RICHARD PERRY LOVING, et ux.,

Appellants,

—v.— No. 395

COMMONWEALTH OF VIRGINIA,

Appellee.

Washington, D.C.
Wednesday, April 10, 1967

The above-entitled matter came on for oral argument, pursuant to notice,

BEFORE:

EARL WARREN, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
TOM C. CLARK, *Associate Justice*
JOHN M. HARLAN, *Associate Justice*
WILLIAM J. BRENNAN, JR., *Associate Justice*
POTTER STEWART, *Associate Justice*
BYRON R. WHITE, *Associate Justice*
ABE FORTAS, *Associate Justice*

APPEARANCES:

BERNARD S. COHEN, ESQ., and PHILIP J. HIRSCHKOP, ESQ., *110 North Royal Street, Alexandria, Virginia, on behalf of Appellants.*

R. D. McILWAINE, III, ESQ., *Assistant Attorney General of the Commonwealth of Virginia, Supreme Court-State Library Building, Richmond, Virginia 23219, on behalf of Appellee.*

WILLIAM M. MARUTANI, ESQ., *2010 Two Penn Center Plaza, Philadelphia, Pennsylvania 10192, on behalf of the Japanese American Citizens League, as Amicus Curiae.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: Number 395, *Richard Perry Loving*, et al., appellants, versus *Virginia*.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Hirschkop?

MR. COHEN: Mr. Chief Justice, may it please the Court:

I am Bernard S. Cohen. I would like to move the admission of Mr. Philip J. Hirschkop, *pro hac vice*, my co-counsel in this matter. He is a member of the Bar in Virginia.

MR. CHIEF JUSTICE WARREN: Your motion is granted.

Mr. Hirschkop, you may proceed.

MR. HIRSCHKOP: Thank you, Your Honor.

ORAL ARGUMENT OF PHILIP J. HIRSCHKOP, ESQ., ON BEHALF OF APPELLANTS

MR. HIRSCHKOP: Mr. Chief Justice, Associate Justices, may it please the Court:

We will divide the argument accordingly. I will handle the equal protection argument, as we view it, and Mr. Cohen will argue the due process argument.

You have before you today what we consider the most odious of the segregation laws and the slavery laws. In our view of this law, we hope to clearly show that this is a slavery law. We refer to the law itself. I would first like to bring to the Court's attention that there is some discrepancy in the briefs, between us and the Commonwealth especially, as to which laws are in essence. They have particularly said that Section 20-58 and 20-59 of the Virginia Code are the only things for consideration by this Court, and those two sections, of course, are the criminal sections making it a criminal penalty for Negro and white to intermarry in the State of Virginia; 20-58 is the evasion section under which this case particularly arose, which makes it a criminal act for people to go outside the State to avoid the laws of Virginia to get married.

We contend, however, Your Honors, that there is much more in essence here; that there's actually one simple issue; and the issue is: May a state proscribe a marriage between two adult consenting individuals because of their race? And this was taken much more in the Virginia statute.

Section 20-54 and 20-57 void such marriages. And, if they void such marriages—if you decide on 20-58 and 29-59—these people, were they to go back to Virginia—and they are in Virginia now—will be subject to immediate arrest under the fornication statute, and the lewd and lascivious cohabitation statute. And, more than that, there are many, many other problems with these statutes. Their children will be declared bastards under many Virginia decisions. They themselves would lose their rights for insurance, social security, for numerous other things to which they're entitled. So we strongly urge the Court, in considering this, to consider this basic question: May the State proscribe a marriage between such individuals because of their race, and their race alone?

THE COURT: How many states have laws like this?

MR. HIRSCHKOP: There are 16 states, Your Honor, that have these presently. Maryland just repealed theirs. These are all southern states, with 4 or 5 border southern states. There's Oklahoma, and Missouri, and Delaware. There have been, in recent years, two—Oklahoma and Missouri—that have had bills to repeal them, but they did not pass them.

Now in dealing with the equal protection argument, we feel that on its face—on its face—these laws violate the equal protection of the laws. They violate the Fourteenth Amendment. In dealing with it, we look at the arguments advanced by the State. And there are basically two arguments advanced by the State. On the one hand, they say the Fourteenth Amendment specifically exempted marriage from its limitations. On the other hand, they say that if it didn't, that the *Maynard* versus *Hill* doctrine would apply here. That this is only for the State to legislate upon.

In replying to that, we think the health and welfare aspects of it are in essence. And we hope to show the Court these are not health and welfare laws. These are slavery laws, pure and simple. And for this reason, we went to some length in our brief to go into the history of these laws, to look at why Virginia passed these laws, and why other states have these laws on the books; and how they use these laws. Without reiterating what is in the brief, I will just refer to that history very briefly.

As we point out in the brief, the laws go back to the 1600s. The 1691 Act is the first basic Act we have. There was a 1662 Act which held that the child of a Negro woman and a white man would be

free or slave according to the condition of its mother. It was a slavery law, and it was only concerned with one thing, and it's an important element in this matter: Negro woman, white man. That's all they were really concerned with; and it may be all they're still concerned with. The purity of the white woman, not the purity of the Negro woman.

These laws rob the Negro race of their dignity. It's the worst part of these laws, and that's what they're meant to do, to hold the Negro class in a lower position, lower social position and lower economic position. 1691 was the first basic Act, and it was entitled "An Act for the Suppressing of Outlying Slaves." And the language of the Act is important. That's why we go back to it, because they talk about the prevention of "that abominable mixture and spurious issue." And we'll see that language time and again throughout all the judicial decisions referred to by the State.

And then they went into two centuries of trying to figure out who these people were that they were proscribing. I won't touch upon all the states. I understand *amicus* will do that. But at one time, in 1705, it was if a person is one-eighth or more Negro blood, and then in 1785 it became a person with one-quarter or more; and it went on and on. It wasn't until 1930 that we finally arrived at what a "Negro" is, in the State of Virginia, and that's a person with "any traceable Negro blood," a matter which we think defies any scientific interpretation.

And the first real judicial decision we get in Virginia was in 1878, when the *Kinney* v. *Commonwealth* decision came down. And there again we have a very interesting decision, because in *Kinney* v. *Commonwealth* they talk about the public policy of the State of Virginia and what that public policy was, and how it would be applied. If Your Honors will indulge me, I have the language here, which is the language that is carried through, through the history of Virginia, and they talk about "spurious issue" again, and that is what is constantly carried through, and carried through from the Act for the Suppressing of Outlying Slaves. And they talk about the "cherished southern civilization," but they didn't think about the "southern civilization" as a whole, but the white civilization. And they want the races kept "distinct and separate," the same thing this Court has heard since *Brown*, and before *Brown*, it has heard so many times during the *Brown* argument, and since the *Brown* argument. They talk about "alliances so unnatural that God has forbidden them," and this language—

THE COURT: Would you mind telling me what case that was?

MR. HIRSCHKOP: *Kinney* v. *Commonwealth.*

THE COURT: *Kinney*?

MR. HIRSCHKOP: *Kinney*—K-i-n-n-e-y.

And then in 1924, in a period of grave hysteria in the United States, an historical period we're all familiar with, a period when the West was in arms over the "yellow peril" and western states were thinking about these laws—and some got them then—a period when the immigration laws were being passed in the United States because the North was worried about the great influx of Italian immigrants and Irish immigrants; a period when the Klan rode openly in the South; and that's when they talked about "bastardy of the races," and "miscegenation" and "amalgamation" and "race suicide" became the watchword.

And John Powell, a man we've singled out in our brief, a noted pianist of his day, started taking up the Darwin theory and perverting it through the theory of eugenics, a theory that applied to animals—to pigs and hogs and cattle—and started applying it to human beings; and taking Darwinism, that the Negro race was the steppingstone, that lost man we've always been looking for, between the white man and the abominable snowman, or whatever else they went back.

And that's when the Anglo-Saxon clubs formed in the State of Virginia. And that's when the Virginia Legislature passed our present body of laws. They took all these old laws, these antebellum and postbellum laws, and they put them together into what we presently have.

THE COURT: How many states for the first time, in the '20s, passed these kind of laws? Do you recall?

MR. HIRSCHKOP: Your Honor, to the best of our knowledge, basically most states had them. It was just Virginia, and then Georgia copied the Virginia Act, which had such a complete Act—and it was described in many places as the most perfect model of this type of act.

THE COURT: But you were saying that the western states and eastern states and others during the 1924 period had these laws, as I understood you.

MR. HIRSCHKOP: No, Your Honor. Most of them actually had them on the books.

THE COURT: I see. All right.

MR. HIRSCHKOP: There was some recodification of them. Virginia strove to make a perfect law, and only Georgia followed. And it was expected, from our reading of the history, that many other states would follow, but they just let remain what they had. There were very few repeals in those days. Actually, the great

body of repeal has been since *Brown*, when 13 states have repealed these statutes.

THE COURT: Well, what relevance does that 1924 period have to this?

MR. HIRSCHKOP: Because some of the statutes we have were enacted then. All the registration statutes were enacted in the 1924 period, Your Honor, and these are the statutes, basically, in which you have to have a certificate of racial composition in the State of Virginia, the statutes which we find absolutely most odious, the statutes which reflect back to Nazi Germany and to the present South African situation.

THE COURT: I see.

MR. HIRSCHKOP: But the present bill, as it sits on the books, is that law from 1924, and it was entitled "A Bill to Preserve the Integrity of the White Race" when it was initially issued. It was passed as a bill for racial integrity—to preserve "racial integrity." And we would advance the argument very strongly to the Court that they're not concerned with the racial integrity of the Negro race, only with the white race. In fact, in Virginia it's only a crime for white and Negro to intermarry, and the law is couched in such terms that they say white may only marry white, in Section 20-54 of our law, but it goes on from there to make it a crime only for whites and Negroes to intermarry. There's no crime for a Malaysian to marry a Negro, and it's a valid marriage in Virginia. But it would be a void marriage for a Malaysian or any other race, aside from Negro, to marry a white person. A void marriage, but there would be no criminal penalty against anyone but the white person. They were not concerned with racial integrity, but racial supremacy of the white race. In 1930, they finally, as I said before, went on to say that any person with "traceable Negro blood," was a Negro.

These laws, Your Honors, are ludicrous in their inception, and equally ludicrous in their application. It is not possible to look at just the Virginia laws alone. We have to look at what happened in the whole South, we feel, and the classifications in the South.

It's impossible to say—I won't go into, again, the exact classification of Negroes—but South Carolina and North Carolina make certain Indians white people. In North Carolina a Cherokee Indian from Roanoke County is a white person. All other Cherokee Indians are Negroes. In South Carolina, it's the Catawba Indians. And these laws gave vent to some other very hateful laws. In Mississippi an advocate of social equality, under the miscegenation body of law—it's a criminal penalty—I think it carries one to five years.

If Your Honors please, there are several decisions handed down by states which again point up the racial feelings concerning these laws. The Missouri law is bottomed on *State* v. *Jackson*, which basically held that, if the progeny of a mixed marriage, there would be no further progeny—a fundamentally ridiculous statement. Maybe it wasn't to those men in that day and age, but it certainly is now. And Georgia has an equally ridiculous basis for their laws in *Scott* v. *Georgia*, where they held that, from their daily observances, they see that the offspring of such marriages are effeminate.

And, in this case—and I will refer to the appellant's brief here at page 35—the *Loving* case comes to you based on the case of *Naim* v. *Naim*. Well, what were they talking about in *Naim* v. *Naim*? Again, they wanted to preserve the racial integrity of their citizens. They wanted not to have a mongrel breed of citizens. We find there no requirement that a state shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken and destroy the quality of its citizenship. These are racial, and equal protection thoroughly proscribes these.

In the case before you, the opinion of the lower court by Judge Faseil—and we have it footnoted at page 37 of our brief—he says: "Almighty God created the white, black, yellow, malay and red, and he placed them on separate continents." And I needn't read the whole quote, but it's a fundamentally ludicrous quote, and again that's what they're talking about.

We feel that the very basic wrong of these statutes is that they rob the Negro race of their dignity. Fundamental in the concept of liberty, in the Fourteenth Amendment, is the dignity of the individual, for without that there is no "ordered liberty." We've quoted from numerous authorities—and particularly not from the scientific point—particularly I refer you to the quotes from Gunnar Myrdal, who made a noted study in recent years of this; and not the old studies that are otherwise quoted.

If Your Honors please, there is one other issue that the State raises that I will touch on briefly, and that's the Fourteenth Amendment issue. To begin with, the State advances no history of the Fourteenth Amendment debates themselves. They go to the debates of the 1866 Act, and the Freedmen's Bureau Bill, which did immediately precede the Fourteenth Amendment. And, in their own brief, they have an excellent cite that the Fourteenth Amendment was, in part, designed to provide a firm constitutional basis for the Civil Rights Act.

We would advance that the "in part," is the answer. The Fourteenth Amendment, even if you read the history of the 1866 Act, is much broader in scope. Its language is much broader in

scope. The language of "liberty," "due process," is much broader than the "Rights, privileges and immunities," that were put into the 1866 legislative Act. It was more than an effort to put these laws beyond the grasp of the Congress. It was a greater protection.

And, if Your Honors please, even if you want to take the history of the Civil Rights Bill of 1866, we feel that even in reading that language it wasn't clear that it's up to the Court to decide. Many legislators felt it would proscribe—that the Civil Rights Act itself would proscribe these type of laws in the states. Even various proponents said that amalgamation laws were not touched. And basically what they rely on in their brief, and in their argument in the court below—and I might point out to Your Honors that this was argued fully in the court below, and the Virginia Supreme Court didn't deign to rule on the argument. They pushed it aside and went to the merits of whether these laws were or were not unconstitutional, taking into account the Fourteenth Amendment.

As I recall, this was put before this Court in the *McLaughlin* case—I know it was—and it was put before the lower court in the *McLaughlin* case, this same argument. Now, while *McLaughlin* was cohabitation, I think you'd have to read those both together if they were intended to be reached, because they spoke of amalgamation laws in the arguments in the 1866 Act.

But, even if you were to read the language of Senator Trumble, which they rely on so strongly, what did he really say? Well, at one point, at page 17 of their brief, he says: "I presume there is no discrimination in this respect," and he goes on to talk about his argument: "The law, as I understand it, in all states applies equally." This was the *Pace* reasoning, which this Court has set aside.

But the real tipoff on this, we feel, comes on page 22 where they're quoting Trumble again, and he says: "This bill would not repeal the law to which the Senator refers [replying to Senator Johnson] if there is no discrimination made by it." If there is no discrimination made by it. We submit, very strongly, as has been before the Court many times, that the application of the Fourteenth Amendment is an open-ended application even on these laws, even where we have this argument, because it is "if it's not discriminatory." Your Honors must reach the conclusion as to whether it's discriminatory or not; and it is clearly discriminatory.

We speak of this on page 30 and 31 of our brief, quoting Bickel, a noted constitutional authority. He says, "They were open-ended and meant to be expounded in light of changing times and circumstances." And, quoting this Court, from *Burton* v. *Wilmington Parking Authority,* "Its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relations." There are

any number of such quotes in your opinions in the last ten years. This is the same argument you've had before you all the time: The Fourteenth Amendment doesn't apply.

Your Honors very adequately answered that argument in the *McLaughlin* decision when you said this was the central purpose of the Fourteenth Amendment. And we submit, very strongly, it is the central purpose of the Fourteenth Amendment.

If Your Honors please, resting on the equal protection argument, we fail to see how any reasonable man can but conclude that these laws are slavery laws, were incepted to keep the slaves in their place, were prolonged to keep the slaves in their place, and in truth the Virginia laws still view the Negro race as a slave race. These are the most odious laws to come before the Court. They rob the Negro race of its dignity, and only a decision which will reach the full body of these laws of the State of Virginia will change that. We ask that the Court consider the full spectrum of these laws and not just the criminality, because it's more than the criminality that's at point here. It's the legitimacy of children, the right to inherit land, and many, many rights, and in reaching a decision we ask you to reach it on that basis.

Thank you, Your Honors.

MR. CHIEF JUSTICE WARREN: Mr. Cohen?

ORAL ARGUMENT OF BERNARD S. COHEN, ESQ., ON BEHALF OF APPELLANTS

MR. COHEN: Mr. Chief Justice, may it please the Court:

If we were here merely to obtain a reversal on behalf of Richard Perry Loving and Mildred Jeter Loving, I think Mr. Hirschkop would have presented a cogent and complete argument based upon the equal protection clause, which would leave no court but to find the statute in question unconstitutional.

However, while there is no doubt in our mind that these statutes are unconstitutional and have run afoul of the equal protection clause of the Fourteenth Amendment, we urge with equal strength that the statutes also run afoul of the due process clause of the Fourteenth Amendment.

Now whether one articulates in terms of the right to be free from racial discrimination as being due process under the Fourteenth Amendment, or whether one talks of the right to be free from infringement of basic values implicit in ordered liberty, as Justice Harlan has said in the *Griswold* case citing *Palko* v. *Connecticut*, or if we talk about the right to be free from arbitrary and capricious denials of Fourteenth Amendment liberty, as Mr. Justice White has said in the concurring opinion in *Griswold*, or if

we urge upon this Court to say as it has said before in *Meyer* v. *Nebraska* and *Skinner* v. *Oklahoma*, that marriage is a fundamental right or liberty; and whether we go further and urge that the Court say that this is a fundamental right or liberty retained by the people within the meaning of the Ninth Amendment and within the meaning of liberty in the due process clause of the Fourteenth Amendment—

THE COURT: Surely there's some limit on that? I suppose you would agree that a state could forbid marriage between a brother and a sister, wouldn't you?

MR. COHEN: We have conceded that the State may properly regulate marriages, and regulate divorces, and indeed they have done so and this Court has upheld certain regulations. I don't know whether the issue of consanguinity or affinity has ever been here, but certainly the one that comes to mind first would be the *Reynolds* case, and the polygamy matter; and we have no trouble distinguishing those, and I don't think the Court will, either.

There was no race question—

THE COURT: But you're not now arguing about any race question. You're arguing complete freedom to contract, aren't you, under the due process clause?

MR. COHEN: Well, I have stated that the due process clause has been subject to many articulations. And what I was going to go on to say was that all of these articulations can find some application in this particular case. If you ask me for the strength of the argument of the Fourteenth Amendment due process clause as applied to this case, I urge most strongly that it be on the basis that the Fourteenth Amendment is an amendment to protect against racial discrimination.

However, I do not think that the other arguments are completely invalid. I don't even know if the Court ever has to reach them. But one can still argue that there is liberty and a right to marry, as this Court has said in *Meyer* and *Skinner*. And that, in no way, detracts from our argument that they cannot—the State cannot—infringe upon the right of Richard and Mildred Loving to marry, because of race. These are just not acceptable grounds. We are talking about an arbitrary and capricious ground. And we should have no trouble.

THE COURT: Some people might think, with reason, that it's arbitrary and capricious to forbid first cousins to marry each other. The State where I used to live does have such a law prohibiting first cousins from marrying each other. Now, because a large body of opinion might think that's arbitrary and capricious, does that mean

the State has no constitutional power to pass such a statute?

MR. COHEN: I believe that we run into another step before we can reach that, Your Honor, and that is the burden of coming forth with the evidence. I think that a state can legislate and can restrict marriage, and might even be able to go so far as to restrict marriage between first cousins, as some states have. And I think that if that case were before the Court, they would not have the advantage that we have of a presumption being shifted and a burden being shifted to the state to show that they have a reasonable basis for proscribing as to racial marriages. However, if we were here on a first cousins case, I think we would have the tougher row to hoe, because we would have to come in and show that the proscription was arbitrary and capricious, was not based upon some reasonable grounds, and that is a difficult thing for an appellant to do. Frankly, we are not here with that burden; the State is. And we submit that the State cannot overcome that burden.

Not only do we submit that they cannot, but for the purposes of this case we certainly submit that they have not. Nowhere in the State's brief, nowhere in the legislative history of the Fourteenth Amendment, nowhere in the legislative history of Virginia's anti-miscegenation statutes, is there anything clearer than what Mr. Hirschkop has already elucidated, that these are racial statutes to perpetuate the badges and bonds of slavery. That is not a permissible state action.

THE COURT: Have there been any efforts to repeal this law in Virginia?

MR. COHEN: Your Honor, there have not been any efforts. And I can tell you, from personal experience, that candidates who run for office for the State Legislature have told me that they would, under no circumstances, sacrifice their political lives by attempting to introduce such a bill. There is one candidate who has indicated that he would probably do so, at some time in the future, but most of them have indicated that it would be political suicide in Virginia.

THE COURT: May I ask you if you are arguing the due process question on the theory that even if the Court holds it violates the equal protection clause, it's necessary to go and reach the broad expanses you mentioned?

MR. COHEN: Your Honor, we should be very pleased to have a decision from this Court that all of these statutes are unconstitutional based upon the equal protection clause. However, what we are concerned about is that the Court, if it uses the equal protection argument to find the statute unconstitutional, that there might be

some way that Virginia could possibly get around this by re-enacting a statute that would absolutely only permit whites to marry whites, Negroes to marry Negroes, Malaysians to marry Malaysians, and possibly we might be back here again.

THE COURT: I don't see how that would be possible, if the Court held according to the first argument that this is a plain violation of the equal protection clause.

MR. COHEN: I quite agree, Your Honor, and I do think that the equal protection argument is the strongest argument; it is the correct argument; and it is the basis upon which we strongly urge the Court to rule. We are mostly concerned about a narrow ruling that would not go to the whole section of statutes. There are 10 sections, Sections 20-50 through 20-60, and this is our chief concern, that the Court might not touch the racial composition statute.

THE COURT: The what?

MR. COHEN: The racial composition certificate. Section 20-50 says that anybody in Virginia who applies to the State Registrar of Vital Statistics shall be given a "Certificate of Racial Composition." He goes in and he says to the Clerk of the Court, "I'm white. I want a Certificate of Racial Composition that I'm white." Or, "I'm Negro, and I want a Certificate of Racial Composition that I'm Negro." And, if the Clerk looks at him and believes him, he has him fill out something that certifies that the way it looks to him this person is white, or is Negro, and he sends down to Richmond and gets his Certificate of Racial Composition.

To the best of my knowledge, this has not been used in recent years, and I don't know what its extent was back around 1924, except that the legislative history shows that they brought in the State's Registrar of Vital Statistics, and he testified that there was great confusion under the old law as to who was a member of which race, and that they were having a little bit of difficulty determining who was a member of which race, and who could be proscribed from marrying whom; and called for this very strict statute which now says that white persons may only marry white persons. Therefore, what they've done is to make it a crime for a white person to marry a Negro, or a Negro person to marry a white person. But it's not a crime for a Negro to marry a Malaysian. It's a void marriage in Virginia, and they may be prosecuted for violation of the fornication statutes, but not for violation of the antimiscegenation statute.

Section 20-54 merely makes civil disability apparent in a marriage between a white and a Malaysian, or a Negro and a—

well, we're not exactly sure about that—but between a white, and anybody else but a white, or another Negro, it is not a criminal act, and therefore they are under great civil disability. The children are illegitimate. The wife cannot—

THE COURT: Could that possibly be approved, that the Court should decide straight out that a state cannot prevent marriage—the relationship of marriage—between the whites and the blacks, because of their color?

MR. COHEN: Absolutely not. That would be no problem to us, Your Honor.

THE COURT: That would settle it, wouldn't it?

MR. COHEN: Yes, I think it would.

THE COURT: That would settle it, constitutionally?

MR. COHEN: I believe it would.

The enormity of the injustices involved under this statute merely serves as indicia of how the civil liabilities amount to a denial of due process to the individuals involved. As I started to say before, no matter how we articulate this, no matter which theory of the due process clause, or which emphasis we attach to, no one can articulate it better than Richard Loving, when he said to me: "Mr. Cohen, tell the Court I love my wife, and it is just unfair that I can't live with her in Virginia." I think this very simple layman has a concept of fundamental fairness, and ordered liberty, that he can articulate as a bricklayer that we hope this Court has set out time and time again in its decisions on the due process clause.

With respect to the legislative history urged by the State as being conclusive that the Fourteenth Amendment did not mean to make unconstitutional state statutes prohibiting miscegenation, we want to emphasize three important points: One, only a small group of senators, in any of the debates cited, ever expressed themselves at all with respect to the miscegenation statutes. There are perhaps five or six that are even quoted, and these were for the Freedman's Bureau Bill, and the Civil Rights Act of 1866. If absence of debate ever has any influence at all, this is a classic case. Nowhere has the State been able to cite one item of legislative debate on the Fourteenth Amendment itself with respect to antimiscegenation statutes—not one item. All of their references are to the 1866 Act.

And, again, we point out that those comments were very carefully worded by both the proponents and opponents of the bill. Again, we carefully point out that their own record of the legislative history shows that there were just as many senators who believed that—indeed, especially the southern senators whose states

had antimiscegenation statutes, there were just as many of them who did believe that the passage of the Civil Rights Act of 1866 would invalidate such an act. Their own passages that they've printed in the brief around pages 30 to 33 are replete with support for our argument, that, at best, the legislative history is inconclusive.

And, as this Court has found before and we hope will continue to find, the Fourteenth Amendment is an Amendment which grows and can be applied to situations as our knowledge becomes greater and as our progress is made, and that there will be no problem in finding that this set of statutes in Virginia are odious to the Fourteenth Amendment.

I have been questioned about the right of the State to regulate marriage; and I think that where the Court has found that the State could, in fact, regulate marriage within permissible grounds, they have gone on as they did in the *Reynolds* case to find that the people—that there was a danger to the principles on which the government of the people, to a greater or a lesser extent, rests.

I ask this Court, if the State is urging here that there is some State principle of theirs: What is it? What is the danger to the State of Virginia, of interracial marriage? What is the state of the danger to the people of interracial marriage? This question has been carefully avoided.

MR. CHIEF JUSTICE WARREN: What is the order? Have you agreed upon an order? I would think Mr. Marutani would probably be next. That would be the normal way.

Mr. Marutani, you may proceed.

ORAL ARGUMENT OF WILLIAM M. MARUTANI, ESQ., ON BEHALF OF THE JAPANESE AMERICAN CITIZENS LEAGUE, AS *AMICUS CURIAE*

MR. MARUTANI: Mr. Chief Justice, may it please the Court:

My name is William Marutani, legal counsel for the Japanese American Citizens League, which has filed a brief *amicus curiae* in this appeal. On behalf of the Japanese American Citizens League, I would like to thank this Court for this privilege.

Because the issues before this Court today revolve around the question of race, may I be excused in making a brief personal reference in this regard. As a nisei, that is, an American born and raised in this country, but whose parents came from Japan, I am—and I say this with some trepidation of being challenged—perhaps among those few in this courtroom, along with a few other nisei who happen to be here this morning, who can declare with some degree of certainty the verity of his race. That is, if the

term "race" is defined as an endogamous or in-breeding geographic population group, this being the broad definition of convenience utilized by anthropologists.

Now, those who would trace their ancestry to the European cultures where, over the centuries, there have been invasions, cross-invasions, population shifts, with the inevitable cross-breeding which follows, and particularly those same Europeans who have been part of the melting pot of America, I suggest would have a most difficult, if not impossible, task of establishing what Virginia's antimiscegenation statutes require, namely—and I quote— proving that "no trace whatever of any blood other than Caucasian." This is what Virginia statutes would require.

Incidentally, this presupposes that the term "Caucasian" is susceptible of some meaningful definition, a burden incidentally which Virginia's laws somehow conveniently overlook. But then this same infirmity applies to the remaining 15 states, which have similar antimiscegenation laws.

Now, while the most sophisticated anthropologists, with all their specialized training and expertise, flatly reject the notion of any "pure" race—and in this connection, I refer to the UNESCO proposal, "A Statement on Race," which is attached as Appendix A to the *Amicus* brief, and incidentally also signed by Professor Carlton Coon who is very frequently cited by those who would hold racial differences—now, notwithstanding the fact that anthropologists reject, flatly reject, the concept of any notion of a "pure race," under Section 20-53 of Virginia's law, the Clerk, or the Deputy Clerk, is endowed with the power to determine whether an applicant for a marriage license is, "of pure white race"—the Clerk or his Deputy.

Moreover, the Commonwealth of Virginia would have laymen—that is, clerks, judges, and juries—take vague and scandalous terms such as "colored person," "white person," "Caucasian," and apply them to specific situations, coupled with the power in these laymen to invoke civil and criminal sanctions where in their view and interpretation of these terms the laws of Virginia have been violated. I believe no citation is required to state, or to conclude, that this is vagueness in its grossest sense. I refer the Court, again, to the decision of this Court in *Giaccio* v. *Pennsylvania*, decided in 1966, in which the Court stated that such a law, "which leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not, in each particular case, fails to meet the requirements of the due process clause."

Now, let us assume, *arguendo*, that there are such things as "definable races," within the human species; that these can be defined with sufficient clarity and certainty as to be accurately

applied in particular situations; and, further, let's assume that the State of Virginia's laws do exactly this—and, incidentally, all of this is something that the anthropologists have not been able to do. We submit that, nevertheless, the antimiscegenation laws of Virginia, and its sister states, are unconstitutional. For if the antimiscegenation laws purport to preserve morphologic or physical differences—that is, differences essentially in the shape of the eyes, the size of noses, or the texture of hair, pigmentation of skin—such differences are meaningless and neutral. They serve no proper legislative purpose. To state the proposition itself is to expose the utter absurdity of it.

Moreover, the antimiscegenation laws would take the aspiration of marriage, which is common to all people, and which is otherwise blessed by the State, and which institution incidentally is founded of course upon one of man's biological drives, it would take this and solely on the basis of race, it would convert it into a crime. In *McLaughlin*, where this Court considered a Florida statute which involved, "concepts of sexual decency," dealing with extramarital and premarital promiscuity, this Court nevertheless struck down such a statute, because it was formulated on racial classifications, and thus laid an unequal hand on those who committed intrinsically the same quality of offenses.

Now, for the appellants here, Richard Loving and Mildred Loving, marriage in and of itself is not a crime. It is not an offense, even under Virginia's laws. By Virginia laws, it was their race. It was their race which made it an offense. Incidentally, while Mr. Loving apparently admitted that he was white, and thereby admitted to the fact which rendered his marriage a criminal act under Virginia's laws, it is suggested that he was incapable of making a knowing admission that he was "of pure white race," or "had no trace whatever of any blood other than Caucasian."

Now we further submit that the antimiscegenation laws involve an unequal application of the laws. Virginia's expressed state policy for its antimiscegenation laws has been declared to maintain, "purity of public morals, preservation of racial integrity, as well as racial pride, and to prevent a mongrel breed of citizens." However, under these antimiscegenation laws, since only white persons are prevented from marrying outside of their race, and all other races are free to intermarry, and within this particular context are free thereby to "despoil" one another, and "destroy their racial integrity, purity and pride," Virginia's laws are exposed for exactly what they are: a concept based upon racial superiority, that of the white race, and the white race only.

Now we submit that striking down of the antimiscegenation laws will, first of all, not do certain things. It will not force anyone to do what he presently does not wish to do. It does not force

anyone to marry outside of his race by striking down the antimiscegenation laws. By striking down the antimiscegenation laws, no one is caused to undo anything which he has already done. And, in this connection, perhaps a distinction may be made to the *Brown* case, or the school desegregation cases. On the contrary, by striking down the antimiscegenation laws, freedom of choice will be restored to all individuals, including those who are opposed to racial intermarriage, for the white person who marries another white person does not, under Virginia's laws as they now stand, have any other choice.

We submit that "race" as a factor has no proper place in state laws governing whom a person, by mutual choice, may or may not marry. Now the nature of such statutory intervention upon personal freedom may be exposed by applying the same operative racial principle in reverse. Let us suppose that the State of Virginia exercised its power of determining—of applying this racial principle so that it decreed that every citizen must marry a person of a different race. This would indeed be shocking. That the same operative principle happens to be geared in the way it is presently geared, makes it no less shocking and demeaning to the citizens.

THE COURT: Will you concede, Mr. Marutani, that if the law provided that the other races, so-called, must not intermarry, that the law would be good?

MR. MARUTANI: No, sir, Mr. Chief Justice. We submit that, first of all, it is no answer to compound what we believe to be wrong. Moreover, as a practical matter, who is to determine? Who is to categorize how many "races" there are? The anthropologists range from 2 to 200. They themselves—and they are the so-called "experts," and they are unable to agree—if anthropologists cannot agree, I would assume that it would be extremely difficult for the legislators to determine; and then, having determined it, to apply it.

THE COURT: Yes, sir. The reason I asked you was because there was some intimation in what you've said that they were denied equal protection in that there was not the same prohibition against the intermarrying of the other so-called races.

MR. MARUTANI: I believe the thrust of that argument, sir, is that to expose this law for exactly what it is: It is a white supremacy law.

THE COURT: May I ask you—it's not material, perhaps, in any way, but do you happen to know whether there are any laws in Japan which prohibit the intermarriage between Japanese and what you might call "Caucasians," or "white people"?

MR. MARUTANI: Well, Mr. Justice Black, I might answer that I

do not know, except by custom. I can state, for example, that my own mother would have strenuously objected to my marrying a person of the white race.

Now Mr. Justice Potter, I believe, raised a question as to whether or not the State properly has a function to play in the area of control of marriage. Reference was made to consanguinity. And of course there are other standards: mentality, age—

THE COURT: Age, and I suppose number of spouses?

MR. MARTUANI: Yes.

Now we submit that the racial classification cannot be equated with these standards, because racial classification is not an additional standard which is added, on the same level as these standards which were just enumerated. They are superimposed, over and above all these other standards.

To restate it in another way: The standards of consanguinity, mentality, age, and number of spouse and so forth, apply to all races—white, black, yellow, it doesn't matter—to all races, without any distinction. But now the racial factor is superimposed over and above this, and is therefore not on the same level. It is something different. It is something additional, and over and above, and on a different level.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. McIlwaine?

ORAL ARGUMENT OF R. D. MC ILWAINE III, ESQ., ON BEHALF OF APPELLEE

MR. MC ILWAINE: Mr. Chief Justice, may it please the Court:

As an Assistant Attorney General of the Commonwealth of Virginia, I appear as one of counsel for the appellee, in support of the judgment of the Supreme Court of Appeals of our State affirming the constitutional validity of the two statutes which are involved in this case.

In view of what has been said before, it may not be inappropriate to emphasize that there are only two statutes before this Court for consideration: Sections 20-58 and 20-59 of the Virginia Code. These statutes, in their combined effect, prohibit white people from marrying colored people, and colored people from marrying white people, under the same penal sanctions; and forbid citizens of Virginia of either race from leaving the State with the intent and purpose of evading this law. No other statutes are involved in this case. No attempt has been made by any Virginia official to apply any other statute to the marital relationship before this Court. The decision of the Supreme Court of Appeals of

Virginia can be read from beginning to end without finding any other statute mentioned in it, except 20-58 and 20-59, with the exception of that one provision which relates to the power of a court to suspend the execution of sentence, upon which ground the Supreme Court of Appeals of Virginia referred this case back to the lower court to have a new condition of suspension imposed. With that exception, only two provisions of the Virginia Code are mentioned. Therefore, we take the position that these are the only statutes before the Court, and anything that may have to do with any other provision of the Virginia Code which imposes a prohibition on the white race only, or has to do with certificates of racial composition, whatever they may be, are not properly before this Court. This is a statute which applies to a Virginia situation and forbids the intermarriage of the white and colored races.

THE COURT: I suppose, on the question of equal protection, maybe your section which allows anyone with one-sixteenth or less of Indian blood to intermarry with white would have some significance, would it not, whereas this one says anyone who has a drop of colored blood in them cannot marry with a white?

MR. MC ILWAINE: That would only be significant, Mr. Chief Justice, with respect to that provision, 20-54, which is not before the Court, which says that a white person shall not marry any other save a white person or a person having no other admixture of blood than white and American Indian. That is a special statute. That is the 20-54 statute, against which I myself could find a number of constitutional objections, perhaps, in that it imposes a restriction upon one race alone, which it does not impose on the other races, and therefore more stringently curtails the rights of one racial group.

THE COURT: But you do put a restriction on North American Indians if they have more than one-sixteenth of Indian blood in them, do you not?

MR. MC ILWAINE: Yes, sir. But this is because in Virginia we have only two races of people which are within the territorial boundaries of the State of Virginia in sufficient numbers to constitute a classification with which the legislature must deal. That is why I say the white and colored prohibition here completely controls the racial picture with which Virginia is faced.

THE COURT: You have no Indians in Virginia?

MR. MC ILWAINE: Well, we have Indians, Your Honor, but this is the point we make with respect to them: Under the census of figures of 1960, 69-and-some-hundredths percent of the Virginia

population was made up to white people; 20-and-some-odd-hundreds percent of the Virginia population was made up of colored people. Whites and Negroes, by definition of the United States Department of Commerce, Bureau of the Census. Thus, 99 and 44/100 percent of the Virginia population fall into these two racial categories. All other racial classes in Virginia combined do not constitute as much as one-fourth of one percent of the Virginia population. Therefore, we say that this problem of the intermarriage of whites and orientals, or Negroes and orientals, or any of these two classes with Polynesians or Indians or Asiatic Indians, is not a problem with which Virginia is faced, and one with which it is not required to adapt its policy forbidding interracial marriage to.

A statute, of course, does not have to apply with mathematical precision, but on the basis of Virginia population, we respectfully submit that the statute before the Court in this case does apply almost with mathematical precision, since it covers all the dangers which Virginia has a right to apprehend from interracial marriage, in that it prohibits the intermarriage of those two groups which constitute more than 99 percent of the Virginia population.

Now so far as the particular appellants in this situation are concerned, there is no question of constitutional vagueness or doubtful definition. It is a matter of record, agreed to by all counsel here in the course of this litigation and in the briefs, that one of the appellants here is a white person within the definition of Virginia law, the other appellant is a colored person within the definition of Virginia law. Thus, the Court is simply faced with the proposition of whether or not a state may validly forbid the interracial marriage of two groups—the white and the colored—in the context of the present statute.

THE COURT: Does Virginia have a statute on its books that would prevent an interracial married couple, say from New York never having had any contact with Virginia, from coming and living in Virginia?

MR. MC ILWAINE: No, sir, it does not. We have the question of whether or not that marriage would be recognized as valid in Virginia, even though it was contracted by parties who were not residents of the State of Virginia.

Under the conflict of laws principle that a marriage valid where celebrated is valid everywhere, this would be a serious question. And under Virginia law, it is highly questionable that such a marriage would be recognized in Virginia, especially since Virginia has a very strong policy against interracial marriage; and the implementing statutes declare that marriages between white and colored people shall be absolutely void, without decree of divorce or other

legal process; the implementing statute which forbids Virginia citizens to leave the State for the purpose of evading the law and returning; the exception to the conflict of laws principle that I've stated, that a marriage valid where celebrated would be valid everywhere, except where contrary to the strong local public policy. The Virginia statute here involved does express a strong local public policy against the intermarriage of white and colored people.

Now, with respect to any other interracial marriage, this policy of the Virginia statutes here involved does not express any sentiment at all, and we do not have any decision of the Virginia Supreme Court, Mr. Justice Harlan, which would shed light on that proposition so far as other races are concerned.

THE COURT: So you take the position it would prevent them?

MR. MC ILWAINE: Well, it has been suggested that it would. I do not know whether Virginia, or any state—

THE COURT: —is required to recognize—

MR. MC ILWAINE: Yes, sir, is required to recognize a marriage which is contrary to its own laws, especially with respect to matters within its own state.

Now the appellants, of course, have asserted that the Virginia statute here under attack is violative of the Fourteenth Amendment. We assert that it is not, and we do so on the basis of two contentions and two contentions only. The first contention is that the Fourteenth Amendment, viewed in the light of its legislative history, has no effect whatever upon the power of states to enact antimiscegenation laws, specifically antimiscegenation laws forbidding the intermarriage of white and colored persons, and therefore, as a matter of law, this Court under the Fourteenth Amendment is not authorized to infringe the power of the State; that the Fourteenth Amendment does not, read in the light of its history, touch, much less diminish, the power of the states in this regard.

The second contention, an alternative contention, is that if the Fourteenth Amendment be deemed to apply to state antimiscegenation statutes, then this statute serves a legitimate legislative objective of preventing the sociological and psychological evils which attend interracial marriages, and is an expression—a rational expression—of a policy which Virginia has a right to adopt.

So far as the legislative history of the Amendment is concerned, we do not understand that this Court ever avowed in principle the proposition that it is necessary, in construing the Fourteenth Amendment, to give effect to the intention of the framers. With respect to the instant situation, you are not presented with any question involving a dubious application of certain principles to a

situation which was unforeseen or unknown to those who framed the principles. The precise question before this Court today, the validity under the Fourteenth Amendment of a statute forbidding the marriage of whites and Negroes, was precisely before the Congress of the United States 100 years ago when it adopted the Amendment. The situation is perfectly clear that those who considered the Amendment against a charge of infringing state power to forbid white and colored marriages specifically excluded that power from the scope of the Fourteenth Amendment.

THE COURT: Do you get that from the debates on the Fourteenth Amendment?

MR. MC ILWAINE: Yes, Your Honor. We get it specifically—

THE COURT: Where do you quote that in your brief?

MR. MC ILWAINE: We get it specifically, Your Honor, from the debates leading to the Fourteenth Amendment, the debates on the Freedman's Bureau Bill and the Civil Rights Act of 1866.

THE COURT: That is a little different, though, isn't it?

MR. MC ILWAINE: Only to this extent, Your Honor: The Fourteenth Amendment has been construed by members of this Court a number of times in its historical setting. The Court has said, on a number of instances, that the specific debates on the Freedmen's Bureau Bill and the Civil Rights Act of 1866, which Act ultimately became the first section of the Fourteenth Amendment, are the most material relating to the Fourteenth Amendment.

Now in this situation, by the time the Freedmen's Bureau Bill and the Civil Rights Act of 1866 had been debated and passed, the issue of whether or not the Civil Rights Act of 1866 would infringe the power of the states to pass antimiscegenation statutes was so completely settled that, when the Fourteenth Amendment resolution was brought on, the question was no longer considered to be an open one.

It is said in our brief, and pointed out by our adversaries, that we take the position that the Fourteenth Amendment was designed in part to place the Civil Rights Act of 1866 in the Constitution beyond the reach of shifting Congressional majorities. We say, "in part," only because as Mr. Justice Black has pointed out in his dissent in the *Adamson* case, there were a number of reasons why people thought the first section of the Fourteenth Amendment was included. Some people thought that the Civil Rights Act of 1866 was absolutely unconstitutional, and that it was necessary to pass an amendment to validate it. Others thought that the Act was perfectly constitutional, but that it could be repealed and that it was

necessary to place it in the Constitution to keep it from being repealed. Still others thought that the first section of the Fourteenth Amendment was nothing but the Civil Rights Bill of 1866 in another shape.

Nobody suggested that the Civil Rights Act of 1866 and its adoption into the first section of the Fourteenth Amendment of the Constitution expanded the rights which were covered in the 1866 bill. And certainly no one suggested that what was expressly removed from the 1866 Act was reinserted in the Constitution in the Fourteenth Amendment, within a period of just a few months.

Now the debates on the Civil Rights Act of 1866 clearly show that the proponents—those who had the bill in charge, those who were instrumental in passing the first section of the Fourteenth Amendment—clearly, in answer to questions put by their adversaries, stated in no uncertain terms that the bill had no application to the states' power to forbid marriages between white and colored persons—not simply "amalgamation," but specifically between white and colored persons.

This was repeatedly stated by Senator Trumble, who was Chairman of the Senate Judiciary Committee, who steered the bill to passage and was instrumental in passing the first section of the Fourteenth Amendment; by Senator William Fessendon of Maine, who was the leading Republican member on the Joint Committee on Reconstruction, and by various other Members who supported the bill and steered it to passage.

Now, text writers have disagreed as to whether or not the charge that the Civil Rights Act of 1866 would invalidate state laws was seriously made, or whether it was made for political purposes, simply as a smokescreen. Regardless of the purpose for which it was made, the historical fact remains that the challenge was put by those who disagreed with the Civil Rights Act of 1866, that it would affect the power of the states to pass antimiscegenation statutes, and the proponents and the managers who had the bill in charge absolutely denied that it would have any such effect. No one who voted for, sponsored or espoused the Civil Rights Act of 1866 dared to suggest that it would have the effect of invalidating state antimiscegenation statutes.

Thus we have a clear intent on the part of those who framed and adopted the Amendment to exclude this area of state power from the reach of the Amendment. And this history is buttressed by the fact that the state legislatures which ratified the Amendment clearly did not understand that it would have any effect whatever upon their power to pass antimiscegenation statutes.

THE COURT: Mr. McIlwaine, what do you do with this Court's decision in *McLaughlin* against *Florida*? I don't believe you discussed that in your brief—at least I don't remember that you did.

MR. MC ILWAINE: No, sir, we did not. We simply say that it relates to a statute which is above and beyond, or extraneous to, the interracial marriage statutes, specifically left this question open for future decision, and the question left open in *McLaughlin* is now here.

THE COURT: I understand that, but your adversaries take a great deal of comfort out of *McLaughlin* in theory, in principle, and with respect to the specific points you've been making here.

MR. MC ILWAINE: I do not think they take any comfort from *McLaughlin* with respect to the legislative history of the Fourteenth Amendment, Your Honor. They take comfort, of course, from the dicta of Mr. Justice Stewart that it is impossible for a state under the Fourteenth Amendment to make the criminal act turn upon the color of the skin of the individual. And if that dicta, of course, stands unchallenged, they have reason to take comfort from it in this case. But it has nothing to do with the history of the Fourteenth Amendment, nor do I understand that in *McLaughlin* the Court considered this point.

THE COURT: Well, they take some comfort, too, from the definition of equal protection which was given, and that the *Pace* case was repudiated as being too narrow, simply because the statute in that case, as the statute in this case does, applied equally to the white spouse and the black spouse.

MR. MC ILWAINE: Yes, sir. But we do not put forward the proposition that the *Pace* case does justify this statute. So if you want to take comfort in that, that's—they may be our guests.

We simply say that the power of the state to forbid interracial marriages, if we [illegible] beyond the Fourteenth Amendment, can be justified on other grounds.

THE COURT: Your basic position is that this is outside of the purview of the jurisdiction of this Court, given what you say is the legislative history.

MR. MC ILWAINE: That is our basic position, yes, Your Honor.

THE COURT: But *McLaughlin* could not have been decided—perhaps *McLaughlin* could not have been decided as it was—if the Court had accepted that premise.

MR. MC ILWAINE: The legislative history? Well I don't know that the legislative history would support the proposition with respect to statutes of lewd and lascivious cohabitation, and so forth. My legislative history, or the legislative history which we have set out, specifically relates to interracial marriage.

THE COURT: The legislative history was raised—

MR. MC ILWAINE: Well, so far as this case is concerned, we would like to point out one fact, one circumstance, which we think is analogous. Perhaps the most far-reaching decision of this Court so far as the popular mind is concerned in the last quarter of a century has been *Brown* against *Board of Education*. In that case the matter was argued in 1952, and in 1953 this Court restored the case to the docket for reargument, and entered an order in which it called the attention of all counsel in that case to certain matters which the Court *en banc* wished to have counsel consider.

The first of these questions was—and I am quoting now from the Court's order—"What evidence is there that the Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment, contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?" Now of course it cannot be—no presumption can be indulged that that question was put to the eminent counsel in that case simply as an academic exercise. The matter was material to this Court to determine what the evidence was with respect to the intention of those who adopted the Fourteenth Amendment and the legislatures which ratified it. It was material to the proper disposition of that case.

And in response to that question, on behalf of South Carolina, Mr. John W. Davis filed a brief in excess of 150 pages, and in behalf of the Commonwealth of Virginia the former Attorney General of Virginia and private counsel filed another brief in excess of 150 pages on that point; the current Solicitor General of the United States on behalf of the National Association for the Advancement of Colored People, Mr. Thurgood Marshall, also filed a brief of a similar length, in which both sides of this question were presented to this Court.

In view of the conflict which the Court found there to result, the Court said that the legislative history on this point was unclear. Now that proposition cannot arise in this case, because the legislative history on this point is all one way. No one has been found who has analyzed this problem who has suggested that it was the intention of the framers of the Fourteenth Amendment, or the understanding of the legislatures which ratified it, that the Fourteenth Amendment affected to any degree the power of the states to forbid the intermarriage of white and colored citizens.

THE COURT: What was the basis for the people who spoke to the question who were suggesting that the language of the statute they were then debating did not cover interracial marriage?

MR. MC ILWAINE: For the proponents, in saying that it did not

cover? The bases placed were two: One, that if the statute equally forbade the white race to marry the colored race, and the colored race to marry the white race, then in the opinion of the framers that was not a violation of equal protection or due process. In other words, the classification itself was not a violation. The second was that, historically, the regulation of a marital relationship was within the states and that there was no intent in the Fourteenth Amendment to have any effect at all upon the state's power over marriage. These are the two bases.

THE COURT: But you're arguing that, whether or not that first reason hasn't stood up in terms of Fourteenth Amendment adjudication—

MR. MC ILWAINE: It has no effect upon the intention of the framers.

THE COURT: —the fact that they were wrong, even if they intended to exclude it for the wrong reason, they nevertheless intended to exclude it?

MR. MC ILWAINE: That's correct, Your Honor. How can a subsequent difference in approach of this Court, after the framers of the Fourteenth Amendment are dead and buried, possibly have any effect upon what they intended when they wrote this language?

Now, under this, the language which they used in saying that it had no effect upon the state's power over marriage, they also said, provided no discrimination is made by it. It's clear under the legislative history of the Fourteenth Amendment that if a statute had forbade white people to marry colored people, and then had a different penalty prescribed for violation of that statute, then even the framers of the Fourteenth Amendment would have thought that that would have been unconstitutional; and that the Fourteenth Amendment was specifically designed to meet that difference in penalty proposition.

THE COURT: These debates, or these statements, didn't take place with respect to the Fourteenth Amendment itself?

MR. MC ILWAINE: No, Your Honor. The material which we have set up—

THE COURT: They were contemporaneous?

MR. MC ILWAINE: Absolutely contemporaneous. The Fourteenth Amendment resolution was brought on for consideration in early 1866, and it stayed in committee while the Freedmen's Bureau Bill and the Civil Rights Act of 1866 were steered to passage. Then,

after they were steered to passage, the debate began on the Fourteenth Amendment; and by the time that began, this question of whether or not the Civil Rights Act of 1866 had any effect upon the power of the states to forbid interracial marriages was so thoroughly settled that it did not even become an issue. The question there was whether or not the Act was constitutional or unconstitutional and needed the first section of the Fourteenth Amendment to substantiate it. But no suggestion was ever made that it expanded the Civil Rights of 1866.

Our reading of the legislative history is sufficient to lead us to believe that, if anybody had suggested that it would have that effect, the entire first section of the Fourteenth Amendment would have been lost. No one—the proponents would never have suggested that the Fourteenth Amendment was going to abolish the power of the states to forbid interracial marriage. Thus we say that, if the legislative history is given in this case, the statute of Virginia cannot be held to violate it.

Thank you, Mr. Chief Justice.

[A brief recess is taken.]

MR. CHIEF JUSTICE WARREN: Mr. McIlwaine, you may continue your argument.

CONTINUED ORAL ARGUMENT OF
R. D. MC ILWAINE, ESQ.,
ON BEHALF OF APPELLEES

MR. MC ILWAINE: May it please the Court:

We would sum up the argument which we have made on behalf of the legislative history of the Fourteenth Amendment by referring to a statement of Mr. Justice Black in his dissenting opinion in the recent case of *South Carolina* against *Katzenbach*, two sentences which read as follows:

"I see no reason to read into the Constitution meanings it did not have when it was adopted, and which have not been put into it since. The proceedings of the original Constitutional Convention show, beyond all doubt, that the power to veto or negative state laws was denied Congress."

We respectfully assert that there is no propriety in this Court's reading into the Constitution meanings it did not have when it was adopted, or expanding the reach of the Constitution to embrace a subject which was specifically excluded by the framers.

THE COURT: Mr. McIlwaine, wouldn't it be pretty clear in the absence—in the absence of the specific legislative history to which you refer us—if there just were no history, wouldn't it be pretty

clear that the very purpose of the equal protection clause of the Fourteenth Amendment was to provide that every state had to treat Negro citizens the same as white citizens, so far as their laws go? Isn't that what the equal protection clause means?

MR. MC ILWAINE: Yes, Your Honor, I think it does. I think that's reinforced by the legislative history, and I don't know exactly how to consider the question, aside from the legislative history. But that is clearly indicated in the legislative history itself.

THE COURT: That was the very purpose of the equal protection clause, coming as it did in the wake of the Civil War.

MR. MC ILWAINE: That is correct. But it is clear that the framers understood that, in their intention, a law which equally forbade the members of one race to marry members of another race, with the same penal sanction on both, did treat the individuals of both races equally.

Turning, then, to our alternative argument, which we say can only be reached if the legislative history of the Fourteenth Amendment is ignored, and the Fourteenth Amendment is deemed to reach the state power to enact laws relating to the marriage relationship, we say that the prevention of interracial marriage is a legitimate exercise of the state power, that there is a rational classification, certainly so far as the Virginia population is concerned, for preventing marriages between white and colored people, who make up almost the entirety of the State's population; and that this is supported by the prevailing climate of scientific opinion. We take the position that while there is evidence on both sides of this question, when such a situation exists it is for the legislature to draw its conclusions, and that these conclusions are entitled to weight; and, that unless it can be clearly said that there is no debatable question, that a statute of this type cannot be declared unconstitutional.

We start with the proposition, on this connection, that it is the family which constitutes the structural element of society; and that marriage is the legal basis upon which families are formed. Consequently, this Court has held, in numerous decisions over the years, that society is structured on the institution of marriage; that it has more to do with the welfare and civilizations of a people than any other institution; and that out of the fruits of marriage spring relationships and responsibilities with which the state is necessarily required to deal. Text writers and judicial writers agree that the state has a 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.

It is clear, from the most recent available evidence on the

psycho-sociological aspect of this question that intermarried families are subjected to much greater pressures and problems than are those of the intramarried, and that the State's prohibition of racial intermarriage, for this reason, stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage, or the prescription of minimum ages at which people may marry, and the prevention of the marriage of people who are mentally incompetent.

THE COURT: There are people who have the same feeling about interreligious marriages. But because that may be true, would you think that the State could prohibit people from having interreligious marriages?

MR. MC ILWAINE: I think that the evidence in support of the prohibition of interracial marriages is stronger than that for the prohibition of interreligious marriages; but I think that—

THE COURT: How can you say that?

MR. MC ILWAINE: Well, we say that principally—

THE COURT: Because you believe that?

MR. MC ILWAINE: No, sir. We say it principally on the basis of the authority which we have cited in our brief, particularly this one volume which we have cited from copiously in our brief—

THE COURT: Who wrote that?

MR. MC ILWAINE: This is a book by Dr. Albert I. Gordon, Your Honor, which is characterized as the definitive book on intermarriage, and as the most careful, up-to-date, methodologically sound study of intermarriage in North America that exists. It is entitled *Intermarriage: Interfaith, Interracial, Interethnic.*"

Now, our proposition on the psycho-sociological aspects of this question is bottomed almost exclusively on this particular volume. This is the work of a Jewish rabbi who also has an M.A. in sociology and a Ph.D. in social anthropology. It is a statistical study of over 5,000 marriages which was made by the computers of the Harvard Laboratory of Social Relations and the MIT Computation Center. This book has given statistical form and basis to the proposition that, from a psycho-sociological point of view, interracial marriages are detrimental to the individual, to the family, and to the society.

I do not say that the author of this book would advocate the prohibition of such marriages by law, but we do say that he personally clearly expresses his view as a social scientist that interracial marriages are definitely undesirable; that they hold no

promise for a bright and happy future for mankind; and that interracial marriages bequeath to the progeny of those marriages more psychological problems than parents have a right to bequeath to them.

As I say, this book has been widely accepted, and it was published in 1964 as being the definitive book on intermarriage in North America that exists.

THE COURT: Is he an Orthodox, or an Unorthodox Rabbi?

MR. MC ILWAINE: I have not been able to ascertain that, Your Honor, from any of the material that I've gotten here. He is the Rabbi of the Temple Emmanuel in Newton Center, Massachusetts. I do not understand that, certainly, the religious view of the Orthodox or the Conservative or the Reformed Jewish faiths disagree necessarily on this particular proposition; but I cannot say whether Dr. Gordon is Orthodox or a Reformed Jewish Rabbi.

I am more interested, of course, in his credentials as a scientist, for this purpose, as a Doctor of Social Anthropology and as a Sociologist, than of course I am in his religious affiliations. But it is clear—unmistakeably clear, and we have set it forth, as I say, in our brief and in the appendix to our brief—the results of the study which has been made and which is embodied in this volume. As I say, it was published in 1964, and some of the statements which are made in it are based upon the demonstrably, statistically demonstrably greater, ratio of divorce/annulment in intermarried couples than in intramarried couples. Dr. Gordon has stated it, as his opinion, that "It is my conviction that intermarriage is definitely inadvisable; that they are wrong because they are most frequently, if not solely, entered into under present-day circumstances by people who have a rebellious attitude towards society, self-hatred, neurotic tendencies, immaturity, and other detrimental psychological factors."

THE COURT: You don't know what is cause, and what is effect. Presuming the validity of these statistics, I suppose it could be argued that one reason that marriages of this kind are sometimes unsuccessful is the existence of the kind of laws that are in issue here, and the attitudes that those laws reflect. Isn't that correct?

MR. MC ILWAINE: I think it is more the matter of the attitudes that, perhaps, the laws reflect. I don't find anywhere in this that the existence of the law does it. It is the attitude which society has toward interracial marriages, which in detailing his opposition, he says, "causes a child to have almost insuperable difficulties in identification," and that the problems which the child of an interracial marriage faces are those which no child can come through without damages to himself.

Now, if the State has an interest in marriage, if it has an interest in maximizing the number of stable marriages, and in protecting the progeny of interracial marriages from these problems, then clearly there is scientific evidence available that this is so. It is not infrequent that the children of intermarried parents are referred to not merely as the children of intermarried parents, but as the victims of intermarried parents, and as the martyrs of intermarried parents. These are direct quotes from the volume.

THE COURT: Does Dr. Gordon take the position that there is a basic difference in intelligence in the races?

MR. MC ILWAINE: No, sir. I don't understand that he does, or that he purports to say, one way or the other, about the biological differences. This is not his field. In other words, genetics and biology—he reviews the materials on this, and concludes for the purpose of his study that biologically and genetically there is probably no justification for the prevention of intermarriage. Then he takes it further into the psycho-sociological field, and its effect upon children and upon the intermarried couples; and this is what his views are based upon.

THE COURT: I was wondering what you thought of the findings of this great committee of UNESCO, where about 20 of the greatest anthropologists in the world joined unanimously in making some very cogent findings on the racist view. Do you agree with that? Is your position consistent with what is said by this group?

MR. MC ILWAINE: No, sir. We take two positions with respect to that: One is that the evidence there is negative. They take the position that there is no reliable evidence that there are any harmful consequences of intermarriage. They do not say that the evidence shows conclusively that there are none. Their position in the UNESCO statement is that there is no evidence that there is any harmful effect. That's the first position, that it is negative on this point.

The second position is set out in Appendix C of our brief, in which, the next year after the publication of the UNESCO statement, UNESCO also published another book entitled *The Race Concepts: Results of An Inquiry*, in which it set forth the criticisms that had been levelled at that statement by equally eminent anthropologists and biologists with respect to it. And we have, on page 12 through 22 of the Appendix to our brief, published, extracted from the second UNESCO publication, a symposium of the critiques levelled at the UNESCO statement, as well as other scientists who agreed with the UNESCO statement.

So we say that the UNESCO statement is, by no means, definitive; and it is not a statement which is at all joined in by the scientific community, especially on that point.

THE COURT: I hardly think that the whole scientific community would agree with Mr. Gordon, either, would they?

MR. MC ILWAINE: I dare say they would not, Your Honor. But I do not find that on the psycho-sociological aspects there is any disagreement with his work. No one has challenged the statistics in this work, and it has been widely received—as we have set forth in our brief—as putting statistical form on an embarrassing gap in the literature of the social scientists. And it has been, as I say, received not only by scientists but by religious individuals as well.

THE COURT: It seemed to me that the last paragraph of UNESCO's report is rather definite. It isn't "general" in any sense. It said:

"The biological data given above stand in open contradiction to the tenets of racism. Racist theories can in no way pretend to have any scientific foundation; and the anthropologists should endeavor to prevent the results of their researches from being used in such a biased way that they would serve nonscientific ends."

It's a rather definite finding, it seems to me.

MR. MC ILWAINE: Yes, sir. But there is equally, in the second publication of UNESCO, there is equally stringent criticism of that statement as being an attempt to close a system of knowledge and to state that there is no scientific evidence the other way, when that is simply not the case; and this material which we have set forth in our brief is from the second UNESCO statement. In other words, UNESCO itself realized that its first publication elicited such criticism that it felt bound to put this criticism, as well as others supplementing the UNESCO statement, in a second publication which shows that there is by no means unanimity of agreement on this point.

And we have pointed out in further appendices to our brief, the 1964—the UNESCO statement, of course, was 1951-52—we have pointed out the recent statements of Professor Engle, Professor of Physiology at Chicago University, in which he cautions against interracial marriages on the ground—not of any specific finding of his own—but on the grounds that there has not been sufficient scientific investigation of this matter for a physiologist, at least, to determine the true effects, physiologically speaking, of interracial marrage; and cautions against it. And it is perfectly clear that the libraries are filled with treatises and research studies of a cautionary nature, which advise against it on a biological and

genetic point of view. A number of these were cited in *Perez* against *Sharp* in the dissenting opinion, and we have updated them by the citation of additional authorities, most of which were published in the last five years, which updates that study. Perhaps I can summarize this—

THE COURT: I guess you would agree, wouldn't you, that we can't settle that controversy?

MR. MC ILWAINE: I would, Your Honor.

I have stated clearly in the brief that for the Court to undertake to enter this controversy, the Court would find itself mired in a Sybarian bog of conflicting scientific opinions which, I assure the Court, is sufficiently broad, sufficiently fluid, and sufficiently deep to swallow the entire Federal Judiciary. If you read one volume on this point, you find 20 additional authorities cited in that one volume which you haven't read. By the time you read six articles on this point, you've got a bibliography of 150 books, all on the same subject, pro and con.

THE COURT: May I ask you this question? Aside from all questions of genetics, physiology, psychiatry, sociology, and everything else—aside from all that, forgetting it for the moment—is there any doubt in your mind that the object of these statutes, the basic premise on which they rest, is that the white people are superior to the colored people, and should not be permitted to marry them?

MR. MC ILWAINE: On these, the two statutes before you, Your Honor, I do think that that is not so. So far as 20-54 is concerned, the Act of Virginia of 1924 to Preserve Racial Purity, I think that is unquestionably true.

THE COURT: I'm not talking about what they labelled it. I'm just asking you for your judgment. Is there any possible basis—is not the basic premise on which they're written, that the white people are superior to the colored people, and that they should not therefore be permitted to marry them, because it might "pollute the white race"?

MR. MC ILWAINE: Your Honor, I think that there is—in other words, I think there is a justification for saying that that is not the—

THE COURT: Do you think there's a stronger justification that that is it?

MR. MC ILWAINE: You mean, do I think that historically that the legislatures which enacted them had that thought in mind?

THE COURT: That's right.

MR. MC ILWAINE: Yes. I think that's clear.

THE COURT: The basic thing on which they rested—

MR. MC ILWAINE: On which the original enactments were rested, I think that's perfectly clear; but, Your Honors, I say that you are facing a problem in 1967.

THE COURT: Whether it's 1967 or 1868, it's no difference to me in a discussion of the equal protection of the laws. It is, as I would see it—is it not true that that was the basic reason it was done? And that a man that belongs to this race that is forbidden to marry into the other race is bound to feel that he's not given the equal protection of the laws?

MR. MC ILWAINE: Well, the prohibition, Your Honor, works both ways.

THE COURT: What's that?

MR. MC ILWAINE: The prohibition works both ways. A man that is prohibited from marrying into another race feels inferior. That prohibition also prohibits a white person to marry a colored person.

THE COURT: The prohibition is the same, but it's the common sense and pragmatics of it that it's the result of the old slavery days, the old feeling that the white man was superior to the colored man, which was exactly what the Fourteenth Amendment was adopted to prevent.

MR. MC ILWAINE: Your Honor, I think it is clear that the motivation of the earlier statute, if by the motivation you undertake to analyze the feelings of the individual members of the legislature that were responsible for the adoption of the statutes, I think that is correct. But I do not see how that can effect the constitutional problem which is presented to this Court, where an enactment of the General Assembly of Virginia is on trial, in which we submit that it is beyond the scope of the Fourteenth Amendment, as a first proposition; and as a second proposition, even if it wasn't beyond the scope of the Fourteenth Amendment, and is subjected to due process and equal protection tests, it is a justifiable regulation in view of today's evidence on the point.

THE COURT: Well, I wonder, Mr. McIlwaine, if it does work equally as against both? Now, as counsel pointed out, it prevents—it keeps the white race, as you would say, "pure," but does it keep

the other races that way? You don't have any prohibition against a Negro marrying a Malay, or a Mongolian?

MR. MC ILWAINE: We don't have any prohibition against anyone in Virginia, so far as these statutes are concerned, marrying a Mongol or a Malay.

THE COURT: Well, I know, but if it's to "preserve the purity of the races," why aren't they as much entitled to have the purity of their races protected as the white race is?

MR. MC ILWAINE: They are, Your Honor.

THE COURT: How can you—what prohibits it, under Virginia law? What prohibits a Negro from marrying an Indian? What prevents a Negro from marrying a Japanese or a Malay?

MR. MC ILWAINE: There's nothing; and there's nothing that prohibits the whites, either.

THE COURT: Beg your pardon?

MR. MC ILWAINE: There's nothing that prohibits the whites, either, Your Honor. As I've undertaken to say, Your Honor, the Virginia statute deals with Virginia's situation. The western statutes, where the racial classification of a state may be one-third Caucasian; one-third Negro; and one-third Oriental, those statutes deal with that problem. But the Virginia problem does not present any question of any social evil with which the legislature is obliged to deal resulting from interracial marriage between Negroes and Malays or whites and Malays, because there is no significant population distribution, to that extent, in Virginia.

THE COURT: Well, I understood from the brief of Mr. Marutani that there are 1,750 Japanese in Virginia, according to the last census.

MR. MC ILWAINE: I do not say that this is not so.

THE COURT: Do we deny equal protection to them?

MR. MC ILWAINE: No, sir, because that sort of a racial composition, Your Honor, which constitutes less than one-fourth of one percent, does not present the probability of sufficient interracial marriages and sufficient difficulty for the legislature to be required to deal with it. The legislature in this statute has covered—

THE COURT: You mean, in principle, because there are only a few people of one race in Virginia, that Virginia can say they have no rights?

MR. MC ILWAINE: It isn't a matter of saying they have no rights, Your Honor. It's a matter of saying that they do not present a problem.

THE COURT: You're saying they don't have the same rights as the other race, the white race, to keep their race pure.

MR. MC ILWAINE: We simply say that in Virginia that segment of the population does not present a problem with which we are required to deal. The justification for these statutes—

THE COURT: Because you haven't got enough of them? Is that it?

MR. MC ILWAINE: That is correct. Yes, sir.

THE COURT: Well—

MR. MC ILWAINE: And on that point this Court has clearly said that a statute is not unconstitutional simply because it does not reach every facet of the evil with which it might conceivably deal. Suppose in Virginia there were no Japanese. Would a statute be unconstitutional—suppose Virginia's population was entirely, 100 percent, white and colored, in any proportion you want, but there were no Japanese in Virginia. Would a statute which did not undertake to regulate marriages between Mongols or Malays or Japanese be unconstitutional simply because it didn't regulate a relationship which doesn't even exist, under Virginia law?

Now the fact that there are only a few does not—you cannot inflate this minority group into constitutional significance, when you are talking about the legislature dealing with the problems with which it is likely to be faced. The statute doesn't have to apply, with mathematical nicety; it is sufficient if it reasonably deals with what the legislature can reasonably apprehend to be an evil. And with 99 percent of the population of Virginia in one of these two races, the danger of interracial marriage, insofar as Virginia is concerned, is the danger of marriage between white and colored, not the danger of marriage of either the white or the colored with races which, for all intents and purposes, hardly exist.

As one of the text writers which they have cited in their brief, Mr. Applebaum, in a treatise entitled "Miscegenation Statutes: A Constitutional and Social Problem," which is probably the most balanced analysis of these statutes which we have found, says this: "Coverages of other races in the South is hardly necessary, since they scarcely exist." And surely this is true under the equal protection clause. The Legislature of Virginia is not required to foresee that some day there may be in Virginia a significant population of another racial group which may require Virginia to deal with that problem.

THE COURT: There are a lot of Indians in the South, aren't there?

MR. MC ILWAINE: In the South, generally yes; more in the Midwest, I think.

THE COURT: This man said there weren't.

MR. MC ILWAINE: Very few in Virginia.

As I say, the statistics show that all other races combined, outside of white and Negro, constitute less than 1/100th of 1 percent of Virginia's population, according to the 1960 census. And those figures have not varied more than 1 or 2 percent from the 1950 population figures. So that the problem of other types of interracial marriages which caused interracial marriage statutes of western states to consider the Oriental problem, just simply doesn't exist in Virginia.

THE COURTS: I suppose that if either of us happened to be one of the 1,750 Japanese who are in the State, and you had a law of that kind, we'd feel that we were somewhat demeaned, would we not?

MR. MC ILWAINE: I don't see how we would, Your Honor. I mean so far as this statute is concerned there's no prohibition against whites or Negroes marrying any other races.

THE COURT: Well, there would be, probably, against Japanese marrying whites.

MR. MC ILWAINE: No, sir, not under this statute. There is no prohibition—

THE COURT: It was a rather open question as to what—

MR. MC ILWAINE: Well, they do, Your Honor, because they insist on dragging into this case statutes which are not here, which they can easily attack. I mean it's a well-known strategem to attack the easy statute, which is simply not involved in this case.

THE COURT: Does your statute apply only to "colored people," Negroes?

MR. MC ILWAINE: "White and colored people,"—white and colored people—that's all.

THE COURT: What are "colored"?

MR. MC ILWAINE: Colored people are defined in Virginia statutes the same way they're defined by the United States Department of Census, Your Honor: Those people who have Negro blood or have any mixed Negro blood are considered to be colored people. The Virginia Statute—

THE COURT: It does apply, doesn't it, to American Indians? If anyone has more than one-sixteenth of Indian blood in him, it applies to him, doesn't it?

MR. MC ILWAINE: No, sir. That's 20-54, again.

THE COURT: That's your same body of law in this area, isn't it?

MR. MC ILWAINE: No, sir, because the two statutes which you have involved in this case, Your Honor, were originally started as a prototype in 1691, and they had been on the Virginia books for more than two centuries. The law to which they refer, the law growing out of what they call the "hysteria of the 1920s," is an entirely separate law which was designed to preserve the purity of the white race. It is a statute which is not before this Court, and a statute which we are not defending.

THE COURT: Have you ever declared it to be unconstitutional—

MR. MC ILWAINE: No, sir.

THE COURT: —or invalid?

MR. MC ILWAINE: No, sir. The Virginia courts have not.

THE COURT: It's one of a group of statutes, is it not, intended to make it intolerable or impossible, or to be very burdensome, for white and colored people to marry, and for the Japanese and white people to marry, and all these others? How can they be separated? I don't quite understand that.

MR. MC ILWAINE: They can be separated, Your Honor, because of the fact that historically, and in their coverage, and in the context of this case, they are different.

THE COURT: Are they not all based on the premise of doing something to make it bad, or hard, or difficult, or illegal for the two groups to marry?

MR. MC ILWAINE: The statute before Your Honors is of that nature.

THE COURT: All the groups—

MR. MC ILWAINE: The two groups; but the statute to which they refer, which is not mentioned in the Virginia opinion which has never been applied to them, which is not now applied to them, and which this Court, we respectfully submit, cannot possibly reach, is a statute which forbids a white person to marry any other than a white person.

THE COURT: What effect does that have on a white person and a colored person who married in New York and moved to Virginia to live?

MR. MC ILWAINE: A white person and a colored person who married in New York and moved to Virginia to live, under that statute their marriage would not be recognized in Virginia, under that statute or under this statute.

THE COURT: Under Virginia law?

MR. MC ILWAINE: Under Virginia law.

THE COURT: So that they would be living in adultery?

MR. MC ILWAINE: That's correct, Your Honor—well, either that or—

THE COURT: —fornication?

MR. MC ILWAINE: —fornication, or illicit cohabitation.

THE COURT: Then that could be punished, could it not?

MR. MC ILWAINE: Yes, sir.

THE COURT: As a felony?

MR. MC ILWAINE: No, sir. The marriage, you see, if it were between residents of New York, would not offend either of these two statutes at all. It would be a felony if they were Virginia residents and left the State for that purpose.

THE COURT: I thought you had a general statute that says every marriage between a colored person and a white was void—

MR. MC ILWAINE: That's right.

THE COURT: —without the necessity of a divorce or any other judicial decree?

MR. MC ILWAINE: That's correct, Your Honor.

THE COURT: Then they would be living in adultery, would they not?

MR. MC ILWAINE: No, sir, because Virginia would not recognize the marriage as void, and the offense there would probably be the same type of offense that this Court considered in *McLaughlin* against *Florida*, namely, illicit cohabitation, a misdemeanor.

THE COURT: I understood earlier in your argument that if the

State of Virginia had shown so strong an interest as they have shown in this case, "to preserve the purity of the races," that they probably would not recognize the marriage of another state.

MR. MC ILWAINE: I think that is true, Your Honor, but it does not follow that if they came to Virginia they would be guilty of a felony. Only those citizens of Virginia who purport to engage in a miscegenetic marriage, or who leave the State and go to another state with the intention of returning to Virginia, to evade the law, are guilty of a felony. The legal consequences which would flow from the position you put would be that Virginia would not recognize this couple as being married at all. They would not violate—

THE COURT: Therefore they would fall, under the law, would they not?

MR. MC ILWAINE: Therefore they would fall, under the misdemeanor statutes I believe it is, Your Honor, forbidding illicit cohabitation.

THE COURT: It would be criminal.

MR. MC ILWAINE: It would be criminal, yes.

THE COURT: I thought the other statute which said that cohabitation between whites—or between negroes—was only a misdemeanor, but that if it was between whites and Negroes, it was a felony.

MR. MC ILWAINE: No, sir; that's the Florida case.

THE COURT: Beg your pardon?

MR. MC ILWAINE: That is the Florida case which the Court considered. In Virginia, the law is just a simple, nonracial, illicit cohabitation statute.

In the brief on behalf of appellants—and with this I will move to a conclusion—an article is cited which, as I say, we think to be the best-balanced of the authorities investigating this problem. I suppose that in reading from it I can summarize best the results of an investigation of the materials which are available and the characterization of those materials. The author of that article says this:

"Reference to scientific and sociological evidence of the undesirability of amalgamation is frequently made, but the courts have rarely examined any of this evidence. The California Court in *Perez* made the first real inquiry into the evidence and found that the weight of the evidence refuted the view that the Negro race or that the progeny of interracial marriages is inferior. It is not the purpose of this article to reach any conclusion regarding the available scientific data on the results of miscegenation. It will suffice to indicate,

by a brief survey of the materials, that there may arguably be sufficient evidence on both sides of the controversy to afford some basis for a legislature to take either side." He goes on: "A large number of studies and research projects have concluded that miscegenation is undesirable."

He points out that Justice Shenk, dissenting in *Perez*, cited ten authorities, one of which itself cited ten additional authorities, which would support a legislative finding that amalgamation of the races is inimical to the public welfare. He says that these studies were frequently made by notable scientists and have reached that conclusion.

He then goes on and says: "The authorities finding that interracial intermixture has no harmful effects are also quite numerous." And he considered the authorities available on that point, including the UNESCO statement. And he concludes: "Nonetheless, there is still considerable debate in comparatively recent studies as to the desirability of racial intermixture. Thus, even today, a legislature can find some scientific support for the position that miscegenation should be banned."

He then goes on to say that of course the sociological evidence is even more persuasive in support of a policy against miscegenation. And in the later portion of the article, he takes the position that even if the presumption of the validity of the statute should be reversed and the state were required to carry the burden of justifying the statute as a piece of social legislation, he says that the social harm argument would present a closer case.

He says: "But, again, it is not likely that the state could prove that the social difficulties of the children of miscegenous couples are exceptional enough to overcome a presumption against racial categorization." He's assuming here that the presumption is against the state. "Concrete evidence of the effect upon such children would be difficult to obtain, particularly since miscegenation is not widespread. The state, then, could not present any definite estimate of the potential of the evil it is attempting to prevent. A state might produce a strong case by investing in research, but that would involve considerable time and expense."

Now, of course, we say it involves no time, and the expense is simply an expenditure of $10. The study which he is suggesting should be made to enable the state to carry the burden of justifying the statute, even if the burden were upon the state, has already been made; and it was rolling off the presses even as Mr. Applebaum wrote this article. There is no reference in that—

THE COURT: Assuming, Mr. McIlwaine, that he's correct in his scientific findings, does he equate any of those things to the rights of people under the Fourteenth Amendment to equal protection of the laws?

MR. MC ILWAINE: Yes, indeed, Your Honor.

THE COURT: He does that?

MR. MC ILWAINE: On both sides of the question, yes, Your Honor.

THE COURT: He argues—

MR. MC ILWAINE: He argues both sides of the question.

THE COURT: Is he a legal writer?

MR. MC ILWAINE: Yes, Your Honor. The gentleman in question is a member of the Bar of the District of Columbia, an associate of Covington and Burling in Washington, a B.A. at Yale University, and an LL.B. at Harvard Law School.

He concludes, or I would assume he concludes, that it is necessary for the Court to reverse the presumption in favor of the legislation, to a presumption against the legislation, for these statutes to be declared unconstitutional. If the presumption in favor of the legislation is permitted to prevail, then there is arguable evidence on both sides of this question, and the Court is not justified in overturning the legislative determination on this point. If the presumption is against us, we say that, despite the fact that this article would seem to indicate that the State couldn't carry the burden, he said the particular difficulty would be in the absence of evidence of a sociological nature, which we say is now at hand, and which clearly shows that the State has a justifiable and overriding interest in preventing interracial marriages.

Of course, we go fundamentally to the proposition that for over 100 years, since the Fourteenth Amendment was adopted, numerous states—as late as 1956, the majority of the states—and now even 16 states, have been exercising this power without any question being raised as to the authority of the state to exercise this power.

THE COURT: Those happen to be the same 16 states that have the school segregation laws, do they not?

MR. MC ILWAINE: A number of them are not, Your Honor. Most of them are southern or border states.

THE COURT: Which, among the 16, are not among those that had segregation laws?

MR. MC ILWAINE: Your Honor has asked me a question—I am not sure about the states which had the miscegenation laws. I can give Your Honors the states which now—the 16 states—which have these laws on their books at the present time.

THE COURT: Yes.

MR. MC ILWAINE: But I do not have available the states which had antimiscegenation—I mean school segregation statutes.

THE COURT: No. I'm talking about those 16. I've just been looking at the list, and I can't—I can't see a single one of these states that wasn't among those that had the school segregation laws. You may find one, but I think they're identical.

MR. MC ILWAINE: Well, Missouri—I'm not sure.

THE COURT: Yes, Missouri did have.

MR. MC ILWAINE: Well—

THE COURT: Oklahoma is a border state; it did have it.

MR. MC ILWAINE: Yes, Your Honor.

THE COURT: Well, it isn't a matter of any great consequence.

MR. MC ILWAINE: But, of course, we say that there were 30 states, in 1950, which had these statutes; and those states included a number of the western states—Wyoming, California, and Washington.

THE COURT: And they've all—

MR. MC ILWAINE: They've repealed their statutes, as Maryland has repealed it.

And we say that this would indicate to us that this problem is one which should be left to the legislatures. Each individual state has the right to make this determination for itself, because under the Fourteenth Amendment it was intended to leave the problem here. The judicial decisions contemporaneous with the Fourteenth Amendment, and all of the decisions with the exception of the *Perez* case, since that time have confirmed the common understanding of everyone, that these statutes were not within the scope of the Fourteenth Amendment. And we say it is unlikely that judges from all the states, and from both judiciaries, could have for so long a period of time acted in disregard of the provisions of the Constitution or in any ignora - of what its provisions were intended to accomplish.

THE COURT: Could I ask you a question, before you sit down? Assuming, for the moment, that your historical argument is rejected, how would you rationalize a decision upholding this statute with *Brown* against *The Board of Education*?

MR. MC ILWAINE: You mean rationalize a decision upholding this statute?

THE COURT: Upholding this statute. Assuming, now, that your historical argument is rejected—and I'm expressing no view on that, or intimating no view, whatsoever—but starting from that premise, how would you rationalize a decision upholding the statute, with *Brown* against *The Board*?

MR. MC ILWAINE: Well, I would say that *Brown* against *The Board of Education* proceeded upon the premise that education was fundamental to good citizenship; that it was a necessary requirement of good citizenship that all children were, in the modern age, required to be educated; and that the right to be educated, in the present-day world, was one of overriding importance; and, that that right could not be infringed by a statute which the Court found made the educational opportunities inherently unequal.

THE COURT: Wouldn't you say the right to marry and to bear children is equally important?

MR. MC ILWAINE: I would say that the right to marry, if I were rationalizing the decision upholding it, would under the decisions of this Court—*Meyer* against *Nebraska*, and *Pierce* against the *Society of Sisters*, and *Skinner* against *Oklahoma*—that also say that the right to marry is a right. But there is no requirement that people marry. And, therefore, a statute which forbids marriage is not the same as forbidding children to receive education.

Now, if you say a decision is going to uphold the statute, then you just naturally flow from the fact that marriage is a right; that it cannot be arbitrarily infringed; then if you make the statement that any racial classification necessarily infringes the right, then you have a decision of course which would be consistent with *Brown* against *The Board of Education*, if you take that view.

But, in that case, you do not come to the proposition of the power of the state to forbid interracial marriages, and the interest of the state in doing so on the basis of the valid scientific evidence that exists on the detrimental effects of interracial marriage. I don't see how you can start with a right and come to the proposition that the state statute infringes the right, unless you exclude the evidence which tends to show that the statute in question is rational. Because even rights, the right to marry, is subjected to reasonable limitations by the state. It's always been.

The polygamy statute has never been questioned. The incest statutes have never been questioned. They have, in fact, been specifically upheld, and upheld against the charge, in *Reynolds* v. *The United States*, that the person convicted there had a religious duty to marry. Not that he had a right to marry—his religious tenets as a Mormon required him to marry—and this Court held

that the fact that his religious tenets required him to do so did not prevent him from being convicted criminally from engaging in a polygamous marriage.

So, you can't reach the conclusion that this statute infringes a right under the Fourteenth Amendment without examining evidence on behalf of the State to show that the infringement is a reasonable one; just as reasonable, as far as we can determine—there's far more evidence of the reasonableness of a ban against interracial marriage than there is against polygamous, or incestuous marriages, as far as the scientific proposition is concerned. But I cannot conceive of this Court striking down a polygamy or incest statute on the basis of scientific evidence. And I submit that it would be no more appropriate for this Court to invalidate the miscegenation statute on that basis.

THE COURT: Mr. McIlwaine, didn't we, in the segregation cases, have also argued to us what was supposed to be "scientific evidence" to the effect that the whites would be injured by having to go to school with the Negroes?

MR. MC ILWAINE: Your Honor, I—

THE COURT: Isn't that the same argument you're making here?

MR. MC ILWAINE: Yes, sir, it is. But it is being made in a context in which the evidence in support of the proposition is existing evidence which is voluminous in its character, and which supports the view not of racial superiority or inferiority, but a simple matter of difference; that the difference is such that the progeny of the intermarried are harmed by it; and that the divorce rate arises from the difference, not from the "inferiority," or "superiority," of either race.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE WARREN: Mr. Cohen?

REBUTTAL ORAL ARGUMENT OF BERNARD S. COHEN, ESQ., ON BEHALF OF APPELLANTS

MR. COHEN: The State has made a strong argument in favor of the Court limiting its decision to Sections 20-58 and 20-59, but has very, very carefully avoided the fact that 20-58—which is classified as an evasion statute—is much more than that.

Section 20-58 cannot exist without 20-54, because it refers to a "white person," and there is nowhere else in the Virginia Code that a white person is defined, other than in Section 20-54, which is a general ban on interracial marriage. So, if he says that 20-58 and

20-59 are before this Court, it is absolutely necessary that 20-54 also be considered, because 58 and 59 could not stand, without the definition in 54. In addition, the definition of "colored person," appears in Section 1-14 of the Virginia Code, and similarly is here involved.

These are the very minimum number of sections which could possibly be involved. But we go further. When the Racial Integrity Act of 1924 was passed, it was passed as a single Act, with 10 sections. It is true, and we do not argue with the State, that 20-58 and 59 were Sections which had preexisted the Racial Integrity Act of 1924, and were just added on with the other Sections. But it was part and parcel of one Act, and today the mere fact that it's codified in the Virginia Code with different numbers does not detract from the fact that it was passed as one legislative act on one day, with the same vote, before the Virginia legislature. They are inseparable.

The State has urged that the legislative history is conclusive on the Fourteenth Amendment, and that nobody has stated that the Fourteenth Amendment did expand the meaning of equal protection and due process over and above what was meant to be included in the Civil Rights Act of 1866. In our brief, at page 30, we take issue with this. And, again at page 32, citing Bickel, *The Original Understanding and the Segregation Decision,* we go on to say, referring to the Bickel work, that "A correct appraisal of the legislative history, of the broad guarantees of the Fourteenth Amendment, for purposes of constitutional adjudication, is that they were open-ended and meant to be expounded in light of changing times and circumstances."

On page 32, we indicate that the Bickel article has concluded that the principle of the *Brown* case should control the constitutionality of the miscegenation laws. This is in the Bickel article, "The Least Dangerous Branch," at page 71, published in 1962. This is a definitive work and this is the study of the legislative history of the Fourteenth Amendment that has reached the very conclusion that the State would have us believe nobody can reach.

THE COURT: You can find people on the other side of that article.

MR. COHEN: Oh, yes, Your Honor.

Another point of statutory construction, I think, Your Honor, which I think is very significant: If the framers had the intent to exclude antimiscegenation statutes, it would have taken but a single phrase in the Fourteenth Amendment to say, "excluding antimiscegenation statutes." The language was broad. The language was sweeping. The language was meant to include equal protection for Negroes. That was at the very heart of it, and that equal pro-

tection included the right to marry, as any other human being had the right to marry, subject to only the same limitations.

The State has said that the amount of persons other than Negroes and whites involved is "very insignificant," and "very small." Well, this is the first Negro-white miscegenation case in Virginia to come to the Supreme Court. It is the first Negro-white miscegenation case to go to the Supreme Court of Appeals of Virginia. There have been a handful of others, every single one of them involving a person of what might be called "yellow" extraction, or Malaysian, or Filipinos, and white persons. So, to say that the problem itself is "insignificant" in Virginia is not at all as reflected in the actual case law in Virginia. The case of *Calmer* v. *Calmer* involved a Filipino. The case of *Naim* v. *Naim* involved a possible Oriental whose background was not exactly clear, from the record.

Now, the State is ignoring a very important point, which we cannot overemphasize. If this decision only goes to Sections 58 and 59 of the statute—and that is the right of Richard and Mildred Loving to wake up in the morning, or to go sleep at night, knowing that the sheriff will not be knocking on their door or shining a light in their face in the privacy of their bedroom, for "illicit cohabitation"—if 58 and 59 are found unconstitutional, and 54 is allowed to remain on the books, that is precisely what can happen.

It will be an exact repetition of what, in fact, did happen to them. And this Court will not have given the Lovings the relief they require. The Lovings have the right to go to sleep at night, knowing that should they not awake in the morning their children will have the right to inherit from them, under intestacy. They have the right to be secure in knowing that if they go to sleep and do not wake in the morning, that one of them, a survivor of them, has the right to social security benefits. All of these are denied to them, and they will not be denied to them if the whole antimiscegenation scheme of Virginia, Sections 20-50 through 20-60, are found unconstitutional.

While I do not place great emphasis on Rabbi Gordon, I feel compelled to note that in the State's quotes from Rabbi Gordon, there is conspicuous absence of the following quotation, on appendix page 4, which would fit neatly in the ellipses shown there. Rabbi Gordon states, and it is not printed in the State's brief: "Our democracy would soon be defeated if any group on the American scene was required to cut itself off from contact with persons of other religions or races. The segregation of any group, religious or racial, either voluntarily or involuntarily, is unthinkable and even dangerous to the body politic."

Now Virginia stands here today, and in this *Loving* case, for the first time, tries to find a justification other than white racial supremacy for the existence of its statute. Mr. McIlwaine is quite

candid that this is a current-day justification; not the justification of the framers. On the one hand, I see a little dilemma here. He asks that the Court look to the intent of the framers of the Fourteenth Amendment, but to ignore the framers of the 1924 Act to Preserve Racial Integrity in Virginia. It is not a dilemma I would like to be in.

THE COURT: Well isn't it true that rationalizations and justifications for statutes change, over time?

MR. COHEN: I have no quarrel with that statement, Your Honor.

THE COURT: You're almost in the same dilemma yourself, aren't you, quoting the legislative history of the Virginia statute but claiming that the legislative history of the Fourteenth Amendment isn't important?

MR. COHEN: No, I don't feel that dilemma at all, Your Honor. We do not, for a moment, concede that the legislative history of the Fourteenth Amendment is clear, or conclusive, that they meant to exclude miscegenatic marriages. Mr. Mc[illegible]ine has stood here and, I believe, conceded that the intent of the framers of the 1924 Act of Racial Integrity was a white supremacy act. So I don't feel at all uncomfortable in that situation.

On the one hand, the State urges that it is not necessary to prohibit or for the statute to go against smaller minority groups that exist in Virginia. And I say, then, why have they taken the trouble in Section 54 to prohibit marriages between whites and Malaysians, or whites and anybody else? The fact of the matter is that it is important in the statutory scheme of Virginia to discriminate against anybody but white people.

Now, while there is no definitive case decision as to whether or not a New York couple involved in a miscegenetic marriage moving to Virginia would be prosecuted for a felony—and I admit it might be open to some judicial interpretation—I feel strongly, and I think the Court can reach this decision and I think some authorities writing in law journals have reached the decision, that under Section 20-59, referring to "any white person intermarrying with a colored, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years." I don't see how there's any doubt—appearing in the very same Racial Integrity Act of 1924, five sections after the act which says, "It shall hereafter be unlawful for any white person in this State to marry any save a white person"—I don't see how it is possible to conclude that even a New York couple would not be prosecuted for a felony in Virginia.

In any event, the State has conceded that they certainly would

be guilty of a crime, that of illicit cohabitation, and has left the rest open. We argue that certainly there is no doubt that there are some prosecutors at the lower trial level, some places in Virginia, that would have no compunction whatsoever in going ahead and prosecuting under 59 as a felony, couples moving into the State involved in a miscegenatic marriage.

THE COURT: In New York, they don't have a statute?

MR. COHEN: Not to our knowledge, and to our research, Your Honor.

THE COURT: In any of the northern states?

MR. COHEN: I believe some of the northern states did, Your Honor.

I think the State's position, and the appellants' position, come together and agree on only one point: That the Court should not go into the morass of sociological evidence that is available on both sides of the question. We strongly urge that it is not necessary, and that our position on the equal protection clause of the Fourteenth Amendment and the due process clause of the Fourteenth Amendment, specifically related to it being an anti-racial Amendment, gives this Court sufficient breadth and sufficient depth to invalidate the entire statutory scheme.

Thank you.

[Whereupon, oral argument in the above-entitled matter ceased.]