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## Justice Alito's Dissent in *Loving v. Virginia*

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# JUSTICE ALITO'S DISSENT IN *LOVING v. VIRGINIA*

CHRISTOPHER R. LESLIE\*

**Abstract:** In 1967, in *Loving v. Virginia*, the U.S. Supreme Court unanimously struck down miscegenation statutes, which criminalized interracial marriage, as unconstitutional. In 2013, the Court in *United States v. Windsor* invalidated Section 3 of the so-called Defense of Marriage Act (“DOMA”), which precluded federal agencies from recognizing marriages between same-sex couples even if the marriages were legally valid in the couples’ home state. While *Loving* was a unanimous decision, the Court in *Windsor* was closely divided. Almost half a century after Chief Justice Warren issued his unanimous *Loving* opinion, the *Loving* dissent has been written. Justice Alito authored it in *Windsor*. Justice Alito fashioned his dissent as upholding DOMA. But the rationales he employed were much more suited to the facts of *Loving* than the facts of *Windsor*. In this Article, Professor Leslie explains how each of Justice Alito’s reasons for upholding DOMA applies equally or more strongly to miscegenation laws at the time of the *Loving* opinion than to DOMA in 2013. There is simply no internally consistent way to defend DOMA with Justice Alito’s arguments without also upholding the constitutionality of miscegenation laws. Thus, Justice Alito not only authored a dissent for the *Windsor* case; he effectively wrote a dissent in *Loving* nearly 50 years after the case was decided. His reasoning would require the upholding of Virginia’s miscegenation statute. To the extent that the legal community now recognizes that the former anti-miscegenation regimes represent a shameful chapter of American history, the fact that the same arguments used to defend miscegenation laws are being invoked to justify bans on same-sex marriage suggests that such bans are inherently suspect and probably unconstitutional.

## INTRODUCTION

Marriage is an institution both sacred and civil. Couples decide to get married for a variety of reasons. Some marry as a religious sacrament. Others get married to secure the bundle of rights conferred upon married couples by federal, state, local, and foreign governments. Some couples get married because of the social acceptance afforded by friends, family, and community to married couples. Some couples get married to express their love and commitment to each other. Most couples get married for multiple reasons, including some or all of the

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above.<sup>1</sup> Whatever the reason or reasons, the marriage proposal, its acceptance, and the ceremony itself are generally joyous events.

A couple's decision to marry becomes less joyous when government officials prohibit the marriage or refuse to recognize its legitimacy. State governments regulate who may marry whom as a civil matter. They enact restrictions, for example, setting minimum age requirements. Historically, most states imposed race restrictions, generally criminalizing interracial marriage.<sup>2</sup> In 1883, in *Pace v. Alabama*, the U.S. Supreme Court held that such laws did not violate the Equal Protection Clause because neither black people nor white people could marry across racial boundaries and, thus, both races were treated equally. As of this writing, many states impose gender restrictions, refusing to allow or recognize same-sex marriages as valid civil marriages.

In the context of race and gender restrictions, courts have played a critical role in bringing greater equality to America's marriage laws. The stories of three couples—Sylvester Davis and Andrea Perez; Richard Loving and Mildred Jeter; and Edith Windsor and Thea Spyer—illustrate this phenomenon. Los Angeles residents Sylvester Davis and Andrea Perez were in love and sought to make their relationship permanent through marriage. Unfortunately, in the 1940s California maintained an intricate anti-miscegenation regime that proscribed marriages

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<sup>1</sup> See *Turner v. Safley*, 482 U.S. 78, 95–96 (1987) (discussing marriages as “expressions of emotional support and public commitment,” as “an exercise of religious faith as well as an expression of personal dedication,” and as “a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits . . .”).

<sup>2</sup> PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 6 (2009) (“Miscegenation law reached well beyond the South. When the term ‘miscegenation’ was invented, laws prohibiting interracial marriage were in effect not only there but also in Maine and Rhode Island; in Michigan, Illinois, and Ohio; in California, Nebraska, and Washington. By the end of the nineteenth century, the laws had spread to cover nearly all the states of the U.S. West . . .”); *id.* at 2 (“In the North and South, states usually banned marriages between Whites and Blacks, but in the American West, to which the laws were extended in the late nineteenth century, legislatures prohibited (depending on the state) marriages between Whites and American Indians, native Hawaiians, Chinese, Japanese, Filipinos, Koreans, and Hindus.”); see NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 43 (2000) (“Community sentiment against whites marrying African Americans was not limited to the south in the antebellum decades. Inter-marriage bans and penalties echoed each other from state to state, north and south, east and west, together composing an American system.”); RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 219 (2003) (“Every state whose black population reached or exceeded 5 percent of the total eventually drafted and enacted antimiscegenation laws.” (citing Joseph Golden, *Patterns of Negro-White Inter-marriage*, 19 AM. SOC. REV. 144 (1954))); PASCOE, *supra*, at 21 (listing specific miscegenation laws); cf. Edward T. Wright, Comment, *Interracial Marriage: A Survey of Statutes and Their Interpretations*, 1 MERCER L. REV. 83, 88 (1949) (“Though many states which have miscegenation laws have a large population of members of the race prohibited from marrying whites, there are many states which do not. North Dakota has a statute on its books prohibiting Negroes and whites from marrying despite the fact that there are only two hundred and one Negroes in the entire state.”).

across defined racial lines.<sup>3</sup> Because the State classified Sylvester Davis as “a Negro male” and Andrea Perez as “a white female,” their marriage was illegal.<sup>4</sup> Although their Catholic church did not prohibit their marriage, the State did. Dan Marshall, a lawyer and the President of the Catholic Interracial Council in Los Angeles, believed that the couple would make excellent plaintiffs to challenge California’s miscegenation law.<sup>5</sup> Against the advice and admonitions of the Catholic Church hierarchy,<sup>6</sup> Marshall persevered in the legal challenge. In its 1948 opinion in *Perez v. Sharp*, the California Supreme Court became the first state high court since Reconstruction to strike down an anti-miscegenation law as unconstitutional.<sup>7</sup> A narrowly divided court held—in a 4-to-3 opinion—that California’s law violated the Fourteenth Amendment to the U.S. Constitution. Writing for the majority, Justice Traynor concluded that marriage “is a fundamental right of free men” and the miscegenation laws impermissibly impinge the “liberty to marry.”<sup>8</sup>

Although the California ruling represented a sea change, it did little to benefit interracial couples living in states that continued to maintain miscegenation statutes, like the states of the former confederacy.<sup>9</sup> In 1958, Richard Loving and Mildred Jeter lived in Virginia, a state whose supreme court had upheld its miscegenation law in 1955 and 1956.<sup>10</sup> Because Richard was white and Mildred black, they had to leave their home state to get married. Upon returning from Washington, D.C. as a married couple, a grand jury indicted the Lovings for violating Virginia’s miscegenation law.<sup>11</sup> After pleading guilty, the Lovings were sentenced to one year in jail, which the trial judge suspended, conditioned upon the Lovings not returning to Virginia together for 25 years.<sup>12</sup> The Lovings chal-

<sup>3</sup> *Perez v. Sharp*, 198 P.2d 17, 18 (Cal. 1948).

<sup>4</sup> PASCOE, *supra* note 2, at 211 (describing how Marshall chose not to challenge the racial classification by the marriage license bureau of Mexican Americans as white, a tactic other attorneys had used); *see Perez*, 198 P.2d at 18.

<sup>5</sup> *See id.*

<sup>6</sup> *See infra* notes 42–48 and accompanying text.

<sup>7</sup> *Perez*, 198 P.2d at 29.

<sup>8</sup> *Id.* at 19; *see also id.* (“The right to marry is as fundamental as the right to send one’s child to a particular school or the right to have offspring.”).

<sup>9</sup> RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 87 (2001). Professor Moran noted:

Despite the clarity and comprehensiveness of the majority decision in *Perez*, it did not immediately prompt other state courts or the U.S. Supreme Court to strike down anti-miscegenation statutes as unconstitutional. Indeed, other states continued to enforce the laws vigorously. One year after the *Perez* decision, a man in Ellisville, Mississippi, was sentenced to five years in prison for marrying a white woman.

*Id.*

<sup>10</sup> *Naim v. Naim*, 90 S.E.2d 849, 850 (Va. 1956); *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955).

<sup>11</sup> *Loving v. Virginia*, 388 U.S. 1, 2–3 (1967).

<sup>12</sup> *Id.* at 3. The Virginia Supreme Court later reversed this banishment penalty. *Loving v. Commonwealth*, 147 S.E.2d 78, 83 (Va. 1966).

lenged the constitutionality of the miscegenation law.<sup>13</sup> In 1967, the U.S. Supreme Court in *Loving v. Virginia* unanimously rejected the 1883 equal-treatment reasoning of *Pace v. Alabama*<sup>14</sup> and struck down all miscegenation statutes as unconstitutional, rendering the Lovings legally wed in every state of the union.<sup>15</sup>

Edith Windsor and Thea Spyer had been a couple for decades but were legally prevented from getting married because their love—like that of the Lovings before them—was forbidden. As two women living in a country with gender-specific marriage laws, Edith and Thea could not get married at home. When Canada began to recognize same-sex marriage, Edith and Thea seized the opportunity to make their commitment official. They traveled to Ontario in 2007 and had a legal marriage ceremony performed.<sup>16</sup> The State of New York, where Edith and Thea resided, eventually recognized their marriage as legally valid. The federal government, however, did not. In 1996, Congress had enacted the so-called Defense of Marriage Act (“DOMA”), Section 3 of which precluded federal agencies from recognizing marriages between same-sex couples even if the marriages were legally valid in the couples’ home state. Consequently, when Thea passed away and left her entire estate to her wife Edith, the IRS charged Windsor over \$363,000 because the agency refused to recognize her as a surviving spouse. When Windsor challenged section 3 of DOMA as unconstitutional, Justice Kennedy—writing for a narrowly divided Court in its 2013 opinion in *United States v. Windsor*—opined that the statute “violat[e] basic due process and equal protection principles” of the Fifth Amendment and struck it down.<sup>17</sup>

The opinions in *Perez*, *Loving*, and *Windsor* have more in common than just the subject of marriage equality. The arguments made against applying Equal Protection principles to marriage discrimination were the same across all three cases. This suggests that just as the arguments in favor of miscegenation laws proved unpersuasive—and often offensive—the arguments against same-sex marriage are likewise unconvincing.<sup>18</sup>

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<sup>13</sup> See Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1102 (2014).

<sup>14</sup> 106 U.S. 583, 585 (1883).

<sup>15</sup> *Loving*, 388 U.S. at 12.

<sup>16</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2679 (2013).

<sup>17</sup> *Id.* at 2693.

<sup>18</sup> Several prominent scholars have discussed the analogy between miscegenation laws and bans on same-sex marriage. See, e.g., Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 120–85 (2002); Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1377–78 (2000); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 200–01 (1994); R. A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839, 872 (2008); Josephine Ross, *Riddle for Our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 RUTGERS L. REV. 999, 1009–15 (2002); Josephine Ross, *Sex,*

The similarity of the arguments also raises an interesting thought experiment. In its unanimous decision,<sup>19</sup> the Supreme Court in *Loving* held that miscegenation laws violated the Equal Protection Clause of the Fourteenth Amendment. Today, how do we perceive arguments made to defend laws that forbade interracial couples from marrying? Do we consider them credible, worthy of respect? What would we think today of a Justice who had written a dissent in the *Loving* case? Would we perceive that Justice the way that many view Chief Justice Roger Taney, the author of the U.S. Supreme Court's 1857 opinion in *Dred Scott v. Sandford*?<sup>20</sup> The question is not just rhetorical because almost half a century after Chief Justice Warren issued his unanimous *Loving* opinion, the *Loving* dissent has been written—Justice Alito authored it in *United States v. Windsor*. Justice Alito fashioned his dissent as upholding DOMA. But the rationales he employed were better suited to the facts of *Loving* than the facts of *Windsor*.

This Article examines the rationales that Justice Alito espoused for upholding DOMA. After addressing the standing issues in the case,<sup>21</sup> Justice Alito advanced five substantive arguments in his dissent for why the Court should not intervene and invalidate DOMA: (1) the Court should avoid ruling on controver-

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*Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 SMU L. REV. 1657, 1668 (2002); Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 262–88 (2002); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 291–311 (1994); Rebecca Schatschneider, *On Shifting Sand: The Perils of Grounding the Case for Same-Sex Marriage in the Context of Antimiscegenation*, 14 TEMP. POL. & CIV. RTS. L. REV. 285, 297–305 (2004); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 981 (1991); James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 108–16 (1993). *But see* Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117, 153–64 (2007) (rejecting the analogy).

This Article takes a slightly different tack by showing how the arguments used by a Justice in the first U.S. Supreme Court case addressing same-sex marriage bans are the same arguments used to criminalize interracial marriage and, further, that these arguments are equally or more applicable to miscegenation laws than to DOMA.

<sup>19</sup> On the significance of unanimous Supreme Court opinions addressing segregation, see Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 2 (1979).

<sup>20</sup> 60 U.S. (19 How.) 393, 396, 451 (1857); *see* ROBERT J. SICKELS, RACE, MARRIAGE AND THE LAW 92 (1972) (“In the *Dred Scott* case in 1857, notably, Chief Justice Roger Taney cited state miscegenation laws as evidence that Negroes were low in status and unfit for citizenship and the other privileges of whites . . . .”) (citation omitted); Ian C. Bartrum, *Religion and Race: The Ministerial Exception Reexamined*, 106 NW. U. L. REV. COLLOQUY 191, 198 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/29/LRColl2011n29Bartrum.pdf>, archived at <http://perma.cc/VQT4-LXT4> (referring to “Taney’s unabashed bigotry” in *Dred Scott*); Justice Felix Frankfurter, *Taney and the Commerce Clause*, 49 HARV. L. REV. 1286, 1287 (1936) (noting characterization of “Taney, the bigoted provincial and protector of slavery”); *see also* David Snyder, *Chief Justice Taney Hailed as a Hero, Reviled as a Bigot; Historical Society to Revisit Life of Author of Dred Scott Decision*, WASH. POST, Oct. 26, 2003, at C5.

<sup>21</sup> *Windsor*, 133 S. Ct. at 2711–14 (Alito, J., dissenting).

sial issues;<sup>22</sup> (2) the Constitution is silent on same-sex marriage;<sup>23</sup> (3) the Court should not interfere with states' right to determine marriage laws;<sup>24</sup> (4) there is no deep-rooted tradition of same-sex marriage;<sup>25</sup> and (5) the long-term consequences of same-sex marriage are unknown.<sup>26</sup> This Article proceeds in five parts, one devoted to each of Justice Alito's arguments, in order to show that each of his reasons for upholding DOMA applies equally or more strongly to miscegenation laws at the time of the *Loving* opinion than to DOMA in 2013.

Justice Alito's *Windsor* dissent is most striking for what is missing from his list of arguments—a legitimate government interest in affirmatively denying federal recognition of valid state marriages between same-sex couples. Section 3 of DOMA discriminates both on the basis of sex and sexual orientation.<sup>27</sup> Under intermediate scrutiny, the government must show that the challenged restrictions “are substantially related to a legitimate state interest.”<sup>28</sup> Under rational basis review, “a statutory classification must be rationally related to a legitimate governmental purpose.”<sup>29</sup> Thus, whether a reviewing court applies intermediate scrutiny or rational basis review, proof of at least a “legitimate governmental purpose” is necessary to uphold a law challenged on Equal Protection grounds. None of Justice Alito's arguments articulates a government purpose in enacting DOMA in the first place. This omission is important because the *Windsor* majority specifically noted the absence of a legitimate government interest.<sup>30</sup> That alone suggests the *Windsor* defense is inherently deficient.

Demonstrating the similarity of reasoning between Justice Alito's opinion in *Windsor* and the segregationists who supported bans on interracial marriage does not necessarily imply that Justice Alito today would support miscegenation

<sup>22</sup> *Id.* at 2711; see *infra* notes 32–109 and accompanying text.

<sup>23</sup> *Windsor*, 133 S. Ct. at 2714; see *infra* notes 110–144 and accompanying text.

<sup>24</sup> *Windsor*, 133 S. Ct. at 2715; see *infra* notes 145–194 and accompanying text.

<sup>25</sup> *Windsor*, 133 S. Ct. at 2715; see *infra* notes 195–247 and accompanying text.

<sup>26</sup> *Windsor*, 133 S. Ct. at 2715; see *infra* notes 248–270 and accompanying text.

<sup>27</sup> See Leslie, *supra* note 13, at 1131.

<sup>28</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985) (quoting *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)); see *United States v. Virginia*, 518 U.S. 515, 533 (1996) (noting that under intermediate scrutiny, “[t]he burden of justification is demanding and it rests entirely on the State”).

<sup>29</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>30</sup> See *Windsor*, 133 S. Ct. at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”); cf. *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))). In his *Windsor* dissent, Justice Scalia suggested that the need for a “uniform federal definition of marriage” represented a legitimate government interest. *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting). But Justice Alito did not join Justice Scalia's dissent, effectively leaving Justice Alito defending a discriminatory law without any purpose but to discriminate.

laws. Rather, it suggests that if Justice Alito had espoused the same reasoning in 1967, it would have been as a dissent in *Loving v. Virginia*. It would have been intellectually inconsistent to join the *Loving* majority while arguing that the Supreme Court should not weigh in on controversial issues, should rely on constitutional silence to avoid extending rights to non-traditional couples, should defer to state legislatures, should not overturn laws that had been in existence for hundreds of years, and should let the prospect of unknown consequences prevent the legal recognition of non-traditional couples. This Article does not argue that Justice Alito supports—or ever would have supported—miscegenation laws. Rather, it views Justice Alito's dissent through the lens of *Loving* in order to demonstrate the hollowness of the arguments employed against marriage equality for same-sex couples.

In sum, there is no internally consistent way to defend DOMA with Justice Alito's arguments without also upholding the constitutionality of miscegenation laws. Justice Alito not only authored a dissent for the *Windsor* case; he effectively wrote a dissent in *Loving* nearly fifty years after the case was decided. His dissent would require the upholding of Virginia's miscegenation statute, as well as the criminal statutes in a dozen other states that in 1967 forbade interracial marriage. Furthermore, it can be argued that Justice Alito drafted the opinion for a future case that challenges the constitutionality of state bans on same-sex marriage. To the extent that the legal community now recognizes that the former anti-miscegenation regimes represent a shameful chapter of American history, the fact that the same arguments used to defend miscegenation laws are being invoked to justify bans on same-sex marriage suggests that such bans are inherently suspect and probably unconstitutional.<sup>31</sup>

## I. THE CONTROVERSIES OVER MARRIAGE RESTRICTIONS

Justice Alito began his 2013 dissent in *United States v. Windsor* by noting that the subject at hand was controversial, describing the country as “engaged in a heated debate about same-sex marriage.”<sup>32</sup> He then chastised Edith Windsor and the U.S. Department of Justice for “really seeking to have the Court resolve a debate between two competing views of marriage.”<sup>33</sup> Justice Alito thus implied

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<sup>31</sup> Over two decades before *Windsor*, Professor Mark Strasser observed: “If jurists and theorists are concerned about their own integrity and credibility, they must refrain from employing the kinds of arguments that were used to justify the refusal to recognize interracial marriages.” Strasser, *supra* note 18, at 989.

<sup>32</sup> *Windsor*, 133 S. Ct. at 2711 (Alito, J., dissenting) (“That debate is, at bottom, about the nature of the institution of marriage.”).

<sup>33</sup> *Id.* at 2718.



that the Court should avoid current topics that divide the nation, such as marriage equality for same-sex couples.<sup>34</sup>

This Part argues that Justice Alito's assertion that controversy compels upholding marriage restrictions against constitutional challenge would have compelled him to dissent in *Loving v. Virginia*, had he been on the Court. First, this Part explores the trajectory of the controversy over miscegenation laws, focusing on religion, social attitudes, and prominent civil rights groups. It then discusses the Supreme Court's avoidance of the issue of interracial marriage through the 1950s and most of the 1960s. Given these historical overviews, this Part finally argues that Justice Alito's argument that the Supreme Court should avoid controversial issues applies more to the case of *Loving* than to *Windsor*.

The issue of interracial marriage has been enduringly controversial throughout American history. In the mid-1800s, French author Auguste Carlier observed in his book, *Marriage in the United States*, that "the force of prejudice" against interracial marriage between black and white was so great that "no one would dare to brave it. It is not the legal penalty which is feared, but a condem-

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<sup>34</sup> Scholars have argued that jurists are wise to avoid controversial issues. Entering the sphere of public debate can undermine the legitimacy of the judiciary. The debate over whether the Supreme Court should avoid controversial issues predates the Court's *Loving* opinion. Compare Alexander Bickel, *The Supreme Court, 1960 Term-Foreward: The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961) (analyzing what the Court should take into consideration when deciding whether to adjudicate and concluding that there is a "wide area of choice open to the Court in deciding whether, when, and how much to adjudicate"), with Gerald Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964) (arguing that Bickel's thesis should not be accepted uncritically and that the Court has "an obligation to decide in some cases").

The controversy-avoidance argument has been employed extensively in gay rights litigation. For example, Justice Scalia lamented in *Romer v. Evans*—which invalidated Colorado's prohibition on gay-inclusive anti-discrimination laws—and *Lawrence v. Texas*—which invalidated sodomy laws—that whenever the Court condemns discrimination against gay Americans that the Court is improperly taking sides in a culture war. *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("I think it no business of the courts (as opposed to the political branches) to take sides in this culture war."); *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("It is clear from this that the Court has taken sides in the culture war . . ."). Justice Scalia—like Justice Alito in *Windsor*—apparently failed to appreciate that conservative justices are also taking sides in the culture war over equality for gay citizens; they are simply choosing the side against equality.

One might argue that conservative justices are trying to protect the Court's legitimacy by deferring to legislative bodies when the challenged law's subject leads to "heated debate." That would explain Justice Scalia's decision to uphold Colorado's anti-gay Amendment 2 in *Romer*, anti-gay sodomy laws in *Lawrence*, and the anti-gay DOMA in *Windsor*, the latter of which Justice Alito defended. (Justice Alito was not on the Court for *Romer* or *Lawrence*.) The avoiding-controversy theory is not particularly persuasive because Justice Scalia had no difficulty striking down controversial applications of laws that protected gay Americans, such as anti-discrimination laws in Massachusetts and New Jersey that would have facilitated gay participation in public parades and the Boy Scouts, respectively. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 559 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000). The only consistency in this "avoiding controversy" philosophy is that gay Americans lose—always.

nation a thousand times more terrible.”<sup>35</sup> Most Americans believed that interracial intimacy violated God’s law, which they interpreted as mandating the separation of the races in schools, swimming pools, and bedrooms.

Separatist views found voice most outspokenly in southern Protestant theology. Judges invoked “the white southern Protestant theology of race to justify antimiscegenation laws.”<sup>36</sup> For example, Virginia’s Supreme Court upheld that state’s miscegenation law in 1878, asserting that the “two distinct races . . . should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.”<sup>37</sup> This philosophy, however, extended beyond southern states. For example, in 1871 in *State v. Gibson*, the Supreme Court of Indiana held that neither the Fourteenth Amendment nor the Civil Rights Bill of 1875 affected the power of the state to criminalize interracial marriage because marriage “is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness, and well-being of society.”<sup>38</sup> The court opined:

Why the Creator made one black and the other white, we do not know, but the fact is apparent, and the races are distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect, and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures, when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races.<sup>39</sup>

Because Catholic doctrine was relatively more accepting of interracial marriage, some southern Protestants openly condemned the Catholic Church for not

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<sup>35</sup> COTT, *supra* note 2, at 42 (quoting AUGUSTE CARLIER, *MARRIAGE IN THE UNITED STATES* 87 (Joy Jeffries, trans., Arno Press 1972) (1867)).

<sup>36</sup> FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE & AMERICAN LAW* 137 (2009) (citing *Lonas v. State*, 50 Tenn. 287, 296 (1871), which referred to members of an interracial couple having a “distinction between them in race and color, made by nature”). In contrast, many black churches vocally opposed miscegenation laws. CHARLES FRANK ROBINSON II, *DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH* 117 (2003) (“Black ministers also demonstrated their opposition to anti-miscegenation laws by performing the marriages of interracial couples.”).

<sup>37</sup> *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (1878).

<sup>38</sup> 36 Ind. 389, 402–03 (1871).

<sup>39</sup> *Id.* at 404.

sufficiently separating the races. Most notably, in the aftermath of an interracial wedding held at a New York City Catholic parish, Alabama Senator Thomas J. Heflin in 1930 made a speech to Congress publicly condemning both the Catholic Church and New York public officials for not preventing the marriage from taking place.<sup>40</sup> He railed: “The fact . . . that the Roman Catholic Church permits negroes and whites to belong to the same Catholic Church and to go to the same Catholic schools and permits and sanctions the marriage between whites and negroes in the United States is largely responsible for the loose, dangerous, and sickening conditions that exist in New York City and State to-day.”<sup>41</sup>

Even though the Catholic Church was more enlightened in its views about interracial marriage than many southern Protestant churches, the issue of miscegenation laws still proved controversial even among Catholics.<sup>42</sup> Many decision-makers within the Catholic Church affirmatively declined to challenge miscegenation laws because they were “‘not at all willing to be pulled into a controversy of this kind.’”<sup>43</sup> Thus, many high officials in the Church were upset when they were unwillingly dragged into the spotlight on the issue in California. When Dan Marshall challenged California’s miscegenation law in the 1940s in *Perez*, he made a religious freedom argument based on the fact that Perez and Davis were Catholics who sought to exercise their right to enter the sacrament of marriage, which their religion did not limit to same-race couples.<sup>44</sup> Although Catholic doctrine did not prohibit miscegenation, “[a]t the Los Angeles Diocese, Catholic officials were appalled that Marshall had put the Catholic Church in the position of seeming to endorse interracial marriage.”<sup>45</sup> In response to Marshall’s request that Auxiliary Bishop Joseph McGucken testify about church doctrine in the *Perez* case, McGucken refused, stating “‘I cannot think of any point in existing race relationships that will stir up more passion and prejudice . . . . I want to make very clear that I am not at all willing to be pulled into a controversy of this kind.’”<sup>46</sup> Ultimately, Marshall pursued the litigation against the strong wishes of

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<sup>40</sup> BOTHAM, *supra* note 36, at 127 (“[T]he Senator berated New York’s Governor Franklin D. Roosevelt, Senator Royal Samuel Copeland, Alfred E. Smith, and New York City’s Irish Catholic mayor, Jimmy Walker.”).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 120 (“[T]he church’s theologies of marriage and race implicitly—and sometimes explicitly—tolerated interracial marriage, but given the volatility of the issue, this was not a position the American bishops would openly support until the 1960s with *Loving v. Virginia*.”). Some Catholic organizations, as well as prominent Protestants, supported the Lovings’ challenge. *Id.* at 128 (“And finally, a coalition of southern bishops and two Catholic organizations joined together in 1966 to advocate the legality of the marriage between Richard and Mildred Loving of Virginia.”).

<sup>43</sup> *Id.* at 21 (citation omitted).

<sup>44</sup> See 198 P.2d 17, 18 (Cal. 1948); PASCOE, *supra* note 2, at 211 (“Because California miscegenation law prevented Perez and Davis from exercising their right ‘to participate fully in the sacramental life of the religion in which they believe,’ it was an unconstitutional restraint on their freedom of religion.”) (citation omitted).

<sup>45</sup> PASCOE, *supra* note 2, at 214.

<sup>46</sup> *Id.* (citation omitted).

the Church's hierarchy. Indeed, his decision to pursue the issue was "one of the factors that made [Marshall] *persona non grata* in the Chancery office about that time (1948) and from that time on."<sup>47</sup> Despite Marshall's success, his decision to create a public controversy by challenging miscegenation laws as a Catholic official was one of the factors that led to the end of the Catholic Interracial Council.<sup>48</sup>

Across the country, although many Catholic theologians had spoken about the canonical right of interracial couples to marry,<sup>49</sup> the issue remained controversial in many Catholic circles.<sup>50</sup> Some Catholics resisted the official Catholic teachings permitting interracial marriage.<sup>51</sup> Ultimately, it was a devout Catholic judge—Judge Leon Bazile—who rejected the Lovings' challenge against Virginia's miscegenation statute because, in Judge Bazile's words: "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>52</sup>

Support of miscegenation laws ultimately transcended religion among most white Americans, who saw the issue as less a matter of politics than adherence to natural law.<sup>53</sup> As such, they assigned great importance to the issue. Among Caucasian Americans, social scientist Gunnar Myrdal reported in 1944 that "the ban on intermarriage and other sex relations involving white women and colored

<sup>47</sup> BOTHAM, *supra* note 36, at 22.

<sup>48</sup> *Id.* ("And although the Perez-Davis case was only one of His Excellency's disagreements with the CIC, by publicly advocating the most intimate union of members of different races, and by forcing the church into the spotlight on this volatile issue, the CIC exemplified most strikingly [Archbishop] McIntyre's trepidations about interracialism.").

<sup>49</sup> *Id.* at 128 ("In an article in the *Negro Digest* in 1943, Monsignor John A. Ryan affirmed the canonical right of Catholic interracial couples to request that their parish priest marry them.") (citation omitted); PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 203 (2002) ("For example, the National Catholic Conference for Interracial Justice insisted at its annual meeting in 1963 that interracial marriage was entirely compatible with the doctrine and canon law of the Roman Catholic Church. 'Diversity of faith' was an impediment to marriage, in this view, but race and color were not.").

<sup>50</sup> PHYL NEWBECK, VIRGINIA HASN'T ALWAYS BEEN FOR LOVERS: INTERRACIAL MARRIAGE BANS AND THE CASE OF RICHARD AND MILDRED LOVING 78 (2004) (In his *Perez* dissent, Justice Shenk began with "an attack on the freedom of religion argument, quoting a Catholic priest who had written that, while the Church did not forbid interracial marriages, it asked its ministers to dissuade mixed couples from trying to wed in states where such unions were forbidden. Thus he suggested that the church was bound by local laws, not vice versa." (citing 198 P.2d at 36 (Shenk, J., dissenting))).

<sup>51</sup> BOTHAM, *supra* note 36, at 128 ("Moreover, just as some Catholics resisted Catholic doctrine, some white Protestants also resisted the southern theology of separate races.").

<sup>52</sup> *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting trial judge).

<sup>53</sup> PASCOE, *supra* note 2, at 1 ("Between the 1860s and the 1960s, Americans saw their opposition to interracial marriage as a product of nature rather than a product of politics. The more natural opposition to interracial marriage seemed, the easier it was for it to serve as the bottom line of white supremacy and the most commonsense justification for all other forms of race discrimination.").

men takes precedence before everything else.”<sup>54</sup> The societal condemnation of miscegenation presented itself in myriad ways. For example, the Hays Code, which Hollywood studios used as a voluntary—but strictly followed—form of self-regulation and self-censorship, prohibited movies from depicting either interracial sex or marriage until 1956.<sup>55</sup> The California Supreme Court’s repudiation of that state’s miscegenation law did not compel a change in attitudes regarding interracial marriage across the nation. In the 1950s, over 92 percent of white Americans nationwide opposed interracial marriage; polls showed southern opposition in excess of 99 percent.<sup>56</sup>

In the black community, interracial marriage was sufficiently controversial that opinion was deeply divided over miscegenation laws. Just as many Caucasian Americans supported miscegenation laws as facilitating so-called white racial purity, many African Americans opposed interracial marriage as interfering with black racial purity.<sup>57</sup> Marcus Garvey championed this position.<sup>58</sup> Garvey

<sup>54</sup> *Id.* at 192 (citing GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 587 (1944)); *see id.* (noting that “miscegenation laws had become politically untouchable in the South”).

<sup>55</sup> Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY REV. LESBIAN & GAY LEGAL ISSUES 9, 14–15 (1991) (citing EDWARD DE GRAZIA & ROGER K. NEWMAN, BANNED FILMS: MOVIES, CENSORS AND THE FIRST AMENDMENT 92 (1982)). So controversial was the issue that after commissioning an essay from Harrah Arendt on school integration in the late 1950s, the editors of *Commentary* refused to let her discuss miscegenation laws. David A. Hollinger, *Amalgamation and Hypodescent: The Question of Ethnoracial Mixture in the History of the United States*, 108 AM. HISTORICAL REV. 1363, 1363 (2003).

<sup>56</sup> KENNEDY, *supra* note 2, at 85 (“According to Myrdal, ‘even a [white] liberal-minded Northerner of cosmopolitan culture and with a minimum of conventional blinds will, in nine cases out of ten, express a definite feeling against amalgamation.’” (quoting MYRDAL, *supra* note 54, at 57)); *id.* at 88 (“To most white Americans, interracial marriage was a bizarre heresy that generated both curiosity and abhorrence. In a 1958 Gallup poll—the first in which Gallup gauged public opinion regarding interracial marriage—only 4 percent of whites questioned approved of marriage between blacks and whites. In the South, 99 percent of whites disapproved.” (citing Renée Christine Romano, *Crossing the Race Line: Black-White Interracial Marriage in the United States, 1945-1990*, at 21 (1996) (Ph.D. diss., Stanford Univ.)); PASCOE, *supra* note 2, at 206–07 (citing opinion polls from the 1950s). Professor Jane Schacter has questioned the utility of the 1958 Gallup poll. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1181 (2009) (“A second limitation of the 1958 Gallup poll relates to what it measured. The poll asked respondents if they *approved* of interracial marriage, as opposed to whether they *avored a legal ban* on it.”).

<sup>57</sup> KENNEDY, *supra* note 2, at 26 (“In fact, substantial numbers of blacks have always been hostile to interracial marriage, viewing black participants in such matches as racial defectors.”); PASCOE, *supra* note 2, at 183. One scholar noted:

The NAACP increasingly had to worry about Black Americans, too. The group was well aware that many, perhaps most, Blacks opposed interracial marriage, and it had expected they would be reluctant to take a public stand against miscegenation laws. It was, however, entirely unprepared for the possibility that Blacks might actually support miscegenation laws. Yet this was the prospect that arose in the mid-1920s, when a growing number of African Americans responded to the surging political power of calls for white racial purity by advancing an offsetting program of black racial purity.

and his organization Universal Negro Improvement Association (“UNIA”) waged battle against the NAACP for the hearts and minds of African Americans. Garvey drew a stark contrast between the two groups on the issue of miscegenation laws. He condemned the NAACP as a “Miscegenationist organization”<sup>59</sup> in contrast to the UNIA, which according to Garvey stood “in opposition to [the NAACP] on the miscegenation question, because we believe in the racial purity of both the Negro and white races.”<sup>60</sup> Not only did Garvey approve of miscegenation laws,<sup>61</sup> in 1925 his wife informed reporters at her appearance at the Virginia Bureau of Vital Statistics that Virginia’s anti-miscegenation law had “the support of millions of negroes throughout the country.”<sup>62</sup>

Fearing failure, the establishment civil rights organizations refrained from participating in court challenges against miscegenation laws.<sup>63</sup> Although by the time of *Loving* the NAACP had outlived the UNIA to become the nation’s dominant civil rights organization for racial equality, the NAACP avoided court challenges against miscegenation laws for most of the twentieth century because the issue was too controversial. Despite their personal opposition to miscegenation laws, the leaders of the NAACP knew that legislators and judges largely supported the laws and that America’s black population was divided on the issue.<sup>64</sup> The NAACP lawyers were keenly aware that “the white South was insane on the

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PASCOE, *supra* note 2, at 183. For example, Frederick Douglass’ marriage to a white woman caused a backlash from many black Americans who had previously revered the man. See KENNEDY, *supra* note 2, at 73 (“A dispatch published in a black-owned newspaper aptly captures the tenor of the hurt: ‘Fred Douglass has married a red-head white girl . . . Goodbye, black blood in that family. We have no further use for him. His picture hangs in our parlor, we will hang it in the stables.’” (quoting WILLIAM S. McFEELY, *FREDERICK DOUGLASS* 320 (1991))).

<sup>58</sup> PASCOE, *supra* note 2, at 183 (describing Marcus Garvey’s attempts to convince African-Americans to support miscegenation laws).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (citing Marcus Garvey, *Essays on Racial Purity by Marcus Garvey*, in *THE MARCUS GARVEY AND UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION PAPERS* 216, 219 (Robert A. Hill ed., 1989)).

<sup>61</sup> PASCOE, *supra* note 2, at 184.

<sup>62</sup> *Id.* Many African Americans opposed both miscegenation and laws to prohibit it. For example, W. E. B. Du Bois, supported neither interracial marriage nor bans against it because the latter “provided a ‘magna charta of concubinage and bastardy’ to white men, giving them license to exploit black women sexually without feeling any obligation.” COTT, *supra* note 2, at 164; see also KENNEDY, *supra* note 2, at 110 (“While black opposition to intermarriage has always been a powerful and constant undercurrent, it was largely suppressed prior to the mid-1960s in order to accentuate protest against antimiscegenation laws, which most black enemies of mixed marriage also opposed.”). In the early 20th century, the NAACP walked a fine line of opposing miscegenation laws while explaining “that the NAACP’s opposition was in no sense tantamount to advocacy *in favor of* intermarriage. This is an important point.” KENNEDY, *supra* note 2, at 257.

<sup>63</sup> KENNEDY, *supra* note 2, at 214 (“Afterward, the liberal magazine *The Nation* would account for their absence by reporting that ‘most of the civil-rights organizations failed or refused to participate in the case on the assumption that miscegenation statutes could not be successfully challenged in the courts.’” (quoting *The Shape of Things*, *NATION*, Oct. 16, 1948, at 415)).

<sup>64</sup> PASCOE, *supra* note 2, at 192–93.

issue—Northern attitudes weren't very rational either."<sup>65</sup> Perceiving a low likelihood of success, the NAACP initiated no litigation to invalidate any state miscegenation laws during the 1930s and 1940s.<sup>66</sup> Neither would they participate in others' legal challenges; for example, neither the NAACP nor the ACLU would publicly support—let alone file an amicus brief in—the *Perez* litigation.<sup>67</sup>

Yet even after the *Perez* decision showed that some judges were willing to invalidate miscegenation laws as unconstitutional, the NAACP (and its Legal Defense Fund ("LDF")) did not join other legal challenges against interracial marriage bans.<sup>68</sup> For example, in the 1950s, the NAACP left the ACLU and the Japanese American Citizens League ("JACL") to attack Virginia's miscegenation law without assistance from the leading civil rights organization devoted to racial justice.<sup>69</sup> Focused on racial segregation in public schools, "the NAACP feared that any attempt to raise the volatile issue of interracial marriage might derail the campaign against segregation in the schools."<sup>70</sup> Even legal strategist Thurgood Marshall "worried that every attempt to raise the question of interracial marriage would endanger the LDF's entire campaign against segregation just as it was finally coming to fruition."<sup>71</sup> The NAACP had reason to be con-

<sup>65</sup> JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 71–72 (1994).

<sup>66</sup> PASCOE, *supra* note 2, at 192–93. The ACLU, which also opposed miscegenation laws, deferred to the NAACP's prerogative not to bring any litigation on the matter in the 1930s and 1940s. *Id.* (citing SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 60 (2d ed. 1999)).

<sup>67</sup> *Id.* at 214.

<sup>68</sup> NEWBECK, *supra* note 50, at 109 ("In September 1955, Executive Secretary Roy Wilkins went so far as to say that the organization took no stance on the issue of interracial marriage." (citing Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 147 n.121 (1998))).

<sup>69</sup> PASCOE, *supra* note 2, at 206 (discussing the Virginia Supreme Court's 1955 decision in *Naim v. Naim*).

<sup>70</sup> *Id.* at 223; Julie Novkov, *The Miscegenation/Same-Sex Marriage Analogy: What Can We Learn from Legal History?*, 33 LAW & SOC. INQUIRY 345, 354 (2008) ("While the NAACP had other agendas besides challenging state-sponsored segregation, tackling punitive state regulation of interracial intimacy appeared unwise to most NAACP elites. They feared both that they would fail and that the volatile nature of racist emotions around interracial sex would provoke mobilization, threatening other pieces of their overarching legal strategy.").

<sup>71</sup> PASCOE, *supra* note 2, at 204. Thurgood Marshall shrewdly avoided the controversy of miscegenation laws throughout his career. When Senator Thurmond—a supporter of miscegenation laws—asked Thurgood Marshall during his Supreme Court confirmation hearings whether the nominee knew of any evidence that "contradicted the historical evidence of the Commonwealth of Virginia that the 14th Amendment was not intended to affect antimiscegenation laws," Marshall responded that he was "not familiar with the case. I am only familiar with the opinion. I did not read the record in that case." SICKELS, *supra* note 20, at 5 (quoting *The Nomination of Thurgood Marshall to the Supreme Court, Hearing Before the S. Comm. on the Judiciary*, 90th Cong. 175 (1967) (statement of Thurgood Marshall)); see also NEWBECK, *supra* note 50, at 90 ("Although the NAACP later became seriously involved in overturning antimiscegenation laws in the 1960s, during the 1950s, its attitude can best be described as one of 'firm abstention.' . . . In 1944 Thurgood Marshall, then the lead attorney for the NAACP, actually urged the ACLU not to challenge antimiscegenation laws.").

cerned given that its victory in *Brown v. Board of Education* proved controversial in large part because segregationists viewed the decision as a step toward miscegenation.<sup>72</sup> For example, following the *Brown* opinion, the Jackson, Mississippi *Daily News* feared that “White and Negro children in the same schools will lead to miscegenation.”<sup>73</sup> Georgia Governor Herman Talmadge condemned the *Brown* decision as leading to “the mongrelization of the races.”<sup>74</sup> The hostile responses to racial equality meant that the NAACP had to prioritize its goals; consequently, issues of education, voting rights, and criminal justice reform trumped the more controversial issue of interracial marriage.<sup>75</sup>

The issue of miscegenation laws was sufficiently controversial that the Supreme Court repeatedly ducked the issue throughout the 1950s and most of the 1960s. In 1954 in *Jackson v. State*, the Alabama Supreme Court upheld the constitutionality of that state’s miscegenation law while affirming Linnie Jackson’s criminal conviction for violating the statute.<sup>76</sup> She was sentenced to the Alabama penitentiary.<sup>77</sup> When Jackson’s lawyer petitioned the U.S. Supreme Court for certiorari, most of the Justices opposed the petition, largely out of concern that addressing the issue of miscegenation laws could magnify southern resistance to the Court’s invalidation of public school segregation in its recently issued *Brown* opinion.<sup>78</sup>

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<sup>72</sup> See KENNEDY, *supra* note 2, at 24–25.

<sup>73</sup> BROWN V. BOARD OF EDUCATION: A BRIEF HISTORY WITH DOCUMENTS 204 (Waldo E. Martin Jr. ed., 1998) (quoting *Bloodstains on White Marble Steps*, DAILY NEWS, (Jackson, Miss.), May 18, 1954)); see PASCOE, *supra* note 2, at 225 (citation omitted); see also KENNEDY, *supra* note 2, at 24–25; PASCOE, *supra* note 2, at 225 (“[D]ie hard White racists, who were horrified by *Brown*, organized themselves to resist, issuing incendiary pronouncements that integration in the schools was only the first step on the road to a world of miscegenation run amok.”). Such slippery slope arguments against miscegenation were common. For example, courts also argued that society must have segregated railcars in order to prevent miscegenation. See NEWBECK, *supra* note 50, at 25. In 1841, Ohio legislators feared that allowing blacks to testify in court against whites “[w]ill tend to an equality of the races, and promote their intermarriage.” *Id.* at 41 (citation omitted).

<sup>74</sup> WALLENSTEIN, *supra* note 49, at 205 (citing JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY*, at xix (2001)).

<sup>75</sup> KENNEDY, *supra* note 2, at 25; see *id.* at 25 n.\* (quoting CLOYTE M. LARSSON, *MARRIAGE ACROSS THE COLOR LINE*, at vii (1965), for the explanation of black priorities in the 1960s: “‘Defend interracial marriage on principle! Principle costs too much. . . . First things *do* come first. Survival comes first. Food. Clothing. Jobs. Shelter. Recreation. Creature comforts. But interracial marriage? That is for the few. The very few.’”)

<sup>76</sup> 72 So. 2d 116, 116 (1954).

<sup>77</sup> WALLENSTEIN, *supra* note 49, at 179.

<sup>78</sup> PASCOE, *supra* note 2, at 226. As one scholar noted:

Everyone at the Court, even the law clerks, regarded the case as political dynamite, likely to add fuel to the fires of resistance. Three Justices voted to hear the case anyway, but the rest were content to dispose of the matter by simply refusing, as the Court can (and often does, in responding to petitions for certiorari like that offered in *Jackson*), to grant the petition for review.



The following year, the U.S. Supreme Court again faced the issue of miscegenation laws. In 1955 in *Naim v. Naim*, the Supreme Court of Virginia again upheld that state's miscegenation law.<sup>79</sup> Unlike *Jackson*, however, the losing side in *Naim* brought its case to the U.S. Supreme Court via appeal, not certiorari.<sup>80</sup> This made it harder for the Justices to avoid the case. The easiest way to dodge any ruling on the merits would have been to dismiss the case for lack of a substantial federal question.<sup>81</sup> Court records show that the law clerks concluded that this approach lacked credibility.<sup>82</sup> Worried that a ruling against miscegenation laws could “‘thwart[] or seriously handicap[] the enforcement of . . . [school] segregation cases,’” Justice Frankfurter initially advocated that the Court decline to entertain the *Naim* case by claiming “‘that the issue has not reached that compelling demand for consideration which precludes refusal to consider it.’”<sup>83</sup> While the justices struggled with how to deal with the *Naim* appeal, Justices Clark and Frankfurter drafted a per curiam opinion that vacated and remanded the case based on “[t]he inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case . . . .”<sup>84</sup> Holes in the record, the Justices asserted, “prevent[ed] the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered ‘in clean-cut and concrete form, unclouded’ by such problems.”<sup>85</sup> By a vote of 7 to 2, a majority of Justices voted to support the per curiam opinion to remand the

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*Id.*; see also Schacter, *supra* note 56, at 1156 (citing NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S, at 67–81 (La. Paperback ed. 1999)) (noting “massive resistance” to the *Brown* decision). Stanford constitutional law professor Gerald Gunther, who clerked for Chief Justice Warren at the time, later described the denial of certiorari in *Jackson* as “‘totally prudential, totally based on a high-level political judgment.’” ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 450 (1997) (quoting interview with Gerald Gunther).

Chief Justice Warren, along with Justice Hugo Black and Justice William O. Douglas, had voted to hear the case. Justice Douglas's law clerk, Harvey M. Grossman, advised his boss that taking the case “would probably increase the tensions growing out of the school segregation cases and perhaps impede solution to that problem,” but the serious deprivation of rights involved warranted the Court taking action. WALLENSTEIN, *supra* note 49, at 180.

<sup>79</sup> 87 S.E.2d at 756; see SICKELS, *supra* note 20, at 3 (describing *Jackson* as “an ideal test case for the opponents of antimiscegenation legislation because the question of constitutionality had been squarely presented in appeals within the state and rejected by the judges of Alabama”).

<sup>80</sup> See NEWBECK, *supra* note 50, at 109–11 (discussing lawyers' decision in *Naim* regarding whether to bring appeal or to petition for certiorari).

<sup>81</sup> This is how the U.S. Supreme Court avoided the issue of same-sex marriage bans in 1971. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

<sup>82</sup> PASCOE, *supra* note 2, at 230 (footnote omitted).

<sup>83</sup> *Id.*; see WALLENSTEIN, *supra* note 49, at 182 (discussing Justice Frankfurter's “tortured prose”).

<sup>84</sup> *Naim v. Naim*, 350 U.S. 891, 891 (1955) (per curiam).

<sup>85</sup> *Id.* (quoting *Rescue Army v. Mun. Court*, 331 U.S. 549, 584 (1947)).

case to develop the factual record instead of hearing oral argument and issuing a ruling on the constitutionality of miscegenation laws.<sup>86</sup>

Upon receiving the *Naim* case back on its docket, the Virginia Supreme Court refused to remand the case to the lower state court, asserting that—despite the U.S. Supreme Court's per curium opinion—the record was already adequate to decide the relevant issues.<sup>87</sup> As a result, Virginia's miscegenation law remained in place. Virginia's newspapers cheered their high court's defiance.<sup>88</sup> When the Virginia Supreme Court declined to follow the U.S. Supreme Court's instructions, the losing party again appealed to the U.S. Supreme Court. This time, instead of enforcing its own previous opinion, the Justices again declined to hear the case, issuing a new per curium opinion stating that the action of the Virginia Supreme Court "leaves the case devoid of a properly presented federal question."<sup>89</sup> Scholars have characterized this as an "absurd fictitious ground."<sup>90</sup> Chief Justice Warren himself condemned his fellow Justices' approach in *Naim* as "total bullshit."<sup>91</sup> However characterized, these maneuvers allowed the Justices to achieve their goal of avoiding any substantive ruling on the constitutionality of race-based marriage laws because they were so controversial.<sup>92</sup>

<sup>86</sup> PASCOE, *supra* note 2, at 230–31.

<sup>87</sup> *Naim v. Naim*, 90 S.E.2d 849, 850 (Va. 1956).

<sup>88</sup> KENNEDY, *supra* note 2, at 271 ("Newspapers in Virginia lauded the actions of the state supreme court."); MORAN, *supra* note 9, at 90 (quoting *Virginia's Top Tribunal Rejects Order of U.S. Supreme Court*, RICHMOND TIMES-DISPATCH, Jan. 19, 1956, at 12) ("Applauding this act of defiance, the *Richmond Times-Dispatch* commended the Virginia court for rebuffing the Justices in an 'area of State affairs over which [the U.S. Supreme Court] has no jurisdiction.'"); *see also* WALLENSTEIN, *supra* note 49, at 183 (quoting *Virginia's Top Tribunal Rejects Order of U.S. Supreme Court*, *supra*) ("Noting 'many' Virginians' 'displeasure' with the Supreme Court's recent rulings on public school segregation, the [*Richmond Times-Dispatch*] editorial observed that those 'many Virginians . . . also applaud the Virginia court in rebuffing the Federal court's attempt to operate in an area of State affairs over which it has no jurisdiction.'").

<sup>89</sup> *Naim*, 350 U.S. at 985. Peggy Pascoe notes that "Chief Justice Earl Warren . . . drafted—and then, at the last minute, withdrew—a stinging dissent chiding his colleagues for a decision he regarded as 'completely impermissible in view of this Court's obligatory jurisdiction.'" PASCOE, *supra* note 2, at 231; BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 161 (1994).

<sup>90</sup> LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 72 (2000).

<sup>91</sup> MORAN, *supra* note 9, at 90.

<sup>92</sup> The Court's refusal to actively engage in either *Jackson* or *Naim* illustrated the intensity of the controversy and "reflected the court's conservative strategy on highly emotional and sensitive issues." ROBINSON, *supra* note 36, at 136; *see* KENNEDY, *supra* note 2, at 270 (noting that in light of *Brown*, "the same justices worried that it might be imprudent to consider *Naim*, which might well result in the majority striking down racial segregation at the altar. One unidentified justice reportedly remarked, 'One bombshell at a time is enough.'" (quoting WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 193 (1964))); WALLENSTEIN, *supra* note 49, at 284 n.31 ("The refusal to take the *Jackson* and *Naim* cases reflected less an inclination to uphold the antimiscegenation regime than a strong sense that the time was inauspicious for throwing out the ancient laws[.];"); WALLENSTEIN, *supra* note 49, at 182 ("Justice Harold M. Burton's law clerk struck much the same tone: 'In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time.'").

The Court's decision to evade the issue mirrored the strategies of other public and private organizations. For example, the issue was sufficiently controversial that the Department of Justice refused to contribute an amicus brief in *Naim* in opposition to miscegenation laws, although it had submitted an anti-segregation amicus brief in *Brown*.<sup>93</sup> The Anti-Defamation League (ADL) also counseled against pursuing the case to the Supreme Court, reasoning that in light of outcry created by the *Brown* opinion, "this is not the time to push the Supreme Court for a decision on the validity of miscegenation statutes."<sup>94</sup> The ADL lawyers worried that the negative response to *Brown* in the South might lead the Justices to find miscegenation laws constitutional.<sup>95</sup>

The Court again ducked the issue of miscegenation laws a full decade after the *Brown* opinion had been issued. In 1964, in *McLaughlin v. Florida*,<sup>96</sup> the U.S. Supreme Court heard a constitutional challenge to a Florida statute that punished interracial cohabitation by imprisonment.<sup>97</sup> The Supreme Court held that because the Florida statute made criminality dependent on race,<sup>98</sup> the law violated the Equal Protection Clause of the Fourteenth Amendment. When the State of Florida claimed that its race-based anti-cohabitation law was a necessary part of the State's overall anti-miscegenation regime, the Supreme Court rejected this argument while declining to "reach[] the question of the validity of the State's prohibition against interracial marriage."<sup>99</sup> Although the *McLaughlin* decision could be seen as laying the groundwork for the eventual invalidation of state miscegenation laws, because *McLaughlin* avoided the issue, state courts continued to uphold the constitutionality of interracial marriage bans after *McLaughlin*.<sup>100</sup>

When the Supreme Court eventually proved willing to tackle the issue and ruled miscegenation laws unconstitutional in *Loving*, the Court's decision marked a turning point in the controversy over miscegenation laws.<sup>101</sup> Nonethe-

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<sup>93</sup> PASCOE, *supra* note 2, at 229.

<sup>94</sup> *Id.* (citation omitted).

<sup>95</sup> *Id.*

<sup>96</sup> 379 U.S. 184, 184 (1964).

<sup>97</sup> *Id.* at 184 (quoting FLA. STAT. ANN. § 798.05 (repealed 1969)).

<sup>98</sup> The Florida statute punished by imprisonment "[a]ny negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room . . . ." *Id.* (quoting FLA. STAT. ANN. § 798.05 (repealed 1969)).

<sup>99</sup> *Id.* at 195; see also MORAN, *supra* note 9, at 93 ("[R]enowned constitutional law scholar Alexander Bickel urged the Justices to confine themselves to the cohabitation issue and not to create a controversy over the validity of interracial marriage, 'an issue that is, after all, hardly of central importance in the civil rights struggle.'") (citation omitted).

<sup>100</sup> See *Hibbert v. Mudd*, 187 So. 2d 503, 508 (La. Ct. App. 1966); *Jones v. Lorenzen*, 441 P.2d 986, 990 (Okla. 1965).

<sup>101</sup> By the time that the *Loving* litigation reached the Supreme Court, more civil rights organizations were prepared to publicly challenge the constitutionality of miscegenation laws. For example, the NAACP contributed an amicus brief, as did the Japanese American Citizens League and a collection of religious leaders. See SICKELS, *supra* note 20, at 85 ("The American Civil Liberties Union,

less, some controversy continued after the Court announced its *Loving* decision. For example, although the southern response to *Loving* was largely tepid,<sup>102</sup> many southern states refused to repeal their miscegenation laws for decades. Despite the Court's decision in *Loving*, many jurisdictions continued to enforce their anti-miscegenation regimes and to refuse to marry interracial couples, who had to seek federal court orders to marriage licenses.<sup>103</sup>

Justice Alito's invocation of controversy as a reason to avoid striking down a marriage prohibition applies more strongly to miscegenation laws in the 1960s than to DOMA in 2013. Miscegenation laws were bolstered by overwhelming support when the Court was considering whether the Lovings had a constitutional right to marry. Interracial marriage was more controversial among the public in the 1960s than same-sex marriage was in 2013.<sup>104</sup> In fact, a majority of Americans did not support interracial marriage until three decades after the *Loving* opinion.<sup>105</sup> By comparison, a majority of Americans nationwide voiced support for same-sex marriage in February of 2014,<sup>106</sup> a mere eight months after the

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various Catholic organizations acting together, the Japanese American Citizens League, the National Association for the Advancement of Colored People, and the NAACP Legal Defense and Educational Fund came to the assistance of the Lovings.”)

<sup>102</sup> See BOTHAM, *supra* note 36, at 176; KENNEDY, *supra* note 2, at 278–79 (2003) (“Whereas officials openly and effectively stymied the enforcement of *Brown* in large areas of the country for decades, opposition to the implementation of *Loving* was relatively Lilliputian.”); SICKELS, *supra* note 20, at 111 (“[O]fficial reaction to the *Loving* decision was mixed, ranging from acceptance to hostility . . . .”); WALLENSTEIN, *supra* note 49, at 225 (“The major white newspapers in Virginia greeted the Supreme Court’s ruling with equanimity, black newspapers with congratulations.”).

<sup>103</sup> KENNEDY, *supra* note 2, at 278–79 (citing examples); ROBINSON, *supra* note 36, at 142 (same); SICKELS, *supra* note 20, at 112–15 (same).

<sup>104</sup> MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 321 (2004) (noting that in the 1950s, more than 90 percent of white Americans opposed interracial marriage). Some polls showed majority support of miscegenation laws though with less intensity. See PASCOE, *supra* 2, at 292. Opposition to same-sex marriage was both significantly less and dwindling at a faster rate.

While Justice Alito was correct that the issue of same-sex marriage was controversial in 2013, it was for the same reasons that interracial marriage was controversial in the 1960s—and still is in some corners of the country. Both forms of non-traditional marriage were condemned as violating a particular religious view of marriage that demanded only marriages between people of opposite genders and the same race could be ordained. In both instances, religious adherents demanded that their interpretation of marriage be enshrined in law, even though other religions would ordain such marriages and no secular rationale for these marriage prohibitions could be mustered.

<sup>105</sup> See Joseph Carroll, *Most Americans Approve of Interracial Marriage*, GALLUP NEWS SERVICE, Aug. 16, 2007, <http://www.gallup.com/poll/28417/most-americans-approve-interracial-marriages.aspx>, archived at <http://perma.cc/3JRD-AXLQ>. As recently as 1990, 65 % of respondents objected to having a close relative marry an African American. Trosino, *supra* note 18, at 93 (citing Lynne Duke, *25 Years After Landmark Decision, Still the Rarest of Wedding Bonds*, WASH. POST, June 12, 1992, at A3).

<sup>106</sup> *Majority of Americans Now Support Gay Marriage*, REUTERS, Feb. 26, 2014, <http://www.reuters.com/article/2014/02/26/us-usa-gay-survey-idUSBREA1P07020140226>, archived at <http://perma.cc/6T49-DBB4>. It bears noting that support for same-sex marriage is not the right question to be asking because DOMA was more limited. The *Windsor* decision did not mandate that states recognize same-sex marriage; rather, *Windsor* required that the federal government recognize valid

*Windsor* decision was announced. This is more than 700 months sooner than it took a majority of Americans to support interracial marriage following the *Loving* opinion. Furthermore, at the time of *Loving*, no state had repealed its miscegenation law through a popular vote.<sup>107</sup> In contrast, the voters of Maine, Maryland, and Washington State had all voted to legally recognize same-sex marriages before the Court announced its opinion in *Windsor*.

If Justice Alito were truly concerned about avoiding controversy, he would have been hard pressed to join the majority opinion in *Loving* if he had been on the Court at the time. Justice Alito's position is in line with the Court's approach in *Jackson*, *Naim*, and *McLaughlin* (all of which left miscegenation laws in place), rather than with the Court's landmark decision in *Loving*. Justice Alito's stated desire to avoid picking a side in a controversy exposes a similar problem. Justice Alito characterized Edith Windsor as asking the "Court to intervene in that debate" over marriage equality and seeking "a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference."<sup>108</sup> The same can be said of the Lovings, who were asking the Court to hold that the U.S. Constitution enshrined a constitutional "understanding of marriage under which the [race] of the partners makes no difference."<sup>109</sup> Laws denying rights to a wide swath of the American public often are controversial, but that does not absolve the courts of their responsibility to protect the rights of Americans targeted by discriminatory laws.

## II. CONSTITUTIONAL SILENCE

Justice Alito next argued in his *Windsor* dissent that same-sex marriage is not in the Constitution and therefore should not be protected by it: "Same-sex marriage presents a highly emotional and important question of public policy—

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state marriages, including those between same-sex couples. If the question is whether the federal government should recognize all marriages that were legally valid and recognized in the host state, one might expect even stronger support for same-sex couples who were married.

<sup>107</sup> See KENNEDY, *supra* note 2, at 258 (noting legislative repeals). Indeed, Alabama did not vote to repeal its miscegenation law until 2000.

<sup>108</sup> *Windsor*, 133 S. Ct. at 2711 (Alito, J., dissenting).

<sup>109</sup> See *id.* Some may argue that just as the Supreme Court consciously delayed invalidating miscegenation laws, it should similarly postpone invalidating same-sex marriage bans. The Court's 2014 denial of review of seven same-sex marriage petitions indicates that the Court may indeed postpone ruling on the subject. Amy Howe, *Today's Orders: Same-Sex Marriage Petitions Denied*, SCOTUSBLOG, Oct. 6, 2014, <http://www.scotusblog.com/2014/10/todays-orders-same-sex-marriage-petitions-denied/>, archived at <http://perma.cc/U6RN-QBMR>. Such an argument for postponement, however, is unpersuasive. First, it assumes that the Court was right to participate in denying marriage to interracial couples when it refused to decide the issue in *Jackson*, *Naim*, and *McLaughlin*. Chief Justice Warren himself found the Court's avoidance to be, in his words, "total bullshit." Moreover, the Court did not wait for the controversy to die down or for public opinion to support interracial marriage before striking down all miscegenation laws as unconstitutional. Even if the Court's approach to miscegenation laws counsel in favor of waiting for social attitudes regarding marriage restrictions to change, the majority of Americans have already evolved to supporting same-sex marriage.

but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.”<sup>110</sup> Justice Alito sought to then demonstrate his fealty to law by asserting that, “if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage.”<sup>111</sup> Of course, if the Constitution explicitly recognized a right to same-sex marriage, it would be exceedingly unlikely that same-sex couples would need to seek redress from the Supreme Court. Nevertheless, Justice Alito ultimately concluded that constitutional silence, in and of itself, warrants rejection of constitutional protection for same-sex couples: “The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned.”<sup>112</sup> In sum, Justice Alito concluded that because the Constitution is silent on the issue of same-sex marriage, the federal government’s refusal to recognize state-sanctioned, legally valid same-sex marriages does not create a constitutional issue.

This Part argues that in many ways, Justice Alito’s attempt to infer congressional intent through constitutional silence presents a stronger rejoinder to the *Loving* opinion than to the *Windsor* majority opinion, given strong historical evidence of politicians’ views of the issue during the 1860s. Although the Fourteenth Amendment does not mention marriage, miscegenation laws featured prominently in the congressional debates over that amendment and related civil rights legislation. In the congressional debates over the Civil Rights Act of 1866 and the Fourteenth Amendment,<sup>113</sup> members of Congress believed that miscegenation laws would remain intact.<sup>114</sup> Some segregationists worried that extending equal rights to former slaves was inconsistent with the anti-miscegenation regimes maintained by states.<sup>115</sup>

Some congressional Democrats tried to derail the progress toward racial equality by raising the specter of miscegenation as a bogeyman against Republican efforts to free slaves, enfranchise former slaves, and grant civil rights to black Americans.<sup>116</sup> The Democrats did not actually believe that the Republican

<sup>110</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2714 (2013) (Alito, J., dissenting).

<sup>111</sup> *Id.* at 2716.

<sup>112</sup> *Id.* at 2718.

<sup>113</sup> The Fourteenth Amendment was intended “in part to put the Civil Rights Act of 1866 beyond the reach of a potentially hostile subsequent Congress and ensure that the courts would not declare it unconstitutional.” WALLENSTEIN, *supra* note 49, at 59–60.

<sup>114</sup> See KENNEDY, *supra* note 2, at 250; *id.* at 277 (“[W]hen the Fourteenth Amendment was drawn up and ratified, the vast majority of its supporters did not envision it as a bar to antimiscegenation laws . . .”).

<sup>115</sup> See Novkov, *supra* note 70, at 349 (“Interracial intimacy gained political salience in response to the fears of many elite whites in all regions about the scope of freedom for former slaves.”).

<sup>116</sup> See Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1230 (1966).

efforts would invalidate state miscegenation laws; Democrats raised the prospect of interracial marriage “throughout the Reconstruction period as a political smokescreen.”<sup>117</sup> Off the floor of Congress, Democrats tried to paint Republicans as pro-miscegenation.<sup>118</sup> For example, during the presidential election of 1864, Democratic pamphleteers in New York sought to convince readers that Abraham Lincoln supported interracial marriage.<sup>119</sup>

Though some disagreement exists among scholars,<sup>120</sup> evidence suggests that even Republicans who supported the Fourteenth Amendment neither favored nor viewed the Amendment as invalidating state miscegenation statutes. Many Republicans seeking equal rights for freed slaves did not intend these rights to extend to interracial marriage.<sup>121</sup> For example, Republican senators, like Illinois Senator Lyman Trumbull, paradoxically supported both civil rights for black Americans and miscegenation laws, which he argued treated blacks and whites equally by forbidding both from marrying across racial lines.<sup>122</sup> Similarly,

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<sup>117</sup> *Id.* at 1253. KENNEDY, *supra* note 2, at 22 (“During the reaction against Reconstruction, white supremacists exploited fears of interracial intimacy as perhaps *the* major justification for subverting the civil and political rights that had been granted to blacks, and *the* major reason for confining blacks to their degraded ‘place’ at the bottom of the social hierarchy.”).

<sup>118</sup> MORAN, *supra* note 9, at 26 (“[S]outhern Democrats coined the term *miscegenation* to ridicule the quest for racial equality during Reconstruction . . . .”); ROBINSON, *supra* note 36, at xiv (“For instance, in 1883, when the liberal Virginia governor William Cameron placed black men on the Richmond school board, Democratic newspapers lambasted the decision by raising the fear of miscegenation.”).

<sup>119</sup> PASCOE, *supra* note 2, at 28 (noting that “the pamphlet built up to an argument that when Lincoln ‘proclaimed Emancipation he proclaimed also the mingling of the races. The one follows the other as surely as noonday follows sunrise’”) (quoting ELISE LEMIRE, “MISCEGENATION”: MAKING RACE IN AMERICA 116 (2002)).

<sup>120</sup> Compare Steven A. Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 305 (1995) (“Moreover, when directly confronted with the miscegenation question, several Republicans called for the repeal of anti-miscegenation statutes on the basis of their understanding of equality, and no supporter of the bill sought to avoid the issue by defending the constitutionality of anti-miscegenation laws or by invoking the principle of symmetrical equality.”), with Novkov, *supra* note 70, at 349 (“While some scholars have suggested that the congressional Radical Republicans endorsed sweeping egalitarian reform, including the elimination of bans on interracial intimacy and the desegregation of schools, those approving the Fourteenth Amendment on the state level likely did not favor these implications as consequences of its passage.”).

<sup>121</sup> COTT, *supra* note 2, at 100 (“Only a rare civil rights supporter aimed to undo the many laws, northern and southern, on this subject. Although the Republicans wanted to guarantee freedmen equal rights before the law in most respects, they did not have in mind guaranteeing them the right to marry white women.”).

<sup>122</sup> Avins, *supra* note 116, at 1232. Senator Trumbull maintained:

‘[Y]our law forbidding marriages between whites and blacks operates alike on both races. This bill does not interfere with it. If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both.’

*Id.* (quoting Senator Trumbull). Senator Trumbull argued that it was “‘a misrepresentation of this bill [Freedmen’s Bureau Bill] to say that it interferes with those laws.’” *Id.* at 1233; *see id.* at 1253

two and a half weeks after he voted for the Fourteenth Amendment, West Virginia Senator Waitman T. Willey, a Republican, spoke in favor of voting rights for black Americans in the District of Columbia, noting such a change “creates no barrier to the interposition of legislative prohibitions against such intermarriage.”<sup>123</sup> When Democrats opposed the Civil Rights Act of 1875 as undermining miscegenation laws, South Carolina Congressman Joseph H. Rainey, a black Republican, responded that “we do not ask . . . that the two races should intermarry one with the other. God knows we are perfectly content.”<sup>124</sup> Republican congressmen did not believe that miscegenation laws were unconstitutional under the Fourteenth Amendment or federal civil rights legislation<sup>125</sup> because Republican congressmen, by and large, did not consider interracial marriage to be a civil right.<sup>126</sup> Ultimately, historians of marriage, such as Hendrick Hartog, have concluded that the post-Civil War Congress did not intend the Fourteenth Amendment to be a federal foray into the state issue of marriage requirements.<sup>127</sup>

When the *Lovings* challenged Virginia's miscegenation law in federal court, the State argued that neither the state legislatures nor the Congress of the Reconstruction Era intended to nullify miscegenation laws with either the Fourteenth Amendment or ancillary civil rights legislation.<sup>128</sup> First, the State of Vir-

(“Trumbull, in particular, vigorously denied that his proposals, which were later embodied in the fourteenth amendment, would overturn state anti-miscegenation laws, and angrily criticized President Andrew Johnson for even alluding to them in his veto message.”); see also KENNEDY, *supra* note 2, at 251 (“Most [congressmen] subscribed to Lyman Trumbull's interpretation, believing that the Civil Rights Act of 1866 would *not* grant colored people a federal right to marry across racial lines.”).

<sup>123</sup> Avins, *supra* note 116, at 1237.

<sup>124</sup> *Id.* at 1246.

<sup>125</sup> See Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1209 (1992).

<sup>126</sup> See MORAN, *supra* note 9, at 77 (“As the federal government undertook to rehabilitate former black slaves during Reconstruction, the scope of the equality principle was limited to preserve anti-miscegenation statutes. Officials were quick to distinguish between ‘political’ equality, which related to formal access to the governmental process, and ‘social’ equality, which related to informal relations among neighbors, friends, and family.”); Avins, *supra* note 116, at 1234; see also KENNEDY, *supra* note 2, at 252 (“During debates held prior to congressional passage of the Fourteenth Amendment, its proponents repeatedly denied that it would affect the legality of properly drafted antimiscegenation laws.”). In contrast, the *Loving* Court described marriage as “one of the basic civil rights of man.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

<sup>127</sup> HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 16–17 (2000) (“That implicit denial of constitutional responsibility was reaffirmed, explicitly and consciously, during the debates over the Fourteenth Amendment after the Civil War.”). Historian Steven A. Bank disagrees and refutes the evidence of earlier scholars, like Avins. See Bank, *supra* note 120, at 324; see also KENNEDY, *supra* note 2, at 252 (“The historical record strongly indicates that the politicians who framed the Fourteenth Amendment did *not* intend for it to render illegal statutes prohibiting interracial marriage.”).

<sup>128</sup> Brief for Appellee at 1, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 93641, at \*5 (arguing that “an analysis of the legislative history of the Fourteenth Amendment conclusively establishes the clear understanding—both of the legislators who framed and adopted the Amendment and the legislatures which ratified it—that the Fourteenth Amendment had no application whatever to



ginia argued that the “States which ratified the Fourteenth Amendment clearly signified their intent by continuation of their anti-miscegenation laws contemporaneously with the ratification of the Fourteenth Amendment.”<sup>129</sup> Second, Virginia’s lawyers pointed to the speeches of “Senator Lyman Trumbull of Illinois, who had introduced the Bill and was its manager [and] made it clear that there was no intention to nullify the anti-miscegenation statutes or constitutional requirements of the various states or to restrict such future legislation as to miscegenation.”<sup>130</sup> The State’s attorneys emphasized that in defending civil rights legislation, Senator Trumbull argued:

[Y]our law forbidding marriages between whites and blacks operates alike on both races. *This bill does not interfere with it.* If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both.<sup>131</sup>

Senator Trumbull foreshadowed the equal-application theory that the U.S. Supreme Court adopted in 1883 in *Pace v. Alabama*, in which the Court upheld miscegenation laws because they applied equally to black and white people.<sup>132</sup> In 1963, the U.S. Supreme Court’s opinion in *McLaughlin v. Florida* repudiated the reasoning of *Pace*.<sup>133</sup> Despite this, the State of Virginia attempted to resurrect it by quoting a congressman from the Reconstruction era.<sup>134</sup>

the anti-miscegenation statutes of the various States and did not interfere in any way with the power of the States to adopt such statutes”).

<sup>129</sup> *Id.* at \*28 (“In this connection, a comparison of the States which retained their anti-miscegenation laws as late as 1951 with the list of States which ratified the Fourteenth Amendment reveals that a majority of such States maintained their anti-miscegenation laws in force after ratification of the Fourteenth Amendment.” (citing U.S. CONST. amend. XIV; PAULI MURRAY, STATES’ LAWS ON RACE AND COLOR 18 (1951))).

<sup>130</sup> *Id.* at \*16.

<sup>131</sup> *Id.* at \*16–\*17; see also ROBINSON, *supra* note 36, at 26 (“Senator Pitt Fessenden also suggested the consistency of anti-miscegenation laws with civil rights measures by asserting that the anti-marriage laws applied to both races and provided ‘equal’ punishment for both races.”) (citation omitted).

<sup>132</sup> Brief for Appellee, *supra* note 128, at \*16–\*17 (“If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both.”); see *infra* notes 231–233 and accompanying text (discussing *Pace*).

<sup>133</sup> 153 So. 2d 1, 2 (Fla. 1963).

<sup>134</sup> Brief for Appellee, *supra* note 128, at \*18. Virginia’s brief quoted Rep. Samuel W. Moulton of Illinois, who stated:

I deny that it is a civil right for a white man to marry a black woman or for a black man to marry a white woman . . . . The law, as I understand it, in all the States, applies equally to the white man and the black man, and there being no distinction, it will not operate injuriously against either the white or the black . . . .

*Id.*; see Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1178–79 (2006).

Although the *Loving* Court unanimously rejected the State's arguments on the intent of the framers of the Fourteenth Amendment, Justice Alito accepted a variant of them in his *Windsor* dissent. Justice Alito was correct that the Constitution is silent on the issue of same-sex marriage. Neither the drafters of Fifth nor of the Fourteenth Amendment expressed any intent to protect same-sex couples from discrimination.<sup>135</sup> This is not surprising; same-sex marriage was never discussed during the passage of either the Fifth Amendment or the Fourteenth Amendment because there was no concept of homosexuality or of same-sex couples.<sup>136</sup> In contrast, legislators were well aware of the possibility of interracial couples wanting to marry and they explicitly supported prohibitions on interracial marriage. Many legislators who voted for the Fourteenth Amendment did so on the explicit understanding that the amendment would not invalidate state anti-miscegenation laws.<sup>137</sup> In contrast, no congressman conditioned his vote for the Fifth Amendment on assurances that the federal government would not have to recognize same-sex marriages.<sup>138</sup>

Furthermore, Justice Alito's description of the Constitution is a bit superficial because the Constitution is not completely silent: the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>139</sup> Although Justice Alito is correct that the Fourteenth Amendment does not explicitly pronounce *who* is entitled to *what* rights, his approach would gut the Amendment because the text does not proscribe any specific type of discrimination.<sup>140</sup> The significance that Justice Alito attaches to purported silence is too sweeping. The Constitution is silent—under Justice

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<sup>135</sup> Because *Loving* dealt with a state law (Virginia's anti-miscegenation statute) and *Windsor* dealt with a federal law (Section 3 of the Defense of Marriage Act), different constitutional sources of equal protection principles were used. The Fourteenth Amendment Equal Protection Clause applies to challenges of state laws, whereas the Fifth Amendment Due Process Clause governs Equal Protection claims challenging federal laws. The substance of the Equal Protection analysis is the same under either provision. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217–18 (1995).

<sup>136</sup> Marriage laws were historically written in gender specific language because the concept of homosexuality did not yet exist. While the act of sodomy did exist and was criminalized, same-sex couples were not visible and were given no thought when drafting marriage statutes.

<sup>137</sup> See ROBINSON, *supra* note 36, at 26 ("Republican congressmen answered almost unanimously that civil rights legislation would have no harmful effect upon the right of states to legislate against interracial marriage.").

<sup>138</sup> When developing our democratic structures of government, the early congresses did not debate or consider such domestic issues as marriage. HARTOG, *supra* note 127, at 16 ("For the better part of two centuries, the agencies of the federal government claimed little constitutional responsibility or interest over the law of marriage. During the framing of the Constitution in 1787, the topic never arose.").

<sup>139</sup> U.S. CONST. amend. XIV, § 1.

<sup>140</sup> Indeed the early Court held that equal protection applied only to African-Americans. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81–83 (1873). This led the Court to reject an equal protection challenge to laws that prevented women from voting. *Minor v. Happersett*, 88 U.S. 162, 178 (1875). Today we would see such a truncation of equal protection to be anathema to the Fourteenth Amendment. Yet this is the approach that Justice Alito adopts in his *Windsor* dissent.

Alito's treatment—to myriad principles that are now well-established including judicial review, whether the Bill of Rights applies to the states, personal jurisdiction, and the right to procreate, among others.<sup>141</sup> Justice Alito's treatment of silence would undo over two centuries of our constitutional understanding of government structure and individual rights.<sup>142</sup>

In short, if Constitutional silence is sufficient reason to deny recognition of marriage rights under the U.S. Constitution, then Justice Alito, had he been on the Court in 1967, would have had to conclude that the Lovings' constitutional claim had no merit. The amount of constitutional text devoted to interracial marriage matches that devoted to same-sex marriage.<sup>143</sup> Ultimately, constitutional silence is not a legitimate justification for holding that marriage discrimination is permissible under the Fourteenth Amendment, whether that discrimination is based on race or sex.<sup>144</sup>

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<sup>141</sup> See Erwin Chemerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review*, 66 B.U. L. REV. 47, 56–57 (1986) (discussing potential outcomes of originalist approaches to Constitutional provisions).

<sup>142</sup> Professor Doug NeJaime explains that—although arguing the Constitution is silent on the definition of marriage—Justice Alito tried to make the Constitution tow his ideological line that marriage must be opposite gender:

[Justice Alito] acknowledges that the parties are engaged in “a debate between two competing views of marriage.” What he terms the “traditional” or “conjugal” view “sees marriage as an intrinsically opposite-sex institution.” Under this view, “the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing.” That structure is defined by biological, dual-gender parenting. Justice Alito contrasts this with a “newer view” he labels the “‘consent-based’ vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons.” “Proponents of same-sex marriage,” he explains, “argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution is rank discrimination.” Justice Alito contends that in pursuing her claims, Edie Windsor sought “a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference.” He rejects this bid by explaining that, as between the “traditional” and “consent-based” views of marriage, “[t]he Constitution does not codify either.” Yet in conceptualizing the scope of the constitutional right to marry earlier in his opinion—easily dismissing any claim by same-sex couples to a fundamental right—Justice Alito writes into the Constitution the “traditional” view of marriage. Rather than understand the constitutional right to marry in relation to the evolving contours of marriage, he cements the meaning of marriage for constitutional purposes. Ultimately, even as Justice Alito asserts that he “would not presume to enshrine either vision of marriage in our constitutional jurisprudence,” he does just that—and in a way inconsistent with *Turner*, the Court's most recent precedent on the fundamental right to marry.

Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219, 233–34 (2013), [http://www.yalelawjournal.org/pdf/1205\\_3mchpr78.pdf](http://www.yalelawjournal.org/pdf/1205_3mchpr78.pdf), archived at <http://perma.cc/L77J-9APS>.

<sup>143</sup> Although the Constitution does address race, it never mentions marriage.

<sup>144</sup> See Leslie, *supra* note 13, at 1131 (arguing that same-sex marriage bans constitute sex discrimination).

### III. LEAVE IT TO OTHER ACTORS: STATES, ELECTED OFFICIALS

Justice Alito, in his *Windsor* dissent, next asserted that federal courts are not the appropriate decision-maker on the issue of marriage equality. Framing his decision to uphold DOMA as an act of humility,<sup>145</sup> Justice Alito argued that “the people” should decide the issue, not the Supreme Court.<sup>146</sup> By “the people,” he meant elected officials.<sup>147</sup> Justice Alito argued that the U.S. Constitution “does not dictate” whether same-sex couples have a right to marry, but instead “leaves the choice to the people, acting through their elected representatives at both the federal and state levels.”<sup>148</sup> Further, Justice Alito put down a marker that the Supreme Court should not hold in any future case that state same-sex marriage bans violate the Equal Protection Clause. He expressed his belief “that the question of same-sex marriage should be resolved primarily at the state level” and memorialized his “hope that the Court will ultimately permit the people of each State to decide this question for themselves.”<sup>149</sup> This Part shows that opponents of interracial marriage used the same states’ rights arguments to defend their views. It then argues that, given that DOMA was a federal statute that eliminated deference to states on the issue of same-sex marriage, Alito’s mention of states’ rights was better suited for *Loving v. Virginia* than for *United States v. Windsor*.

The deference-to-states argument may seem appealing in that marriage has long been the prerogative of state law. States have differed in their approaches to many aspects of marriage, including the legal requirements for marriage, grounds for divorce, and the legal consequences of marriage.<sup>150</sup> Throughout America’s first two centuries, the federal government largely stayed out of the business of defining marriage.<sup>151</sup> However, Justice Alito tried to have his cake

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<sup>145</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2715 (Alito, J., dissenting) (stating that Edith Windsor and the U.S. Department of Justice “seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility”).

<sup>146</sup> *Id.* at 2718–19 (“Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.”).

<sup>147</sup> *Id.* at 2716 (“Any change on a question so fundamental should be made by the people through their elected officials.”).

<sup>148</sup> *Id.* at 2711.

<sup>149</sup> *Id.* at 2720.

<sup>150</sup> HARTOG, *supra* note 127, at 12; see Leslie, *supra* note 13, at 1119 (discussing coverture).

<sup>151</sup> The primary exception to this federal silence on marriage matters involved the congressional move to ban polygamy as a condition to Utah’s admission to the Union. HARTOG, *supra* note 127, at 322 n.27 (“Only in the case of Mormon polygamy did Congress interfere with the instituted marital rules of the territorial legislatures.”). Congress criminalized bigamy in 1862 with the Morrill Anti-Bigamy Act, which made bigamy a federal crime with a maximum prison sentence of five years. BOTHAM, *supra* note 36, at 82–83. With the Poland Act of 1874, Congress responded to the perceived problem of polygamy in the Utah Territory by “eliminat[ing] offices held by territorial officials and transferr[ing] their duties to federally appointed officials. In essence, the act permitted federal courts

and eat it, too. He claimed that states are the appropriate locus of decision-making as to marriage but then championed a federal law that requires federal agencies to refuse to respect those same state decisions whenever states protect same-sex couples.

More importantly, the states' rights arguments that Justice Alito advocated were recycled from decades of segregationist rhetoric. States' rights formed the core of the defense of miscegenation laws for a century until the U.S. Supreme Court's decision in *Loving*.<sup>152</sup> State courts consistently upheld their state miscegenation laws, relying on federalism and states' rights arguments.<sup>153</sup> Such arguments are generally associated with the former confederate states. For example, the Missouri Supreme Court held that that state's miscegenation law did not violate the Fourteenth Amendment because "[t]he power of each state to regulate and control marriages within its jurisdiction[] is as unquestionable as state sovereignty."<sup>154</sup> In reversing a lower court decision, the Missouri Supreme Court mocked the lower court for ascribing "magical power" to the Fourteenth Amendment.<sup>155</sup> Most post-Reconstruction southern courts in miscegenation cases thought the supremacy of state sovereignty to be beyond question.<sup>156</sup>

One of the most powerful invocations of the states' rights argument, however, came from the north. In 1871, the Indiana Supreme Court upheld that state's miscegenation law in *State v. Gibson*.<sup>157</sup> The court's discussion of marriage noted:

The right, in the states, to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution is of

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to try federal crimes, including bigamy, and allowed these courts to appoint juries of which at least half the members could be non-Mormon." *Id.* at 83. As one scholar noted:

The power of Congress—qua the federal government—to regulate territorial law was so clear to the Court as to be inarguable, a given. Thus, with regard to restrictions on polygamous marriages, the Court's decision declared territorial laws against polygamy to be constitutional—a legitimate function of the federal government. *Reynolds* thus strongly affirmed the authority of the federal government to enact marriage law.

*Id.* at 83–84.

<sup>152</sup> *Id.* at 131 ("In nearly every case—from *Scott v. State of Georgia* in 1869 to *Loving v. Virginia* in 1967—and in nearly every region of the country, the states' right argument formed the most commonly cited legal basis for antimiscegenation statutes.")

<sup>153</sup> See, e.g., *State v. Gibson*, 36 Ind. 389, 403–04 (1871) (stating that the states "undoubtedly have the power to pass such laws" under the police power); *State v. Jackson*, 80 Mo. 175, 178 (1883) (stating that states held the power to regulate marriage laws); *Lonas v. State*, 50 Tenn. 287, 296 (1871) (stating that the U.S. Constitution did not restrict state laws regarding marriage).

<sup>154</sup> *Jackson*, 80 Mo. at 178.

<sup>155</sup> *Id.* at 176.

<sup>156</sup> See *Lonas*, 50 Tenn. at 296 ("That this [marital] relation is subject to the law of the State, without any restriction from the Constitution of the United States, is too clear for argument."); see also *Gibson*, 36 Ind. at 403–04; *Jackson*, 80 Mo. at 178.

<sup>157</sup> 36 Ind. at 405.

inestimable importance, and cannot be surrendered, nor can the states suffer or permit any interference therewith. If the federal government can determine who may marry in a state, there is no limit to its power.<sup>158</sup>

Historian Peggy Pascoe has explained that “[w]ith an authority that only a northern state free of the taint of secession could muster, the *Gibson* decision established the principle that marriage was a state rather than a federal matter, and so could be held apart from federal guarantees and civil rights protections.”<sup>159</sup> With its northern provenance, the *Gibson* opinion “offered judges across the nation a template for using state police power to sidestep federal guarantees of civil rights.”<sup>160</sup> Ultimately, by the end of the Reconstruction era, the states’ rights mantra insulated miscegenation laws from federal invalidation.<sup>161</sup>

Similarly, foreshadowing Justice Alito’s assertion in his *Windsor* dissent, supporters of miscegenation laws strenuously argued that legislatures and public opinion should decide the legality of interracial marriage, not courts.<sup>162</sup> Federal courts upheld miscegenation laws, asserting that the issue of interracial marriage bans “is more properly . . . within the range of legislative duty.”<sup>163</sup> Upon remand from the U.S. Supreme Court in *Naim*,<sup>164</sup> the Virginia Supreme Court in the 1950s asserted that arguments against its miscegenation law “are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate.”<sup>165</sup> In the California Supreme Court’s 1948 decision in *Perez v. Sharp*, defenders of California’s miscegenation law asserted that opponents of miscegenation laws should limit their efforts to legislators, not

<sup>158</sup> *Id.* at 403.

<sup>159</sup> PASCOE, *supra* note 2, at 56.

<sup>160</sup> *Id.* at 50.

<sup>161</sup> BOTHAM, *supra* note 36, at 27 (“By the end of Reconstruction, in all cases involving interracial marriage, courts consistently ruled that . . . laws pertaining to marriage were and had always been subject to the control of the state and it was therefore the state’s right to enact legislation prohibiting intermarriage . . . .”); *see id.* at 144 (“[W]henver cases challenged the constitutionality of antimiscegenation statutes, court decisions continued to assert the states’ right to regulate marriage as the basis for the states’ legitimacy.”).

<sup>162</sup> Novkov, *supra* note 70, at 377 (“Those opposing the judicial extension of marriage rights have also addressed the appropriate institutional location for social change, rooting it in the democratic process and public opinion, and specifically denying the authority of the courts to promote it. These structural arguments do not echo (but do resemble) nineteenth-century courts’ arguments about the need for state rather than federal control over marriage policy.”); *see* Scott v. State, 39 Ga. 321, 324 (1869) (“The power of the Legislature over the subject matter when the Code was adopted, will not, I suppose, be questioned. The Legislature certainly had as much right to regulate the marriage relation by prohibiting it between persons of different races as they had to prohibit it between persons within the Levitical degrees, or between idiots.”).

<sup>163</sup> State v. Tutty, 41 F. 753, 762 (C.C.S.D. Ga. 1890).

<sup>164</sup> *See supra* notes 87–92 and accompanying text.

<sup>165</sup> *Loving v. Commonwealth*, 147 S.E.2d 78, 82 (Va. 1966).

judges.<sup>166</sup> In his *Perez* dissent, Justice John W. Shenk asserted that those “favoring present day amalgamation of these distinct races irrespective of scientific data . . . should direct their efforts to the Legislature in order to effect the change in state policy which they espouse.”<sup>167</sup> Linking two of Justice Alito’s rationales for upholding DOMA, Justice Shenk asserted that the presence of controversy mandates greater judicial deference to the legislature with respect to miscegenation laws.<sup>168</sup>

While these states’ rights defenses of miscegenation laws took root in the nineteenth-century South, they retained their potency across the nation well into the twentieth century. In 1922, the Arizona Supreme Court upheld its miscegenation law with the assertion that marriage “is peculiarly a matter of state regulation.”<sup>169</sup> The following year, the Oklahoma Supreme Court similarly upheld its miscegenation law against a federal constitutional challenge, reasoning “the laws regulating marriages come clearly within the police power of the state, and, in the exercise of the state’s sovereign right, it has the sole and only power within the state to regulate who shall, or who shall not, marry.”<sup>170</sup> Two decades later, in 1942, the Montana Supreme Court—in a case involving the estate of a deceased Japanese man and his surviving white wife—upheld the public administrator’s

<sup>166</sup> *Perez v. Sharp*, 198 P.2d 17, 43 (Cal. 1948) (Shenk, J., dissenting). Justice Shenk stated:

Courts are neither peculiarly qualified nor organized to determine the underlying questions of fact with reference to which the validity of the legislation must be determined. Differing ideas of public policy do not properly concern them. The courts have no power to determine the merits of conflicting theories, to conduct an investigation of facts bearing upon questions of public policy or expediency, or to sustain or frustrate the legislation according to whether they happen to approve or disapprove the legislative determination of such questions of fact.

*Id.*; *see id.* at 45 (“[L]egislators are not required to wait upon the completion of scientific research to determine whether the underlying facts carry sufficient weight to more fully sustain the regulation.”).

<sup>167</sup> *Id.* at 46. Justice Shenk further stated:

Those favoring present day amalgamation of these distinct races irrespective of scientific data of a cautionary nature based upon the experience of others, or who feel that a supposed infrequency of interracial unions will minimize undesirable consequences to the point that would justify lifting the prohibition upon such unions, should direct their efforts to the Legislature in order to effect the change in state policy which they espouse . . . .

*Id.*

<sup>168</sup> *Id.* at 42 (“The Legislature is, in the first instance, the judge of what is necessary for the public welfare. Earnest conflict of opinion makes it especially a question for the Legislature and not for the courts.”); *see id.* at 43 (“The fact that the finding of the Legislature is in favor of the truth of one side of a matter as to which there is still room for difference of opinion is not material. What the people’s legislative representatives believe to be for the public good must be accepted as tending to promote the public welfare. It has been said that any other basis would conflict with the spirit of the Constitution and would sanction measures opposed to a republican form of government.”).

<sup>169</sup> *Kirby v. Kirby*, 206 P. 405, 406 (Ariz. 1922).

<sup>170</sup> *Blake v. Sessions*, 220 P. 876, 879 (Okla. 1923).

refusal to recognize their Washington-performed marriage because of Montana's miscegenation law.<sup>171</sup> The court reasoned: "The control and regulation of marriage is a matter of domestic concern within each state. In the adoption of policies in respect thereto . . . the state is sovereign and not subject to the control of the Federal Government nor of the laws of any other state."<sup>172</sup>

Federal courts, too, embraced the states' rights rhetoric in upholding the constitutionality of state anti-miscegenation regimes.<sup>173</sup> For example, a Texas federal court upheld Emile Francois's criminal conviction—and his sentence of five years in a penitentiary—for violating Texas's miscegenation law by marrying a black woman.<sup>174</sup> The federal court found no violation of the Fourteenth Amendment, reasoning, in part, that "[t]he subject of marriage is one exclusively under the control of each state."<sup>175</sup> Similarly, in *State v. Tutty*,<sup>176</sup> a federal district court in Georgia rejected a Fourteenth Amendment challenge to that state's refusal to recognize interracial marriages performed in other states. The court cited an opinion of the Kentucky Supreme Court for the proposition that "marriage was more than a contract; that it was the most elementary and useful sovereign power of the state."<sup>177</sup> The federal court in *Tutty* ultimately concluded that it possessed neither the right nor the power to interfere with Georgia's policies regarding miscegenation.<sup>178</sup>

By deferring to state court opinions upholding miscegenation laws, federal courts essentially "allowed state courts to remove the contract of marriage from the reach of civil rights laws."<sup>179</sup> As late as 1944, the Tenth Circuit upheld Oklahoma's miscegenation statute against a Fourteenth Amendment challenge by invoking the states' rights refrain to conclude that "a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."<sup>180</sup> Ultimately, for several generations, both state and federal courts effectively re-

<sup>171</sup> *In re Takahashi's Estate*, 129 P.2d 217, 222 (Mont. 1942).

<sup>172</sup> *Id.* at 220.

<sup>173</sup> See PASCOE, *supra* note 2, at 64 ("In all but one of them, federal judges solved the conflict between state miscegenation laws and federal civil rights laws by adopting states' rights arguments."); see, e.g., *In re Hobbs*, 12 F. Cas. 262, 264 (C.C.N.D. Ga. 1871).

<sup>174</sup> *Ex parte Francois*, 9 F. Cas. 699, 701 (C.C.W.D. Tex. 1879).

<sup>175</sup> *Id.* at 700.

<sup>176</sup> 41 F. at 763.

<sup>177</sup> *Tutty*, 41 F. at 759 (discussing *Maguire v. Maguire*, 37 Ky. (7 Dana) 181 (1838)); see also *id.* at 761 (explaining that marriages performed in other states must be held void "if the statutory provision is expressive of a decided state policy as a matter of morals").

<sup>178</sup> *Id.* at 762–63 ("The policy of the state upon this subject has been declared, as we have seen, by its supreme court as well as by its statutes, and it is enough to say that this court is unable to discover anything in that policy with which the federal courts have the right or the power to interfere."); see *id.* at 762 (holding that "the fourteenth amendment to the constitution does not limit the power of the state to protect its citizens" (citing *Railway Co. v. Beckwith*, 129 U.S. 26, 33 (1889)).

<sup>179</sup> PASCOE, *supra* note 2, at 64–65.

<sup>180</sup> *Stevens v. United States*, 146 F.2d 120, 123 (10th Cir. 1944).



moved federal authority to constrain states from adopting and enforcing race-based marriage laws.<sup>181</sup>

The states' rights argument provided the core defense of miscegenation laws in both the *Perez* and *Loving* cases. The *Perez* dissent cited a string of cases for the proposition that "the right of the state to exercise extensive control over the marriage contract has always been recognized."<sup>182</sup> In the *Loving* litigation, the State of Virginia again turned to the states' rights argument. This was not surprising. Previously, in the mid-1950s *Naim* case,<sup>183</sup> the Virginia Supreme Court refused to interpret the Fourteenth Amendment in a manner that would "prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens."<sup>184</sup> In its brief, the State of Virginia in *Loving* invoked the nearly unbroken line of state and federal court opinions upholding miscegenation laws based largely on states' rights rhetoric. The State argued that it was "the exclusive province of the legislature of each State to make the determination for its citizens as to the desirability, character and scope of a policy of permitting or preventing such alliances—a province which the judiciary may not, under well-settled constitutional doctrine, invade."<sup>185</sup> The *Perez* and *Loving* opinions both rejected the states' rights "deference-to-legislatures" arguments.

Justice Alito's reference to deference to state legislators is more appropriate to the *Loving* litigation than to *Windsor*. *Loving* represented a sea change as "a federal court—for the first time in U.S. history—deemed the individual's right to marry superior to the states' right to regulate marriage law."<sup>186</sup> In contrast, the *Windsor* majority's decision to strike down DOMA was far less intrusive. From a federalism standpoint, *Windsor* represented a rather commonplace instance of a federal court striking down a federal law.

Moreover, Justice Alito's leave-it-to-the-states argument is particularly odd given that DOMA eliminated federal deference to states on the issue of marriage equality for same-sex couples. Justice Alito noted that the majority believed that DOMA "encroache[d] upon the States' sovereign prerogative to define marriage,"<sup>187</sup> but he claimed no such intrusion existed.<sup>188</sup> Yet Justice Alito contra-

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<sup>181</sup> WALLENSTEIN, *supra* note 49, at 120 ("From the 1880s into the 1960s, no state had to answer to federal authority for what it chose to do regarding the law of race and marriage.").

<sup>182</sup> *Perez*, 198 P.2d at 37 (Shenk, J., dissenting).

<sup>183</sup> See *supra* notes 87–92 and accompanying text.

<sup>184</sup> *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955).

<sup>185</sup> PASCOE, *supra* note 2, at 80 (quoting Brief for Appellee, *supra* note 128, at \*32, \*38, \*50).

<sup>186</sup> BOTHAM, *supra* note 36, at 175.

<sup>187</sup> *Windsor*, 133 S. Ct. at 2719 (Alito, J., dissenting).

<sup>188</sup> *Id.* at 2720 ("In any event, § 3 of DOMA, in my view, does not encroach on the prerogatives of the States, assuming of course that the many federal statutes affected by DOMA have not already done so.").

dicted his own states' rights argument by asserting that the U.S. Congress is "entitled" to pick a side in the debate over marriage equality for same-sex couples. For example, he asserted that "both Congress and the States are entitled to enact laws recognizing either of the two understandings of marriage."<sup>189</sup> DOMA, however, effectively overrode every state decision to prefer a gender-neutral view of marriage.<sup>190</sup> In contrast, the *Windsor* decision itself did not override the decisions of state legislatures; it merely held that the federal government would respect state definitions of marriage when granting federal benefits.<sup>191</sup>

Because the *Windsor* case did not involve the constitutionality of any decisions made by state officials, Justice Alito's discussion of deference to states seems geared more for a future case in which a state law that prohibits same-sex marriage is challenged. Through his *Windsor* dissent, Justice Alito indicated that in such a case he would vote against marriage equality while invoking the principle of deference to states.<sup>192</sup> But Justice Alito's deference argument does not show that state laws prohibiting same-sex marriage are constitutional. Rather, Justice Alito *assumes* that these laws are constitutional, because states are entitled to deference only *when they are not violating the U.S. Constitution*. Whenever a state or local government is held to violate the Constitution, deference ceases.<sup>193</sup> Indeed, the underlying purpose of Section One of the Fourteenth Amendment is to reject deference to states when they deny equal protection of their laws to some of their citizens.

If, in a future decision, Justice Alito does invoke deference to states, he will be taking a page from the segregationists' playbook. Whereas the *Windsor* decision did not force states to recognize same-sex marriages within their borders, the *Loving* decision did precisely what Justice Alito suggested the Supreme Court should not do: compel individual states to recognize marriages under their *state* law that the state legislators had outlawed. While facially an act of modesty, Justice Alito's paean to deference is the same argument that segregationists

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<sup>189</sup> *Id.* at 2719.

<sup>190</sup> With respect to the locus of decision-making on marriage equality, some of the states that recognize same-sex marriage have done so through a majority of state voters deciding to recognize these marriages. In contrast, not a single state that eliminated its miscegenation law before 1967 did so through a popular vote. Any such attempt would have failed. Americans overwhelmingly opposed interracial marriage in numbers far greater than the current opposition to same-sex marriage. *See supra* notes 53–56 and accompanying text. Justice Alito ignored the fact that the citizens of a dozen states—some through direct popular votes, some through legislative action, and some through judicial action—have already decided the issue and concluded that same-sex marriages should be equal to opposite sex marriages. It was the federal government's decision to enact DOMA that subverted the sovereignty of state decision-makers, including legislators, judges, and voters.

<sup>191</sup> *Windsor*, 133 S. Ct. at 2696.

<sup>192</sup> *See id.* at 2720 (Alito, J., dissenting).

<sup>193</sup> Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 546 (1985); *see Ker v. California*, 374 U.S. 23, 62 (1963) (Brennan, J., concurring in part and dissenting in part) ("My Brother Clark correctly states that only when state law 'is not violative of the Federal Constitution' may we defer to state law in gauging the validity of an arrest under the Fourth Amendment.").

made to support miscegenation laws in those states where “the people through their elected officials” had decided to criminalize interracial marriage. If the Supreme Court in 1967 had adopted Justice Alito’s *Windsor* reasoning and deferred to state legislatures, criminal prohibitions on interracial marriage would have persisted, perhaps for decades.<sup>194</sup>

When today’s opponents of marriage equality claim to champion states’ rights, these arguments should be greeted with suspicion. Segregationists employed this same rhetoric to justify some of the most invidious discrimination in our nation’s history.

#### IV. TRADITION

In his dissent to the U.S. Supreme Court’s 2013 decision in *United States v. Windsor*, Justice Alito next argued that DOMA is constitutional because same-sex marriage is not deeply rooted in tradition. He stressed: “It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation’s history and tradition.”<sup>195</sup> Justice Alito noted that “In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution.”<sup>196</sup> He then described same-sex marriage as novel on an international scale as well.<sup>197</sup> This Part first argues that Justice Alito’s tradition-based rationale for upholding DOMA is flawed for multiple reasons, including its framing, facts, and logic. This Part then shows, through a history of miscegenation laws in the United States, that the appeal to tradition would necessitate a different result in *Loving v. Virginia*.

As an initial matter, Justice Alito framed the question improperly. The right at issue was not “the right to same-sex marriage” but the right to marry. The Supreme Court has recognized the right to marry in several cases, holding that the right cannot be denied to interracial couples,<sup>198</sup> to prisoners,<sup>199</sup> or to parents who

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<sup>194</sup> See Avins, *supra* note 116, at 1225 (“It is doubtful whether Congress today could be induced to pass a statute eliminating anti-miscegenation laws.”); see also *supra* note 105 and accompanying text (noting that until the 1990s a majority of white Americans opposed their close relatives marrying an African American).

<sup>195</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting). Justice Scalia, too, asserted that the argument “that same-sex marriage is ‘deeply rooted in this Nation’s history and tradition’ . . . would of course be quite absurd.” *Id.* at 2707 (Scalia, J., dissenting) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

<sup>196</sup> *Id.* at 2715 (Alito, J., dissenting) (citing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003)).

<sup>197</sup> See *id.* at 2715 (“Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.”); see also *id.* at 2718 (“BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex.”).

<sup>198</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>199</sup> *Turner v. Safley*, 482 U.S. 78, 100 (1987).

fall behind on paying child support.<sup>200</sup> Notably, in 1967 in *Loving*, the Court did not frame the question as “the right to interracial marriage”; rather, it noted that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>201</sup> When properly framed, *Windsor* is about a deeply rooted right—the right to marry—which the Supreme Court has held “is of fundamental importance.”<sup>202</sup>

As a factual matter, Justice Alito's recitation of the history of same-sex marriage was a bit facile. He asserted that “there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution . . . .”<sup>203</sup> Justice Alito was apparently unaware that many societies have historically recognized the legitimacy of same-sex relationships.<sup>204</sup>

As a matter of law and logic, Equal Protection is not coterminous with tradition. As Professor Cass Sunstein explains, “the Equal Protection Clause is self-consciously directed against traditional practices. It was designed to counteract practices that were time-honored and expected to endure. It is based on a norm of equality that operates as a critique of past practices.”<sup>205</sup> Overreliance on tradition has been problematic, as when Chief Justice Roger B. Taney invoked America's tradition of discrimination against African Americans to justify the opinion in *Dred Scott*.<sup>206</sup> In enacting the Fourteenth Amendment, Congress created the framework for confronting inequality despite its pedigree.

At a fundamental level, Justice Alito failed to appreciate that most discrimination is based on tradition. For example, the discrimination that women face in the workforce is a continuation of the discrimination visited upon women in prior centuries. When states forbade women from becoming lawyers, the Supreme

<sup>200</sup> *Zablocki v. Redhail*, 434 U.S. 374, 390–91 (1978).

<sup>201</sup> *Loving*, 388 U.S. at 12.

<sup>202</sup> *Zablocki*, 434 U.S. at 383; *see id.* at 384 (“[T]he right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”). In narrowly framing the right sought as “the right to same-sex marriage,” Justice Alito commits the same error as the now-repudiated *Bowers* decision, which framed the question as whether there is “a fundamental right to engage in homosexual sodomy.” *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558, 566–67 (2003). In reversing *Bowers*, the U.S. Supreme Court in *Lawrence v. Texas* chastised the *Bowers* majority for framing the issue narrowly around the rights of gay people, instead of “appreciat[ing] the extent of the liberty at stake.” 539 U.S. at 578.

<sup>203</sup> *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

<sup>204</sup> *See* William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1419–21 (1993) (discussing stories of historical same-sex relationships from Native American, African, and Roman cultures).

<sup>205</sup> Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994).

<sup>206</sup> *See* WALLENSTEIN, *supra* note 49, at 53; *see also* Frederick Schauer, *Constitutionalism and Coercion*, 54 B.C. L. REV. 1881, 1882–83 (2013) (recounting examples throughout American history where the Constitution was used to prevent government officials from continuing racist, outdated, and unethical policies).

Court upheld these prohibitions as necessary to protect women.<sup>207</sup> Our nation has spent far more of its history discriminating against racial minorities than protecting them from discrimination. Centuries of slavery were replaced with decades of Jim Crow laws that continued to prohibit African-Americans from such basic activities as using public swimming pools and drinking fountains.

More importantly for our purposes, at the time of the *Loving* opinion, interracial marriage was certainly “not deeply rooted in this Nation’s history and tradition.” Miscegenation laws were older than the nation itself. Most of the original thirteen colonies prohibited interracial marriage or sex.<sup>208</sup> Prohibitions in America against interracial marriage and intimacy date back to the 1600s.<sup>209</sup> For example, in the 1660s the colony of Maryland prohibited “marriages between ‘freeborne English women’ and ‘Negro Slaues [sic].”<sup>210</sup> The details of these prohibitions differed across the colonies:

As of 1700, Delaware and South Carolina forbade bastardy and/or fornication but not marriage, while Rhode Island prohibited marriage only, Georgia and Massachusetts outlawed illicit marriage *and* sex, and the other colonies proscribed some combination of fornication, bastardy or marriage. And by 1800, in every colony that banned interracial sex and/or marriage, all except Delaware, Georgia, and South Carolina also punished ministers or magistrates for solemnizing a marriage ceremony between a white person and a person of color. Ten of the thirteen original colonies thus enacted bans or restrictions on intermarriage within one hundred years after settlement.<sup>211</sup>

Between the nation’s unification in the 1770s and its temporary division in the 1860s, the nationwide coverage of miscegenation laws expanded and contracted, but was always extensive.<sup>212</sup>

By 1860, the vast majority of states maintained miscegenation statutes; those that did not included South Carolina, Alabama, and Mississippi.<sup>213</sup> The absence of miscegenation laws reflected not tolerance of interracial marriage but a perceived lack of necessity given the existence of slave codes, which effective-

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<sup>207</sup> *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (upholding prohibition against allowing women to be lawyers, stating “[m]an is, or should be, women’s protector and defender”).

<sup>208</sup> COTT, *supra* note 2, at 40 (“Six of the thirteen original colonies had prohibited and penalized marriage between a white and a Negro or mulatto (as did a French decree in colonial Louisiana); three more punished extramarital sex between them.”).

<sup>209</sup> BOTHAM, *supra* note 36, at 52 (detailing various prohibitions).

<sup>210</sup> MORAN, *supra* note 9, at 19 (“Maryland enacted the first antimiscegenation statute in 1661, and Virginia followed suit one year later.”); PASCOE, *supra* note 2, at 19–20 (footnote omitted).

<sup>211</sup> BOTHAM, *supra* note 36, at 52 (footnote omitted).

<sup>212</sup> See PASCOE, *supra* note 2, at 21.

<sup>213</sup> COTT, *supra* note 2, at 40–41.

ly accomplished the same end.<sup>214</sup> As one North Carolina judge explained, marriage is a contract and slaves were incapable of contracting.<sup>215</sup>

The hard-fought freedoms won during the Civil War did not include long-term marriage equality. Temporary gains were made in some southern statehouses and courthouses.<sup>216</sup> On the legislative front, some southern legislatures fluctuated in their treatment of interracial marriage. For example, although South Carolina's 1868 constitution repealed the Palmetto State's ban on miscegenation, the State reinstated its miscegenation statute in 1879.<sup>217</sup> Eventually, every southern state that repealed its miscegenation law—Louisiana, Mississippi, South Carolina, Arkansas, and Florida—re-adopted its ban on interracial marriage between 1879 and 1894.<sup>218</sup> Indeed, some southern states strengthened their miscegenation laws, making interracial marriage a crime punishable by imprisonment for several years.<sup>219</sup> For example, in 1877, Virginia increased the maximum imprisonment for miscegenation from two years to five years.<sup>220</sup> At one point, Mississippi made interracial marriage a felony punishable by life imprisonment.<sup>221</sup> Many southern states amended their state constitutions to prohibit interracial mar-

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<sup>214</sup> *Id.* (“These southern abstentions can be attributed to the sufficiency of slave codes in maintaining social inequality, not to special tolerance. After emancipation, many southern states (including these four) instituted new bans; several made these marriages felonies and prescribed extremely high penalties. In Mississippi the penalty was life imprisonment.”).

<sup>215</sup> *Howard v. Howard*, 51 N.C. (6 Jones) 235, 236 (1858); see Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 207–08 (1987).

<sup>216</sup> See WALLENSTEIN, *supra* note 49, at 80.

<sup>217</sup> COTT, *supra* note 2, at 258 n.64.

<sup>218</sup> PASCOE, *supra* note 2, at 63.

<sup>219</sup> Lenhardt, *supra* note 18, at 872. As one scholar noted:

Southern states moved quickly to establish bans on interracial intimacy in the years after the Civil War. Once it was clear that the Reconstruction amendments and the Civil Rights Act of 1866 would not be a barrier to racial separation in this context, states adopted new, more stringent prohibitions on interracial marriage, sometimes imposing multi-year terms of imprisonment as punishment for transgressing racial lines. A number of legislatures even moved to include antimiscegenation provisions in their state constitutions.

*Id.*; see also COTT, *supra* note 2, at 99 (“Ten states created new bans; eight others reiterated or refined theirs; others kept previous laws in place.”); PASCOE, *supra* note 2, at 30 (“These laws, passed in the spirit of the contemporary uproar over ‘miscegenation,’ were considerably harsher than their antebellum predecessors.”). States also increased the enforcement of their miscegenation laws. ROBINSON, *supra* note 36, at 66 (“A more significant change in the 1890s was a tightening of what had been a loose enforcement of the laws.”); *id.* at 67 (“Alabama prison records also suggest the increased enforcement of anti-miscegenation laws in the 1890s. Between 1880 and 1889, Alabama authorities imprisoned eighteen people for interracial marriage and/or cohabitation. Over the next ten years, the number of people incarcerated for miscegenation violations more than doubled, to forty-one.”).

<sup>220</sup> PASCOE, *supra* note 2, at 63; see *id.* (“[I]n 1879, Missouri raised its penalty to two years in prison. In 1884, the Maryland legislature redefined miscegenation as an ‘infamous crime’ punishable by prison sentences.”) (footnote omitted).

<sup>221</sup> BOTHAM, *supra* note 36, at 52–53 (citing WALLENSTEIN, *supra* note 49, at 81–82).

riage.<sup>222</sup> Legislators in the former slave states reasoned that miscegenation laws were now necessary in order to make white women less accessible to newly freed black men.<sup>223</sup> The new wave of miscegenation laws, however, was by no means limited to the Confederacy, as Arizona, Colorado, Idaho, Nevada, Ohio, Oregon, and West Virginia all enacted new bans on interracial marriage.<sup>224</sup>

Opponents of miscegenation laws achieved some temporary judicial victories during Reconstruction as courts in a handful of states either condemned miscegenation laws or recognized individual interracial marriages.<sup>225</sup> For example, in 1872, the Alabama Supreme Court in *Burns v. State* referred to the Fourteenth Amendment when invalidating that state's miscegenation law.<sup>226</sup> Successes were short-lived, however, as those state supreme courts reversed themselves.<sup>227</sup> Thus, five years after *Burns*, the same court—with different judges—overruled *Burns* and held that in voting to adopt the Fourteenth Amendment, the states did not “intend[] to deprive themselves of the important power of regulating matters of so great consequence and delicacy within their own borders for themselves, as it always was their undoubted right to do.”<sup>228</sup>

Despite the brief respite from their anti-miscegenation regimes, when states resurrected their miscegenation prohibitions, state courts (as noted in Part III) upheld these racial marriage restrictions against challenges based on the Fourteenth Amendment and the Civil Rights Act of 1866.<sup>229</sup> Federal courts, too, uni-

<sup>222</sup> *Id.* at 53; PASCOE, *supra* note 2, at 63 (“Five states—North Carolina in 1876, Florida in 1885, Mississippi in 1890, South Carolina in 1895, and Alabama in 1901—put bans on interracial marriage directly into their state constitution.”).

<sup>223</sup> BOTHAM, *supra* note 36, at 150 (“In the 1860s immediately following the Civil War, southern states enthusiastically enacted and amended antimiscegenation statutes. Deeply anxious about the potential hordes of formerly enslaved black men rushing to the altar to wed white women, white southerners viewed interracial unions, especially marriages, as something that needed to be prevented at all costs.”); COTT, *supra* note 2, at 99 (“After emancipation, white women’s accessibility to African American men became a demon of the white southern imagination—far more than it was during the centuries of enslavement.”).

<sup>224</sup> COTT, *supra* note 2, at 258.

<sup>225</sup> PASCOE, *supra* note 2, at 40 (“In Alabama and in Texas, courts declared state laws unconstitutional. In Louisiana, Mississippi, and even, in one case, North Carolina, courts issued decisions that upheld the validity of individual interracial marriages.”).

<sup>226</sup> 48 Ala. 195, 198 (1872).

<sup>227</sup> PASCOE, *supra* note 2, at 46 (“During the next decade, the Reconstruction-era decisions upholding interracial marriages were first overruled and then abandoned. By the 1890s, they were all but forgotten, and judges and lawyers would routinely rattle off a supposedly unbroken string of court precedents upholding miscegenation laws.”).

<sup>228</sup> *Green v. State*, 58 Ala. 190, 197 (1877); *id.* (“No amendment to the Constitution, nor any enactment thereby authorized, is in any degree infringed by the enforcement of the [miscegenation law], under which the appellant in this cause was convicted and sentenced.”); see MORAN, *supra* note 9, at 77 (In “*Green v. State*, the court found that Congress did not intend the Civil Rights Act of 1866 to overturn antimiscegenation laws. After all, many congressmen who voted for the Act lived in states that banned interracial marriage.” (citing 58 Ala. at 197)).

<sup>229</sup> See, e.g., *State v. Jackson*, 80 Mo. 175, 179 (1883) (upholding Missouri miscegenation law); *State v. Hairston*, 63 N.C. 451, 453 (1869) (holding the Civil Rights Act of 1866 did not prohibit

formly upheld state miscegenation laws against constitutional challenge. For example, a federal judge in Virginia concluded: "The fourteenth amendment gives no power to congress to interfere with the right of a state to regulate the domestic relations of its own citizens, and if a state enact such laws as those which have been quoted, the federal courts must respect them as they stand, without inquiring into the reasons of them."<sup>230</sup>

After state and federal courts had decisively lined up in favor of upholding miscegenation laws, the Supreme Court entered the fray in 1883. In *Pace v. Alabama*,<sup>231</sup> the Justices upheld an Alabama criminal law that punished interracial adultery more severely than same-race adultery. The Court held that the law did not violate the Equal Protection Clause of the Fourteenth Amendment in part because the law punished equally both whites and blacks who engaged in interracial intimacy.<sup>232</sup> Because miscegenation laws employed the similar equality of punishment for perceived racial transgressions, courts interpreted *Pace* as validating all state miscegenation laws.<sup>233</sup>

In short, all post-bellum progress toward marriage equality was ultimately pared back such that by the end of the nineteenth century, miscegenation laws blanketed the country.<sup>234</sup> In the aftermath of *Pace*, America settled into being a country largely under the grip of miscegenation laws. After 1887, until California's 1948 *Perez v. Sharp* decision, no state with a miscegenation law abolished its ban on interracial marriage either legislatively or judicially.<sup>235</sup> Federal courts continued to uphold the constitutionality of miscegenation statutes well into the mid-twentieth century.<sup>236</sup> The nation certainly had no deeply rooted tradition of

states from criminalizing interracial marriage); *Lonas v. State*, 50 Tenn. 287, 296 (1871) ("That this [marital] relation is subject to the law of the State, without any restriction from the Constitution of the United States, is too clear for argument.").

<sup>230</sup> *Ex parte Kinney*, 14 F. Cas. 602, 605 (C.C.E.D. Va. 1879) (No. 7825).

<sup>231</sup> 106 U.S. 583, 585 (1883).

<sup>232</sup> *Id.*

<sup>233</sup> See PASCOE, *supra* note 2, at 269 ("Every southern court that upheld its state miscegenation law—the Supreme Court of Virginia in 1955, the Supreme Court of Louisiana in 1959, and the Supreme Court of Florida in 1963—had cited *Pace* in doing so." (citing *Naim v. Naim*, 87 S.E.2d 749, 754 (Va. 1955); *State v. Brown*, 108 So. 2d 233, 234 (La. 1959); *McLaughlin v. State*, 153 So. 2d 1, 2 (Fla. 1963)); Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 49 (1964) (referring to *Pace* as "the only precedent that has been consistently cited by courts in upholding these [miscegenation] statutes").

<sup>234</sup> MORAN, *supra* note 9, at 80 ("After *Pace*, antimiscegenation laws proliferated. Bolstered by the Court's approval, twenty states and territories added or strengthened bans on interracial sex and marriage between 1880 and 1920. Some states went so far as to amend their constitutions to include prohibitions on miscegenation." (citing MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 138 (1985))).

<sup>235</sup> Novkov, *supra* note 70, at 353 (citation omitted).

<sup>236</sup> For example, in 1944 in *Stevens v. United States*, the Tenth Circuit held that miscegenation laws did "not contravene the Fourteenth Amendment" because "within the range of permissible adoption of policies deemed to be promotive of the welfare of society as well as the individual members



recognizing a right to interracial marriage at the time that the *Perez* plaintiffs brought their case to the California Supreme Court—indeed, most of the nation had a long, if not entirely unbroken, tradition of barring interracial marriage.

Given the history of miscegenation laws, in his dissent in *Perez*, Justice Shenk foreshadowed Justice Alito's tradition argument in *Windsor*. Justice Shenk noted that most states maintained miscegenation laws and "[t]he ban on mixed marriages in this country is traceable from the early colonial period."<sup>237</sup> The *Perez* dissent provided a brief history of California's anti-miscegenation regime, noting that the first session of the California Legislature declared "marriages between white persons and Negroes to be illegal and void."<sup>238</sup> The State of California had periodically expanded the reach of its miscegenation laws, as when it amended the civil code to prohibit "marriages . . . between white persons and members of the Malay race."<sup>239</sup> Ultimately, the *Perez* dissent could not comprehend how a law that had been "constitutionally enforceable in this state for nearly 100 years" could suddenly be "unconstitutional under the same Constitution and with no change in the factual situation."<sup>240</sup>

Like *Perez*, the *Loving* opinion represented a break with tradition—a tradition that virtually defined the culture of a region for decades. The tradition of anti-miscegenation regimes was self-reinforcing as courts often considered miscegenation laws constitutional, in part, because of their longevity. This created "a tautological system in which attorneys and judges 'knew' the laws were constitutional because previous judges had ruled so, and those judges had ruled so because they 'knew' their interpretations of the law to be correct."<sup>241</sup> The *Loving* Court soundly rejected the notion that tradition necessarily makes a statute constitutional.<sup>242</sup>

Nevertheless, Justice Alito tried to resurrect the tradition defense rejected in *Loving* when he construed Edith Windsor and the U.S. Department of Justice as

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thereof, a state is empowered to forbid marriages between persons of African descent and persons of other races or descents." 146 F.2d 120, 123 (10th Cir. 1944).

<sup>237</sup> *Perez v. Sharp*, 198 P.2d 17, 38 (Cal. 1948) (Shenk, J., dissenting).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 35.

<sup>241</sup> BOTHAM, *supra* note 36, at 178.

<sup>242</sup> *Loving*, 388 U.S. at 12 (stating that the right to marriage could not be denied "on so unsupported a basis" as race classifications). For example, while Justice Scalia argued in *Lawrence v. Texas* that historical tradition provided justification for maintaining sodomy laws, Justice Stevens noted that *Loving* had rejected that argument. DAVID A. J. RICHARDS, *THE SODOMY CASES: BOWERS V. HARDWICK AND LAWRENCE V. TEXAS* 144 (2009) ("Justice Scalia helpfully asked Rosenthal if historical tradition might not be the answer, to which Justice Stevens responded that it was not when the Supreme Court struck down antimiscegenation laws."). Justice Stevens had explained in *Bowers v. Hardwick* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

seeking “not the protection of a deeply rooted right but the recognition of a very new right.”<sup>243</sup> The validity of Justice Alito’s argument depends on how the “tradition” in question is defined. Edith Windsor was not asking for a new right to same-sex marriage; Edith Windsor and Thea Spyer were legally married. Windsor was not asking for the right to marry; she was challenging a recent law that denied her the federal benefits associated with a state right she had already exercised. One could argue that *Windsor* was, in fact, on the side of tradition—that of the federal government recognizing marriages that were valid in the states in which the couple is domiciled.

Windsor’s challenge asked the Court to respect America’s legal tradition of the federal government recognizing legal state marriages. Unlike *Loving*, the *Windsor* Court was not called on to review a long-lived traditional state law.<sup>244</sup> Rather, the Court was evaluating a profoundly untraditional federal law that trespassed upon the states’ traditional right to define marriage for the purposes of all government benefits.<sup>245</sup> Windsor challenged a federal law of recent vintage that refused to recognize state-sanctioned legally valid marriages between consenting adults. DOMA represented no tradition; it constituted a new and unprecedented federal intrusion into the issue of state-sanctioned marriages.<sup>246</sup> Edith Windsor was not demanding a new right; DOMA had extinguished an old right.

Finally, even if one accepts Justice Alito’s framing of the issue, that Windsor was in fact asking the Supreme Court to recognize a new right, tradition is not a barrier to unconstitutionality. A state’s traditional views of marriage do not trump rights guaranteed by the U.S. Constitution. Thus, state bans on same-sex marriage are no more immune from invalidation than were state bans on interracial marriage.

In sum, the notion that DOMA was deeply rooted in tradition is specious. The federal government has long allowed states to define the requirements of marriage between two people. Tradition held that the federal government deferred to state marriage requirements regarding age, race, gender, etc. Virginia’s

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<sup>243</sup> *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting).

<sup>244</sup> *Windsor* was not a challenge to state marriage laws—as was *Loving*.

<sup>245</sup> Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1473 (1997) (“In accordance with the long-held understanding that domestic relations law is a province of state concern, federal statutes that use the terms ‘marriage’ and ‘spouse’ have allowed the meaning of those terms to be filled in by substantive laws of the states.”); *see id.* at 1467–73; *see also* *Boddie v. Connecticut*, 401 U.S. 371, 389–90 (1971) (Black, J., dissenting) (“The power of the States over marriage and divorce is complete except as limited by specific constitutional provisions.”).

<sup>246</sup> The Second Circuit noted in its *Windsor* decision—which was affirmed by the Supreme Court—“DOMA was . . . an unprecedented intrusion ‘into an area of traditional state regulation.’” *Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012) (quoting *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012)).

miscegenation law was traditional; DOMA was not. The “tradition” canard is an argument against the majority opinion in *Loving*, not *Windsor*.<sup>247</sup>

## V. UNKNOWN CONSEQUENCES

Finally, Justice Alito’s *Windsor* dissent speculated about the uncertain long-term consequences of same-sex marriage on the institution of marriage more broadly. He opined that “[t]he long-term consequences of [accepting same-sex marriage] are not now known and are unlikely to be ascertainable for some time to come.”<sup>248</sup> Again presenting his hostility to marriage equality as an act of humility, Justice Alito warned that “[a]t present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment.”<sup>249</sup> In the face of uncertainty, Justice Alito reasoned, federal judges should not strike down DOMA.<sup>250</sup> This Part recounts the use of this type of argument in several miscegenation cases and concludes that Justice Alito used this argument ultimately as a scare tactic that would have been more timely as a dissent in 1967 in *Loving v. Virginia*.

Justice Alito’s formulation of his uncertainty concerns is telling. He set up certainty of consequence as a criterion for recognizing constitutional rights as he simultaneously asserted that the Court cannot “for some time to come” achieve the necessary level of certainty regarding marriage equality. He implied that the Court should know the “long-term consequences” of marriage equality before

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<sup>247</sup> The tradition against same-sex marriage was qualitatively different than the tradition against interracial marriage. Whereas attempts at interracial marriage constituted criminal conduct that resulted in brides and grooms being imprisoned, attempts at same-sex marriage would simply not be recognized. This is particularly true in the context of DOMA, which denied federal recognition of same-sex marriage. These marriages were still completely legally valid in states like New York, where Edith Windsor and Thea Spyer resided as a legally married couple. Edith and Thea were never at risk for criminal prosecution. This suggests that the intensity of tradition against interracial marriage was significantly greater than the tradition against same-sex marriage. In short, American’s tradition against interracial marriage was both more deeply held and affirmatively constructed in law than its historical refusal to recognize same-sex marriage.

<sup>248</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2715 (Alito, J., dissenting).

<sup>249</sup> *Id.* at 2716.

<sup>250</sup> It may seem that Justice Alito was simply asking for evidence, but that was not the case. Ironically, in the same session that the Court decided *Windsor*, it decided *Hollingsworth v. Perry*, 133 S. Ct. 1521 (2013), which arose from the first federal trial devoted to same-sex marriage. Judge Vaughn Walker heard testimony from various experts in the fields listed by Justice Alito in his *Windsor* decision. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 958 (N.D. Cal. 2010). After evaluating all of the evidence, Judge Walker concluded that recognizing same-sex marriage would not visit a parade of horrors upon society. Justice Alito made a point of mocking both the trial as “reach[ing] the heights of parody” and constitutional law professors (who thought Judge Walker’s factual findings were entitled to deference) as reflecting “an arrogant legal culture that has lost all appreciation of its own limitations.” *Windsor*, 133 S. Ct. at 2718–19 n.7 (Alito, J., dissenting).

the federal government should be required to recognize marriages that are valid in one-third of U.S. states. Justice Alito did not define his vision of what constitutes “long term.” Is it until the children of same-sex married couples reach adulthood? Is it the time necessary to determine whether all children raised in states with marriage equality have stable marriages throughout their lives? While voting to deny marriage equality to millions of Americans, Justice Alito gave no explanation of what “long-term consequences” we—lawyers, social scientists, citizens—should be looking for or how to measure them. Ultimately, the justice appeared to be attempting to keep the issue of marriage equality away from federal courts for a generation or more.

Similarly, those opposed to miscegenation argued that interracial marriage had unknown consequences that required courts to uphold the constitutionality of miscegenation laws. Supporters of miscegenation laws raised several types of uncertainty arguments. First, one uncertainty defense of miscegenation bans took the form of concern about the balance of power between the states and federal government should the U.S. Constitution be interpreted to bar states from prohibiting interracial marriage. Linking the states’ rights issue to the indefinite effect of federal involvement in marriage matters, the Supreme Court of Indiana worried in 1871 in *State v. Gibson* about allowing federal intrusion: “If the federal government can determine who may marry in a state, there is no limit to its power.”<sup>251</sup> The consequences could ultimately “result in the destruction of the states.”<sup>252</sup>

Second, opponents of interracial marriage spoke about both the unknown—and predicted dire—consequences of allowing interracial couples to marry and have children.<sup>253</sup> Most famously, the Georgia Supreme Court in *Scott v. State* upheld that state’s constitutional provision prohibiting marriages between a white person and a black person because:

[The law] was dictated by wise statesmanship, and has a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.<sup>254</sup>

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<sup>251</sup> 36 Ind. 389, 403 (1871).

<sup>252</sup> *Id.*

<sup>253</sup> Strasser, *supra* note 18, at 1009 (“Historically, one of the reasons offered to prevent interracial marriages involved the children who might be the product of such a marriage.”); Trosino, *supra* note 18, at 101–02 (“Another justification for anti-miscegenation laws was based on the popular belief that children of interracial marriage were mentally and physically inferior to pure race children.”).

<sup>254</sup> *Scott v. State*, 39 Ga. 321, 323 (Ga. 1869).

The dissent in *Perez v. Sharp* quoted with approval the offensive text of *Scott*,<sup>255</sup> as did other state courts in their opinions upholding miscegenation states.<sup>256</sup> In *Perez*, the State argued “that persons wishing to marry in contravention of race barriers come from the ‘dregs of society’ and that their progeny will therefore be a burden on the community.”<sup>257</sup> Miscegenation laws were thus necessary to “prevent[] the birth of children who might become social problems.”<sup>258</sup> Historically, these arguments were not limited to the children of black-white interracial couples. When California was drafting its constitution around 1880, the chairman of the Committee on the Chinese urged lawmakers to include the Chinese in California’s miscegenation law: “Were the Chinese to amalgamate at all with our people, it would be the lowest, most vile and degraded of our race, and the result of that amalgamation would be a hybrid of the most despicable, a mongrel of the most detestable that has ever afflicted the earth.”<sup>259</sup>

After smearing the children of interracial couples as somehow defective, supporters of miscegenation laws changed tack and asserted that such laws were necessary to protect these same children by preventing them from being born. In the *Loving* case, the State argued that interracial couples experience a higher rate of divorce, which would be unfair to the children and, thus, interracial marriage should be prohibited.<sup>260</sup> The State next quoted an academic text for the proposition that interracial marriage constitutes “a threat to the children of such a marriage, in that it may tend to make them marginal in their relationships to parents . . . or their races,” which “create[s] a threat to their welfare and to the welfare of society as well because highly charged emotional experiences often leave such children disturbed, frustrated and unable to believe that they can live normal, happy lives.”<sup>261</sup> Similarly, the State in *Perez* argued that “the progeny of a mar-

<sup>255</sup> *Perez v. Sharp*, 198 P.2d 17, 40 (Cal. 1948) (Shenk, J., dissenting).

<sup>256</sup> See, e.g., *State v. Tutty*, 41 F. 753, 756 (C.C.S.D. Ga. 1890); *Eggers v. Olson*, 231 P. 483, 486 (Okla. 1924); *Blake v. Sessions*, 220 P. 876, 879 (Okla. 1923); *In re Atkin’s Estate*, 3 P.2d 682, 686 (Okla. 1931) (Riley, J., dissenting).

<sup>257</sup> *Perez*, 198 P.2d at 25. Similarly, the State of Virginia in *Loving* argued that couples who intermarry are “people who have a rebellious attitude toward society, self-hatred, neurotic tendencies, immaturity, and other detrimental psychological factors.” MAY IT PLEASE THE COURT 284 (Peter Irons & Stephanie Guitton eds., 1993).

<sup>258</sup> *Perez*, 198 P.2d at 25.

<sup>259</sup> MORAN, *supra* note 9, at 31 (quoting 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF CALIFORNIA, 1878–79, at 632 (1880) (statement of John F. Miller at California’s state constitutional convention)).

<sup>260</sup> Brief for Appellee, *supra* note 128, at \*47–48.

<sup>261</sup> *Id.* at Appendix B (quoting ALBERT I. GORDON, INTERMARRIAGE: INTERFAITH, INTERRACIAL, INTERETHNIC (1964)). Similarly, the Supreme Court of Louisiana upheld its miscegenation law by—surprisingly and perhaps disingenuously—invoking *Brown v. Board of Education* and the need to protect children:

A state statute which prohibits intermarriage or cohabitation between members of different races we think falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-

riage between a Negro and a Caucasian suffer not only the stigma of such inferiority but the fear of rejection by members of both races.”<sup>262</sup>

Other claimed unknown consequences included the effect of interracial marriage on race relations in the nation.<sup>263</sup> Segregationists predicted “dire consequences” from the so-called “intermixture and amalgamation of races.”<sup>264</sup> For example, in 1947, Mississippi Senator Theodore Bilbo argued that “[s]eparation leads to the preservation of both the white and Negro races, to a future which belongs to God. Mongrelization leads to the destruction of our Nation itself.”<sup>265</sup> In upholding its state miscegenation law in 1871 in *Lonas v. State*, the Tennessee Supreme Court reasoned that “any effort to intermerge the individuality of the races [should be regarded] as a calamity full of the saddest and gloomiest portent to the generations that are to come after us.”<sup>266</sup> The *Perez* dissent worried whether interracial marriage would lead to the extinction of the white race as the dissent knew it.<sup>267</sup>

Unlike the *Perez* dissent and supporters of miscegenation laws, Justice Alito did not go into detail about the particular “long-term consequences” that he

breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

*State v. Brown*, 108 So. 2d 233, 234 (La. 1959) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

<sup>262</sup> *Perez*, 198 P.2d at 26 (“If they do, the fault lies not with their parents, but with the prejudices in the community and the laws that perpetuate those prejudices by giving legal force to the belief that certain races are inferior. If miscegenous marriages can be prohibited because of tensions suffered by the progeny, mixed religious unions could be prohibited on the same ground.”).

<sup>263</sup> For example, a Georgia federal court asserted that it would “be impossible to overstate the importance of this question under the grave and unsettled relations which exist between the distinct races now inhabiting a large portion of these United States, and it will be neither wise nor patriotic for the court to evade the vital point of decision, as might perhaps be done in this case.” *Tutty*, 41 F. at 756.

<sup>264</sup> *Bank*, *supra* note 120, at 310 (quoting 2 CONG. REC. 4169 (1874) (statement of Sen. Saulsbury)).

<sup>265</sup> SICKELS, *supra* note 20, at 36 (quoting THEODORE G. BILBO, TAKE YOUR CHOICE 292 (1947)).

<sup>266</sup> 50 Tenn. 287, 311 (1871).

<sup>267</sup> *Perez*, 198 P.2d at 44 (Shenk, J., dissenting) (“On the biological phase there is authority for the conclusion that the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock.”); *id.* at 46 (“The regulation does not rest solely upon a difference in race. The question is not merely one of difference, nor of superiority or inferiority, but of consequence and result. The underlying factors that constitute justification for laws against miscegenation closely parallel those which sustain the validity of prohibitions against incest and incestuous marriages.”). Similarly, in 1909, Senator William H. Milton of Florida championed a federal miscegenation law, arguing that “the mixture of blacks with whites would result in the extinction of the Caucasian race because ‘one drop of negro blood makes one a negro . . . a child of the jungle.’” ROBINSON, *supra* note 36, at 82–83 (quoting 43 CONG. REC. 3443, 3480–83 (1909)).

believed warranted denying federal recognition of valid state marriages. Justice Alito seemed to imply that federal recognition of same-sex marriage might have negative consequences for family structure and stability. Virginia's legal counsel made this same argument in *Loving*. After noting the State's "natural, direct, and vital interest in maximizing the number of successful marriages which lead to stable homes and families and in minimizing those which do not," the State asserted that miscegenation laws were necessary because "intermarried families are subjected to much greater pressures and problems than are those of the intra-married."<sup>268</sup> State officials did not seem to appreciate that miscegenation laws may cause and facilitate the problems they articulated.

Justice Alito's lack of clearly articulated specific consequences is a shrewd omission. Opponents of civil rights for minorities generally forgot their prior positions after history had proven their dire predictions of the consequences of, for example, interracial marriage, to be false, wrong-headed, and indeed bigoted.<sup>269</sup> The concern about creating a record that in hindsight does not survive the test of time makes Justice Alito's vague insinuations a discerning strategy. Nevertheless, opponents of marriage equality in *Perez*, *Loving*, and *Windsor* all employed the scare tactic of unforeseen and/or grim consequences should marriage restrictions be lifted. None of these predictions have proven correct.

Ultimately, using the prospect of unknown consequences to deny equal rights is breathtakingly broad. This type of argument could be applied to all judicial decision making. Every equal protection case could potentially have unintended consequences. The justification also is selectively employed.<sup>270</sup> "Unknown consequences" is a convenient argument, but not a principled one. Fear of the unknown is not a legitimate government interest that justifies discrimination.

## CONCLUSION

Although the Supreme Court's 1967 decision in *Loving v. Virginia* was unanimous, Justice Alito's dissent in *United States v. Windsor* provides some insights into what a *Loving* dissent would have looked like. The California Supreme Court in 1948 in *Perez v. Sharp* broke new ground in marriage equality

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<sup>268</sup> MAY IT PLEASE THE COURT, *supra* note 257, at 282–83.

<sup>269</sup> See PASCOE, *supra* note 2, at 291–92 (citing CAROL A. HORTON, RACE AND THE MAKING OF AMERICAN LIBERALISM 192–93, 199–204 (2005)); Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 945 (1993).

<sup>270</sup> For example, Justice Alito expressed no concern about unknown consequences of extending the Second Amendment to create an individual right to carry handguns. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Nor did he seem to care that the Constitution is silent on the issue of handguns, which did not exist at the time of the Second Amendment. *Cf. supra* notes 110–144 and accompanying text (noting Justice Alito's invocation of constitutional silence as to same-sex marriage).

but with a strong dissent from three of the Court's seven justices. The *Perez* dissent advanced precisely the same arguments against recognizing interracial marriages that Justice Alito made against recognizing same-sex marriages.<sup>271</sup> Justice Alito's *Windsor* dissent appears to have been cribbed from Justice Shenk's *Perez* dissent.

When listening to the arguments made against same-sex marriage, Mildred Loving herself observed the similarities between her struggle during the sixties and the current legal battle for marriage equality:

Mrs. Loving observed that many people in her generation had believed "it was God's plan to keep people apart and that the government should discriminate against people in love." Not a "day goes by," she continued, "that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the 'wrong kind of person' for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights . . . . I support the freedom to marry for all. That's what *Loving*, and loving, are all about."<sup>272</sup>

When we look back at the 1960s fight for marriage equality, most Americans feel a collective sense of shame that the apparatus of government was channeled to hurt loving couples. Younger generations are often stunned that interracial marriage was considered such a big deal by so many people for so long. Younger Americans see the arguments employed against interracial marriage to be offensive, transparent, and deeply flawed. Thus, it is particularly disturbing—and telling—that Justice Alito and other opponents of marriage equality for same-sex couples are recycling these same discredited arguments. It is also both sad and ironic that the only other justice to sign on to Justice Alito's dissent was Justice Clarence Thomas, whose marriage to his wife would have constitut-

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<sup>271</sup> BOTHAM, *supra* note 27, at 45 ("Shenk's twelve-page opinion repeated the same justifications for the statutes that virtually every antimiscegenation case in American history had affirmed: the long tradition of such statutes, the state's constitutional right to regulate marriage, and the idea that the judiciary had no business interfering with the right of the legislature to enact laws."); MORAN, *supra* note 8, at 86 ("Shenk emphasized the state's prerogative to regulate marriage, the longstanding judicial approval of antimiscegenation laws, and the need to defer to legislative judgments regarding the threat to health, safety, morals, and the general welfare posed by interracial unions." (citing 198 P.2d at 35–45)).

<sup>272</sup> BOTHAM, *supra* note 36, at 179 (quoting Mildred Loving, *Loving for All*, Remarks Prepared for the 40th Anniversary of the *Loving v. Virginia* Announcement (June 12, 2007), available at [http://www.thetaskforce.org/downloads/release\\_materials/loving\\_for\\_all.pdf](http://www.thetaskforce.org/downloads/release_materials/loving_for_all.pdf), archived at <http://perma.cc/SJ8D-6AQ9>.)



ed criminal conduct under Virginia's anti-miscegenation law had not the *Loving* Court rejected all of the arguments advanced in Justice Alito's dissent in *Windsor*.

Justice Alito takes umbrage at the implication that he and his fellow opponents of civil rights for gay people could be perceived as bigoted for cleaving to their distaste for all things gay. He attacked today's civil rights leaders as "cast[ing] all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools."<sup>273</sup> Segregationists tried to claim this same moral high ground in the miscegenation debate, such as when the State of Virginia in its *Loving* brief argued that "the tendency to classify all persons who oppose intermarriage as 'prejudiced' is, in itself, a prejudice."<sup>274</sup> "Prejudiced" is a moniker that did not stick to opponents of miscegenation laws. Instead, today's society views proponents of miscegenation laws as prejudiced—as bigoted—despite couching their hostility to interracial marriage as authorized or mandated by tradition.

What ultimately is the significance of Justice Alito's dissent in *Windsor*? Not only is it a direct rebuttal to the unanimous decision in *Loving*. Justice Alito's dissent is also a rehearsal; it is a first draft written in anticipation of a future Supreme Court case involving a federal constitutional challenge to a state law prohibition on same-sex marriage. Such a case would be more directly analogous to the posture of *Loving* than was *Windsor*. That is why it is important to view Justice Alito's *Windsor* dissent through the lens of *Loving*. This makes it easier to see that Justice Alito is recycling the same discredited arguments that were used to justify the criminalization of interracial marriage. Understanding *Loving* and the history of miscegenation laws provides context for the current debate over marriage equality.

What would we think today of a dissent in *Loving*, if one had been written? That is probably how future generations of Americans—historians and ordinary citizens—will view Justice Alito's dissent in *Windsor*. In the end, however, the important issue is not Justice Alito's legacy. It is the ability of millions of Americans to exercise their constitutional right to marry in the same way that Sylvester Davis and Andrea Perez were allowed after the California Supreme Court struck down that state's miscegenation law. Although progress toward marriage equality has been made at a heartening pace, same-sex couples across the country are

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<sup>273</sup> *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting). Claiming an open-mind and generous spirit is common among people who oppose civil rights for others. For example, when Senator William H. Milton of Florida argued that the federal government should adopt a national law to forbid interracial marriage—in part because, he argued, blacks were "a distinct species" as shown by their "smaller brains" and "rancid smells"—he also "insisted that his support for the bill did not in any way suggest any personal antipathy for blacks. He asserted that blacks within his state recognized him as a 'friend.'" ROBINSON, *supra* note 36, at 82–83 (quoting 43 CONG. REC. 3480–83 (1909)).

<sup>274</sup> Brief for Appellee, *supra* note 128, at \*48 (quoting GORDON, *supra* note 128).

still waiting for their *Loving*. As state and federal courts consider constitutional challenges to bans on same-sex marriage, judges should take heed not to accept the arguments used to bolster miscegenation laws. These arguments have been soundly and rightly rejected.

