IN THE

Supreme Court of the United States

October Term, 1966

No. 395

RICHARD PERRY LOVING, ET UX.,
Appellants,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO AFFIRM

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

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PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated October 20, 1966, the Attorney General of Virginia was requested to file a response to the appeal taken from an order of the Supreme Court of Appeals of Virginia in the instant case. In accordance with the request contained in the above-mentioned communication,* written by the Clerk at the direction of this Court, the within response is filed. The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the question sought

to be presented by this appeal, files this statement in opposition to appellants' jurisdictional statement and includes her motion to affirm the judgment of the court below upon the ground that the question on which the decision of this cause depends is so unsubstantial as to obviate further argument.

PRIOR PROCEEDINGS

On January 6, 1959, appellants were convicted in the Circuit Court of Caroline County of leaving the State of Virginia and contracting a miscegenetic marriage in the District of Columbia with the intention of returning to—and actually returning and residing in—Virginia, in violation of Section 20-58 of the Virginia Code. Each appellant was sentenced to serve one year in jail; however these sentences were suspended for a period of twenty-five years upon the provision that appellants would leave Caroline County and the State of Virginia at once and not return together or at the same time to the county or state within such period. Upon payment of costs, appellants were released from custody and further recognizance.

On November 6, 1963, appellants filed in the Circuit Court of Caroline County a motion to vacate the judgment and set aside the sentence therein contained. Thereafter, the trial court filed an opinion indicating its intention to deny the motion, and an order effectuating such opinion was entered on January 22, 1965. Appellants subsequently appealed from this order to the Supreme Court of Appeals of Virginia, and the cause was heard on the merits. On March 7, 1966, the Supreme Court of Appeals of Virginia entered its opinion and order (1) affirming the order of the trial court with respect to the validity of the challenged statute (2) reversing that portion of the order of the trial

* Post, Appendix A.

court upholding the validity of the sentence imposed upon appellants and (3) remanding the cause for further proceedings not inconsistent with the views expressed by the Court on the latter question. See, *Loving et al.* v. *Commonwealth*, 206 Va. 924, 147 S.E.(2d) 78. The case is now before this Court upon an appeal filed by appellants on July 29, 1966.

STATEMENT OF FACTS

Richard Perry Loving, one of the appellants in this case, is a white, male citizen of the United States who was at all times relevant to this litigation a citizen and resident of the Commonwealth of Virginia. Mildred Jeter Loving, the additional appellant in this case, is a Negro, female citizen of the United States who was at all times relevant to this litigation a citizen and resident of the Commonwealth of Virginia. Richard Perry Loving is a "white person" within the definition of the Virginia Code, and Mildred Jeter Loving is a "colored person" within the definition of the Virginia Code.

On or about June 2, 1958, appellants went to the District of Columbia and were there married to each other pursuant to the laws of the District of Columbia. Subsequently, they returned to their residence in Caroline County, Virginia, and at the October Term, 1958, of the Circuit Court of Caroline County, an indictment was filed charging that on the 2nd day of June, 1958, "the said Richard Perry Loving, being a white person and the said Mildred Delores Jeter being a colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caro-

line, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth."

On January 6, 1959, appellants entered pleas of guilty to the charge specified in the indictment, whereupon the court fixed the punishment of each appellant at one year in jail. Thereafter, the court suspended such sentence for a period of twenty-five years upon the provision that both appellants leave Caroline County and the State of Virginia at once and not return together or at the same time to said county and state during the specified period. Upon payment of costs, appellants were released from custody and further recognizance.

THE STATUTES INVOLVED

The statutes under attack in the instant proceedings are Sections 20-58 and 20-59 of the Code of Virginia (1950), which statutes respectively prescribe:

> "§ 20-58—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.
>
> "§ 20-59—If any white person intermarry with a colored person, or any colored person intermarry with a white person, 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.

QUESTION PRESENTED

Are Sections 20-58 and 20-59 of the Virginia Code violative of the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

Sections 20-58 and 20-59 Of The Virginia Code Are Not Violative Of The Fourteenth Amendment To The Constitution Of The United States.

A.

THE PRECISE STATUTES UNDER ATTACK IN THIS CASE

The record discloses that the indictment under which appellants were convicted in the Circuit Court of Caroline County charged that, on June 2, 1958, "Richard Perry Loving being a White person and the said Mildred Dolores Jeter being a Colored person, did unlawfully and feloniously go out of the State of Virginia for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth."

The substantial identity between the language of the indictment quoted above and that contained in Section 20-58 of the Virginia Code (*ante*, p. 4) establishes that appellants were indicted for violation of Section 20-58 of the Virginia Code and that sentence was imposed in accordance with the provisions of Section 20-59 of the Virginia Code as specified in the statute under which the indictment was laid. In this connection, the Supreme Court of Appeals of Virginia pointed out (206 Va. at 925, 147 S.E. (2d) at 79):

> "There is no dispute that Richard Perry Loving is a white person and that Mildred Jeter Loving is a colored person within the meaning of Code, § 20-58. Nor is there any dispute that the actions of the defendants, as set forth in the indictment, violated the provisions of Code, § 20-58."

In light of these circumstances, it is manifest that the instant appellants possess the requisite standing to challenge only the provisions of Sections 20-58 and 20-59 of the Virginia Code and that the Supreme Court of Appeals of Virginia passed upon the validity of these statutes only. So far as the instant litigation is concerned, no official of the Commonwealth of Virginia has undertaken to apply or impose any provision of the remaining statutes comprising Chapter 4 of Title 20 of the Virginia Code to the present appellants. Specifically in this connection, no attempt has been made to bring the marital status of the appellants within the ambit of Section 20-54 of the Virginia Code or its collateral statutes (Sections 20-50, 20-51, 20-52, 20-53 and 20-55) which comprise Chapter 371 of the Acts of Assembly (1924) entitled "An Act to preserve racial integrity." See Appendix B, *post*.

B.

History Of The Fourteenth Amendment.

As pointed out by the Supreme Court of Appeals of Virginia (206 Va. at 926, 147 S.E. (2d) at 80):

> "The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law."

Counsel for appellee submit that the constitutional issue sought to be tendered by the instant appeal has been so thoroughly settled against the position of appellants, and settled by such an exhaustive array of judicial authority, as

to render the question so unsubstantial as to obviate further consideration by this Court.

Initially in this connection, an analysis of the legislative history of the Fourteenth Amendment conclusively establishes the clear understanding—both of the legislators who framed and adopted the Amendment and the legislatures which ratified it—that the Fourteenth Amendment had no application whatever to the anti-miscegenation statutes of the various States and did not interfere in any way with the power of the States to adopt such statutes. The precise question was specifically considered by the framers of the Amendment, and a clear intent to exclude such statutes from the scope of the Fourteenth Amendment was repeatedly made manifest.

The propriety of undertaking a study of the legislative history of the Fourteenth Amendment so that it may be read to effectuate the intent and purposes of the Framers is abundantly supported by numerous decisions of this Court. See, *Bell* v. *Maryland,* 378 U.S. 226, 288-289; *Ullman* v. *United States,* 350 U. S. 422, 428; *Adamson* v. *California,* 332 U. S. 46, 72. Moreover, as this Court has frequently pointed out, the Fourteenth Amendment had its origins in the Civil Rights Act of 1866 and a companion measure, the Freedman's Bureau Bill, and was adopted to provide a firm constitutional basis for the Civil Rights Act of 1866. *Bell* v. *Maryland, supra,* at 292-293, *Adamson* v. *California, supra,* at 68, 107-108. A review of the debates on the bill which ultimately became the Civil Rights Act of 1866, discloses beyond cavil the intention of the Framers to exclude State anti-miscegenation laws from the terms of that enactment. Typical of the observations of the Framers upon the question here under consideration are those of Senator Lyman Trumbull of Illinois and the Honorable C. E. Phelps of Maryland. Senator Trumbull, who had introduced the Civil Rights Bill and was its manager, made

it clear that there was no intent to nullify the anti-miscegenation statutes or constitutional requirements of the various States or to restrict future legislation as to miscegenation. On this point he said:[1]

> ". . . But, says the Senator from Indiana, we have laws in Indiana prohibiting black people from marrying whites, and you are going to disregard these laws? Are our laws enacted for the purpose of preventing amalgamation to be disregarded, and is a man to be punished because he undertakes to enforce them? I beg the Senator from Indiana to read the bill. One of its objects is to secure the same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vice versa?* I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races. *This bill does not interfere with it.* If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both. Make the penalty the same on all classes of people for the same offense, and then no one can complain." (Italics supplied.)

Speaking on the same matter at a later date, Senator Trumbull repeated:[2]

> ". . . The Senator says the laws of Kentucky forbid a white man or woman marrying a negro, and that these laws of Kentucky are to exist forever; that severe

[1] Cong. Globe, 39th Cong., 1st Sess. 322.

[2] Cong. Globe, 39th Cong., 1st Sess., 420.

> penalties are imposed in the State of Kentucky against amalgamation between the white and black races. . . . *But, sir, it is a misrepresentation of this bill to say that it interferes with those laws.* I answered that argument the other day when it was presented by the Senator from Indiana. The bill provides for dealing out the same punishment to people of every color and every race; and if the law of Kentucky forbids the white man to marry the black woman I presume it equally forbids the black woman to marry the white man, and the punishment is alike upon each. All this bill provides for is that there shall be no discriminations in punishments on account of color; and unless the Senator from Kentucky wants to punish the negro more severely for marrying a white person than a white for marrying a negro, the bill will not interfere with his law." (Italics supplied.)

To the same effect were the following observations of the Honorable C. E. Phelps of Maryland:[3]

> "—Efforts have been made, and very ingeniously, by gentlemen opposed to the bill,—by arguing from the language used in the seventh and eighth sections an inference of a design *to control state laws in respect to the marriage relation. Such a construction is not warranted by the terms employed.—*" (Italics supplied.)

In light of the above-quoted observations, it is clear that it was the opinion of those who spoke on behalf of the Civil Rights Act of 1866 that it had no application to State anti-miscegenation statutes. Equally clear is it that the Fourteenth Amendment had no other or broader scope. See, Pittman: "The Fourteenth Amendment: Its Intended Effect On Anti-miscegenation Laws," *The North Carolina Law Review,* Vol. 43 No. 1, December, 1964.

[3] App. to the Cong. Globe, 39 Cong., 1st Sess., p. 75.

If the intent of the State Legislatures which ratified the Fourteenth Amendment is deemed controlling, then surely the question of whether or not the Fourteenth Amendment forbids enactment of anti-miscegenation statutes by the States must be decided contrary to the contention of appellants, for those States which ratified the Fourteenth Amendment clearly signified their intent by continuation of their anti-miscegenation laws contemporaneously with the ratification of the Fourteenth Amendment. In this connection, a comparison of the States which retained their anti-miscegenation laws as late as 1951 with the list of States which ratified the Fourteenth Amendment reveals that a majority of such States maintained their anti-miscegenation laws in force after ratification of the Fourteenth Amendment. See Murray: States' Laws On Race And Color (1951); U.S.C.A. Const. Amend. XIV. Pertinent in this regard is the observation of Mr. Justice Frankfurter in *Adamson* v. *California, supra,* at 64, with respect to an analogous situation involving interpretation of the Fourteenth Amendment:

> "Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It would hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system."

In *In re Hobbs,* 1 Woods 537 (5 Cir., 1871) a Federal court considering a petition for writ of habeas corpus submitted by one arrested for violation of a State anti-miscegenation law held that the Fourteenth Amendment did not invalidate the provisions of the statute in question. More-

over, in *Ex parte Kinney,* 3 Hughes 1 (4 Cir., 1879), a Federal court, construing Virginia's anti-miscegenation statute, held that such statute was not violative of the Fourteenth Amendment.

In addition, as will be pointed out later in this brief, numerous decisions of the highest judicial tribunals of various States have sustained anti-miscegenation statutes against attack under the Fourteenth Amendment. Of such decisions, those contemporaneous with the passage of the Fourteenth Amendment are *Scott* v. *Georgia,* 39 Ga. 323 (1869) and *State* v. *Gibson,* 36 Indiana 389 (1871).

In light of the foregoing, it is clear that—contemporaneously with the adoption of the Fourteenth Amendment —the Congress of the United States, the legislatures of various States ratifying the Fourteenth Amendment, Federal courts and State courts clearly indicated that anti-miscegenation statutes of the various States are not violative of the Fourteenth Amendment.

C.

Judicial Decisions.

Thoroughly consistent with the legislative history of the Fourteenth Amendment is the virtually uninterrupted line of judicial decisions, both Federal and State, in which the constitutional validity of State anti-miscegenation statutes has been sustained against assault under the Fourteenth Amendment. So far as the case at bar is concerned, the very statute currently under attack has been held not violative of the Fourteenth Amendment by a Federal Court of the Fourth Circuit. *Ex parte Kinney,* 3 Hughes 9, 14 Fed. Cases 607. In that case, the United States Circuit Court (now District Court) for the Eastern District of Virginia denied a writ of habeas corpus sought by a Virginia citizen

who had been convicted for violation of what is now Section 20-58 of the Virginia Code. The writ was requested upon the ground, *inter alia*, that the challenged enactment violated the Fourteenth Amendment. Rejecting this contention the Court declared (14 Fed. Cases at 606, 607 608):

> "Congress has made no law relating to marriage. It has not, simply because it has no constitutional power to make laws affecting the domestic relations and regulating the social intercourse of the citizens of a state. *If it were to make such a law for the states, that law would be unconstitutional, and the federal courts would not hesitate to declare it so.*
>
> * * *
>
> "It was competent for the state of Virginia, *so far as there is anything in the constitution and laws of the United States to prevent,* to enact the law just quoted under which the petitioner was convicted. . . .
>
> * * *
>
> "On the whole, I am of the opinion that the law of Virginia, under which this petitioner is detained in prison by the state, *does not violate the constitution or any law of the United States. . . .*" (Italics supplied.)

The most recent decision of a Federal Court on the question of the constitutionality of anti-miscegenation statutes appears to be *Stevens* v. *United States,* 10 Cir., 146 F. (2d) 120. In that case, the Court of Appeals for the Tenth Circuit stated (146 F. (2d) at 123):

> "Section 12, supra, making unlawful marriages between persons of African descent and persons of other races or descents is challenged on the ground that it violates the Fourteenth Amendment. Marriage is a consentient covenant. It is a contract in the sense

that it is entered into by agreement of the parties. But it is more than a civil contract between them, subject to their will and pleasure in respect of effects continuance, or dissolution. *It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state.* A state has power to prescribe by law the age at which persons may enter into marriage, the procedure essential to constitute a valid marriage, the duties and obligations which it creates, and its effects upon the property rights of both parties. *Maynard* v. *Hill,* 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654. *And within the range of permissible adoption of policies deemed to be promotive of the welfare of society as well as the individual members thereof, a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."* (Italics supplied.)

To the same effect are the decisions in a host of cases arising in various jurisdictions, both State and Federal, in which the constitutional validity of State anti-miscegenation statutes has received judicial approbation. See, *Rogers* v. *State,* 37 Ala. App. 638, 73 So. (2d) 389; *State* v. *Pass,* 59 Ariz. 16, 121 P. (2d) 882 (1942); *Dodson* v. *State,* 61 Ark. 57, 31, S.W. 977 (1895); *State* v. *Gibson,* 36 Ind. 389 (1871); *Scott* v. *Georgia,* 39 Ga. 321 (1869); *State* v. *Kennedy,* 76 N.C. 251 (1869); *State* v. *Jackson,* 80 Mo. 175 (1883); *In Re Paquet's Estate,* 101 Ore. 393; 200 P. 911 (1921); *Lonas* v. *State,* 3 Heisell (50 Tenn.) 287 (1871); *Frasher* v. *State,* 3 Tex. App. 263 (1877); *Re Shun T. Takahashi's Estate* 113 Mont. 490, 129 P. (2d) 217 (1942); *In re Hobbs,* 1 Woods 537, 12 Fed. Cases 262 (5th Cir. 1871); *Ex Parte Francois,* 3 Woods 367, 9 Fed. Cases

699 (5th Cir. 1879).

The most recent decisions of State courts upon the question here under consideration are *State* v. *Brown,* 236 La. 562, 108 So. (2d) 233; *Naim* v. *Naim,* 197 Va. 80, 87 S. E. (2d) 749, *remanded* 350 U. S. 891, *aff'd.* 197 Va. 734, 90 S. E. (2d) 849, *app. dism.* 350 U. S. 985; and *Jackson* v. *State,* 37 Ala. App. 519, 72 So. (2d) 114, 260 Ala. 698, 72 So. (2d) 116, *cert. den.* 348 U. S. 888. With respect to the last mentioned of these recent cases, the Supreme Court of Appeals of Virginia pointed out in its opinion in the case at bar (206 Va. at 927, 147 S. E. (2d) at 81):

> "The United States Supreme Court itself has indicated that the *Brown* decision [*Brown* v. *Board of Education,* 347 U. S. 483] does not have the effect upon miscegenation statutes which the defendants claim for it. The *Brown* decision was announced on May 17, 1954. On November 22, 1954, just six months later, the United States Supreme Court denied certiorari in a case in which Alabama's statute forbidding intermarriage between white and colored persons had been upheld against the claim that the statute denied the Negro appellant 'her constitutional right and privilege of intermarrying with a white male person,' and that it violated the Privileges and Immunities, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. *Jackson* v. *State,* 37 Ala. App. 519, 72 So. 2d 114, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U.S. 888, 99 L. ed. 698, 75 S. St. 210."

So uniform has been the course of decisions from the earliest cases decided contemporaneously with the adoption of the Fourteenth Amendment to the most recent decisions of Federal and State courts in the *Stevens, Brown, Naim* and *Jackson* cases, *supra,* that the law applicable to the con-

stitutional issue presented in the case at bar is deemed to be no longer open to question. In this connection, the governing rule is well summarized in 36 Am. Jur. 452, Miscegenation: Section 3, in the following language:

> In accordance with the power of every country to make laws regulating the marriage of its own subjects to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying, *it is considered as well settled that although miscegenation statutes have been persistently attacked on the ground that they are violative of the United States Constitution, they nevertheless constitute a proper exercise of the power of each state to control its own citizens.*" (Italics supplied.)

The above canvassed array of judicial decisions covering a period of almost one hundred years led the Supreme Court of Appeals of Virginia to observe in the instant case (206 Va. at 926, 147 S. E. (2d) at 80):

> "The problem here presented is not new to this court nor to other courts, both state and federal, throughout the country. The question was most recently before this court in 1955, in *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749, remanded 350 U.S. 891, 100 L ed. 784, 76 S. Ct. 151, aff'd. 197 Va. 734, 90 S.E. 2d 849, app. dism. 350 U.S. 985, 100 L. ed. 852, 76 S. Ct. 472.
>
> "In the *Naim* case, the Virginia statutes relating to miscegenatic marriages were fully investigated and their constitutionality was upheld. There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The one exception, it was noted, was the California Supreme

> Court which declared the California miscegenation statutes unconstitutional in *Perez* v. *Sharp,* 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. *Perez* v. *Lippold*).
>
> "The *Naim* opinion, written for the court by Mr. Justice Buchanan, contains an exhaustive survey and citation of authorities, both case and text from both state and federal sources, upon the subject of miscegenation statutes. It is not necessary to repeat all those citations in this opinion because the defendants concede that the *Naim* case, if given effect here, is controlling of the question before us."

In light of the foregoing, counsel for appellee submit it is manifest that Sections 20-58 and 20-59 of the Virginia Code are not violative of the Fourteenth Amendment to the Constitution of the United States.

D.

Wisdom of Statutory Policy.

The historical background of the Fourteenth Amendment and the judicial exposition of the Fourteenth Amendment canvassed in Section B and Section C, respectively, of this statement on behalf of the appellee conclusively demonstrates that—*as a matter of law*—the Fourteenth Amendment has no applicability to the anti-miscegenation statutes of the various States and does not circumscribe to any degree the power of the States to prevent interracial marriages. Under such circumstances, counsel for the appellee assert than any judicial inquiry into the wisdom, propriety or desirability of preventing interracial alliances is utterly forbidden, and any evidence of a scientific nature tending to support or undermine the legislative determination of the propriety or desirability of such a policy would be completely irrelevant and incompetent. The validity of this posi-

tion is abundantly supported by authority. See, 11 Am. Jur: 804, 808-813, Constitutional Law: Section 138; 16 C.J.S. 775-790, Constitutional Law: Section 154.

In this connection, we note that—aside from general rhetoric concerning the alleged arbitrary, capricious and unreasonable nature of the challenged enactment—appellants have not included in their Jurisdictional Statement any reference to scientific treatises or texts tending to support this aspect of their position. However, such references were made in their brief and argument before the Supreme Court of Appeals of Virginia, as the following observation of that Court reveals (206 Va. at 929, 147 S. E. (2d) at 82):

> "The defendants also refer as to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the *Naim* decision is erroneous and that such marriages should not be forbidden by law.
>
> A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term. Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate."

In the Supreme Court of Appeals of Virginia, counsel for appellee successfully asserted the impropriety of any judicial inquiry into the wisdom of the anti-miscegenation policy reflected in the statutes under attack, or any analysis of scientific treatises or texts. We advised that Court (and now respectfully advise this Court) that if it should undertake such an inquiry, it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability

of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view. Here, we only wish to make it clear that our emphasis upon this point was not occasioned by any dearth of scientific materials supportive of the wisdom or desirability of the Virginia statutes. A host of such authorities was carefully catalogued in the twelve page dissenting opinion in *Perez* v. *Sharp,* 32 Cal. (2d) 711, 198 P. (2d) 17 (*sub. nom.—Perez* v. *Lippold*). Moreover, it appears that there has been no diminution in the flood of scientific materials on this subject. See, Gates: *Heredity in Man* (1929); Gates: *Genetics, Taxonomy, and the Races of Man,* 68 *Journal of the Elisha Mitchell Scientific Society* No. 2, (1952); Keith: *A New Theory of Human Evolution* (1949); Darlington: *The Facts of Life* (1956); Mayr: *Animal Species and Evolution* (1963); Coon: *The Origin of Races* (1962). So far as counsel for the Commonwealth have been able to ascertain the most recent scientific treatise upon the propriety or desirability of interracial marriages from the psychological and sociological point of view is that of Dr. Albert I. Gordon, entitled *Intermarriage—Interfaith Interracial, Interethnic* published in 1964. This work has been characterized as the "definitive book on intermarriage" by Dr. Gordon W. Allport, Professor of Psychology at Harvard University, and as "the most careful, up-to-date, methodologically sound study of intermarriage in North America that exists . . ." by Dr. Herbert Gezork, President of the Andover Newton Theological School.

Typical of the findings, observations and conclusions set forth in this most recent treatise upon the subject of interracial marriages are the following:

> [PP. 334-335]
>
> "Inasmuch as we have already noted the higher rate of divorce among the intermarried, is it not proper to

ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?' If there is any possibility that this is likely to occur—and the evidence certainly points in that direction—it would seem that our obligation to children should tend to reduce the number of such marriages.

* * *

[P. 357]

"The argument that persons who oppose intermarriage—religious or racial—are per se 'prejudiced,' may be true of some persons; true, in degree, about others; and yet be completely untrue about still others. The desire to perpetuate one's own religion or to prevent its assimilation is understandable and reasonable. If it were necessary to 'prove' that each of us is entitled to life only because we possess some demonstrably unique or special talent or gift of mind or body, our society would be decimated in short order. Just as no individual needs to explain his desire to live, so it would seem to me that neither races of man nor religious or ethnic groups need offer apologies for their desire to perpetuate themselves. I believe that the tendency to classify all persons who oppose intermarriage as 'prejudiced' is, in itself, a prejudice.

* * *

[PP. 367-368]

"It is my conviction that intermarriage is definitely inadvisable. It places a greater stress and strain upon marriage than is ordinarily true when persons of similar religious views are married. We need not guess about this. In every case of interfaith marriage that we have examined, the facts about the greater strains involved have come to the fore. The fact that divorce and separation rates are higher in these interfaith marriages serves also to support this view.

* * *

"Intermarriages are wrong too because they are often based on the mistaken premise that, in this way, universalism and human brotherhood is assured. Not

only has this theory not been proved—it has rather, been exploded. Two nothings are still nothing. A plus and a minus simply cancel each other out. Nothing of any significance is gained by such a marriage. If all humans on a given day gave up all their differences (an utterly fantastic idea) we might have half a chance. But in the world as we know it such an idea is impracticable if not absurd.

* * *

"As I view it, intermarriage constitutes a threat to society and is not necessarily a promise of a brighter day to come.

* * *

[P. 370]

"Intermarriage, as I view it, holds no promise for a bright and happy future for individuals or for mankind. The evidence, as I view it, is clear on this point. The facts speak for themselves.

* * *

[PP. 372-373]

"The statistical evidence incorporated in this study makes it clear that the 'odds' do not favor intermarriages, in that almost two to four times as many intermarriages as intramarriages end in divorce, separation or annulment. This is a highly significant fact. It is objective and utterly free from emotion-inducing factors. It ought, therefore, to be considered and weighed most carefully.

* * *

"I lay no claim to omniscience or infallibility; hence, I can not claim that the views expressed here are correct in every detail and meet every situation. Both years of study of intermarriage as a concern of the social scientist, and years of intimate personal contact with people who have come to me asking for counsel and assistance with marital problems, make me feel that I may be of assistance to others who contemplate intermarriage. Perhaps our society will change so radically in its views and attitudes within the next

> decade that my views, too, will change. However, I doubt that such a condition is likely to occur. So for the present these views are, I think, worthy of careful consideration and study."

These materials, and others which could be cited by counsel for the appellants, clearly demonstrate the conflicting views of eminent scientific authorities upon the wisdom or desirability of interracial marriages and the prevention of such marriages. In such a situation, it is the exclusive province of the legislature of each State to make the determination for its citizens as to the desirability of a policy of permitting or preventing such alliances—a province which the judiciary may not, under well settled constitutional doctrine, invade. Counsel for the appellee submit, therefore, that such scientific evidence is irrelevant to any proper area of judicial inquiry in the instant case, and that the determination of the General Assembly of Virginia upon this matter should be left undisturbed by this Court.

CONCLUSION

Upon a consideration of the whole matter, the Supreme Court of Appeals of Virginia declared (206 Va. at 929, 147 S. E. (2d) at 82):

> "The defendants direct our attention to numerous federal decisions in the civil rights field in support of their claims that the *Naim* case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law.
>
> "We have given consideration to these decisions, but it must be pointed out that none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized—that there is an overriding state interest in the institution of marriage.
>
> * * *

> "Our one and only function in this instance is to determine whether, for sound judicial considerations, the *Naim* case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case. According that decision all of the weight to which it is entitled under the doctrine of *stare decisis*, we hold it to be binding upon us here and rule that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States."

It is difficult to comprehend how any other conclusion could have been reached. "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature." *Maynard* v. *Hill*, 125 U.S. 190, 205. "Upon it society may be said to be built, and out of its fruit spring social relations and social obligations and duties, with which government is necessarily required to deal." *Reynolds* v. *U.S.*, 98 U.S. 145, 165. Moreover, "under the Constitution the regulation and control of marital and family relationships are reserved to the States . . . [and] . . . the regulation of the incidents of the marital relation involves the exercise by the States of powers of the most vital importance." *Sherrer* v. *Sherrer*, 334 U.S. 343, 354.

The Virginia statutes here under attack reflects a policy which has obtained in this Commonwealth for over two centuries and which still obtains in almost half of the fifty States of the Union. They have stood—compatably with the Fourteenth Amendment, though expressly attacked there-

under—since that Amendment was adopted. Under such circumstances, it is clear that the challenged enactments infringe no constitutional right of the appellee. Counsel for appellee submit therefore that the question upon which the decision of this cause depends is so unsubstantial as to obviate further argument.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

KENNETH C. PATTY
Assistant Attorney General

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for appellee in the above-captioned matter, hereby certify that copies of this Statement of Appellee Opposing Jurisdiction and Motion to Affirm have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first-class postage prepaid, this 17th day of November, 1966, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Bernard S. Cohen, Esq. and Philip J. Hirschkop, Esq., Lainof, Cohen & Cohen, Esq., 1513 King Street, Alexandria, Virginia; Melvin L. Wulf, Esq., 156 Fifth Avenue, New York, New York, and David Carliner, Esq., 1424 16th Street, N.W., Suite 501, Washington, D. C., counsel for appellants.

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Assistant Attorney General

APPENDIX A

Office of the Clerk
Supreme Court of the United States
Washington, D. C., 20543

October 20, 1966

The Honorable Robert Y. Button
Attorney General of Virginia
Richmond, Virginia

RE: LOVING, ET UX. v. VIRGINIA
No. 395, October Term, 1966

Dear Sir:

An appeal from the order of the Supreme Court of Appeals of Virginia (No. 6163), dated March 7, 1966, was filed in this Court on July 29, 1966, in the above-entitled case.

The Court has directed this office to request that you file a response. Such a response usually takes the form of a motion to dismiss or affirm (Rule 16). Forty printed copies of such a motion, together with proof of service thereof, should reach this office on or before November 19, 1966.

Very truly yours,

JOHN F. DAVIS, Clerk
By MICHAEL RODAK, JR.
Deputy Clerk

cc: BERNARD S. COHEN, ESQ.
1513 King Street
Alexandria, Virginia

APPENDIX B

§ 20-50.—The State Registrar of Vital Statistics may prepare a form whereon the racial composition of any individual, as Caucasion, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains and if there be any mixture, then, the racial composition of the parents and other ancestors, insofar as ascertainable, so as to show in what generation such mixture occurred, may be certified by such individual, which form shall be known as a registration certificate. The State Registrar of Vital Statistics may supply to each local registrar a sufficient number of such forms for the purpose of this chapter; each local registrar may, personally or by deputy, as soon as possible after receiving the forms, have made thereon in duplicate a certificate of the racial composition, as aforesaid, of each person resident in his district, who so desires, born before June fourteenth, nineteen hundred and twelve, which certificate shall be made over the signature of such person, or in the case of children under fourteen years of age, over the signature of a parent, guardian, or other person standing in loco parentis. One of such certificates for each person thus registering in every district shall be forwarded to the State Registrar of Vital Statistics for his files; the other shall be kept on file by the local registrar.

Every local registrar may, as soon as practicable, have such registration certificate made by or for each person in his district who so desires, born before June fourteenth, nineteen hundred and twelve, for whom he has not on file a registration certificate, or a birth certificate. (1924, p. 534; Michie Code 1942, § 5099a.)

§ 20-51.—It shall be a felony for any person wilfully or knowingly to make a registration certificate false as to color

or race. The wilful making of a false registration or birth certificate shall be punished by confinement in the penitentiary for one year. (1924, p. 534; Michie Code 1942, § 5099a.)

§ 20-52.—For each registration certificate properly made and returned to the State Registrar of Vital Statistics, the local registrar returning the same shall be entitled to a fee of twenty-five cents, to be paid by the registrant. Application for registration and for transcript may be made direct to the State Registrar, who may retain the fee for expenses of his office. (1924, p. 534; Michie Code 1942, § 5099a.)

§ 20-53.—No marriage license shall be granted until the clerk or deputy clerk has reasonable assurance that the statements as to color of both man and woman are correct.

If there is reasonable cause to disbelieve that applicants are of pure white race, when that fact is stated, the clerk or deputy clerk shall withhold the granting of the license until satisfactory proof is produced that both applicants are "white persons" as provided for in this chapter.

The clerk or deputy clerk shall use the same care to assure himself that both applicants are colored, when that fact is claimed. (1924, p. 534. Michie Code 1942, § 5099a.)

§ 20-54.—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed

and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter. (1924, p. 535; Michie Code 1942, § 5099a.)

§ 20-55.—For carrying out the purposes of this chapter and to provide the necessary clerical assistance, postage and other expenses of the State Registrar of Vital Statistics, twenty per cent of the fees received by local registrars under this chapter shall be paid to the State Bureau of Vital Statistics, which may be expended by the Bureau for the purposes of this chapter. (1924, p. 535; Michie Code 1942, § 5099a.)