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TIME FOR RIGHTS?
LOVING, GAY MARRIAGE, AND THE LIMITS OF LEGAL JUSTICE

Chandan Reddy*

The only historian capable of fanning the spark of hope in the past is the one who is firmly convinced that even the dead will not be safe from the enemy if he is victorious. And this enemy has never ceased to be victorious.

—Walter Benjamin

The document is not the fortunate tool of a history that is primarily and fundamentally memory; history is one way in which a society recognizes and develops a mass of documentation with which it is inextricably linked.

To be brief, then, let us say that history, in its traditional form, undertook to "memorize" the monuments of the past, transform them into documents, and lend speech to those traces, which, in themselves, are often not verbal, or which say in silence something other than what they actually say; in our time, history is that which transforms documents into monuments.

—Michel Foucault

Permit me to ask what it means to remember, indeed to commemorate on its anniversary, Loving v. Virginia, the landmark U.S. Supreme Court case that invalidated state-based antimiscegenation laws. What kind of critical and political possibilities does commemoration make possible? What do we desire when we desire to commemorate Loving v. Virginia? Indeed, as a paradigmatic text of contemporary U.S. desire, what kind of desires does Loving enable?

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On June 12, 1967, the Supreme Court, in a unanimous vote, struck down Virginia’s Racial Integrity Act of 1924, which declared marriage between a white and “colored” person a felony offense.\(^4\) Falling three years after *McLaughlin v. Florida*,\(^5\) which invalidated anti-interracial cohabitation and intimacy laws, *Loving* is credited with invalidating all remaining state-based forms of racial discrimination in marriage contracts. Last year marked the fortieth anniversary of *Loving*. Once an anniversary that might have passed unnoticed by all but legal scholars and a few constituencies (those caught one way or another in the effects and aftereffects of modern U.S. antimiscegenation laws), this anniversary now has become a matter of some concern for a majority of U.S. society. In particular, the coincidence of this anniversary with the current legal, legislative, and, to some degree, electoral campaigns for gay and lesbian marriage have drawn *Loving* into a rather expanded arena of meaning and application.\(^6\) Until recently, most Americans would have seen in *Loving* nothing more than a story of the nation’s racial morality. That *Loving* might be constitutive of social relations and forces determining their own lives in the present might not have occurred to many citizens.

And yet this changed with the emergence of gay marriage as a central issue in electoral politics and judicial culture at both the state and national levels. Suddenly, *Loving* became a touchstone of comparative history, politics, and identities. What were the legacies of *Loving* for homosexuals? What are the analogies between racial and sexual difference? Is racial discrimination in marriage contracts arbitrary in a way that sexual-orientation discrimination is moral? And, relatedly, are both forms of discrimination necessarily invidious? Questions such as these have preoccupied diverse scholars, historians, and lawyers, including Janet Halley, Andrew Sullivan, George Chauncey, Evan Wolfeson, and Randall Kennedy, to name a few.

How we remember *Loving* and why we remember it at all might be as interesting an inquiry to make as answering the questions that I have just laid out. In part, this is because such an investigation will help us see the animating field of force within which Americans ask those questions, make those comparisons, and seek those answers.

Janet Halley has argued convincingly that “like race” similes abound in legal discourse, especially in antidiscrimination claims, in part because nearly every equal protection claim cannot but cite the race-based jurisprudence for which the Fourteenth Amendment was crafted.\(^7\) This can

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4. See generally id.
6. It is perhaps not accidental that the Supreme Judicial Court of Massachusetts’s decision affirming gay marriage in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), took effect on May 17, 2004, fifty years to the date of the U.S. Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which has often been considered the precedent-setting modern civil rights case.
explain to some degree the reason for Loving's popularity at this moment. As gay marriage advocates press their claims in the law, they cannot but analogize their claims to those of race-based claimants of discrimination who found in the Fourteenth Amendment an apposite discursive context for their own claims. Indeed, this has generated what Siobhan Somerville richly terms the "miscegenation analogy" in legal communities, policy circles, and media culture. That analogy, she argues, posits that sexual orientation discrimination (in the form of sodomy laws and, in most states, refusals to recognize same-sex marriage contracts), like antimiscegenation laws, constitutes an indefensible exclusion of a suspect class. Both the "like race" similes and the miscegenation analogies propel Loving into the public light for the purpose of revealing the invalidity of state-based homophobia and sexual discrimination.

It is important to note here that the desire to remember Loving at this historical moment in the interest of furthering the gay marriage movement is ultimately circumscribed by that interest. This interest first analogizes the discursive productions of sexuality and race in the law and, in the broader social formation for which this law is devised, reduces and effaces the specificity of each production as well as their linked and relational coproductions, as Halley and Somerville each argue. Somerville, like Darrel Hutchinson and Mary Eaton, reveals how this desire for the miscegenation analogy effaces and occludes gay, lesbian, and queer people of color as a compound class with distinct experiences of domination and subordination. These experiences, she explains, cannot be captured, comprehended, or articulated by prevailing legal and cultural epistemologies founded on so-called single issue oppression or suspect class subordination.

In addition, Somerville argues, analogies like the miscegenation analogy also efface the linking of the nonequivalent histories of stigmatized homosexuality and formal racial equality within the law that Loving more tightly fastened during the era of its decision. Examining in immigration policy and case law the legal codification of homosexuality as a legitimate ground for exclusion in the 1950s and 1960s, Somerville posits that what is significant about the intersection of race and sexuality is not the analogical relation but rather the manner in which the former depends on the latter for its normalization. The degree to which the juridical sphere in the Loving decision universalizes the virtue and right of marriage for "all" without restrictions of race, while at the same time it stigmatizes homosexuality as a

legitimate ground of exclusion from membership in the state, suggests that miscegenation analogies promote the omission of this “heterosexualization” of race and the “racial” construction of homosexual practices that Loving helped advance. Somerville writes,

What activists fail to see when using Loving as a precedent for same-sex-marriage rights is that the case is not parallel to a history of homosexuality, as it is represented in the law; rather, it is embedded in the same history of sexuality that has determined the status of gay men and lesbians as excluded others. By establishing a fundamental right to marriage regardless of race, the federal state in effect shored up the privileges of heterosexuality through a logic that was on the surface antiracist and anti-white supremacist.11

Following on Somerville’s insights—that formal equality generated a new organization rather than the abolition of structuring power in the lives of those interpellated by the law—perhaps we can ask a different kind of question about those who seek the miscegenation analogy. It appears that the desire for the miscegenation analogy among legal “activists” and gay marriage rights advocates is a desire ultimately for formal equality before the law, as the law’s withholding of such equality constitutes a “dignity assault” on lesbian and gay citizens. And yet therein lies a paradox: seeking to address and neutralize the disruptive demands of the civil rights movement through formal equality in Loving, the state created the very conditions that only further entrenched the law’s power to delegitimize gay, lesbian, bisexual, and transgender lives. Today, the law promotes and extends formal equality as a solution for gay and lesbian subordination, inequality, and cultural domination. What then prevents the faith in that very form of equality from further entrenching in the law contemporary forms of illegitimacy? Might we see in this desire for formal equality not merely hope for better terms of living and intimacy, but hope for a legally recognized identity, one that imprints gay rights as the leading edge of formal equality? And what about the forms of illegitimacy that formal equality not only refuses to address but surreptitiously estranges from rights? I would suggest that even the most single-minded of gay marriage rights advocates have not been immune to these questions. Rather, the promotion of the miscegenation analogy indicates that they have encountered these questions. In fact, the analogy becomes the form by which such questions are structured and temporarily resolved. For indeed, is there not a second analogy—one that would supplant the miscegenation analogy in the near future—desired by those gay and lesbian advocates that promote the miscegenation analogy? Do not such advocates seek something like a gay marriage analogy that would benefit the very others seeking to emerge from the shadows of legal illegitimacy that the assertion of formal equality at this moment casts?

11. Somerville, supra note 8, at 357.
To be concrete, the current demand for gay and lesbian marriage rights as a means of gaining formal equality before the law has intersected with broad demands by undocumented immigrants who critique the law, the warrant of national sovereignty, as productive of illegitimate force and arbitrary violence. For example, Latino/a, Chicano/a, and Asian immigrant communities and their supporters have pressed for citizenship and an end to the legal delegitimization, harassment, violence, incarceration, and criminalization of twelve million undocumented workers in the United States, suggesting that the laws currently governing qualifications for citizenship produce illiberal working and living conditions across the United States. How have gay marriage rights advocates engaged this demand, one that interrogates the “moral” basis of citizenship exclusion, at the very moment that gays and lesbians seek inclusion in the moral universalism promoted by the law—the law’s supposed foundation on the “fundamental right of marriage”? Based upon the above argument, we should not be surprised by the statements of Los Angeles resident Jasmyne Cannick, a lesbian writer and member of the National Association of Black Journalists. Appraising the demands and the public debate precipitated by the unprecedented immigrant rights marches, Cannick argued in a widely circulated essay for the online edition of the gay and lesbian magazine *The Advocate* that gay marriage rights must be achieved before U.S. citizens, their representatives, and the Left may begin to champion the rights of undocumented workers. Cannick suggested that however compelling the claims of “illegal immigrants”—conceding that immigrant rights advocacy might even constitute “the next leading civil rights movement”—these new claimants for rights need to wait. She explained, “[W]e haven’t even finished with our current civil rights movement.” Though Cannick acknowledged that she “recognize[s] the plight of illegal immigrants,” she emphasized that, unlike the undocumented workers, she “didn’t break the law to come into this country.” On the contrary, “This country broke the law by not recognizing and bestowing upon me my full rights as a citizen.” She concluded, “[I]mmigration reform needs to get in line behind the LGBT [lesbian/gay/bisexual/transgender] civil rights movement, which has not yet realized all of its goals.”

There is much to say about such symptomatic language, of the way in which rights are construed as goods, the nation as recipient of its citizens’ labor and lives, and the state as little more than a disperser of those desired goods conceived as the purpose and end of social politics. But permit me instead to focus on the blurred analogy that Cannick has constructed here. Her discourse fuses two different ideologies. One is a civil rights ideology that produces the law as unfaithful to its own principles. Under that ideology, African Americans once stood, and gays and lesbians now stand,

13. *Id.*
14. *Id.*
as the representation of that breach. The other is a current neoconservative ideology that exclusively highlights legal redress in order to efface rhetorically the worldliness of the civil rights movement, turning that movement into an American exceptionalist drama of the nation's repeated betrayal of black equality. In this latter ideology and rhetorical argument, that betrayal typically has been manifested and imagined as a contest between "immigrants" and "African Americans" for social mobility in civil society. More recently, however, it has been figured as a contest between "gays and lesbians" and "immigrants" in the domain of law for legal recognition. If Cannick's statements have gained widespread popularity, it is not only because of her analogizing the civil rights movement to the gay and lesbian so-called civil rights movement, but because of her turn to analogy itself as the narrative and logical form for discussing this multidimensional crisis.

It is worth remembering that, as a class of metaphor, "analogy" is the creation of likeness between unlike subjects that is permitted by their "govern[ment] by the same general principle." In the law, analogy expresses an "[i]dentity or similarity of proportion, where there is no precedent in point." If analogies draw their rhetorical, affective, and apparent logical force from the likeness they draw between unlike subjects, they also regulate what we understand as the essential matter and meaning of those subjects by their reduction of the subjects to the principle supposedly shared between them. Here, each subject is vulnerable to the principle that supposedly constitutes it. But equally, in linking unlike subjects through a single principle or set of principles, that principle must sever or cut off what cannot be relevant matter to the principle. Hence, the principle is also vulnerable, in the form of a failed or improper analogy, to the accumulating forms of unlikeness not just between the subjects compared but equally between each individual subject and the principle to which that subject is reduced. In this way, far from stabilizing both historical and contemporary contradictions (those of the civil rights era of the 1950s to 1970s and those of our contemporary moment), analogies such as Cannick's risk multiplying the unlikeness of subjects not only to each other but also to the seemingly stable principle for which they must stand as representative.

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17. Id.
18. Indeed, the fact that in cities (like New York) that have LGBT and black demographics within their urban social landscape, blackness is also an enunciation of immigrant conditions that belies the nationalization of black differences upon which Cannick's analogy rests. By the 1990s, nearly forty percent of New York City's black population was immigrant or of immigrant descent. *New York City's Newest*, N.Y. Times, Mar. 14, 1996, at A22. In many ways, this extends to and correlates with an earlier twentieth-century history of blackness in New York City. In the 1920s and 1930s, nearly one in every four black persons in the city was an immigrant. Winston James, *The History of Afro-Caribbean Migration to the United States*,
Analogy, as a form for legal reasoning, generates its own vulnerabilities, ambiguities, and instabilities. Perhaps this is why Cannick must fuse the imperatives of the civil rights movement and the gay marriage movement. Yet, in doing so, she must estrange the links between the civil rights movement and the immigrant rights movement, promoting the principle that will relate the likeness of the former comparison (gay rights and civil rights), while simultaneously nullifying the relatability of the latter comparison (civil rights and immigrant rights). To the degree that Cannick makes appeals to the civil rights subject (African Americans) through discourse most closely associated with that subject, stating that “[t]his country broke the law by not recognizing and bestowing upon me my full rights as a citizen,” she reopens rather than resolves the contradictions generated by the state’s attempt to neutralize and rearticulate the meanings of the black freedom movement. If analogical reason such as that expressed by Cannick or other gay marriage advocates have import and purchase for the law and legally constituted subjects at a certain historical moment, it is because they posit a fundamental comparison between unlike subjects otherwise incommensurate. They promise to reduce the terrain of conflict to a single contradiction (the principle found within the analogy), and they promote the resolution of that contradiction by resolving not just the tensions of the present, but those of the “past” as well. The analogy screens off incommensurability and heterogeneity, positing instead a principle to which each contradiction constitutes a more or less identical segment of a single line, and leaves immigrants to “get in line behind” the other segments.

For Cannick, if the law is to remain legitimate, it must prosecute the nation, like any other offender, just as it did before, with decisions such as Loving. And equally, while the nation must suffer this prosecution by the law, Cannick’s analogy offers to it the status of principle or framework to link unlike differences that threaten the transparency and self-evidence of that framework. In the case of analogies like Cannick’s, it is supposedly the nation’s bind to liberal law that is the deep principle connecting the unlikeness of each claim. Indeed, in making immigrant rights the “next” civil rights movement “behind” that of the gay marriage movement, Cannick argues that enshrining gay marriage first “in line for rights” promises the limitless continuity of the nation as analogical principle.

It is marriage equality that realigns “our” past (the civil rights era), “our” present (gay rights), and “our” future (immigrant rights), where the first person plural possessive is the nation form. That is, the nation form simultaneously is critiqued for its transgression against the law and offered the chance to “rise again” to the degree that it accepts this indictment and

http://www.inmotionaame.org/migrations/topic.cfm?migration=10&topic=1 (follow Winston James hyperlink). Black racial formations reveal complex conditions of national heterogeneity and mixed juridical status, making analogies such as Cannick’s susceptible to the differences they seek to mark as inconsequential. On the rising percentage of immigrants as the fulcrum of black demographics in the 1990s, see New York City’s Newest, supra.
recognizes its accuser. And to the degree that both national law and the 
nation form are at this moment more vulnerable to displacement, inquiry, 
reduction, and reappraisal, perhaps we see here the appeal of gay marriage 
for both representatives of the law and cultural nationalists.

It might come as a surprise that not only do many gay and lesbian groups 
align with cultural nationalism and liberal legalism at this moment, but also 
that these groups and ideologies find in gays and lesbians cherished 
comrades as well. This is the shock of recognition that some seek to evoke 
with the coining of the terms “homonormativity” or “homonationalism.”

However much these might look like strange bedfellows, perhaps we are 
now in the position to grasp analogy as precisely the form that enables these 
coincidences. In fact, we might say that, in our contemporary modernity, 
analogy is the logic upon which the nation narrates its relation to the 
differences it has created and that now threaten to reveal its own 
incoherency. The nation-state, as the promise of analogy between forms of 
difference, is precisely the revelation of its incoherency and struggle to 
retain the principle of difference.

Keeping this vulnerability of the liberal nation in mind, we can better 
grasp that gay and lesbian marriage advocates’ promise to “remember Loving” through analogy is compelling to cultural nationalists and liberal 
rights advocates precisely for the way in which it reinstates the bond 
between the nation and liberal rights at the very moment they are most 
threatened by an irrevocable sundering. But I hope I have also explained to 
some degree how this homonormativity reveals in fact the precariousness of 
the very vehicles—cultural nationalism and liberal rights—through which 
they seek identity. In fact, we might be in a position to ask a question other 
than why gays and lesbians desire formal recognition by national law.

Instead, let us ask why national law in this historical moment seeks gay 
and lesbian desire for recognition. Why does the law recruit this desire? 
What vulnerabilities and instabilities are created through national norms 
such as those the law “desires” the LGBT community to desire? And, 
finally, might we see in these vectors of desire—between the gay and 
lesbian subjects’ desire for formal rights and the norm’s “desire” for that 
desire—a nonequivalence between the two desires such that one does not 
fulfill the wants of the other, but rather, both desires are vulnerable to the 
incompletion and exposure that modern desiring more often reveals.

To understand why national norms might recruit LGBT desires for 
formal equality through marriage, permit me to return again to the current 
interest in Loving. If we suspend the desire for analogy, for the 
miscegenation analogy as the import of Loving, what other stories might we 
tell about this decision and its historical value?

19. Lisa Duggan, The Twilight of Equality?: Neoliberalism, Cultural Politics, and the 
Attack on Democracy 65 (2003); Jasbir K. Puar, Terrorist Assemblages: Homonationalism 
in Queer Times 1 (2007).
Let us begin with this: of the many legal decisions delivered by the Supreme Court at mid-century, *Loving* is possibly the only text, or, if not, then one of the only texts, in which the Supreme Court declared in writing that the norm to which state marriage laws assented prior to *Loving* was one of "White Supremacy."²⁰ The Court of Appeals of Virginia upheld a lower court's decision that the Lovings broke Virginia's antimiscegenation laws by citing its own decision in *Naim v. Naim*, in which the Virginia Supreme Court had upheld a lower court ruling voiding the marriage between a white woman and a Chinese immigrant who married outside the state of Virginia but later resettled in Virginia as a violation of the State's Racial Integrity Act.²¹ Though the immigrant defendant in *Naim* petitioned the U.S. Supreme Court for an appeal and was subject to deportation after the voiding of his marriage, the U.S. Supreme Court declined to hear the case. Hence, in its reversal of the Virginia Supreme Court's decision in *Loving*, the U.S. Supreme Court directly referenced the Virginia court's own citation of its position in *Naim v. Naim*, a position the Court had implicitly shared and allowed to stand just a decade earlier. The U.S. Supreme Court wrote in *Loving*,

> In *Naim*, the state court concluded that 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," obviously an endorsement of the doctrine of White Supremacy.²²

What compelled such speech, especially when the U.S. Supreme Court only a decade earlier had declined even to give *Naim* a hearing in its own hallowed hall?

*Loving*, as document, enacts a performative representation of state-legalized racism and its own self-invalidation of that racism into state-legalized antiracism. How did a state that once used its constitution to uphold antimiscegenation laws now find in that very document the means not only to invalidate that text, but also to uphold it as well? To what did the law turn and how did it present itself so that it could uphold and invalidate itself in the same act?

*Loving* is part of the historic shift, what Howard Winant referred to as the "racial break," in which the state apparatus moved from being officially white supremacist to officially liberal "antiracist."²³ And yet, as critical race theorists and historians of the civil rights movement have argued, only a willful neglect to remember and hear race-based social movements' claims and demands against U.S. racial capitalism could make those claims and demands synonymous with the legalized formal remedies for racism.

²⁰ Loving v. Virginia, 388 U.S. 1, 7 (1967).
²² Loving, 388 U.S. at 7.
that the capitalist state offered as an “address” and “response.”24 That is, as the state shifted from white supremacist to officially liberal “antiracist” in this period, it distilled a meaning specific to its framework from the changing and unstable meanings of both race and racism generated by a society rife with antiracist contestation. In particular, race is analogized either as a private particularity or as a mark of membership in a group—like creed, nationality, or religion—all of which are then protected from invidious state action. Indeed, Loving produces an account of race that seeks to organize the meaning of race and racism in a manner consistent with the state’s liberal theory of individual liberty, formal equality, and right of property.

Ironically, gay marriage advocates who repeatedly interpolate Loving into the public sphere, producing “like race” similes and miscegenation analogies in their pursuit of marriage contracts, only affirm the Loving court’s original and unstable analogizing of race itself as a mark or visible sign of membership in a social group. In affirming Loving as the basis upon which they press their claims, gay and lesbian advocates either deliberately or inadvertently extend a state-based juridical “analogy” of race itself, displacing the contest of racial meanings produced by the civil rights movement. Instead, in reopening the Loving decision, we might seek to observe the way in which the legal understanding of race and racism is in fact a performative act, one that attempted to conquer the social contest of racial meanings that were productive of the racial break.25

In what follows, I examine different commemorations of Loving v. Virginia to tease out the consequences of how Loving is remembered. I argue that how Loving is remembered can tell us much about the period of the racial break, about the present day, and about the way the state reasserts its legitimacy (now as antiracist) at the very moment of its own self-invalidation (as historically white supremacist). I argue that it is perhaps

24. See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, in Critical Race Theory: The Key Writings That Formed the Movement 103, 110–15 (Kimberlé Crenshaw et al. eds., 1995); see also Singh, supra note 15.

25. Both Patricia Williams and Kimberlé Crenshaw have argued a similar point, one in relation to property law and the other in relation to antidiscrimination law. Both use critical race theory to suggest that it is not enough simply to unmask the ideology of the law as a guarantor of capitalist social relation and capitalist hegemony. Rather, we must acknowledge that the legal sphere actively produces, constrains, and shapes racial identities and meanings, and rearticulates those meanings. Here, the state is not just a site that sits above or separate from racial struggle, but a central domain of conflict over racial meanings. Both Williams and Crenshaw stress that formal equality—the legal remedy of racism within U.S. racial capitalism from the 1970s onward—is limited to what Crenshaw calls “[s]ymbolic subordination.” This formal equality fails to address “[m]aterial subordination.” Yet neither Williams nor Crenshaw suggest that formal equality is the only manner in which race can be adjudicated in the law. Rather, current law and legal norms concerned with “racial remedy” have rarely championed the racial meanings promoted by race-based social movements or intellectuals of those movements, such as critical race theorists. See Crenshaw, supra note 24, at 114; Patricia J. Williams, The Alchemy of Race and Rights 216–36 (1991).
this function of declaring the law both invalid and legitimate at the same moment that has made Loving a touchstone and symptom of our times.

What enables the law to "succeed" in such a strategy? To what does it turn in the period of the racial break, a period with which we are still bound? In dissecting this strategy, I argue that it is only through temporalizing racial experience into a past, present, and future that the state can both invalidate itself and maintain its legitimacy. To this end, I argue that legal decisions of this period, such as Loving, reveal the law's unique dependence on historical narrative—on narrating the history of a social group as an inextricable aspect of the justice the law promotes. As inheritors of a legal sphere transformed by the period of the racial break, what kinds of instabilities might issue from the institutionalization of this strategy? And, how can those instabilities be exploited for further transformation of the state?

For some gay marriage advocates who commemorate Loving, legal victories, whether against the antimiscegenation laws of forty years ago or against the contemporary legal codification of marriage as exclusively heterosexual, indicate less the arrival of a particular social group into the hegemony and more the efforts of these groups to free modern norms from the petty restrictions and blockages that prevent their innate development. In this instance then, to remember Loving is to reconnect with the goals of the Loving warriors, to see in their goals the image of a modernity, both originally and presently constricted, in an effort to dispatch oneself and others for battle yet again and to unshackle the norms already at our door. Indeed, if the writings of gay marriage legal advocate William Eskridge can stand as an example of this mode of commemoration, both Loving and contemporary gay marriage struggles are merely protracted stages of cultural development in the full expression of a specifically U.S. nation-state liberalism.26 Eskridge writes,

Liberal premises do not require the state to recognize any two people's marriages, nor to attach legal obligations and benefits to such interpersonal commitments, but once the state has made a policy decision to recognize and even encourage marriages, the state may not arbitrarily deny that recognition and bundle of regulations. For example, the state presumptively cannot give marriage licenses to same-race couples but deny them to different-race couples. The United States Supreme Court elevated this liberal principle to a constitutional rule in Loving v. Virginia, which held that the state could not bar different-race marriages.

Today, the Court's liberal jurisprudence considers sex a quasi-suspect classification, namely, one that is presumptively arbitrary and requires strong justification when deployed by state policy. By analogy to miscegenation, state recognition of same-sex marriage is required by this liberal sex discrimination jurisprudence: just as it is race discrimination for the state to deny marriage licenses to black-white couples because of

the race of one partner, so it is sex discrimination for the state to deny marriage licenses to female-female couples because of the sex of one partner.27

Here, Eskridge defines the contours of a uniquely U.S. liberalism, one shaped by the active state participation in the social definition and recognition of marriage. In his normative reading, Eskridge argues that it is this unique American style of liberalism that generates the contradictory forces of both *Loving* and contemporary gay marriage. Eskridge offers no account or hypothesis for why the U.S. government became involved in or continues to involve itself in the regulation of marriage.28 Rather, he merely seeks to suggest that the unity of national culture and liberal universalism requires the substantive equality of homosexuals, defined by the universal extension of marriage rights to same-sex couples. To commemorate *Loving* in accounts such as these is to commemorate a future in which the law, signified by a state founded upon liberal precepts, is unified with American culture and social life, signified by the apparent historical choice to involve the state in the recognition of marriage. If *Loving* is firmly an event in the past, it is worthy of remembering because it signposts the origin of a substantive American liberal modernity.

Commemorations also housed a second seemingly opposite position from the one taken by Eskridge and many gay marriage advocates in relation to the anniversary of *Loving v. Virginia*. This second position has been voiced most powerfully by scholars, activists, and historians interested in remembering the social and cultural history of specific oppressed social groups, whether they are African Americans or homosexuals. They argue against using commemorations to universalize a single political position or perspective, particularly one determined by present needs or desires. They argue that such a mode of “memorializing” misrepresents the uniqueness of social histories of difference that intersect at one point or another with the law. In contrast to the position advocated by Eskridge and others that seeks to remember the past as a milestone in the gradual development of a singular quasi-liberal legal subject of U.S. modernity, this position advocates social histories of difference as the subject of commemoration.

To remember *Loving* for this second group is to remember the history of African American struggles for equality and dignity in all spheres of life. For instance, such advocates consider the struggle for equality in the sphere of intimacy as merely one aspect of the African American civil rights movement’s contributions to the meaning of equality and dignity that “we”

27. *Id.*

28. That is, Eskridge circumvents any account of the history of slavery, continental genocide, and racialized immigration as the primary conditions of determination of the state regulation of marriage. Instead, marriage regulation by the state, and the practices of racial marking and ascription of which it is a part, are rused in Eskridge’s normative account as the unequal state recognition of its subjects via marriage regulation. For an account that reveals the centrality of these conditions of determination for the writing of marriage law in the state of Virginia, see Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 Chi.-Kent L. Rev. 371, 372, 389–406 (1994).
now inherit as a newly revamped modern society. They believe that
through an engagement with this social history, one can ethically conduct
important political comparisons between African American civil rights
struggles and the legal movement for gay marriage.

Randall Kennedy’s Leary Lecture, “Marriage and the Struggle for Gay,
Lesbian, and Black Liberation,” can stand as emblematic of this important
mode of commemoration. Remembering Loving in our contemporary
moment, Kennedy says, demands an engagement with the current drive for
gay marriage, a drive against what Kennedy terms “the heterosexual—
‘straight’—majority.” Yet Kennedy cautions against what he and others
term the “Loving analogy,” one that argues that “prohibitions against
interracial marriage and prohibitions against same-sex marriage are the
same.”29 And Kennedy concurs with social historian George Chauncey that
doing so, in fact, “does no justice to history and no service to the gay
cause.”30 Moreover, Kennedy argues, such analogizing tells us next to
nothing about why heterosexual majoritarianism persists and why there are
traces of that heterosexism in African American communities as well,
despite African Americans’ formal position in the law as historically
oppressed. Kennedy argues that, instead, “we” must look in the domain of
“American history” to discover repeated instances of “victims
victimizing”31 so that “we” might work against both “our” and the previous
victims’ complacency and righteousness. Hence, commemorating Loving
by remembering African American social history can help “us” better
understand both the past and current forms of oppression—racial, sexual,
and otherwise. Indeed, it is through the encounter with and remembering of
African American social history that “we” might

remember that history unfolds in mysterious ways that are difficult (if not
impossible) to anticipate. The ugliness of the reaction to Brown, the Civil
Rights Act of 1964, and other progressive racial reforms helped to
awaken the country to the need for a larger, more determined, and
ongoing confrontation with past and present racial injustices. A similar
chain of events may assist in prompting society to confront and overcome
its deeply ingrained oppression of gays and lesbians.32

Remembering African American social history through Loving
commemorations enables the important understanding of history not, as
Eskridge would like, as a normative schema, the progressive realization of
society in universal compliance to its norms; rather, social history reveals
the power of unexpected (from the perspective of the norm) agents of
society that reformulate both the meaning and the scope of existing norms.
Social history, of the type that Kennedy, Chauncey, and others advocate,

29. Randall Kennedy, Marriage and the Struggle for Gay, Lesbian, and Black
30. See George Chauncey, Why Marriage? The History Shaping Today’s Debate over
32. Id. at 801.
repopulates political life with minortized social actors and their collective efforts that are left out of the normative accounts and often excluded from the privileged domains of the political sphere. And engaging African American social history during Loving commemorations enables the use of history to contraindicate those acts of African American homophobia that are otherwise coded as merely the expression of so-called communal values. That is, engaging African American social history enables one to better specify the unique conditions that organized particular forms of African American homophobia. Lastly, recounting African American social history as the subject of Loving commemorations can serve as evidence for gays and lesbians and others that those who confront dominating norms, however painfully and “unsuccessfully” in their own time, will nonetheless become the subject of a future generation’s acts of remembering.

For those who hold this position, commemorating Loving is, like in the previous position, an act of remembering an event that is firmly in the past and fully completed. The social history that Loving is a part of is more or less knowable (what is important about that history at least) for the subject who seeks to commemorate and remember it. And, most importantly, the commemoration represents a past whose meaning for the present is as vital as it is clear. Unlike the former position, however, the past—in this case, the social world of which Loving is merely representative—is seen as distinct from the “present.” Precisely because we are the inheritors of that past despite its seclusion from the time of our “present,” commemorations for those who adhere to this position enunciate a promise to remember the past.

To commemorate Loving in this instance is to put in relief for appraisal the apparent difference between “our” own contemporary society and the society of the past. It is imperative to remember this past because it can serve as an important negative example for contemporary subjects of society, preventing these subjects from repeating the mistakes of the past. More importantly, we commemorate this past out of a moral commitment to remember the victims of the society of which we are members.

On the other hand, normative accounts of society, like that of Eskridge, view the past as merely an early and primitive moment of national development. This other position, while not entirely contesting that schema, grips onto the past in order to remember the social histories of the groups that had once been excluded from the norms of society. Within this temporal logic, commemorations are tools of memory. They are non-site-specific monuments to the past that reveal and represent the otherness of the past—an otherness that is both produced and threatened by our desire for and experience of modernity as the universalization of once exclusive norms.

This is demonstrated most vividly by the numerous attempts of social historians and legal scholars of all political stripes to remember the past “correctly,” its warts and all. Such activities for the modern citizen and
historian demonstrate the historical and ethical capacity of the modern subject to appraise the past just as it "was," suppressing the apparent modern or postmodern desire for identity, affiliation, congruence, or even juxtaposition and contiguity. At stake is the valuing of those others, now firmly lost for the present, whose lives and meaning could be grasped by the subject who seeks to remember them through the practice of history. For this subject, to commemorate Loving is to gain the opportunity to once again remember national kin subject to and violated by racism and state-based forms of segregation. Specifically, it is to remember the group particularly ravaged by such legal and extralegal violence, African Americans. Central to the logic that upholds this mode of commemoration and memory, however, is the notion that the historical subjects of the past are themselves whole and unique, sharing a positive essence. Hence, within this logic of commemoration, emphasizing African American differences of gender, sexuality, and so forth is beside the point because such differences are merely an expression of the organized plurality within a unified and positive (in the sense of being empirically real) African American human community. It is this community that is commemorated. It is this community's struggle for survival and equality in the face of repeated enactments of material and symbolic forms of violation and subordination that is remembered and honored.

This latter mode of commemorating Loving has importantly revealed the real disregard for African American history, evidenced by the many gay and lesbian marriage advocates who supposedly seek to commemorate Loving. As Kennedy has pointed out, the antihistorical legal formalist mode of comparison and commemoration that many gay and lesbian marriage rights advocates pursue when they "remember" Loving tends to disregard or "forget" critical differences. For example, while gay and lesbian marriage is not legally recognized, it does not constitute a criminal offense, as did the black/white marriages (like that of the Lovings) in the time leading up to Loving. That is, the desire for state recognition by gays and lesbians misremembers or forgets not only gay history before the Supreme Court ruling in Lawrence v. Texas, but also the history of African American survival and struggle against the state, which was at that time formally white supremacist. Indeed, though not suggested by Kennedy, a more historicized formalist analysis of Loving would suggest that the genealogy of which Loving is a part is not identical to the struggle for gay marriage rights. Rather, Loving's genealogy could more accurately encompass something like contemporary disproportionate sentencing guidelines for crack/cocaine possession that has further ballooned the disproportionate incarceration of black and Latino men and women in the United States over the last two and a half decades. For, in the case of the Lovings as well as those affected by the sentencing guidelines, de jure in the former and de

33. See id. at 788.
34. 539 U.S. 558 (2003).
facto in the latter, "the criminality of an act depend[s] upon the race of the actor." 35

Additionally, critical gay and lesbian historians, such as Chauncey, have argued that the fight for gay marriage must forgo the logics of dehistoricized comparison with *Loving*, lest we forget the specific, unique, and historical forms of discrimination that lesbian and gay people experienced for most of the twentieth century. Just as African American history remembers a "people's" past, gay and lesbian history must be a memory of another "people's" past. And, while the latter is neither experientially nor historically separate from the former (for, as Chauncey argues, the segregated logics that produced Harlem also made Harlem a refuge of survival and space for self-expression for a number of black and white gay and lesbians in the early twentieth century), each tells the story of a unique people and identity, however racially or sexually plural each "people" and identity might be. 36

We see that, in the case of the former, commemoration suggests a past continuous with our own time, while in the case of the latter, the past is, while sequentially and chronologically linked, nonetheless discontinuous with the present. It is the place where, for some, "our" generational kin are now lost, but not forgotten. In the first case, the substantive difference of the past is denied in the interest of establishing an identity between the past and the present within a single continuum of modernity. In the second case, the difference of the past is preserved and engaged to some degree; indeed, modernity, with its care only for the present and the future, is diagnosed as generative of a loss not of historical consciousness, but of a certain "people's" history as their future and generational kin are otherwise absorbed into the singular and continuous modernity of which they were originally excluded.

Commemorations in this latter model offer the opportunities to remember not just the past, but more importantly a previously excluded "people" who are the historically important subjects of this past. Indeed, remembering these "people" reminds us that "our" modernity, understood as singular, continuous, and expansive in its contemporary promise of nearly universal inclusion, can easily inspire a letting go of the past that has nothing to tell us about who "we" are in the present. This remembrance may have devastating consequences if we remember the lives of those who had been originally excluded from that modernity. This latter model appreciates the disheartening irony that a "people" who have been the victims of a particular modernity, such as African Americans, must not be forgotten, lest they suffer yet another injustice, this time at the hands of a new national unity for which they become the unremembered "others."

Both modes of commemoration share a singular and continuous sense of modernity. Both divide time into units called "past," "present," and

"future." And both seek to remember the murky origins and discontinuities within modernity through that very prism of past, present, and future. The former commemorates the past as the beacon of a liberalized modernity still incomplete, promising oneself for the completion of that modernity. The latter, on the other hand, commemorates the past as the figure of an otherness no longer with us, committing oneself to a vigilance directed toward the modernity of which one is a part, but that historically denied some of "our" past kin. The latter mode of commemoration acknowledges what the former is anxious to deny, that American modernity, particularly that produced by the nation-state, has had the dual tendency both to recognize and include certain forms of difference and to act violently toward and exclude other forms of difference (namely, racial difference). In the latter model, however, commemorating *Loving* as the means to remember African American survival of hyperexploitation and violent subordination by the nation is, if not atonement, a gesture of reparation, one that inserts in the space and time of commemoration (as a conference, a special issue of a journal, or a social history) a "people" for remembrance and deliberation.

In the case of Eskridge's liberal formalism, history is little more than formal memory, a pure means of revealing the demanding truths of a developing universal norm, such as the universal recognition of marriage as a fundamental right. In the case of Kennedy's historicism, history is a revered and deeply respected repository of social agency, one triggered by cultural memory, but irreducible to the particularistic attachments associated with memory. This is why the social historian Chauncey argues that, in using the *Loving* analogy to pursue its agenda, gay marriage advocacy "does no justice to history." For Kennedy, Chauncey, and others who adhere to this position, "history" is not simply a means of representing the past. It is the only means by which the "we" who share a modern set of norms can address the ghostly otherness that haunts the borders of those norms—those "others" among us who were not fully included in those norms in the past. In the case of liberal formalism, historical memory is merely the reinforcement of an already developing abstract norm, such as the universal right to marriage. In the case of social historicism, historical memory, in the form of producing and receiving social history, is a central aspect of the work one does to make the universality of the political sphere just in our time. Unlike the former position, history is not merely a means or a transparency for viewing the

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37. Michel Foucault offers the term "discontinuities" to discuss ruptures, transformations, or changed arrangements within a modern social formation. *See* Foucault, *supra* note 2.

38. This is the logic and mode of relation that undergirds the (white) liberal institutional desire for Black History Month or any other month or week dedicated to the public recognition of groups historically marginalized by the inheriting institution's (coded as "our") modernity.

norm at work, embracing all forms of difference by its apparently universal or universalizing character and capaciousness.

Indeed, if “we” must take care to do justice to “history,” this is because history has a central role in making just “our” contemporary society governed as it is by legal norms that were once exclusive but are now striving for real universality. History, for the subject of historicism, has both a redemptive and an explanatory force in relation to the legal norms that were once exclusionary. It is redemptive in the sense that it is a promise not to forget those communities that were once excluded from the very norms to which the remembering subject belongs, lest the injustice of their historical exclusion be redoubled by the injustice of their erasure within social memory. And it is explanatory in the sense that these histories detail the specific social relations that denied a “people” protection and recognition by those norms. It is also explanatory in the sense that it relates the distinct meanings encoded in those norms by a “people” or marginalized “community” originally excluded from those norms, such that the norm is itself, in our present moment, a monument of sorts to the once historically excluded “community” or “people.” The irony of course is that the social history of the excluded community is now dependent for its conditions of representational existence on the popular affirmation of the norm from which it was excluded. In addition, what is socially remembered of that community is governed by the framework of the norm or norms themselves, such that the social history of the excluded people is told only through the prism produced by that norm or set of norms.

The norm, such as the right of marriage, becomes two things simultaneously. First, it is an abstraction universally valid for members of present society. Second, it is a metonym in the present for the past exclusion and for the “people” excluded so that the perpetuation of the norm is now paradoxically the very means by which a society promises never to “forget” the historically excluded. This promise comes at the very instant that the norm is supposedly cleansed of its social and cultural heteronomy—the very moment when the norm promises freedom from social history, from the need to historicize itself. Ironically, society “redeems” itself and its norms of their exclusionary origins through the universal extension of those norms. Here, given that the norm presents itself as transhistorical, the norm promises temporal perpetuity. The “other,” the excluded people of the norm, will always be the face of that norm. Cast in this way, as the historically excluded “others” with the very norm from which they were excluded, the subjects excluded by that norm experience a certain ambivalence. For if the memory of the excluded community—of its otherness in the present—is dependent on the perpetuation and universalization of the very norm from which the subjects were excluded, then any desiring of the norm cannot but also be the desire to “remember” the history of exclusion. This ambivalence makes any articulation of the norm by either the generational “kin” of the excluded community or the contemporary communities experiencing exclusion
difficult to decode because such ambivalence makes it unclear whether they desire the norm or the face (the historically excluded “people” in which it also arrives). Thus, a contemporary subject might possess both rage against and desire for that very norm.

If it is only through “history” that the universalization of the norm in the present is made legitimate, then it is only through social history that the excluded are made an inextricable part of the norm from which they were originally and otherwise severed. Hence, U.S. legal norms, to the degree that they are foundationally exclusionary (particularly those from racialized communities), require social histories of the excluded as the face of those norms to be the governing precondition of their abstract universality and universalization. And yet, if the representation of these histories of exclusion constitutes the contemporary extension, circulation, and universalization of these norms, the norms are also regulated by the framework of the norms to which they are constitutively attached. These norms powerfully contour what we seek to know when addressing the excluded face of the norm, how we apprehend that excluded face, and what gives that face its unity and representational coherence for “us.” To the degree that the norm has this regulative force in shaping the excluded face, it has been difficult to desire that excluded face and the histories of the excluded and marginalized without also at once internalizing the norms that both preserve the excluded “past” in our “present” and contour what “we” desire from this “past.” If the norm mediates “our” access to the excluded past that haunts our present—to the otherness of the past—it powerfully shapes both the “us” and that “past.” Hence, we might ask what it would mean to remember Loving in a manner that did not pass over the mediating function of the norm, in a manner that sought out the particularity of the norm that wishes to dissimulate itself both in “us” and in the excluded history that is now the face of that norm. How might “we” do this? From what “location”? And what might it look like?

The German Jewish Marxist philosopher of history Walter Benjamin reminds us that “[t]here is no document of culture which is not at the same time a document of barbarism” and that the historian’s task is to retrieve the past for contemporary struggles, lest the past too be surrendered as yet another of the victor’s spoils: “[E]ven the dead will not be safe from the enemy if he is victorious. And this enemy has never ceased to be victorious.” Indeed, as Benjamin argues, “The danger [of oblivion] threatens both the content of the tradition and those who inherit it. For both, it is one and the same thing: the danger of becoming a tool of the ruling classes.” Benjamin reminds us that a social history shorn of its cultural remainders, of the historicity that disrupts formal comparison, jeopardizes both “past” and present social struggles. Instead, historicism produces representations of the “past” and present that operate in the

40. Benjamin, supra note 1, at 392.
41. Id. at 391.
42. Id.
interest of the victor. It is only those of us willing to fight in the unrefined, underdeveloped, and crude spaces present in our ambiguous times that might seize the past as it flits by the empty homogeneous time of our present.

We might repose the question like so: What are the other legacies of Loving for our contemporary moment? Or perhaps, more appropriately, what legacies of Loving does our moment make available, legacies that can be seized against the victors’ histories? What kind of past is opened up for collective memory in this moment? And what kind of legacy is Loving’s within this condition? What I would suggest is that Loving v. Virginia is not just the record of the break in the racial state against miscegenation, but one of a number of precedent-setting cases in the making of an officially liberal nationalist anti-white-supremacist state. It is also the record of the way in which that emergent order sought to incorporate substantively African American life into its legitimate domain. Katherine Franke has written articulately about the first aborted attempt of the state to do so during the Reconstruction. And, in many ways, Loving is part of a genealogy that might include the numerous petitions by African American slaves for cohabitation rights both during and after slavery that Franke unearthed as an archive of “forgotten” and perhaps nearly unrecognizable intimacies. Engaging Loving as a genealogy then, or viewing it from the standpoint of a Benjaminian historical materialist, we might look upon the anniversary as a commemoration of both the beginning of the end of the white supremacist state as well as the beginning of our new times, of the norms that replaced white supremacy as the new socially and ethically reasonable social violences.

Let us turn for a moment to the decision. Rather remarkably, the majority in the Loving opinion begins by quoting the Virginia state trial judge:

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

The majority opinion cites this opinion only to replace it with an emerging dominant “reason” of state: liberal racial humanism. Citing Korematsu v. United States, the Court averred that it could not conceive of any abiding state interest in racially regulating marriage through antimiscegenation statutes. Holding that the statutes could not pass muster under the “most rigid scrutiny,” the level of review demanded by the Fourteenth

43. By unrecognizable intimacies, I mean that they are forms of intimacy that are undesirable to us as intimacies. See Katherine M. Franke, Becoming a Citizen: Reconstruction Era Regulation of African American Marriages, 11 Yale J.L. & Human. 251 (1999).
44. Loving v. Virginia, 388 U.S. 1, 3 (1967).
45. 323 U.S. 214 (1944).
Amendment and affirmed by *Korematsu*, the Supreme Court struck down the Racial Integrity Act as abrating both due process and equal protection rights.\(^{46}\) Note the mode by which the knowledge of difference as a social and economic force is understood comparatively through racial typology by the Virginia judge, most surely the contemporary descendent of the modern slavocracy of the nineteenth century. In refuting Virginia's argument that racial separation of intimacy is a compelling state interest, the Supreme Court issued a proclamation perhaps as outlandish as the law being struck down, but one that I fear would be passed over as little other than "reason" and hardly looked upon as anachronism like the Virginia state judge's opinion. The Court stated,

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

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.\(^{47}\)

What is remarkable about this quote and just as worthy of our historical curiosity, is that racial typology and its comparative logic of racial differences are preserved and even extended in the very decision founded on a new liberal state humanism.\(^{48}\) What we see here is that the Supreme Court—the late modern descendents of the agrarian industrialists, and the modern industrial elite—provided a new rationale to refute the reason of the Virginia state judge, the modern descendent of the slavocracies. The figures of two different modernities both share a larger singular racialized gendered modernity, one defined by the organization of social differences

\(^{46}\) *Loving*, 388 U.S. at 2.

\(^{47}\) *Id.* at 12. It is worth asking if the Supreme Court would have ratified *Loving* in the way that it did if the plaintiff in the case were an African American man or woman; that is, if in adjudicating the case of a black man's or woman's right to marry, would the Court have placed the same emphasis on one's fundamental "right" for the orderly pursuit of "happiness"? Indeed if we take the "man" seriously in this statement, we see that *Loving* overturns white supremacy only by affirming the liberal theory of the male prerogative for private life as the precondition for formal equality in the public sphere. What would happen to that "right" if it had been seized by a black woman or man?

\(^{48}\) In fact, what is very interesting about the majority opinion is that the majority did not work with a white/black or white/nonwhite racial economy so characteristic of most of the Court's civil rights decisions in this period. Rather, the majority refuted the reasoning of the racial segregation of intimacy by pointing out that the law only prohibited black/white interracial marriage and not those between these groups and other racial groups.
into racial typologies. Both, that is, "determine" the meaning of social differences through a discourse of racial typology, one that continues to interiorize race as an attribute of personhood. And because of this, that modernity—defined as unilinear—is simultaneously made ambiguous and reaffirmed by the majority’s opinion. It is made ambiguous by the fact that racial typology is apparently invalidated as proper science—that is, as legitimate knowledge for the production of state “reason.” As the Court avers, racial classifications are “so unsupportable a basis” of state action that such knowledge is “subversive” to equality, making state action a violation of individual liberty. Yet the negation of racial classification is not, as the Court’s opinion shows, the destruction of racial typology. Rather, racial typologies are preserved, in the discussion of white men, black women, Indians, and so forth, and made coincident with both equality and liberty through the legal recognition of heterosexual marriage, through heterosexuality and heterosexual gendering as the metonym for marriage, and through marriage as a “right.”

Further, we could say that on the one hand the late modern construction of marriage as a right participates in the “cultural” production of race and gender as the formal units for the state’s notion of abstract equality and personal liberty as structured in this case by the marriage contract. On the other hand, to the degree that this construction tries to depoliticize race and gender at the very moment that the court invalidates white supremacy through the universalization of a “right to marriage,” it has only expanded and animated a variety of material contestations—from women of color to queer of color cultural politics—that seek to narrate as “race” and “gender” what the depoliticized formalization of race and gender cannot admit or represent in the juridical sphere. Put otherwise, race and gender name the ambiguities of a modernity that has illegitimated itself even as it disavows this recognition. As a consequence, we can also say that defining marriage as a fundamental right that cannot be abridged by “White Supremacy,” which demanded at its time heterogendering, but may not need such heterogendering anymore, is the means by which racial typology is preserved, despite the ambiguities generated by a modernity articulated in part through a state science founded on racial typology, now reduced to racial classifications.

Indeed, it is this longer modernity that is refashioned and advanced in the majority opinion and that now operates through a rational state liberal racial humanism where marriage is in fact one of the “basic civil rights of man,”

49. The construction of marriage as a right within American federal and state jurisprudence can be tracked to decisions in the 1920s. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923). For a discussion of the implication of this right of marriage argument for equal protection claims, see Walter Wadlington, The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189, 1216 (1966). Wadlington writes, “Although the language of Maynard v. Hill indicated the great importance accorded to marriage in our society, the Court did not speak of marriage in terms of a right. However, marriage was specifically so characterized in 1923 in the majority opinion in Meyer v. Nebraska.” Id.
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(who knew?) basic for the very existence and survival of an “orderly” human kind. In fact, the “freedom to marry, or not marry a person of another race” (and let us note here that it is, however ludicrous, a sad reality that we are almost at the point at which “not to marry” will be articulated and understood as a right exercised) is in fact presumed by that long modern political document we call the U.S. Constitution. The right to marriage is the means by which the differences central to the white supremacist state are preserved as race and gender difference, making them the very precondition for thinking and experiencing that liberty which the state is bound to respect and protect. Ironically, it was precisely this “right to marriage” from which late modern U.S. suburbia developed—the promise of marriage, real property, and commodities aplenty—that ideologically enabled the shifting of the welfare state’s resources to the production of suburban infrastructures. And this growth of the suburbs resulted in the devouring of yet again “almost emancipated” urban racialized neighborhoods this time into suburban highways and on-ramps and in the creation of the single largest force of natural environmental planetary death: the American, restrictively reproductive, middle class, 2.5 nuclear family. To say this is to assert that race and gender are the critical cultural remainders of a modernity forcibly made ambiguous and temporarily resolved through the substantive recognition of marriage as a right in the era of the “racial break.”

It is the history of the severing of white supremacy from liberal property that Loving is a part of and that gay and lesbian marriage rights activists now champion. Indeed, whatever other legacy Loving might possess, it does tell those of us trying to catch the past as it flashes up in this moment of danger that the universalization of the right to marriage is the very means by which the law forecloses other, possibly more difficult and imaginative articulations of antiracism and “cultural” difference that mark the limit of our current ways of thinking and organizing politics. Perhaps we can read in the desire to further extend marriage as a right the preservation of a modern notion of personhood founded in racial typology. As such, we could say that the desire for the universal right of marriage is primarily the preservation of an episteme that has lived beyond its utility.

In conclusion, two points stand out, and the connection between these points is essential. First, I have sought to interrogate both the LGBT desire for state recognition in the domain of marriage and the juridical sphere’s desire for that desire as symptomatic of a deeper crisis in legal reason. In our current historical moment, one that we can pinpoint as emerging in the 1980s, it is the state’s relationship to multiple differences as opposed to a formalized “difference” that threatens its function as the neutralizer of political contest among rights-bearing subjects. And yet, I argue, even the juridical sphere’s symptomatic response to these deeper contradictory conditions has not achieved its ends. Rather, they have borne unique ambivalences that draw subjects historically produced through differences into juridical norms in a manner that destabilizes those norms, especially as
national norms. That is, juridical discourse’s recourse to social history as its explanatory and interpretive vehicle for addressing subjects historically considered different in relation to the national norms that now seek their incorporation has made the relation of historically excluded groups to those norms more complex and ambivalent. For indeed, encoded in that relation is as much a desire for the norm as a desire for the social history of these historically excluded groups who are, ironically, both separated from and joined to the desiring subject by those very juridical norms at this historical moment. In this way, I suggest we treat more carefully the ambiguity that emerges with any rights articulation by groups historically excluded from modern juridical norms.

And lastly, I suggest a genealogy of “social history” as it is imagined by juridical thought and legal decisions in order to further destabilize the viability of using modern legal norms (articulated as founded on fundamental rights) as the basis of imagining a more just racial and gendered state. It is as a genealogist that I read Loving v. Virginia. And I do so in the hopes of suggesting that contemporary queer practices and cultural struggles, organized around forms of difference irreconcilable to the type of gendered liberal individualist personhood imagined by marriage rights and founded upon an episteme of racial typology, demarcate the limits of contemporary legal justice and its current notions of ethical and socially reasonable violence, helping us to see alternatives to that justice, especially for multiply differentiated “bodies” or groups subject to the law.