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The Legacy of Loving

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Tell the Court I love my wife, and it is just unfair that I can't live with her in Virginia.*
Richard Loving

I feel free now . . . it was a great burden.**
Mildred Loving

[I would prefer to see] less mixed marriages. But if one doesn't know any better than to mess up, let them have it.***
Georgia Governor Lester Maddox

I. INTRODUCTION

The Supreme Court sounded the death knell for anti-miscegenation laws in *Loving v. Virginia*,[1] a unanimous ruling in which Chief Justice Earl Warren broadly and unambiguously pronounced such laws unconstitutional as a matter of both due process and equal protection law. Of course, the ruling was immediately significant to Mildred and Richard Loving, who could finally return home to Virginia without fear of criminal prosecution and lift the veil of illegitimacy over their three interracial children. It was also immediately signifi-

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* Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 HOW. L.J. 229, 239 (1998) (quoting message conveyed by Richard Loving's lawyer to the U.S. Supreme Court during oral argument in *Loving v. Virginia*).

** Helen Dewar, *Victor in Mixed Marriage Case Relieved: 'I Feel Free Now. . . ,'* WASH. POST, June 13, 1967, at A11 (quoting Mildred Loving in the wake of the Court's ruling in *Loving v. Virginia*).

*** *Court Kills Mixed Marriage Laws, Upholds King Contempt Conviction*, ATLANTA CONST. 1, June 13, 1967, at 1 (quoting Georgia Governor Lester Maddox in the wake of the Court's ruling in *Loving v. Virginia*).

1. 388 U.S. 1 (1967).

cant to some states, since they were stripped of the power to enforce existing civil or criminal bans on interracial marriage. The day after, news reports agreed that the decision marked the end of miscegenation nationwide, even though the Court directly invalidated Virginia's law.[2] Since no American law prohibiting or burdening interracial marriage has been enforced in the forty years since *Loving* was decided,[3] the ruling was, in that particular sense, an effective one.

But, at the time *Loving* was decided, anti-miscegenation laws were already on their way out. Only sixteen states still had such laws on the books,[4] although all but twelve had once banned such marriages.[5] Indeed, Maryland had voluntarily repealed its anti-miscegenation law just a few months before the ruling in *Loving* was handed down, just as fourteen other states had done in the fifteen years prior.[6] And, although the Supreme Court had never addressed the constitutionality of interracial marriage bans prior to *Loving*, two state courts had already struck down such laws on constitutional grounds.[7] So while the Supreme Court's ruling certainly hastened their demise, the criminalization of interracial marriage had already suffered a cultural blow that was more wounding than the constitutional one.

How, then, does one best celebrate the fortieth anniversary of a case that itself signaled the end rather than the beginning of an era? On anniversaries of *Roe v. Wade*, for example, commentators still have many live questions to consider about the doctrinal coherence of the ruling, the political backlash against it, the re-emergence of anti-abortion laws in spite of it, and the likelihood that the right it estab-

2. *See, e.g.*, Jean M. White, *Court Overturns Virginia's Ban on Mixed Marriages*, WASH. POST, June 13, 1967, at A1 ("The Chief Justice's sweeping language left no doubt that similar laws in 15 other states must fail."); *Justices Upset All Bans on Interracial Marriage: 9-0 Decision Rules*, N.Y. TIMES, June 13, 1967, at 1 ("The wording was sufficiently broad and disapproving to leave no doubt that the anti-miscegenation laws of 15 other states are also now void.").

3. There were a few cases post-*Loving* that tested the specific effects of the invalidation of anti-miscegenation laws, but they were easily disposed of.

4. *Loving*, 388 U.S. at 6 n.5.

5. *See* Edward Stein, *Past and Present Proposed Constitutional Amendments*, 82 WASH. U. L.Q. 611, 627-28 (2004).

6. *Loving*, 388 U.S. at 6 n.5.

7. *See, e.g.*, Perez v. Sharp, 198 P.2d 17 (Cal. 1948) (invalidating California's ban on interracial marriage on federal constitutional grounds). A court in Alabama also invalidated the state's miscegenation ban in 1872, but the decision was subsequently overruled. *See* Burns v. State, 48 Ala. 195 (1872), *overruled by* Green v. State, 58 Ala. 190 (1877). Many more courts upheld their state's miscegenation laws than struck them down. *See* Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49 (1964) (reviewing cases). The retreat from bans on interracial marriage was primarily a function of legislative, rather than judicial action. *See* Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1211-12 (1966).

lished will survive pressures from an increasingly conservative Supreme Court.[8] But similar questions are not raised by *Loving*, which did not influence any presidential elections, has not been the victim of state legislative subterfuge, and has *never* been vulnerable to being overturned, even at the hands of the most conservative Supreme Court justices.[9] So what questions should we ask instead when evaluating the legacy of *Loving*?

Loving is understood by most to be a "landmark" case,[10] a reference to its perceived great import and significance to American law. A full understanding of *Loving*'s legacy—and the reasons for its revered treatment over the years—must consider not only its immediate effect on anti-miscegenation laws, but also its use by litigants and courts in other legal contexts, as well as its impact on the parties, society and culture. It is this legal, personal, and cultural legacy we try to construct here.

In Part II we consider the influence of *Loving* on the law, with respect to the right to marry, the constitutional limits on state regulation of family law, and the constitutionality of race-based classifications. In Part III we attempt to place *Loving* in its personal, societal, and cultural context through a canvass of selected newspaper accounts

8. Several symposia were convened on the twenty-fifth anniversary of *Roe v. Wade*. *See, e.g., Symposium: A Celebration of Reproductive Rights: Twenty-Five Years of* Roe v. Wade, published in volume 9 of the Women's Rights Law Reporter. The thirty-fifth anniversary in 2008, may prove to be the most fruitful occasion to consider *Roe*'s legacy, given the Supreme Court's recent decision upholding the federal Partial-Birth Abortion Ban Act of 2003. *See* Gonzales v. Carhart, 127 S. Ct. 1610 (2007); *see also* Joanna Grossman & Linda McClain, *New Justices, New Rules: The Supreme Court Upholds the Federal Partial-Birth Abortion Ban Act of 2003*, FindLaw's Writ, May 1, 2007, http://writ.news.findlaw.com/commentary/20070501_mcclain.html (discussing the impact of *Gonzales* on constitutional protection for a woman's right to seek an abortion).

9. On *Loving*'s invulnerability, see William N. Eskridge, Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment 109 (1996) ("no respectable scholar disputes the correctness of *Loving*"); Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 278 (2003) ("any constitutional theory that cannot support [*Loving*'s] result is a constitutional theory that should not be supported"). Jill Hasday cites these authorities as evidence that *Loving* is a part of the family law canon. *See* Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825, 854-56 (2004).

10. Law journal articles on a wide variety of topics routinely use "landmark" to describe *Loving*. *See, e.g.*, Robert A. Destro, Loving v. Virginia *after 30 Years: Introduction*, 47 Cath. U. L. Rev. 1207, 1209 (1998) ("*Loving v. Virginia* is, by any definition, a landmark case."); Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828 (1999); Nadine Strossen, *In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future*, 29 Harv. C.R.-C.L. L. Rev. 143 (1994); *see also* Hasday, *supra* note 9, at 854-55 ("Legal authorities and legal scholars consistently identify *Loving* as one of the most crucial decisions in family law, illuminating family law's nature and core values."). The briefs from *Loving* are included in Landmark Briefs and Arguments of the Supreme Court of the United States (Philip B. Kurland & Gerhard Casper eds., 1975).

published near the time of the decision.[11] We also examine academic commentary that relates to the issues in *Loving* and its impact on the practice of interracial marriage.

II. *LOVING*'S LEGAL LEGACY

The simple fact that decennial anniversaries of *Loving* are celebrated by law journals reveals something about its importance to the legal canon.[12] Scholars are convened to consider the "legacy" of the case—what it has left us so many years after it was decided. This type of legacy is similar to the one we will someday construct for *Lawrence v. Texas*, a 2003 case in which the Supreme Court held Texas' criminal same-sex sodomy law unconstitutional.[13] As in *Loving*, the Supreme Court in *Lawrence* intervened at the tail end of an era, when most states had already eliminated criminal bans on sodomy, if they ever had them. Only thirteen still criminalized sodomy when *Lawrence* was decided, and only four of those specifically targeted same-sex sodomy.[14] And, also like *Loving*, *Lawrence* was instantaneously "effective" in barring states from adopting or enforcing any such law. But putting an end to legal bans on sodomy is hardly what *Lawrence* will be remembered for. It will, instead, be remembered for what it did or did not do for same-sex marriage, and for what it did or did not do for other laws regulating sexual conduct, such as adultery,[15] fornication,[16] polygamy,[17] incest, statutory rape,[18] and even the use of sex toys.[19]

11. While we realize that a larger project would justify an examination of articles in local publications, particularly in the southern states, for our purposes here we believe that archival material from *The New York Times* is fairly representative.

12. This symposium celebrates the fortieth anniversary of *Loving*. A conference celebrating the thirtieth anniversary of *Loving*, co-sponsored by Howard, Catholic, and Brigham Young Law Schools, produced a number of articles in a symposium entitled *Law and the Politics of Marriage*. *See* Destro, *supra* note 10 (describing the purpose of the conference to "provide historical, legal, and interdisciplinary background to scholars and practitioners who are interested in the ways that courts, advocates, and scholars use the Court's holding in *Loving v. Virginia*").

13. 539 U.S. 558 (2003).

14. *See id.* at 573.

15. The District of Columbia enacted the Elimination of Outdated Crimes Amendment of 2003 to repeal a number of obsolete or unenforceable laws. *See* D.C. LAW 15-154 (effective Apr. 29, 2004) (repealing, *inter alia*, D.C. LAW 22-201, § 3(B), which criminalized adultery).

16. *See, e.g.*, Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005) (invalidating Virginia's criminal ban on fornication in light of *Lawrence*).

17. *See, e.g.*, State v. Holm, 137 P.3d 726 (Utah 2006) (upholding state's ban on polygamy against *Lawrence* challenge).

18. *See, e.g.*, State v. Limon, 122 P.3d 22 (Kan. 2005) (invalidating sentence escalation for statutory rape involving two parties of the same sex under *Lawrence*).

19. *See* Joanna L. Grossman, *Is There a Constitutional Right to Promote the Use of Sex Toys?*, FINDLAW'S WRIT, Jan. 27, 2004, http://writ.news.findlaw.com/grossman/20040127.html

Although *Lawrence* has already been invoked in a wide range of cases, four years is too few to sit back and conjure up a legacy, or celebrate an anniversary.

It's not too soon for *Loving*, though. Forty years is plenty to justify this question: What has *Loving* meant in American law? *Loving*'s legal and doctrinal legacy is three-fold. *Loving* has been used to define and affirm the fundamental right to marry, to enforce federal constitutional limits on domestic relations, and to invalidate racial classifications and other practices that perpetuate racial subordination.

A. *Loving* and the Right to Marry

The contemporary battle over same-sex marriage has given *Loving* a renaissance. The rhetorical parallels are too tempting to ignore, and the few rulings that have supported marriage or marriage-like rights for same-sex couples have made much of the similarities.[20] But let's not put the cart before the horse. How did *Loving* shape constitutional protection for marriage in the first place?

1. Marriage in the Pre-*Loving* Era

Before *Loving*, the Supreme Court's role with respect to marriage law was limited to refereeing conflicts between the states, who had long differed over the substantive restrictions on marriage, and, even more stridently, about the accessibility of divorce.[21] Increasing mobility and the rise of divorce mills made conflicts between states about the proper regulation of marriage and divorce a common occurrence, disputes which reached the Supreme Court's doorstep on occasion.[22] Through those decisions the Supreme Court, and to a greater extent lower federal and state courts, developed an approach to inter-

(considering the impact of *Lawrence* on the validity of Texas's criminal ban on the promotion of sex toys).

20. *See infra* text accompanying notes 62–88.

21. Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87 (2004) (considering history of interstate conflict over marriage and divorce).

22. *See, e.g.*, Williams v. North Carolina, 317 U.S. 287 (1942) (ruling that North Carolina must give full faith and credit to a Nevada divorce granted to North Carolina residents); Estin v. Estin, 334 U.S. 541 (1948) (ruling that a Nevada divorce court had no authority to terminate a husband's obligation to provide support established under a New York decree of legal separation); *see also* Grossman, *supra* note 21, at 89-100 (considering Supreme Court's approach to interstate conflict over divorce and related judgments). Several states competed for divorce business by shortening residency requirements and adopting more expansive grounds for divorce. Nevada ultimately became the premier divorce mill, and thus many of the conflicts between

state recognition that drew on notions of comity, pragmatic considerations about the need for portable personal status, and, where applicable, principles of full faith and credit.[23]

There was no federal law norm about the right approach to regulating marriage and divorce before *Loving*, and thus no substantive principles for the Supreme Court to bring to bear on the few family law cases it heard.[24] There was, instead, merely the need for federal courts to establish a coherent approach to interstate conflicts. This limited involvement was thus consistent with the longstanding belief that domestic relations law was reserved to the states.[25] Indeed, prior to *Loving*, the Supreme Court had invalidated not a single state marriage or divorce law,[26] despite significant variations among state codes,[27] and had often made clear its belief that marriage was a matter for the states to regulate. As Justice Field wrote in *Maynard v. Hill*, an 1888 case involving the validity of a legislative divorce granted by the Oregon Territory to a Vermont husband:

> *Marriage*, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, *has always been subject to the control of the legislature.* That body prescribes the age at which parties may contract to marry, the procedure or form essential to marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.[28]

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states involved the enforceability of Nevada divorce decrees. *See* Grossman, *supra* note 21 (reviewing the history of migratory divorce).

23. *See generally* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433 (2005) (describing the history of interstate conflicts over marriage).

24. The Court occasionally made pronouncements about the importance of marriage while elaborating on the meaning of a fundamental right for constitutional purposes, but all of these mentions were pure dicta. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (observing that marriage is "fundamental to the very existence and survival of the race"); Meyer v. Nebraska. 262 U.S. 390, 399 (1923).

25. *See* Hasday, *supra* note 9, at 831 ("The family law canon contends that family law is, and has always been, a matter of exclusively local jurisdiction. . . . Yet contesting the family law canon's construction reveals the existence and extent of federal family law.").

26. The California Supreme Court had invalidated the state's anti-miscegenation law on federal equal protection grounds in 1948, but that ruling was not appealed to the U.S. Supreme Court. *See* Perez v. Sharp, 198 P.2d 17 (Cal. 1948).

27. *See* Grossman, *supra* note 23, at 437-43 (describing marriage law variations in the century prior to 1967).

28. 125 U.S. 190, 205 (1888) (refusing to invalidate the legislative divorce) (emphasis added); *see also* Pennoyer v. Neff, 95 U.S. 714, 734-35 (1878) (noting that a state has an "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved").

Pre-*Loving*, then, the Supreme Court's deference to state substantive norms regarding marriage was essentially complete. *Loving* heralded a new era for the Supreme Court, however, in which state marriage and divorce laws conflicted not only with parallel statutes in other states, but also with developing federal constitutional norms of equality and privacy.

2. *Loving*: The Ruling

The facts of *Loving* are familiar, but worth reiterating. Mildred Jeter, a part-African and part-Cherokee woman, and Richard Loving, a white man, crossed the border in 1958 from their home state of Virginia to neighboring Washington, D.C. to marry.[29] They returned to Virginia and set up house, but were indicted for violating Virginia's ban on interracial marriages. "Indicted" is perhaps too polite a description of how the Lovings became criminal defendants, however. Early one morning, three law enforcement officers entered their bedroom, shined a flashlight on them, and asked Richard, "What are you doing in bed with this lady?"[30] When he pointed to their District of Columbia marriage certificate hanging on the bedroom wall, Richard was told by Sheriff R. Garnett Brooks, "That's no good here."[31] The couple was hauled off to jail for unlawful cohabitation.

The Virginia law under which the Lovings were charged and convicted criminalized not only a marriage between a white person and a "colored person" celebrated in Virginia, but also such a marriage conducted out of state if celebrated by Virginia residents who left in order to evade the state's miscegenation ban.[32] (Non-whites could marry other non-whites under the code.) The trial judge suspended the sentences on the condition that the couple leave the state of Virginia and not return together for twenty-five years. Explaining the sentence, the judge opined:

> Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such

29. Loving v. Virginia, 388 U.S. 1, 2-3 (1967).

30. *See* David Margolick, *A Mixed Marriage's 25th Anniversary of Legality*, N.Y. TIMES, June 12, 1992, at B20.

31. *See id.*

32. *Loving*, 388 U.S. at 4-5 (excerpting relevant Virginia statutes). Anti-evasion laws such as this one were common, but not universal. *See* Grossman, *supra* note 21, at 100-05 (discussing prevalence and scope of marriage evasion laws at various points in American history).

> marriages. The fact that he separated the races shows that he did not intend for the races to mix.[33]

Pursuant to the court's order, the Lovings moved to the District of Columbia, but returned to Virginia four years later and filed a motion to vacate their convictions on federal constitutional grounds.[34] They challenged the constitutionality of the Virginia law under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In striking down the law, the Supreme Court reached three important conclusions. First, the Court dispensed with the notion that state power to regulate marriage was unlimited. Although earlier cases like *Maynard v. Hill* used broad language to describe state legislative control over domestic relations, *Loving* made clear that state marriage laws must comply with federal constitutional norms. As the Court stated, Virginia "does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. Nebraska* and *Skinner v. Oklahoma*."[35] The Court thus established a role for federal courts in hearing challenges to state marriage laws and for the constitution in circumscribing them.

Second, the Court concluded that Virginia's miscegenation ban violated the Equal Protection Clause of the Fourteenth Amendment. As discussed in greater detail below, it is the state's proffered defense to this particular challenge—and the Supreme Court's repudiation of it—that has proved the most important aspect of *Loving*'s legacy. Virginia argued that "because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination on the basis of race."[36] And if the classification is not invidious, Virginia contended, the Court should consider only whether there was any "rational basis" for the state to adopt and further a policy of discouraging interracial marriages.[37] The Supreme Court roundly rejected Virginia's approach, however, and put the so-called "equal application" theory to rest. Ap-

33. *Id.* at 3 (quoting trial judge).

34. *Id.*

35. *Id.* at 7 (citations omitted). These cases struck down, respectively, a law banning foreign language instruction for certain children and a compulsory sterilization law for certain criminals.

36. *Id.* at 8.

37. *Id.*

plying the "most rigid scrutiny,"[38] the Court found no sufficiently compelling purpose to justify Virginia's racial classification. Rather, the Court concluded:

> The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the classifications must stand on their own justification, as measures designed to maintain White Supremacy. . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.[39]

This ruling was sufficient to invalidate the Virginia law, but the Court did not stop there.

The Court also concluded that Virginia's miscegenation ban also violated the Due Process Clause of the Fourteenth Amendment. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[40] This aspect of the holding drew primarily on *Skinner v. Oklahoma*, a case in which the Supreme Court struck down as a violation of substantive due process a state law imposing compulsory sterilization as a penalty for some forms of theft but not others.[41] The Court viewed the right to marry as akin to the right to avoid involuntary sterilization and thus deserving of due process protection. The Court also cited *Maynard v. Hill* in support of its due process analysis, but that case had only to do with the desirability and importance of marriage as a social institution and nothing to do with a constitutional right to enter it. With little discussion, however, the Court concluded that Virginia's law was inconsistent with due process protections for marriage. But even this aspect of the Court's ruling clearly hinged on race:

> To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. Under our Constitution, the

38. *Id.* at 11 (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

39. *Id.* at 11-12. The Court found support in *McLaughlin v. Florida*, 379 U.S. 184 (1964), a little discussed case in which it had invalidated a Florida law banning cohabitation by interracial couples. *See also id.* at 198 (Stewart, J., concurring) (noting that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense").

40. *Loving*, 388 U.S. at 12.

41. *Id.*

> freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.[42]

The immediate import of *Loving* was clear: states no longer had the power to prohibit interracial marriages. But, as the next sections will explore, the ruling had broader import as well.

3. The Right to Marry After *Loving*

Because of the inextricable link in *Loving* between the invidiousness of the racial classification and the fundamental nature of marriage,[43] the impact of *Loving* on other types of marriage restrictions was not predetermined. The ruling certainly did not signify the Supreme Court's willingness to generally override state law with respect to marriage, nor to view all marriage prohibitions as equally invidious. Just five years later, the Court dismissed an appeal in *Baker v. Nelson*, one of the first cases to challenge (unsuccessfully) a state's refusal to permit same-sex couples to marry, "for want of substantial federal question."[44] Published dissents from the denial of certiorari in several cases in the 1970s and 1980s perhaps reveal a broader dispute on the Court about the appropriateness of federal intervention into state laws regulating marriage and other intimate relationships.[45]

The Court did, however, revisit the scope of the federal constitutional right to marry in two important cases after *Loving*. In 1978, the Court in *Zablocki v. Redhail*, struck down a Wisconsin statute that prohibited noncustodial parents who were behind on support obligations and whose children were on welfare from marrying without prior court approval.[46] The Court began its analysis with *Loving*—in its words, the "leading decision" on "the right to marry."[47] Truth be told, in 1978, *Loving* was the Court's only decision on the *right* to marry. Drawing on *Loving*, *Skinner*, *Griswold v. Connecticut*,[48] and the Court's view of marriage's importance as espoused in *Maynard v. Hill*,

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42. *Id.*

43. *See* Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1448 (2004) ("Today, most courts and scholars see the Equal Protection and Due Process Clauses as discrete bases for strict scrutiny. But in *Loving*, the two clauses operated in tandem.").

44. 409 U.S. 810 (1972).

45. *See, e.g.*, Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052, 1055 (1987) (Marshall, J., dissenting from the denial of certiorari) (refusing to review public library's decision to discharge two employees because of nonmarital coparenting and cohabitation); Whisenhunt v. Spradlin, 464 U.S. 965 (1983) (Brennan, J., dissenting from the denial of certiorari) (refusing to review police department policy disciplining two offers for nonmarital cohabitation).

46. 434 U.S. 374 (1978).

47. *Id.* at 383.

48. 381 U.S. 479 (1965).

the plurality in *Zablocki* characterized marriage as a right "of fundamental importance," the infringement of which warranted heightened scrutiny. Between the time of *Loving* and *Zablocki*, the right of privacy had been broadened to include a panoply of rights regarding marriage, family, intimate relationships, and reproduction.[49] In *Zablocki*, the Court found the importance of the right to marry sufficiently fundamental to justify "critical examination" of laws that significantly interfere with it.[50]

Zablocki was not, however, a due process case.[51] It was, instead, a case decided under the now moribund fundamental rights branch of the Equal Protection Clause. So *Zablocki* did not establish absolute protection for the right to marry; rather, it stands for the proposition that classifications that directly and substantially interfere with the fundamental interest in marriage must be subjected to heightened scrutiny. Though *Zablocki* was an equal protection case, and *Loving* stopped short of declaring marriage a fundamental right in its due process analysis, the two cases together have been understood to establish that "the right to marry counts as fundamental for constitutional purposes."[52]

Zablocki, moreover, made clear that the Court's unwillingness to tolerate certain marriage restrictions was not limited to those drawn on the basis of race. The defendant in *Zablocki*, after all—a Caucasian, teenage father of an out-of-wedlock child with a new pregnant girlfriend—was part of no "suspect" class.[53] Justice Powell argued in his concurrence in *Zablocki* that the majority was overreading *Loving* by applying it outside of the race context, though he agreed with the

49. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (the right to live with nonnuclear family members); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (the right to continue working while pregnant); Roe v. Wade, 410 U.S. 113 (1973) (the right to seek an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (the right of single people to obtain contraceptives).

50. *Zablocki*, 434 U.S. at 383. The precise standard adopted in *Zablocki* authorizes "rigorous scrutiny" for marriage regulations that "interfere directly and substantially with the right to marry." *Id.* at 386.

51. For a helpful discussion of *Zablocki* and its relationship to *Loving*, see 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 (1998).

52. Cass R. Sunstein, *The Right to Marry*, 26 Cardozo L. Rev. 2081, 2087 (2005).

53. *See also* Mark Strasser, Loving *in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. Chi. L. Sch. Roundtable 61 (2000) (noting that *Zablocki* "laid to rest the suggestion that only marital statutes discriminating on the basis of race will be held to violate the Equal Protection Clause").

majority that the Wisconsin statute must fall to the constitutional challenge.[54]

A decade later, the Court took up the right to marry again in *Turner v. Safley*,[55] a case challenging the constitutionality of a Missouri prison regulation that permitted inmates to marry only with permission of the prison superintendent, approval that was to be granted only for "compelling reasons."[56] There, *Loving* and *Zablocki* were cited together as precedent for the proposition that "the decision to marry is a fundamental right, a point so well-established it is conceded by the State of Missouri."[57] The question for the Court in *Turner* was only whether that fundamental right was shared, in whole or in part, by prison inmates. As with other rights, the Court held that prisoners retain the fundamental right to marry, which can be burdened only to the extent required by legitimate penological interests.[58] Here, the Court found insufficient justification for the marriage restriction and thus invalidated it.[59] *Turner* completed the right-to-marry trilogy, which provides robust constitutional protection for the right to marry against attempted governmental intrusions.[60]

4. *Loving* and the Lower Courts

Though the Supreme Court has not revisited the right to marry in the two decades since *Turner*, matters on the marriage front have hardly been quiet. The scope of the right to marry remains fiercely contested because of the issue of same-sex marriage, and *Loving* plays a central role in that battle. The role of *Loving* in same-sex marriage cases has been given much treatment in this symposium and elsewhere,[61] but we would be remiss to not give it at least some consideration.

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54. *See Zablocki*, 434 U.S. at 396 (Powell, J., concurring in the judgment).

55. 482 U.S. 78 (1987).

56. *Id.* at 82.

57. *Id.* at 94.

58. *Id.* at 95. Thirteen years earlier, the Supreme Court denied certiorari in a case challenging the validity of a prison marriage regulation. *See In re* Goalen, 512 P.2d 1028 (Utah 1973), *cert. denied*, 414 U.S. 1148 (1974). Justice Stewart, joined by Justices Douglas and Brennan, dissented from the denial of certiorari, raising the question whether Utah's justification for the marriage restriction was sufficient to overcome the right to marry as articulated in *Loving*. *See In re* Goalen, 414 U.S. at 1150 (Stewart, J., dissenting).

59. *Turner*, 482 U.S. at 97.

60. For an interesting discussion of what the "right" to marry really consists of, see Sunstein, *supra* note 52.

61. *See generally* ESKRIDGE, *supra* note 9, at 109 (considering the relevance of *Loving* to litigation over same-sex marriage); Mark Strasser, Loving *Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 How. L.J. 75 (2007).

a. *Loving* and Same-Sex Marriage

Same-sex marriage advocates have invoked *Loving* in both a doctrinal sense and in a broader rhetorical one. Doctrinally, plaintiffs invoke *Loving* to argue two points: that "state regulation of the right of access to the marital relationship is subject to constitutional limitations or constraints,"[62] and that banning same-sex marriage is a form of invidious sex discrimination. The first successful use of the "*Loving* analogy" in a same-sex marriage case was in *Baehr v. Lewin*, a 1993 case in which the Hawaii Supreme Court set the stage for the legalization of same-sex marriage in that state.[63]

The court in *Baehr* first drew on *Loving* to define the fundamental right to marry. In *Loving*, the Hawaii court reasoned, the U.S. Supreme Court had rejected the idea that a state could restrict a particular marriage or type of marriage because the "Deity had deemed such a union intrinsically unnatural."[64] The Virginia trial court's infamous words about "Almighty God['s]" separation of the races,[65] cited above, made clear that its decision to uphold the miscegenation ban turned on some notion of divine law. In the Hawaii court's view, the reversal of the outcome in *Loving* by the U.S. Supreme Court also signified a repudiation of this reasoning. "[W]e do not believe," the Hawaii Supreme Court wrote, "that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order."[66]

The plaintiffs in *Baehr* also made the claim that same-sex marriage bans discriminate on the basis of sex in the same way the anti-miscegenation laws discriminate on the basis of race, pointing to *Loving*'s rejection of the "equal application" justification for discrimination.[67] In *Loving*, the Supreme Court refused to accept the argument

62. Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993).

63. *Id.* at 44. At least two earlier cases had rejected the argument that bans on same-sex marriage were analogous to bans on interracial marriage. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (rejecting argument that same-sex marriage ban violated federal constitution), *appeal dismissed*, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. 1974) (rejecting analogy to *Loving* because same-sex couples are "being denied entry into the marriage relationship because of the recognized definition of that relationship").

64. *Baehr*, 852 P.2d at 63.

65. *Loving*, 388 U.S. at 3 (quoting trial judge).

66. *Baehr*, 852 P.2d at 63.

67. In his dissent from *Bowers v. Hardwick*, in which the Court refused to invalidate Georgia's sodomy law, Justice Blackmun observed that the "parallel between *Loving* and this case is almost uncanny," although he did not draw the specific analogy that later took hold among same-sex marriage advocates. *See* Bowers v. Hardwick, 478 U.S. 186, 211 n.5 (1986) (Blackmun,

that Virginia's law was valid because it applied equally to whites and blacks—whites could not marry blacks, just as much as blacks could not marry whites.[68] Thus, states should not be permitted to ban same-sex marriage as a matter of sex discrimination law because it means that men are permitted to marry women, but women are not, and vice versa. This is, the argument goes, plainly discrimination on the basis of sex because the class of potential spouses is determined by the individual's sex.

The *Baehr* majority refused to accept the argument made by one of the dissenting judges that the ban on same-sex marriage was valid because it "treats everyone alike and applies equally to both sexes. . . [because] neither sex is being *granted* a right or benefit the other does not have, and neither sex is being *denied* a right or benefit that the other has."[69] The court concluded, instead, that "[s]ubstitution of 'sex' for 'race' and article I, section 5 [of the Hawaii Constitution] for the fourteenth amendment yields the precise case before us together with the conclusion we have reached."[70] Thus, based on *Loving*, the Hawaii court concluded that the ban on same-sex marriage constituted a sex-based classification. This doomed it to almost certain invalidation since such classifications are reviewed with strict scrutiny under the Hawaii Constitution.[71] Same-sex marriage never came to pass in Hawaii, however, because while the case was pending on remand the constitution was amended to grant the legislature the power to ban same-sex marriage, which it subsequently exercised.[72]

Later cases on same-sex marriage wrestled as well with the import of *Loving*. To be sure, *Loving* has been routinely invoked by plaintiffs to make the sex discrimination argument, but with mixed

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J., dissenting). This analogy was urged by Professor Andrew Koppelman in his student note. *See* Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988) (arguing that just as miscegenation laws were designed to maintain white supremacy, "sodomy laws discriminate on the basis of sex – for example, permitting men, but not women, to have sex with women – in order to impose traditional sex roles").

68. *Loving*, 388 U.S. at 7-8.

69. *Baehr*, 852 P.2d at 67-68.

70. *Id.* at 68.

71. The standard of review under the Federal Constitution is nominally lower than under the Hawaii Constitution. *See* Craig v. Boren, 429 U.S. 190 (1976) (establishing "intermediate scrutiny" as the standard of review for sex-based classifications); United States v. Virginia, 518 U.S. 515 (1996) (requiring an "exceedingly persuasive justification" for a sex-based classification).

72. *See* Grossman, *supra* note 23, at 448-49 (describing battle for same-sex marriage in Hawaii).

results.[73] *Loving* has also been invoked in the same-sex marriage context on the broader question of the states' right to restrict marriage given due process protections for the fundamental right to marry, but again with mixed results. Many courts have simply held that *Loving* did not alter the nature of the fundamental right protected by due process principles, nor did it eradicate the right of states to restrict marriage.[74]

Other courts have distinguished *Loving* from same-sex marriage primarily because of their view that racial classifications are uniquely invidious and thus intolerable. The New Jersey Supreme Court in *Lewis v. Harris*, for example, refused to find that the state's ban on same-sex marriage violated the Due Process Clause of the state constitution, even though it ultimately held same-sex couples were entitled to equal benefits of marriage.[75] For due process purposes, the court rejected plaintiffs' reliance on *Loving*, noting that "the heart of the case was invidious discrimination based on race" and that the "fact-specific background of that case, which dealt with intolerable racial distinctions that patently violated the Fourteenth Amendment," provides no "support for plaintiffs claim that there is a fundamental right to same-sex marriage."[76]

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73. *Compare* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amended 1999) (same-sex marriage ban creates an illegal sex-based classification), *and* Li v. State, No. 0403-03057, 2004 WL 1258167, at *5-6 (Or. Cir. Apr. 20, 2004) (same), *and* Andersen v. King County, 138 P.3d 963, 989 (Wash. 2006) (same), *and* Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145, at *4 (Md. Cir. Ct. Jan. 20, 2006) ("[T]he relative genders of a same-sex couple are the very crux of the matter."), *with* Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999) (ban on same-sex marriage does not create a sex-based classification), *and* Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003) (same).

74. *See, e.g.*, Smelt v. County of Orange, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005) ("*Loving* did not confer a new fundamental right or hold the fundamental right to marry included the unrestricted right to marry whomever one chooses."), *aff'd in part and vacated in part*, 47 F.3d 673 (9th Cir. 2006).

75. *See* 908 A.2d 196, 210 (N.J. 2006) ("Despite the rich diversity of this State, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law, we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right."). The court in *Lewis* was interpreting the due process clause of the New Jersey constitution, but that clause has been interpreted coextensively with its federal analog and the court drew heavily on U.S. Supreme Court precedents in analyzing the issue. *See id.* at 207.

76. *Id.* at 210. Though it refused to find a due process violation, the court did rule that equal protection principles require that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." *Id.* at 221. It left the decision to the legislature whether to offer same-sex couples the right to marry or some legally equivalent alternative. *Id.* at 222-23. In the wake of the ruling in *Lewis*, the New Jersey legislature adopted a civil union law. *See* N.J. STAT. ANN. § 37:1-28 *et seq.* (West 2007).

Likewise, in *Baker v. State*, the Vermont Supreme Court interpreted the state constitution to require that equal benefits be extended to same-sex couples (codified ultimately in a civil union bill),[77] but rejected the analogy to *Loving* as "flawed." As the court explained, "[w]e do not confront in this case the evil that was institutionalized racism;" moreover, plaintiffs "have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy."[78] Thus, even before courts that were ultimately sympathetic to the claim for recognition of same-sex unions, *Loving* has not proven to be a trump card.

Some courts refused the *Loving* analogy because of their perceptions about the differing degrees of historical entrenchment for bans on same-sex marriage versus bans on interracial marriage. As an appellate court in California reasoned, "although anti-miscegenation laws had been around for many years when they were declared invalid," there is "no indication that interracial marriages were regarded at the time as so unprecedented that recognizing them would work a fundamental change in the definition of marriage."[79] Indeed, an Arizona court found a restriction on same-sex marriage implicit in *Loving* itself.[80]

Still other courts have distinguished *Loving* by taking into account recent history and tradition to decide whether a fundamental right is at stake.[81] In *Andersen v. King County*, for example, the court observed that "whatever the history and tradition of interracial marriage had been, by the time *Loving* was decided, it had changed."[82]

77. *See* An Act to Create Civil Unions, 15 VT. STAT. ANN. tit. 15, § 1201 *et seq.* (2004).

78. Baker v. State, 744 A.2d 864, 887 (Vt. 1999).

79. *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 704-05 (Cal. App. 2006); *see also* Samuels v. N.Y. State Dep't of Health, 29 A.D.3d 9, 19 (N.Y. App. 2006) (observing that "the law in *Loving* did not seek to redefine the historical understanding of marriage, but instead involved a race-based barrier to a traditional one woman, one man union.").

80. *See* Standhardt v. Superior Court, 77 P.3d 451, 458 (Ariz. Ct. App. 2004) ("Thus, while *Loving* expanded the traditional scope of the fundamental right to marry by granting interracial couples unrestricted access to the state-sanctioned marriage institution, that decision was anchored to the concept of marriage as a union involving persons of the opposite sex.").

81. Justice Kennedy's majority opinion in *Lawrence v. Texas* supports this approach. *See* 539 U.S. 558, 571-72 (2003) ("We think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.").

82. 138 P.3d 963, 977 (Wash. 2006).

On that point, the right to marry someone of a different race clearly stood on stronger footing in 1967, when only sixteen states still restricted the practice, than same-sex marriage does today, when only a single state permits such unions.[83] However, the only court to insist that same-sex couples be permitted to enter marriage per se read *Loving* differently in this regard. The Massachusetts Supreme Judicial Court, in *Goodridge v. Department of Public Health*, concluded that *Loving*'s outcome did not depend on the "full-scale retreat" of miscegenation laws, but turned instead on a "more fully developed understanding of the invidious quality of the discrimination."[84]

Loving has also played a less doctrinal, but still important, role in some of the same-sex marriage cases. Take, for example, the ruling of the appellate court in *Hernandez v. Robles*, which invalidated New York's ban on same-sex marriage.[85] Though it was ultimately reversed on appeal, the ruling exemplifies the rhetorical power of *Loving*. Justice Ling-Cohan began her opinion by describing the plaintiff-couples before the court and noting, among other things, that the parents of one plaintiff had themselves been denied the right to marry in Texas in the early 1960s because they were of different races.[86] "Thirty-eight years later," the judge noted in describing the plaintiffs who had filed suit to challenge New York's ban on same-sex marriage, "their son (Curtis Woolbright), his partner, and four other couples, bring suit to secure the fundamental right to choose one's partner in marriage. Karen Woolbright, mother of plaintiff Curtis Woolbright, understands from her own experience a generation ago what this means for her son."[87] *Loving*'s rhetorical force is not unlimited, however, and it frequently does not do the work plaintiffs ask of it.[88]

83. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (invalidating the state's ban on same-sex marriage on state constitutional grounds); *see also* Opinion of the Justices to the Senate, 802 N.E.2d 565 (2004) (advisory opinion pronouncing invalidity of Senate bill to adopt civil unions for same-sex couples rather than civil marriage).

84. *Goodridge*, 798 N.E.2d at 958.

85. 794 N.Y.S.2d 579, *rev'd*, 26 A.D.3d 98 (2005).

86. *See id.* at 582.

87. *Id.*

88. *See, e.g.*, Morrison v. Sadler, No. 49D13-0211-PL-001946, 2003 WL 25279748 (Ind. Super. Ct. May 7, 2003) (order on motion to dismiss) ("*Loving* in no way held that the right to marry means the right to marry whomever one wishes. Its import is far more focused: that whatever else marriage is about, it is not about racial segregation."); *In re* Marriage Cases, 49 Cal. Rptr. 3d at 708 (the analogy to *Loving* clearly falters given the Supreme Court's determination that the true purpose of Virginia's law was "to maintain White Supremacy").

b. *Loving* and Other Challenges to Marriage Law

Outside of the same-sex marriage context, *Loving* has had little relevance, if any, in challenging state regulation of marriage. Typical state laws (historically and today) restrict marriages on the basis of age, incest, bigamy, and mental capacity.[89] Relatively few constitutional challenges to state restrictions on marriage have been brought, and *Loving* has played only a marginal role in them. In *Moe v. Dinkins*, for example, a federal court considered the validity of New York's statute providing that minors below a certain age can only marry with parental consent.[90] In upholding the law, the court cited *Loving* only for the basic proposition that the right to marry is fundamental, but quickly dismissed its relevance to the narrower question before it since *Loving* did not arise "in the context of state regulation of marriages of minors."[91] And *Loving* was not cited at all in *Potter v. Murray City*, a case indirectly upholding Utah's ban on polygamous marriage against constitutional challenge,[92] or *Utah v. Holm*, a very recent case upholding a man's conviction for bigamy against a constitutional challenge.[93] The Tenth Circuit in *Potter* rejected a police officer's claim that he could not be fired for being a polygamist under the Due Process Clause of the Federal Constitution, noting that: "We find no authority for extending the constitutional right of privacy so far that it would protect polygamous marriages."[94]

Because of the relative infrequency with which marriage laws are challenged, the scope of the right to marry under *Loving* has not really been tested outside of the same-sex marriage context. But when it is invoked in such challenges, *Loving* provides little guidance as to the ways in which the right to marry can be restricted.[95]

B. *Loving*, Substantive Due Process, and the Limits of Federalism

An important but sometimes overlooked aspect of *Loving* is its role in establishing the federal constitutional limits on state domestic relations laws. The validity of Virginia's anti-miscegenation law had

89. *See generally* Grossman, *supra* note 23, at 437-46 (describing historical and contemporary impediments to marriage).
90. 533 F. Supp. 623 (S.D.N.Y. 1981).
91. *Id.* at 628.
92. 760 F.2d 1065 (10th Cir. 1985).
93. 137 P.3d 726 (Utah 2006).
94. *Potter*, 760 F.2d at 1070.
95. *See* Sunstein, *supra* note 52 (considering whether a state could abolish civil marriage altogether without running afoul of the fundamental right to marry).

been litigated in an earlier case, *Naim v. Naim*, in which a white man sought to annul his marriage to a Chinese woman, evasively contracted in North Carolina.[96] The Supreme Court of Appeals of Virginia upheld the law against the constitutional challenge, observing that "[m]arriage . . . is subject to the control of the States. Nearly seventy years ago the [U.S.] Supreme Court said [so], and it has said nothing to the contrary since."[97] In rejecting the petitioner's challenge to the miscegenation law, the Virginia court relied squarely on the fact that marriage had traditionally been "subject to state regulation without federal intervention, and, consequently . . . should be left to exclusive state control by the Tenth Amendment."[98] Even though the Supreme Court declined to review *Naim*,[99] it made clear in *Loving* that the Virginia court's ruling vastly overstated a state's power. The *Loving* majority wrote:

> While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it. . . .[100]

Loving thus cemented not only the right but also the practice of federal courts' reviewing state domestic relations laws for consistency with federal constitutional guarantees.[101] As the Tenth Circuit Court of Appeals noted in *Wise v. Bravo*, a case involving visitation interference, "The state's power to legislate, adjudicate and administer all aspects of family law . . . is subject to scrutiny by the federal judiciary within the reach of the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment."[102]

This repudiation of unlimited state power over domestic relations had implications beyond the right to marry, and spurred an expansion

96. 87 S.E.2d 749 (Va. 1955).

97. *Id.* at 751.

98. *Loving*, 388 U.S. at 7 (discussing *Naim*).

99. *See generally Naim*, 87 S.E.2d at 749, *vacated*, 350 U.S. 891 (1955), *on remand* 90 S.E.2d 849 (Va. 1956), *appeal dismissed*, 350 U.S. 985 (1956). According to Pamela Karlan, the Court "disingenuously" denied jurisdiction in order to avoid jeopardizing the effectiveness of its recent racial equality ruling in *Brown v. Board of Education* by tackling the "politically incendiary" question of interracial marriage. *See* Karlan, *supra* note 43, at 1463 n.65; *see also* Wadlington, *supra* note 7, at 1209-10 (1966) (discussing "speculation about the meaning of the final dismissal of *Naim* by the Supreme Court").

100. *Loving*, 388 U.S. at 7 (citations omitted).

101. *See also* Destro, *supra* note 10, at 1218 (noting *Loving*'s support for "federal oversight of State power to define, regulate, and order sexual, marital, and family relationships").

102. 666 F.2d 1328, 1332 (10th Cir. 1982) (rejecting section 1983 claim based on police failure to enforce visitation order) (citing *Loving*, 388 U.S. at 1).

of substantive due process rights more generally. Prior to *Loving*, there were only a handful of cases, mostly involving attempted intrusions into parental autonomy,[103] in which the Supreme Court considered overriding a state law regarding family status or operation based on constitutional constraints. But the body of constitutional family law grew dramatically beginning in the 1970s, an arc triggered in part by the Supreme Court's repudiation of Virginia's marriage law in *Loving*. According to Pamela Karlan, "*Loving* is seen today as a critical point in the revival of substantive due process."[104] The number of specific rights protected by that doctrine increased significantly in the two decades after *Loving* was decided.[105]

There is now a lengthy patchwork of cases that stand for the principle that individuals have "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy,"[106] and *Loving* is virtually always among those cited. *Loving* thus provides support for the right not to marry as well as the right to marry, and the related rights to make decisions over a "broad range of private choices involving family life and personal autonomy."[107] The Supreme Court includes *Loving* among the litany of cases collectively establishing the contours of the right to privacy: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.'"[108]

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103. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating, on due process grounds, statute that banned teaching of foreign language to children who had not passed the eighth grade); Prince v. Massachusetts, 321 U.S. 158 (1944) (affirming against Fourteenth Amendment challenge parent's conviction for violating child labor law by using child to distribute religious pamphlets).

104. Karlan, *supra* note 43, at 1463 n.7.

105. *See* cases cited *supra* note 49.

106. Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052, 1055 (1987) (Marshall, J., dissenting from the denial of certiorari) (citing, for example, *Loving*, *Zablocki*, *Skinner*, *Meyer*, and *Moore* to argue for the invalidation a public employer's prohibition on unmarried employees' living together in an intimate relationship).

107. Whisenhunt v. Spradlin, 464 U.S. 965 (1983) (Brennan, J., dissenting) (arguing that the court should consider the validity of police department's anti-nepotism policy as applied to a nonmarried couple). Somewhat curiously, *Loving* is omitted from the litany of cases cited by the majority in *Lawrence v. Texas* to define the "substantive reach of liberty under the Due Process Clause." 539 U.S. 558, 564-66 (2003). This may have been deliberate, given Justice Kennedy's clear intent to avoid creating a precedent for invalidating same-sex marriage bans on substantive due process grounds. *See id.* at 578 ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

108. M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (invalidating a Mississippi statute requiring a woman to prepay record preparation fees in order to appeal an order terminating her parental rights). *Loving* is cited in pivotal privacy cases. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110

C. *Loving* and the Heightened Suspicion of Racial Classifications

As *Zablocki* made clear, *Loving* was not just a case about race. But other cases have made clear that *Loving* was also not just a case about marriage. *Loving v. Virginia* has come to stand for the proposition that the Fourteenth Amendment should be used as a sword to stamp out vestiges of slavery. Because of the centrality of race to *Loving*, the opinion has had a robust life outside of the family law context. Indeed, some have come to understand *Loving* as first and foremost a "race" case.[109]

The Virginia law at issue in *Loving* was just part of a broader campaign against racial integration. The version of the Virginia law challenged in *Loving* was adopted as the Racial Integrity Act of 1924, and passed, according to the Supreme Court, "during the period of extreme nativism which followed the end of the First World War."[110] It actually tightened an existing restriction on interracial marriage to prohibit whites from marrying a person with *any* black blood. As the highest court in Virginia had explained in an earlier, unsuccessful challenge to the law, the state's "legitimate" purposes were to "preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride."[111] On this record, the Supreme Court in *Loving* had no trouble concluding that the law was expressly "designed to maintain White Supremacy."[112]

The *Loving* majority took a hard line on racial classifications, both rejecting the "equal application" theory the state had urged (that the law was valid because it punished whites and non-whites equally for marrying in violation of the statute) and applying an unrelenting form of scrutiny to the law.[113] The equal application theory had been validated in an 1883 case, *Pace v. Alabama*, in which the Supreme

(1989) (upholding conclusive presumption of husband's paternity over constitutional challenge from child's biological father); Harris v. McRae, 448 U.S. 297 (1980) (refusing to extend the right to privacy to include a right to Medicaid reimbursement for a medically necessary abortion); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (striking down New York ban on distribution of non-prescription contraceptives); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (invalidating zoning ordinance that distinguished between nuclear and non-nuclear families for purposes of residential restrictions).

109. *See, e.g.*, Destro, *supra* note 10, at 1219 ("The first and most obvious way to characterize *Loving* is as a 'race' case.").

110. Loving v. Virginia, 388 U.S. 1, 6 (1967).

111. Naim v. Naim, 87 S.E. 2d 749, 756 (Va. 1955) (upholding Virginia's anti-miscegenation law against constitutional challenge).

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

113. *Id.* at 7-8.

Court upheld a law that punished illicit interracial sexual conduct more severely than illicit intraracial sexual conduct.[114] Because punishment was determined by the nature of the offense (intraracial versus interracial conduct) rather than the race of the defendant, the Court upheld the constitutionality of the statute against an equal protection challenge. Blacks and whites were both punished less severely for engaging in conduct with someone of the same race, and more severely for conduct with someone of a different race.[115] This characterization enabled the Court to overlook the subordinating effect of the law under the guise of formal equality. *Pace* wreaked much havoc in lower courts, which could cite it to hold back challenges to their own miscegenation laws.

The Supreme Court officially repudiated the reasoning in *Pace* three years before the Lovings' case came before it. In *McLaughlin v. Florida*, the Court considered the constitutionality of a statute imposing a more severe penalty for interracial cohabitation than for intraracial cohabitation.[116] Florida defended its statute with *Pace*, but the Supreme Court rejected that view as too narrow a view of the Equal Protection Clause, though it expressly drew no conclusion about the validity of bans on interracial marriage.[117] The Court in *Loving* read *McLaughlin* to require "consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination,"[118] regardless of whether they appeared to impose equal burdens on members of different races. *Loving* thus cemented the death of the equal application theory with its observation that "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."[119]

In the context of racial classifications, *Loving*'s rejection of "equal application" discrimination has stood firm. In *Powers v. Ohio*,

114. 106 U.S. 583 (1883).

115. *Id.* at 584.

116. 379 U.S. 184 (1964).

117. *Id.* at 188 ("In our view, however, *Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court."). On the importance of *McLaughlin* to the question presented in *Loving*, *see* Wadlington, *supra* note 7, at 1213-14 ("Although the majority of the United States Supreme Court found it unnecessary to take the step of ruling on miscegenous marriage statutes when *McLaughlin* came before them, they eliminated one of the key grounds on which state courts had previously relied to uphold interracial marriage bans by delivering the coup de grace to the *Pace* rationale.").

118. *Loving*, 388 U.S. at 10.

119. *Id.* at 9.

for example, the Supreme Court refused to accept the argument that race-based peremptory challenges should be permissible if used against members of all races.[120] As the Court observed, "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."[121]

Loving is also cited as precedent for the level of scrutiny to be applied to race-based classifications. Because of the "Fourteenth Amendment's proscription of all invidious racial discriminations," the majority in *Loving* demanded more than the "rational" and "legitimate" explanations the state tried to offer in defense of the statute.[122] Chief Justice Earl Warren demanded that the state satisfy the "very heavy burden of justification" required for race-based classifications in state laws.[123] *Loving* continues to be cited today for the proposition that racial classifications in a variety of contexts, including affirmative action,[124] voting rights,[125] school financing,[126] and even voluntary desegregation,[127] warrant the highest form of judicial scrutiny.

Loving also continues to represent the Supreme Court's efforts to put an end to racial subordination. The observation in *Loving* that the Supreme Court has "consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality'" is often quoted. Doctrinally, Pamela Karlan has argued, "*Loving* marked the crystallization, a dozen years after *Brown*, of the antisubordination principle."[128] In this vein, *Loving* is cited in cases like *Bob Jones University v. United States*, a case challenging the tax-exempt status of an all-white educational institution, for the proposition that a policy against racial affiliation and association is a form of race discrimina-

120. *See* 499 U.S. 400 (1991).

121. *Id.* at 410.

122. *Loving*, 388 U.S. at 8.

123. *Id.* at 9.

124. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (citing *Loving* and applying strict scrutiny to evaluate the constitutionality of a race-conscious law school admissions policy); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents v. Bakke, 438 U.S. 265 (1978).

125. *See, e.g*, Miller v. Johnson, 515 U.S. 900 (1995) (citing *Loving* for the proposition that racial distinctions are inherently suspect and that the Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking"); Shaw v. Reno, 509 U.S. 630 (1993).

126. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

127. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 127 S. Ct. 2738 (2007).

128. Karlan, *supra* note 43, at 1447.

tion.[129] The Court also relied on *Loving* in *Palmore v. Sidoti*, a case in which the trial court divested a white mother of custody because she remarried a black man.[130] Citing *Loving* for the proposition that the central purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination on the basis of race, the Court concluded that private biases and the potential harm they might inflict were impermissible considerations for courts in custody cases.[131] Most recently, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[132] *Loving* was treated by both the concurrence and the dissent as a cornerstone in the Supreme Court's equal protection doctrine. In the concurrence, *Loving* was credited for first establishing the principle that race-based classifications must be subjected to strict scrutiny[133] and cited in support of the claim that governmental entities are constitutionally obligated to remedy *de jure* segregation, but not *de facto* segregation.[134] The dissent, arguing that the voluntary desegregation efforts of two school districts should have been upheld, invoked *Loving* as one of a long line of cases illustrating the importance of context in understanding the potential for subordination and, thus, the appropriate level of scrutiny.[135] These cases, far afield from the core right to marry, establish *Loving*'s importance to constitutional protection against race discrimination.

III. THE PERSONAL AND CULTURAL LEGACIES OF *LOVING*

As noted in the introduction to this essay, a significant element of a fuller understanding of *Loving* and what relevance it may retain some four decades after the Court's decision, is an examination of its impact on the litigants themselves, as well as society more broadly.

A. The Personal Aftermath of *Loving*

For the Lovings, the Supreme Court's ruling paved the way for them to return to their families and friends in their home state of Vir-

129. *See* 461 U.S. 574 (1983) (denying tax-exempt status to university based on racially discriminatory admissions policy).
130. *See* 466 U.S. 429 (1984).
131. *Id.* at 432.
132. 127 S. Ct. 2738 (2007) (striking down voluntary desegregation efforts by school districts in Seattle and Louisville as unconstitutional).
133. *Id.* at 2774 n.10 (Thomas, J., concurring).
134. *Id.* at 2794.
135. *Id.* at 2818 (Breyer, J., dissenting).

ginia. This was the ultimate goal in their legal quest, according to a personal narrative by Robert Pratt, who knew both Richard and Mildred.[136] They had "not really been that interested in the civil rights movement," but contacted Attorney General Robert Kennedy to seek help with what they viewed as a personal struggle.[137] Kennedy referred their case to the American Civil Liberties Union, and two lawyers from Alexandria took up the cause.[138] They did not attend the argument in the Supreme Court, and, when asked afterward what the ruling meant for them, Richard noted only that: "For the first time, I could put my arm around her and publicly call her my wife."[139] The Lovings told reporters that they had the support of their hometown community. "Everyone here really wanted us to win the case. They were as happy as we were at the decision."[140] Richard told *Life* magazine in a profile before their case was heard by the Supreme Court that they "encounter hostile stares only when they venture away."[141] Though he always wanted to "ask them what the hell they are staring at," Richard vowed to wait until he and his wife "were allowed to live here legally" before confronting them.[142] The Lovings' marriage ended tragically in 1975 when Richard was killed by a drunk driver. Mildred lost an eye in the same accident, but lived several decades more without Richard.[143] She and Sheriff Brooks have "not exchanged a single word," though they saw each other occasionally in Central Point, Virginia, the small town where they both lived.[144] When interviewed on the twenty-fifth anniversary of the ruling in *Loving*, Brooks was unapologetic about his role in arresting the couple. "I was acting according to the law at the time, and I still think it should be on the books. I don't think a white person should marry a black person. I'm

136. *See* Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 How. L.J. 229 (1998).

137. *Id.* at 237-38.

138. The case certainly had an impact on the lawyers, Philip J. Hirschkop and Bernard S. Cohen, as well. As David Margolick describes, "[t]here were cold shoulders from some disapproving bar colleagues, nasty anonymous telephone calls, disparaging references to 'two Jew lawyers' in the Ku Klux Klan newspaper and sugar dumped into the gasoline tanks of family cars." *See* Margolick, *supra* note 30, at B20.

139. *See* Simeon Booker, *The Couple That Rocked the Courts*, Ebony, Sept. 1967, at 78.

140. *See State Couple 'Overjoyed' by Ruling*, Richmond Times-Dispatch, June 13, 1967, at B1.

141. *The Crime of Being Married*, Life, Mar. 18, 1966, at 85.

142. *Id.*

143. *See* Pratt, *supra* note 136, at 241.

144. *See* Margolick, *supra* note 30, at B20.

from the old school. The Lord made sparrows and robins, not to mix with one another."[145]

Mildred shied away from attention and press coverage, insisting, according to Pratt, that she never considered herself a celebrity.[146] She shunned efforts to recognize her contribution to the civil rights movement. As Pratt described Mildred, after meeting with her thirty years after the Supreme Court ruled on her case, "she still sees herself as an ordinary black woman who fell in love with an ordinary white man, and had they been allowed to marry without the state's interference, that would have been the end of it."[147] Peggy Loving Fortune, the youngest of the couple's three children, married a man of mixed race. Though her parents never openly took credit for changing the world, Peggy credited them with setting "the world free to be with whomever they want."[148]

B. The Cultural Aftermath of *Loving*

To consider the broader, cultural legacy of *Loving*, one may usefully ask, having in mind the two quotations with which this essay begins, whether the comments of the notoriously segregationist Governor of the State of Georgia[149] about "mixed marriages" reflected a national consensus before or shortly after the time when the case was decided. Again, while Mildred Loving's reaction to the case is understandable in light of her personal experience of being convicted and sentenced to prison under the Virginia miscegenation law, and of being forced to abandon her home state, one might speculate that feelings may not have been as strong among other participants in interracial unions, or those who observed, or were indirectly affected

145. *See id.*

146. She did eventually agree to cooperate with an HBO movie made about the case, *Mr. and Mrs. Loving*, which aired in 1996. *See* Pratt, *supra* note 136, at 242.

147. *Id.* at 244; *see* Margolick, *supra* note 30, at B20 ("We have thought about other people, but we are not doing it just because somebody had to do it and we wanted to be the ones. We are doing it for *us*, because we want to live here.").

148. *See* Margolick, *supra* note 30, at B20.

149. Lester Maddox, a restauranteur, was charged with pointing a gun at two black men who tried to eat at his Pickrick chicken restaurant on July 3, 1964, the day after the Civil Rights Act was passed. He made an unsworn statement before the all-white jury that acquitted him, insisting that he had pulled a pistol, but had not pointed it at "a person or an animal." *Maddox Acquitted of Weapons Charge*, N.Y. TIMES, Apr. 21, 1965, at 28. Maddox's supporters stood behind him in court wielding ax handles, which later became his symbol. He subsequently closed his restaurant rather than serve African-Americans. Two years later, he became governor of Georgia. *See Former Georgia Governor Maddox Dies*, CNN.COM, June 25, 2003, http://www.cnn.com/2003/ALLPOLITICS/06/25/maddox.dead/index.html.

by them around the time of *Loving*. We begin with an examination of selected contemporary news accounts published during the latter half of the decade before the *Loving* decision and others published shortly afterward, in an effort to place the case in context by gauging the popular or societal context that existed at the time.

Two articles published in *The New York Times*, both of which survey popular opinion relating to interracial marriage, are illustrative. The first article, by Anthony Lewis, appeared in 1964, three years prior to the Court's holding that invalidated the Virginia law anti-miscegenation law,[150] and the second, by William Barry Furlong, in 1968, shortly after the Court rendered its decision.[151] After pointing out that during the preceding decade, "the legal foundations of racial discrimination in this country have been washed away in the Supreme Court," Lewis notes that "[o]nly one area of race relations has escaped this judicial scrutiny, and that is the most sensitive of all–sex."[152] Lewis made these comments after the Court had heard arguments in *McLaughlin v. Florida*,[153] a case that successfully challenged a Florida law against interracial cohabitation. After musing about what "leads people to talk about intermarriage when the issue is the killing of civil-rights workers by Mississippi sheriffs," and why "so many southerners introduce sex into any consideration of school desegregation or even of Negro voting rights,"[154] Lewis observes that as a practical matter, little will change after the invalidation of miscegenous cohabitation laws. This, he writes, is because:

> only social disapproval really inhibits marriage between whites and Negroes now. Any southern couple desiring to marry in the face of a state anti-miscegenation law can go to a state without one. It is the whole social apparatus of caste, and history, that makes intermarriage unlikely. And of course the choice is always up to the individual. The removal of the legal obstacle would not require anyone to marry anyone else.[155]

Lewis assesses the impact on blacks of the invalidation of laws against interracial cohabitation in much the same way, although for different reasons. He states:

150. *See* Anthony Lewis, *Race, Sex and the Supreme Court*, N.Y. TIMES, Nov. 22, 1964, at SM30.

151. *See* William Barry Furlong, *Interracial Marriage is a Sometime Thing*, N.Y. TIMES, June 9, 1968, at SM44.

152. Lewis, *supra* note 150.

153. 379 U.S. 184 (1964).

154. Lewis, *supra* note 150.

155. *Id.*

> The demise of the anti-miscegenation laws would not be immediately relevant to many Negroes, either. Studies show that the right to marry whites is at the distant bottom of the list of Negro desires. At the top are access to a decent job and schools, equality of service in places of public accommodation, equal treatment by law enforcement officials and other immediate issues. It is only the unusual, highly sophisticated Negro who even thinks about intermarriage.[156]

Lewis' conclusions appear to be reinforced by the second referenced article,[157] which appeared shortly after *Loving* was decided in 1967. As the author noted at the time, Stanley Kramer's movie "Guess Who's Coming to Dinner" and Gore Vidal's play "Weekend" had recently appeared. The daughter of Secretary of State Dean Rusk had married a Negro, and the daughter of Senator Edward Brooke, himself identified as a Negro married to a white woman, was in turn planning to marry a white man, leading to the observation that "interracial marriage is in a kind of vogue, though it is hardly the racial amalgamation that Arnold Toynbee once saw as [a route] to world peace."[158]

In the balance of the article, based on interviews in Chicago, the author describes several black-white interracial marriages in which the respondents describe a variety of problems, both personal and societal, that have resulted from their status as parties to a racially mixed marriage. The author asserts that "[t]here is a singularity to each of those marriages, though some are more singular than others. No one couple reflects all of the woes and tribulations of marriages across racial lines, but there are some representative reactions and problems." In the first account, for example, a "blonde woman related to a half-Negro truck driver," is warned by her mother to stay away on weekends so as not to reveal her marital situation to the mother's visitors. The mixed-race truck driver, for his part, recounts the fact that he resented his father and "treated him like a dog because he was black" and confesses that he is passing as white so that life will be better for him.[159]

The next story is that of "[a] Negro postal worker just over 40 and a white woman a few years younger," who "have been married for 20 years–and isolated for about as long," who "might represent the fairly

156. *Id.*
157. *See* Furlong, *supra* note 151.
158. *Id.*
159. *Id.*

typical interracial couple."[160] He is originally from a slum area of the city and she from a middle class neighborhood; at the time of the account they are living in an integrated neighborhood near the University of Chicago. After a discreet and youthful courtship, they were married in a simple City Hall wedding. Afterwards, the author writes, "[h]er family–like the average white in such circumstances–didn't acknowledge the marriage. They feel she's living in sin because she didn't get married in church; they also feel that she's living in sin with a *nigger*. That disgraced the whole family."[161]

Subsequently, the brothers and sisters of the white wife married and moved to newer Chicago neighborhoods or to the suburbs. She has never gone to see her mother, who is living with one of the sisters in the suburbs, and about whom, the author quotes her as stating: "she's not interested; She's got plenty of other grandchildren, none of them niggers."[162] After reading of her father's death in the newspaper, the woman states that she "went to the church and sat in the back. I thought I could get in and out without anybody seeing me. You know, you go a little late, leave a little early."[163] Besides family estrangement, the woman also describes in detail other typical travails that accompanied the "twilight world" of interracial marriage. These included the sudden disappearance of all of the couple's relatives and friends; the difficulty of finding new friends, either black or white; the reluctance to face "the humiliation of traveling together, even in the North"; the need to hide from co-workers the fact of their interracial marriage; and even their decision, after enrolling in night classes at a junior college, to pretend in class that they were strangers.

The article points out, however, that "[s]ome interracial couples insist that they have not experienced the quiet smoldering desperation that has been the lot of the postal worker and his wife."[164] Apparently representative is the Executive Director of the Chicago Urban League, who has served in that position for ten years and has been a party to an interracial marriage for the same length of time, and who asserts that "[r]aces don't get married; only people do," and that he "didn't marry a white woman" but married his wife and all the problems that come with the particular woman whom he married.[165]

160. *Id.*
161. *Id.*
162. *Id.*
163. *See* Furlong, *supra* note 151.
164. *Id.*
165. *Id.*

Yet, despite these assertions, as the article points out, "the Berrys were opposed by in-laws on both sides," and the marriage was not celebrated in Chicago, but in Milwaukee.[166] Further, at the urging of the prospective husband, a Chicago newspaper that had learned of the planned wedding omitted any discussion of the fact that the marriage would be interracial, but made the point more subtly by printing a picture of the wife.[167]

The parties to the final marriage discussed in this newspaper article included "the daughter of Earl Dickerson, one of the richest Negroes in America,"[168] who met her husband, an Orthodox Jew, while they were both pursuing graduate studies at the University of Chicago. They were raising their son as a Jew, while the child of the wife's first marriage, to a black man, was being raised as a Christian. Problems growing out of this interracial marriage pale in significance when compared with those in the other marriages described. The article notes, for example:

> One of their first problems after their marriage five and a half years ago was the attitude of Steve's father who had many stereotypes about Negroes. "He'd ask us to dinner and have watermelon *just* for me," says Diane with more wonder than rancor. "Or he'd ask–seriously–if I ate anything besides fried chicken."[169]

The white husband's account also makes no reference to the kinds of traumatic events the other accounts mention. He observes, with reference to his father:

> "He liked to believe – as I suppose most fathers would in the same circumstances that, as the white relative in the union, he was bringing a little bit the better to the situation," says Steve. "Then, bit by bit, he discovered that Diane's father has many of the things that most people covet in life–great wealth and high status in the community. Eventually, I noticed that he was bragging just a bit that his son was married to the daughter of Earl Dickerson."[170]

One might speculate that the social and economic positions of the parties and their families may have been a contributing factor to their interracial marriage being relatively trouble free by comparison with

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *See* Furlong, *supra* note 151.

the other marriages described above, in which the participants had significantly fewer financial resources.[171]

Other reports in the popular press less than a decade before the *Loving* decision support the conclusion that interracial marriage was far from the most pressing or important issue of race relations in America. For example, the Reverend Farley Wheelwright, a prominent minister told the congregation of the Unitarian-Universalist Church of Nassau County, reporting on his three day visit to Albany, Georgia, that acceptance of interracial marriages would become just as acceptable as interfaith marriages once schools, hospitals and restaurants and the like were integrated.[172] Wheelwright further observed, however, that Albany residents were a long way from having to deal with the issue, and noted that "[t]he Negro in Albany is not concerned with marrying the white," but "[w]hat he wants today is the vote."[173] Another account, describing the testimony during the false arrest suit of a clergyman who served as a Freedom Rider, reports that the Protestant Episcopal Church supported eight of nine positions of the Communist Party that related to race relations, including abolition of race discrimination in the armed services.[174] The account concludes, however, that "[t]he one on which he said his church had taken no stand recommended the repeal of laws forbidding interracial marriages."[175]

The positions of other religious groups in support of biracial marriage were reported routinely in the national press without fanfare. In 1963, for example, the press reported briefly and without comment that the advisory board of the Family Life Bureau of the National Catholic Welfare Conference, described as "the spokesman for the

171. The newspaper article just discussed evoked at least one letter to the editor from a woman who described herself as a white Jewish female mother of five children who had been married to a black male for five years, who bemoaned the fact that writers like the author of the article never seemed to interview people like herself, and who claimed that the only rejection she had experienced was from her parents. She states:

> My in-laws have accepted me fully: we planned to have children (otherwise why get married?) and we are not concerned whom our children marry so long as they are good and decent. None of my friends dropped me as a result of my marriage. We live in a predominately white middle-class neighborhood [in Elizabeth, New Jersey] and have been accepted without incident.

See Mrs. Belle Downing, Letter to Editor, *Marriage is Color-Blind*, N.Y. TIMES, Jan. 30, 1968, at SM7.

172. *See Unitarian Minister Who Visited Georgia Backs Miscegenation*, N.Y. TIMES, Sept. 17, 1962, at 52.

173. *Id.*

174. *Id.*

175. *Id.*

Catholic hierarchy in the United States," had adopted resolutions deploring "the attitudes and cruel behavior of American society which penalizes and ostracizes those persons who exercise their fundamental human right to free choice of a marital partner by entering into interracial marriages."[176] Some two years later, delegates attending the General Assembly of the United Presbyterian Church, whose 3.3 million members were overwhelmingly white, were presented with an apparently uncontroversial position paper urging the repeal of laws in nineteen states that at the time prohibited interracial marriage.[177]

During the decade of the *Loving* decision, and even before the case began wending its way to the High Court, opposition to interracial cohabitation and marriage had significantly diminished within secular institutions as it had within religious groups and congregations. In 1963, for example, the United States Air Force ended its practice of asking personnel whether they had married a person of another race during their overseas tours.[178] The same year, the resolution committee of the Young Democratic Clubs of America presented to its convention delegates a resolution that condemned state laws banning interracial marriage.[179]

It would be naive, of course, to think that opponents of interracial marriage were silent during the years leading up to *Loving*. Some four years before the decision, for example, Arthur Krock, a prominent New York Times writer, expressed his opinion, after the announcement that the first black woman ever admitted to the University of Georgia had married a white fellow-student,[180] that "the future of race relations [had] reached an inflammatory stage," and that the Supreme Court might "find a greater opportunity to withhold

176. *See Ban on Interracial Couples Assailed by Catholic Group*, N.Y. TIMES, Nov. 24 1963, at 16. During the same year, a statement approved at the annual meeting of the National Catholic Conference for Interracial Justice made clear that race and color, unlike consanguinity, a prior existing marriage or diversity of faith, were not impediments to marriage. *See* George Dugan, *Catholics Uphold Biracial Couples*, N.Y. TIMES, Nov. 18 1963, at 47.

177. *See* George Dugan, *Presbyterians Urged to Oppose Bans on Interracial Marriages*, N.Y. TIMES, May 22, 1965, at 20; *see also* George Dugan, *Race in Marriage Held Irrelevant*, N.Y. TIMES, May 25, 1965, at 24.

178. *See* Warren Weaver, Jr., *Air Force Drops Marriage Query*, N.Y. TIMES, July 3, 1963, at 12. New York Senator Jacob Javits objected to the question, "Are you a member of an interracial marriage?" after receiving a letter from an airman who protested the inclusion of the question in connection with reassignment in the United States. *Id.*

179. *See Democrats Asked to Oppose Antimiscegenation Laws*, N.Y. TIMES, Oct. 14, 1965, at 30.

180. *See Georgia Calls Negro Coed's Wedding Illegal*, N.Y. TIMES, Sept. 4, 1963, at 27.

indefinitely the firebrand that a decision on the constitutionality of [miscegenation] laws would be."[181]

Krock's alarums seem at best to have been overblown and grossly exaggerated. Indeed, two months after the Court handed down its *Loving* decision, Virginia's first interracial marriage was scarcely noted.[182] And months later, the first interracial marriage in Tennessee was celebrated on the steps of the Nashville City Hall and Courthouse.[183] Alabama was the last of the states, by means of an amendment of the state's constitution, to repeal its prohibition against interracial marriage.[184] One writer observed on the eve of the vote on the constitutional amendment:

> [I]n the state nicknamed "The Heart of Dixie," the land of Bill Connor and George Wallace, the movement to relinquish this searing symbol of the past has caused barely a ripple. There are no billboards on the highways, no marches for or against the repeal, no yard signs or bumper sticker. Articles about Amendment 2, as the ballot measure is known, are few and far between in the local press.[185]

In sum, if newspaper coverage reflects or even bears on popular opinion, during the period shortly prior to and after the *Loving* decision, concerns about interracial marriage seem not to have been near the forefront of American consciousness. Yet, these articles also suggest that cultural acceptance of interracial marriage was far from complete, even though laws banning the practice were on the wane.

We conclude with a caveat, perhaps an unnecessary one. The comments and observations that we make here relate solely to what we perceive as the societal view of interracial marriage in the *Loving* era. We do not mean to draw conclusions about the general state of race relations in America at that time or now. Rather, many would agree with a recent observation—occasioned by the firing of controversial radio personality Don Imus for his racially charged description of the women's basketball team from Rutgers University—that "racism remains a central issue in our national life."[186]

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181. *Id.*

182. *See Virginia Ban Struck Down, Has an Interracial Wedding*, N.Y. TIMES, Aug. 13, 1967, at 31.

183. *See Negro and White Wed in Nashville*, N.Y. TIMES, July 22, 1967, at 11.

184. *See* Susie Parker, *Erasing A Remnant of Jim Crow South From Law Books*, CHRISTIAN SCI. MONITOR, Mar. 23, 1999, at 2.

185. *See* Somini Sengupta, *Removing a Relic of the Old South*, N.Y. TIMES, Nov. 5, 2000, at D5.

186. *See* Weston Kosova, *Imus: Race, Power and the Media*, NEWSWEEK, Apr. 23, 2007, at 29.

C. *Loving* in Academic Commentary

It is surprising to find that there is a paucity of commentary in behavioral or social science journals that address societal or popular attitudes about interracial marriage during the decade of *Loving*. Although a number of studies have addressed the phenomenon, their concern for the most part, is with the incidence of interracial marriage or, more precisely, whether or not marriages between blacks and whites has increased, rather than with its effects, impact, or the level of acceptance.[187] One typical study, for example, summarizes "the small amount of research which has been done on international and interracial marriages" in an attempt to determine, among other things, whether the rate of interracial marriage has increased or decreased.[188] This study, and others conducted during the four years leading up to the *Loving* decision conclude that there was at the time a rising trend in interracial marriages.[189]

Historical treatment of the *Loving* decision provides few, if any, insights into whether it has remained a significant or important legal landmark during the four decades since it was rendered. In what appears to be the first and only book-length historical treatment of the decision, published in 2004, the author Phyl Newbeck, observes:

> I would rank the Supreme Court case of *Loving v. Virginia* as one of the major landmarks of the civil rights movement, right up there with *Brown v. Board of Education, Topeka Kansas* in 1954, the Freedom Rides of 1961, the March on Washington in 1963, Freedom Summer in Mississippi in 1964, and the march from Selma to Montgomery, Alabama in 1965. There are a variety of books, from scholarly tomes to personal memoirs, about all of these events, but there is only a void regarding the Lovings and their battle to live together legally in Virginia. Entire tomes about the 1960s devote not a single sentence to this epic case.[190]

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187. *See, e.g.*, Larry D. Barnett, *Research on International and Interracial Marriages*, 25 MARRIAGE & FAM. STUD. 105 (1963).

188. *Id.*

189. *See, e.g.*, M. Annella, *Interracial Marriages in Washington D.C.*, 36 J. NEGRO EDUC. 428 (1967) (finding that in Washington D.C., black-white marriages "increased more than six times between the 1946-55 and 1956-65 span"); David M. Herr, *Negro-White Marriages in the United States*, '28 J. MARRIAGE & FAM. L. 262, 273 (1966) (finding a "rising trend" in interracial marriage in the United States and concluding that "any increase in Negro-white marriages is likely to bring Negroes nearer to equality with whites").

190. *See* PHYL NEWBECK, VIRGINIA HASN'T ALWAYS BEEN FOR LOVERS: INTERRACIAL MARRIAGE AND THE CASE OF RICHARD AND MILDRED LOVING xii (2004). *But see* PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE MARRIAGE AND THE LAW–AN AMERICAN HISTORY (2002) (treating the history of interracial marriage from the marriage of John Rolfe and

Other books have given some, but not substantial attention to *Loving* and its aftermath. In *Mixed Race America and the Law*,[191] Kevin Johnson collects brief excerpts from the law review literature. In a section labeled "The Road to *Loving* and Its Impact,"[192] one finds the edited opinion of the California Supreme Court in 1948 invalidating that state's miscegenation law;[193] a historical description of Virginia's miscegenation laws prior to *Loving*;[194] a narrative about the lives of William Loving and Mildred Jeter;[195] and an edited version of the opinion in *Loving*.[196] Concluding the section, Professor Randall Kennedy laments the fact that the rates of intermarriage between blacks and whites remain relatively low after *Loving*, offering reasons why that is so.

In his own book, *Interracial Intimacies*,[197] also published in 2003, Professor Kennedy identifies 1967 as "the pivotal year" with respect to miscegenation laws[198] and asserts that "[t]he most consequential of the year's developments was *Loving v. Virginia*, the aptly named United States Supreme Court decision that invalidated state anti-miscegenation statutes."[199]

At a later point in his book, Professor Kennedy explicitly discusses *Loving* and its aftermath,[200] observing at the outset that "[l]ittle suspense attended the announcement of the Court's ruling."[201] He summarizes the series of cases that led up to the *Loving* decision, describing in some detail the courtship, marriage, and prosecution of Richard Loving and Mildred Jeter. He analyzes the Court's opinion

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Pocahontas in 1614 to *Loving* and its aftermath). Wallenstein usefully discusses the impact of *Loving* on the law of marriage in several states, and on federal death benefits, inheritance law, custody law, and same-sex marriage. *Id.* at 231-45. Another academic historian characterizes *Loving v. Virginia* as "the most important miscegenation case ever heard and the only one now widely remembered," but limits her account to the fact that neither the lawyers in the case nor the Court relied on expert opinion. *See* Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 66 (1996).

191. *See* MIXED RACE AMERICA AND THE LAW: A READER (Kevin R. Johnson ed., 2002).

192. *Id.* at 41-63.

193. *Id.* at 43-52; *see also* Perez v. Sharp, 198 P.2d 17 (Cal. 1948).

194. MIXED RACE AMERICA AND THE LAW, *supra* note 191, at 53-55.

195. *Id.* at 56.

196. *Id.* at 60-63.

197. *See* KENNEDY, *supra* note 9.

198. *Id.* at 104 (noting that during 1967 the white daughter of the U.S. Secretary of State married a black man, *Loving* was decided, and "Hollywood's most talked about film was *Guess Who's Coming to Dinner*").

199. *Id.* at 105.

200. *Id.* at 272-80.

201. *Id.* at 272.

in *Loving*[202] and subsequent state cases and legislative enactments,[203] by which "formal anti-miscegenation provisions were finally erased completely from the American legal system."[204] None of this, unfortunately, enhances appreciation of *Loving*'s impact on society and culture during the decades after the Court's decision.

Professor Rachel F. Moran's *Interracial Intimacy*,[205] published in 2001, makes a noteworthy contribution to an understanding of *Loving*'s impact. After a richly detailed treatment of the state anti-miscegenation laws in effect prior to *Loving*, the doctrines, policies and theories that underlay those laws, and the myriad judicial decisions that challenged them,[206] Professor Moran concludes:

> Anti-miscegenation laws played a critical role in defining racial difference, enforcing racial inequality, and establishing the boundaries of proper sexual and marital practices. The *Loving* decision lifted formal restrictions on intermarriage, but it would be naive to think that the Court could instantly undo the informal assumptions and practices that developed during three centuries of a "separate but equal" principle in sex, marriage, and family. *Loving* treated race as a biological irrelevancy by discrediting eugenic theories, but the decision did not take a position on the ongoing social and psychological significance of race in choosing a sexual partner, selecting a spouse or raising a family. Instead, the Justices gave ordinary Americans the freedom to rethink the role of race in their intimate relationships.[207]

At a later point in the book, Professor Moran turns her attention to events that followed the *Loving* decision, first noting the ease with which states complied with the decision, exemplified by the marriage of a black man to a white woman two years later.[208] Yet, she observes that despite the removal of legal barriers, "interracial marriages, particularly between blacks and whites, remain an anomaly over thirty years after the decision,"[209] and that "it has never been clear whether *Loving* succeeded because official behavior changed or whether it failed because marital behavior remains substantially unchanged."[210]

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202. *Id.* at 272-78.
203. *Id.* at 278-80.
204. *Id.* at 280.
205. RACHEL MORAN, INTERRACIAL INTIMACY (2001).
206. *Id.* at 76-99.
207. *Id.* at 99.
208. *Id.* at 101.
209. *Id.*
210. *Id.*

Research about patterns of racial intermarriage and racial preference in the selection of intimate partners confirms Professor Moran's conclusions. One recent study documented significant increases in interracial marriage since the 1970s, but also noted trends that reflect *Loving*'s limits.[211] Interracial marriages account for only six percent of all married couples in the United States,[212] and African-Americans remain the "least likely of all racial/ethnic minorities to marry whites."[213] And although "the pace of marital assimilation among African Americans proceeded more rapidly over the 1990s than it did in earlier decades, the social boundaries between African Americans and whites nevertheless remain highly rigid and resilient to change."[214] Data from 1990 and 2000 reveal that "race/ethnicity and color, especially the divide between African Americans and others, represent a strong and persistent barrier to racial mixing in romance and marriage."[215] Research on dating preferences also reveals that a significant proportion of the population prefers to date people of the same race.[216]

While Professor Moran offers a number of reasons why same-race marriage continues to persist after *Loving*, the following is most pertinent for the purposes of this essay:

> The most striking feature of the aftermath of *Loving v. Virginia* is how readily people have accepted segregation in marriage, so long as it is not officially mandated. Despite compelling evidence that race continues to matter in affairs of the heart, Americans embrace a colorblind ideal. Same-race marriages are not considered evidence of racism, nor are they seen as a barrier to racial equality. Americans overwhelmingly believe that so long as people do not despise members of another race, they are free to love members of their own race without legal interference or moral reproach. . . .[217]

The cultural legacy of *Loving*, like the law's power to transform societal norms more generally, is thus limited.

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211. *See* Zhenchao Qian & Daniel T. Lichter, *Social Boundaries and Marital Assimilation: Interpreting Trends in Racial and Ethnic Intermarriage*, 72 AM. SOC. REV. 68 (2007).

212. *See id.* at 69.

213. *See id.* at 90.

214. *See id.*

215. *See id.* at 92.

216. *See, e.g.*, Günter J. Hitsch et al., *What Makes You Click?—Mate Preferences and Matching; Outcomes in Online Dating*, (MIT Sloan Research, Paper No. 4603-06), *available at* http://ssrn.com/abstract=895442; Raymond Fisman et al., *Racial Preferences in Dating*, REV. ECON. STUD. (forthcoming 2007), *available at* http://www.restud.com/uploads/papers/MS-10563-2-submission.pdf.

217. MORAN, *supra* note 205, at 124-25.

IV. CONCLUSION

It is hard to question the importance of a case like *Loving v. Virginia* to the canon of American law. It shaped two substantive constitutional doctrines and recalibrated the balance of federal-state power over domestic relations. *Loving*'s declaration of marriage as a fundamental right not only has played an important role in defining the right to marry, but also is central to the long line of cases in its wake that broadened and strengthened a right to privacy that encompassed decision-making over virtually all aspects of family life without government interference. Likewise, *Loving*'s pronouncements about the Constitution's intolerance for racial classifications and other vestiges of slavery have been invoked in a wide variety of contexts and serve as a potent reminder of the Fourteenth Amendment's purpose. The legal legacy of this case, then, is clear.

Beyond the legal texts, the legacy of *Loving* is less well-defined. The Lovings themselves benefited greatly from the ruling in their favor, which enabled them to have the only thing they wanted: to live together as a married couple in peace. And for the years before Richard's tragic death, the Supreme Court's ruling indeed granted them that wish. Other couples in the sixteen states that still banned interracial marriage benefited as well from the Court's broad pronouncement that all such laws were immediately unenforceable. Those laws would have disappeared eventually, however, since the winds were already blowing against race-based marriage restrictions in 1967. Even if *Loving* had never reached the Supreme Court, it is highly unlikely we would still have miscegenation laws in 2007. But *Loving* did hasten their demise and brought immediate relief to couples, like the Lovings, who might not have lived to see the winds of cultural change complete their work.

Legalizing interracial marriage was an essential step toward racial equality. For the government to deny individuals access to such an important institution of civil society for no reason other than the color of their skin is obviously inconsistent with notions of formal equality. The legacy of *Loving*, however, seems to stop there. Interracial marriages remain, forty years later, a relatively unusual occurrence, and the black-white cultural and marital divide is still deeply entrenched. That cultural change has lagged behind the legal change is no criticism of the Supreme Court's ruling in *Loving*, but simply a reflection of the limits of law. Had *Loving* come out the other way, we would certainly not come together to celebrate its anniversaries.