LOVING V. VIRGINIA AND WHITE SUPREMACY

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Professor Davis examines a neglected but potentially important aspect of the Supreme Court's opinion in Loving*: the Court acknowledged, for the first and only time, the social construction of white supremacy.*

Loving v. Virginia[1] is celebrated as a declaration of liberty in choosing whom to love and whom to marry. And it did affirm, for the first time, that marriage—and by implication marriage choice—is a right so fundamental as to warrant special protection from government interference. *Loving* is also celebrated for unsettling one of the nation's most potent and pernicious taboos. It roundly rejected the argument that "race-mixing" offends a divine or natural order. But *Loving* is a constitutional milestone for an additional and largely unrecognized reason: *Loving* was the first *and the only* case in which the Supreme Court explicitly recognized the existence of white supremacist social ordering and declared that ordering inconsistent with principles for which the United States has stood, at least since Reconstruction. This essay follows the winding path from the infamous *Plessy v. Ferguson*,[2] through the Court's invalidation of official segregation in *Brown v. Board of Education*,[3] to the *Loving* Court's condemnation of Virginia's anti-miscegenation laws as "measures designed to maintain White Supremacy."[4] It then laments the Court's failure to follow the implications of its belated recognition of the nation's supremacist ordering.

Little needs to be said in this context about *Plessy* itself. It was the Supreme Court's disingenuous response to the Fourteenth Amendment's conferral of citizenship regardless of race and its guarantee of equal protection of the law: it declared that forced racial separation was consistent with the command of equal protection so long as each race was treated equally. In doing so it enabled an apartheid system that has been repeatedly and rightly called "slavery by another name." In response to plaintiffs' argument that forced racial separation is subordinating, the *Plessy* Court insisted that any demeaning implications of racial separation

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1 388 U.S. 1 (1967).

2 163 U.S. 537 (1896).

3 347 U.S. 483 (1954).

4 *Loving*, 388 U.S. at 11.

were figments of the imaginations of those who felt oppressed by it.[5] Separate but equal was ostensibly a racially neutral arrangement.

In a long and brilliant legal struggle to overturn *Plessy*'s separate but equal doctrine in the context of public schooling, civil rights lawyers set out to undermine official segregation by first insisting that racially separate facilities—which were invariably unequal in fact—failed to live up to the *Plessy*-mandated standard of equality. These lawyers understood two things: (1) there was no will to equalize racially segregated facilities, and (2) the challenge of equality was impossible to meet. No will, and no way. The lawyers began their assault at the graduate school level. States facing challenges to exclusively white graduate schools had gone to such lengths as creating new, all-black graduate schools and setting up separate spaces for black students in libraries and classrooms of otherwise all-white schools. The absurdity, the insult, and the inadequacies of these arrangements were apparent. In cases involving graduate schools, the NAACP lawyers persuaded the Court that separate black graduate schools—and separated seating in white graduate schools—did not constitute equal educational opportunity.[6] The NAACP lawyers next went for *Plessy*'s jugular, arguing that official racial separation was inherently unequal, even in segregationists' bastion in the field of education: public elementary schools. And, as most schoolchildren in the United States are now taught, in 1954—nearly one hundred years after the passage of the Fourteenth Amendment—the Court held in *Brown v. Board of Education*[7] that public school segregation is a denial of equal protection. And, as most law students in the United States are now taught, the *Brown* Court based its ruling on a conclusion that segregation in public schooling was hurtful to black children.[8]

This claim of hurtfulness—made by the children's[9] lawyers and seized upon by the Court—resonates uncomfortably with the *Plessy* Court's reference to segregation as a perceived affront. Was the doctrine of separate but equal viable so long as little children were not hurt by it? One might ask why the fact that a practice or policy is hurtful makes it unconstitutional. Couldn't something more forceful and persuasive be said

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5 *Plessy*, 163 U.S. at 551.

6 Sweatt v. Painter, 339 U.S. 629, 633 (1950) (holding that separate law school facilities for black students violated the Equal Protection Clause); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950) (holding that physical separation of black graduate students violated the Equal Protection Clause).

7 347 U.S. 483, 495 (1954).

8 *Id.* at 494.

9 For a discussion of why the children and not the parents were the chosen claimants, see Peggy Cooper Davis, *Performing Interpretation: A Legacy of Civil Rights Lawyering in* Brown v. Board of Education, *in* RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 23, 31–32 (Austin Sarat ed., 1997).

about why school segregation offends the Fourteenth Amendment?

Something more forceful could be said. It was said directly in *Loving*, both by the claimants and by the Court. Both insisted that the United States' system of racial segregation *was designed for the establishment and perpetuation of white supremacy.* The Court relied on "[t]he fact that Virginia prohibit[ed] only interracial marriages involving white persons," on the anti-miscegenation act's title: *An Act to Preserve the Purity of the White Race*, and on the absence of any other compelling justification, to hold that the act's racial classifications "must stand on their own justification, as measures designed to maintain White Supremacy."[10] The claimants' lawyers probed deeper to observe as well that Virginia allowed non-white races to intermarry at will.[11] But the words "white supremacy" were not spoken in *Brown*, either by the Court or, I am sure, by the claimants' lawyers.

The white supremacist character of racial segregation in the United States had been no secret to the *Brown* plaintiffs' legal team. It was, as Charles Black argued so eloquently,[12] a common sense interpretation of the facts of life in the southern states where members of the legal team had practiced extensively. It was the unrefuted conclusion of comprehensive ethnographic analyses of southern culture, the most important of which were conducted and published by a member of the claimants' litigation team.[13] And, finally, it was apparent in the very structure of the system: the presumptively pure white race was kept apart from those with traces of non-white blood. As Professor Black observed, this is the way one deals with a "taint."[14]

The *Brown* Court's—and the *Brown* claimants'—reliance on hurtfulness to unseat Jim Crow segregation made sense as a strategic choice; the image of hurt children could arouse sympathy whereas the charge of white supremacist intent could easily arouse defensiveness and denial. But the reliance on hurtfulness made the *Brown* opinion doctrinally

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10 *Loving*, 388 U.S. at 11.

11 *Id.* at 11 n.11.

12 Charles L. Black, Jr., *The Lawfulness of the Desegregation Decisions*, 69 YALE L.J. 421, 424–26 (1960).

13 Allison Davis was the lead author of a widely acclaimed examination of the American color caste system that documented a deliberate and pervasive system of caste subordination. ALLISON DAVIS, BURLEIGH B. GARDNER & MARY R. GARDNER, DEEP SOUTH: A SOCIAL ANTHROPOLOGICAL STUDY OF CASTE AND CLASS (1941). Davis was one of thirty-two scholars to sign a social scientists' amicus brief in *Brown*, a participant in a three-day conference of black intellectuals held at the NAACP to critique the social science brief, and the brother of John Davis, head of the litigators' social science consultant team. *See* DAVID A. VAREL, THE LOST BLACK SCHOLAR: RESURRECTING ALLISON DAVIS IN AMERICAN SOCIAL THOUGHT 201–03 (forthcoming 2018).

14 Black, *supra* note 12, at 426.

weak. The *Brown* Court's conclusion that public school segregation was hurtful to black children was controversial as a matter of social science,[15] and irrelevant to the Fourteenth Amendment question that *Brown* raised. The ruling was predictably resisted by segregationists, but it was also—and more interestingly—resisted by some proponents of racial justice. Herbert Wechsler, one of the most respected legal scholars in the nation and a self-described civil rights proponent, argued that the *Brown* decision was unprincipled,[16] because he was unable to identify a neutral principle that would trump the principle of free association—the principle that each person has a right to associate, or not, with whomever the person chooses.[17]

It is odd that Wechsler was unable to identify a neutral principle that could dismantle official segregation. Such a principle was announced and enforced as early as 1872 in the miscegenation context and—perhaps surprisingly—by the Alabama Supreme Court.[18] A justice of the peace by the name of Burns had been indicted and convicted of solemnizing the marriage of an interracial couple in Mobile in violation of Alabama law. Fortunately for Mr. Burns, his case was heard during the brief window of time during which a multiracial Reconstruction government was in power and in control of judicial appointments. This was the fleeting golden age during which integrated southern state governments enacted the Reconstruction Amendments' vision of free and equal citizenship after the Union won the Civil War. The Reconstruction Amendments held out the promise of freedom in the Thirteenth (prohibiting slavery), citizenship in the Fourteenth (overturning the Supreme Court's ruling in *Dred Scott v.*

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15 *See, e.g.*, Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 110–17 & nn.116–23 (1993) ("The research cited by the Court in *Brown* has been attacked as an expression of the political values of the liberal community masquerading as social science. The *Brown* studies have been assailed on methodological grounds and for selectively ignoring social science data finding that no harm results from segregation."); Ernest van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 75–77 (1960) (arguing that, if they show anything, the Clark studies show that segregated schools were less damaging to African American self-esteem than integrated schools in the North). For a critique of claims that the African American psyche is damaged by segregation, see DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE 81–86, 96–97 (1997).

16 *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (arguing that "where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it" he could find no "basis in neutral principles for holding that the Constitution demands that the claims for association should prevail").

17 Interestingly, Professor Wechsler singled out anti-miscegenation laws as the only cases of official discrimination in which "it is implicit in the situation that association is desired by the only individuals involved." *Id.* at 34. This absence of coercion did nothing, however, to hasten the Court's invalidation of enforced racial separation with respect to love and marriage.

18 *See* Burns v. State, 48 Ala. 195 (1872).

Sandford[19] that people of African descent could not be citizens), and male voting rights in the Fifteenth (prohibiting the denial of voting rights on the basis of race). People in Alabama, and in the rest of the former confederacy, began to enact the free citizenship that the Reconstruction Amendments had guaranteed. As free black men exercised the right to vote, there began to form integrated, Republican, and progressive state and local governments. It was in this historical moment that the *Burns* case reached the Alabama Supreme Court.

In 1872, during the reign of an integrated, pro-Union government, the Alabama Supreme Court relied on the Fourteenth Amendment (and the Civil Rights Act of 1866[20]) to conclude that because *Dred Scott*'s denial of citizenship to African Americans had been overturned, the wedding celebrants who appeared before Mr. Burns, both of whom were free citizens of the United States, were entitled to marry whomever they chose.[21] This Reconstruction-era Alabama court then gestured toward the anti-caste principle that supports the invalidation of all Jim Crow segregation laws. Anticipating Justice Harlan's dissenting pronouncement in *Plessy* that in the post-Civil War (Re)United States "there is in this country no superior, dominant, ruling class of citizens,"[22] the Alabama court said that the Fourteenth Amendment "destroy[ed] the distinctions of race and color in respect to the rights secured by it," including the right to contract marriage.[23]

Alabama's Reconstruction government was overthrown by 1875, and by 1878 the Alabama Supreme Court, now appointed by those who resisted Reconstruction in favor of "redemption" of the old South, had reversed course to hold that the state controlled domestic relations within its borders and had full power to prohibit interracial sex and marriage.[24] When it was claimed that the Alabama anti-miscegenation law denied equal protection, the post-Reconstruction Alabama court anticipated and embraced *Plessy*'s separate but equal principle, pointing out that Alabama law made black and white participants in interracial liaisons equally liable, each being "punishable for the offense prohibited, in precisely the same manner and to the same extent" with "no discrimination made in favor of the white person, either in the capacity to enter into such a relation, or in the

19 60 U.S. 393 (1857).

20 *See generally* Civil Rights Act of 1866, ch. 31, §§ 1–3, 14 Stat. 27 (codified as amended at 18 U.S.C. § 242 (2012)).

21 *See Burns*, 48 Ala. at 197.

22 Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

23 *Burns*, 48 Ala. at 197.

24 *See* Peter Wallenstein, *Race, Marriage, and the Supreme Court from* Pace v. Alabama *(1883) to* Loving v. Virginia *(1967)*, 2 J. SUP. CT. HIST. 65, 67–69 (1998) and cases cited therein.

penalty."[25]

Federal courts followed suit. In 1883, the Supreme Court considered a case, also arising in Mobile, Alabama, involving Tony Pace and Mary Cox, an interracial couple that was unable to marry under Alabama law, and was found to have cohabited.[26] The conduct of which they were convicted was distinguished from, and carried heavier penalties than, the same conduct committed by a same-race couple, and this disparity was the ground for their appeal. Both the Alabama Supreme Court and the United States Supreme Court relied on the separate but equal principle later enshrined in *Plessy* to uphold the Alabama statutory scheme and the couple's convictions and sentences.[27] Mixed-race cohabitation simply was a more serious crime than same-race cohabitation; in the words of the Alabama court, it threatened "the amalgamation of the two races, producing a mongrel population and a degraded civilization."[28]

It was not until 1964 that the Supreme Court overturned *Pace v. Alabama* and questioned its "separate but equal" premise. *Brown* was behind it, and the "separate but equal" principle had been weakened, if not entirely overruled. When *McLaughlin v. Florida* raised the constitutional legitimacy of another statute punishing same-race and interracial unmarried cohabitation differently, the Court observed that *Pace* represented "a limited view of the Equal Protection clause that ha[d] not withstood analysis in subsequent decisions."[29] Relying on evolved tests of the constitutionality of racial classifications, the Court held that there was inadequate justification for the racial distinction made by the Florida legislature in its unmarried cohabitation statutes.[30] But the Court conspicuously ducked the question whether interracial *marriage* could be prohibited; when Florida argued that its prohibition of interracial cohabitation was a reasonable means of enforcing its ban on interracial marriage, the court *assumed* the constitutionality of Florida's prohibition of interracial marriage, saying simply that the interracial cohabitation penalties had to stand on their own.[31]

There is very good evidence that the Court avoided assessing the constitutionality of mixed-race marriage prohibitions for so many years after *Brown* because it feared exacerbating the furor *Brown* had caused.[32]

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25 Green v. State, 58 Ala. 190, 192 (1877).

26 Pace v. Alabama, 106 U.S. 583 (1882).

27 *See id.* at 584–85; Pace v. State, 69 Ala. 231, 232–33 (1881).

28 *Pace*, 69 Ala. at 232 (1881).

29 379 U.S. 184, 188 (1964).

30 *See id.* at 196.

31 *See id.*

32 The reluctance of both civil rights leaders and Supreme Court justices to address the controversial subject of anti-miscegenation laws is documented in Dorothy E. Roberts, Loving v. Virginia *as a Civil Rights Decision*, 59 N.Y. L. SCH. L. REV. 175, 183–87 (2014).

But the Court's timidity about broaching the miscegenation question is ironic when juxtaposed with its boldness in calling out in *Loving* the flaw in laws mandating racial separation.

The claimants in *Loving* argued directly that anti-miscegenation laws were tools for the establishment and perpetuation of white supremacy.[33] They were designed to maintain caste subordination. This was clear from their history, their wording, and their segregation of "pure" whites and "tainted" others. Considered in these terms, the laws were, as the short-lived Reconstruction judiciary in Alabama had seen in 1872, plainly inconsistent with the Reconstruction Amendments' establishment of free and equal citizenship.

Why did it take so long for the Court to call out *Plessy*'s hypocritical claim that the offensiveness of official racial separation was a "construction" that "the colored race [chose] to put" on it?[34] Perhaps it was because calculated caste subordination is an uncomfortable thing to acknowledge. It is unfortunate, however, that *Loving* is singular in Supreme Court jurisprudence for having acknowledged it. Had the Court held to the *Loving* Court's appreciation of deliberately structured mechanisms for maintaining white supremacy, our constitutional jurisprudence might have evolved differently in more ways than I am able to imagine. It might have fully accepted the legitimacy of affirmative measures to remedy discrimination in employment, housing, or schools.[35] It might have appreciated more deeply the urgency of measures to protect access to the franchise.[36] It might have been bolder in confronting racial bias in criminal prosecution, conviction, and sentencing.[37] And it might have been open to the idea that, in a just society, the government may have affirmative duties of equalizing protection and support.[38]

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33 *See* Loving v. Virginia, 388 U.S. 1, 11 n.11 (1967).

34 Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

35 *Cf.* Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016) (affirming that strict scrutiny must be applied to race-based affirmative measures for determining school admissions).

36 *Cf.* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) (questioning the need to continue preclearance requirements under the Voting Rights Act).

37 *Cf.* McCleskey v. Kemp, 481 U.S. 279 (1987) (upholding a death sentence arrived at in a sentencing system that disproportionately sentenced black defendants to death when the victims were white).

38 *Cf.* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (finding that a state had no constitutional duty to protect against domestic violence).