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## Prejudice, Constitutional Moral Progress, and Being “On the Right Side of History”: Reflections on Loving v. Virginia at Fifty

Linda C. McClain  
*Boston University School of Law*

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**PREJUDICE, CONSTITUTIONAL MORAL  
PROGRESS, AND BEING “ON THE RIGHT SIDE  
OF HISTORY”:  
REFLECTIONS ON  
LOVING V. VIRGINIA AT FIFTY**

*Linda C. McClain\**

Too many times in our history, our citizens have had to lead the way on civil rights while their leaders stood against them . . . . It is time for the [C]ommonwealth [of Virginia] to be on the right side of history and the right side of the law.

—Virginia Attorney General Mark Gerring<sup>1</sup>

INTRODUCTION

*Loving v. Virginia*<sup>2</sup> is a landmark civil rights case that struck down the last relic of state-enforced racial segregation (antimiscegenation laws) as an unconstitutional “endorsement of the doctrine of White Supremacy.”<sup>3</sup> Fifty years later, this Symposium also reminds us of the poignant human story giving rise to Mildred and Richard Loving’s successful constitutional

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\* Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law. I am grateful to Professor Tanya Hernández and the *Fordham Law Review* for including me in the Symposium entitled *Fifty Years of Loving v. Virginia and the Continued Pursuit of Racial Equality*. For an overview of the Symposium, see R.A. Lenhardt, Tanya K. Hernández & Kimani Paul-Emile, *Foreword: Fifty Years of Loving v. Virginia and the Continued Pursuit of Racial Equality*, 86 *FORDHAM L. REV.* 2625 (2018). Thanks to the Symposium participants for valuable conversations; thanks, in particular, to Jonathan Kahn for commenting on an earlier draft. This Article draws on my forthcoming book, *Bigotry, Conscience, and Marriage: Past and Present Controversies* (under contract with Oxford University Press).

1. Timothy Williams & Trip Gabriel, *Virginia’s New Attorney General Opposes Ban on Gay Marriage*, *N.Y. TIMES* (Jan. 23, 2014), <https://www.nytimes.com/2014/01/24/us/new-virginia-attorney-general-drops-defense-of-gay-marriage-ban.html> [<https://perma.cc/3QS8-CGCC>] (quoting Virginia’s Attorney General Mark Herring’s criticism of his predecessor’s defense of Virginia’s antimiscegenation law in *Loving v. Virginia*, 388 U.S. 1 (1967), and explanation of his decision not to defend Virginia’s ban on same-sex marriage in federal court).

2. 388 U.S. 1 (1967).

3. *Id.* at 17 (characterizing the “reasons” given in *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), on which the Supreme Court of Virginia relied in *Loving v. Commonwealth*, 147 S.E.2d 78, 80 (Va. 1966)); see also Dorothy E. Roberts, *Loving v. Virginia as a Civil Rights Decision*, 59 *N.Y.L. SCH. L. REV.* 175, 177 (2014) (criticizing the argument that *Loving* does not deserve “a central place in the civil rights canon” (quoting 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 291 (2014))).

challenge.<sup>4</sup> *Loving* remains a foundational case on the limits on governmental authority to regulate marriage and the family.<sup>5</sup>

No U.S. Supreme Court case has proven more central to the constitutional battle over same-sex marriage than *Loving*. In *Obergefell v. Hodges*,<sup>6</sup> the case in which the Court held that the fundamental right to marry extends to same-sex couples, the majority drew on *Loving* repeatedly to support its reasoning.<sup>7</sup> *Loving* features in controversies over whether state laws protecting lesbian, gay, bisexual, and transgender persons from discrimination in public accommodations and other areas of civic life violate the First Amendment rights of those with conscientious or religious objections to same-sex marriage. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>8</sup> for example, baker Jack Phillips and his amici seek to distinguish the “bigotry” and odious racism behind antimiscegenation laws from Phillips’s sincere, “decent and honorable” religious convictions about marriage.<sup>9</sup> Defenders of state antidiscrimination laws, in response, enlist *Loving* to show that discrimination “justified” by history, tradition, or religious motivation, however sincere, should not prevail.<sup>10</sup>

This Article argues that *Loving* illustrates a theme of generational moral progress in our constitutional jurisprudence: laws once justified by appeals to nature, God’s law and plan for the races, and the well-being of children and society are now repudiated as rooted in prejudice. In *Obergefell*, Justice Kennedy stated that “[t]he nature of injustice is that we may not always see it in our own times”; “new insight[s] reveal[] discord between the Constitution’s [commitments and] . . . received legal stricture[s].”<sup>11</sup> Thus, with such insight, the Court struck down antimiscegenation laws in *Loving* and “invidious” laws embodying gender hierarchy in marriage.<sup>12</sup> As Justice Ginsburg wrote in *United States v. Virginia (VMI)*,<sup>13</sup> “the history of our Constitution . . . is the story of the extension of constitutional rights and

4. This Symposium included a panel with the director of the HBO documentary, *The Loving Story*. For more on the Lovings’ story, see PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 215 (2002).

5. See generally John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 How. L.J. 15 (2007).

6. 135 S. Ct. 2584 (2015).

7. *Id.* at 2598–99, 2602–04 (citing *Loving*, 388 U.S. at 12). But cf. *Obergefell*, 135 S. Ct. at 2619 (Roberts, J., dissenting) (rejecting this reliance because *Loving* removed racial barriers to marriage but did not change the “core definition of marriage as the union of a man and a woman”).

8. No. 16-111 (U.S. argued Dec. 5, 2017).

9. The Court is hearing Phillips’s appeal from the ruling against him in *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015). *Masterpiece Cakeshop, Ltd.*, No. 16-111; see also Amicus Curiae Brief of Ryan T. Anderson, Ph.D. et al. in Support of Petitioners at 26, *Masterpiece Cakeshop, Ltd.*, No. 16-111, 2017 WL 4004529, at \*37 (quoting reference to “decent and honorable” in the *Obergefell* majority opinion).

10. See Brief of Americans United for Separation of Church and State et al. as Amici Curiae in Support of Respondents at 28–30 & n.9, *Masterpiece Cakeshop, Ltd.*, No. 16-111, 2017 WL 4998227, at \*28–30 & n.9.

11. *Obergefell*, 135 S. Ct. at 2598.

12. *Id.* at 2603–04.

13. 518 U.S. 515 (1996).

protections to people once ignored or excluded.”<sup>14</sup> This moral reading of the Constitution interprets its guarantees of liberty and equality as reflecting commitments to “abstract aspirational principles” that we seek to realize over time.<sup>15</sup> In interpreting or constructing the Constitution, we aim to redeem those promises.<sup>16</sup>

Looking back at the record in *Loving*, this Article shows the role played by narratives of constitutional moral progress, in which the Lovings and their amici indicted Virginia’s antimiscegenation law as an “odious” relic of slavery and a present-day reflection of racial prejudice.<sup>17</sup> In response, Virginia sought to distance such laws from prejudice and white supremacy by appealing to “the most recent” social science that identified problems posed by “intermarriage,” particularly for children.<sup>18</sup> Such work also rejected the idea that intermarriage was a path toward progress and freedom from prejudice.<sup>19</sup> This Article concludes by briefly examining the appeal to *Loving* in arguments about not being on “the wrong side of history” in the successful challenge to Virginia’s bans on permitting or recognizing same-sex marriage.

#### I. PREJUDICE AND CONSTITUTIONAL MORAL PROGRESS: ARGUMENTS IN *LOVING*

The Court’s opinion in *Loving* shows traces of Virginia’s various rationales for its antimiscegenation laws. Chief Justice Earl Warren quotes, without comment, the trial court’s famous theological justification:

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.<sup>20</sup>

Appeals to scripture to defend antimiscegenation law and oppose any form of racial integration had long been a staple in judicial opinions and political rhetoric.<sup>21</sup>

14. *Id.* at 557.

15. See JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* 4 (2015).

16. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 5–6 (2011) (introducing the idea of redemption of the Constitution’s promises).

17. See *infra* Part III.

18. Transcript of Oral Argument at 27–29, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), reprinted in 64 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 959, 986–87 (Philip B. Kurland & Gerhard Casper eds., 1975).

19. Brief and Appendix on Behalf of Appellee at 7–9, *Loving*, 388 U.S. 1 (No. 395), reprinted in 64 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW*, *supra* note 18, at 789, 800–02 [hereinafter Brief of Appellee]. Cites to the record are from this Kurland and Casper volume, with the exception of citations to appendices to the appellee’s brief, which are available at 1967 WL 93641.

20. *Loving*, 388 U.S. at 1, 3 (quoting *Loving v. Commonwealth* (Va. Cir. Ct. Caroline Cty. Jan. 22, 1965)).

21. See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 78 (N.M. 2013) (Bosson, J., concurring) (“Whatever opinion one might have of the [*Loving*] trial judge’s religious

The Court also quotes from *Naim v. Naim*,<sup>22</sup> on which the Virginia Supreme Court relied in its *Loving* opinion.<sup>23</sup> *Naim* asserts that an “unbroken line of decisions”—with the exception of the California case *Perez v. Lippold*<sup>24</sup>—does not read the Fourteenth Amendment as denying states the power to regulate marriage to prevent “the corruption of blood” and a “mongrel breed of citizens” that would “weaken or destroy the quality of its citizenship.”<sup>25</sup> Warren described these supposed “legitimate purposes” as “obviously an endorsement of the doctrine of White Supremacy” and concluded that “no legitimate overriding purpose independent of *invidious racial discrimination*” justified Virginia’s antimiscegenation law.<sup>26</sup> In addition to this Equal Protection Clause holding, the Court held that the law violated the Due Process Clause by restricting the fundamental right to marry by means of invidious racial discrimination.<sup>27</sup>

These holdings made it unnecessary for the Court to engage with Virginia’s more “modern” argument that, because “the scientific evidence is substantially in doubt” as to “whether there was any rational basis for a State to treat interracial marriages differently from other marriages,” the Court “should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriage[.]”<sup>28</sup> The Lovings and their amici countered that antimiscegenation laws reflected and perpetuated racial prejudice.<sup>29</sup> This tension demonstrates how Virginia attempted to escape the racist origins and purposes of its antimiscegenation law by recasting it as a legitimate way to deal with the psychological and sociological problems arising from interracial marriage.

## II. ARGUMENTS ON BEHALF OF VIRGINIA’S ANTIMISCEGENATION LAW

This Part discusses how Virginia attempted to offer an alternative, scientific argument against interracial marriage by drawing on sociological concerns about the supposed effects of interracial marriage on marital success and child well being. In doing so, this Part illustrates how Virginia analogized interracial marriage to other “problematic” marriages that the state could bar while ignoring how its “scientific” evidence also applied to legally permitted marriages, such as interfaith marriage.

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views, which mirrored those of millions of Americans at the time, no one questioned his sincerity either or his religious conviction.”).

22. 87 S.E.2d 749 (Va. 1955).

23. *Loving*, 388 U.S. at 7.

24. 198 P.2d 17 (Cal. 1948).

25. *Naim*, 87 S.E.2d at 756.

26. *Loving*, 388 U.S. at 7, 11 (emphasis added).

27. *Id.* at 12.

28. *Id.* at 8. The Court rejected Virginia’s “equal application” argument in light of its prior invalidation of Florida’s law punishing interracial cohabitation more harshly than intraracial cohabitation as “invidious discrimination” prohibited by the Fourteenth Amendment. *Id.* at 10. In *McLaughlin v. Florida*, 379 U.S. 184 (1964), the Court rejected Florida’s reliance on *Pace v. Alabama*, 106 U.S. 583 (1883), for the argument that the statute was lawful because it applied equally to those who committed the intraracial offense. *McLaughlin*, 379 U.S. at 188.

29. See *infra* Part III.A.

A. *Not Racial Prejudice, but Preventing Problem  
Marriages Doomed by “Difference”*

In *Loving*, Virginia argued that its antimiscegenation law did not violate the Fourteenth Amendment because the framers intended to exclude such laws from its terms; thus, the Court should not inquire into “the wisdom, propriety or desirability of preventing interracial alliances.”<sup>30</sup> Alternatively, Virginia argued that “if the Fourteenth Amendment [is] deemed to apply to state antimiscegenation statutes, then this statute serves [the] legitimate legislative objective of preventing the sociological and psychological evils [that] attend interracial marriage.”<sup>31</sup> Specifically, Virginia relied on Rabbi Albert I. Gordon’s 1964 book *Intermarriage: Interfaith, Interracial, Interethnic* as “the most recent scientific treatise upon the propriety or desirability of interracial marriages from the psychological and sociological point of view.”<sup>32</sup>

Virginia attempted to recast its antimiscegenation law as rooted not in racial prejudice and white supremacy but on “today’s evidence” about the detrimental “psychological aspects” of intermarriage.<sup>33</sup> During oral argument, the Justices repeatedly asked Assistant Attorney General Robert McIlwaine whether Virginia’s Racial Integrity Act was anything other than “the result of the old slavery days, the old feeling that the white man was superior to the colored man, which was exactly what the Fourteenth Amendment was adopted to prevent.”<sup>34</sup> McIlwaine conceded that the Act, as a whole, rested on a premise of white superiority, but he urged that the issue should be restricted to whether the two specific provisions in question were justifiable in 1967.<sup>35</sup> That contemporary justification, he contended, citing Gordon’s book as principal authority, stemmed from the psychological and sociological problems such marriages posed.<sup>36</sup>

Virginia, however, used Gordon’s book strategically and selectively. It brushed aside Gordon’s lengthier treatment of—and warnings against—interfaith marriage. In enlisting Gordon’s book to show that interracial marriage was especially harmful for children, Virginia left out Gordon’s reasoning for that argument: that such children are likely to suffer the same “discriminatory practices,” “indignities,” and complete lack of acceptance by white society as their parents.<sup>37</sup>

Virginia related its antimiscegenation law to its “natural, direct, and vital interest in maximizing the number of successful marriages [that] lead to stable homes and families, and in minimizing those [that] do not.”<sup>38</sup> It

30. Brief of Appellee, *supra* note 19, at 38.

31. Transcript of Oral Argument, *supra* note 18, at 20.

32. Brief of Appellee, *supra* note 19, at 47. Gordon was also a trained sociologist.

33. Transcript of Oral Argument, *supra* note 18, at 27–28, 33.

34. *Id.* at 33.

35. *Id.* at 32–33.

36. *Id.* at 27–28, 33–34.

37. ALBERT I. GORDON, *INTERMARRIAGE: INTERFAITH, INTERRACIAL, INTERETHNIC* 334 (1964).

38. Transcript of Oral Argument, *supra* note 18, at 27.

asserted that “the most recent available evidence on the psycho-sociological aspect of this question [indicated] that intermarried families are subjected to much greater pressures and problems than are those of the intramarried”; thus, its “prohibition of racial intermarriage” stood on “the same footing” as other restrictions, such as barring polygamous, incestuous, and underage marriages, and marriages by “people who are mentally incompetent.”<sup>39</sup> Virginia enlisted Gordon’s book to give “statistical form and basis to the proposition that, from a psycho-sociological point of view, interracial marriages are detrimental to the individual, to the family, and to the society.”<sup>40</sup>

Virginia also enlisted Gordon to deflect charges of racial prejudice. It quoted Gordon’s rejection of “the argument that persons who oppose intermarriage—religious or racial—are per se prejudiced” and his retort that “*the tendency to classify all persons who oppose intermarriage as ‘prejudiced’ is, in itself, a prejudice.*”<sup>41</sup> While *some* people’s opposition may rest in “prejudice,” Gordon acknowledged “the desire to perpetuate one’s own religion [and] to prevent its assimilation [as] understandable and reasonable”; “neither races of man nor religious or ethnic groups need offer apologies for their desire to perpetuate themselves.”<sup>42</sup> Citing Gordon, McIlwaine attempted to recast Virginia’s law as being not about “racial superiority or inferiority” but simply racial difference,<sup>43</sup> and he argued that children of the intermarried are harmed by such “difference” in marriage<sup>44</sup> and that higher divorce rates arise from such difference.<sup>45</sup>

Virginia’s brief included numerous passages from Gordon about the importance of “like marrying like” as a formula for marital happiness and divorce prevention.<sup>46</sup> But Gordon applied that formula to religion as well.<sup>47</sup> At oral argument, Chief Justice Warren observed that some people have “the same feeling about interreligious marriages”—that intermarried families face (in McIlwaine’s words) “greater pressures and problems than . . . the intramarried”—and asked whether the state could also prohibit interreligious marriage for that reason.<sup>48</sup> Warren’s observation and question echoed an observation made nearly twenty years earlier, in *Perez v. Lippold*, when the Supreme Court of California struck down California’s antimiscegenation law: “If miscegenous marriages can be prohibited because of tensions suffered by the progeny, mixed religious unions could be prohibited on the

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39. *Id.* at 27–28.

40. *Id.* at 28. Gordon disavowed any reliance on a biological argument in his tallying of the costs of intermarriage. GORDON, *supra* note 37, at 220–21.

41. Brief of Appellee, *supra* note 19, at 48 (emphasis added) (quoting GORDON, *supra* note 37, at 357).

42. *Id.*

43. *Id.* at 44.

44. *Id.*

45. Transcript of Oral Argument, *supra* note 18, at 44.

46. See Brief of Appellee, *supra* note 19, app. B (quoting GORDON, *supra* note 37, at 348–49, 354).

47. *Id.* (quoting GORDON, *supra* note 37, at 367–69).

48. Transcript of Oral Argument, *supra* note 18, at 28.

same ground.”<sup>49</sup> McIlwaine responded, “I think that the evidence in support of the prohibition of interracial marriages is stronger than that for the prohibition of interreligious marriages . . . .”<sup>50</sup> When questioned about the basis for his statement, he rested “particularly” on Gordon’s book.<sup>51</sup>

Gordon’s book, however, does not support singling out interracial marriage for legal prohibition. He devotes far more of his book to interfaith (interreligious) marriage.<sup>52</sup> The book’s criticism of both forms of “intermarriage” is clear even from the passages Virginia quoted in its brief. For example, Gordon warns that “intermarriage” introduces “major differences,” whether religious or racial, that make marital success less likely and divorce more likely than in the “average” marriage:

A rereading of the factual material contained in this study of intermarriage in its various forms, and of its effects on those who intermarry, *leads me to the conclusion that intermarriage is actually a threat to ultimate happiness*, that the problems that result from the major differences *in religion and race* are so weighty as to require that those who would intermarry be persons of far greater strength and courage than is ordinarily required in marriage. If, in the average marriage, there are differences that must be resolved and adjustments that must be made, and if, even then, the divorce rate is about one in every three marriages, we may expect that the divorce rate for the intermarried will be much greater.<sup>53</sup>

Such higher risks of divorce, Gordon argues, support the conclusion that “intermarriage is unwise for most individuals and must, therefore, be regarded as a threat to both personal and group happiness.”<sup>54</sup> Instead, “the chances of happiness in marriage are greatest for those who are culturally, socially, educationally, temperamentally, ethnically, nationally, racially, and religiously more like than they are different from each other.”<sup>55</sup> Interfaith and interracial marriages, Gordon asserts, pose “a threat to the children of such” marriages because they “tend to make [children] marginal in their relationships to parents, their faiths or their races.”<sup>56</sup>

Gordon rejected the argument that intermarriage, of whatever form, was a sign of progress. Thus, Virginia quotes Gordon’s emphatic insistence that there was no evidence that intermarriage might be a path to realizing “[u]niversal brotherhood, freedom from prejudice, intolerance and hatred of

49. *Perez v. Lippold*, 198 P.2d 17, 26 (Cal. 1948).

50. Transcript of Oral Argument, *supra* note 18, at 28.

51. *Id.*

52. Chapters 4 through 7 of Gordon’s book address interfaith marriage. *See* GORDON, *supra* note 37, at 87–219. Two chapters, chapters 8 and 9, address interracial marriage. *Id.* at 220–94. One short chapter, chapter 10, discusses “Interethnic Marriages.” *Id.* at 295–309. Chapter 11, “What of the Children?” contains more narratives about interfaith marriages than interracial ones. *Id.* at 310–47.

53. Brief of Appellee, *supra* note 19, app. B (second emphasis added) (quoting GORDON, *supra* note 37, at 369–70). Gordon mentions evidence that “the rate of divorce in cases of intermarriage is two to four times as heavy as the ‘normal’ rate.” GORDON, *supra* note 37, at 370.

54. GORDON, *supra* note 37, at 369.

55. *Id.*

56. *Id.* at 370.



the unlike.”<sup>57</sup> But, once again, Gordon viewed all forms of intermarriage as “a threat to society and . . . not necessarily a promise of a brighter day to come.”<sup>58</sup> Instead, he insisted, “It is the duty of men and women of different faiths, colors and nations to learn to live together in peace and amity while maintaining their differences.”<sup>59</sup> Gordon’s pervasive concern, as a Rabbi and social scientist, was an evident increase in Jewish young people, with more opportunities for social contact across lines of religion, “interdating” and intermarrying, disregarding the advice of their elders and even threatening Jewish survival.<sup>60</sup> Throughout his book, however, Gordon, often lumped together race and religion, as in the following passage Virginia quotes: “intermarriage appears to the major religious bodies, as well as to national ethnic and racial groups, to constitute a betrayal of the ideals and values [that] each professes”; it “betray[s] . . . family and group values” and often creates “a deep hurt” in “family and friends whose values are spurned.”<sup>61</sup>

Perhaps Gordon’s book appealed to Virginia’s attorneys because his appeal to group pride and a duty to preserve difference seemed to echo defenses of antimiscegenation laws as furthering racial pride—and racial purity—for both whites and “Negroes.” However, in passages not quoted by Virginia, Gordon rejects any biological basis for ideas of a “pure” race or of racial superiority and inferiority; he suggests one can make sense of the persistence of these ideas only if one sees them as a pretext for prejudice.<sup>62</sup> Still, in discussing controls on intermarriage, Gordon matter-of-factly reports that antimiscegenation laws exist in “over half of the states in the Union” “[u]nder the impression that the preservation of our society depends upon such methods.”<sup>63</sup> Disturbingly, he takes no normative position on such laws.<sup>64</sup>

### B. *Why Are Interracial Marriages Problem Marriages?*

Virginia deployed Gordon’s book strategically to argue that interracial marriage causes children to suffer but ignored the role of *racial prejudice* in causing that suffering. At oral argument, the Court pressed McIlwaine on whether “one reason that marriages of this kind are sometimes unsuccessful is the existence of the kind of laws that are in issue here, and the attitudes that those laws reflect.”<sup>65</sup> McIlwaine tried to shift from the role of law by quoting

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57. Brief of Appellee, *supra* note 19, app. B (quoting GORDON, *supra* note 37, at 358–60).

58. GORDON, *supra* note 37, at 368.

59. *Id.*

60. See, e.g., Daniel Levinson, *Rabbi’s Study Opposes Intermarriage*, BOS. GLOBE, May 5, 1964, at 17 (reviewing GORDON, *supra* note 37). To put this concern in historical context, see, e.g., Meir Ben-Horin, *Intermarriage and the Survival of the Jewish People*, in INTERMARRIAGE AND JEWISH LIFE: A SYMPOSIUM 38, 42 (Werner J. Cahnman ed., 1963) (discussing a “consensus” that religious intermarriage was contrary to Judaism and raising question, “Is intermarriage a significant problem that needs to be discussed vis-à-vis the survival of the Jewish People?”).

61. Brief of Appellee, *supra* note 19, app. B (quoting GORDON, *supra* note 37, at 359).

62. See GORDON, *supra* note 37, at 220–21.

63. *Id.* at 66.

64. *Id.*

65. Transcript of Oral Argument, *supra* note 18, at 29.

Gordon's observation that society's "*attitude . . .* toward interracial marriages . . . 'causes a child to have almost insuperable difficulties in identification.'"<sup>66</sup> McIlwaine added that "'the problems [that] the child of an interracial marriage faces are those which no child can come through without damages to himself'" given a state interest in "protecting the progeny of interracial marriages from these problems."<sup>67</sup>

A closer look at Gordon reveals that the social "attitudes" causing those problems are racial prejudice and hostility. Thus, although children of intermarriage—whether interfaith, interracial, or interethnic—suffer, racial prejudice makes the children of such marriages particularly "socially unfortunate."<sup>68</sup> Gordon explains that, in interfaith marriages, because the household does not share a religion, the couple often experiences difficulties and children lack a clear identity, lack security, and experience divided loyalty.<sup>69</sup> Turning to the harms to children from interracial marriage, Gordon is briefer and starker: "The children born of Negro-white marriages in the United States are, I believe, among the most socially unfortunate persons in all the world if they seek or expect acceptance by the white community in America."<sup>70</sup> He also warned that, as teenagers, children will encounter the general refusal of whites in the United States to allow "interdating."<sup>71</sup> In language unwittingly mirroring Virginia's interpretation of its antimiscegenation law (the "one drop" rule), Gordon takes the baseline of racial prejudice as a given:

To date there is no evidence that persons with even one drop of Negro blood will, knowingly, be accepted as whites. . . . He must find his roots within the Negro community or remain unaccepted and unacceptable to the white community. It will do no good to argue whether whites are correct in taking such an attitude. It is far more important to know that, realistically speaking, this unfortunately is their attitude.<sup>72</sup>

Even though Gordon published *Intermarriage* in 1964, as Congress debated what became the landmark Civil Rights Act of 1964, he does not give credence to the possibility of moral progress through civil rights. Instead, for him, racial prejudice is a moral argument *against* interracial marriage. Thus, after detailing the pervasive discrimination against "the Negro in the United States," Gordon asserts:

Unless a miracle occurs that will eliminate discrimination from our society—and that does not seem probable—we may expect such children

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66. *Id.* at 29 (quoting GORDON, *supra* note 37).

67. *Id.* at 29–30 (quoting GORDON, *supra* note 37).

68. GORDON, *supra* note 37, at 333.

69. *Id.* at 87–118, 310–47; *see, e.g.*, JAMES H.S. BOSSARD & ELEANOR STOKER BALL, ONE MARRIAGE, TWO FAITHS: GUIDANCE ON INTERFAITH MARRIAGE 126–28 (1957) (discussing how children without "unicultural training" do not benefit by the different cultures but are rather burdened by the parents' arguing about the "correct" way to live).

70. GORDON, *supra* note 37, at 333.

71. *Id.* at 334.

72. *Id.* at 333–34.

[of interracial married parents] to suffer the same indignities as do their parents.

Whether people, however much they may love each other, have the moral right to create such a problem for a child is, of course, debatable. It is my belief that interracially intermarried parents are committing a grave offense against their children that is far more serious and even dangerous to their welfare than they realize.<sup>73</sup>

Omitting the above passage, Virginia's brief quotes Gordon's conclusion that "[t]he chances for the success of an interracial marriage are, according to my research, even less than for that of an inter-faith marriage."<sup>74</sup> Virginia also omits the basis for Gordon's conclusion, that "obvious difference in skin color makes for an unfavorable societal attitude toward the intermarried" such that "[p]ersons who entertain the thought of entering into an interracial marriage should know that they and any children born to them will suffer many hardships and disadvantages as the result of such a marriage."<sup>75</sup> Gordon asserts, "I believe that the institution of marriage certainly does not require that we make martyrs of ourselves and of our children."<sup>76</sup>

This closer look at Gordon clarifies that, in his view, racial prejudice and discrimination made interracial marriage particularly fraught with problems. Without condoning it, Gordon treats such prejudice as a social fact. But he also offers his "personal view," which seems to be a pluralistic vision of the normative good stemming from preserving differences—religious, racial, and national—rather than eliminating them.<sup>77</sup> Virginia quotes this vision:

I believe that basic differences will not be eliminated. . . . [T]he most we can hope and work for with any degree of moderate success is that we will grow more accustomed to the idea that it is possible for persons of different colors, races, nations and religions to work together in many areas even while retaining their distinctiveness.<sup>78</sup>

Virginia may have quoted this passage to attempt to hold the line on dismantling legally compelled racial segregation at marriage after so fiercely resisting school desegregation in *Brown v. Board of Education*.<sup>79</sup> The context, however, is not *legal* prohibition of intermarriage but rather Gordon's skepticism that "intermarriage"—whether interfaith, interracial, or interethnic—is the path to greater social harmony and the end of "prejudice, intolerance, and hatred."<sup>80</sup> Once again, Virginia quotes selectively, omitting the reason Gordon criticizes the belief that more black-white marriages could overcome the "race problem," that "Negroes" still lack "social equality" and,

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73. *Id.* at 334.

74. Brief of Appellee, *supra* note 19, app. B (quoting GORDON, *supra* note 37, at 348–49).

75. GORDON, *supra* note 37, at 349.

76. *Id.*; *cf.* *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.").

77. GORDON, *supra* note 37, at 357–60.

78. Brief of Appellee, *supra* note 19, app. B (quoting GORDON, *supra* note 37, at 362).

79. 347 U.S. 483 (1954).

80. GORDON, *supra* note 37, at 361.

although some “Negro and white college youth” may meet and marry, the present attitude of “the white man to the Negro” is not likely to change for at least a generation.<sup>81</sup> Gordon’s quiescence toward the status quo is in striking contrast with one of his mentors, social psychologist Gordon W. Allport. In *The Nature of Prejudice*, Allport acknowledged that prejudice made interracial marriage inadvisable under the current conditions, but he also argued for dismantling legal segregation and working for conditions that made those marriages possible.<sup>82</sup> Allport observed, “It is because intermarriage would symbolize the abolition of prejudice that it is so strenuously fought.”<sup>83</sup>

### III. ARGUMENTS MADE BY THE LOVINGS AND THEIR AMICI

The Lovings’ counsel engaged Virginia’s reliance on Gordon only briefly. At oral argument, Bernard Cohen read the following passage from *Intermarriage*: “[O]ur democracy would soon be defeated if any group on the American scene was required to cut itself off from context with persons of other religions or races. The segregation of any group, religious or racial, either voluntarily or involuntarily, is unthinkable and even dangerous to the body politic.”<sup>84</sup> In contrast to Virginia’s selective use of Gordon’s theory to demonstrate harms to children from interracial marriage, the Lovings and their amici countered that *prejudice* created the problems. This Part focuses on the role, in their arguments, of appeals to constitutional moral progress of repudiating prejudice and discrimination in light of the gradual realization of constitutional commitments to equality and liberty.

#### A. Racial Prejudice and Constitutional Moral Progress

The Lovings urged the Court to take this “appropriate opportunity to strike down the last remnants of legalized slavery in our country.”<sup>85</sup> Antimiscegenation laws were “both relics of slavery and expressions of modern day racism which brand Negroes as an inferior race.”<sup>86</sup> Antimiscegenation laws, the Lovings argued, “are legalized racial prejudice, unsupported by reason or morals, and should not exist in a good society.”<sup>87</sup> This appeal to “morals” and a “good society” is powerful, given the repeated quoting—in defenses of antimiscegenation laws—of *Maynard v. Hill*<sup>88</sup> and its notion that marriage has “more to do with the morals and civilization of a people than any other institution.”<sup>89</sup> Moral progress requires abandoning such unsupportable laws.

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81. *Id.* at 364.

82. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 354–55 (1954).

83. *Id.* at 354.

84. Transcript of Oral Argument, *supra* note 18, at 46.

85. Brief for Appellants at 1, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395).

86. *Id.* at 15.

87. *Id.* at 40.

88. 125 U.S. 190 (1888).

89. *Id.* at 205.

The amicus briefs in support of the Lovings similarly linked Virginia's laws to racial prejudice and urged their demise as an important measure of constitutional progress.<sup>90</sup> The NAACP Legal Defense and Education Fund (the "Fund") asserted that such laws rested on an "amalgam of superstition, mythology, ignorance and pseudoscientific nonsense summoned up to support the theories of white supremacy and racial 'purity.'"<sup>91</sup> Further, the trial court's appeal to "Almighty God" also illustrated the appeal to theology, which is not a sufficient rationale under the Fourteenth Amendment to implement racial discrimination.<sup>92</sup>

The Lovings' brief also highlights the interplay of racial prejudice and white men's "sore conscience" under the "illicit conditions fostered by the miscegenation laws": they quote Gunnar Myrdal on white men's sexual exploitation of "the Negro female" and the fixation on "the purity of white womanhood."<sup>93</sup> They argued that such laws are the "paradigm" of measures expressing "the subordinate status of the Negro people and the exalted position of the whites . . . functioning chiefly as the State's official symbol of a caste system."<sup>94</sup> They "inflict[] indignity upon every person cast . . . as not good enough to marry a 'white person.'"<sup>95</sup>

The Japanese American Citizens League also situates the striking down of Virginia's law within a narrative of moral and constitutional progress by asserting that "[t]he torchlight of the Constitution has been wielded to expose and burn away these remaining shackles to individual liberty and to cast forth light extending "to the full range of conduct which the individual is free to pursue."<sup>96</sup> The group's brief debunks ideas of a pure race and of racial superiority by arguing that Virginia's law is "readily exposed as a racist, 'white supremacy' law."<sup>97</sup> The brief invokes interfaith marriage to *condemn* legal bans on interracial marriage: "no one would seriously contend" that various forms of bans on marriage based on differences—such as "between Protestants and Catholics . . . would be constitutional."<sup>98</sup> As with religion, so with race: "Whatever differences may exist between these groups cannot provide proper bases for fixing public policy."<sup>99</sup>

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90. See, e.g., Brief of N.A.A.C.P. Legal Defense and Education Fund, Inc., as Amicus Curiae at 9–10, 13, *Loving*, 388 U.S. 1 (1967) (No. 395) [hereinafter Fund Brief] (arguing that "the laws against interracial marriage grew out of the system of slavery and were based on race prejudices and notions of Negro inferiority used to justify slavery, and later segregation").

91. *Id.* at 9–10 (referring to the mongrelization rhetoric in *Naim v. Naim*, 87 S.E.2d 749, 756 (1995)).

92. *Id.* at 13–14.

93. Brief for Appellants, *supra* note 85, at 25 (quoting GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY 591 (1962)).

94. *Id.* at 27–28 (quoting GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY 66 (1962)).

95. *Id.* at 27.

96. Brief of Amici Curiae Japanese American Citizens League at 6, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395).

97. *Id.* at 4.

98. *Id.* at 30.

99. *Id.*

The Fund's Brief situates invalidating racial prohibitions on marriage as part of the "never-ending struggle" of the "Negro in the United States" for "full and equal citizenship" and against "laws, customs, practices, usages and opinion relegating him to an inferior status."<sup>100</sup> It further invokes the Court's striking down of "all other segregation laws" in urging the Court to strike down the antimiscegenation laws, and it argues that these laws "intrude a racist dogma into the private and personal relationship of marriage," which is inconsistent with the Fourteenth Amendment.<sup>101</sup>

### B. Modern Science, Race Prejudice, and Harms to Children

While Virginia stressed the harms to children born into interracial marriages as a reason to prohibit such marriages,<sup>102</sup> the Lovings stressed the "immeasurable social harm" (including to children) caused by *prohibiting* those marriages, including rendering children illegitimate.<sup>103</sup> To show the absence of any rational basis for Virginia's law, the Lovings and their amici enlisted modern scientific understanding of race, particularly the United Nations Educational, Scientific and Cultural Organization's (UNESCO) 1952 "Statement on the Nature of Race and Race Differences," which found that "*no biological justification exists for prohibiting intermarriage between persons of different races.*"<sup>104</sup> Amici argued that Virginia's rationales about mongrelization and race mixture (as embraced in *Naim*) are "abhorrent to" present day science and jurisprudence.<sup>105</sup> Although Chief Justice Warren asked counsel for Virginia his opinion about the "very cogent findings on the racist view" in the UNESCO report,<sup>106</sup> his opinion "stopped short of refuting the validity of race as a biological category."<sup>107</sup> But in concluding that the purpose of Virginia's law was to "maintain white supremacy,"<sup>108</sup> *Loving* was the "capstone of the Court's blow to the Jim Crow regime."<sup>109</sup>

In the only amicus brief filed on behalf of the Lovings by religious leaders and institutions, the National Catholic Conference for Interracial Justice, the

100. Brief of the National Association for the Advancement of Colored People as Amicus Curiae at 1, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) [hereinafter NAACP Brief].

101. Fund Brief, *supra* note 90, at 14–15.

102. See Transcript of Oral Argument, *supra* note 18, at 27–29; *supra* Part II.A.

103. Brief of Appellants, *supra* note 85, at 24.

104. Fund Brief, *supra* note 90, at 11 (quoting PHYSICAL ANTHROPOLOGISTS & GENETICISTS, UNESCO, STATEMENT ON THE NATURE OF RACE AND RACE DIFFERENCES art. 7 (1952)); NAACP Brief, *supra* note 100, at 9 (same); United Nations Educational, Scientific, and Cultural Organization, Expert Meeting on the Biological Aspects of Race, Statement on the Nature of Race and Race Differences (Apr. 27, 1964); see also Brief of Appellant, *supra* note 85, at 36–37.

105. NAACP Brief, *supra* note 100, at 6–7.

106. Transcript of Oral Argument, *supra* note 18, at 30. Virginia's brief countered this 1951 statement by referring to a subsequent UNESCO "booklet," see UNESCO, THE RACE CONCEPT: RESULTS OF AN INQUIRY (1952), discussing objections to its 1951 statement, see Brief of Appellee, *supra* note 19, app. C.

107. Roberts, *supra* note 3, at 207–08. The Fund Brief urged that, in light of the Court's evolving jurisprudence, "racially discriminatory state laws" lack any justification and "are all invalid per se." See Fund Brief, *supra* note 90, at 6.

108. Roberts, *supra* note 3, at 208.

109. *Id.* at 176.

National Catholic Social Action Conference, and several Catholic bishops and archbishops in southern dioceses (including Richmond, Virginia) asserted that third parties' "race prejudice" creates suffering for "parties to an interracial marriage" and their children—not "anything inherent in the family structure of the marriage."<sup>110</sup> By contrast to some studies of the harmful effects of polygamy (to which Virginia compared interracial marriage), there is no proof that "an interracial marriage, *because of the nature of such a marriage*, is likely to engender similar harmful effects."<sup>111</sup> Further, they argued that the government should not allow the racial prejudice of third persons to justify restrictions on the freedom to marry.<sup>112</sup> The brief quotes *Perez v. Sharp*<sup>113</sup>: "it is 'no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension.'"<sup>114</sup>

These briefs provide an important contrast to Virginia's appeal to "social attitudes" (i.e., racial prejudice and intolerance of interracial marriage) to justify perpetuating legalized racial discrimination. They also bring to mind the Supreme Court's later statement about racial prejudice in *Palmore v. Sidoti*<sup>115</sup>: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>116</sup>

#### CONCLUSION

Reflecting on *Loving* invites questions about when "new insights" regarding objectionable discrimination and the need to realize better the Constitution's promises are possible. When same-sex couples, nearly fifty years after *Loving*, challenged Virginia's defense of marriage laws ("DOMA"), the Attorney General of Virginia declined to defend the bans and asserted that he did not want to be "on the wrong side of history."<sup>117</sup> He criticized his predecessors, who chose to defend racially discriminatory laws in *Loving* and *Brown* and sex-discriminatory laws in *VMI*.<sup>118</sup> Similarly, the Solicitor General of Virginia argued, in federal district court, that the "legal principle" of equality was clear in those earlier cases; the problem lay in "the

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110. Brief Amicus Curiae, Urging Reversal, On Behalf of John J. Russell, Bishop of Richmond et al. at 15, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395). This brief also appealed to "freedom of conscience," asserting that Virginia's laws prohibit "the free exercise of religion," as well as "the right to beget children." *Id.* at 6, 20.

111. *Id.* at 15.

112. *Id.* at 17.

113. 198 P.2d 17 (Cal. 1948).

114. Brief Amicus Curiae, Urging Reversal, On Behalf of John J. Russell, Bishop of Richmond et al., *supra* note 110, at 17 (quoting *Perez*, 198 P.2d at 25).

115. 466 U.S. 429 (1984).

116. *Id.* at 433.

117. Eyder Peralta, *Virginia's New Attorney General Will Not Defend Gay Marriage Ban*, NPR (Jan. 23, 2014, 12:17 AM), <http://www.npr.org/sections/thetwo-way/2014/01/23/265050444/virginias-new-attorney-general-will-not-defend-gay-marriage-ban> [https://perma.cc/HJ3F-URXL].

118. See Peralta, *supra* note 117; see also Williams & Gabriel, *supra* note 1.

perception about how that principle applied at that time in history.”<sup>119</sup> The federal district court judge that found Virginia’s DOMA unconstitutional opened her opinion with Mildred Loving’s reference, on the fortieth anniversary of *Loving*, to generational progress: she noted that “the older generation’s fears and prejudices have given way” and affirmed her belief in the right to marry regardless of race, sex, or sexual orientation.<sup>120</sup> In *Obergefell*, Virginia filed a brief supporting same-sex marriage, pointing out parallels between the rationales offered for its prohibition and those offered long ago to justify antimiscegenation laws.<sup>121</sup> Some other southern states (including states whose antimiscegenation laws *Loving* struck down) filed amicus briefs in support of bans on same-sex marriage, which insisted that “odious” antimiscegenation laws had *nothing in common* with laws preserving the traditional definition of marriage.<sup>122</sup> How the Court assesses these competing interpretations of *Loving* and the nation’s civil rights past, both in *Masterpiece Cakeshop* and the next generation of civil rights cases, will shape the next chapter in this story of constitutional moral progress.

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119. Transcript of Proceedings at 17, *Bostic v. Rainey*, 970 F. Supp. 2d 460 (E.D. Va. 2014) (No. 13-CV-00395), ECF No. 132.

120. *Bostic v. Rainey*, 970 F. Supp. 2d 460 (E.D. Va.) (quoting Mildred Loving’s public statement on the fortieth anniversary of *Loving v. Virginia*, “Loving for All”), *aff’d sub nom.* *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014).

121. *See generally* Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1022690.

122. Brief of Louisiana et al. as Amici Curiae Supporting Respondents at 24, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1608213, at \*29.