

## NOTE

### DECIDING ON DOCTRINE: ANTI-MISCEGENATION STATUTES AND THE DEVELOPMENT OF EQUAL PROTECTION ANALYSIS

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*At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the “most rigid scrutiny,” and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective . . . .*

Chief Justice Earl Warren’s majority opinion in *Loving v. Virginia*<sup>1</sup>

IN 1967, the Justices of the Supreme Court of the United States were in complete agreement that the statutory scheme before them in *Loving v. Virginia*, which criminalized interracial marriage, should be invalidated. They did not, however, agree on which legal doctrines justified the invalidation. Eight Justices signed on to an opinion that carefully hedged the question with arguments related to both the equal protection and the due process clauses. Justice Potter Stewart authored a terse concurring opinion asserting that there could be no valid state law “which makes the criminality of an act depend upon the race of the actor.”<sup>2</sup> Although no other member of the Court was willing to sign on to this concurrence, it gave voice to a doctrine that had been a central argument of civil

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<sup>1</sup> *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (citation omitted) (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

<sup>2</sup> *Id.* at 13 (Stewart, J., concurring).

rights litigation, articulated as early as Justice Harlan's famed dissent in *Plessy v. Ferguson*.<sup>3</sup>

This Note will explore why the Warren Court chose the path it did to invalidate anti-miscegenation laws. More generally, it will analyze the Warren Court's treatment of anti-miscegenation statutes with the object of gaining perspective on the relationship between decision and doctrine: assuming that Justices are in agreement as to which party should prevail, what factors, legal and non-legal, can influence the Court's preference for one doctrine over another? In *Loving*, the decision to reject Justice Stewart's rationale had far-reaching consequences. Had the Court followed Justice Stewart's reasoning, review of criminal statutes, at least, would not require even a cursory analysis of the legislature's purpose once a racial classification was detected. It might be argued that the Court was simply seeking the narrowest grounds on which to decide the case and that Justice Stewart's reasoning was simply too broad. *Loving's* now-controversial place as a precedent supporting substantive due process analysis in right-to-marriage jurisprudence, however, would have been minimized, if not eliminated, by Justice Stewart's approach. It may be difficult to predict the ramifications of doctrinal choices, particularly with respect to the interaction between equal protection, due process, and fundamental rights. Ultimately, this Note will argue that the Warren Court showed a preference for a less rule-like approach to equal protection analysis, in part because the conditions surrounding desegregation exacerbated the difficulty of analyzing the scope of rules.<sup>4</sup> Dissecting the

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<sup>3</sup> 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law . . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."). For the role of the dissent's argument for a color-blind constitution in civil rights litigation, see Andrew Kull, *The Color-Blind Constitution* 164–71 (1992). Kull asserts that "[f]rom *Sweatt v. Painter* to *McLaughlin v. Florida*, civil rights advocates urged the Court to define that constitutional rule to be one of color blindness." *Id.* at 171.

<sup>4</sup> My argument is related to Professor Klarman's assertion that "the Court's legitimacy flows less from the soundness of its legal reasoning than from its ability to predict future trends in public opinion" in that I propose the Court's awareness of this dynamic in turbulent times may lead the Court to employ standard-like tests that facilitate case-by-case, rather than principled, analysis. See Michael J. Klarman, *Brown and Lawrence* (and *Goodridge*), 104 Mich. L. Rev. 431, 488 (2005). Compare also Pro-

circumstances under which the Warren Court viewed its potential paths to a ruling against Virginia in *Loving* may help us to understand how and why the Court resolves such problems in particular ways.

Part I will set out the context in which the Court avoided deciding the anti-miscegenation issue in the years between *Brown v. Board of Education*<sup>5</sup> and *Virginia v. Loving*. At this stage, a number of factors combined to undermine the Court's confidence in its ability to address the anti-miscegenation statutes. These factors included the sensitivity of the miscegenation issue, the backlash against *Brown*, the Justices' apprehension of political consequences for the enforcement of desegregation, and a desire to wait for an ideal test case for consideration of the issue. Part II will analyze the Court's treatment of *McLaughlin v. Florida*,<sup>6</sup> tracing a shift in the Court's consensus. Part III will turn to the decision in *Loving* to analyze the changed circumstances, external and internal to the Court, that influenced its decision to dispose of the case as it did.

#### I. THE CONTEXT OF AVOIDING THE MISCEGENATION ISSUE

Soon after Justice Stewart began his tenure on the Supreme Court, his wife Andy wrote a note to Chief Justice Earl Warren thanking him for meeting the family at the train station to welcome them to Washington. At the close of the note, which reminisces about a pleasant day of sightseeing for the children, she remarked, "I promise I will *not* ask you about segregation again!"<sup>7</sup> The note is a reminder that, at Justice Stewart's appointment in 1958, the status of segregation was still uncertain to the public. In that year, Mildred Jeter and Richard Loving were married.

This Part begins with the societal uncertainty regarding segregation after *Brown* and the effect of that uncertainty on the Court. It

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fessor Andrew Kull's criticism of the Warren Court's preservation of judicial discretion in the *Brown* decision and its progeny. Kull, *supra* note 3, at 169–71. We differ to the extent that I argue the preservation of judicial discretion was not necessarily motivated by judicial maximalism.

<sup>5</sup> 347 U.S. 483 (1954).

<sup>6</sup> 379 U.S. 184 (1964).

<sup>7</sup> Letter from Andy Stewart, Wife of Assoc. Justice Potter Stewart, to Earl Warren, Chief Justice, U.S. Supreme Court (Oct. 22, 1958) (on file with the Library of Congress, Manuscript Division, Earl Warren Papers, Box 358) (emphasis in original).

then covers elements of the public discourse that made it difficult for the Court to confront the miscegenation issue. Finally, this Part gauges the effects of the backlash against *Brown* on the Court.

#### A. Uncertainty After Brown

By the time of Justice Stewart's appointment to the Supreme Court in 1958, it was not clear how far the effects of *Brown v. Board of Education* would reach. The *Brown* opinion suggested that "separate but equal" facilities would no longer satisfy the requirements of the Constitution, but also contained language that carefully cabined its holding to the specific circumstances of public schools.<sup>8</sup> The Court's appeal to sociological evidence in Footnote Eleven of the opinion further suggested that the Court might have been swayed by particular facts that would not apply to every instance of state-imposed racial segregation.<sup>9</sup> There is now evidence that the Court included the footnote primarily as a proactive response to the "anticipated crisis of legitimacy" and not because the Justices decided the question on the basis of the work of the social scientists cited.<sup>10</sup> At the time, however, there was considerable confusion as to the role of such evidence in communicating the basis and scope of the holding.<sup>11</sup>

The Court did little to clarify the limits of *Brown* when it followed the decision with per curiam opinions invalidating segregation in situations outside of schools, though "the Justices were quickly confronted with cases that seemed to require them to acknowledge that *Brown's* logic extended beyond the sphere of education."<sup>12</sup> The Court addressed state-mandated segregation in public beaches, golf courses, and local transportation during the 1955–56 term.<sup>13</sup> In light of *Brown's* emphasis on education, which prevented the opinion from readily extending to challenges to all ra-

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<sup>8</sup> *Brown*, 347 U.S. at 495 ("We conclude that *in the field of public education* the doctrine of 'separate but equal' has no place. Separate *educational facilities* are inherently unequal.") (emphases added).

<sup>9</sup> *Id.* at 494 n.11.

<sup>10</sup> Sanjay Mody, Note, *Brown* Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy, 54 *Stan. L. Rev.* 793, 794, 814–28 (2002).

<sup>11</sup> *Id.* at 803–07.

<sup>12</sup> Klarman, *supra* note 4, at 447.

<sup>13</sup> *Id.*

cial classifications, these subsequent cases “seemed to require additional explanation.”<sup>14</sup> Instead of providing such an explanation, however, the Court merely issued terse per curiam decisions striking down the racial restrictions and citing *Brown*.

Contemporary commentators were left to interpret the opinions by implication. Professor Herbert Wechsler, for instance, observed: “The Court did not declare, as many wish it had, that the fourteenth amendment forbids all racial lines in legislation, though subsequent per curiam decisions may, as I have said, now go that far.”<sup>15</sup> The use of sociological evidence to show harm, however, left questions lingering for Wechsler: “Does the validity of the decision turn then on the sufficiency of evidence or of judicial notice to sustain a finding that the separation harms the Negro children who may be involved?”<sup>16</sup>

There is considerable evidence that one of the reasons the Court limited its holding in *Brown* (and, perhaps, its elaboration of *Brown* in the following years) was to avoid the question of miscegenation.<sup>17</sup> There is some irony, however, in the use of sociological evidence to do so. Kenneth Clark, the psychologist whose work is cited first in Footnote Eleven of the *Brown* opinion, also researched interracial marriage. His analysis, published in *Ebony* magazine in 1946, similarly suggested a damaging link between racial intermarriage and black self-image: “In our culture beauty has been systematically and continuously associated with whiteness and lightness of skin. Thus a successful Negro male tends to demonstrate his success, maybe unconsciously, by seeking a light or white female.”<sup>18</sup> It is difficult to know which direction such evidence would have cut, but, as we will see, by the time the Court did face the miscegenation issue, sociological evidence would play no role in determining or supporting the Court’s decision.

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<sup>14</sup> Id.

<sup>15</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 32 (1959).

<sup>16</sup> Id. Ultimately, Wechsler speculates that it did not. Id. at 33–34.

<sup>17</sup> Klarman, *supra* note 4, at 446.

<sup>18</sup> Alex Lubin, *Romance and Rights: The Politics of Interracial Intimacy, 1945–1954*, at 85 (2005) (quoting Kenneth Clark, *Famous Negroes Who Married Whites Featuring Walter White and Poppy Cannon*, *Ebony*, Dec. 1946).

*B. Keeping Segregation and Miscegenation Apart*

The Court's determination to avoid the issue of anti-miscegenation laws reflected a national discomfort with interracial intimacy. Interracial marriage remained a sensitive subject in the 1950s. Opinion polls of the time, noted in Professor Klarman's history of the civil rights struggle, indicated that "over 90 percent of whites, even outside the South, opposed interracial marriage."<sup>19</sup> Interracial marriages had also long been controversial in African-American communities.<sup>20</sup> African Americans had opposed anti-miscegenation laws, however, on the dual grounds that the statutes "represented both the refusal of whites to treat blacks as equals and the determination of white males to protect their sexual license with black women."<sup>21</sup> In 1913, W.E.B. Du Bois wrote:

[S]o far as the present advisability of intermarrying between white and colored people in the United States is concerned, both races are practically in complete agreement. Colored folk marry colored folk and white marry white, and the exceptions are very few. . . . The *moral* reason for opposing laws against intermarriage is the greatest of all: such laws leave the colored girl absolutely helpless before the lust of white men . . . . Low as the white girl falls, she can compel her seducer to marry her . . . . We must kill [anti-miscegenation laws], not because we are anxious to

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<sup>19</sup> Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 321 (2004).

<sup>20</sup> See Charles Frank Robinson II, *Dangerous Liaisons: Sex and Love in the Segregated South* 114–28 (2003) (citing incidents of disapproval in the black community dating back to editorials in black newspapers criticizing Frederick Douglass's marriage to a white woman in 1884). But see Lubin, *supra* note 18, at 66–95 (arguing that opinion in black communities became conflicted in the post-war era, when the emphasis of some civil rights leaders in dealing with anti-miscegenation laws shifted "away from the issue of protecting black women and toward the issue of black male social mobility . . . . Hence official NAACP claims that intermarriage was not a goal of civil rights organizing were undermined by a growing black public culture that publicized and celebrated interracial marriage").

<sup>21</sup> Robinson, *supra* note 20, at 115. Professor Robinson does note, however, that "[s]ometimes blacks illustrated a subtle opposition to interracial marriage by invoking anti-miscegenation laws in civil cases. These cases also revealed the desire of blacks to gain some monetary reward at the expense of an unlawful interracial relationship." *Id.* at 123 (citing *Locklayer v. Locklayer* 35 So. 1008 (Ala. 1903); *Succession of Mingo*, 78 So. 565 (La. 1917); *Minor v. Young*, 87 So. 472 (La. 1920)).

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marry white men's sisters, but because we are determined that white men shall let our sisters alone.<sup>22</sup>

Du Bois's argument suggests that, early on, black leaders were compelled to allay fears that intermarriage was the objective of the civil rights movement.

Such fears endured, however, not only as a recurring theme in American racial politics, but also as a recurring strategy of opponents of desegregation, forming part of the public backlash against the *Brown* decision. Chief Justice Warren's biographer cited the following comment made in 1957 by a man in Alabama, as reported in the *New York Times Magazine*:

How do we know, if we shove kids in schools together, our white girls won't get so used to being around nigras [sic] that after a while they won't pay no attention to color? Then pretty soon they will be socializing together, dancing all hugged up, and the next thing they'll be at the altar.<sup>23</sup>

Reader responses to a *Time* article covering Thurgood Marshall's "legal victory in *Brown*" were marked with suspicions that miscegenation actually provided an ulterior motive for desegregation. One reader asserted, "Miscegenation, NOT integration, is the correct term used in describing the sinister scheme sponsored by the NAACP," while another called the reporting "dishonest" and asked, "How many of your staff would welcome mulatto grandchildren?"<sup>24</sup>

The challenge in the public discourse for integrationists was always to maintain a distinction between intermarriage and desegregation. Following *Brown*, black leaders like Benjamin Mays, the president of Morehouse College, hastened to articulate that distinction. When the Southern Advertising and Publishing Company published an article charging the NAACP with an ulterior motive of miscegenation, Mays wrote in response: "The thing that disturbs me is that it is intermarriage we have objected to all along . . . . I

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<sup>22</sup> W.E.B. Du Bois, *Intermarriage*, 5 *Crisis* 180, 180–81 (1913). For a discussion of Du Bois's position, see Lubin, *supra* note 18, at 71–72.

<sup>23</sup> Ed Cray, *Chief Justice: A Biography of Earl Warren* 450–51 (1997) (quoting Wilma Dykeman and James Stokely, *Inquiry into the Southern Tensions*, *N.Y. Times Mag.*, Oct. 13, 1957, at 20).

<sup>24</sup> Lubin, *supra* note 18, at 67.

don't agree with you that the abolition of segregation means intermarriage. It has not happened in Boston, New York, and Chicago."<sup>25</sup>

This aspect of the public discourse found its way into the commentary of legal scholars as well. Paul Freund, then a professor at Harvard Law School, wrote in support of the *Brown* decision, but warned:

It would be idle to look for a sudden, miraculous reconciliation. For one thing, resistance to integration flows from a deep spring of primitive, sub-rational fears, summed up in the frightful spectre of "mongrelisation" of the races. To exorcise this image is not the work of a day or a year. It may be slowly dissipated as the evidence is borne in that miscegenation, licit and illicit, actually declines when the status and self-respect of the Negro are enhanced.<sup>26</sup>

Even Freund, who was supportive of the Court's "activism," appeared wary of the prospect of the Court directly engaging the miscegenation issue. From that standpoint, it is not surprising that the same discourse entered into the courtroom during one of the school desegregation cases. Justice Frankfurter "seemed relieved" when counsel advocating desegregation asserted that striking down

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<sup>25</sup> Id. at 94 (quoting Letter from Benjamin Mays to Garland Porter (Dec. 18, 1954), *microformed on Papers of the NAACP*, Part 16, Series B, Reel 10).

<sup>26</sup> Paul A. Freund, *Storm Over the American Supreme Court*, 21 *Mod. L. Rev.* 345, 354 (1958). A rumor would later circulate among the Justices that Freund was being considered to replace Justice Tom Clark upon his retirement in 1967. It was another advocate of the *Brown* decision, Thurgood Marshall, who was appointed instead. See Memorandum, Abe Fortas, Assoc. Justice, U.S. Supreme Court, to William O. Douglas, Assoc. Justice, U.S. Supreme Court, (Mar. 21, 1967) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Part II: Box 1782). The memorandum jocularly refers to Marshall, whose winning record in arguments before the Supreme Court was legendary: "Bill—The line has been: That Thurgood is no good as a lawyer—that he will be a black mark on the President's record of excellent judicial appointments. If it's not Thurgood, it won't be Freund, I think. I think it's more likely to be a Texan. But my *guess* is that Thurgood will get it. —A." Id. That Justice Fortas could joke about a "black mark" on the President's record of "excellent judicial appointments" is an indication of how far civil rights had come by 1967—clearly Fortas's sarcasm actually communicates the opposite points, that where previous appointments had not been well received, the appointment of the first African American to the Court would be a triumph.



segregation in schools would not necessitate invalidating anti-miscegenation laws.<sup>27</sup>

### *C. The Effects of Backlash on the Court*

It is clear that the Court was aware of public opinion and the potential political consequences of confronting anti-miscegenation statutes in the wake of *Brown*. Chief Justice Warren's memoirs recall the "Southern Manifesto," a statement "signed by over a hundred Southern representative and senators in the Congress of the United States," which "urged all such states to defy the Supreme Court decision":

With courage drawn from this profession of faith in white supremacy by practically every Southern member of Congress, together with oft-repeated congressional speeches and statements to the effect that no nine honest men could possibly have come to the conclusion reached by the Court in *Brown v. Board of Education*, excited and racist-minded public officials and candidates for office proposed and enacted every obstacle they could devise to thwart the Court's decision.<sup>28</sup>

After oral arguments—but before the opinion in the *Brown* case was announced—President Eisenhower made his own views known to the Chief Justice in terms that again underscored the connection between opposition to school desegregation and aversion to interracial relationships between students. At a White House dinner, the Chief Justice was seated "within speaking distance" of John W. Davis, whom Warren describes as "counsel for the segregation states." Warren reported that, as the party filed out after the dinner ended, the President took him by the arm and, "speaking of the Southern states in the segregation cases . . . said, 'These are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes.'" <sup>29</sup> Given this climate, in which desegregation was op-

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<sup>27</sup> See Klarman, *supra* note 4, at 447 (citing Transcript of Oral Argument at 10–11, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 413), *reprinted in* 49 *Landmark Briefs and Oral Arguments of the Supreme Court of the United States: Constitutional Law* 395, 405–06 (Philip B. Kurland & Gerhard Casper eds., 1975)).

<sup>28</sup> Earl Warren, *The Memoirs of Chief Justice Earl Warren* 289 (1977).

<sup>29</sup> *Id.* at 291.

posed by fears of intermarriage, it is not surprising that the Court perceived the invalidation of anti-miscegenation statutes as a step fraught with particular controversy.

A note from Justice Stewart to the rest of the Court reflects the Court's besieged mentality in the late 1950s. Dated November 24, 1959, the note conveys Justice Stewart's dismay, beginning, "Dear Brethren: At noon today I fell into what may have been a trap." It goes on to describe a meeting of the D.C. Junior Bar Association at which the justice had been invited to speak. After giving a few informal remarks, the Justice was surprised by members of the press: "Only after the meeting, and I found myself surrounded by nine inquisitive men bombarding me with loaded questions, did I realize that there had been no less than that number of newspaper and radio people in the audience."<sup>30</sup> Justice Stewart seemed anxious both to prepare his colleagues for a mischaracterization of his remarks in the press and to warn them against similar situations:

Because the presence of the press was entirely contrary to my understanding of the kind of meeting this was to be, I send this memorandum only as a warning to any of my Brethren who may be as naive as I, and as an apology for whatever distortion the press may choose to put upon my remarks, which, I can assure you, in fact were entirely innocuous.<sup>31</sup>

The tone of the note may well be meant to be jocular, but it also carries undertones of embarrassment, as the still relatively new Justice confronts the burden of serving on the Court in the midst of controversial decisions.

Awareness of the particularly controversial nature of the miscegenation issue resulted in the Court invalidating a number of segregation practices by per curiam opinions, while assiduously avoiding even hearing challenges to anti-miscegenation statutes.<sup>32</sup> In the years between *Brown* and *Loving*, the Court "declined to decide

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<sup>30</sup> Memorandum from Potter Stewart, Assoc. Justice, U.S. Supreme Court, to the Conference (Nov. 24, 1959) (on file with the Library of Congress, Manuscript Division, Earl Warren Papers, Box 358).

<sup>31</sup> *Id.*

<sup>32</sup> Klarman, *supra* note 4, at 447.

the constitutionality of such laws in 1954, in 1955, and in 1964.”<sup>33</sup> The Court quietly denied a petition for certiorari to the case of Linnie Jackson, an African-American woman who was convicted of marrying a white man, A.C. Burcham, in Lauderdale County Circuit Court.<sup>34</sup>

The Court then twice deflected appeals from Ham Say Naim, a Chinese man who had married a white woman when both were residents of Virginia.<sup>35</sup> When the wife, Ruby Naim, sought an annulment, the judge declared the marriage void, as required of marriages between whites and non-whites as defined by Virginia’s anti-miscegenation statutes. Ham Say Naim appealed because his application for an immigrant visa was dependent upon his marriage to an American citizen.<sup>36</sup> The case illustrated the devastating consequences of statutory schemes like Virginia’s, which not only criminalized interracial marriage, but also involved civil consequences for interracial couples whose marriages would not be recognized.<sup>37</sup>

Internal correspondence between Court members at the time indicates that the prospects of further backlash influenced the Court when it chose to avoid confronting anti-miscegenation statutes in these cases. A memorandum on the *Naim* appeal written by Justice Harold Burton’s clerk expressed preference that the Court “give

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<sup>33</sup> Laurence C. Nolan, The Meaning of *Loving*: Marriage, Due Process and Equal Protection (1967–1990) as Equality and Marriage, from *Loving* to *Zablocki*, 41 How. L.J. 245, 245–46 (1998). Professor Nolan cites *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), vacated and remanded, 350 U.S. 891 (1955), aff’d, 90 S.E.2d 849 (Va. 1956), appeal dismissed, 350 U.S. 985 (1956) and *Jackson v. State*, 72 So.2d 116 (Ala. 1954), cert. denied, 348 U.S. 888 (1954).

<sup>34</sup> Robinson, *supra* note 20, at 135–36.

<sup>35</sup> *Id.*; see also Klarman, *supra* note 19, at 321.

<sup>36</sup> Peter Wallenstein, Interracial Marriage on Trial: *Loving v. Virginia*, in *Race on Trial: Law and Justice in American History* 177, 180 (Annette Gordon-Reed ed., Oxford Univ. Press 2002).

<sup>37</sup> These civil consequences would also be noted in the brief for the appellants in *Loving v. Virginia*: a loss of inheritance rights; illegitimacy of children born to the couple; and loss of Social Security benefits, the ability to file tax returns jointly, and rights to workmen’s compensation benefits. See Brief for Appellants at 8–9, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), reprinted in 64 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, *supra* note 27, at 741, 756–57. For a complete history and analysis of Virginia’s statutory scheme, see Walter Wadlington, The *Loving* Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189 (1966). For an interesting extension of the holding in *Loving* to immigration cases, see Victor C. Romero, Crossing Borders: *Loving v. Virginia* as a Story of Migration, 51 How. L.J. 53 (2007).

the present fire a chance to burn down” before taking on the issues in the case.<sup>38</sup> Professor Klarman observes that Justice Frankfurter, in particular, wrestled with the implications of denying an appeal that would ordinarily seem to fall within the mandatory jurisdiction then imposed on the Court. Ultimately, Justice Frankfurter believed that

“moral considerations” for dismissing the appeal “far outweigh the technical considerations in noting jurisdiction.” To thrust the miscegenation issue into “the vortex of the present disquietude” would risk “thwarting or seriously handicapping the enforcement of [*Brown*].”<sup>39</sup>

Justices Frankfurter and Clark worked together to write the initial remand to the Virginia Supreme Court “to consider the fact that the couple had deliberately married in North Carolina where marriages between Asians and whites were not barred.”<sup>40</sup> The Virginia Supreme Court then “refused to comply with the Court’s instructions; they denied that the record was unclear and that state law permitted returning final decisions to trial courts in order to gather additional evidence.”<sup>41</sup> The case was then appealed to the Supreme Court again, but this time the Justices ducked the issue by “dismissing the appeal on the ground that the Virginia court’s response ‘leaves the case devoid of a properly presented federal question.’”<sup>42</sup>

Most scholars see the ruling as expedient, if not completely disingenuous.<sup>43</sup> Professor Klarman characterized the decision as evidence that “[a] majority of the Justices apparently preferred being

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<sup>38</sup> Klarman, *supra* note 4, at 448 (quoting Memorandum from AJM, Law Clerk, to Harold H. Burton, Assoc. Justice, U.S. Supreme Court, *Certiorari in Naim v. Naim* (Oct. 1955), *quoted in* Dennis Hutchinson, *Unanimity and Desegregation: Decision-making in the Supreme Court, 1948–1958*, at 68 *Geo. L.J.* 1, 63 (1979)).

<sup>39</sup> *Id.* at 448–49 (quoting Memorandum from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, *Naim v. Naim*, *microformed on* Frankfurter Papers, pt. 2, reel 17, frames 588–90 (Univ. Publ’ns of Am. 1986)).

<sup>40</sup> Cray, *supra* note 23, at 451.

<sup>41</sup> Klarman, *supra* note 4, at 449.

<sup>42</sup> *Id.* (quoting *Naim v. Naim*, 350 U.S. 985, 985 (1956)).

<sup>43</sup> But see Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 *How. L.J.* 75, 78–79 (2007) (arguing that when it remanded the case “[t]he Court might instead have believed that the important issue was whether either of the parties was domiciled in Virginia when the marriage was contracted in North Carolina”).

humiliated at the hands of truculent state jurists to further stoking the fires of racial controversy ignited by *Brown*.”<sup>44</sup> By claiming that there was no federal jurisdiction, the Court undoubtedly knew that it was opening itself up for criticism from “academic commentators most committed to ‘reasoned elaboration’ in judicial decisionmaking.”<sup>45</sup> In 1959, for instance, Professor Herbert Wechsler wrote of the *Naim* case that he took “no pride in knowing” the Court proceeded as it had, dismissing the case on procedural grounds “wholly without basis in the law.”<sup>46</sup>

Professor Wechsler’s perspective was perhaps exceptional in two respects, however. First, the rationale on which he advocated invalidating segregation laws was a fundamental freedom of association, not the requirement of equal protection:

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.<sup>47</sup>

Second, Professor Wechsler readily broke the taboo against linking desegregation and a right to intermarry: “Does not the problem of miscegenation show most clearly that it is the freedom of association that at bottom is involved [in segregation], the only case, I may add, where it is implicit in the situation that association is desired by the only individuals involved?”<sup>48</sup> The Court would eventually reject the direct application of freedom of association to marriages in

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<sup>44</sup> Klarman, *supra* note 4, at 449.

<sup>45</sup> *Id.* (citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 34 (1959)). Professor Klarman also quotes from a memorandum by law clerk William Norris, who recommended taking the appeal on the second round because “[i]t will begin to look obvious if the case is not taken that the Court is trying to run away from its obligation to decide the case.” *Id.* (quoting Memorandum from WAN (William A. Norris), Law Clerk, to William O. Douglas, Assoc. Justice, U.S. Supreme Court, *Certiorari in Naim v. Naim* (Mar. 1, 1956)) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Office Memos, nos. 350–99, Box 1164).

<sup>46</sup> Wechsler, *supra* note 45, at 34.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

its consideration of *Griswold v. Connecticut*.<sup>49</sup> Thus, fears of backlash aside, there may have been differences in doctrinal understanding that prevented the Court from seeing the miscegenation issue in quite the way that Wechsler did. In particular, the Court would not squarely face the “miscegenation problem” until it had been separated from desegregation by external circumstances.

The Court was far from comfortable with its avoidance of the issue. One of Chief Justice Warren’s law clerks would later recall that the Chief Justice “was furious. He thought that the failure to take the case was an evasion of the Court’s responsibility.”<sup>50</sup> Justice Black was also prepared to review the appeal.<sup>51</sup> From Chief Justice Warren’s point of view, the direction compelled by legal doctrine was aligned with his personal values and it was only the concern for political backlash that was holding the Court back from facing the issue.

Chief Justice Warren’s memoir makes it clear that the Court was also aware of, and sympathetic to, the plight of African Americans under segregation. His accounts of the “indignities” imposed on African Americans by segregation are extensive and include not only summaries of law but also anecdotes of individual experiences

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<sup>49</sup> 381 U.S. 479 (1965). Justice Brennan initiated concerns about the basis and scope of such a right based in marriage. In a letter to Justice Douglas during the composition of the *Griswold* opinion, Justice Brennan argued,

I hesitate to bring the husband-wife relationship within the right to association we have constructed in the First Amendment context. Any language to the effect that the family unit is a sacred unit, that it is unreachable by the State because it is an instruction unit, may come back to haunt us just as *Lochner* did.

Letter from William J. Brennan, Assoc. Justice, U.S. Supreme Court, to William O. Douglas, Assoc. Justice, U.S. Supreme Court (Apr. 24, 1965) (on file with Library of Congress, William O. Douglas Papers, Part II: Box 1347). Justice Brennan’s case history of the October 1964 term records the reasoning by which Justice Douglas was persuaded to drop freedom of association from the opinion:

It was possible to persuade Justice Douglas to abandon the First Amendment approach by showing that the ‘association’ of married couples had little to do with advocacy—and that so broad-gauged an approach might lead to First Amendment protection for the Communist Party simply because it was a group, an approach Justice Douglas had rejected in the original Communist Party registration case.

Case History for October 1964 Term at xiv (on file with Library of Congress, Manuscript Division, William J. Brennan, Jr. Papers, Box II: 6).

<sup>50</sup> Cray, *supra* note 23, at 451.

<sup>51</sup> *Id.*

that affected the Chief Justice at the time. One anecdote involved the segregation of ambulance services:

In this respect, I recall after the *Brown* decision, in one of the Southern cities a little black girl was critically injured and lying on the street. Someone called for an ambulance, but unfortunately for the little one she was refused ambulance service because the ambulance which responded was for whites and not for blacks.<sup>52</sup>

There is similar evidence for the personal feelings of the other Justices. Justice Black referred to segregation as “Hitler’s creed.”<sup>53</sup> Justice Jackson, who had served as the chief counsel for the United States in the Nuremberg Trials, remarked in a letter to a friend, “You and I have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with racial conceits which underlie segregation policies.”<sup>54</sup>

## II. APPROACHING INTIMACY WITH THE LAW: *MCLAUGHLIN V. FLORIDA*

Nonetheless, when the Court was presented with a challenge to a Florida statute that punished the cohabitation of interracial, heterosexual couples, it took care to reserve the question of statutes banning interracial marriage. It was not at all clear what the Court would do with the case. As noted above, the series of per curiam opinions following *Brown* had suggested that racial classifications were invidious per se in a number of contexts. But the Court had never articulated a test for such classifications under the Fourteenth Amendment. This Part works through the Court’s analysis

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<sup>52</sup> Warren, supra note 28, at 294. Justice Warren does not, however, include any mention of anti-miscegenation laws.

<sup>53</sup> Klarman, supra note 4, at 433 (citing *The Supreme Court in Conference (1940–1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions* 639 (Del Dickson ed., 2001) (reproducing the April 8, 1950, conference discussion in *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950))).

<sup>54</sup> Klarman, supra note 4, at 435 (quoting Letter from Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, to Charles Fairman, Professor, Stanford Univ. (Mar. 13, 1950) (on file with Library of Congress)). See also Robert H. Jackson: 1941–1954, in *The Supreme Court Justices: Illustrated Biographies, 1789–1993*, at 409 (Clare Cushman ed., 1993) (describing Justice Jackson’s tenure as chief counsel for the United States at the Nuremberg trials).

of the issue in *McLaughlin v. Florida*, from the grant of certiorari through a shifting consensus, and then analyzes the reasons why the decision settled as it did.

### A. Taking the Case

A commentator writing just after the Supreme Court noted probable jurisdiction in *McLaughlin v. Florida* remarked that there was “[c]onsiderable national attention” on the case.<sup>55</sup> He argued that “[a]lthough the Court in *McLaughlin* may not reach the issue of the constitutionality of miscegenation statutes, it will apparently be confronted with the only precedent that has been consistently cited by courts in upholding these statutes—its 1883 decision of *Pace v. Alabama*.”<sup>56</sup> In *Pace*, the Court upheld a criminal statute that punished interracial “fornication” more severely than the same offense when committed by members of the same race.<sup>57</sup> The opinion held that “[w]hatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.”<sup>58</sup> This theory, known as the equal application theory, determined that racial classifications would not be discriminatory as long as attendant sanctions were applied equally to members of both races.<sup>59</sup>

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<sup>55</sup> Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 *Geo. L.J.* 49, 49 (1964).

<sup>56</sup> *Id.* (citing *Pace v. Alabama*, 106 U.S. 583 (1883)). Professor Applebaum concludes that the normal presumption in favor of legislation exercising the police power should not apply in cases where there is a racial classification at issue. *Id.* at 90. He then predicts that a state would not likely be able to carry the burden of showing harm. *Id.*

<sup>57</sup> 106 U.S. at 583–84. The first conviction for fornication between any white person and “any negro, or the descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person” would carry a penalty of two to seven years’ imprisonment or hard labor. *Id.* at 583 (quoting Ala. Code § 4189 (1876)). The first conviction for fornication between members of the same race carried a minimum fine of one hundred dollars. *Id.* (citing Ala. Code § 4184 (1876)).

<sup>58</sup> *Id.* at 585.

<sup>59</sup> Applebaum, *supra* note 55, at 58.



Ostensibly, *Pace* was still good law when the Court convened to hear arguments in *McLaughlin*.<sup>60</sup> The appellants, Dewey McLaughlin, a man from British Honduras, and Connie Hoffman, a white woman, had been arrested when Hoffman's landlady called the police to the apartment on the suspicion that Hoffman was living with a black man.<sup>61</sup> The police found McLaughlin there with Hoffman and identified him "on the basis of their 'experiences and observations as a Negro.'"<sup>62</sup> Hoffman and McLaughlin were each fined \$150 and sentenced to thirty days in jail by a jury.<sup>63</sup> The Florida Supreme Court upheld the conviction on the authority of *Pace v. Alabama* because the statute called for the two of them to receive the same punishment.<sup>64</sup>

The memorandum on certiorari written by Justice Douglas's law clerk advocated strongly for jurisdiction to be noted and the judgment reversed:

I think *Pace* is wholly inapposite but if it is thought to control, I think it shd be overruled. This sort of law certainly cannot stand with decisions like *Brown* and its aftermath. This must be the nearest thing to *apartheid* in America today. The state has not filed a response. I don't think one is necessary and I think cert shd be granted and the judgment reversed. I see no reason to slow this thing down by taking time for oral arguments.<sup>65</sup>

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<sup>60</sup> See *id.* at 60. Professor Applebaum felt, however, that "recent Supreme Court decisions indicate that the Court will no longer accept the 'equal application' theory utilized in *Pace*." *Id.* at 58.

<sup>61</sup> Robinson, *supra* note 20, at 137.

<sup>62</sup> *Id.* at 137–38.

<sup>63</sup> *Id.* at 138.

<sup>64</sup> *McLaughlin v. Florida*, 379 U.S. 184, 187 (1964).

<sup>65</sup> Memorandum on Certiorari from ELS, Law Clerk, to William O. Douglas, Assoc. Justice, U.S. Supreme Court (Dec. 23, 1963) (on file with Library of Congress, Manuscript Division, William O. Douglas Papers, Part II: Box 1334). It is not clear why the law clerk thought *Pace* "wholly inapposite"—perhaps because McLaughlin and Hoffman had not been charged with fornication, only cohabitation. The structure of the law was quite different from that in *Pace*, and one of the objections raised to it was that it was broad and vague enough to apply "where an uncle spends the night in a relative's room." *Id.* So "ELS" was probably thinking in terms of a challenge to the statute as void for vagueness—the appellants made this argument as well as an argument that the state's definition of "Negro" ("with at least 1/8 Negro or African Blood") rendered the statute vague because it is "genetically and biologically absurd." *Id.* The application of *Pace*, however, would have to do with the way in which

The Justices thus heard strong feelings from their young colleague about the clerk's perception of the case. Within the Court at the beginning it might even have looked as if this case provided an opportunity to invalidate miscegenation and cohabitation statutes as invidious remnants of American apartheid.

*B. The Indication of a New Rule?*

There was every indication, then, that *McLaughlin* would be a "hard case," demanding reconciliation of "traditional legal sources with broader social and political mores and the personal values of the judges."<sup>66</sup> Appellants moved to have the case removed from the summary calendar to allow more time for oral arguments. A memorandum on the motion by the same law clerk quoted above reflected a sense that the case was growing more complex than it initially seemed. The clerk recommended granting the motion with the remark that "the issues in this miscegenation case can't adequately be argued in 30 minutes per side."<sup>67</sup> The description of *McLaughlin* as a "miscegenation case" is significant. Early on, it seems, internal correspondence of the Court treated *McLaughlin* as if it would involve the miscegenation statutes.

A handwritten note in the margin of the memo on certiorari reads: "Brennan suggests reversing on *Dorsey* 359 U.S. 533 on interracial boxing—CJ [Chief Justice] agrees—WOD " [William O. Douglas agrees]."<sup>68</sup> *State Athletic Commission v. Dorsey* was a per curiam opinion issued in 1959, granting the motion to affirm for *Dorsey*, and affirming the judgment of the court below in the federal district court of Louisiana.<sup>69</sup> Joseph Dorsey, a "colored" prizefighter, had brought a class action suit against the Louisiana State Athletic Commission to enjoin its prohibition of boxing (or "fistic combat match[es]") between "any person of the Caucasian or

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the statute called for *McLaughlin* and Hoffman to receive the same punishment for their "crime."

<sup>66</sup> Klarman, *supra* note 4, at 431–32.

<sup>67</sup> Memorandum from ELS, Law Clerk, to William O. Douglas, Assoc. Justice, U.S. Supreme Court (June 9, 1964) (on file with Library of Congress, Manuscript Division, William O. Douglas Papers, Part II: Box 1334).

<sup>68</sup> Memorandum on Certiorari from ELS, *supra* note 65. The note in the margin is written in two lines. It indicates that Justice Douglas also agrees by placing a ditto mark after his initials and under the word "agrees" from the phrase "CJ agrees."

<sup>69</sup> *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959).

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‘white’ race and one of the African or ‘Negro’ race.”<sup>70</sup> Writing for a three-judge panel, Circuit Judge Wisdom ruled that “separation of Negroes and whites based solely on their being Negroes and whites is a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.”<sup>71</sup> His reasoning drew on *Brown* and the per curiam opinions in its wake:

In the School Segregation Cases, the Supreme Court held that classification based on race is inherently discriminatory and violative of the Equal Protection Clause of the Fourteenth Amendment. This principle, originally stated with respect to children in public schools, has been applied to classification based on race at golf courses, parks, beaches and swimming pools, and in buses and streetcars. The application of the principle does not depend purely upon the fact that the school or the park is publicly owned; it rests on the fact that the discriminatory classification is enforced by state officials or state agencies. The Supreme Court has consistently defined state action as including action of any agency of the state . . . .<sup>72</sup>

*Dorsey* was evidence that lower courts were reading *Brown* and its progeny as a general proscription of classifications based “solely” on race. When the Supreme Court granted certiorari for *McLaughlin*, it seemed poised to articulate such a rule. Justices Brennan, Warren, and Douglas, at minimum, seemed prepared to rule on the basis of the reasoning in *Dorsey*.

*C. A Shift in Consensus*

By the time of the conference following oral arguments in *McLaughlin*, however, it had become clear that the Court would reach a different consensus. The State had responded to the appellants with an argument that the constitutional validity of the anti-miscegenation statute was procedurally out of bounds. According to the memorandum on the petition for certiorari, appellants argued that “[t]he one defense under the statute—marriage—was removed from jury consideration because the judge instructed that

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<sup>70</sup> *Dorsey v. State Athletic Comm’n*, 168 F. Supp. 149 (E.D. La. 1958).

<sup>71</sup> *Id.* at 153.

<sup>72</sup> *Id.* at 151–52 (citations omitted).

appltnts could not lawfully marry. But for their races, appltnts would have been considered joined by common law marriage, which Fla recognizes.”<sup>73</sup> The State’s response countered that there was “little or no” evidence that the appellants would have qualified for a common law marriage and that, because they did not object at trial, the point was not at issue.<sup>74</sup> The law clerk who summarized the State’s response for Justice Douglas voiced a new openness toward a ruling that would invalidate the cohabitation statute but not reach the anti-miscegenation statute: “I don’t think the validity of this [anti-miscegenation] statute needs to be considered to reverse the convictions, as I think the statute they were convicted of violating, and which is clearly before the ct, is plainly unconst.”<sup>75</sup>

Justice Brennan’s notes from the conference recorded only one argument, from the Chief Justice: “reverse on equal protection as in *Dorsey*.”<sup>76</sup> Justice Brennan did, however, record the votes of the conference that day, with six votes to reverse; two votes to dismiss, Justices Clark and Douglas; and one pass, Justice Harlan.<sup>77</sup> Justice Douglas’s notes from the conference record Justice Black remarking that he “does not see how the question can be decided without deciding [the] marriage question.”<sup>78</sup> Justice Black apparently also toyed with advocating dismissal of the case, continuing, “this is a bad case to reach the issue—clear underneath that both these people are married—if we do not dismiss.”<sup>79</sup> He seemed to have hoped not to reach the anti-miscegenation issue until there was a set of facts in which the two people concerned were “clearly” married

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<sup>73</sup> Memorandum on Certiorari from ELS, *supra* note 65.

<sup>74</sup> Memorandum on State’s Response from ELS, Law Clerk, to William O. Douglas, Assoc. Justice, U.S. Supreme Court (Apr. 21, 1964) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Part II: Box 1330).

<sup>75</sup> *Id.* It is interesting that the clerk was thinking in terms of “reversing the convictions” and not simply in terms of invalidating the statute—the clerk seems attuned to the plight of the parties in the case, or perhaps there is special resonance because the reversal of convictions under Jim Crow laws with criminal penalties had been meaningful in much of the litigation surrounding the civil rights movement.

<sup>76</sup> William J. Brennan, Conference Notes, No. 11, *McLaughlin v. Florida* (Oct. 16, 1964) (on file with the Library of Congress, Manuscript Division, William J. Brennan Papers, Part I: Box 113).

<sup>77</sup> *Id.*

<sup>78</sup> William O. Douglas, Conference Notes, No. 11, *McLaughlin v. Florida* (Oct. 16, 1964) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Part II: Box 1330).

<sup>79</sup> *Id.*

“underneath.” Chief Justice Warren, however, asserted that he “can’t see any justification for denying common law marriage to those of different races and granting it to others.”<sup>80</sup> Justice Douglas’s notes suggest that Justice Stewart split the difference, arguing that while the “Cohabitation Act is unconstitutional,” and the case “does not reach [the] miscegenation Act,” nonetheless “our decisions over the last 10 years require us to reverse both this [and] the miscegenation Act.”<sup>81</sup> Justice Douglas noted next to the initials of Justices Byron White and Arthur Goldberg that they both agreed with Justice Stewart.<sup>82</sup>

Justice Harlan passed on his vote that day because of lingering questions about the history of the Fourteenth Amendment, his grandfather’s famous dictum declaring the Constitution “color-blind” notwithstanding.<sup>83</sup> Justice Douglas recorded Justice Harlan’s comments as follows: “if [a] state can base [a] miscegenation Act on race they can have a cohabitation Act based on race—both would be unconstitutional he thinks but he has to go thru 14<sup>th</sup> Amendment history first—passes.”<sup>84</sup> Justice Harlan’s biographer, Tinsley Yarbrough, characterizes Justice Harlan’s “caution” in this field as similar to that which “he displayed in every constitutional field.”<sup>85</sup> After Justice Harlan asked his clerk to research the historical record, “[t]he clerk concluded in a memorandum to the Justice . . . that ‘[a]lthough the case for concluding that antimiscegenation statutes are not covered by the Amendment is not as good as that made in [your] dissent in *Reynolds v. Sims* for voting . . . the case is there.’”<sup>86</sup> While Yarbrough concedes that Justice Harlan “probably agreed . . . that the types of racial classifications the Fourteenth Amendment prohibited were not necessarily limited to

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<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Justice Harlan did discuss his perception of his grandfather’s views with the other Justices with reference to school desegregation. For an interesting account of an exchange between Justices Harlan and Frankfurter, see Tinsley E. Yarbrough, *Judicial Enigma: The First Justice Harlan* 161–62 (1995). Justice Harlan confessed that, in spite of some evidence to the contrary, he still thought his grandfather “would have been against segregation [in schools]”—but Justice Frankfurter disagreed. Id. at 161.

<sup>84</sup> Douglas, *supra* note 73.

<sup>85</sup> Tinsley E. Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* 267 (1992).

<sup>86</sup> Id. at 268.

those envisioned by its framers,” the lack of evidence that the framers would have applied the Amendment to anti-miscegenation laws “gave him pause.”<sup>87</sup>

Yarbrough’s formulation of Justice Harlan’s position shows the give and take between doctrinal issues and public controversy in the Justice’s thinking: “Since, if anything, the available historical evidence offered support for such laws, Harlan did not believe the Court should move too quickly to a contrary decision, especially in a case which did not even directly raise the issue.”<sup>88</sup> He therefore advocated a decision to invalidate the cohabitation statute without reaching the antimarriage law. In a letter to Justice White, he offered arguments that would later recirculate during the debates regarding another case regulating intimate relations, *Griswold v. Connecticut*. Justice Harlan argued that “laws infringing upon ‘a constitutionally protected area’ could be upheld only if ‘necessary, and not merely rationally related to, the accomplishment of a permissible state policy.’”<sup>89</sup> He could then assume, *arguendo*, the validity of a policy against interracial marriage, but invalidate the cohabitation statute as unnecessary, “[s]ince Florida had offered no argument that its policy against interracial couples could not be as adequately served by its racially neutral laws forbidding illicit sexual behavior as by a law ‘which singles out the promiscuous interracial couple for special statutory treatment.’”<sup>90</sup> Justice Harlan

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (quoting Letter from John M. Harlan, Assoc. Justice, U.S. Supreme Court, to Byron White, Assoc. Justice, U.S. Supreme Court (Nov. 30, 1964) (on file with the Library of Congress, John Marshall Harlan II Papers, Box 218)); see also *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (“[A] ‘governmental purpose to control or prevent activities . . . may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’”).

<sup>90</sup> Yarbrough, *supra* note 85, at 268. The basis and scope for the “constitutionally protected area” infringed is not clear from Yarbrough’s account of the letter. Since Justice Harlan made references to First Amendment cases in his letter, perhaps he was thinking in terms of a right of association, which would also be considered and rejected during the deliberations over *Griswold*. See Letter from William Brennan, Assoc. Justice, U.S. Supreme Court, to William O. Douglas, Assoc. Justice, U.S. Supreme Court (Apr. 24, 1965) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Part II: Box 1347).

would later author a concurring opinion in *McLaughlin* expressing this view.<sup>91</sup>

At this stage of the Court's engagement with the miscegenation issue, Justice Harlan's calculation seemed to suggest that as perception of doctrinal support for a decision increased, the importance of public controversy would decrease. The Court appeared to have changed its understanding of the balance of these concerns since the *Naim* appeal, in which, in Justice Frankfurter's words, "moral considerations . . . far outweigh[ed] technical considerations."<sup>92</sup> The change was not great enough, however, for the entire Court to sign on to the *Dorsey* reasoning in *McLaughlin*.

#### *D. An Uneasy Resolution of Majority and Concurrence*

In the end, only Justice Stewart was willing to voice a rationale in *McLaughlin* that would go almost as far as *Dorsey*. He authored a concurrence stating grounds that would have invalidated all criminal anti-miscegenation statutes because he could not "conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense."<sup>93</sup> Thus, he could not adopt the Court's implication that a criminal law "might be constitutionally valid if a State could show 'some overriding statutory purpose.'"<sup>94</sup> Why limit the reasoning in *Dorsey* to criminal statutes? As the opinion acknowledges, Justice Stewart could foresee civil laws that might involve benign racial classifications:

There might be limited room under the Equal Protection Clause for a civil law requiring the keeping of racially segregated public records for statistical or other valid public purposes. [citation omitted.] But we deal here with a criminal law . . . . And I think it is simply not possible for a state law to be valid under our Consti-

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<sup>91</sup> *McLaughlin v. Florida*, 379 U.S. 184, 197–98 (1964) (Harlan, J., concurring) (arguing that "[i]f the legitimacy of the cohabitation statute is considered to depend upon its being ancillary to the antimarriage statute, the former must be deemed 'unnecessary' . . . . If, however, the interracial cohabitation statute is considered to rest upon a discrete state interest, existing independently of the antimarriage law, it falls of its own weight").

<sup>92</sup> *Supra* note 39 and accompanying text.

<sup>93</sup> *McLaughlin*, 379 U.S. at 198 (Stewart, J., concurring).

<sup>94</sup> *Id.*

tution which makes the criminality of an act depend upon the race of the actor.<sup>95</sup>

There was a brief period when both Justices Black and Douglas looked as if they would sign on to the concurrence, but ultimately only Justice Douglas joined Justice Stewart.<sup>96</sup>

Justice White, writing for the majority, reserved the question of interracial marriage in this passage:

Florida's remaining argument is related to its law against interracial marriage, Fla. Stat. Ann. § 741.11, which, in the light of certain legislative history of the Fourteenth Amendment, is said to be immune from attack under the Equal Protection Clause. Its interracial cohabitation law, § 798.05, is likewise valid, it is argued, because it is ancillary to and serves the same purpose as the miscegenation law itself.

We reject this argument, without reaching the question of the validity of the State's prohibition against interracial marriage or the soundness of the arguments rooted in the history of the Amendment. For even if we posit the constitutionality of the ban against the marriage of a Negro and a white, it does not follow that the cohabitation law is not to be subjected to independent examination under the Fourteenth Amendment.<sup>97</sup>

The majority opinion rejected the "equal application theory," ruling that the statute was "reduced to an invidious discrimination forbidden by the Equal Protection Clause" because there was no "overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro,

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<sup>95</sup> Id.

<sup>96</sup> Successively dated drafts of Justice Stewart's concurrence on file in Chief Justice Warren's papers indicate the changing allegiances. Drafts dated November 23, 24, and 25 circulated with minor changes and were signed only by Justice Stewart. The twenty-seventh and the thirtieth drafts circulated with both Justices Black and Douglas signing on to it. A final draft dated December 3 indicates that Justice Black had changed his mind. Drafts of Concurrence in *McLaughlin v. Florida* (Nov. 23, 24, 25, 27, 30, and Dec. 3) (on file with the Library of Congress, Manuscript Division, Earl Warren Papers, Box 522).

<sup>97</sup> *McLaughlin*, 379 U.S. at 195.



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but not otherwise”—that is, no purpose other than invidious discrimination itself.<sup>98</sup>

As Professor Andrew Kull noted, the decision moved the Court “toward its modern posture in racial cases” and has been criticized as “plainly artificial”:

The purpose of a statutory scheme that prohibits interracial marriage, and treats certain offenses (adultery, fornication, cohabitation) more harshly when the actors are of different races, is to deter and punish interracial sexual relations. The question is not whether the legislation employs a “reasonable classification” in terms of means and ends—in a candid assessment of legislative purpose, the classification is not only reasonable but indispensable—but whether the Constitution allows the legislature to pursue its race-conscious objective. A simple statement that it did not would seem to have been well within the Court’s reach at the time.<sup>99</sup>

For a number of reasons, however, the Court was not willing to state a rule that would sweep away anti-miscegenation statutes. It was not simply that the Court was seeking to avoid controversy—the Court also sought the traction of solid doctrinal footing. Justice Black, for instance, would have them wait for a “good case” to decide the issue.

Professor Kull suggests that the Justices’ unwillingness to state a rule was nevertheless not purely a show of judicial modesty: “To state a rule—for instance, that racial classifications were presumptively impermissible—could only diminish the justices’ freedom to decide future cases when and how they wished.”<sup>100</sup> To be sure, the statement of a rule would have reduced judicial discretion, but the six Justices who did not sign on to Justice Stewart’s opinion might legitimately have feared that the rule was overbroad. The Court had not considered squarely the question of whether the state’s police power could extend to the criminalization of racial intermarriage.

Why then, might Justice Stewart have felt ready to commit to such a rule? Presumably, he was experiencing the same external

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<sup>98</sup> *Id.* at 192.

<sup>99</sup> Kull, *supra* note 3, at 169–70.

<sup>100</sup> *Id.* at 170.

pressures as the other Justices. Here, the difference must have been, at least in part, a different valuation of the doctrinal footing for such a rule. Justice Stewart's comments in conference had focused on what the last ten years of Court precedent required.<sup>101</sup> According to one of his former law clerks, Ben W. Heineman, Jr., Justice Stewart's "solution to the riddle of judicial review under the great open-ended constitutional guarantees was a 'common law' approach in which principles emerged slowly and organically from the facts of each case."<sup>102</sup> Justice Stewart "believed deeply in history and in precedent."<sup>103</sup> Heineman points out, for instance, that Justice Stewart dissented in *Griswold v. Connecticut* "because he could find no such right [to privacy] in the Constitution," but "once the Court had found such a right, he accepted that doctrine and applied it in *Roe v. Wade*."<sup>104</sup> There is a similar pattern in the unfolding of the Court's equal protection jurisprudence. Perhaps this is why Justice Stewart was more willing to bind and be bound by the precedents set by *Brown* and the per curiam opinions in its wake—even if it meant applying them to anti-miscegenation statutes. The rest of the Court would wait for a good case.

### III. DECIDING ON DOCTRINE: *LOVING V. VIRGINIA*

It has been said that the Supreme Court is, by its nature, a reactive institution. Courts, unlike legislatures, must wait for appropriate cases to come before them and may only react to the issues presented in them.<sup>105</sup> If it is true that hard cases make bad law, then easy cases may well make good law. In 1967, *Loving v. Virginia* was arguably the right case at the right time for the Court to decide the anti-miscegenation issue. At last, the Court would take the opportunity to articulate a test for racial classifications challenged under the Equal Protection Clause and to clarify, to a certain extent, its view of marriage as a fundamental right protected by the due proc-

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<sup>101</sup> William O. Douglas, Conference Notes, *supra* note 78.

<sup>102</sup> Ben W. Heineman, Jr., A Balance Wheel On The Court, 95 Yale L.J. 1325, 1325 (1986).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1326.

<sup>105</sup> See, e.g., Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 163–64 (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994).

ess clause. The claim I am making here is not that the outcome of *Loving* was inevitable,<sup>106</sup> but rather that its timing and the facts presented in the case afforded the Court the chance to deal squarely with the legal issues.

#### *A. An Easy Case?*

It seems clear, as Professor Klarman has argued, that *Brown* was a classic hard case, requiring the Justices to reconcile “traditional legal sources with broader social and political mores and the personal values of the judges.”<sup>107</sup> The Justices were split five to four when the initial vote was taken at conference following the first oral arguments for *Brown*.<sup>108</sup> By contrast, the initial vote following oral arguments in *Loving* was unanimous in favor of invalidating the anti-miscegenation statutes.<sup>109</sup> In 1955, when the *Naim* appeal came before the Court, the anti-miscegenation statutes of Virginia seemed too difficult a case even to review. *Loving* was now apparently easy to decide. There remained, however, some disagreement about the legal doctrine that justified the decision.

In the years between *Brown* and *Loving*, the Court had seen the positions of the President and of Congress change with respect to segregation. The Civil Rights Act of 1964 formally did away with discrimination in public accommodations, facilities, and education, though it left the states’ anti-miscegenation statutes untouched. Meanwhile, state legislatures began repealing anti-miscegenation laws of their own accord. Between 1954 and 1967, eleven states repealed their anti-miscegenation statutes, leaving only a block of sixteen predominantly Southern states with such statutes at the

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<sup>106</sup> Conflicting analyses of how the case should come out appeared in the same issue of the *Virginia Law Review* in 1966. See Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 Va. L. Rev. 1224, 1224–26 (1966); Walter Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1222–23 (1966).

<sup>107</sup> Klarman, *supra* note 4, at 431–32.

<sup>108</sup> *Id.* at 433 (citing a letter from Justice Frankfurter to Stanley Reed in May of 1954, recalling that the vote was five to four to invalidate segregation; and a memorandum dictated by Justice Douglas reporting that the vote would have been “five to four in favor of the constitutionality of segregation in the public schools”).

<sup>109</sup> William O. Douglas, *Conference Notes*, No. 395, *Loving v. Virginia* (Apr. 14, 1967) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Part II: Box 1402).

time oral arguments in *Loving* were heard.<sup>110</sup> Maryland's repeal had passed in early 1967, just before the oral arguments on April 10th.<sup>111</sup> It was a point that would be emphasized during oral arguments—the Court's first question was “[h]ow many states have laws like this?”<sup>112</sup> The sense that anti-miscegenation laws were on their way out, or had been repealed in jurisdictions without the history of Jim Crow laws, may well have contributed to the Court's readiness to invalidate them.

Similarly, the *Loving* case, unlike the *McLaughlin* case in 1964, presented the “marriage underneath” for which Justice Black had been waiting as a basis for challenging anti-miscegenation statutes. Richard Loving and Mildred Jeter had grown up together in rural Virginia. Though Richard was six years older, they began “court-ing” at a young age without objection from a community whose “close-knit nature . . . required a certain degree of interdependence [among black and white] which could sometimes lead to an acceptance of personal relationships in a particular setting that would have been anathema elsewhere.”<sup>113</sup> When Mildred was eighteen, she and Richard decided to marry. Richard was aware that interracial

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<sup>110</sup> See Lynn D. Wardle & Lincoln C. Oliphant, In Praise of *Loving*: Reflections on the “*Loving* Analogy” for Same-Sex Marriage, 51 How. L.J. 117, 180–83 (2007). The states repealing anti-miscegenation statutes between 1954 and 1967 were Arizona (1962), Colorado (1957), Idaho (1959), Indiana (1965), Maryland (1967), Nebraska (1963), Nevada (1959), North Dakota (1955), South Dakota (1957), Utah (1963), Wyoming (1965). *Id.* Ten states had already repealed similar statutes before *Brown* and thirteen states had never had them. *Id.* That left the following sixteen states with anti-miscegenation statutes at the time of the oral argument in *Loving*: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia. *Id.*

<sup>111</sup> Transcript of Oral Arguments at 2, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), reprinted in 64 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 959–61 (Philip B. Kurland & Gerhard Casper eds., 1975); Wallenstein, *supra* note 36, at 181.

<sup>112</sup> Transcript of Oral Arguments at 2, *supra* note 111, at 959–61.

<sup>113</sup> Robert A. Pratt, Essay, Crossing the Color Line: A Historical Assessment and Personal Narrative of *Loving v. Virginia*, 41 How. L.J. 229, 235 (1998). Professor Pratt grew up in the same neighborhood in Battery, Virginia, where Mildred Loving's sister lived in the early 1960s. Pratt knew the family and occasionally played with Mildred and Richard Loving's children when they came for visits with the family—visits that Richard would not join in until after dark, because of the court order against their presence together in Virginia. *Id.* at 229–30. Much of the article is based on rare interviews given by Mildred Loving. *Id.* at 242–43.

cial marriage was illegal (though Mildred was not), so he drove them to Washington, D.C., where they obtained a marriage certificate and were married.<sup>114</sup> Mildred and Richard then settled in Virginia with Mildred's parents. They hung their marriage certificate on their bedroom wall.<sup>115</sup> Five weeks after the Lovings married, Caroline County Sheriff R. Garnett Brooks and deputies "opened the unlocked door of [the Lovings'] home" in the early hours of the morning, walked into the bedroom where the Lovings were sleeping, and "shined a flashlight in their faces."<sup>116</sup> The Sheriff then "demanded to know what the two of them were doing in bed together."<sup>117</sup> Richard gestured toward the marriage certificate on the wall and Mildred said that she was Richard's wife, but Sheriff Brooks only responded, "That's no good here."<sup>118</sup> He arrested them both on charges of unlawful cohabitation and took them to jail. Richard was let go after the first night, but Mildred was kept for several more days.<sup>119</sup> A grand jury indicted the Lovings for violating the Racial Integrity Act of 1924.<sup>120</sup> The statutory scheme made it a crime for a white person to marry anyone defined as colored, and provided that any white person and colored person who are married out of the state with the intention of returning would be punished as if they had been married in Virginia.<sup>121</sup>

This set of facts likely resonated with the Court. The sudden inspection of a marital bedroom recalls Justice Douglas's rhetorical question in *Griswold v. Connecticut*: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>122</sup> Because Mildred and Richard Loving were known to be of different races, the County Sheriff had indeed broken into their bedroom early that morning to ascertain whether they were in fact sleeping together as man and wife.

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<sup>114</sup> *Id.* at 236.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Wallenstein, *supra* note 36, at 183.

<sup>120</sup> *Loving v. Virginia*, 388 U.S. 1, 3–6 (1967).

<sup>121</sup> *Id.* at 4.

<sup>122</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

Another sign that the Court felt liberated from external concerns about the practical enforcement or legitimacy of an opinion on the miscegenation issue was the status of social science in the arguments and in the final opinion. If Footnote Eleven was a sign that the *Brown* Court was seeking to shore up its legitimacy with social science, then the Court's quick disposition of Virginia's argument regarding the "scientific evidence" of a rational basis for banning interracial marriage is a sign of the Court's confidence that its legal reasoning could stand alone. In effect, the Court swept away the social science on either side of the question, asserting instead that the Fourteenth Amendment requires heightened scrutiny of racial classifications that could not be satisfied by the State's invocation of the debatable science in this case. The Court rejected the State's argument that, when "scientific evidence is substantially in doubt," the Court should defer to the "wisdom of the state legislature," distinguished previous precedent involving distinctions "not drawn according to race," and proceeded to lay out the new rule for dealing with racial classifications: "In the case at bar, however, we deal with statutes containing racial classifications, and 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."<sup>123</sup>

The confidence of the opinion belies the extent to which the social science was discussed during oral arguments, however, and the Court's characterization of the State's argument is canny. The State, in its brief, did argue that the social science was conflicted and that it should not form any basis for the Court's ruling, but the State also argued in the alternative that the most recent science favored its ban of interracial marriage.<sup>124</sup> The Lovings' attorneys similarly argued that "Virginia has not presented, and we submit cannot present, reputable scientific evidence to prove that a person of

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<sup>123</sup> *Loving*, 388 U.S. at 8–9.

<sup>124</sup> Brief on Behalf of the Appellee at 38–48, *Loving*, 388 U.S. 1 (No. 395), reprinted in 64 Landmark Briefs and Arguments, supra note 111, at 831–43 (arguing that "[i]f this Court (erroneously, we contend) should undertake such an inquiry, it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion," and that "the most recent scientific treatise," the "definitive book on intermarriage," by Dr. Albert Gordon argues that interracial marriages are "definitely inadvisable").

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mixed blood is somehow ‘inferior’” and that “[e]ven if reliable scientific evidence could be presented . . . the State’s burden would not be met.”<sup>125</sup>

During oral arguments, the Court did not question the Lovings’ attorneys on the citations of social scientists in their brief, but the Court did engage with the State’s attorney when the State made the following claim:

It is clear, from the most recent available evidence on the psycho-sociological aspect of this question that intermarried families are subjected to much greater pressures and problems than are those of the intramarried, and that the State’s prohibition of racial intermarriage, for this reason, stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage . . . .<sup>126</sup>

Chief Justice Warren asked: “There are people who have the same feeling about interreligious marriages. But because that may be true, would you think that the State could prohibit people from having interreligious marriages?”<sup>127</sup> The question had particular meaning for the Chief Justice, since his youngest daughter was married to a Jewish man.<sup>128</sup> R.D. McIlwaine, assistant attorney general for Virginia, was forced into the following exchange:

MR. MCILWAINE: I think that the evidence in support of the prohibition of interracial marriages is stronger . . .

THE COURT: How can you say that?

MR. MCILWAINE: Well, we say that principally—

THE COURT: Because you believe that?

MR. MCILWAINE: No, sir. We say it principally on the basis of the authority which we have cited in our brief, particularly this one volume which we have cited from copiously in our brief—<sup>129</sup>

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<sup>125</sup> Brief on Behalf of Appellants at 36, *Loving*, 388 U.S. 1 (No. 395), reprinted in 64 Landmark Briefs and Arguments, supra note 111, at 784.

<sup>126</sup> Transcript of Oral Arguments, supra note 23, at 27–28.

<sup>127</sup> Id. at 28; see also Cray, supra note 23, at 450.

<sup>128</sup> Cray, supra note 23, at 450.

<sup>129</sup> Transcript of Oral Arguments, supra note 111, at 28. Chief Justice Warren’s biographer interprets this moment as if McIlwaine “confessed he did not accept his own argument . . . lamely.” Cray, supra note 23, at 450. I would disagree with that characterization. The recording of the oral arguments has now been made available online through The Oyez Project. The tone of McIlwaine’s answer is not one of a personal

The exchange slowly backed McIlwaine into the position of revealing just how weak the scientific underpinning of the State's rational purpose was: "Now, our proposition on the psychosociological aspects of this question is bottomed almost exclusively on this particular volume . . . ."<sup>130</sup> The State pushed the credentials of the book hard, asserting that it "has been widely accepted, and it was published in 1964 as being the definitive book on intermarriage in North America that exists."<sup>131</sup>

There is evidence that these claims may be somewhat inflated: contemporary reviews of the work are mixed.<sup>132</sup> But the Court did not seem interested in the soundness of the work itself. The point of the line of questioning led not to the weighing of sociological evidence, but to the sincerity of the State's claim that the purpose of the statute was to minimize the kind of harm Gordon's psychosociological study purported to show. After allowing McIlwaine to expound on Gordon's theses briefly, the Court countered with this reference to an authority cited by the Lovings' attorney: "I was wondering what you thought of the findings of this great committee of UNESCO, where about 20 of the greatest anthropologists in the world joined unanimously in making some very cogent findings

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confession. To the contrary, McIlwaine only seems too eager to assert that it is a matter of a policy preference for cited authorities, impersonal and scientific, rather than a matter of personal prejudice. See The Oyez Project, *Loving v. Virginia* Oral Argument, [http://www.oyez.org/cases/1960-1969/1966/1966\\_395/](http://www.oyez.org/cases/1960-1969/1966/1966_395/) (last visited Nov. 10, 2008).

<sup>130</sup> Transcript of Oral Arguments, *supra* note 111, at 28.

<sup>131</sup> *Id.* at 29.

<sup>132</sup> See Ruby Jo Reeves Kennedy, Book Review, 4 *J. Sci. Study Religion*, 135, 135 (1964) (observing that "[w]hile Dr. Gordon presents what he regards as incontrovertible evidence to establish his first thesis, his secondary theses are supported for the most part by his own opinions based upon his experience"); Raymond Payne, Book Review, 71 *Am. J. Soc.* 227, 228 (1965) (remarking that "Gordon seems to value institutional stability beyond individual freedom of choice and action, accommodation beyond assimilation, and categorical loyalty beyond interpersonal attachment. One suspects that these and other of the author's values were formed some time ago and that they have remained relatively unaffected by the materials accumulated for this volume, a statement intended to detract not at all from this thoroughly instructive and stimulating book"); Robert F. Winch, Book Review, 30 *Am. Soc. Rev.* 323, 324 (1965) (expressing skepticism over Gordon's assertion that the end of hatred should not come at the loss of diversity: "Is such blandness too high a price to pay for the abolition of the differences leading to ethnocentrism, inter-group conflict, and genocide? Can the rabbi be serious?").



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on the racist view. Do you agree with that?”<sup>133</sup> Then, in answer to the Court’s query, “I guess you would agree, wouldn’t you, that we can’t settle that controversy,” McIlwaine retreated to the position that the “psycho-sociological” evidence is not determinative:

I would, Your Honor. I have stated clearly in the brief that for the Court to undertake to enter this controversy, the Court would find itself mired in a Sybarian [sic] bog of conflicting scientific opinions which, I assure the Court, is sufficiently broad, sufficiently fluid, and sufficiently deep to swallow the entire Federal Judiciary.<sup>134</sup>

Having harried McIlwaine into bungling his reference to Milton’s “Serbonian bog,” the Court pressed home what feels like the true point in the whole exchange:

May I ask you this question? Aside from all questions of genetics, physiology, psychiatry, sociology, and everything else . . . is there any doubt in your mind that the object of these statutes, the basic premise on which they rest, is that the white people are superior to the colored people, and should not be permitted to marry them?<sup>135</sup>

McIlwaine eventually admitted that this was the purpose of the “original enactments.” He went on, however, to suggest that the laws now serve the purpose indicated by the sociological evidence in the brief: “[B]ut, Your Honors, I say that you are facing a problem in 1967.”<sup>136</sup> One member of the Court rejoined: “Whether it’s 1967 or 1868, it’s no difference to me in a discussion of the equal protection of the laws.”<sup>137</sup> This time the Court was prepared to “bottom” its argument on the logic of its own jurisprudence as set

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<sup>133</sup> Transcript of Oral Arguments, *supra* note 111, at 30.

<sup>134</sup> *Id.* at 32. The “Serbonian bog” to which the assistant attorney general refers is from John Milton’s *Paradise Lost*, Book II 592–94 (Henry W. Boynton ed., 1916) (“A gulf profound as that Serbonian bog / Betwixt Damiata and Mount Casius old / Where armies whole have sunk.”). According to the ancient historian Diodorus Siculus, the Egyptian lake Serbonis was thought to create a trap for travelers when desert sands blew across it and disguised its surface as dry land. See *Paradise Lost*, 1668–1968: Three Centuries of Commentary 116 (Earl Miner et al. eds., 2004).

<sup>135</sup> Transcript of Oral Arguments, *supra* note 111, at 32.

<sup>136</sup> *Id.* at 33.

<sup>137</sup> *Id.*

out in *McLaughlin*, and the state's purpose in passing the statutes would be central to the logic of the Court's equal protection analysis.

*B. "Simple" Equal Protection*

Justice Douglas's conference notes indicate that the Court was unanimous in voting to reverse on its first count.<sup>138</sup> The Chief Justice apparently remarked that it was a "simple equal protection case—14th A[mendment] was to wipe out discrimination on basis of race—miscegenation stat[utes] maintain white supremacy—they should all go down the drain."<sup>139</sup> Only Justice Harlan added to the discussion by stating his conclusions as to the place of the history of the Fourteenth Amendment. Justice Douglas summarized Justice Harlan's argument: "[I]f history of the 14th A showed exclusion of the matter, he would affirm, as 14th A not ambulatory—so legislative history is relevant—subject matter is within 14th A—1866 Act measures the scope of the 14th A."<sup>140</sup> In stark contrast to the conference on *McLaughlin*, the conference on *Loving* made it seem as if the important issues had already been decided.

Indeed, during oral arguments the Court scarcely interrupted Philip Hirschkop, who presented the Lovings' equal protection argument.<sup>141</sup> Justice Douglas preserved a number of memoranda passed to him from Justice Fortas during the arguments that further suggest the Justices were not finding the case difficult. There are three separate memoranda in the case file that jokingly intersect with lines of the argument. For instance, Justice Fortas plays with the role of sociological evidence: "The argument sociologically / Is overwhelming anthropologically / But the legal principle / Is not so non-vincible."<sup>142</sup> The reference to "a Jap" in another poem by Justice Fortas apparently plays on arguments made by William

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<sup>138</sup> William O. Douglas, Conference Notes, *supra* note 109.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> The Court asked only five questions—they would ask nearly twice that number of Bernard Cohen, who presented the Lovings' due process argument. See Transcript of Oral Arguments, *supra* note 111, at 1–13.

<sup>142</sup> Memorandum from Abe Fortas, Assoc. Justice, U.S. Supreme Court, to William O. Douglas, Assoc. Justice, U.S. Supreme Court (Apr. 10, 1967) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Part II: Box 1379).

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M. Marutani, amicus curiae on behalf of the Japanese American Citizens League, who contrasted the Virginia code's treatment of different "colored" races: "Loving may marry a Jap / A gal from anywhere on the Map / But not a black, even one-third / with two-thirds blood of the [Virginia Senator Harry] Byrd."<sup>143</sup> The taboo of confronting the miscegenation issue had become available as a source of fun. The Court had come a long way since Justice Frankfurter had confided to Learned Hand after *Naim*, "We twice shunted it away and I pray we may be able to do it again, without being too brazenly evasive."<sup>144</sup>

*C. Due Process?*

As the majority opinion was being drafted, there were only two real points of contention recorded. First, there was the question of whether to address the due process argument mounted by the appellants. Justice Black felt that it was not necessary to address it, writing to the Chief Justice:

I heartily agree with the equal protection part of your opinion that ends on page 10 but having decided the whole case there I see no reason for adding what follows. The case comes so fully under equal protection that I think [that] should end it. Besides therre [sic] are statements in the due process part with which I

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<sup>143</sup> Id.; Transcript of Oral Arguments, supra note 111 at 13–17. There is another version of this poem in the Abe Fortas Papers, which has been reprinted in Kalman's biography of Justice Fortas. She interprets it as evidence that "[t]he pomp of the Court tickled Fortas, and sometimes the issues it considered spurred him to doggerel." See Laura Kalman, *Abe Fortas: A Biography* 320 (1990). There is one other poem by Justice Fortas in Justice Douglas's *Loving* file, also dated April 10, 1967, but it doesn't seem to have a connection to any legal argument—except perhaps the need for a right to privacy in the marital relationship: "A number of spouses / is not like grouses— / Many spouses add up to spice / Many grouses mean lots of grice. / A grouse in hand is worth a lot / A spouse in hand may be or not / But grice in the bush are wasted / While spice in the bush may be tasted." Memorandum from Abe Fortas, Assoc. Justice, U.S. Supreme Court, to William O. Douglas, Assoc. Justice, U.S. Supreme Court (Apr. 10, 1967) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Part II: Box 1379). Justice Fortas also may have been thinking of state regulation as to the number of spouses, a phrase that comes up a number of times in the oral arguments.

<sup>144</sup> Cray, supra note 23, at 451.

would not agree. If you keep it in it would be easier for me to agree if you would divide it into two points.<sup>145</sup>

Justice Black's preference was to decide the case on the narrowest grounds possible, without entering into a substantive due process analysis. Professor Kull's criticism of the Court's reluctance to adopt rules in order to maximize the discretion at their disposal is apt, but it does not follow that all members of the Court were therefore judicial "maximalists." Justice White echoed a similar concern in a letter to the Chief Justice:

[I]f the statute satisfied the Equal Protection Clause, I would not hold it a violation of due process as "arbitrary." On the other hand, since it does not meet equal protection standards, it may automatically be a violation of due process also. All in all, I see no reason to reach the due process question.<sup>146</sup>

Ruling that the racial classifications in these statutes were "arbitrary" deprivations of due process might have led to the conclusion that all racial classifications were arbitrary—a rule with a wider potential scope than Justice Stewart's rule.

A draft of the opinion stamped June 5, 1967, reflects Chief Justice Warren's responses to these comments.<sup>147</sup> He created a separate part, labeled "II," for the due process argument and greatly shortened it. The earlier version included a long quotation from *Meyer v. Nebraska* on the definition of liberty,<sup>148</sup> which was struck from the opinion. He also edited out a reference to the racial classifications in the statute as "arbitrary" and replaced it with "unsupportable." The new adjective in that context suggested that the classifications in the statute could not be supported because they did not meet the standard under equal protection: "To deny this fundamental freedom on so unsupportable a basis as the racial

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<sup>145</sup> Note in the Margin of Draft Opinion Circulated May 31, 1967, *Loving v. Virginia*, by Hugo L. Black, Assoc. Justice, U.S. Supreme Court (May 31, 1967) (on file with the Library of Congress, Manuscript Division, Earl Warren Papers, Box 620).

<sup>146</sup> Letter from Byron White, Assoc. Justice, U.S. Supreme Court, to Earl Warren, Chief Justice, U.S. Supreme Court (May 31, 1967) (on file with the Library of Congress, Manuscript Division, Earl Warren Papers, Box 620).

<sup>147</sup> Draft of Opinion, *Loving v. Virginia*, (June 5, 1967) (on file with Library of Congress, Manuscript Division, Earl Warren Papers, Box 620).

<sup>148</sup> *Id.*; see also *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

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."<sup>149</sup> This change left room for some racial classifications, those that meet the standard under equal protection analysis, to be "supportable." The due process argument otherwise remained intact. Nothing in the record indicates why the other Justices joined it in spite of their reservations. Perhaps the invocation of the liberty of "all the State's citizens" seemed particularly apt in this overruling of the last vestige of segregation.

#### *D. Stewart's Concurrence in a New Context*

The final point the Justices discussed was the question with which this Note began: Why not adopt the rule advocated by Justice Stewart's concurrence in *McLaughlin*? The reasons the Justices clearly had for rejecting the rule in 1964 seem to have been resolved. They no longer needed to avoid reaching the anti-miscegenation statutes, and they had a good case before them. However, Professor Kull has suggested that by 1967, new "institutional concerns" were within the contemplation of the Court:

During the two and a half years [between *McLaughlin* and *Loving*], the restrictions on judicial freedom of action threatened by an acknowledged rule of color blindness . . . had assumed specific and unwelcome form . . . [F]ederal judges in the still-segregated South were fighting massive resistance with massive desegregation. Civil rights lawyers who read the opinions being written in the Fifth Circuit school cases could not fail to perceive the conflict between the emerging law of school desegregation and a constitutional prohibition of racial classifications.<sup>150</sup>

Professor Kull's reading may help to explain a cryptic comment in Justice White's letter to the Chief Justice about the draft of the opinion: "I prefer the second approach [requiring a heavy burden for racial classifications over a per se rule] since I think there are some racial classifications . . . I would approve, although I see no

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<sup>149</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Meyer*, 262 U.S. at 399–400.

<sup>150</sup> Kull, *supra* note 3, at 169–70.

reason for me or the Court to say so at this point.”<sup>151</sup> It seems probable that Justice White had the desegregation orders in mind.

Of course, Justice Stewart had cabined his per se rule to reach only criminal statutes, which made application of the rule in *Loving* problematic. In *McLaughlin*, the only penalties involved were criminal, but in *Loving* there was also a civil statute declaring all marriages between a white and a non-white void without decree. A per se rule against only the criminal punishment of interracial marriage would have left intact many of the differences in treatment that violated the Equal Protection Clause as we now understand it.<sup>152</sup> What had seemed to be an overbroad rule in response to *McLaughlin* must have seemed underinclusive in response to *Loving*.

#### CONCLUSION

The institution of the Court had to function within a quickly changing world in the period from *Brown* to *Loving*. The Warren Court's apparent preference for a standard-like means-and-ends test of the Equal Protection Clause is understandable in this context not only as an offensive desire to retain judicial discretion, but also as a defensive desire to preserve the Court's ability to react to whatever unpredictable changes would develop next. In such a context, it must have seemed difficult to evaluate what the scope and application of broad, sweeping rules might mean for the Court alone and in its relationship to the other branches of government. Thus, for the Warren Court, in dealing with racial classifications, judicial discretion was the better part of valor. The Court would continue to move case by case. The irony in *Loving* is that the Court's decision not to adopt a per se rule against racial classifications could have been read as a conservative decision in its time. Yet Chief Justice Warren's formulation of the holding gave the case potential for a far wider application than it could possibly have had if Justice Stewart had written the majority opinion, instead of the concurrence.<sup>153</sup>

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<sup>151</sup> Letter from Byron White, *supra* note 146.

<sup>152</sup> See *supra* note 37 and accompanying text.

<sup>153</sup> Scholars in family law, marriage law, immigration law, and civil rights law, as well as advocates of same-sex marriage have all cited the case as important to their respec-

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tive fields. See, e.g., Margaret F. Brinig, *The Supreme Court's Impact on Marriage, 1967-90*, at 41 *How. L.J.* 271, 272-73 (1998); Adele M. Morrison, *Same-Sex Loving: Subverting White Supremacy Through Same-Sex Marriage*, 13 *Mich. J. Race & L.* 177 (2007); Nolan, *supra* note 33; Romero, *supra* note 37; Cass R. Sunstein, *The Right to Marry*, 26 *Cardozo L. Rev.* 2081, 2086-87 (2005).