the basic ground that they do great harm to both races."[62] But the NAACP still refrained from mounting the type of aggressive litigation campaign to overturn the laws as it had in the areas of education, housing, employment, public

53. *Id.* at 172–73.

54. *Id.* at 172.

55. *Id.* at 202–04; *see also* Wallenstein, *supra* note 3, at 201–02.

56. *See* Wallenstein, *supra* note 3, at 179. ("[E]xperience had led the NAACP lawyers to see that they 'must proceed with caution in that the case must not only be the right type of case, but it must also be brought at the right time.'").

57. Stevens v. United States, 146 F.2d 120, 122, 124 (10th Cir. 1944).

58. *See* Wallenstein, *supra* note 3, at 175–76.

59. *See id.* at 176.

60. *See id.*

61. *Stevens*, 146 F.2d at 124.

62. Wallenstein, *supra* note 3, at 184.

accommodation, and voting rights. Instead, it was the ACLU that persuaded the California Supreme Court in 1948 to strike down the California law in *Perez v. Sharp*, and challenged the Virginia statute in the U.S. Supreme Court.[63]

Most civil rights activists at that time distinguished between political rights and less pressing rights, such as "social equality" involving personal relationships.[64] On the one hand, Dr. Martin Luther King, Jr. condemned anti-miscegenation laws because "from the beginning [they] grew out of racism and the doctrine of white supremacy," and he called the *Loving* decision "a real attack on racism."[65] On the other hand, King diminished their significance, observing, "In states where you have had that right all along there hasn't been a large number of intermarriages."[66] Morehouse College President Benjamin Mays echoed this observation in a letter, objecting to the claim that the NAACP's attack on segregation would lead to intermarriage: "I don't agree with you that the abolition of segregation means intermarriage. It has not meant this in Boston, New York and Chicago. In fact it has not meant this in over half of the nation where segregation by law does not exist."[67]

In a 1966 article supporting the constitutionality of anti-miscegenation laws, Alfred Avins wrote that Negroes at the time the Fourteenth Amendment was adopted considered intermarriage less urgent because "[i]t was not treated like the right to vote or other rights which should be encouraged."[68] In the wake of the Civil War, white Americans also believed that granting emancipated African Americans limited forms of legal equality need not entail treating them as social equals.[69] Their preference for granting blacks political rights over social rights persisted into the twentieth century. Swedish economist Gunnar Myrdal discovered in his interviews of U.S. whites for his 1944 classic, *An American Dilemma*, "that they overwhelmingly put their highest priority on maintaining 'the bar against intermarriage and sexual intercourse involving

63. Ackerman, *supra* note 9, at 293; Perez v. Sharp, 198 P.2d 17 (Cal. 1948).

64. Pascoe, *supra* note 21, at 168; *see also* Renee C. Romano, Race Mixing: Black-White Marriage in Postwar America 177 (Harvard Univ. Press 2003).

65. Chester Higgins, *Mixed Marriage Ruling Brings Mixed Reaction in Dixieland*, Jet, June 29, 1967, at 24.

66. *Id.* at 25.

67. Alex Lubin, Romance and Rights: The Politics of Interracial Intimacy, 1945–1954, at 94 n.46 (quoting Letter from Benjamin E. Mays to Garland B. Porter (Dec. 16, 1954) (on file with the Library of Congress)).

68. Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 Va. L. Rev. 1224, 1253 (1966).

69. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1120 (1997); Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 Cardozo L. Rev. 1689, 1696 (2005). *But see* Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. Rev. 1393, 1463 (2012) ("The Civil Rights Act of 1866 gave African Americans the same right to enter into marriage contracts with white citizens as was enjoyed by white citizens."). Calabresi and Matthews discuss two state supreme court decisions from the 1870s that held that anti-miscegenation laws violated the Civil Rights Act of 1866 and the Fourteenth Amendment. *See id.* at 1463–69.

white women'" and were less resistant to extending opportunities to blacks in the public spheres of education, employment, and voting.[70]

Civil rights advocates feared that pressing to overturn interracial marriage bans would jeopardize the gains made in desegregating public education. Peter Wallenstein explains, "Not only were other matters more urgent, but there seemed far greater likelihood of success in pursuing them, and a failed effort would be substantially worse than just leaving things alone."[71] The Court victories leading to *Brown* posed a barrier because Southerners viewed the erosion of segregated education as a path to interracial intimacy.[72] Southerners interviewed by a *Los Angeles Times* reporter in 1961 expressed their "deep-rooted fear" of interracial marriage as the source of their objection to integration.[73] According to a New Orleans businessman, it was fine for blacks to use public accommodations, "[b]ut as soon as they start going to school with white children they'll start breaking in socially. Kids don't know any better. First thing you know they'll be fooling around and then intermarrying and eventually you'll have amalgamation of the races."[74] Roy Wilkins of the NAACP explained whites' obsession with intermarriage as the result of "desperation" from civil rights gains: "The little world they have constructed for themselves that was so comfortable and unchallenged for so long (due largely to the illegal machinery they had built to delay or prevent its being challenged) is now crumbling about them. So they scream intermarriage."[75] Ironically, the subject of interracial intimacy was at once too trivial and too controversial to rise to the top of the civil rights agenda.

Like the NAACP advocates, the justices of the Supreme Court delayed acting on state bans on interracial marriage for fear that a premature challenge might set back the momentum created by civil rights activism. An Alabama case involving the conviction of a black woman, Linnie Jackson, for marrying a white man arrived at the Court in 1954, shortly after the decision in *Brown*. In a November 3, 1954 memo, Harvey M. Grossman, law clerk to Justice William O. Douglas, advised that although "[i]t seems clear that the statute involved is unconstitutional," the justices should consider postponing review "until the school segregation problem is solved" because "review at the present time would probably increase the tensions growing out of the

70. Ackerman, *supra* note 9, at 292 n.4 (quoting Gunnar Myrdal, An American Dilemma 60–61 (2d ed. 1962).

71. Wallenstein, *supra* note 3, at 179.

72. *See* Pascoe, *supra* note 21, at 202–03 ("The closer the NAACP came to eradicating the principle of separate but equal in education, the more southern intransigents defended race segregation in the schools as necessary in order to stave off interracial sex and marriage."). Successful challenges to segregated education preceding *Brown* included *Sweatt v. Painter*, 339 U.S. 629 (1950), holding that admission of blacks to a separate law school at the University of Texas violated the Fourteenth Amendment. *See generally* McLaurin v. Okla. Regents for Higher Educ., 339 U.S. 637 (1950) (holding unconstitutional the University of Oklahoma's separate treatment of a black doctoral student).

73. Sherman, *supra* note 6.

74. *Id.* at 9.

75. Letter from Roy Wilkins to Benjamin E. Mays (Dec. 23, 1954) (on file with the Library of Congress).

school segregation cases and perhaps impede solution to that problem."[76] Nevertheless, Douglas, along with Justice Hugo Black and Chief Justice Earl Warren, voted to hear *Jackson v. Alabama*. But a five-justice majority (Harold Burton, Thomas Clark, Felix Frankfurter, Sherman Minton, and Stanley Reed) cast the deciding votes to let Linnie Jackson's conviction stand.[77]

One year later, in *Naim v. Naim*, the justices continued to avoid the miscegenation issue when they declined to overturn a Virginia Supreme Court decision upholding the constitutionality of the 1924 Racial Integrity Act in a case challenging the race-based annulment of the marriage between a Chinese man and white woman.[78] Justice Frankfurter reiterated the worry that striking down state restrictions on interracial marriage would jeopardize implementation of the Court's recent school desegregation rulings. He warned that deciding *Naim* would insert the topic of interracial marriage "into 'the vortex of the present disquietude' and 'very seriously . . . embarrass the carrying-out of the Court's decree of last May,'" referring to *Brown II*'s declaration that school desegregation would proceed with "all deliberate speed."[79] Instead, Frankfurter reminded his fellow brethren of "the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases."[80] Although the justices cast their handwringing over interracial marriage bans as prudent prioritizing, their delay in striking down these laws also reflected a timid reluctance to take such radical action against the Jim Crow regime at an early stage of the civil rights movement.[81]

It would be a mistake, however, to see this postponement as disconnecting *Loving* from the civil rights movement. The conflicted sentiments of both the NAACP lawyers and the U.S. Supreme Court justices show that they viewed anti-miscegenation laws as an odious part of the Jim Crow regime that the Fourteenth Amendment prohibited and the civil rights movement fought to abolish. When the *Loving* decision was issued, one of the Lovings' attorneys, Bernard S. Cohen, declared: "We hope we have put to rest the last vestiges of racial discrimination that were supported by the law in Virginia and all over the country."[82] Similarly, *Jet Magazine*'s Washington Bureau Chief Simeon Booker wrote, "For generations, civil

76. Wallenstein, *supra* note 3, at 180 (quoting Letter from Harvey M. Grossman, law clerk to William O. Douglas, Supreme Court Justice (Nov. 3, 1954) (on file with the Library of Congress)).

77. *Id.*

78. *Id.* at 180–81; Naim v. Naim, 87 S.E.2d 749, 749 (Va. 1955).

79. Ackerman, *supra* note 9, at 289, 294; *see also* Brown v. Bd. of Educ., II, 349 U.S. 294 (1955) (issuing directives to district courts to implement the Court's holding in *Brown I*).

80. Wallenstein, *supra* note 3, at 182; *see also* Pascoe, *supra* note 21, at 230 ("When *Naim* reached the U.S. Supreme Court, it caused even more distress among the justices than it had among civil rights organizations."); Ackerman, *supra* note 9, at 289 ("Throughout the entire civil rights revolution, the president and Congress were completely unwilling to pass a federal statute banning state anti-miscegenation laws.").

81. *See* Richard Delgado, *Naim v. Naim*, 12 Nev. L.J. 525 (2012).

82. Helen Dewar, *Victor in Mixed Marriage Case Relieved: "I Feel Free Now . . ."*, Wash. Post, June 13, 1967, at A11.

rights leaders conceded that until the complete framework of segregation was erased and that freedom extended into the sphere of marriage, the United States' role as a democracy could be challenged. Few organizations, however, dared to contest 'the bedroom aspect.'"[83] The delay was a matter of strategic prioritizing, not a lack of concern about interracial marriage laws as a civil rights matter.

Moreover, litigation and legislative challenges to state marriage restrictions proceeded outside the more visible federal court campaigns waged by the NAACP and ACLU. In the *Perez* decision, the Supreme Court of California held by a 4-3 majority that the state anti-miscegenation law was unconstitutional.[84] Court-ordered reapportionment weakened conservative control in Southern border states, making laws restricting interracial marriage more vulnerable.[85] By 1963, almost one-third of the thirty states that banned interracial marriage at the time of *Perez* had repealed their statutes.[86] While between 1946 and 1956 only one state—California—invalidated its interracial marriage ban as unconstitutional, twelve states repealed their anti-miscegenation laws between 1956 and 1966.[87] The civil rights revolution had already reached restrictive marriage laws by the time *Loving* reached the high court. As Bruce Ackerman notes, moreover, the political transformation generated by landmark civil rights statutes passed by Congress in 1964 and 1965 opened the way for civil rights litigators to broach this "dangerous territory" in the U.S. Supreme Court.[88]

Civil rights organizing also affected attitudes on interracial intimacy. Historian Renee C. Romano points to the growing interest in social equality among young civil rights activists in the 1960s who "envisioned a world where blacks and whites would relate to each other as brethren and social equals."[89] Their rejection of traditional racial and sexual norms and embrace of interracial organizing helped make anti-miscegenation laws a higher priority.[90] At the same time, the question of interracial marriage seemed less a trivial indicator of racial progress and more its supreme test. "Would you like to have your daughter marry a Negro?"—the "ultimate question" of race relations according to a 1966 *New York Times* article on *Loving*[91]—was seen by

83. Simeon Booker, *Kill Laws Against Mixed Marriages: Case of Virginia White Man with Negro Wife Led to Ruling*, Jet, June 29, 1967, at 18.

84. Perez v. Sharp, 198 P.2d 17, 34 (Cal. 1948); R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp*, *Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 Calif. L. Rev. 839, 848 (2008).

85. *See* Romano, *supra* note 64, at 190.

86. *See* Wallenstein, *supra* note 3, at 253–54 (explaining that nine of the thirty states with anti-miscegenation laws after World War II no longer had miscegenation laws by 1963); *see also* Ackerman, *supra* note 9, at 296 ("[A] decline in the number of anti-miscegenation states from thirty in 1947 to seventeen in 1965.").

87. M. Annella, *Interracial Marriages in Washington, D.C.*, 36 J. Negro Educ. 428, 428 (1967).

88. Ackerman, *supra* note 9, at 289.

89. Romano, *supra* note 64, at 178.

90. *Id.*

91. Fred P. Graham, *The Law: Miscegenation Nears Test in High Court*, N.Y. Times, Mar. 13, 1966, at 200; *see also* Sherman, *supra* note 6, at 2; St. Clair Drake & Horace R. Cayton, Black Metropolis: A Study

conservatives as a powerful rallying call for all white men, and by liberals as a gauge of racial bias.[92] As Joseph Washington argued in *Marriage in Black and White*, published in 1970, "To the degree we come clean on marriage in black and white, everything else can be worked out, and to the degree we are dishonest about marriage in black and white, nothing else will work."[93] By the time lawyers for the Lovings announced they would test intermarriage bans before the high court, *The New York Times* criticized the significant delay in declaring the laws unconstitutional because they "strike deeper than ordinary segregation acts."[94]

In 1964, Yale Law School Dean Louis Pollak declared, "The time has come to remove this stigma from the fabric of American law."[95] Pollak was part of the NAACP Legal Defense Fund team that successfully defended a Miami Beach couple who were arrested in 1962 for violating a Florida statute that punished interracial couples who lived together without being married.[96] In *McLaughlin v. Florida*, the U.S. Supreme Court overturned its 1883 holding in *Pace v. Alabama* to strike down Florida's ban on interracial cohabitation for violating the Fourteenth Amendment.[97] The Court, however, explicitly declined to hold that its ruling applied to state bans on interracial marriage.[98]

The Court's narrow opinion reflected persistent caution in entering a controversial arena that Congress and the president had avoided.[99] Moreover, as I discuss below, it was not clear at that juncture whether or not the states' power to regulate marriage shielded anti-miscegenation laws from federal enforcement of the equal protection clause. *Loving* was a case of first impression. As Warren noted in *Loving*, "This case presents a constitutional question never addressed by this Court."

Thus, though delayed for strategic reasons, the *Loving* lawsuit was part of the civil rights litigation agenda to help dismantle the segregationist regime. Civil rights advocates long recognized that laws banning interracial marriage were critical to the racial order's ideological and institutional scaffolding. Indeed, the reluctance of the NAACP litigators and Supreme Court justices to confront anti-miscegenation stemmed

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of Negro Life in a Northern City 130 (Univ. Chi. Press 1993) (1970) ("The ultimate appeal for the maintenance of the color-line is always the simple, though usually irrelevant question, 'Would you want your daughter to marry a Negro?' To many white persons, this is the core of the entire race problem.").

92. *See* Romano, *supra* note 64, at 196–99.

93. *Id.* at 199 (quoting Joseph Washington, Marriage in Black and White 1–2 (1970)).

94. Graham, *supra* note 91.

95. Pascoe, *supra* note 21, at 265 (quoting Anthony Lewis, *Court Considers Race Marriages*, N.Y. Times, Oct. 15, 1964, at 34).

96. *Id.* at 246–48. The petitioners, Connie Hoffman and Dewey McLaughlin, were in fact married, but failed to disclose this fact to the court because the jail sentence for interracial marriage was longer than that for cohabitation. Ackerman, *supra* note 9, at 296.

97. McLaughlin v. Florida, 379 U.S. 184, 188–92 (1964).

98. *Id.* at 196.

99. *See* Ackerman, *supra* note 9, at 300 ("*McLaughlin* was simply an artful effort to legitimate a cautious judicial advance into a sphere left untouched by the Civil Rights Act.").

largely from white Southerners' deep aversion to interracial intimacy. *The New York Times* heralded the Court's decision to hear the case as "set[ting] the stage for a historic ruling on the last vestige of 'Jim Crow' legislation to survive in the South."[100]

II. THE *LOVING* DECISION'S CHALLENGE TO WHITE SUPREMACY

As we have seen, the assault on anti-miscegenation laws in the U.S. Supreme Court was a postponed yet integral part of the civil rights struggle and litigation agenda. Just as bans on interracial marriage were an essential part of the segregationist regime, eliminating them was an indispensable chapter in the series of civil rights decisions issued by the Warren Court. The Court's decision in *Loving* extended the anti-separation holding in *Brown*, decided thirteen years earlier, from the public sphere of state-provided education to the private sphere of marriage. In striking down Virginia's racial integrity law, the justices in *Loving* aimed to invalidate an instrument of white supremacy as much as to validate marriage rights—and the two missions were entangled in the Court's opinion.

A. "A Measure to Maintain White Supremacy"

The State of Virginia argued that the Racial Integrity Act did not violate the equal protection clause because it treated all citizens equally; it prohibited both whites and non-whites from entering interracial marriages. According to Virginia, "because its 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."[101] The proper standard of scrutiny, therefore, was whether Virginia had shown a rational basis for its race-based prohibition. But the Court soundly dispensed with the equal application theory and refused to let the smokescreen of formal equality hide the subordinating reality of the statute's blatant racial classification, noting that "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."[102] The Court therefore held that the statute should "be subjected to the 'most rigid scrutiny'" and "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."[103]

The contention between the Lovings and Virginia ultimately revolved not around the existence of a racial classification (the Racial Integrity Act meticulously categorized and regulated individuals by race) but on the purpose the classification scheme served. Virginia argued that the law's racial classification served a legitimate state purpose. In upholding the trial court's decision, the Supreme Court of Appeals

100. *Supreme Court Agrees to Rule on State Miscegenation Laws*, N.Y. Times, Dec. 13, 1966, at 40.

101. Loving v. Virginia, 388 U.S. 1, 8 (1967).

102. *Id.* at 9.

103. *Id.* at 11.

of Virginia relied on the 1955 decision in *Naim*, which approved state efforts "'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and the 'obliteration of racial pride.'"[104]

The U.S. Supreme Court, by contrast, could find no purpose for the law other than invidious racial discrimination. The Lovings' attorney, Philip Hirschkop, argued before the Court, "[W]e fail to see how any reasonable man can but conclude that these laws are slavery laws [and] were incepted to keep the slaves in their place . . . and in truth, the Virginia law still views the Negro race as a slave race."[105] The Court agreed, finding that the Racial Integrity Act originated as "an incident to slavery" and continued to be a "measure[] designed to maintain White Supremacy."[106] Justice Black asked Virginia Assistant Attorney General R.D. McIlwaine III during oral argument,"[I]s there any doubt in your mind that the object of this statute, the basic premise on which [it rests], is that the white people are superiors of the colored people and should not be permitted to marry?"[107] According to the Court's reasoning, the Virginia law violated the equal protection clause not simply because it employed racial classifications, but because its racial classification system furthered the state's impermissible white supremacist mission.[108]

B. Extending Brown *to Interracial Marriage*

The Lovings' attorneys also treated *Loving* as a part of the civil rights campaign when they treated the case as an extension of *Brown*. A central question in *Loving* was whether the Court would apply its ruling against state-enforced segregation in *Brown* to state restrictions on interracial marriage. In upholding the Racial Integrity Act, the Virginia Supreme Court in *Naim* saw the need to distinguish state school segregation, at issue in *Brown*, from state restrictions on marriage. Justice Archibald Chapman Buchanan wrote that the benefits to citizenship achieved by integrated education did not pertain to interracial marriage, which would only "weaken or destroy the quality of its citizenship" through "the obliteration of racial pride" and "the corruption of blood."[109]

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104. *Id.* at 7 (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)).

105. Transcript of Oral Argument at 6, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), *available at* http://www.oyez.org/cases/1960-1969/1966/1966_395 (last visited Jan. 15, 2015).

106. *Loving*, 388 U.S. at 6, 11.

107. Transcript of Oral Argument, *supra* note 105, at 24.

108. *See* Adele M. Morrison, *Same-Sex* Loving*: Subverting White Supremacy Through Same-Sex Marriage*, 13 Mich. J. Race & L. 177, 192–99 (2007) (distinguishing between *Loving*'s freedom of choice, antidiscrimination, and antisubordination principles); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. Miami L. Rev. 9, 10–12 (noting that *Loving* involved both anticlassification and antisubordination principles and arguing "that the scope of the two principles overlap, that their application shifts over time in response to social contestation and social struggle, and that antisubordination values have shaped the historical development of anticlassification understandings").

109. *Naim*, 87 S.E.2d at 755–56.

The ACLU countered this distinction by arguing that laws banning interracial marriage were a more obvious violation of the Fourteenth Amendment than laws segregating schools.[110] In its amicus brief, the NAACP Legal Defense and Education Fund echoed this comparison: "[L]aws against interracial marriage are among the last of such racial laws with any sort of claim to viability. But they are the weakest, not the strongest, of the segregation laws."[111] The *Brown* opinion relied on the influential 1944 study of race relations in America, *An American Dilemma*, by economist Gunnar Myrdal, for social scientific evidence of the injuries segregated education inflicted on black children.[112] Likewise, the ACLU's brief in *Loving* quoted *An American Dilemma* five times, suggesting that laws segregating schools and banning interracial marriage imposed a similar barrier to racial justice.[113]

More fundamentally, laws prohibiting integrated schools and interracial marriage were related parts of the Jim Crow legal apparatus designed to police a strict racial hierarchy based on white racial purity and superiority. Indeed, a key reason for educating children in separate schools was to prevent interactions that might lead to interracial marriages.[114] The *Loving* decision was an extension of *Brown* in the sense that both struck down anti-miscegenation laws that helped to maintain white supremacy.[115]

In *The Civil Rights Revolution*, however, Ackerman observes that Chief Justice Warren prudently avoided "excessive reliance on *Brown*" because of lingering concern that invalidating anti-miscegenation laws would "inflame southern resistance to school desegregation."[116] Warren quoted and cited *Brown*'s rejection of originalism to counter Virginia's argument that the Fourteenth Amendment's framers did not intend the amendment to reach state laws banning interracial marriage.[117] But he relied on two pre-civil rights decisions—*Hirabayashi v. United States*[118] and *Korematsu*

110. Brief for Appellants at 32, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), 1967 WL 113927, at *32 ("[M]iscegenation laws seem more clearly unconstitutional than school segregation . . . .").

111. Brief of NAACP Legal Def. and Educ. Fund, Inc. as Amicus Curiae at 14, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), 1967 WL 113929, at *14; *see also* Hannah Arendt, *Reflections on Little Rock*, *reprinted in* Same-Sex Marriage: Pro & Con: A Reader 144, 145 (Andrew Sullivan ed., 2004) (1997) (arguing that the right to integrated education and political rights, such as the right to vote, are secondary to the right to marry).

112. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954).

113. Brief for Appellants, *supra* note 110, at *24–27.

114. Oh, *supra* note 6, at 1324, 1333.

115. *Id.* at 1333–34 (analyzing *Loving* and *Brown* jointly as "cases dealing with anti-miscegenation").

116. Ackerman, *supra* note 9, at 285.

117. *Id.* at 301; *see also* Loving v. Virginia, 388 U.S. 1, 9 (1967) ("As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources 'cast some light' they are not sufficient to resolve the problem . . . .") (citing *Brown*, 347 U.S. 483).

118. 320 U.S. 81 (1943) (holding that President Franklin D. Roosevelt's wartime executive orders subjecting individuals of Japanese descent to a curfew did not violate the Fifth Amendment).

v. United States[119]—for the core holding that the equal protection clause requires that racial classifications be subjected to strict scrutiny.[120] Ackerman writes, "Rather than basing his judgment squarely on school desegregation precedents, he reached back a quarter century to the Court's decisions upholding the detention of Japanese Americans during World War II and made those into foundational precedents for *Loving*."[121] To Ackerman, this rhetorical gesture that enlisted wartime doctrine signaled that "the Court was *not* carrying on the civil rights revolution beyond the scope of concerns endorsed by We the People," as reflected by congressional action.[122]

Ackerman argues further that the *Loving* opinion "shifted doctrinal attention away from *Brown*'s focus on the real-world humiliations" caused by Jim Crow segregation to "the suspect purposes" of state legislators in enacting racial classifications.[123] According to Ackerman, the Court held in *Brown* that segregated education was unconstitutional based on the humiliation black children experienced every day by having to attend schools that were separate and inferior to those reserved for whites. In contrast, rather than describe how the Racial Integrity Act stigmatized interracial couples in everyday life, the *Loving* Court emphasized Virginia's invidious interest in banning interracial marriage. Warren failed to mention Myrdal's observations about white Americans' aversion to interracial sex quoted in the Lovings' brief and in *Brown*.[124]

Ackerman therefore disagrees "that *Loving* deserves a central place in the civil rights canon."[125] With *Loving*, the Court merely filled the gap remaining at the end of the civil rights revolution when its prior decisions and federal statutes left state anti-miscegenation laws standing—"a judicial mop-up operation."[126] Unlike its decisions that aligned with congressional action, *Loving* supplemented federal law by legalistically "entering a sphere that remained too hot for the political branches to handle."[127]

Ackerman's analysis of *Loving*, however, does not disconnect the decision from the civil rights movement. Indeed, his analysis, like mine, places *Loving* squarely in its historical context at the end of the struggle to revolutionize the racial order in the United States. Ackerman attributes *Loving* to "We the Judges" rather than "We the People," because it followed no landmark legislation invalidating state prohibitions of interracial marriage.[128] Yet, despite Congress's failure to touch "the bedroom aspect,"

119. 323 U.S. 214 (1944) (upholding the constitutionality of President Roosevelt's order excluding individuals of Japanese descent from certain areas, resulting in their confinement to internment camps).

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

121. Ackerman, *supra* note 9, at 290.

122. *Id.*

123. *Id.* at 291, 301 ("[Chief Justice Warren] swerved away from a strong reaffirmation of *Brown*'s anti-humiliation principle.").

124. *See id.* at 301–02.

125. *Id.* at 291.

126. *Id.* at 321.

127. *Id.* at 296.

128. *Id.* at 317, 321–22.

civil rights activists had overturned or defeated anti-miscegenation laws in most state legislatures over the prior five decades.[129] Moreover, the Court timed and framed its decision in *Loving* differently than its decision in *Brown* precisely for strategic reasons deeply entangled with the civil rights revolution taking place in the courts, in Congress, in the White House, and in the streets. In this sense, *Loving* is most definitely a civil rights decision.

What about *Loving*'s place in the civil rights canon? Ackerman finds *Loving*'s legacy tarnished further because Warren swerved away from the anti-humiliation principle that animated *Brown*. Although the Court did not highlight the everyday indignities inflicted on interracial couples, it recognized that the political purpose behind interracial marriage laws was to help maintain the white supremacist regime. The equal protection doctrine should attend to the "law's powerful capacity to stigmatize vulnerable groups in social life."[130] Yet, the anti-miscegenation apparatus erected in Virginia buttressed the racial order in fundamental ways that encompassed, and even surpassed, its impact on the everyday lives of interracial couples alone. Bans on interracial marriage not only stigmatized this aspect of social life, but they reinforced the ideology and practice of racial separation that undergirded the entire Jim Crow regime and systematically dehumanized all black people. The Court's identification of their purpose to uphold white supremacy reinforced rather than diluted *Brown*'s condemnation of racial separation in education.[131]

C. Federal Intervention in the Private Sphere of Marriage

By extending *Brown*'s prohibition of racial separation to the private sphere of marriage, formerly seen as the exclusive domain of states' power, the Court radically confirmed a constitutional mandate for federal intervention in all aspects of the South's racial regime. In one sense, the Court extended the power of the equal protection clause to eliminate state discrimination in the realm of domestic relations.[132] But by applying strict scrutiny to the Virginia statute, the Court also opened state marriage laws more broadly to federal oversight for the first time. Prior to *Loving*, the Court had never once struck down a state marriage statute.[133] The

129. *See supra* text accompanying notes 53–54, 86–87.

130. *See* Ackerman, *supra* note 9, at 304.

131. Ackerman recognizes a broad interpretation of *Loving* that "uses Warren's condemnation of laws 'designed to maintain White Supremacy' as a springboard for reviving an approach to equal protection that emphasizes the real-world dynamics of stigmatization." Ackerman, *supra* note 9, at 306. Thus, it is possible to reconcile *Brown* and *Loving* without disputing Ackerman's assessment of *Brown* as "the greatest judicial opinion of the twentieth century." *See* Ackerman, *supra* note 9, at 317.

132. Kevin Noble Maillard & Rose Cuison Villazor, *Introduction* to Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex, and Marriage 4 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012) ("If *Brown* dismantled systems of racial supremacy at the institutional and public level, *Loving* enables a transformation at the most domestic and private.").

133. Gregory & Grossman, *supra* note 7, at 20 ("[P]rior to Loving, the Supreme Court had invalidated not a single state marriage or divorce law, despite significant variations among state codes, and had often made clear its belief that marriage was a matter for the states to regulate.").

prevailing precedent was the Court's decision in *Maynard v. Hill* to defer to state domestic relations norms because "[m]arriage . . . has always been subject to the control of the legislature."[134]

From the vantage point of contemporary constitutional law, *Loving* seems split in two parts. One part, based on the equal protection clause, struck down anti-miscegenation laws as a form of state racial discrimination. The other, based on the due process clause, protected the right to marry the partner of one's choice. The Fourteenth Amendment clauses are now treated as distinct sources for applying strict scrutiny.[135] However, the jurisprudence that supports a separate due process analysis of state intrusion in private family decisions developed largely after *Loving* in cases such as *Eisenstadt v. Baird* (1972),[136] *Roe v. Wade* (1973),[137] and *Lawrence v. Texas* (2003).[138] *Loving* paved the way for federal courts to scrutinize state marriage laws for their compliance with substantive due process; the *Loving* Court did not have this body of constitutional family law to rely on.[139] As John DeWitt Gregory and Joanna L. Grossman note: "There was no federal law norm about the right approach to regulating marriage and divorce before *Loving*, and thus no substantive principles for the Supreme Court to bring to bear on the few family law cases it heard."[140] Instead, the Court's application of the equal protection and due process clauses to Virginia's anti-miscegenation law worked together.[141]

More important, the equal protection and due process clauses "operated in tandem"[142] in *Loving* because the Racial Integrity Act's restriction of marriage

134. 125 U.S. 190, 205 (1888) (upholding an order by the Supreme Court of the Territory of Washington that validated a legislative divorce).

135. Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 Mich. L. Rev. 1447, 1448 (2004) ("Today, most courts and scholars see the Equal Protection and Due Process Clauses as discrete bases for strict scrutiny.") (footnote omitted).

136. 405 U.S. 438 (1972) (holding that a Massachusetts statute prohibiting the distribution of contraceptives to unmarried individuals violated the equal protection clause of the Fourteenth Amendment).

137. 410 U.S. 113 (1973) (holding that a Texas statute prohibiting abortions at any stage of pregnancy except to save the life of the mother violated the due process clause of the Fourteenth Amendment).

138. 539 U.S. 558 (2003) (holding that a Texas statute prohibiting sodomy between people of the same sex was unconstitutional and that the intimate, adult consensual conduct at issue here was part of the liberty protected by the substantive component of the Fourteenth Amendment's due process clause).

139. *See* Gregory & Grossman, *supra* note 7, at 33–34 ("[The] repudiation of unlimited state power over domestic relations . . . spurred an expansion of substantive due process rights more generally."); *id.* at 34 ("Prior to Loving, there were only a handful of cases . . . in which the Supreme Court considered overriding a state law regarding family status or operation based on constitutional constraints."); *see also* Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790–1990*, 41 How. L.J. 289 (1998) (discussing *Loving*'s importance to the evolution of a constitutional right to marry).

140. Gregory & Grossman, *supra* note 7, at 20. *Griswold v. Connecticut*, 381 U.S. 479 (1965), protecting the right of married couples to use contraceptives, had been decided only two years earlier.

141. Karlan, *supra* note 135, at 1448 ("Today, most courts and scholars see the Equal Protection and Due Process Clauses as discrete bases for strict scrutiny. But in Loving, the two clauses operated in tandem.").

142. *Id.*; *see also* Ackerman, *supra* note 9, at 306 (noting that Warren's approach broke down the "doctrinal barriers separating equal protection from due process").

operated in tandem with the state's racial classification system. It was the combined force of the invidiousness of the racial classification and the vital importance of marriage that violated the Fourteenth Amendment.[143] Warren's reasoning merges both aspects of the anti-miscegenation law:

> 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.[144]

In hindsight, *Loving*'s failure to explicitly recognize in the due process clause a separate, fundamental right to marry seems a grave limitation. Robin Lenhardt, for example, argues that the *Perez* decision is superior to *Loving* because "Justice Taynor refused to treat *Perez* as a case about race alone, insisting that it also concerned the right to marry 'the person of one's choice.'"[145] *Perez*, she writes, "helps expose the limitations of the Court's decision in *Loving*," which, in declining clearly to articulate a fundamental right to marry, "fails to capture the true meaning of modern marriage."[146]

Although failing to set forth a separate basis for family liberty, the Court's opinion in *Loving* acknowledges the nature of institutionalized racism often missed in contemporary theories of the individual's right to choose. The Racial Integrity Act enforced a racial caste system by regulating marriage. Its restrictions on individual marital decisions not only denied autonomous choices, but also subordinated and dehumanized entire groups of people.

The Court's due process analysis relied mainly on *Skinner v. Oklahoma*, the 1944 decision striking down the Oklahoma Habitual Criminal Sterilization Act, which imposed involuntary sterilization for persons convicted three times for a felony involving moral turpitude.[147] The statute made an exception for embezzlement and political offenses, but permitted sterilization of chicken thieves. As in *Loving*, the *Skinner* Court treated equal protection and due process as inextricably coupled. The *Loving* Court borrowed directly from *Skinner* in finding that the freedom to marry

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143. *See* Gregory & Grossman, *supra* note 7, at 23.

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

145. Robin A. Lenhardt, Perez v. Sharp *and the Limits of* Loving, *in* Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex, and Marriage 73, 76–77 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012).

146. *Id.* at 80, 83. Chief Justice Warren, the author of the *Loving* opinion, was governor of California when the California Supreme Court issued its decision in *Perez*. *See generally* I. Bennett Capers, *The Crime of Loving: Loving, Lawrence, and Beyond*, *in* Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex, and Marriage 114, 117 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012). Warren had a traditional view of marriage and limited *Loving*'s discussion of the right to marry to accommodate the other justices. Rachel F. Moran, *Beyond the* Loving *Analogy: The Independent Logic of Same-Sex Marriage*, *in* Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex, and Marriage 242, 245 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012); *see also* Ackerman, *supra* note 9, at 305 (discussing Warren's efforts to appease Justice Hugo Black, who opposed reinvigorating substantive due process).

147. 316 U.S. 535 (1942).

deserved constitutional protection because "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[148] *Skinner* was particularly apt because it, too, recognized the danger of racist state standards for family decisionmaking: "In evil or reckless hands [the state's power to sterilize] can cause races or types which are inimical to the dominant group to wither and disappear."[149]

Indeed, by highlighting the way Virginia institutionalized white supremacy in its regulation of families, the *Loving* decision helps to dispel the false dichotomy between public and private domains. Feminist scholars have shattered the mythical separation of public and private spheres that justified women's exclusion from the market, sheltered domestic violence from public scrutiny, and disqualified women's needs from public support.[150] The Court bridged this divide when it rejected Virginia's argument that the Fourteenth Amendment did not apply to anti-miscegenation laws because its framers viewed marriage as a contract or social right rather than a political or civil right.[151]

A false split between public and private spheres appears in the history of *Loving* as well as scholarship interpreting it. One reason for the delay in aggressively challenging interracial marriage bans was the view that state restrictions on interpersonal relationships were less important than state restrictions on public rights. Treating interracial marriage as a private matter that affected only a tiny minority of African Americans also made its prohibition seem less significant and urgent. In 1963, Howard University President James M. Nabrit, Jr. explained, "My own personal view is that interracial marriages are constitutionally protected, but they affect such small numbers of people that their consideration might very well be postponed at this critical time in the lives of our citizens."[152] A. Philip Randolph, president of the Brotherhood of Sleeping Car Porters, similarly declared, "'I'm neither for nor against

148. *Loving*, 388 U.S. at 12 (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)).

149. 316 U.S. at 541.

150. *See generally* Martha Albertson Fineman, *Dependency and Social Debt*, *in* Poverty and Inequality 133, 139 (David B. Grusky & Ravi Kanbur eds., 2006) ("[T]he failure to adequately provide for its members can move a family from the private to the public sphere, where it may be regulated and disciplined."); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 656–57 (1983) ("Privacy is everything women as women have never been allowed to be or to have; at the same time the private is everything women have been equated with and defined in terms of *men's* ability to have."); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1501 (1983) (explaining that transcending the market-family dichotomy is critical to improving the lives of all individuals).

151. *Loving*, 388 U.S. at 9–10 ("The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. . . . We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State . . . ."); *see* Brief and Appendix *ex rel.* Appellee at 19, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931, at *19 ("[Marriage] is not a civil right. . . . Marriage is a contract between individuals competent to contract it. . . . It is a social right. I understand that a civil right is a right that a party is entitled to and that he can enforce by operation of law.").

152. Wallenstein, *supra* note 3, at 185.

interracial marriages. It's a personal relations question."[153] Like many of his peers, Nabrit considered the ongoing legal fight against discrimination in more public arenas such as education, employment, and voting "too critical for a diversion of scarce legal talent into . . . the relatively minor area of interracial marriage."[154]

Some legal scholars distinguish between civil rights decisions, such as *Brown*, which struck down official discrimination in the public sphere, and *Loving*, which "protects individuals from arbitrary governmental intrusions upon their intimate lives."[155] But, as Part I showed, the regulation of marriage was part and parcel of the government system of racial separation, establishing the very racial classifications needed to operate the Jim Crow regime. *Loving*'s great contribution to the civil rights struggle was abolishing this official scaffolding of white domination. *Loving* did "protect[] the ability of interracial couples to marry,"[156] but this was tied to its monumental blow to the segregationist apparatus that affected the status of all people based on race, regardless of their marital decisions.

Moreover, the Racial Integrity Act and the Court's opinion invalidating it show that the family operates not only as a set of private relationships created by the choices of its individual members. The family serves an institutional role that can both promote and resist state interests and societal hierarchies.[157] Virginia's restriction of interracial marriage used family regulation to promote the state's interest in maintaining a political system of white supremacy and a racist ideology about human equality. State surveillance of African American families has played a crucial role in racial subordination by disrupting kin and community ties that are important to self-determination, and by portraying black people as incapable of forming loving and responsible family bonds.[158] Denying enslaved Africans, newly emancipated freedmen, and women the right to marry excluded them from full citizenship.[159]

153. Higgins, *supra* note 65, at 25.

154. Wallenstein, *supra* note 3, at 185.

155. Maillard & Villazor, *supra* note 132, at 2.

156. Renee M. Landers, *What's Loving Got to Do with It? Law Shaping Experience and Experience Shaping Law*, *in* Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex, and Marriage 128, 137 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012).

157. *See generally* Hayward Derrick Horton et al., *Rural-Urban Differences in Black Family Structure: An Analysis of the 1990 Census*, 16 J. Fam. Issues 298, 299–300 (1995) (explaining the black family's relationship to societal hierarchies); Linda C. McClain, The Place of Families: Fostering Capacity, Equality, and Responsibility 3–4 (2006) (arguing that governments have an interest in "producing persons capable of responsible personal and democratic self-government").

158. *See generally* Roberts, *supra* note 27 (explaining that racism as opposed to black procreation creates racial inequality); Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2002) (arguing for the transformation of a child welfare system that systematically demolishes black families).

159. *See* Peggy Cooper Davis, *Marriage as a "Badge and Incident" of Democratic Freedom*, *in* Marriage Proposals: Questioning a Legal Status 171 (Anita Bernstein ed., 2006) ("In the cauldron of [the] antislavery struggle, these acts of resistance, and the forced separations, restrictions on time and mobility, coerced partnerings, and retaliatory violence by which they were often punished or frustrated, combined to produce an understanding of family rights as essential to democratic citizenship and human freedom."); *see also* Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*,

The impact of anti-miscegenation laws on individuals in interracial relationships was cruel and dehumanizing. According to Robert Pratt, the Lovings contacted Attorney General Robert Kennedy because they wanted to return to their home in Virginia and "had not really been that interested in the civil rights movement."[160] Mildred avoided celebrating the couple's contribution to the cause and saw herself "as an ordinary black woman who fell in love with an ordinary white man, and had they been allowed to marry without the state's interference, that would have been the end of it."[161] Bernard S. Cohen reported at the end of oral argument that Richard Loving's instructions to him were simply to "tell the Court I love my wife."[162] The *Loving* decision allowed thousands of interracial couples to live at home without fear of official sanction and thousands more to gain the privileges of marriage they had been denied on account of race.[163]

But it would distort civil rights history and politics to view the Movement's goal as increasing racial intermarriage. Some scholars treat interracial relationships themselves as a positive social good. In their view, these private crossings of racial lines show that racism is waning, offer sites where individuals can overcome racial prejudices and discover their common humanity, and constitute a powerful symbol of the potential for racial harmony.[164] Randall Kennedy, for example, observes that "[f]ew situations are more likely to mobilize the racially privileged individual to move against racial wrongs than witnessing such wrongs inflicted upon one's mother-in-law, father-in-law, spouse, or child."[165] Because of its benefits for racial equality, he concludes, black-white intermarriage "is a mode of partnership that should be applauded and encouraged."[166]

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11 Yale J.L. & Human. 251, 252 (1999) ("[T]he institution of marriage was viewed as one of the primary instruments by which citizenship was both developed and managed in African Americans.").

160. Pratt, *supra* note 15, at 16; Gregory & Grossman, *supra* note 7, at 24; *Virginia Ban on Interracial Marriages Goes to Federal Court This Week*, N.Y. Times, Jan. 24, 1965, at 43 (noting that "the Lovings are not civil rights marchers 'or even pioneers,'" and quoting Mrs. Loving as stating, "All we want to do is go back to Virginia, build a home, and raise our children").

161. Gregory & Grossman, *supra* note 7, at 24 (quoting *The Crime of Being Married*, LIFE, Mar. 18, 1966, at 85).

162. Transcript of Oral Argument, *supra* note 105, at 9.

163. Capers, *supra* note 146, at 137 ("*Loving* has succeeded in protecting the ability of interracial couples to marry and form families, even if social and isolated pockets of official disapproval remain.").

164. *See* Kennedy, *supra* note 28, at 109. ("One camp views [interracial marriage] as a positive good that decreases social segregation; encourages racial open-mindedness; increases blacks' access to enriching social networks; elevates their status; and empowers black women in their interactions with black men."); *see also* Rachel Moran, Interracial Intimacy 191 (2001) ("New patterns of intimacy are redefining the way that Americans think about race . . . ."). *See generally* Angela Onwuachi-Willig, According to Our Hearts: *Rhinelander v. Rhinelander* and the Law of the Multiracial Family 278 (2013) ("[M]ultiracial families destabilize rigid categories of race in our society . . . .").

165. Randall Kennedy, *How Are We Doing with Loving?: Race, Law, and Intermarriage*, 77 B.U. L. Rev. 815, 819 (1997).

166. *Id.*; *see also* Ralph Richard Banks, Is Marriage for White People? How the African American Marriage Decline Affects Everyone 181 (2012) (arguing that black women would benefit themselves and their racial group if they increased their marriages across racial lines).

These scholars also point to the rate of intermarriage as an indicator of *Loving*'s impact.[167] The number of interracial marriages has steadily increased since *Loving*, growing ten times since 1960.[168] Yet interracial marriage remains relatively rare. Nearly half of all Americans report that they have dated someone of a different race or ethnicity, but they are far less likely to marry across racial lines.[169] Black-white marriages are the least common—they constitute approximately four percent of all marriages.[170] While conservatives parade rising intermarriage rates as proof of America's colorblindness,[171] others view the tiny percentage of marriages crossing racial lines as proof of *Loving*'s failure. The low rates of black-white intermarriage, writes Randall Kennedy, are "an impediment to the development of attitudes and connections that will be necessary to improve the position of black Americans and, beyond that, to address the racial divisions that continue to hobble our nation."[172]

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167. *See* Kennedy, *supra* note 165, at 818 ("[T]he pace of increase in marriage across the black-white racial frontier is quickening, especially in terms of white men and black women."); Landers, *supra* note 156, at 131, 135 ("[T]he removal of prohibitions on interracial marriage has not produced a mixed-race society where race has become irrelevant."); Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *Finding a Loving Home*, *in* Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex, and Marriage 181 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012) ("More than forty years after *Loving*, 95 percent of all individuals marry a person of the same race.").

168. Statistics on interracial marriage during the 1960s are not entirely accurate because some states did not collect racial data on marriage, but the National Center for Health Statistics listed the rate of interracial marriages at 1.44 percent during the period from 1963 to 1966 in unpublished materials based on data from thirty-five states. Thomas P. Monahan, *An Overview of Statistics on Interracial Marriage in the United States, with Data on Its Extent from 1963–1970*, 38 J. Marriage & Fam. 223, 225 (1976). In 2012, the Pew Research Center found that about 15 percent of all new marriages in the United States in 2010 were interracial. Wendy Wang, The Rise of Intermarriage 1 (2012), *available at* http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/.

169. *Compare* Jeffrey M. Jones, *Most Americans Approve of Interracial Dating*, Gallup (Oct. 7, 2005), http://www.gallup.com/poll/19033/Most-Americans-Approve-Interracial-Dating.aspx (reporting that 48 percent of Americans have dated someone from a different racial or ethnic background), *with* Wang, *supra* note 168, at 5 (reporting that 15.1 percent of all new marriages in the United States in 2010 were interracial).

170. Zhenchao Qian & Daniel T. Lichter, *Changing Patterns of Interracial Marriage in a Multiracial Society*, 73 J. Marriage & Fam. 1065, 1076 (2011) (reporting the odds ratio of intermarriage between blacks and whites as 4.5 percent). Other evidence of the lagging social acceptance of interracial marriage is the reluctance of Southern states to repeal interracial marriage bans after *Loving*. Alabama became the last state to repeal its prohibition of intermarriage based in its state constitution in 2000. Even then, 40 percent of the citizens of Alabama voted to retain the law. *See General Election Results from Nov. 7, 2000*, Ala. Sec'y State, http://www.sos.state.al.us/downloads/election/2000/general/2000g-amend.xls (last visited Jan. 15, 2015); *see also* Kennedy, *supra* note 28, at 279–80. The same was true in 1998 when South Carolina repealed its constitutional provision. *See Interracial Marriage Ban Up for Vote in Alabama*, N.Y. Times, June 3, 1999, *available at* http://www.nytimes.com/1999/06/03/us/national-news-briefs-interracial-marriage-ban-up-for-vote-in-alabama.html (discussing South Carolina's removal of its ban on intermarriage from their state Constitution in November 1988).

171. *See* Romano, *supra* note 64, at 291–93 ("Here rising intermarriage rates become proof that America has overcome its history of racist exclusions, even though the black-white marriage rate lags behind that of other types of interracial marriage.").

172. Kennedy, *supra* note 165, at 819.

For some civil rights activists, the political was personal. Entering into interracial relationships was a natural extension of their struggle to create a society where people could relate as equal human beings regardless of race.[173] Casey Hayden, a white staffer in the Student Nonviolent Coordinating Committee, explained, "Our struggle was to break down the system, the walls, of segregation. This implied no barriers in our relations with each other."[174] Marrying across racial lines can reflect a mutual commitment to contest racial privilege, stereotypes, and ideologies and can lead to greater understanding of people's racialized experiences and common humanity.[175]

I disagree, however, with the view that interracial marriage—the choice of individuals to marry someone of another race—is a means or proof of liberation from white supremacy. Although the struggle against white supremacy has expanded possibilities for interracial intimacy, both within social movements and in the broader society, people in these relationships do not necessarily strive to dismantle racial hierarchies or even have liberating ideas about race. As *The New York Times* columnist Charles Blow observed, "You can like and even admire a person of another race while simultaneously disparaging the race as a whole. One can even be attracted to persons of different races and still harbor racial animus toward their group."[176] The potential for interracial marriage to be transformative as well as transgressive depends on the partners' willingness to challenge the privileges of having a white identity and being married to a white person.[177] Sociologist France Winddance Twine studies how some white partners and parents in transracial families learn to develop a critical analysis of racism and their own privileged identities—what she calls "racial literacy." While focusing on these enlightened whites, however, she does not treat being involved in an interracial relationship as automatically leading to racial enlightenment.

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173. Romano, *supra* note 64, at 184.

174. *Id.*

175. *See* Maria P.P. Root, Love's Revolution: Interracial Marriage 3 (2001) ("Although not intended as a political tool, each interracial marriage helps to change long-held assumptions and social conventions.").

176. Charles M. Blow, *Disrespect, Race and Obama*, N.Y. Times (Nov. 15, 2013), http://www.nytimes.com/2013/11/16/opinion/blow-disrespect-race-and-obama.html?. Blow was responding in part to Richard Cohen's statement in the Washington Post that "[p]eople with conventional views must repress a gag reflex when considering the mayor-elect of New York—a white man married to a black woman and with two biracial children." *See* Richard Cohen, *Christie's Tea-Party Problem*, Wash. Post (Nov. 11, 2013), http://www.washingtonpost.com/opinions/richard-cohen-christies-tea-party-problem/2013/11/11/a1ffaa9c-4b05-11e3-ac54-aa84301ced81_story.html.

177. *See* France Winddance Twine, A White Side of Black Britain: Interracial Intimacy and Racial Literacy (2010) (describing how some white partners and parents in interracial relationships develop racial literacy); Amy Steinbugler, Beyond Loving: Intimate Racework in Lesbian, Gay, and Straight Interracial Relationships (2012) (examining the racial dynamics of everyday life for lesbian, gay, and heterosexual black-white couples and their process of negotiating racial differences); Camille Gear Rich, *Making the Modern Family: Interracial Intimacy and the Production of Whiteness*, 127 Harv. L. Rev. 1341, 1346 (2014) (reviewing Angela Onwuachi-Willig, According to Our Hearts: *Rhinelander v. Rhinelander* and the Law of the Multicultural Family (2013) (noting that interracial families can also be invested in cultivating and maintaining white identities).

Bennett Capers, a black law professor at Hofstra University whose husband is white, writes that his interracial marriage has decreased the prejudice he encounters against both his gay and black identities. Being partnered with a white man marks him as safe: "It is telling people I have a white partner that has served me well, that has made me acceptable. Palatable."[178] Still, Capers does not claim that his interracial relationship has diminished white people's superior status or devaluation of black people. To the contrary, the benefits he accrues from having a white husband stem from white privilege.[179]

Moreover, there is no evidence that interracial intimacy has the power to make the institutional changes necessary to achieve racial equality. Indeed, the long history of racial intermixing in the United States that coexisted with enslavement and disenfranchisement of blacks shows just the opposite. It could be argued that the abolition of *de jure* segregation, including *Loving*'s invalidation of anti-miscegenation laws, dramatically increased the chances for interracial relationships to achieve their liberating potential. Yet, as the marriage statistics show, persistent political, social, and economic gaps between whites and blacks pose barriers to any significant trend toward crossing racial lines to marry. Rather, institutionalized racism, as well as other social hierarchies which create these inequities, must be eradicated to allow people to relate to each other fully as equal human beings.[180]

The civil rights dimension of *Loving* is just as relevant to arguments for same-sex marriage, as is the right to marry a partner of one's choice. Indeed, attending to *Loving*'s civil rights lesson is more true to the distinctive histories of the black and gay liberation movements. Using *Loving* as a freedom of choice analogy has stretched the *Loving* opinion beyond the scope of its discussion of marriage and its roots in civil rights struggle.[181] Moreover, extracting a right to marry from *Loving*, disconnected from its civil rights rationale, privileges marriage itself as the goal of the lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights movement.

Seeing *Loving* as a civil rights decision ties state-imposed marriage restrictions to the preservation of unjust hierarchies of power.[182] From this vantage point, bans on same-sex marriage are unconstitutional because they perpetuate the distinct history

178. Capers, *supra* note 146, at 127.

179. *Id.* at 126–27; *see also* Morrison, *supra* note 108, at 208–12 (discussing the impact of interracial marriage on the social status of black and white partners).

180. Romano, *supra* note 64, at 295 ("Old hierarchies must be dismantled for new attitudes about interracial love and marriage to flourish.").

181. *See* Moran, *supra* note 146, at 244–50; Julie Novkov, *The Miscegenation/Same-Sex Marriage Analogy: What Can We Learn from Legal History?*, 33 Law & Soc. Inquiry 345, 346–47 (2008) ("The analogy is imperfect, as bans on interracial marriages were initially generated as a conscious strategy to embed and articulate white supremacy, while the rules referring to marriage as a relationship between a man and a woman grew out of a background context of heteronormativity."); Catherine Smith, *Queer as Black Folk?*, 2007 Wis. L. Rev. 379, 385–94 (2007) (explaining the appeal and inaccuracy of sameness arguments).

182. *See* Morrison, *supra* note 108 (arguing that same-sex marriage is a civil rights issue because it works against heterosupremacy and white supremacy). *But see* Ackerman, *supra* note 9, at 307–08 (arguing that Justice Anthony Kennedy's opinion in *United States v. Windsor* declaring the federal Defense of Marriage Act unconstitutional relied on *Brown* rather than *Loving* by reviving *Brown*'s anti-humiliation principle).

of the exclusion of gays and lesbians from equal citizenship. We can oppose the prohibition of same-sex marriage without believing that marriage is essential to LGBTQ liberation.[183] Just as the objective of civil rights advocates involved in *Loving* was to end white supremacy, not to promote interracial marriage, the objective of advocates for LGBTQ rights and equality need not be to promote same-sex marriage.

III. HOW FEDERAL COURTS HAVE MISINTERPRETED *LOVING*

Loving generated a line of federal court decisions interpreting its civil rights dimension grounded in the equal protection clause.[184] U.S. Supreme Court decisions applying the equal protection clause to government uses of race have perverted the central lesson of *Loving* as a civil rights decision.[185] Rather than link invidious racial classifications to political subordination as the *Loving* Court did, subsequent Court opinions have wrongly relied on *Loving* to do just the opposite. *Loving* has been misused to support a colorblind approach to the Fourteenth Amendment that treats the government's use of race to eliminate the contemporary vestiges of Jim Crow as equally contemptible as the Jim Crow classifications designed to enforce white rule.

In the decade following *Loving*, courts universally rejected race restrictions in family law cases because they were "fairly uniformly identified by the courts as vestiges of the nation's Jim Crow past."[186] At the same time, a majority of justices had not yet settled on a strictly colorblind approach to affirmative action. The justices' exchange of views surrounding the 1978 decision in *Regents of the University of California v. Bakke*[187] began to reveal fault lines between those who "strongly support[ed] or strongly oppos[ed] the application of strict scrutiny to race-based affirmative action."[188]

At that juncture, by correctly applying the *Loving* inquiry into whether the state's policy supported white supremacy, the Court could have chosen to validate race-based affirmative action efforts while continuing to apply strict scrutiny to race-based rules in other contexts. Instead, a majority of justices followed a colorblind political

183. *See* Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* Same-Sex Marriage: Pro and Con, *supra* note 10, at 118–24.

184. *See* Pascoe, *supra* note 21, at 304 ("Between 1967 and 2005, the U.S. Supreme Court had cited *Loving* as precedent in 78 different cases, and federal district courts had done so in 362 more . . . ."); *id.* at 305–06 (discussing federal cases involving equal protection and racial classifications).

185. Katie Eyer contrasts the Court's treatment of race in affirmative action cases and family law cases, noting that "during the same time frame that the Supreme Court has increasingly proclaimed the need to strictly scrutinize all government uses of race, family law has remained a bastion of racial permissiveness." Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. Pa. L. Rev. 537, 541 (2014).

186. *Id.* at 548–49; *see id.* at 546 n.20 (citing cases "invalidat[ing] race-based family law restrictions on Fourteenth Amendment grounds").

187. 438 U.S. 265 (1978) (holding that a university special admissions program that classified applicants by race violated the Fourteenth Amendment).

188. Eyer, *supra* note 185, at 554 & n.67.

ideology and subsequently crippled government programs seeking to eliminate the vestiges of slavery and Jim Crow.[189]

Colorblindness emerged as a conservative strategy after the civil rights movement succeeded in toppling the Southern Jim Crow system and forms of *de jure* segregation in the North.[190] A backlash movement intent on crushing black empowerment and preserving white dominance latched onto the concept of colorblindness as an ideological tool of retrenchment. As sociologist Eduardo Bonilla-Silva notes in his classic *Racism Without Racists*, "Much as Jim Crow racism served as the glue for defending a brutal and overt system of racial oppression in the pre-civil rights era, color-blind racism serves today as the ideological armor for a covert and institutionalized system in the post-civil rights era."[191] Colorblind ideology posits that because racism no longer impedes minority progress, there is no need for social policies to account for race. Pretending that the civil rights movement attained perfect equality ignores the lingering effects and systemic incorporation of three centuries of official white supremacy as well as newly minted forms of racial discrimination.

Colorblind ideology has been increasingly embraced by a conservative majority of the U.S. Supreme Court.[192] A series of Court decisions in the last several decades have struck down race-conscious measures to desegregate schools and workplaces and to implement voting rights as violations of the Fourteenth Amendment. Justice Clarence Thomas articulated the perspective that equates official Jim Crow segregation with state efforts to end its legacy, noting a "'moral and constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality . . . . In each instance, it is racial discrimination, plain and simple."[193] According to this rationale, both white supremacist and "benign" racial classifications must be subjected to strict scrutiny because of the inherent invidiousness of state racial classifications and the need for consistency in addressing them.[194]

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189. *See* Derrick A. Bell, Jr., *Introduction: Awakening After* Bakke, 14 Harv. C.R.-C.L. L. Rev. 1, 5 (1979) ("Minority admissions programs survived the *Bakke* litigation, but minorities lost the ability to argue entitlement to such programs as a matter of legally cognizable right."); Ian F. Haney Lopez, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 Stan. L. Rev. 985, 1034 (2007) ("Powell effectively argued that for constitutional purposes preferential treatment and Jim Crow laws amounted to the same thing—the central claim of reactionary colorblindness.").

190. *See* Eduardo Bonilla-Silva, Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America (4th ed. 2014); Michael K. Brown et al., Whitewashing Race: The Myth of a Color-Blind Society (2003).

191. Bonilla-Silva, *supra* note 190, at 3.

192. *See* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 Stan. L. Rev. 1, 2–4 (1991). *See generally* Ian F. Haney Lopez, White by Law: The Legal Construction of Race (1996).

193. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring) (alteration in original) (citation omitted).

194. *See* Eyer, *supra* note 185, at 539 ("[T]he Court's ostensible command has been that even programs intended to benefit minority group members—such as affirmative action—must be subjected to the same constitutional regime as undoubtedly invidious uses of race."); *see also Adarand Constructors*, 515 U.S. at 230 (explaining "the principle of consistency").

The conservative justices have relied on *Loving*'s application of strict scrutiny to official racial classifications to support their colorblind approach. A host of Supreme Court opinions involving civil rights issues such as school desegregation,[195] affirmative action,[196] voting rights,[197] and equal education,[198] cite *Loving* to invalidate state efforts to achieve greater racial equality.

In *Bakke*, the Court held that a special admissions program that classified applicants by race violated the Fourteenth Amendment.[199] Citing *Loving*, the Court reasoned that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[200] Three decades later, in a 5-4 decision striking down voluntary plans to desegregate elementary schools in Seattle, Washington and Jefferson County, Kentucky, the Court reiterated the position that the Constitution as interpreted in *Loving* requires the government to be colorblind by paying no attention to race.[201] "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," Chief Justice John Roberts declared.

In citing *Loving* to strike down affirmative action efforts and to support claims of reverse discrimination, judges and advocates completely overlook *Loving*'s connection to the civil rights struggle. The appeal to formal equality to ignore actual oppression sounds strikingly similar to the equal application theory posited by Virginia in support of its ban on interracial marriage. The Court in *Loving* rebuffed Virginia's argument that the intermarriage ban was colorblind because blacks and whites were equally forbidden from marrying outside their race. Instead of applying a theory of formal equality, the justices looked past the law's veneer of equal treatment to the law's purpose to maintain white supremacy. Thus, far from implementing an ideal of colorblindness, the *Loving* Court explicitly rejected it in favor of an examination of the law's relationship to racial subordination. Instead of following *Loving*'s lead to focus on the law's relationship to white supremacy, colorblind Court decisions ignore white supremacy altogether.

IV. THE CONTEMPORARY IMPORTANCE OF *LOVING* AS A CIVIL RIGHTS DECISION

The lessons of *Loving* as a civil rights decision are especially important in today's supposedly "post-racial" society. The 2008 election of Barack Obama as president rejuvenated claims that the United States had overcome its racist past. At the same

195. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 758 n.10 (2007) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications.") (citing Loving v. Virginia, 388 U.S. 1 (1967); Johnson v. California, 543 U.S. 499, 505 (2005)).

196. *See, e.g.*, *Adarand Constructors*, 515 U.S. 200; Wygant v. Jackson Bd. of Educ., 476 U.S. 267. 273 (1986); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 (1978).

197. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 903–04 (1995); Shaw v. Reno, 509 U.S. 630, 643 (1993).

198. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 104–05 (1973).

199. *Bakke*, 438 U.S. at 319–20.

200. *Id.* at 307.

201. Parents Involved in Cmty. Sch. v. Seattle Sch. District No. 1, 551 U.S. 701, 758 (2007) ("We have made it unusually clear that strict scrutiny applies to *every* racial classification.").

time, a new biopolitics of race is resuscitating in the genomic era the very notion of biological racial classifications underlying the anti-miscegenation laws that *Loving* struck down.[202] Genomic science and gene-based biotechnologies, such as race-specific medicines and race-based ancestry testing, are promoting race-consciousness at the molecular level at the very moment that the Court and many policymakers are rejecting race-consciousness at the social level.

Gene-based research and biotechnologies are promoting race-consciousness at the molecular level by incorporating the assumption that race is a natural, genetically determined category.[203] Numerous biomedical studies purport to discover the genetic origins of racial disparities in the prevalence of common complex diseases such as diabetes, cancer, and hypertension.[204] In several widely cited articles in prominent journals, biomedical researchers argued that it was essential to investigate health-related genetic differences among racial groups in order to attend to the health problems of minority patients effectively and equitably.[205] Researchers in the field of pharmacogenomics, studying the genetic origins of disease and differential responses to treatment, are developing pharmaceuticals designed to treat illness in particular racial and ethnic groups.[206] In 2005, the U.S. Food and Drug Administration approved the first racially labeled drug, BiDil, to treat heart failure in self-identified African American patients.[207] In addition, dozens of online companies use genetic testing to tell consumers not only their genetic ancestry, but also their racial identity.[208] This coincidence of rising biological concepts of race alongside a colorblind political ideology provides a convenient but false genetic explanation for the persistent racial inequities that exist in U.S. society.

Although the *Loving* opinion stopped short of refuting the validity of race as a biological category, the ACLU and amici argued extensively that the racial

202. *See generally* Dorothy Roberts, Fatal Invention: How Science, Politics, and Big Business Re-Create Race in the Twenty-First Century (2011); Jonathan Kahn, Race in a Bottle (2013) (discussing the expanding use of racial categories in biomedical research). *See, e.g.*, Nicholas Wade, A Troublesome Inheritance: Genes, Race and Human History (2014). For a discussion on the legal implications of the resurgence of race-based scientific research and biotechnologies, see Dorothy E. Roberts, *Law, Race, and Biotechnology: Toward a Biopolitical and Transdisciplinary Paradigm*, 9 Ann. Rev. L. & Soc. Sci. 149 (2013).

203. Roberts, Fatal Invention, *supra* note 202.

204. *See* Charmaine D.M. Royal & Gloria M. Dunston, *Changing the Paradigm from "Race" to Human Genome Variation*, Nature Genetics Supplement, S5 (Nov. 2004), http://www.nature.com/ng/journal/v36/n11s/pdf/ng1454.pdf.

205. *See, e.g.*, Esteban G. Burchard et al., *The Importance of Race and Ethnic Background in Biomedical Research and Clinical Practice*, 348 New. Eng. J. Med. 1170 (2003), http://bioethics.stanford.edu/events/documents/pdfs/burchard.pdf; Neil Risch et al., *Categorization of Humans in Biomedical Research: Genes, Race and Disease*, 3 Genome Biology 1 (2002), http://genomebiology.com/2002/3/7/comment/2007.

206. Kahn, *supra* note 202, at 1.

207. *Id.* at 1, 3–4.

208. Jennifer K. Wagner et al., *Tilting at Windmills No Longer: A Data-Driven Discussion of DTC DNA Ancestry Tests*, 14 Genetics Medicine 586, 586 (2012), http://www.nature.com/gim/journal/v14/n6/pdf/gim201177a.pdf.

classifications the Racial Integrity Act incorporated were scientifically invalid and so nonsensical that they rendered the statute unconstitutionally vague.[209] At oral argument, Philip Hirschkop pointed out that the Virginia legislature "had changed the definition of 'Negro' from a person with one-eighth Negro blood in 1705 to one-fourth Negro blood in 1785, and to 'any trace of Negro blood' in 1930.'"[210] The varying legal definitions of racial categories demonstrated their instability and, therefore, their scientific indeterminacy.[211]

The arguments also reflected the growing scientific consensus that viewed race as a social, rather than biological, grouping.[212] In 1950, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) issued a landmark "Statement on Race," declaring that race "is not so much a biological phenomenon as a social myth."[213] In its amicus brief in *Loving*, the NAACP noted that physical anthropology and human genetics disproved "three erroneous assumptions" that undergirded anti-miscegenation laws: "(1) that 'pure races' either exist in the present or have existed in the past; (2) that crossing between different racial groups results in biologically inferior offspring; and (3) that cultural level is dependent upon racial attributes."[214] Also relying on the latest scientific evidence, the NAACP Legal Defense and Education Fund concluded, "Clearly, this basis for anti-marriage laws rests on theories long deemed nonsensical throughout the world's community of natural scientists."[215] Pointing out the failure of Virginia's racial classification scheme to account for people of Japanese descent, the Japanese American Citizens League likewise argued that the law relied on unconstitutionally vague definitions of race.[216]

209. *See* Brief of the NAACP as Amicus Curiae at 11–14, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), 1967 WL 113930, at *11–14; Brief of NAACP Legal Def. and Educ. Fund, Inc., *supra* note 111, at *10–11; Brief of Amici Curiae Japanese Am. Citizens League at 17–23, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), 1967 WL 113928, at *17–23; *see also* Perez v. Sharp, 198 P.2d 17, 24, 26–28 (Cal. 1948) (finding that racial categories used in California's anti-miscegenation law were "illogical and discriminatory"); Lenhardt, *supra* note 145, at 81 (noting that Justice Roger J. Traynor's opinion in *Perez* discussed critically "the biological irrelevancy of race").

210. Fred P. Graham, *Marriage Curbs by States Scored: High Court Hears Attack on Virginia Miscegenation Ban*, N.Y. Times, Apr. 11, 1967, at 16.

211. On changing legal definitions of race, see generally Lopez, *supra* note 192, and Ariela J. Gross, What Blood Won't Tell: A History of Race on Trial in America (2008).

212. *See* Roberts, Fatal Invention, *supra* note 202, at 43–49 ("For many scientists . . . the emerging civil rights ethos did not make racial science untenable. Rather, it made it imperative for scientists to detach their study of biological race from societal racism.").

213. UNESCO, The Race Question 8 (1950).

214. Brief of the NAACP, *supra* note 209, at *7.

215. Brief of NAACP Legal Def. and Educ. Fund, Inc., *supra* note 111, at *10.

216. The Brief stated:

> [I]f a 'white person' and a Japanese married while such would be unlawful under § 20-54, under the penal provision of § 20-59 only the 'white person' would be subject to criminal sanctions and the Japanese, being neither a 'white person' nor a 'colored person' presumably would, on the face of things, incur no criminal penalties. But this is far from being clear . . . .

Brief of Japanese Am. Citizens League, *supra* note 209, at *16.

Chief Justice Warren asked Virginia's attorney what he thought "of the findings of this great committee of UNESCO where . . . about [twenty] of the greatest anthropologists in the world joined unanimously in making some very cogent findings . . . on the races."[217] But his opinion in *Loving* failed to denounce the validity of racial classifications themselves. The *Loving* decision would have dealt a more profound blow to the Jim Crow regime, as well as its continuing legacy, if it had incorporated the arguments made by the ACLU and amici and found that state treatment of human beings as biologically distinct races was itself unscientific, illogical, and unconstitutionally vague.[218] The Court might have rejected the false concept of race as a biological category while acknowledging the social reality of race as a political grouping. Still, *Loving* recognized a crucial flaw in Virginia's racial classification scheme when it found that its purpose was to maintain white supremacy.

In contrast to the *Loving* litigators' approach, the ideology that race is important to genetics but not to society is spreading in the United States today. The current resurgence of genetic definitions of race at a time when a majority of Supreme Court justices have embraced a colorblind approach that ignores white supremacy has the potential to intensify racial inequality. The coincidence of these two flawed ideologies—that human beings are naturally divided into genetically distinct races and that racism has ceased significantly to affect society—reinforces a biological explanation for persistent racial inequities. Finding racial differences at the molecular level seems to make sense of the paradox of intensifying racial gaps in health, economic status, and incarceration since the civil rights movement.

Race-based genetic research and biotechnologies have tremendous potential to affect the direction of state efforts to address these disparities by diverting attention from the structural causes of racial inequities toward biological and technological explanations and solutions.[219] The seemingly colorblind regime of surveillance and punishment imposed on poor communities of color may seem more acceptable to most Americans as their belief in intrinsic racial differences is validated by genomic science and technologies.

More fundamental than their attitudes about interracial marriage is the question of whether Americans have rejected the notions of innate racial difference that underpinned anti-miscegenation laws and the racial classifications that supported them. It is more urgent than ever to understand race as a political system that helps to determine individuals' status and welfare, and to eliminate the racism that makes

217. Transcript of Oral Argument, *supra* note 105, at *23.

218. *See* Rachel F. Moran, *Love with a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us About the Meaning of Race, Sex and Marriage*, 32 Hofstra L. Rev. 1663, 1678 (2004) ("The Court agreed that there was no expert justification for bans on intermarriage, but the Justices were reluctant to dismantle race itself.").

219. *See generally* Troy Duster, Backdoor to Eugenics (1990); Roberts, Fatal Invention, *supra* note 202; *see also* Kahn, *supra* note 202, at 199–201 (2013) (discussing the ideologies surrounding the use of race-specific medicine, some of which may "promote[] the framing of health disparities in terms that locate the problem in the bodies of individual members of geneticized racial groups"). For a discussion of proposals to apply strict scrutiny to racial classifications in scientific research, see Roberts, *Law, Race, and Biotechnology*, *supra* note 202, at 158–59.

racial classifications useful. We must affirm our common humanity by working to end the social injustices preserved by the political system of race. This objective requires federal courts to implement, enforce, and uphold strong race-conscious remedies for the lasting vestiges of slavery that the Fourteenth Amendment was intended to abolish, and King and other civil rights activists fought to eradicate. Only then can we hope to create a world where love across what we now see as racial barriers is unremarkable.