Regulating White Desire

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REGULATING WHITE DESIRE

REGINALD OH*

I. Introduction ................................................................................ 463
II. Loving v. Virginia....................................................................... 465
III. The Greatest Threat to the Purity of the White Race: Social Equality Through Interracial Marriage...................................... .468
IV. Miscegenation and Segregation Laws and the Legal Enforcement of White Racial Endogamy ......................................................... 476
A. The Enforcement of White Endogamy Norms During and After Slavery .................................................................................. 476
B. White Racial Endogamy and the Segregation of Public Schools ................................................................................................. 478
C. The Regulation of White Women’s Desires .................................... 482
V. Back to Loving ........................................................................... 485
VI. Conclusion ................................................................................ 487

I. INTRODUCTION

In the landmark decision Loving v. Virginia, the United States Supreme Court held that laws prohibiting interracial marriages violated the Fourteenth Amendment’s Equal Protection Clause because they served the impermissible purpose of maintaining white supremacy.¹ The Commonwealth of Virginia had argued that, because the law equally punished whites and blacks, it did not illegitimately single out African Americans for discriminatory treatment.² In striking down the statute, the

* Professor of Law, Cleveland Marshall College of Law, Cleveland State University. I want to first thank my colleagues who participated in the symposium: Richard Banks, Tonya Brito, Jennifer Chacon, Tucker Culbertson, Rashmi Goel, Kevin Johnson, Rachel Moran, Adele Morrison, Carla Pratt, and Catherine Smith. I want to particularly thank Angela Onwuachi-Willig and Camille Nelson for their dedication and commitment to this project. I also want to thank Odeana Neal for her comments on an earlier draft, the Wisconsin Law Review editors for putting together a wonderful live symposium and for making careful edits and suggestions on my article, and Dean Cynthia Fountaine of the Texas Wesleyan University School of Law for financially supporting the project. Finally, a special thanks to my wife Katharine Hahn for her encouragement, support, and love.

¹ See 388 U.S. 1 (1967).
² See id. at 7-8.
Court rejected the notion that the equal application of miscegenation laws made them consistent with equal protection.\(^3\)

The Court, however, never adequately addressed an apparent flaw in its reasoning. According to conventional understandings of how white supremacy operates, laws promoting white supremacy are supposed to invidiously discriminate against blacks while benefiting whites. But how can miscegenation laws promote white supremacy and the interests of whites if the laws actually restrict their fundamental right of association and punish them if they cross racial boundaries? Was the Court contending that miscegenation laws promoted white supremacy in spite of their incidental effects on the individual rights of whites?

This Article will argue that miscegenation laws functioned to promote the supremacy of the white race by, paradoxically, deliberately regulating and restricting the liberty of white individuals. Segregationists feared that some whites, particularly women and children, wanted to relate to blacks as social equals. Without legal restrictions on the associational rights of whites, segregationists feared that blacks would gain social equality and freely enter into equal intimate relations—and ultimately marriages—with them. This would result in more interracial families, and inevitably end in the creation of a nation of a “mongrel breed of citizens.”\(^4\)

This Article contends that segregationist justifications for miscegenation and segregation laws show that those laws effectively imposed a legal duty on whites to adhere to cultural norms of endogamy. Dominant social groups enforce rules of endogamy—the cultural practice of encouraging people to marry within their own social group—to protect the dominant status of their individual members and of the social group in general. Thus, laws prohibiting interracial marriages regulated white desire in order to protect the dominant status of whites as a group. The Loving Court, therefore, ultimately was correct in declaring that miscegenation laws denied blacks equal protection.

Part II of this Article discusses miscegenation laws and the Loving decision. It contends that the Court understood that miscegenation laws operated to protect white supremacy, but that it failed to adequately explain how such laws did so. Part III argues that the primary rationale used to justify these laws was the protection of the purity of the white race. Part IV will explain these laws’ history and demonstrate that segregationists enacted and supported them to ensure that whites practiced endogamy. Part V concludes by reexamining the Loving decision in light of this Article’s analysis.

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3. Id. at 8.
4. Id. at 7 (quoting Nairn v. Nairn, 87 S.E.2d 749, 756 (Va. 1955)).
II. LOVING V. VIRGINIA

In Loving, the Supreme Court had to determine whether laws banning interracial marriages violated the Fourteenth Amendment. The case involved an interracial couple who challenged their conviction under Virginia’s Racial Integrity Act. The Act made it a felony for a white person to intermarry with a “colored person” and rendered any such marriages void. While the statute required that a white person marry only another white person, it permitted members of nonwhite races to freely marry members of other nonwhite races. The statute also prohibited interracial couples from marrying outside the state and then living in Virginia as a married couple. Mildred Jeter, an African American woman, and Richard Loving, a white man, had violated the statute by getting married in Washington D.C. and then later returning to Virginia.

Decided in 1967, Loving was a foregone conclusion. The case was decided at the height of the civil-rights movement when the Court was poised to put some teeth into Brown v. Board of Education and impose a duty on segregated school districts to racially integrate their schools. The Court could have decided the constitutionality of miscegenation laws as early as 1955, shortly after it decided Brown. In Naim v. Naim, a Chinese sailor challenged the constitutionality of Virginia’s Racial Integrity Act, contending that his marriage had been improperly annulled solely on the basis that it was between a white person and a Chinese person. The Court, wanting to avoid handing down another potentially

5. See id. at 2.
6. See id. at 2-3, 6.
7. Id. at 4 (quoting Va. Code Ann. § 20-59 (1960)).
9. See id. § 20-54.
10. See id. § 20-58.
11. See Loving, 388 U.S. at 3.
controversial decision so soon after Brown, dismissed the case on jurisdictional grounds.

By 1967, however, the Court was clearly ready to further alter the status quo in the South. Nonetheless, miscegenation laws posed difficult doctrinal questions—questions that the Loving Court failed to adequately address. With respect to its equal protection analysis, the Court concluded that the Fourteenth Amendment compelled the invalidation of laws that banned interracial marriages because such laws violated “the central meaning of the Equal Protection Clause.” The Court reached its conclusion by first formulating the contours of modern equal protection suspect-class analysis. It noted, without much explanation, that certain racial classifications, especially those used in criminal statutes, are suspect and must be “subjected to the ‘most rigid scrutiny.’” For a suspect racial classification to be upheld, it “must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.”

The Court began its strict scrutiny analysis by identifying Virginia’s purported interests in prohibiting interracial marriages. The Court referred to the Virginia Supreme Court’s decision in Naim v. Naim and noted that Virginia’s interest was “to preserve the racial integrity of its

15. See Dennis J. Hutchinson, Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958, 68 GEO. L.J. 1, 61 (1979) (citing STEPHEN L. WASBY ET AL., DESEGREGATION FROM BROWN TO ALEXANDER (1977)).
16. See Naim v. Naim, 350 U.S. 985 (1956); see also Dorr, supra note 14, at 120.
17. See Dorr, supra note 14, at 159 (“The radical restructuring of American political and social mores occurring throughout the 1960s created the ideological room-for-maneuver necessary for a successful constitutional challenge to the Racial Integrity Act.”).
19. See id. at 11.
20. Id. (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)). In explaining why such racial classifications are suspect, the Court quoted from its opinion in Hirabayashi v. United States, 320 U.S. 81 (1943). See Loving, 388 U.S. at 11. In that case, the Court declared that racial classifications are “odious to a free people whose institutions are founded upon the doctrine of equality.” Hirabayashi, 320 U.S. at 100. The Court, however, failed to explain why or how certain racial classifications are “odious to a free people.” Moreover, it is important to note that, in Loving, the Court never stated that all laws that rely on racial classifications are suspect. Rather, it qualified its statement by noting that particular racial classifications in particular contexts are suspect. See Loving, 388 U.S. at 11. The qualified nature of the Court’s suspect-classification analysis is important because it is clear that the Court did not mean that all racial classifications, whether invidious or benign, are necessarily suspect. Thus, the actual reasoning in Loving does not speak to, for example, whether race-conscious affirmative-action programs should be subject to same level of scrutiny used to analyze Jim Crow laws.
citizens,' and to prevent the 'corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride . . . .'). The Court concluded that those purposes were "obviously an endorsement of the doctrine of White Supremacy" and held that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."

The Court also held that miscegenation laws violated substantive due process by infringing on the Lovings' fundamental right to marry. It declared that "marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." Moreover, denying that fundamental right on the basis of race deprived "all of the State's citizens of liberty without due process of law." The Court concluded that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

While the Court's analysis in Loving was cursory and superficial, it is difficult to contest its conclusion. The Court's reasoning, however, failed to adequately answer several important questions. First, the Court did not explain why miscegenation statutes that punished whites as well as blacks should be subject to strict scrutiny. Virginia argued that because the law punished all violators equally, it did not deny blacks the equal protection of the laws. The Court ultimately rejected the equal-application argument by declaring that punishing whites and blacks equally did not make the law nondiscriminatory. It reasoned that such laws, because they employ racial classifications, are still suspect. This answer, however, begs the question: why should a racial classification that does not solely target a discrete and insular minority be suspect?

The Court cited the Japanese internment decision Korematsu v. United

22. Id. at 7 (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)).
23. Id.
24. Id. at 12.
25. See id.
26. Id. (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
27. Id.
28. Id.
29. Id. at 10.
30. Id.; see also Pace v. Alabama, 106 U.S. 583 (1883) (holding that a fornication statute imposing greater penalties on an interracial couple than on a same-race couple did not violate equal protection because it punished blacks and whites equally).
31. Loving, 388 U.S. at 8.
32. See id. at 11.
33. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (arguing that strict judicial scrutiny is appropriate when a law discriminates against a discrete and insular minority).
States\textsuperscript{34} to justify its application of strict scrutiny. In \textit{Korematsu}, however, the racial classification was deemed suspect because the government singled out a racial minority and deprived only that group of their civil liberties.\textsuperscript{35} This was not the case in \textit{Loving}.

Second, the Court also failed to satisfactorily explain how a law that restricted whites’ fundamental right to marry promoted the supremacy of whites. Miscegenation laws restricted the fundamental right of association for whites as well as blacks. Moreover, the law arguably was even more restrictive of white liberty, given that members of nonwhite races were free to marry a person outside of their race as long as that person was not white, while whites could only marry within their race.\textsuperscript{36}

\section*{III. The Greatest Threat to the Purity of the White Race: Social Equality Through Interracial Marriage}

For segregationists, the goal of miscegenation and segregation laws was to protect the purity or integrity of the white race.\textsuperscript{37} As the Mississippi Supreme Court in \textit{Rice v. Gong Lum} declared, “To all persons acquainted with the social conditions of this state and of the Southern states generally it is well known that it is the earnest desire of the white race to preserve its racial integrity and purity . . . .”\textsuperscript{38} The court observed that the Mississippi State Constitution prohibited interracial marriages only between whites and racial minorities.\textsuperscript{39} The court also asserted that “[w]hen the public school system was being created it was

\textsuperscript{34} 323 U.S. 214 (1944) (upholding the constitutionality of Japanese imprisonment during World War II).
\textsuperscript{35} See \textit{id.} at 216.
\textsuperscript{36} See \textit{Loving}, 388 U.S. at 11.
\textsuperscript{37} See \textit{id.} at 50 (arguing that “racial segregation is necessary to preserve [white] racial integrity”).
\textsuperscript{38} \textit{Rice v. Gong Lum}, 104 So. 105, 108 (Miss. 1925); \textit{Loving v. Virginia}, 388 U.S. 1, 11-12 (asserting that Virginia’s miscegenation statute was designed to protect white supremacy because it required whites to marry only other whites but freely permitted members of different minority races to intermarry one another). Although proponents of Jim Crow sometimes talked about the desire to protect the integrity of all races through miscegenation and segregation laws, they ultimately were concerned about protecting the purity of the white race. \textit{See Gong Lum}, 104 So. 110 (“Race amalgamation has been frowned on by Southern civilization always, and our people have always been of the opinion that it was better for all races to preserve their purity. However, the segregation laws have been so shaped as to show by their terms that it was the white race that was intended to be separated from the other races.”); Lisa Lindquist Dorr, \textit{Gender, Eugenics, and Virginia’s Racial Integrity Acts of the 1920s}, 11 J. WOMEN’S HIST. 143, 144 (1999) (noting that Virginia’s 1924 miscegenation law purported to protect integrity of all races but the statute only defined whites and did not prohibit interracial marriages between different racial minority groups).
\textsuperscript{39} \textit{Gong Lum}, 104 So. at 108.
intended that the white race should be separate from all other races.” Accordingly, it concluded that the clear "dominant purpose" of those provisions "was to preserve the integrity and purity of the white race." It then held that a Chinese American child could not attend any school designated for white children, because her exclusion was necessary to protect the purity of white children.

In protecting the purity of the white race, segregationists ultimately sought to protect the physical and cultural superiority of the white race from being degraded through social mixing and breeding with inferior races. Segregationists believed that interracial breeding or the "corruption of blood" would ultimately lead to the mongrelization of the white race. Segregationists feared this because they believed it would not only mean the destruction of a physically distinctive white racial group, but also of the superiority of the white race. For example, even though Justice Harlan's *Plessy v. Ferguson* dissent contented that segregation on passenger trains denied blacks their civil equality, he still believed that the white race was socially superior: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage . . . ."

Segregationists were not as optimistic as Justice Harlan; they feared that the dominance of the white race would end if the purity of the white race could not be protected. Relying on eugenics, segregationists believed that the superior genetic traits—and therefore the superior culture—of the white race would be degraded through breeding with inferior races. Once the population transformed into an inferior "mongrel breed of citizens," the characteristics of white civilization in the United States would slowly disappear. Thus, to ensure the continuing

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40. *Id.*
41. *Id.*
42. *Id.* at 110.
43. *Theodore Bilbo, Take Your Choice: Separation or Mongrelization* 56-57 (1946) (arguing that whites are superior to blacks and that "the mingling of the superior with the inferior will result in lowering of the higher"); *see also* Lindquist Dorr, *supra* note 38, at 145-46 (contending that many southerners at the turn of the twentieth century accepted eugenicist belief that interracial breeding "would result in future generations" of whites "dominated by 'inferior' racial characteristics."); Dorr, *supra* note 14, at 124 ("American eugenicists generally, and Virginians particularly, argued for the scientific defense of civilization through racial purity, using their theories about race mixing.").
44. *Bilbo, supra* note 43, at 56 (arguing that efforts to dismantle segregation in the south would "plunge Dixie into hopeless depths of mongrelism.").
45. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
dominance of the white race, it was absolutely vital for segregationists to protect its purity. Segregationists believed that the key to preventing the corruption of blood was to deny the black race social equality.

Former U.S. Senator Theodore Bilbo contended that the only way to protect the purity of the white race was to prevent "the two races from meeting on terms of social equality." It was only through social segregation that the white southern race was able to deny social equality to blacks and stop the "southern white man" from becoming "submerged in the black mass about him."

Bilbo contrasted the white South’s success with the failure of whites to maintain racial purity in South America. He noted that, after the Spaniards had conquered the native peoples of South America, instead of "expelling them as the English did in North America, they ruled over them and married their women." As a result, Bilbo explained, South America became mongrelized and suffered from societal degradation. Bilbo contended that denial of social equality allowed the white southerners, unlike the Spaniards, to preserve their racial purity. If whites were to grant social equality to blacks, however, the inevitable result would be tragic:

If we sit with Negroes at our tables, if we attend social functions with them as our social equals, if we disregard segregation in all other relations, is it then possible that we maintain it fixedly in the marriage of the South’s Saxon sons and daughters? The answer must be "No." By the absolute denial of social equality to the Negro, the barriers between the races are firm and strong. But if the middle wall of the social partition should be broken down, then the mingling of the tides

47. See BILBO, supra note 43, at 56-57.
48. See, e.g., id. at 54 ("To preserve her blood, the white South must absolutely deny social equality to the Negro ...."); see also Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 STAN. L. REV. 1111, 1120 (1997) ("[A]fter the Civil War, white Americans of widely varying political views reiterated their conviction that emancipating African-Americans entailed granting the freedmen some form of legal equality, but assuredly did not require granting them ‘social equality.’"); see also Jack M. Balkin, Plessy, Brown, and Grutter: A Play in Three Acts, 26 CARDOZO L. REV. 1689, 1696 (2005) (arguing that the framers of the Fourteenth Amendment believed that blacks were not “full social equals with whites”).
49. BILBO, supra note 43, at 54.
50. See id.
51. Id. at 52.
52. See id.
53. See id. ("Let anyone who doubts the wisdom of racial segregation or fails to understand the South’s loyalty to the color line make a study of conditions in South America.").
of life would surely begin. It would be a slow process, but the result would be the same. And though the process be gradual, it would be none the less irresistible and inevitable. . . . [T]he southern white race, the southern Caucasian, would be irretrievably doomed. 54

To fully understand white concerns about social equality, it is necessary to understand how Americans thought about racial equality in the late nineteenth and early twentieth centuries. 55 During that period, Americans broke down racial equality into three distinct concepts: civil equality, political equality, and social equality. 56 Civil equality required the acknowledgment of "those rights exercised by economic man, such as the capacity to hold property and enter into contracts, and to bring suit to defend those rights in the legal system." 57 When the framers enacted the Fourteenth Amendment, they made civil equality a constitutional guarantee. 58

Political equality included "the right to vote, the right to serve on juries, and the right to hold political office." 59 Essentially, achieving political equality meant having the right to participate equally in democratic self-governance. While the Fourteenth Amendment was understood to protect civil rights, there was some debate as to whether it also protected political rights. 60 The Reconstruction Congress therefore ratified the Fifteenth Amendment to guarantee African Americans the "political right of voting." 61

Social equality "concerned whether persons [of different races] were considered social equals in civil society." 62 Obtaining social equality

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54. Id. at 55.
55. For discussions about how nineteenth-century Americans conceptualized equality, see Siegel, supra note 48, at 1119-28; Balkin, supra note 48, at 1693-1701.
56. See Siegel, supra note 48, at 1119-20.
57. Id. at 1120; see also Balkin, supra note 48, at 1694 ("[C]ivil equality meant equal rights to make contracts, own, lease, and convey property, sue and be sued, and, according to some formulas, the rights of freedom of speech and free exercise of religion.").
58. See Balkin, supra note 48, at 1696 ("[T]he basic assumption of most of the framers and ratifiers of the Fourteenth Amendment was that . . . [c]ivil equality before the law simply meant civil equality, nothing more."); Siegel, supra note 48, at 1120. There had been some dispute about whether "the Thirteenth Amendment's prohibition of slavery vested Congress with the power to define and protect civil rights," so Congress ratified the Fourteenth Amendment to ensure that Congress had the constitutional authority to protect the civil rights of African Americans. See id. at 1121.
59. See Balkin, supra note 48, at 1694.
60. See Siegel, supra note 48, at 1121.
61. Id.
meant achieving the same status as whites, primarily through interracial associations based on mutual respect and esteem.\textsuperscript{63} Thus, a black man did not achieve social equality if he associated with a white man as his servant.\textsuperscript{64} However, if a white man invited a black man to his home as his dinner guest, such an association signified mutual respect, and through the association, the black man achieved social equality.\textsuperscript{65}

Segregationists believed that whites should never relate to blacks as social equals.\textsuperscript{66} They believed treating blacks as if they had the same social status as whites was like granting "equality for unequals."\textsuperscript{67} Thus, even a middle-class black person was considered socially unequal to a working-class white person, solely because of the black person's membership in an inferior racial group. For segregationists, a black person's low social standing was defined not by personal attributes or accomplishments, but by the collective accomplishments and traits of the black race.\textsuperscript{68}

Even though they believed that it was a universal truth that blacks did not deserve social equality, segregationists feared that some white persons could and would act to grant "equality for unequals" by relating to blacks with respect and affection. Specifically, they feared the possibility of whites granting blacks social equality by marrying them.\textsuperscript{69} The threat posed by interracial marriages was considered so dangerous that segregationists sought to prevent their formation through legal prohibition and through the racial segregation of social spaces.

To understand why, it is necessary to discuss the concept of endogamy.\textsuperscript{70} Social groups which adhere to norms of endogamy do so to

\begin{itemize}
\item \textsuperscript{63} See id. at 1695 (defining social equality as "the product of natural affinities and private social interactions").
\item \textsuperscript{64} See Richard H. McAdams, \textit{Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination}, 108 \textit{HARV. L. REV.} 1003, 1050 (1995) (arguing that during Jim Crow, whites associated with blacks when doing so preserved the "status hierarchy they desired").
\item \textsuperscript{65} See Steven A. Bank, \textit{Anti-miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875}, 2 U. Chi. L. SCH. ROUNDTABLE 303, 313 (1995) (noting that white people viewed social equality as "private mixing" or the "right to come into my parlor and be my guest").
\item \textsuperscript{66} See Bilbo, supra note 43, at 58 ("The South will not grant to the Negro race social equality with the whites.").
\item \textsuperscript{67} Id. at 90.
\item \textsuperscript{68} See id.
\item \textsuperscript{69} See Balkin, supra note 48, at 1694-95 (arguing that whites feared that interracial marriages would alter hierarchical status relationships between whites and blacks).
\end{itemize}
varying degrees. Some may prefer but not require that their members marry within the group, and there often is some intermarriage.\textsuperscript{71} Thus, in the United States, while socioeconomic classes prefer that their members practice endogamy, it is a flexible preference that permits intermarriage between socioeconomic classes.\textsuperscript{72}

However, sociologist Robert Merton contends that in a racial-caste society marked by extreme social stratification, “the endogamous norms are rigid.”\textsuperscript{73} The dominant racial group in a racial-caste society like the Jim Crow South strictly enforces endogamy among its members to reinforce its superior position.\textsuperscript{74} They do so because it is a highly effective tool in preserving the racial identity and distinctiveness of its members, which helps to maintain the stability and power of the racial group.

Thus, during Jim Crow, because whites justified their superior position in the racial hierarchy solely on their whiteness, they strictly enforced endogamy. Whiteness has both physical and social components, and endogamy helped to preserve both aspects by operating as the “genetic mechanism” for preserving the biological identity of its members, and as the “institutional mechanism” for regulating membership and inculcating white racial consciousness.\textsuperscript{75}

As a genetic mechanism, endogamy produced and reproduced the shared physical attributes that define the white race and its members. Thus, through the production of identifiably white children, endogamy ensured that the physical attributes of whiteness were passed from one generation to the next.\textsuperscript{76} In contrast, if whites were permitted to marry nonwhites, such marriages would destabilize whiteness by producing legitimate children who bore the physical marks of “the lower caste,” thereby blurring the physical distinctions justifying the social stratification between the races.\textsuperscript{77}

As an institutional mechanism, endogamy regulated membership in the white race. Across cultures, marriage is a means of social mobility.\textsuperscript{78} A person of a lower social class moves up in social standing by marrying an upper-class person.\textsuperscript{79} In the Jim Crow context, in order for blacks to

\textsuperscript{71.} See id. at 481.
\textsuperscript{72.} See id. at 482 (“Class endogamy is loosely preferential, not prescriptive.”).
\textsuperscript{73.} Id. at 483.
\textsuperscript{74.} Id.
\textsuperscript{75.} See Kingsley Davis, \textit{Intermarriage in Caste Societies}, 43 \textit{AM. ANTHROPOLOGIST} 376, 394 (1941).
\textsuperscript{76.} See Davis, supra note 75, at 394.
\textsuperscript{77.} See id.
\textsuperscript{78.} See Merton, supra note 70, at 482.
\textsuperscript{79.} See Davis, supra note 75, at 377.
achieve the same racial social status as whites, they would have to marry whites. Enforced endogamy among whites, however, effectively prevented blacks from using marriage to achieve social equality by gaining membership into the dominant group.

Interracial marriages were inherently incompatible with the racial-caste system and, if permitted, they would “undermine the very basis of the caste order.” 80 If interracial marriages were permitted, then nonwhites would be granted membership and the white race would no longer be white. In essence, interracial marriages would redefine the identity of the white racial group, making it impossible to maintain a racial-caste system. 81 In segregationist terminology, interracial marriages would destroy and transform the white race into a mongrel breed of citizens. Segregationists therefore understood that interracial marriages had to be “strictly forbidden or racial caste abandoned.” 82

Endogamy also functioned as an institutional mechanism to instill white racial consciousness and group solidarity. 83 First, it fostered social connections among whites. 84 A marriage brings the families of the spouses together, and endogamy ensured that the new kinship relations created by marriage socially connected two whites families. 85 Second, endogamy ensured that the children were socialized solely in white cultural norms. 86 Third, endogamy reinforced white racial consciousness by reinforcing social differences between whites and blacks. 87 The legal and cultural norm of endogamy communicated to whites that they should not intermarry because blacks were genetically and culturally inferior to whites. 88

In-group marriages ensured that all the powers and privileges that whites enjoyed remained exclusively with whites. As Professor Cheryl Harris has argued, whiteness was a valuable form of property: “White identity conferred tangible and economically valuable benefits and was jealously guarded as a valued possession, allowed only to those who met

80. See id. at 389.
81. See id. (“To permit intermarriage would be to give the hybrid offspring the legal status of its father, and would soon undermine the very basis of the caste order.”).
82. Id.
83. See Merton, supra note 70, at 483.
84. See id.
85. See id.
86. See Davis, supra note 75, at 378.
87. See Merton, supra note 70, at 483.
88. See Bilbo, supra note 43, at 198 (arguing that blacks and whites should not “amalgamate” or intermarry because blacks are physically, mentally, and morally inferior to whites).
Regulating White Desire

a strict standard of proof." 89 By being a member of the white race, a person obtained rights, privileges, power, material wealth, and status. 90 Thus, during the Jim Crow era, whites had access to superior political power, facilities, accommodations, and schools. 91 Endogamy ensured that blacks could not obtain those privileges indirectly through a white spouse or parent.

The racially ambiguous nature of the children of interracial marriages threatened to destabilize Jim Crow—a social system based on classifying and physically organizing people on the basis of their race. Where would interracial families fit in a social system that created places only for whites or blacks? Where would an interracial family sit when they dined at a segregated restaurant? Would the husband and wife have to sit at different tables? What about the mixed-race children? Would there have to be a separate section for them? Would they have to attend a mixed-race school? The entire project of racially segregating social spaces would be extremely difficult—if not impossible—if interracial marriages became commonplace.

Given the threat interracial marriages posed to white supremacy, the solution seems fairly obvious. Theoretically, for two people to get married, both partners must consent. So, even if blacks sought to destroy the white race through intermarriage, whites could defeat such a strategy by refusing to marry blacks. But if the white race could be preserved by simply having individual whites refrain from marrying blacks, why did Jim Crow states feel compelled to pass laws prohibiting interracial marriages? Because they feared that white individuals would not necessarily comply with informal cultural norms of endogamy. 92 In other words, they feared the power of white desire to destroy whiteness and white supremacy.

89. See Cheryl Harris, Whiteness as Property, 106 Harv. L. Rev. 1709, 1726 (1993).
90. See id. at 1713.
91. See id. at 1766.
92. See Bilbo, supra note 43, at 55.
IV. MISCEGENATION AND SEGREGATION LAWS AND THE LEGAL ENFORCEMENT OF WHITE RACIAL ENDOGAMY

A. The Enforcement of White Endogamy Norms During and After Slavery

Laws enforcing white endogamy have a long history in America. American miscegenation laws of the late nineteenth and twentieth century have their roots in laws enforcing interracial sexual relations and marriage dating back to the early colonial era in North America.

Prior to the Civil War, such laws were enforced primarily against white offenders. In a study of racial-purity laws in colonial and antebellum Virginia, Judge A. Leon Higginbotham and Barbara K. Kopytoff concluded that "all of the statutes dealing specifically with voluntary interracial sex prescribed punishment for the white partners only," and "did not punish blacks at all for marriage or for voluntary sexual relations with whites." For example, a 1691 Virginia statute prohibiting interracial marriages required that the white partner be banished but did not mention any punishment for the black partner.

Scholars offer several explanations for why early miscegenation laws did not punish blacks. During slavery, there were other mechanisms to control and regulate the behavior of slaves. Moreover, because many of the black offenders were slaves, there actually was an economic incentive not to punish them too harshly—if the statute required that the black partner also be banished from the colony, the slave's master would lose the services of the slave.

93. See Davis, supra note 75, at 394 (“[I]n those societies where racial castes have arisen there were strong currents against intermarriage from the start”).
96. Higginbotham & Kopytoff, supra note 95, at 2000.
97. Id. at 1968.
98. See id. at 1995.
99. See id. at 1994 n.126.
100. See id. at 2000; see also Jason A. Gillmer, Poor Whites, Benevolent Masters, and the Ideologies of Slavery: The Local Trial of a Slave Accused of Rape, 85
Regulating White Desire

An understanding of endogamy, however, suggests that early miscegenation laws punished only whites because their primary purpose was to ensure that whites adhered to norms of endogamy. As Professor Randall Kennedy argued, prior to the Civil War, officials punished only whites because they "were the ones responsible for protecting the purity of their bloodlines."101

After the Civil War and the passage of the Reconstruction Amendments, the nature and enforcement of miscegenation laws changed dramatically, as segregationists took to enforcing miscegenation laws much more vigorously.102 They now punished both the white and black partners.103 Further, Kennedy argues:

With the traumatic abolition of slavery . . . and the even more unsettling assertions of civil and political rights by blacks during Reconstruction, southern whites suffered a tremendous blow to their collective, racial self-esteem. Many compensated by insisting relentlessly upon an exacting observance of formal and informal rules of racial caste. The result in many places appears to have been an enhanced criminal enforcement of miscegenation laws . . . .104

The problem for Jim Crow states, however, was that the discourse of racial equality not only was influencing blacks to assert their new rights, but it was also influencing or had the potential to influence whites to accept black demands for full equality.

N.C. L. REV. 489, 492-93 (2007) (arguing that, during slavery, white male reactions to charges that a slave raped a white woman were nuanced and did not always engender knee-jerk hostility and aggression towards the accused slave).

101. Kennedy, supra note 95, at 144-45.

102. See id.; see also MARTHA HODES, WHITE WOMEN, BLACK MEN 1-2 (1997) ("Under the institution of slavery . . . white Southerners could respond to sexual liaisons between white women and black men with a measure of tolerance; only with black freedom did such liaisons begin to provoke a near-inevitable alarm, one that culminated in the tremendous white violence of the 1890s and after.").

103. See Kennedy, supra note 95, at 145. The punishment of blacks, however, did not mean that miscegenation statutes stopped functioning to enforce endogamy solely among whites. Since miscegenation statutes permitted blacks to marry members of nonwhite racial minority groups, the state obviously was not concerned with ensuring that blacks married only other blacks. Rather, blacks were being punished for playing their part in corrupting the blood of the white race. The state was still seeking to enforce the norm of endogamy among whites. Moreover, a significant reason why blacks were punished more harshly after the Civil War was because of federal civil rights statutes that required racial neutrality in the law. See id. Extralegal punishment such as lynching was used to punish black men for transgressing the limits on interracial intimacies. See HODES, supra note 102, at 1-2 (discussing the use of lynching).

104. Id.
To prevent whites from being influenced by racial equality norms to grant blacks social equality, racial segregation and miscegenation laws operated in tandem to systematically enforce white endogamy.

B. White Racial Endogamy and the Segregation of Public Schools

Racial segregation in public schools was an important means of instilling in white children the value of racial endogamy. While segregationists thought it was necessary to regulate the desires of all whites, they had special concerns about white children. Segregationists believed that white children were the key to preserving the white race, and that the only way to learn the importance of this goal was to develop a sense of racial pride and consciousness.\footnote{105} For segregationists, this required the strict segregation of white children in all facets of social interaction, but especially in public schools.\footnote{106}

In an article written shortly after the Supreme Court had decided Brown, segregationist Herbert Ravenel Sass defended racial segregation in public schools, declaring that “the elementary public school is the most critical of those areas of activity where the South must and will at all costs maintain separateness of the races.”\footnote{107} This was because segregation in public schools was the primary state-sponsored social arrangement aimed at preventing the formation of interracial marriages.\footnote{108}

To understand how racial segregation in public schools operated as a miscegenation tool, it is useful to re-examine the 1925 Mississippi Supreme Court decision in Rice v. Gong Lum, which explained the policies underlying state-enforced racial segregation in public schools.\footnote{109} The Mississippi State Constitution required that public schools segregate whites and colored people.\footnote{110} The Gong Lum court had to determine whether a Chinese American girl born in the United States should be required to attend the all-white or the all-black public school.\footnote{111} The court held that she was “colored” for constitutional and statutory

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\footnote{105. See Herbert Ravenel Sass, Mixed Schools and Mixed Blood, ATLANTIC, Nov. 1956, at 45, 45-46, 48 (“Race preference is one of those instincts which develop gradually as the mind develops and which, if taken in hand early enough, can be prevented from developing at all.”).}

\footnote{106. See id. at 48.}

\footnote{107. Id.}

\footnote{108. See id.}

\footnote{109. 104 So. 105 (Miss. 1925).}

\footnote{110. Id. at 107 (quoting MISS. CONST. of 1890, § 207).}

\footnote{111. See id. at 106.}
purposes and, therefore, that if she wanted to attend public school, she had to attend the all-black public school.\textsuperscript{112}

In reaching its holding, the court relied on Mississippi’s miscegenation statute, which explicitly prohibited marriage between whites and the “Mongolian race.”\textsuperscript{113} The court then explained the underlying purpose of both the segregation and miscegenation statutes was “to preserve the integrity and purity of the white race.”\textsuperscript{114} For the court, “maintain[ing] separate schools and other places of association for the races” was necessary “to prevent race amalgamation.”\textsuperscript{115} Moreover, “[r]ace amalgamation has been frowned on by Southern civilization always, and our people have always been of the opinion that it was better for all races to preserve their racial purity.”\textsuperscript{116}

“Race amalgamation” was code for intimate interracial relations between whites and blacks. In other words, the court believed that the primary purpose of racial segregation in public schools was to protect white racial purity by preventing the formation of interracial intimacies and marriages.\textsuperscript{117} The logic of racial segregation as an antimiscegenation tool can be discerned in the following passage from a speech given by Tom P. Brady, a Mississippi Circuit Judge, criticizing the ruling in \textit{Brown}:

You cannot place little white and negro children in classrooms and not have integration. They will sing together, dance together, eat together, and play together. They will grow up together and the sensitivity of the white children will be dulled. Constantly the negro will be endeavoring to usurp every right and privilege which will lead to intermarriage.\textsuperscript{118}

\textsuperscript{112.} \textit{Id.} at 110.
\textsuperscript{113.} \textit{See id.} at 108.
\textsuperscript{114.} \textit{Id.}
\textsuperscript{115.} \textit{Id.} at 110.
\textsuperscript{116.} \textit{Id.}
\textsuperscript{117.} \textit{See id.} at 108.
\textsuperscript{118.} \textsc{Tom P. Brady}, \textsc{Black Monday} 65 (1955), \textit{quoted in} Anders Walker, \textit{Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following \textit{Brown} v. \textit{Board of Education}, 47 \textsc{Duke L.J.} 399, 401 (1997); \textit{see also} Sass, \textit{supra} note 105, at 48 (arguing that exposure to other races might encourage racial integration). The concern that racially integrated schools could eventually destroy the purity of the white race dates back to the mid-nineteenth century, and was not limited to the South. In 1860, for example, the California state legislature passed a law which prohibited racial minority groups, specifically Chinese children, from attending school with white children. \textit{See} Joyce Kuo, \textit{Excluded, Segregated, and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools}, 5 \textsc{Asian L.J.} 181, 190 (1998). A California newspaper printed an editorial supporting the segregation law,
Segregationists worried that white children, who were too young to have formed a preference for their own race, would never develop racial pride if they went to school with black children and were taught by “teachers necessarily committed to the gospel of racial integration.”119 Interracial relations would then develop, starting with friendships, which would eventually develop into romantic relations as the children grew older.120 Inexorably, these relationships would lead to interracial marriages, the production of mixed-race children, and ultimately, the normalization of such relationships.121 Blacks would then achieve social equality, the inevitable result of which would be the amalgamation of the races.122

White southerners supported racially segregated public schools because they firmly believed that “the key to the schoolroom door is the key to the bedroom door.”123 Ironically, the importance of schools as social spaces for transmitting racial attitudes is reflected in the Brown Court’s observation that segregation “generates a feeling of inferiority as to [black children’s] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”124 Unlike the Court, white segregationists were concerned about the social effect of integration on white children.

The concerns over miscegenation help to explain the tremendously negative reaction to the Court’s decision in Brown. Southerners who immediately denounced the Brown decision understood that it had

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120. See, e.g., id.; Brady, supra note 118, at 65.
121. See Sass, supra note 105, at 48.
122. See Bilbo, supra note 43, at 56-57.
Implications beyond the educational context. They protested the decision as the “first step in a ‘social program for the amalgamation of the two races.’” One Mississippi newspaper reacting to Brown wrote that “White and Negro children in the same schools will lead to miscegenation. Miscegenation leads to mixed marriages and mixed marriages lead to mongrelization of the human race.”

Professor Serena Mayeri’s study of sex segregation as a remedy for racial segregation speaks to how strongly white southerners feared the possibilities of intimacies developing between white and black schoolchildren. If racial integration in public schools was inevitable, white southerners were willing to accept racially integrated schools so long as white boys went to school with black boys, and white girls went to school with black girls.

Once racial segregation is viewed as a tool to enforce white racial endogamy, it becomes clear how racial segregation in general operated to prevent interracial marriages. Miscegenation laws may prohibit whites and blacks from marrying each other, but they cannot prevent the formation of the romantic connections that lead to the desire to marry. To ensure that whites would not have the opportunity to develop intimate relations with blacks, social institutions had to be arranged and organized to eliminate social spaces where whites and blacks could relate to each other intimately as social equals.

See, e.g., Sass, supra note 105, at 46-47; see also Bilbo, supra note 43, at 55 (arguing that racial segregation was necessary to preserve the racial integrity of the white race).


Id. at 1483 (quoting Brown v. Board of Education: A Brief History with Documents 204 (Waldo E. Martin ed., 1998)).


Mayeri, supra note 128, at 196.

See Balkin, supra note 48, at 1709. Balkin notes that state and local governments in the South “inserted themselves into the regulation of almost every facet of everyday life, including schools, hospitals, cafeterias, recreational facilities, transportation, public accommodations, bathrooms, and water fountains, even funeral parlors.” Id. Such massive state regulation of the private sphere was done to “maintain and signify the superior status of whites over blacks.” Id.
schools and other spaces was the answer. The segregation of public accommodations,\textsuperscript{131} transportation,\textsuperscript{132} restaurants,\textsuperscript{133} beaches,\textsuperscript{134} and swimming pools\textsuperscript{135} can all be viewed as creating racially exclusive social spaces as means of enforcing endogamy among whites and reinforcing their racial superiority over blacks.

\section*{C. \textit{The Regulation of White Women's Desires}}

Segregationists feared that white women would not adhere to the norm of endogamy, especially given the prevalence of both racial and gender equality norms around the turn of the twentieth century. In seeking to control white women's desires through segregation and miscegenation laws, they simultaneously reinforced norms of white supremacy and patriarchy.\textsuperscript{136}

The earliest laws regulating interracial sex often sought to deter white women from having interracial relationships with black men.\textsuperscript{137} While white southerners were more tolerant of white women's relationships with black men during slavery, white male anxiety over such relationships increased dramatically several years after the end of Reconstruction.\textsuperscript{138}

In studying miscegenation law-enforcement patterns in Alabama between 1880 and 1900, historian Charles Robinson concluded that interracial relationships between white women and black men were treated more severely than relationships between white men and black women.\textsuperscript{139} Records show that, from 1880 to 1900, sixty-one people were incarcerated for having entered into interracial marriages\textsuperscript{140}—thirty-one were white,\textsuperscript{141} and thirty were black.\textsuperscript{142} White women, however, were

\textsuperscript{131.} See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
\textsuperscript{132.} See Plessy v. Ferguson, 163 U.S. 537 (1896).
\textsuperscript{134.} See Dawson v. Mayor and City Council, 220 F.2d 386 (4th Cir. 1955).
\textsuperscript{135.} See Palmer v. Thompson, 403 U.S. 217 (1971).
\textsuperscript{137.} See Higginbotham & Kopytoff, supra note 95, at 1995.
\textsuperscript{138.} Cf. HODES, supra note 102, at 1-2 ("Scholars agree that the most virulent racist ideology about black male sexuality emerged in the decades that followed the Civil War, and some historians have recognized that the lynching of black men for the alleged rape of white women was comparatively rare in the South under slavery.").
\textsuperscript{140.} \textit{Id.}
\textsuperscript{141.} See id. at 69 tbl.1, 71 tbl.3.
\textsuperscript{142.} See id. at 70 tbl.2, 72 tbl.4.
Regulating White Desire

convicted more often than white men—nineteen white women compared to twelve white men.\textsuperscript{143} Black men were convicted more often than black women—twenty black men compared to ten black women.\textsuperscript{144}

In looking at the average length of sentences, Robinson discovered that black men received the longest sentences, averaging a prison term of 3.84 years.\textsuperscript{145} Next were white women, with an average sentence of 3.27 years.\textsuperscript{146} White men were sentenced to an average of 3.11 years,\textsuperscript{147} while black women were sentenced to an average of 2.75 years.\textsuperscript{148} Most pardons went to white men and black women\textsuperscript{149}—of fifteen pardons, while black women and white men each received ten pardons in total, black men received four and a white woman received only one.\textsuperscript{150}

As Robinson’s study suggests, the former slave states found that white woman–black man relationships were the most threatening to the established racial and gender hierarchies.\textsuperscript{151} As a result, southerners used both legal and social means to regulate the desires of white women. In addition to legal measures, “white women who consorted with black men were subject to whipping, maiming, and murder.”\textsuperscript{152} When white women voluntarily associated with black men, they were accused of being depraved and of having low character and morals.\textsuperscript{153} White women were called “strumpets” and “unchaste.”\textsuperscript{154}

In the early twentieth century, as women began to win certain civil and political rights, concerns over the desires and behavior of white women increased, resulting in passage of miscegenation laws aimed at restricting the liberties of white women and preventing them from entering into intimate relationships with black men.\textsuperscript{155} As historian Lisa Lindquist Dorr contends, the passage of Virginia’s Racial Integrity Act of 1924 “reflected fears of changing gender roles and increasing female

\begin{itemize}
\item \textsuperscript{143} See id. at 69 tbl.1, 71 tbl.3.
\item \textsuperscript{144} See id. at 70 tbl.2, 72 tbl.4.
\item \textsuperscript{145} See id. at 68.
\item \textsuperscript{146} See id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} See id.
\item \textsuperscript{150} See id.
\item \textsuperscript{151} See HODES, supra note 102, at 147.
\item \textsuperscript{152} Id. at 165.
\item \textsuperscript{153} See id. at 162-63.
\item \textsuperscript{154} See id. at 164.
\item \textsuperscript{155} See Lindquist Dorr, supra note 38, at 144 (arguing that Virginia’s 1924 miscegenation law “represents a modern, rationalized means of simultaneously controlling black men and white women” and of “counteracting changes in social and gender norms”).
\end{itemize}
sexual agency and independence.”156 In other words, during the early twentieth century, concerns over miscegenation and the threat to white racial purity reflected white male anxiety over the claims of equality made by both white women and blacks. Protecting white racial patriarchy, therefore, required restricting the liberties of white women so they did not violate the norm of endogamy. Thus, as Dorr contends, the proponents of the Racial Integrity Act believed that the new miscegenation law was necessary because

women, intoxicated by the exciting adventures of youth, might ignore the opinion of their elders, their traditions, and ultimately, their racial pride, which, because of the women’s reproductive capacity, was especially important. Away from parental supervision and protection, these women would be increasingly vulnerable to the manipulations of new “confidence men”—men with unknown racial origins seeking to infiltrate the middle-class white world.157

John Powell, one of the main advocates of the Racial Integrity Act, excoriated white women who engaged in relations with black men, describing them as “deplorable examples of [the] breakdown of racial pride and decency.”158 Moreover, in vigorously arguing that the preservation of white racial purity required the “social control of white women,” Powell viewed black male partners as the victims of the advances and aggressions of white female desire.159 For Powell, therefore, all of society, including both the white race and black men, needed protection from the “sexual depravity” of white women.160 Even though the Racial Integrity Act appeared to apply equally to all races and genders, its proponents believed that it ultimately was about enforcing the norm of white racial endogamy among white women.

Additionally, it was important to enforce endogamy among white women to help prevent mixed-race children from being able to gain membership in the white race.161 While mixed-race children born to black women were presumptively identified as black, mixed-race children born to white women typically remained with the mother in the white community, and therefore could more easily be passed off as

156. See id. at 150.
157. Id. at 149.
158. Id. at 156.
159. See id. at 159.
160. Id.
161. See id. at 157 (“Mixed-race children of white mothers usually remained in the white community, thereby increasing the likelihood that they would [pass as whites] and marry whites.”).
Thus, to prevent mixed-race children from obtaining the benefits of whiteness, under the “Certificates of Racial Composition” provision of Virginia’s Racial Integrity Act, new white mothers were required to register the race of their child with the state. If a white woman was discovered to have given birth to a mixed-race child, the state would send her a letter condemning her and her child. Thus, the Act, by providing a mechanism to identify mixed-race children born to white women, provided a way of enforcing social segregation and preventing nonwhite children from freely mixing with white children. The mixed-race child was “immediately branded as nonwhite” and thus prevented “from benefiting from the privileges of their whiteness.”

V. BACK TO LOVING

Understanding that Jim Crow laws regulated white desire has many important implications for re-thinking our understanding of the Loving decision and Fourteenth Amendment racial doctrine. The Court in Loving held that miscegenation laws violated equal protection because the states’ purpose in enacting such laws was to promote white supremacy. In reaching its conclusion, the Court simply glossed over the fact that miscegenation laws injured whites as well as blacks by preventing a white person from marrying a person of another race. Thus, the question raised—but never answered—in Loving was how a law

162. See id.
164. Lindquist Dorr reproduced such a letter:

Dear Madam,

We have report of the birth of your child, 30 July 1923, signed by Mary Gilden, midwife. She says that you are white and that the father of the child is white.

We have a correction to this certificate sent to us from the City Health Department at Lynchburg, in which they say that the father of the child is negro.

This is to give you warning that this is a mulatto child and you cannot pass it off as white. A new law passed by the last legislature says that if a child has one drop of negro blood in it, it cannot be counted as white. You will have to do something about this matter and see that the child is not allowed to mix with white children, it cannot go to white schools and can never marry a white person in Virginia.

It is an awful thing.

Lindquist Dorr, supra note 38, at 153.
165. Id.
could promote white supremacy and the interests of whites if the law actually violated the liberties of whites as well.

Thinking of miscegenation laws as laws enforcing endogamy among whites helps to support and deepen the meaning of the Loving Court’s decision. First, it explains why the Virginia statute only prohibited interracial marriages between whites and racial minorities, but permitted racial minorities to intermarry with other racial minorities. The statute created a legal duty only for whites to practice endogamy. Second, the white race enforced endogamy among its members as a means of reinforcing its identity as a superior race and of maintaining its dominant position in the racial-caste social system. In holding that miscegenation statutes were impermissibly designed to maintain white supremacy, the Loving Court was essentially concluding that a racial group cannot use the power of the state to preserve an identity infused with racist notions of superiority or to preserve its political, economic, and cultural power over other racial groups.

Ultimately, then, miscegenation and segregation laws reinforced the superiority of the white race and the inferiority of the black race. The regulation of white desire was a crucial part of the white supremacist project of protecting the structures of a racially hierarchical society in which whites remained the “master race” and blacks and other racial minorities constituted the “slave race.”

Thus, when the Court declared that Virginia’s prohibition on interracial marriages between whites and racial minorities violated the Fourteenth Amendment, it could not have been saying that Richard Loving was denied equal protection. Clearly, Richard suffered serious injury because he was deprived of the liberty to marry the woman he loved. But, as a member of the white race, the law was designed to promote the superiority of his racial group in a racial-caste society. Richard’s harm is best understood as an infringement of his fundamental right to marry, and not as a denial of equal protection.

The statute, however, not only violated Mildred’s fundamental right to marry, it also denied her, as a member of the black community, equal protection of the laws because the state was using its power to reinforce the inferiority of her racial group. By ensuring that Richard did not breach his legal duty to practice endogamy, the miscegenation statute preserved the superior status and power of all whites over all blacks. In the end, Virginia violated Richard’s substantive due process right to

167. See generally BILBO, supra note 43, at 82-93 (arguing that white superiority over blacks was inherent and therefore blacks must continue to be denied social equality with whites).

marry in order to deny the entire black community and all of its members the equal protection of the laws.

The *Loving* Court got it right. The miscegenation law was appropriately subject to strict scrutiny because the case ultimately was about invidious discrimination against blacks, a suspect class. The Court just needed to be more explicit about the way that the legal enforcement of white endogamy violated equal protection for blacks.

In *Loving*, the Court rejected Justice Harlan’s notion that the white race is and should continue to view itself as the dominant and superior race in the country. Rather, the Court recognized that whites, blacks, and other racial groups are all equal with respect to civil, political, and social rights. Therefore, any laws enacted to perpetuate the racial superiority of one group over another group are fundamentally inconsistent with the central meaning of the Equal Protection Clause.¹⁶⁹

VI. CONCLUSION

Realizing that miscegenation laws regulated white desire deepens our understanding of how systems of racial subordination operate. Too much mainstream race discourse accepts simple views of racial discrimination that fail to recognize the complex ways in which these systems work. We need to first learn how subordination operates in order to determine how the law can best dismantle it. To that end, this Article has sought to illuminate how segregationists used miscegenation and segregation laws to regulate whites and their desires in order to preserve a social regime structured to protect the superiority of the white race.

This analysis raises several questions about the nature of racial inequality today, forty years after *Loving* was decided. We still have a racially stratified nation with deep, entrenched inequalities between whites and blacks.¹⁷⁰ If interracial marriages were viewed as so threatening to white supremacy, then why haven’t interracial marriages had the effect that segregationists feared that they would have? In 2007, the complete mongrelization of the South and of the United States does not seem likely to happen anytime soon. Did segregationists and the *Loving* Court overstate the relationship between miscegenation laws and

¹⁶⁹. *See* *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *see also* Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW & CONTEMP. PROBS. 175, 180 (2004) (arguing that the Fourteenth Amendment was enacted to prevent former white slaveowners from being able to exploit blacks to maintain their political and economic power).

the preservation of whiteness? Are high rates of interracial marriages even necessary to achieve true racial equality? Is there any constitutional problem if today, various racial groups practice endogamy to some extent? We must explore these questions if we are to better understand how systems of racial hierarchy operate. Only then will we know how to dismantle them.