MARRIAGE DEMOSPRUDENCE

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Some prominent academics and judges contend that courts are an ineffective and improper means of social change. Recently, this argument came to the fore in debates over same-sex marriage. This Article addresses that claim in the context of interracial marriage. The Article analyzes how family law developed in the two decades preceding Loving v. Virginia, and whether courts precipitated social change. This Article uses the framework of "demosprudence," or how democratic action legitimates socio-cultural and legal changes, and how these forces interact in the process. Part II describes the historical roots of state anti-miscegenation laws in the eighteenth and nineteenth centuries. Part III focuses on anti-miscegenation law in California, and the landmark 1948 ruling striking down the law. Part IV examines evidence that rulings of the California and Oregon Supreme Court influenced the first post-war anti-miscegenation repeal. Part V assesses the importance of anti-miscegenation litigation to legislation in Arizona, Nevada, and Maryland. Part VI unravels themes from legislative action on racial discrimination in marriage in the 1950s and 1960s, and examines the legislative landscape leading up to Loving. Part VII briefly compares the movement to recognize interracial marriage culminating in Loving with the movement to recognize same-sex marriage movement culminating in Obergefell. The Article concludes that the history of how rights for interracial households developed is a strong rejoinder to recent claims that judicial influence in shaping the meaning of family is ahistorical.

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I dedicate this Article to memory of Julian Bond. I am forever grateful to have briefly served as his research assistant. His civil rights legacy and immense kindness continue to inspire me and influence my work.

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I. INTRODUCTION

In 1952, a young William Rehnquist clerked for Justice Robert H. Jackson on the U.S. Supreme Court.[1] That year, the future Chief Justice penned a now-infamous memo on the constitutionality of segregated schools.[2] The memo, *A Random Thought on the Segregation Cases*, evaluated the historical effectiveness of the Supreme Court to shape social attitudes and influence the political process.[3] Explaining that the Court has "seldom been out of hot water when attempting to"[4] resolve salient constitutional cases, Rehnquist concluded that the Court could not triumph in the politics of rights:

> One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.[5]

Rehnquist's sobering assessment fails to square with modern American political thought. There is a prominent strain of romanticism in American discourse that judicial institutions are above the fray—the preservation of individual rights and liberties by court decree can valiant-

1. *William H. Rehnquist*, REHNQUIST CENTER, http://www.rehnquistcenter.org/rehnquist.cfm (last visited Apr. 8, 2016).

2. *Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 324–25 (1986) [hereinafter Segregation Cases], *available at* http://www.gpo.gov/fdsys/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST-4-16-6.pdf (Memorandum, William H. Rehnquist, A Random Thought on the Segregation Cases (1952)); *see also* Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown*, 53 B.C.L. REV. 631 (2012) (describing the unfolding of events leading up to the court public school segregation cases).

3. Segregation Cases, *supra* note 2, at 324–25.

4. *Id*. at 324.

5. *Id*. at 325.

ly rise above the lowbrow business of politics.[6] One need look no further than anniversaries of *Brown v. Board of Education*[7] to see Americans celebrating the notion that courts can and should be champions of ideas whose time have yet to come.[8]

Many political scientists and legal academics, on the other hand, have little appetite for such poetics. The portrayal of judges vindicating the rights of the repressed and the downtrodden fails to find wide-scale support in some of the most important political science literature studying courts.[9] In particular, many political scientists criticize the idealized construction of triumphant judicial power as detached from the harsh historical record of backlash and deeply entrenched resistance to the flexing of judicial authority.[10]

This debate over the institutional capacity of courts was at the heart of the United States Court of Appeals for the Sixth Circuit's decision upholding same-sex marriage bans in four states.[11] The decision mainly

6. There is no shortage of literature by legal academics espousing these sentiments. *See*, *e.g.*, John Ferejohn & Larry D. Kramer, *Judicial Independence in a Democracy: Institutionalizing Judicial Restraint*, *in* NORMS AND THE LAW 161, 164 (John N. Drobak ed., 2006) (noting that "majoritarian pressures are especially threatening to judicial independence in a republic"); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1362 (2001) ("The reasons that undergird the need for judicial independence primarily stem from concerns espoused by those who believe the Constitution is designed to protect minorities."); Douglas Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767, 770 (1987) ("[T]heories [of judicial review generally] recognize that democracy generally protects the majority from government abuse but does much less to protect minorities and individuals from government abuse. Our Constitution addresses this problem by creating judicially enforceable constitutional rights, most of which are stated in broad terms."); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1186 (1982) ("Ultimately, if there is to be any protection against the courts becoming imbued with a 'mob' psychology in time of crisis, it is the nation's long tradition of judicial independence and widespread recognition of the role of the courts as protectors of minority rights against majoritarian oppression.").

7. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."), *supplemented*, 349 U.S. 294, 301 (1955) (instructing district courts to fashion remedies to safeguard access to "public schools on a racially nondiscriminatory basis with all deliberate speed").

8. *See*, *e.g.*, Adam Nagourney & Richard W. Stevenson, *Bush and Kerry Mark Desegregation Where Suit Began,* N.Y. TIMES (May 18, 2004), http://www.nytimes.com/2004/05/18/us/bush-and-kerry-mark-desegregation-where-suit-began.html (describing celebrations of *Brown*'s 50th Anniversary).

9. *See* Robert A. Kagan, *A Consequential Court: The U.S. Supreme Court in the Twentieth Century*, *in* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 199, 199 (Diana Kapiszewski et al. eds., 2013) ("Lawyers and legal scholars take it for granted that the U.S. Supreme Court, which has exercised the power of constitutional judicial review for more than 200 years, has been a politically consequential court. To many political scientists, however, the Court's actual influence is an unsettled empirical and theoretical question.").

10. *See* Michael McCann & Helena Silverstein, *Rethinking Law's Allurements: A Relational Analysis of Social Movement Lawyers in the United States, in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 261, 261 (Austin Sarat & Stuart A. Scheingold eds., 1998) ("The bulk of this scholarship has been highly circumspect regarding the progressive potential of legal tactics, legal institutions, and cause lawyers for social reform movements. These critical analyses suggest that, at best, cause lawyers and legal activism tend to be ineffective in advancing progressive reform goals."); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 815 (2005) ("To rely on litigation rather than political mobilization, as difficult as it may be, misunderstands both the limits of courts and the lessons of history. It substitutes symbols for substance and clouds our vision with a naive and romantic belief in the triumph of rights over politics.").

11. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

stands out because, in the two years prior, courts almost uniformly[12] struck down similar laws after the Supreme Court invalidated the Defense of Marriage Act[13] in *United States v. Windsor*.[14]

The majority opinion by Judge Jeffrey Sutton waxed philosophical on the role of courts and social change.[15] Ultimately, the court determined that same-sex marriage was not a proper question for judicial resolution.[16] Rather than constitutionalizing same-sex marriage, the majority insisted on democratic deference. In reaching that conclusion, Judge Sutton's opinion echoed Rehnquist's 1952 warning, writing, "[f]or all of the power that comes with the authority to interpret the United States Constitution, the federal courts have no long-lasting capacity to change what people think and believe about new social questions."[17]

Judge Martha Daughtrey's pointed dissent repudiated the majority's approach:

12. *See* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014); Latta v. Otter, 771 F.3d 496 (9th Cir. 2014); Baskin v. Bogan, 12 F. Supp. 3d 1137 (S.D. Ind. 2014); Baskin v. Bogan, 12 F. Supp. 3d 1144 (S.D. Ind. 2014); Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014); Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014); Bradacs v. Haley, 58 F. Supp. 3d 514 (D.S.C. 2014); Brenner v. Scott, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); Burns v. Hickenlooper, No. 14-CV-1817-RM-KLM, 2014 WL 3634834 (D. Colo. July 23, 2014); Campaign for S. Equal. v. Bryant, 64 F. Supp. 3d 906 (S.D. Miss. 2014); Condon v. Haley, 21 F. Supp. 3d 572 (D.S.C. 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014); Gen. Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790 (W.D. N.C. 2014); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014); Guzzo v. Mead, No. 14-CV-200-SWS, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014); Hamby v. Parnell, 56 F. Supp. 3d 790 (D. Ak. 2014); Henry v. Himes, 14 F. Supp. 3d 1036 (S.D. Ohio 2014); Jernigan v. Crane, 64 F. Supp. 3d 1260 (E.D. Ark. 2014); Latta v. Otter, 19 F. Supp. 3d 1054 (D. Idaho 2014); Lawson v. Kelly, 58 F. Supp. 3d 923, (W.D. Mo. 2014); Love v. Beshear, 989 F. Supp. 2d 536 (W.D. Ky. 2014); Majors v. Jeanes, 48 F. Supp. 3d 1310 (D. Ariz. 2014); Marie v. Moser, 65 F. Supp. 3d 1175 (D. Kan. 2014); McGee v. Cole, No. 66 F. Supp. 3d 747 (S.D. W. Va. 2014); Rolando v. Fox, 23 F. Supp. 3d 1227 (D. Mont. 2014); Tanco v. Haslam, 7 F. Supp. 3d 759 (M.D. Tenn. 2014); Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014); Wolf v. Walker, 986 F. Supp. 2d 982 (W.D. Wis. 2014); Bassett v. Snyder, 951 F. Supp. 2d 939 (E.D. Mich. 2013); Gray v. Orr, 4 F. Supp. 3d 984 (N.D. Ill. 2013); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013); Lee v. Orr, No. 13-CV-8719, 2013 WL 6490577 (N.D. Ill. Dec. 10, 2013); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); Wright v. State, No. 60-CV-13-2662 (Ark. Cir. Ct. May 9, 2014); Costanza v. Caldwell, 167 So. 3d 619 (La. 2015); Barrier v. Vasterling, No. 1416-CV-3892 (Mo. Cir. Ct. Oct. 3, 2014); Garden State Equality v. Dow, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013); Griego v. Oliver, 316 P.3d 865 (N.M. 2013). *But see* Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014) (upholding Louisiana's same-sex marriage ban); Conde-Vidal v. Garcia-Padilla, 54 F. Supp. 3d 157 (D.P.R. Oct. 21, 2014) (upholding Puerto Rico's same-sex marriage ban).

13. Defense of Marriage Act, Pub. L. No. 104–199, Sept. 21, 1996, 110 Stat 2419 ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

14. 133 S. Ct. 2675, 2696 (2013) ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

15. DeBoer v. Snyder, 772 F.3d 388, 395 (6th Cir. 2014) ("This is a case about change—and how best to handle it under the United States Constitution. From the vantage point of 2014, it would now seem, the question is not whether American law will allow gay couples to marry; it is when and how that will happen.").

16. *Id.* at 417.

17. *Id*.

> [A]s it turns out, legalization of same-sex marriage in the "nineteen states and the District of Columbia" mentioned by the majority was not uniformly the result of popular vote or legislative enactment. Nine states now permit same-sex marriage because of *judicial* decisions . . . In addition, another 16 states have been or soon will be added to the list, by virtue of the Supreme Court's denial of *certiorari* [in federal appellate decisions overturning same-sex marriage bans]. Moreover, the 35 states that are now positioned to recognize same-sex marriage are comparable to the 34 states that permitted interracial marriage when the Supreme Court decided *Loving*. If the majority in this case is waiting for a tipping point, it seems to have arrived.[18]

For all the back-and-forth between Judge Sutton and Judge Daughtrey on family law history, tipping points, thresholds, judicial restraint, and institutional capacity, neither opinion juxtaposed the development of family law with same-sex marriage and interracial marriage.[19] As a consequence, two questions were left unanswered: how did family law develop in the crucial twenty years prior to *Loving v. Virginia*,[20] and how does the historical record square with our understandings of courts and social change?

This Article will respond to these unanswered questions through the framework of demosprudence. Demosprudence, a term coined by Lani Guiner and Gerald Torres, is the "study of the dynamic equilibrium of power between lawmaking and social movements. Demosprudence focuses on the legitimating effects of democratic action to produce social, legal, and cultural change."[21] Through this approach, we can holistically track how the meaning of family evolved in America and understand how a dynamic group of individuals, organizations, and institutions impacted family law development.

Part II describes the historical roots of state anti-miscegenation laws in the eighteenth and nineteenth centuries. Springing from the historical backdrop, Part III explores the history of California's anti-miscegenation law and the landmark 1948 ruling striking it down. Part IV examines the evidence of policy diffusion from the California and Oregon supreme courts in the first post-war anti-miscegenation repeal. Part V assesses the importance of anti-miscegenation litigation in Arizona, Nevada, and Maryland. Part VI will unravel the themes that emerged throughout the 1950s and 1960s as legislative bodies tackled racial discrimination in marriage, and examines the legislative landscape leading up to *Loving*. The Article concludes in Part VII with a brief appraisal of the pre-*Loving* and

18. *Id.* at 435 (Daughtrey, J., dissenting).

19. Courts have historically waded into family law issues beyond marriage, which sheds additional light on the institutional questions raised by the 6th Circuit. *See* MARK E. BRANDON, STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER (2013) (exploring the history of courts shaping family law through constitutional jurisprudence).

20. Loving v. Virginia, 388 U.S. 1, 2 (1987); DeBoer, 772 F.3d at 395.

21. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2749 (2014).

pre-*Obergefell* landscapes to compare these two eras in which the nation's understanding of family evolved.

II. THE EARLY HISTORY OF MISCEGENATION BANS

American society long disfavored interracial marriage and prohibited it by law and custom throughout the colonial period. As early as the seventeenth century, Virginia enforced unwritten miscegenation prohibitions punishable by public whippings and religious penance.[22] By 1691, Virginia codified the practice by enacting its first anti-miscegenation statute.[23] Maryland followed Virginia in 1692.[24] Delaware, Massachusetts, North Carolina also passed anti-miscegenation laws before 1725—jumpstarting a trend that continued well into the antebellum era.[25]

Outlawing interracial marriage was still commonplace in the early twentieth century.[26] Of the forty-eight contiguous states, only Minnesota, Wisconsin, New Hampshire, New York, New Jersey, Vermont, and Connecticut failed to enact an anti-miscegenation law.[27] Between 1780 and 1887, eleven states repealed statutory prohibitions of mixed-race marriages.[28] All racially discriminatory marriage laws in place as of 1888 remained intact until 1948 when the California Supreme Court ruled in *Perez v. Lippold*[29] that California's anti-miscegenation law contravened the Fourteenth Amendment.[30]

Until the California Supreme Court, no court held that anti-miscegenation statutes violated equal protection principles.[31] After that ruling, nineteen years before the U.S. Supreme Court handed down *Loving v. Virginia*, twenty-nine states prohibited interracial marriages.[32] Six of those states' constitutions banned interracial marriage.[33] In the fifteen

22. Walter Waldington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191 (1966).

23. *Id*. at 1191–92.

24. PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD 52 (Thomas A. Green & Hendrik Hartog eds., 2d ed. 2000).

25. Perez v. Lippold, 198 P.2d 17, 38–39 (Cal. 1948).

26. Loving v. Virginia, 388 U.S. 1, 6 n.5. (1967).

27. PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND THE LAW—AN AMERICAN HISTORY 253 (2004).

28. *Id*.

29. *Perez*, 198 P.2d at 29.

30. *Id*.

31. *Id.* at 35 (Shenk, J., dissenting) ("[Interracial marriage bans] have never been declared unconstitutional by any court in the land although frequently they have been under attack."); *see also* Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent,* 52 VA. L. REV. 1224, 1224 (1966) ("[Interracial marriage prohibitions] have been upheld as constitutional by every appellate court which has considered the point, with the single exception of the Supreme Court of California, which split four-to-three on the question.").

32. STETSON KENNEDY, JIM CROW GUIDE TO THE U.S.A.: THE LAWS, CUSTOMS AND ETIQUETTE GOVERNING THE CONDUCT OF NONWHITES AND OTHER MINORITIES AS SECOND-CLASS CITIZENS 58 (2011).

33. *See* ALA. CONST. art. 4, § 102 (repealed 2000); FLA. CONST. of 1885 art. 16, § 24; MISS. CONST. art. 14, § 263 (repealed 1987); N.C. CONST. of 1868, art. XIV, § 8 (1875); S.C. CONST. art. 3, § 33 (repealed 1999); TENN. CONST. art. 11, § 14 (repealed 1978).

years before *Loving*, however, fourteen states repealed statutory prohibitions.[34]

During this period of liberalization, the U.S. Supreme Court had opportunities to strike down anti-miscegenation laws. In the wake of *Brown v. Board of Education*, the justices were especially conscious of the controversy ensnaring anti-miscegenation laws and took evasive action to dodge them. Justice Frankfurter, for example, feared a firestorm would erupt if the Court struck a blow to miscegenation prohibitions and devoted considerable energy to steer the Court away from the marriage issue altogether.[35]

By 1955, courts invalidated segregation in public schooling,[36] private common carriers,[37] public transportation,[38] and public recreational facilities,[39] yet the justices balked at protecting interracial families. A challenge to Virginia's miscegenation statute came to the Court in the 1955 case *Naim v. Naim*.[40] *Naim* squarely presented the same questions the Court eventually addressed in *Loving*, but the Court dodged it through a series of unusual procedural maneuvers.[41] Still reeling over school integration, Justice Clark reportedly urged for restraint saying, "[o]ne bombshell at a time is enough."[42]

Activists shared the justices' overreach concerns. The National Association for Colored People publicly expressed that they had no appetite to assault interracial cohabitation and marriage restrictions in the weeks after *Brown*. In an interview with the *U.S. News and World Report*, Walter White, Executive Secretary for the NAACP, said the organization had no immediate plans to test marriage laws.[43] White was clear

34. Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967). As this Article will show, trial courts in Nevada and Arizona dealt significant blows to racially discriminatory laws, a point lost in popular conversations perhaps because they were issued in trial courts and were unpublished. Other scholars have explored how trial courts' influence on legal development can be obscured. *See* Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 992 (2008) ("[B]ecause we do not have access to the vast majority of opinions, we cannot fully assess the revolution in choice of law.").

35. *See* BRUCE ACKERMAN, WE THE PEOPLE VOLUME 3: THE CIVIL RIGHTS REVOLUTION 289 (2014) *(*acknowledging Justice Frankfurter's resistance to deciding anti-miscegenation cases for fear of undermining *Brown*'s implementation); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 50 (1998) ("Justice Frankfurter devoted considerable energy to throwing procedural roadblocks in the way of deciding whether *Brown* extended to overturning anti-miscegenation laws.").

36. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1955) (invalidating segregation in public schools for black and white students).

37. Morgan v. Virgina, 328 U.S. 373, 386 (1946) (invalidating Virginia's segregation mandate for interstate transportation).

38. Browder v. Gayle, 142 F. Supp. 707, 717 (M.D. Ala.) (overturning *de jure* segregation of Montgomery public transit), *aff'd sub nom.* Owen v. Browder, 352 U.S. 903 (1956).

39. *See* Holmes v. City of Atlanta, 350 U.S. 879 (1955) (reversing panel decision upholding segregated recreational facilities).

40. Naim v. Naim, 87 S.E.2d 749 (Va. 1955), *vacated*, 350 U.S. 891 (1955), *remanded to* 90 S.E.2d 849 (Va. 1956).

41. *Id.*; *see also* Richard Delgado, Naim v. Naim, 12 NEV. L.J. 525 (2012) (providing an in-depth history of the *Naim* case).

42. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 193 (1964).

43. *Interview with Walter White: What Negroes Want Now*, U.S. NEWS & WORLD REP., May 28, 1954, at 54.

that the civil rights organization recognized the harmful impact of racially discriminatory family laws despite the lack of enthusiasm for litigation:

> We've always opposed such laws on the basic ground that they do great harm to both races; they deny the women of a so-called minority group protection of their person, and it also is an improper and immoral thing to do. It really places a premium on extramarital relationships on both sides of the racial fence. If two people wish to live together, it is most un-Christian [that] they must live together in sin instead of wedlock.[44]

While, at least publicly, the NAACP cautiously approached anti-miscegenation litigation, other groups, including the Japanese American Citizens League and Native American tribes, were already mobilized in the American West.[45]

In 1964, the Court had another opportunity to sound marriage discrimination's death knell but opted to take a scalpel to racially discriminatory domestic relations laws over an ax. The Court held in *McLaughlin v. Florida* that Florida's criminal proscription of interracial cohabitation failed to meet constitutional muster under the Equal Protection Clause of the Fourteenth Amendment.[46] The Court declined to address the intertwined interracial marriage law, despite having an invitation to do so.

While the pre-*Loving* liberalization of racially restrictive state marriage laws is noteworthy, the shift cannot be attributed to a swell in public opinion favoring mixed-race marriages. In 1958, less than ten years before *Loving*, Gallup recorded only four percent of Americans approved of interracial marriages.[47] A poll in 1965 showed that forty-eight percent of Americans supported the criminalization of interracial relationships while forty-six percent disapproved.[48] A large gap existed between southern whites and non-southern whites. The former approved of anti-miscegenation laws seventy-two to twenty-four percent and non-southern whites disapproved fifty-two to forty-two percent.[49] A year after *Loving* in 1968, Americans' support for interracial marriages rose significantly, but still constituted a small minority at twenty percent.[50]

44. *Id.*

45. *See* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 199, 238–40 (2009).

46. 379 U.S. 184, 196 (1964).

47. Joseph Carroll, *Most Americans Approve of Interracial Marriages*, GALLUP (Aug. 16, 2007), http://www.gallup.com/poll/28417/most-americans-approve-interracial-marriages.aspx.

48. *Public Divided on Ban On Biracial Marriages*, WASH. POST, Mar. 10, 1965, at A2.

49. *Id*.

50. Carroll, *supra* note 47.

III. A CONSTITUTIONAL REGIME SHIFT

In this California decision, then, the entering wedge for dire social consequences? Probably not. It is doubtful if many American laws rest upon more deeply rooted mores than do the statutes against interracial marriage.[51]

-Christian Science Monitor, October 15, 1948

In 1948, Section 69 of the California Civil Code prohibited white persons from marrying a "[n]egro, mulatto, Mongolian or member of the Malay race."[52] California's anti-miscegenation law first appeared in the Civil Code in 1872.[53] Its first iteration, however, only prohibited marriages between white persons and persons of African ancestry.[54] After 1872, California expanded the law's scope twice, in 1901 and 1933, to cover persons of Asian and Pacific Islander descent, respectively.[55]

Nearly fifteen years later in 1948, a Los Angeles County Clerk denied Andrea Perez and Sylvester Davis a marriage license.[56] Perez, who was white, and Davis, who was black, filed a constitutional challenge to Section Code 69.[57] As Roman Catholics, they claimed the racially restrictive marriage laws impermissibly abridged their religious freedom.[58] The California Supreme Court's decision did not center on the merits of the religious liberty claim; rather, the Court took on whether Section 69 squared with the Fourteenth Amendment. A divided 4–3 court struck down the statute.[59] Writing for the plurality, Justice Traynor explained:

> A state law prohibiting members of one race from marrying members of another race is not designed to meet a clear and present peril arising out of an emergency. In the absence of an emergency the state clearly cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups. It has been said that a statute such as section 60 does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members of any other race. The decisive question, however, is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro

51. *Interracial Marriage*, CHRISTIAN SCI. MONITOR, Oct. 15, 1948, at 20.
52. Perez v. Lippold, 198 P.2d 17, 18 (Cal. 1948).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 29. Chief Justice Phil Gibson and Justice Jesse Carter joined Justice Roger Traynor's plurality opinion to void the statute on equal protection grounds. Justice Douglas Edmonds concurred in the judgment, but reasoned that the anti-miscegenation law was an unconstitutional impingement on religious free exercise.

> race, the Caucasian race, or any other race, but to the rights of individuals.[60]

Justice Traynor further explained the vicious cycle that the Court would perpetuate by affirming the law:

> The effect of race prejudice upon any community is unquestionably detrimental both to the minority that is singled out for discrimination and to the dominant group that would perpetuate the prejudice. It is no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension.[61]

The decision was widely reported in newspapers in California and carried by national newswires.[62] The decision, however, was not final. The statute's defenders could file a petition for a rehearing with the California Supreme Court or file an appeal with the U.S. Supreme Court. The City of Los Angeles petitioned for a rehearing. The California Supreme Court rebuffed the city's motion without comment.[63] Los Angeles officials declined to appeal to the U.S. Supreme Court and instructed the marriage clerk to disregard the invalidated racial restrictions.[64] Other counties followed in short order, as interracial couples obtained licenses in San Francisco and Alameda counties.[65]

Perez reverberated in the Deep South and may have influenced the course of a Mississippi case in 1949. In December 1948, Davis Knight, a biracial man, was convicted of miscegenation after marrying a white woman in Jones County, Mississippi.[66] Knight's defense claimed the state racially misclassified him.[67] Knight always considered himself white despite having a biracial grandmother.[68] Unsuccessful, Knight was convicted and sentenced to five years of imprisonment in the first known miscegenation trial in Mississippi.[69]

Knight's attorney pursued a post-conviction constitutional challenge to the anti-miscegenation statute.[70] Likely hedging the risk "that it would be better to let Davis Knight slip through the cracks than to risk triggering U.S. Supreme Court review,"[71] particularly in light of *Perez*, the Mississippi Attorney General conceded on appeal that Knight was white and

60. *Id*. at 20 (plurality) (internal citations omitted).

61. *Id.* at 25.

62. *See*, *e.g.*, Lawrence E. Davies, *Mixed Marriages Upheld by Court: Supreme Bench in California Rejects by 4-3 State's Ban, on Statute Books Since 1850*, N.Y. TIMES, Oct. 2, 1948, at 13.

63. *Supreme Court Refuses Review of Decision*, SANTA CRUZ SENTINEL (Oakland, Cal.), Oct. 29, 1948, at 4.

64. *End of Racial Ban Stands*, N.Y. TIMES, Nov. 2, 1948, at 32.

65. *Japanese Girl Weds Army Captain*, SANTA CRUZ SENTINEL NEWS (Oakland, Cal.), Dec. 19, 1948, at 1; *White, Filipino Get Marriage License*, BAKERSFIELD CALIFORNIAN (San Francisco, Cal.), Nov. 11, 1948, at 1.

66. PASCOE, *supra* note 45, at 224.

67. *Id.*

68. *Id.*

69. *Id.*

70. Melissa Murray*, Foreword: Crossing the (Color) Line*, 16 J. GENDER RACE & JUST. 667, 669 (2013).

71. *Id.* at 670.

erroneously classified.[72] The Mississippi Supreme Court overturned the conviction.[73]

It cannot be said that *Perez* challenged Mississippi officials' position on discriminatory marriage laws. That the Mississippi Attorney General stipulated to Davis Knight's "whiteness" to preserve the state's marriage law evidences this point. It is reasonable to say, however, that *Perez* was a shot across the bow to states that courts were perhaps more emboldened to strike at the heart of white supremacy.

Successful implementation of the *Perez* decision in California and its ripple effect outside the state notwithstanding, state legislators refused to repeal the statute. In 1951, an attempt to repeal the anti-miscegenation law was successful in the lower chamber but was tabled in the Senate by a lopsided vote of 25–8.[74] The lead opponent of the bill argued that the state should preserve the law so it might be litigated again, which brought sharp bipartisan criticism from state senators.[75] It was not until 1959 that the language was successfully removed from the books,[76] the same year California first enacted antidiscrimination legislation.[77]

The refusal of legislators to repeal California's anti-miscegenation statute suggests the California Supreme Court's *Perez* decision was more likely than not countermajoritarian in nature. At a minimum, it is reasonable to infer *Perez* did not reflect the values of many elected officials. Despite the resistance from some quarters, clerks—including non-parties to the original action—adhered to the California Supreme Court's ruling. The extent to which compliance was a non-issue might be unremarkable, but the intense resistance to civil rights enforcement in the late 1950s and early 1960s cautions against taking it for granted.

IV. JUDICIAL SIGNALS AND POLITICAL LESSONS

Oregon was a hotbed of racial animus well into the early twentieth century. Before achieving statehood, Oregon's provisional government enacted legislation prohibiting non-whites from residing in the Oregon Territory.[78] After receiving statehood status, Oregon included its racial exclusion provision in the state's 1857 constitution.[79] Efforts to repeal the constitution's exclusion clause were fruitless until 1927.[80]

72. Knight v. State, 42 So. 2d 747, 748 (Miss. 1949).

73. *Id*.

74. Julian Beck, *Sacramento News Letter*, VAN NUYS NEWS, May 24, 1951, at 5-D.

75. *State Senate Refuses to Repeal Invalid Interracial Marriage Law*, SAN BERNADINO CTY SUN, May 15, 1951, at 1.

76. Beck, *supra* note 74.

77. *Miscegenation Bill Repealed by Assembly,* DAILY INDEP. (San Rafael, Cal.), Feb. 19, 1959, at 26.

78. *See* CHARLES HENRY CAREY, HISTORY OF OREGON 390 (1922).

79. OR. CONST. art. XVIII, § 4 (1857) ("No free negro or mulatto, not residing in this State at the time of the adoption of this constitution, shall ever come, reside, or be within this State, or hold any real estate, or make any contract, or maintain any suit therein . . . .").

80. EUGENE H. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 122 (1967).

On October 24, 1866, the legislature expanded the state's original anti-miscegenation law.[81] While Oregon law banned marriages between whites and persons with a quarter or more "[n]egro blood" in 1862, the 1866 legislation added proscriptions of marriages between whites and Chinese, Polynesians, and Native Americans.[82] Adding insult to injury, the 1868 Legislature rescinded Oregon's ratification of the Fourteenth Amendment.[83]

Throughout the early 1920s, a large number of Klansmen were seated in the Oregon Legislature.[84] During this period, Klan-affiliated legislators enacted laws prohibiting first generation Japanese-Americans from owning or leasing land and permitted localities to refuse first generation Japanese Americans business licenses.[85] Even with the repeal of the exclusion clause in 1927, anti-minority sentiments remained.[86] One failed legislative push in 1945 aimed to prevent Japanese-Americans held in internment camps from returning to Oregon.[87]

In 1949, the Oregon Supreme Court broke away from this history, striking down Oregon's Alien Land Act.[88] The Act blocked aliens ineligible for citizenship from possessing land with the purpose of targeting persons of Japanese ancestry.[89] The Oregon justices' invalidation of the land statute under the state and federal constitutions[90] sent a strong signal on race relations, taking particular care to note the dynamics of immigrant families and their contribution to wartime efforts:

> Our country cannot afford to create, by legislation or judicial construction, a ghetto for our ineligible aliens. And yet if we deny to the alien who is lawfully here the normal means whereby he earns his livelihood, we thereby assign him to a lowered standard of living.[91]

81. Cheryl A. Brooks, *Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 OR. L. REV. 731, 742–44 (2004) (recording that the "legislature ratified the Fourteenth Amendment by a close margin—thirteen votes to nine in the Senate and twenty-five to twenty-two in the House.").

82. *Id*. at 740.

83. *Id*. at 744–45.

84. *See* Eckard V. Toy, *Robe and Gown: The Ku Klux Klan in Eugene Oregon, during the 1920s*, *in* THE INVISIBLE EMPIRE IN THE WEST: TOWARD A NEW HISTORICAL APPRAISAL OF THE KU KLUX KLAN OF THE 1920S 153, 160–61 (Shawn Lay ed., 2004).

85. *Id.*

86. *See generally id.* 153–84 (describing the activity and constituency of the Ku Klux Klan in the 1920s in Eugene, Oregon).

87. H.J. Memorial 9, 43rd Leg., Reg. Sess. (Or. 1945), *available at* arcweb.sos.state.or.us/pages/exhibits/ww2/after/pdf/back3.pdf.

88. Namba v. McCourt, 185 204 P.2d 569, 582 (Or. 1949).

89. *Id.* ("As we proceed we will be warranted in the belief that Japanese aliens are today the only group in Oregon of any significant size to which the Alien Land Law is applicable.").

90. *Id*. at 582 ("Race, color and creed can gain for no one any rights in any of our three departments of government, and likewise no department can impair any one's rights on account of his race, color or creed. The decisions make it clear that legislation which violates those simple precepts is repugnant to the due process and equal protection clauses of the Fourteenth Amendment. It is equally repugnant to Sections 1, 18 and 20 of Article I, Constitution of Oregon.").

91. *Id*. at 583.

The Oregon Supreme Court's decision bolstered the case against racial marriage restrictions in Oregon. In 1950, Governor Douglas McKay scheduled a conference of relevant stakeholders to review the status of Oregon's Native American population. The conference attendees, specifically the Klamath Tribe,[92] raised the issue of Oregon's anti-miscegenation law and formally requested the Governor work towards the law's repeal.[93] In response, Oregon's Attorney General, George Neuner, assessed the 1866 interracial marriage ban:

> I have perused the statutes of neighboring states and have found no such discriminatory restriction against Indians of more than half blood, but did find a similar statute with the reference to other races. The supreme court of the state of California in 1948 declared this statute invalid in that the law is discriminatory and irrational and unconstitutionally restricts not only religious liberty but the liberty to marry as well.[94]

The Attorney General predicted the future of Oregon's statute, accounting for California's *Perez* decision and the Oregon Supreme Court's leanings. Nuener concluded that "considering the concurring and dissenting opinions of the California Court it is not beyond the realm of possibility that if the Oregon sections were brought before a similar constitutional test they would meet with the same fate."[95]

As the Oregon Senate took a repeal bill under consideration, the *Oregon Statesman* editorial page commented that "[p]ertinent to the matter is the fact that the supreme court of California on Oct. 1, 1948, handed down a decision declaring the miscegenation provisions of the California civil code unconstitutional."[96] The editorial piece reprinted an Associated Press summary of the *Perez* decision and advised the legislature to follow the California Supreme Court's lead before the Oregon Supreme Court invalidated Oregon's statute:

> This was a California case, to be sure, but it sets a precedent which court of other states may well follow. It is safe to venture that the Oregon court would, after its decision in an alien land case, opinion by Justice Rossman, invalidating restrictive statutes on holding of lands by certain classes of aliens. . . . In view of the court decision in California . . . the legislature in this state might as well wipe off the statutes banning intermarriage of races.[97]

As the legislative process unfolded, legislators reiterated the sentiments of the Oregon Attorney General and the *Oregon Statesman* editorial pages. Senator Phillip Hitchcock argued on the Senate floor that the anti-miscegenation statute was "a disgrace to the state of Oregon, which

92. *Interracial Marriage Ban Gains Favor*, OR. STATESMAN (Salem), Mar. 13, 1951, at 3.

93. PASCOE, *supra* note 45, at 238–39.

94. Matthew Aeldun Charles Smith, Wedding Bands and Marriage Bans: a History of Oregon's Racial Intermarriage Statutes and the Impact on Indian Interracial Nuptials (1977) (unpublished M.A. thesis, Portland State University).

95. *Id.*

96. *California Court Ruled Marriage Ban Invalid,* OR. STATESMAN (Salem), Feb. 16, 1951, at 4.

97. *Id.*

violates the constitution and the laws of God."[98] The repeal bill's second co-sponsor, Senator Warren Gill, offered in the debate that while he was agonistic on the merits of interracial marriages, it was nevertheless a "personal right."[99] The Senate passed the repeal bill 21–7.[100] The House approved the bill with only four dissenting votes.[101]

There is no evidence that the Klamath Tribe initiated their request for removing racial barriers in state domestic relations law because of the *Perez* decision, yet the subsequent momentum in the political process benefited from it. Repeal proponents relied in no small part on *Perez*. Lawmakers' predictions the Oregon courts would follow California's lead was a well-reasoned calculation given the Oregon Supreme Court's equal protection analysis in the Alien Land Act case. Thus, both courts of last resort in California and Oregon legitimized the repeal campaign, even if they did not induce action on the part of repeal supporters.

V. LEGAL DEVELOPMENT AND DIALECTAL INSTITUTIONS

A. Nevada

Nevada's statute regulating miscegenation originated in its territorial government in 1861 but faced no repeal attempt until 1953.[102] Republican Assemblyman George Hawes introduced legislation in January 1953.[103] To be sure, Hawes was not primarily motivated by *Perez* or Oregon's subsequent legislative action. Rather, he was moved by the hardship endured by a friend of Japanese ethnicity whose daughter could not legally marry a man of Greek ethnicity.[104]

Hawes' efforts were initially successful in the Democratic-controlled Assembly, where his bill passed 39–9.[105] However, his bill was met with hostility in the Senate and his home district.[106] The Republican-held Senate contemplated maintaining black-white miscegenation prohibitions and scrapping the remaining restrictions, but the bill subsequently died in the Senate.[107] A 1955 bill met a similar fate.[108]

In 1956, Democratic Assemblyman Oscar Jepson carried repeal legislation.[109] His effort was a remarkable failure—the Assembly Judiciary

98. *Id.*
99. *Id.*
100. John H. White, *Boost in Dependent Exemptions Passes*, OR. STATESMAN (Salem), Apr. 13, 1951, at 1.
101. *Id*.
102. Phillip I. Earl, *Nevada's Miscegenation Laws and the Marriage of Mr. & Mrs. Harry Bridges*, 37 NEV. HIST. SOC. Q. 1, 7 (1994).
103. *Id.*
104. *Id.*
105. *Bill Would O.K. Mixed Marriages,* NEV. ST. J., Mar. 18, 1953, at 2.
106. Earl, *supra* note 102, at 7.
107. *Inter-Race Weddings Win House Approval*, NEV. ST. J., Mar. 18, 1958, at 6.
108. Earl, *supra* note 102, at 8.
109. *Id.*

Committee did not recommend passage of the repeal bill and the Assembly subsequently killed it 33–10.[110]

The fourth push in 1957 also failed in the Assembly, despite having four lead sponsors.[111] One of those sponsors, Gene Evans, reportedly took an interest in a repeal measure after hearing about an Elko County clerk denying an interracial couple a license.[112] This prompted a conversation between the Assemblyman, Elko County District Attorney Grant Sawyer, and a local judge, Taylor Wines, who encouraged Evans to carry legislation.[113] The political intransigence in Nevada mirrored that of California. The bill died in committee, never receiving a floor vote.[114]

On December 9, 1959, Harry Bridges and Noriko Sawada applied for a marriage license in Reno, Nevada. Clerk Viola Given refused.[115] "It's against the law," she responded.[116] Given explained that that though Sawada was a natural born citizen, her Japanese ancestry rendered her ineligible to marry Bridges, who was white. "It is not a matter of where you were born. It's the blood. It's against the law here," she explained to the couple.[117] Bridges and Sawada appealed to the head Washoe County clerk, who again rejected their application for a marriage license for want of appropriate racial qualifications.[118]

The couple and their attorney Samuel Francovich filed a lawsuit challenging the Nevada interracial marriage ban's constitutionality.[119] Judge Taylor Wines scheduled a hearing for the following afternoon.[120] There was tremendous interest in the hearing, according to media accounts that reported the courtroom was "packed" with "newsmen, photographers, lawyers and spectators crowded into the courtroom."[121]

Unlike the attorneys in *Perez*, Francovich challenged the Nevada statute under both the state and federal constitutions.[122] Francovich urged Judge Wines to follow the California Supreme Court.[123] The district attorney pushed back—marriage was social policy and should not be constitutionalized: "[t]he right of the states to regulate marriage ceremonies has been" a power of the individual states since "the beginning of time."[124]

Bruce Roberts, another attorney for the couple, retorted by linking Nevada to the standoff fomented by Arkansas Governor Orval Faubus

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Nevada Won't Allow Bridges to Marry Nisei*, N.Y. TIMES, Dec. 10, 1958, at 28.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. Robert Mount, *Law Overturned; Bridges Weds*, NEV. ST. J., Dec. 11, 1958, at 1.
122. Earl, *supra* note 102, at 10.
123. *Id.*
124. *Id.*

to block public school integration in Little Rock.[125] Roberts told the court, "[n]o laws within a state can be unreasonable or discriminatory. The right to marry is an individual right, not a group or racial right."[126]

Judge Wines issued no written opinion, but stated in court that *Perez* was correctly decided and that he could see "no evil which would justify the state interfering with the freedom of an individual to marry."[127] Wines issued a written order compelling the county clerk to issue the couple a license.[128] Bridges and Sawada married that day.[129] Their victory was impermanent. The county attorney pledged to appeal to the Nevada Supreme Court.[130] A columnist for the *Nevada State Journal* commented, "[a]s far as those Christmas cards go, I would suggest the couple sign them with their first names only and skip the Mr. and Mrs. routine until the Nevada supreme court gets done reviewing Judge Wines' decision."[131]

The litigation's outcome was not surprising to the local Reno paper's editorial board. The paper praised Judge Wines:

> Few persons, certainly, can doubt the law, long since declared unconstitutional in California, has any merit. Even if there is doubt in some minds that "all men are created equal" the law makes Nevada look ridiculous. This state prides itself on being a great western frontier of freedom. Gambling is legal, liquor is sold around the clock, and marriages (of the same race) can be performed in minutes.[132]

For the local editorial board, like Wines, the nearly century-old law was without any legal merit. Though, it is not clear that the paper's dismissive characterization of the opposition as *de minimis* is terribly accurate. If that proposition were true, in the years prior to the Bridges' case, the "few persons" who could take the law seriously were disproportionately represented in the state legislature. The paper's later reporting suggests that the public reaction was not lopsidedly in favor of Wine's ruling.[133]

The Nevada Supreme Court never weighed in on the constitutionality of Nevada's law. Less than a month after Judge Wines' order, legisla-

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 10–11.
129. *Id.* at 12.
130. *Bars Still Up Against Mixed Race Marriage*, RENO EVENING GAZETTE., Dec. 13, 1958, at 9. The local attorney demanded a written opinion from Judge Wines. His unpublished opinion was brief. Judge Wines wrote, "Sections 122.180, 122.190, and 122.210, Nevada Revised Statutes, are unconstitutional in that the violate Article I, Section I of the Constitution of the State of Nevada and Section I of Amendment XIV of the Constitution of the United States of America." Earl, *supra* note 102, at 13.
131. Frank Johnson, *Law on Miscegenation Picketed by Organizer*, NEV. ST. J., Dec. 12, 1958, at 20; Earl, *supra* note 102, at 13.
132. *State on Miscegenation Gets Some Rude Treatment*, NEV. ST. J., Dec. 11, 1958, at 14.
133. *Mixed Marriage Ban Is Dropped*, NEV. ST. J., Jan. 22, 1959, at 26 ("The marriage set up a clamor among Nevada residents, many opposed to the verdict handed down by Judge Taylor Wines, and many hailing the decision as a major advancement of civil rights."); *see also*, Earl, *supra* note 102, at 13–15.

tion was introduced again in the Nevada Senate to repeal the statute.[134] Reports at the time linked the legislation and the Bridges' litigation:

> The bill was introduced in the Senate Jan. 21 by the judiciary committee and is considered an outgrowth of the successful battle waged last fall by union leader Harry Bridges to wed a pretty Nisei secretary in Reno. After a much-publicized, two-day wrangle with sympathetic authorities, the district court ordered a marriage license issued to the longshoreman leader and his American-born Japanese fiancé.[135]

In a staggering turnaround from prior defeats, the repeal bill passed the Nevada Senate 17–0 and the Assembly 32–5.[136] Only one member of the Assembly took to the floor to denounce the legislation.[137] Governor Grant Sawyer— who earlier discussed the repeal measure with Taylor Wines and Gene Evans— signed the bill with apparently little fanfare.[138]

The historical evidence does not suggest that *Perez* mobilized actors in the political process to begin a campaign to repeal the discriminatory marriage laws. Personal connections and experiences motivated a handful of Nevada legislators to rid the state code of marriage discrimination. Curiously, the first attempt was the closest to success but was thwarted by racial prejudice against black Nevadans. The successive repeal efforts suffered from a rapid decline of political will to attack the statute.

Whether the intervening order from Judge Wines in December 1958 is responsible, either in whole or in part, for the subsequent shift between 1957 and 1959 leaves room for debate. The court's intervention does not likely account for Governor Sawyer's support. Sawyer was sympathetic to other civil rights causes. The Nevada legislature, however, resisted civil rights measures throughout Sawyer's first term in office.

B. Arizona

> *"We want to stay in Tucson."*
> –Harry Oyama[139]

Like Nevada, Arizona first adopted its anti-miscegenation law before statehood. In 1865, the Arizona Territory forbade the intermarrying of whites and individuals of any Native American, African, or Asian ethnicity.[140] The law went undisturbed for years. In 1931, the law's scope was expanded to cover "Malays" and "Hindus."[141] The addition of "Malays"

134. *Mixed Marriage Ban Is Dropped*, *supra* note 133, at 26.

135. *Interracial Marriage Ban Dropped as Bill Is Signed*, RENO EVENING GAZETTE, Mar. 18, 1959, at 18.

136. Earl, *supra* note 102, at 15.

137. *Id.*

138. *Interracial Marriage Ban Dropped as Bill Is Signed*, *supra* note 135, at 18.

139. *Couple Sues to Test Law Banning Mixed Marriages*, TUCSON DAILY CITIZEN, Dec. 12, 1959, at 5.

140. Roger D. Hardaway, *Unlawful Love: A History of Arizona's Miscegenation Law*, 27 J. ARIZ. HIST. 377, 377–78 (1986).

141. *Id.* at 382–83.

to the list of proscribed races was without much controversy—the Arizona House approved the amendment unanimously.[142] The Senate expressed dissatisfaction with the Malay-only House bill and added Hindus.[143] The amended legislation garnered nominal opposition in the House: only eleven of sixty-two members opposed the more sweeping legislation.[144]

The Arizona Supreme Court in *Pass v. Pass* affirmed the constitutionality of the marriage law in 1942.[145] The case arose from a criminal trial in which a white woman was forced to testify against her husband, a man of mixed ancestry.[146] The wife invoked marital privilege to avoid testifying against her husband.[147] She was nevertheless compelled to testify because the miscegenous marriage was unlawful in Arizona.[148] The Arizona Supreme Court rebuffed the constitutional challenge pointing out that no court had indulged challenges to race-conscious marriage qualifications.[149] The Arizona justices, however, expressed skepticism over the sweeping scope of Arizona law—which the majority described as "peculiar" to Arizona[150]—that prevented two individuals of mixed background from marrying.[151] The Arizona justices put the legislature on notice:

> We think the language used by the lawmakers went far beyond what was intended. In trying to prevent the white race from interbreeding with Indians, Negroes, Mongolians, etc., it has made it unlawful for a person with 99% Indian blood and 1% Caucasian blood to marry an Indian, or a person with 99% Caucasian blood and 1% Indian blood to marry a Caucasian. We mention this and the absurd situations it creates believing and hoping that the legislature will correct it by naming the percentage of Indian and other tabooed blood that will invalidate a marriage. The miscegenation statutes of the different states do fix the degree or percentage of blood in a Negro, an Indian, etc., preventing marriage alliances with Caucasians.[152]

Two months after the *Pass* decision, the Arizona Legislature responded and liberalized the state's miscegenation statute. After substantial debate, including debate on whether to scrap the state's miscegenation laws altogether,[153] the legislature defined Caucasians as "someone who was at least seventy-five percent Caucasian, no more than twenty-five percent Indian, and with no Hindu, Negro, Mongolian, or Malay

142. *Id.* at 383.
143. *See id.*
144. *Id.*
145. State v. Pass, 121 P.2d 882, 884 (Ariz. 1942).
146. *Id*. at 882.
147. *Id.*
148. *Id.*
149. *Id.* at 883 ("[W]e are well satisfied that the law, in so far as it forbids a white person to marry an Indian or his descendants, is constitutional. Indeed, all the courts, we believe, hold that.").
150. *Id*.
151. *Id.*
152. *Id.* at 884.
153. Hardaway, *supra* note 140, at 377, 384–86.

blood."[154] The legislature eliminated the prohibition of marriages between whites and Native-Americans and validated the legality of existing marriages between whites and Native Americans.[155]

The "liberalized" 1942 statute remained in place until Henry Oyama and his fiancé Mary Ann Jordan filed suit in state court asserting the law was constitutionality deficient. Oyama, who was of Japanese descent, and Jordan, a Caucasian, asked the court to invalidate the statute as violative of the constitutional guarantees of religious freedom, due process, and equal protection.[156] The couple did not wait long for a decision. District Court Judge Herbert F. Krucker ruled in their favor within an hour of the hearing.[157]

County Attorney Henry Ackerman appealed the decision to the Arizona Supreme Court but did so with the hope the state supreme court would affirm Judge Krucker's ruling and provide a statewide precedent.[158] "This is one suit I hope to lose," he told the media.[159]

Finality was far off. The Chief Justice of the Arizona Supreme Court told reporters that it would likely be a year until the court would hear the marriage appeal.[160] In the interim, talk of repealing the territorial-era marriage law sprung up. A student group, for example, at the University of Arizona held a panel discussion on the topic. Political science professor, Richard Burke, pointed out that the issue had never received serious attention in the state legislature or floor debate.[161] Burke favored legislative repeal.[162] Another panelist, attorney Frank Barry, was skeptical of deferring to the legislative process. Barry said the law was unconstitutional, and the courts had a duty to overturn it.[163]

A month after Judge Krucker's ruling, Pima Senator David Wine dropped a bill to codify it. Senator Wine told the *Tucson Daily Citizen*, "[t]he introduction of this bill is the direct result of the Oyama situation in Tucson. Superior Court Judge Herbert F. Krucker ruled that the miscegenation statute is unconstitutional. Now, the statute should be erased."[164] Support came quickly from organized interests. The Arizona Civil Liberties Union endorsed Wine's legislation, stating, "[w]e welcome the introduction of this bill in the state senate. When passed, it will mean

154. *Id.*
155. *Id.*
156. *Couple File Suit Against Race Law*, TUCSON DAILY CITIZEN, Dec. 11, 1959, at 1.
157. *Id.*
158. *Couple Happily Wed As Racial Bars Fall*, ARIZ. REPUBLIC, Dec. 29, 1959, at 1 ("A superior court ruling has no effect upon the law. Only the supreme court has that authority. That's why we are anxious to get this before it for final determination of its constitutionality.").
159. *Krucker Rules Couple May Wed, Law Unconstitutional*, TUCSON DAILY CITIZEN, Dec. 23, 1959, at 1.
160. *Marriage Case Appeal Dismissed*, TUCSON DAILY CITIZEN, May 5, 1962, at 52.
161. *Interracial Marriage Law Repeal Asked*, ARIZ. REPUBLIC, Dec. 11, 1959, at 13 ("[B]ecause of the committee system in our state legislature it has never come up for discussion on the floor as far as I know.").
162. *Id.*
163. *Id.*
164. *Miscegenation Repeal Introduced By Wine*, TUCSON DAILY CITIZEN, Jan. 12. 1969, at 15.

the people of this state realize that such a law is not only unconstitutional but un-American in spirit."[165]

Wine's legislation made no headway in 1960, but litigation in the district courts pressed on in late 1960 and early 1961. Judge Krucker for a second time struck down the marriage law as it applied to Cesar Lee and Hazel Grimwood.[166] On March 10, 1961, Superior Court Judge Lee Garrett joined Krucker, striking down the marriage ban for a third time. Judge Garrett held the marriage law unconstitutional and compelled the local marriage clerk to issue Harold Merchant, whose mother was Chinese, and Mary Beth Lynn, a Caucasian, a marriage license.[167]

On January 5, 1962, two Democrats and two Republicans introduced a repeal bill[168] a little over a month before oral arguments were set at the Arizona Supreme Court. The repeal legislation successfully passed the House by a margin of 71–6 and the Senate 20–6.[169]

In Arizona, courts did not have the last word. This lack of final resolution by judicial intervention is almost certainly the reason judges fail to receive credit for dismantling marriage discrimination. It would be a mistake to overlook the litigation that immediately preceded the legislative action. Historian Peggy Pascoe's assessment is particularly informative:

> Although the [Japanese American Citizens League] has discussed repealing Arizona's marriage as early as 1955, it was the ACLU's decision in 1958 to take the *Oyama* case to court, which generated a burst of publicity about the denial of a marriage license to a Japanese American man and a White woman, that provided the catalyst for Arizona's repeal. "When the Arizona Supreme Court took its time issuing a decision in the case, the state branch of the ACLU grew impatient with the courtroom strategy and used the *Oyama* example as a rallying point to get the Arizona legislators to consider repealing the law."[170]

C. Maryland

The first recorded attempt to repeal Maryland's race restrictive marriage laws was in 1955. Maryland's first black senator, Republican Harry Cole, announced he would push for legislation to end the marriage ban first adopted in 1715.[171] Unfortunately for Cole, he had little backing from his own party leadership. The Republican leader opposed repeal saying, "[Senator Cole] has come to me to discuss a great many things, but he has not mentioned [an interracial marriage] bill to me. If he does,

165. *Marriage Bill Backed*, ARIZ. REPUBLIC, Jan. 17, 1960, at 4.
166. *Judge Clears Path For 2nd Inter-Racial Marriage*, TUCSON DAILY CITIZEN, Nov. 12, 1960, at 11.
167. *Racial Marriage Ban Again Fails Court Test*, TUCSON DAILY CITIZEN, Mar. 10, 1961, at 3.
168. *Inter-racial Ban Measure's Target*, ARIZ. DAILY SUN, Jan. 15, 1962, at 1.
169. *Id.*
170. PASCOE, *supra* note 45, at 240.
171. *Interracial Marriage*, WASH. POST, Jan. 13, 1955, at 18.

I'll certainly advise him against it."[172] The lack of further media coverage suggests a bill was never cobbled together in 1955, despite Senator Cole's intention.

Two years later, the first legal challenge to Maryland's domestic relations laws were filed. A twenty-year-old, pregnant white woman was charged with violating Maryland law for carrying a child fathered by a black man.[173] The state prosecuted her after she revealed the father's identity while seeking a child support order.[174] Her attorney argued that the law was constitutionally void because "it was conceived in the hatred and hostility of a slave era."[175] Baltimore County Chief Judge Emory H. Niles held that the law was unconstitutional and threw out the indictment, writing, "[t]his statute applies unequally to the conduct which it prohibits, in that it penalizes one class or guilty person on the ground of race."[176]

The decision garnered national attention, perhaps because some viewed it as a vehicle for a ruling from the U.S. Supreme Court.[177] One Indiana newspaper elaborated on this point:

> Surprisingly, the United States Supreme Court has never passed on the constitutionality of the state statutes. There is wide belief that of the Baltimore case or any similar case reaches the high tribunal in the near future, all of the existing anti-miscegenation laws will be overthrown just as the school segregation laws were overthrown three years ago.[178]

The promise the case had to test miscegenation bans nationally was never realized. The state did not appeal Judge Niles' ruling.

At least one paper still saw the decision as a turning point. The *Mason City Globe-Gazette* in Iowa ran an editorial opining that Chief Judge Niles' decision was "[o]f greater significance because it took place in a border state [and] was a decision by the chief judge of the Baltimore supreme court."[179]

Maryland's domestic relations laws were the subject of litigation again in 1964. Benjamin de-Guzman, of Filipino background, and Elizabeth Medaglia, a white woman, were denied a marriage license.[180] Medaglia sued, arguing the marriage license rejection deprived her of due process.[181] Baltimore County Judge W. Albert Menchine avoided a

172. *To Seek Repeal of Marriage Ban*, BISMARCK TRIB., Jan. 15, 1955, at 4.
173. *Miscegenation Law Invalidated*, WASH. POST, Apr. 18, 1957, at B2.
174. *Id.*
175. *Girl, 20, Challenges Miscegenation Law*, KOKOMO TRIB. (Ind.), Mar. 28, 1957, at 30.
176. *Id.*
177. The decision carried by wire news services and printed in newspapers throughout the country. *See*, *e.g.*, *Court Invalidates Interracial Marriage Law*, DENTON REC.-CHRON. (Tx.), Apr. 22, 1957, at 4.
178. *Assail Miscegenation Laws*, HAMMOND TIMES, May 6, 1957, at 7.
179. *Inter-Racial Marriage Bar Put Under Spotlight*, MASON CITY GLOBE & GAZETTE, Apr. 27, 1958, at 19.
180. *Court in Maryland Avoids a Ruling on Miscegenation*, N.Y. TIMES, Feb. 14, 1964, at 33.
181. *Id.*

constitutional decision.[182] Judge Menchine ruled that while "members of the Malay race" were barred from marrying whites under Maryland law, the Maryland statute did not define "Malay."[183] Because the hopeful groom had a white grandmother, the law did not apply, and he was eligible to marry Medaglia.[184]

An early 1966 incident cast Maryland law in the spotlight again. In February of that year, Jo Ann Kovacs and Meli Toalepai applied for a license and were denied by the Baltimore clerk.[185] The clerk classified Kovacs "white," and Toalepai "Malay." Toalepai countered that he was a Hawaiian Polynesian.[186] The clerk, Jack Harris, reaffirmed his interpretation of Maryland law and rejected the couple's application.[187] In the story's wake, a local member of the House of Delegates pledged to pursue a repeal measure.[188] Another legislator, Delegate Julian Lapides, feared the international ramifications of the news.[189] "The Communists will have a field day with this one," he told a local paper.[190]

In March 1966, the Maryland Senate first defeated a repeal bill 15–13.[191] The sponsor of the bill and the only black senator, Senator Verda Welcome, spoke on the floor.[192] Seemingly shocked, Senator Welcome told her colleagues, "I did not believe this would happen today. I did not believe you would do it. I'm a citizen of Maryland and I'm not proud of it, not proud at all today."[193] The *Washington Post* reported that after the Senate chamber had emptied, Senator Welcome sat alone reviewing the roll call, telling the reporter, "I can't understand it. I thought these were my friends . . . I guess I misread them."[194]

After lobbying wavering legislators,[195] Senator Welcome's fortune changed two weeks later. The Senate approved her bill after two senators switched positions, though they gave no public statements explaining their change of heart.[196] Some senators remained vocally opposed to repeal. Senator John Sanford argued that Virginia Supreme Court's decision in *Loving v. Commonwealth*, which upheld Virginia's miscegenation prohibitions, should guide Maryland marriage policy.[197]

182. *Id.*
183. *Id.*
184. *Id.*
185. *Maryland Law Forbids Interracial Marriage*, THE POST (Frederick, Md.), Feb. 12, 1966, at 18.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. Richard Homan, *Maryland Senate Kills Repeal of Miscegenation Ban*, WASH. POST, Mar. 9, 1966, at B14.
192. *Id.*
193. *Id.*
194. *Id.*
195. Herb Thompson, *House Will Air Death Penalty*, CUMBERLAND EVENING NEWS, Mar. 9, 1966, at 17.
196. Alan L. Dessoff, *Miscegenation Vote Reversed*, WASH. POST, Mar. 22, 1966, at B1.
197. *Id.*

Others, however, focused on the image racial discrimination projected to the world about American values. Senator Gilbert Gude spoke on the Senate floor and offered that the "archaic law" "burden[ed]" the United States' goal to "assume leadership in the world."[198] Queen Anne's Senator Robert Dean dismissed the notion that the Maryland General Assembly's debate on interracial marriage had international implications. "Foreigners don't know what we're doing here and they don't give a durn," Dean told his colleagues.[199]

Meanwhile, Senator Welcome remained silent—which prompted one senator to comment, "[i]t's sort of disheartening to have her continually argue the case alone."[200] The success was short-lived. The House of Delegates rejected the bill 66–50, failing to attain a constitutional majority.[201]

Prior the 1967 legislative session, Maryland's law was challenged once again. Navy Ensign Manuel Lopez, who was half Filipino, applied for a marriage license in Prince George's County.[202] His bride-to-be, Sally Smayling, was white.[203] Citing Maryland's racial qualifications, the deputy clerk rejected their application.[204] Much like the 1964 de-Guzman case, Maryland law did not clearly prohibit persons of mixed Asian or Pacific Islander descent from marrying whites.[205] Taking prompt legal action, the couple's representative, the state attorney general's office, and the judge conferenced and agreed that the clerk improperly applied the law.[206] The judge ordered the Prince George's clerk to issue a license.[207] And while the legal action taken did not attempt to challenge the constitutionality of the law, it nevertheless generated some media coverage.

As the 1967 session of the Maryland General Assembly began, the *Washington Post* urged Maryland lawmakers to take swift action on the miscegenation law, which the editors described as "[h]igh on the list of work for the new Maryland Legislature."[208] The *Post* endorsed repeal as the Supreme Court was set to rule in *Loving*, "The statute surely will fall in the courts if is not stricken in the Legislature. The Legislature has the opportunity to take the state willingly, cheerfully, and generously into the 20th Century. It ought to do so."[209]

Between 1966 and 1967, the repeal measure garnered more support, partially because of the Maryland General Assembly's reapportionment

198. *Id.*
199. *Id*.
200. *Id.*
201. *Miscegenation Ban Voted in Maryland*, N.Y. TIMES, Mar. 29, 1966, at 29.
202. Bart Barnes, *Maryland Race Law Nearly Wrecks Wedding of Ensign on Vietnam Leave*, WASH. POST, Jan. 4, 1967, at A1.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. Editorial, *An Infamous Law*, WASH. POST, Jan. 6, 1967.
209. *Id.*

after *Reynolds v. Sims*,[210] which diminished rural power. Senator Welcome, once the lone sponsor of the marriage bill, told reporters that there was "no shortage" of willing co-sponsors in 1967.[211] Unlike the intense, heavily debated, and emotion-laden colloquies that accompanied repeal attempts in 1966, 1967 saw no floor discussion.[212]

The lack of debate did not mean the absence of drama. White segregationists initiated a letter writing campaign posed as black religious leaders. The forged letters called on legislators to kill Senator Welcome's bill because intermarriage was "against God's will."[213] The duplicitous letters' source was exposed, failing to derail repeal.[214] The legislation sailed through the House of Delegates 97–25 and went to Governor Spiro Agnew.[215] Agnew signed the legislation on March 24, 1967, proclaiming the new law erased a "blot" on Maryland's history.[216]

VI. THE POPULAR FOUNDATIONS OF *LOVING*

Between 1953 and 1965, Montana, North Dakota, Colorado, South Dakota, Idaho, Utah, Nebraska, Indiana, and Wyoming also ended racial marriage prerequisites—none under the threat of litigation. In the absence of judicial intervention, what motivated legislators in these states to reexamine the role of race in family law?

In Montana, war brides drove the debate. Scott Pfohl, a Montana repeal proponent, said that the repeal was necessary because "servicemen are intermarrying with other races all over the world."[217] Further, Pfohl told legislators, "[t]he present law creates conflict in the future because children of mixed marriages are not considered legitimate in Montana."[218] Similarly, Representative Leo Graybill, the lead sponsor on Montana's 1953 repeal, reported to the Anti-Defamation League that the bill's success was owed to military spouses:

> The repealer went through with little opposition due, of course, to the fact that many of our soldiers have come back to Montana with Japanese wives. The Legislature recognized that it seemed silly that we would disinherit such a wife, who, in many instances, had been

210. 377 U.S. 533 (1964).

211. Richard Homan, *Md. Legislature Repeals Antimiscegenation Law*, WASH. POST, Mar. 4, 1967, at A1.

212. Richard Homan, *Marriage Law Repeal Passed By Md. Senate*, WASH. POST, Feb. 10, 1967, at B1.

213. *Id.*

214. *Id.*

215. *Maryland Governor Gets Bill To Abolish Miscegenation Ban*, N.Y. TIMES, Mar. 4, 1967, at 15.

216. Richard Homan, *Agnew Signs Far-Reaching Bills on Constitution, Racial Marriage*, WASH. POST, Mar. 25, 1967, at A11.

217. *House Names Probers for Prison, Industrial School and Hospital*, BILLINGS GAZETTE, Jan. 10, 1953, at 1.

218. *Id*.

well received by the local community to which the soldier returned.[219]

North Dakota was the first state to strip its code of anti-miscegenation provisions post-*Brown v. Board*, but grassroots organizers first tried to end race-based marriage laws in 1953. That legislative campaign's leaders were weary of national organizations' involvement. One letter from a local activist asked the ACLU not to intervene, writing, "[o]ur present thinking is that the support for the repeal should be limited to various social groups active in North Dakota and should not include ACLU or other national organizations interested in a problem of this kind."[220]

The 1953 attempt failed. Senator E.C. Stuckey carried the bill arguing, "I am not personally in favor of intermarriage. But that isn't the state's business."[221] Senator Stuckey faced hostility from Senate leadership. First, Senate President CP Dahl refused to place Stuckey's floor speech in the Senate Journal. The Senate then tabled the bill 27–21.[222] When Stuckey requested a copy of the recorded vote, the Senate President refused, destroyed the record, and exchanged barbs with Stuckey on the Senate floor.[223]

Repeal supporters took a second bite at the apple in 1955 but coordinated with the local ACLU.[224] The House acted first. During the floor debate, the chairman of the House Judiciary Committee, Adam Gefreh asked his colleagues, "[d]oes one race have authority to declare itself superior to another by legislative action? The law in my opinion is unconstitutional because it is a violation of God's law. Therefore, I recommend its passage."[225]

T.O. Rohde rose in opposition and asked the chamber to table the bill because the status quo was intended "to protect the innocent."[226] Bill sponsor Lee Brooks was skeptical of the paternalism justification, countering, "Mr. Rohde, if your son or daughter wanted to marry a Negro they could go to Minnesota or Montana and be perfectly free to do it."[227] Following debate, by a margin of 75–32, the House sent the repeal bill to the Senate.[228] The bill had less room for error in the Senate, which approved it 25–22.[229]

219. Letter from Leo Graybill, Member, Montana Gen. Assembly, to Sol Rabkin, Anti-Legal Dep't Dir., Defamation League (Mar. 3, 1953) (on file with author).

220. Letter from Harold W. Bangert, N.D. State Correspondent, Am. Civil Liberties Union, to George E. Rundquist, Exec. Dir., N.Y. Civil Liberties Union (Jan. 8, 1953) (on file with author).

221. *Mixed Marriage Law Repeal Stopped*, BISMARCK TRIB., Feb. 18, 1953, at 7.

222. *Id.*

223. *Id.*

224. Letter from Steven S. Schwarschild, Rabbi, Fargo, N.D. Temple Beth El, to Louis Joughin, Assistant Nat'l Dir., Am. Civil Liberties Union (Feb. 4, 1955) (on file with author).

225. *2 House Measures Bring Debates Before Passage*, BISMARCK TRIB., Jan. 27, 1955.

226. *Id.*

227. *$9 Million*, BISMARCK TRIB., Jan. 13, 1955, at 14.

228. *Id.*

229. *Senate Approves Bill on Inter-Marriage Ban*, BISMARCK TRIB., Feb. 1, 1955, at 8.

Records from Idaho are sparse, perhaps because of limited debate. However, the *Idaho State Journal* did report the following:

> Among [the bills passed by the House] was a measure repealing Idaho's law prohibiting whites to marry persons who are not of the Caucasian race. The vote was 48 to 5 with four Democrats and one Republican among the dissenters. There was no debate, only a brief explanation by [Assistant Majority Leader Gregg] Potvin that the purpose of the measure was the bring Idaho in line with U.S. Supreme Court decisions ruling miscegenation laws unconstitutional.[230]

The Assistant Majority Leader was mistaken, perhaps confusing the California Supreme Court with the U.S. Supreme Court. The passage of time and thin evidence obscures whether the motivation behind Idaho's repeal was to comply with misconstrued "precedent" or whether the U.S. Supreme Court's segregation rulings altogether encouraged repeal.

Four years later, Utah's legislature ended racially restrictive marriage laws, though activists targeted Utah for litigation. Utah's 1888 marriage law was never squarely tested in the courts.[231] Throughout the early 1960s, however, the ACLU actively looked for a test case. Salt Lake City area officials were eager to help the ACLU. The county attorney's office urged the ACLU to file litigation against the state's marriage law.[232] The county clerk screened potential plaintiffs and referred them to the ACLU.[233] On the legislative front, a local ACLU attorney recounted to the national office that the county clerk predicted advocates could "easily repeal the provision outlawing marriages between white people . . . and oriental and malays . . . [but] could not change the law forbidding marriages between white people and negroes."[234]

The clerk's political calculus may have underestimated legislators' willingness to act. The Utah House passed a repeal measure 52–6.[235] As in other states, the arguments in favor and against were varied. Representative Ray Harding urged repeal because the existing statute improperly interfered with individual rights.[236] Salt Lake City Representative J.M. Smith feared the legislation would result in a loss of heritage.[237] Smith said, "[i]t appears we really have no problem except to whether we

230. *Legislature*, IDAHO ST. J., Feb. 16, 1959, at 2.

231. Plaintiffs in one case tried to contest the constitutionality of the miscegenation law in the Utah courts, but the resolution turned on the state's anti-bigamy law. *See* Thomas v. Children's Aid Soc'y of Ogden, 364 P.2d 1029, 1032 (Utah 1961) ("Having determined . . . that the purported marriage was void, it follows the trial court's decision must be sustained and we need not, therefore, concern ourselves with our miscegenation statute . . . the constitutionality of which is questioned by plaintiffs.").

232. PASCOE, *supra* note 45, at 240–41.

233. *Id.*

234. *Id.* at 241.

235. *Id.*; *Utah*, OGDEN STANDARD-EXAMINER, Mar. 14, 1063, at 2A.

236. *Id.*

237. *Id.*

should allow the marriage of blacks and whites . . . . I would not want to sell my heritage or the heritage of my posterity."[238]

Other members pushed back, explaining their pro-repeal vote as a way to avoid litigation, resolve legal ambiguity, and address interstate recognition problems. One member said the "chief justification" for the legislation was to redress the denial of death benefits and inheritance to interracial families.[239] Another, Representative Peterson, proffered his pro-repeal support was not an endorsement of interracial relationships, but a necessity triggered by other states. "I think that any marriages between races should be discouraged, but in view of the fact that some of these things are legalized in other states and then they come here to live, I vote aye," Peterson told his colleagues.[240]

Representative Kassler delivered the longest floor speech, telling the House that the law could not meet constitutional muster:

> The Supreme Court of the United States has struck down milder miscegenation statutes than this, and regardless of what your ultimate belief is, if you want to see the Supreme Court of the United States strike this one down, then vote against this bill . . . . we should pass this bill as it stands, it's a good bill, and not force this before the United States Supreme Court . . . .[241]

Attempts to repeal Nebraska's marriage laws prior to 1963 failed, often in committee. Though a proposal to strike the law successfully navigated the legislature in 1895, Governor Silas Holcomb vetoed it.[242] The legislature's apparent lack of animus towards racial minorities was short lived. In 1913, the scope of Nebraska's law was expanded from prohibiting black-white intermarriage to include persons of Japanese or Chinese ancestry.[243]

In the early 1960s, the law received renewed attention. Governor Robert Crosby's Committee on Human Rights purportedly studied the issue.[244] In late 1962, some churches in Lincoln targeted the statute. At a meeting of the Lincoln Council of Churches, members discussed the marriage law, predicting that the courts would strike it down if challenged.[245]

When lawmakers introduced a repeal measure in 1963, a victory seemed likely. Repeal proponents focused on the susceptibility of Nebraska's law to judicial invalidation. As the *Lincoln Star* reported, "[t]his year, widespread support of the bill to erase the prohibition is anticipated. Opponents of the marriage ban say it is discriminatory and probably

238. Utah State Legislature, *House Floor Proceedings* (Mar. 13, 1963) (on file with author).
239. *Id*.
240. *Id*.
241. *Id*.
242. *Vetoed by Holcomb*, NORTH PLATTE SEMI-WEEKLY TRIB., Apr. 12, 1895, at 3.
243. NEB. REV. STAT. §42-103 (1943); NEB. REV. STAT. § 42-328 (repealed 1972); NEB. REV. STAT. § 42-117 (1929).
244. *Dr. White: State Interracial Marriage Ban "Not Christian,"* LINCOLN STAR, Nov. 17, 1961, at 24.
245. *Id.*

unconstitutional."[246] The bill passed the Judiciary Committee by the narrowest of margins—a 4–3 vote.[247] The Committee heard from nineteen total proponents of the legislation. The *Lincoln Evening Journal* summed up their testimony:

> Arguments put forth by religious leaders took the same line. The speakers said there was no basis for the allegation that inter-racial marriage will result in a "biological deterioration" of the white race. They said the present law is prejudicial, unconstitutional, contrary to the will of God, an infringement on civil rights and the "shame of all Christians."[248]

The anti-miscegenation law's supporters offered religious justifications for maintaining the status quo. "God made man different colors and he intended for him to stay that way," said Omaha attorney Roy Harropp.[249] Theodore Fitch of Council Bluffs offered similar testimony, telling the Committee that whites who married non-whites risked divine vengeance.[250] One opponent testified that the legislation was part of a "Communist plot."[251] The unicameral legislature gave initial approval of the repeal measure 25–8.[252] On March 27, 1963, the bill was sent to the governor after a 29–12 vote on final passage.[253]

Wyoming was the second-to-last state outside the South to eliminate laws on miscegenous relationships. As historian Roger Hardaway described the repeal, the legislature acted knowing the end of Wyoming's interracial marriage law was a *fait accompli*:

> Many legislators realized that the time was not far off when the United States Supreme Court would rule that all miscegenation statutes were unconstitutional. Consequently, in the 1965 session of the Wyoming State Legislature, several members introduced a bill to repeal Wyoming's miscegenation law because they believed it to be unconstitutional. The repeal measure faced some opposition but passed the House of Representatives on January 19 by the vote of 51-8, and the Senate on January 25 by the vote of 21–3. Governor Clifford Hansen signed the bill on January 27, 1965, bringing the legal history of miscegenation in Wyoming to an abrupt end.[254]

Similar developments unfolded in another non-Southern outlier, Indiana. In 1964, the Indiana Civil Rights Commission investigated the state of civil rights law and recommended repeal of the state's anti-miscegenation law to the legislature.[255] Chairman Harold Hatcher report-

246. *Marriage Bill Hearing Monday*, LINCOLN STAR, Feb. 24, 1963, at 13.
247. *Bill Will Lift Bar on Race*, OMAHA WORLD-HERALD, Feb. 26, 1963, at 8m.
248. *Marriage Bill Gets Response*, LINCOLN EVENING J. & NEB. ST. J., Feb. 26, 1963, at 8.
249. *Id.*
250. *Id.*
251. *Id.*
252. *First Approval for Racial Bill*, EVENING WORLD-HERALD, Mar. 11, 1963, at 6.
253. *Interracial Marriage Ban Repeal Bill OKd*, LINCOLN EVENING J. & NEB. ST. J., Mar. 27, 1963, at 8.
254. Roger D. Hardaway, *Prohibiting Interracial Marriage: Miscegenation Laws in Wyoming*, 52 ANNALS OF WYO. 55 (1980).
255. *ICRC Seeks Miscegenation Law Repeal*, ANDERSON HERALD, Feb. 20, 1964, at 19.

ed that a majority of the Commission felt that the statute "should not be on the books" and predicted that if the Indiana General Assembly failed to act, the law could be struck down "by a court ruling that it was unconstitutional."[256]

In January 1965, Indianapolis Democrat Russell Dean introduced legislation to put the miscegenation law to bed.[257] In addition to emphasizing that Indiana and Wyoming were the last non-Southern states with such laws,[258] Dean pointed out that a definitive ruling on Indiana's law was not far off:

> Under the equal protection clause of the 14th-Amendment to the Federal Constitution, the Anti-Miscegenation laws are untenable. Indiana should remove this morally and legally indefensible blot from its record by repealing the Anti-Miscegenation law without further delay.[259]

At least one large pro-repeal organization made the case that the statute could not withstand judicial scrutiny. In a formal statement endorsing the Dean bill, the Indiana Council of Churches cited Justice Potter Stewart's concurring opinion in *McLaughlin v. Florida* in support of their position.[260] At the House Judiciary Committee, testimony in support of the measure was offered by the Vice Chairman of the Indiana Conference on Civil Rights, a representative of the Indiana Council of Churches, and a Butler University history professor.[261] No one appeared at the committee hearing to speak in opposition.[262] The House Judiciary Committee unanimously recommended repeal of Indiana's interracial marriage ban.[263] The Indiana House voted 73–5 for repeal.[264]

The repeal measure was somewhat surprising despite the election of a new progressive governor because of state's deep ties to racially regressive politics. The *New York Times* reported, "Indiana . . . has been famous for its conservative isolationist politics . . . . In the early nineteentwenties, the Ku Klux Klan ran the state for awhile. Last May Gov. George Wallace, the avowed segregationist from Alabama got almost 30 percent of the Presidential primary Democratic vote."[265]

Wyoming and Indiana were among the last states to successfully end racial requirements for marital eligibility. Outlier states that had laws intact when *Loving* was decided did not go unchallenged, however. Legis-

256. *Id.*
257. *Rep. R.J. Dean Authors Bill To Abolish Law*, INDIANAPOLIS RECORDER, Jan. 16, 1965, at 1.
258. *Id.*
259. *Id.* at 6.
260. *Council Urges Miscegenation Repeal Also*, INDIANAPOLIS RECORDER, Jan. 16, 1965, at 1 ("A STATEMENT released by the council's department of Legislation and Civil Affairs quoted [sic] the words of Supreme Court Justice Potter Stewart: '. . . I cannot conceive of a valid legislation purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense.'").
261. *State's Mixed Marriage Ban Heads for Repeal*, KOKOMO MORNING TIMES, Jan. 21, 1965, at 3.
262. *Id.*
263. *Panel Votes Race-Law Repeal*, N.Y. TIMES, Jan. 21, 1965, at 39.
264. Austin C. Wehrwein, *Branigan in Quest of New Indiana*, N.Y. TIMES, Feb. 7, 1965, at 52.
265. *Id.*

lation was introduced in Kentucky,[266] Missouri,[267] Texas,[268] Virginia,[269] and West Virginia[270] to repeal race-based marriage laws. Some of these states saw significant movement behind the legislation, most visibly in Missouri and West Virginia.

Religious groups in both states organized against the interracial marriage bans. In 1964, the St. Louis Archdiocesan Council of Men announced it would work on repealing Missouri's marriage ban, releasing in a statement that there was "no doubt [it] would be held unconstitutional if tested."[271]

The Missouri House favorably received the repeal proposal. News accounts reported that the House voted overwhelmingly to dismantle the racial restrictions on marriage without any debate.[272] One representative took to his local newspaper to explain his vote. State Representative Lloyd Baker wrote:

> Two bills were passed dealing with miscegenation. One bill would repeal the statute prohibiting the marriage of white and negro and white and [M]ongolian. The other would repeal the statute prohibiting the sale of a marriage license to whites and negroes and whites and [M]ongloians. These two bills were very much misunderstood. Several thought if you voted for these bills you were in favor of inter-racial marriage. This is not so because these statutes were unconstitutional according to the Federal Court and they have never been enforced in Missouri, as far as I know.[273]

Despite the progress, the legislation never made it to the governor. Lawmakers introduced another bill in January 1967 that did not move before the Court rendered a decision in *Loving* that May.[274]

In 1965, Republican Minority Leader John Carrigan and Democrat Paul Kaufman introduced a repeal bill in the West Virginia House of Delegates.[275] West Virginia legislators failed to push legislation by June 1966 but received a boost from the governor. A week after the state Methodist Association condemned the status quo as unconstitutional, Governor Hulett Smith announced that the law was "not in keeping with the Supreme Court and the thinking of the people today to allow the

266. Kentucky State Representative Arthur Johnson introduced an equal marriage bill in February 1964; *see* PASCOE, supra note 45, at 290.

267. *Miscegenation Law Repeal Bill Entered*, DAILY CAPITAL NEWS (Jefferson City, Mo.), Jan. 18, 1967.

268. PASCOE, *supra* note 45, at 290.

269. *Id.*

270. *Bill To Repeal Miscegenation Law Introduced*, RALEIGH REG. (Beckley, W. Va.), Feb. 10, 1967, at 1.

271. *Marriage Ban Repeal Sought in Missouri,* EDWARDSVILLE INTELLIGENCER (Ill.), Mar. 12, 1964, at 11.

272. *House Votes to Repeal Old Racial Laws*, MOBERLY MONITOR-INDEX (Moberly, Mo.), May 18, 1965, at 2.

273. Lloyd J. Baker, *Capitol Talk*, MOBERLY MONITOR-INDEX (Moberly, Mo.), May 24, 1965, at 2.

274. *Miscegenation Law Repeal Bill Entered*, DAILY CAPITAL NEWS (Jefferson City, Mo.), Jan. 18, 1967.

275. *Repeal Sought of Interracial Ban*, CHARLESTON DAILY MAIL (W. Va.), Feb. 12, 1965, at 2.

freedom we anticipate under the American system."[276] Governor Smith urged for a careful study of the marriage and divorce laws so that the legislature might amend them to remove any discriminatory language.[277]

Delegates Robert Holliday and George Griffith introduced a bill to amend West Virginia's marriage law in 1967.[278] The West Virginia Bar Committee unanimously endorsed the bill.[279] Like Missouri, West Virginia did not repeal its marriage restrictions before the Supreme Court intervened.

Legislation in Richmond met the same fate, though it held far less promise than West Virginia or Missouri. As Virginia headed to the Supreme Court to fend off Richard and Mildred Loving's appeal, Delegate William Durland of Fairfax County offered a bill to eliminate racial discrimination in Virginia marriage law.[280] Durland projected the bill had virtually no chance of success, but held hope that the courts would do the job legislators would not. "I think the statute is almost certain to fall," Durland said.[281]

VII. RECONSIDERING THE SECOND EQUAL MARRIAGE MOVEMENT

Justice Louis Brandeis' description of states as "laboratories of democracy" continues to hold currency in the development of public policy in the American federal system.[282] Indeed, contemporary debates on a range of issues benefit from federalism as lawmakers look across states for guidance on public policy. The yields of policy diffusion extend beyond discretionary programs. Indeed, the development of constitutional norms and national values, like society's understanding of family, can evolve through the state-by-state spread of social movements. That is the story of interracial marriage recognition, and it is the story of the same-sex marriage movement.[283]

Like interracial marriage, early same-sex marriage litigation failed to secure full marriage rights for same-sex couples. State constitutional amendments thwarted promising lawsuits for same-sex couples in Hawaii and Alaska. Voters amended the Hawaii Constitution to permit a statutory same-sex marriage ban[284] and Alaskans amended their state constitu-

276. *Law Banning Interracial Marriage Hit*, RALEIGH REG. (Beckley, W.Va), June 8, 1966, at 2.

277. *Id.*

278. *Bill To Repeal Miscegenation Law Introduced*, *supra* note 270.

279. Fanny Seiler, *Controversy Ahead: Domestic Relations Laws Changes*, RALEIGH REG. (Beckley W.Va), May 16, 1967.

280. *Interracial Marriage Bill To Be Introduced*, PROGRESS-INDEX (Petersburg, Va.), Dec. 10, 1966, at 3.

281. *Id.*

282. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stating that experimentation "is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

283. For an extensive evaluation of early same-sex marriage legislation, see Anthony Michael Kreis, *Marriage Equality in State and Nation*, 22 WM. & MARY BILL RTS. J. 747 (2014).

284. HAW. CONST. art. 1, § 23 (West 2015) ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

tion to forbid gay nuptials outright.[285] The first successful judicial decision in favor of same-sex relationship recognition was in Vermont—but it was a less than satisfying victory for hopeful couples. The Vermont Supreme Court compelled the legislature to provide the tangible benefits of marriage to same-sex couples but did not mandate full marriage rights.[286] New Jersey's Supreme Court took a similar tack in 2006,[287] declining to follow the Massachusetts Supreme Judicial Court extension of the freedom to marry to same-sex couples.[288] The courts of last resort in Connecticut,[289] Iowa,[290] and California[291] recognized equal marriage rights for same-sex couples in their respective state constitutions. That success notwithstanding, with victories, came losses. Courts in Maryland,[292] New York,[293] and Washington[294] upheld statutory same-sex marriage bans. Undeterred by the setbacks, same-sex marriage advocates successively pushed legislation through each of those states.[295]

Between the historic 2004 Massachusetts Supreme Judicial Court's ruling and the 2013 U.S. Supreme Court decision striking down the Defense of Marriage Act, many jurisdictions joined the marriage equality fold—some by legislation, some by judicial intervention, and some by referenda.[296]

Like the debates over anti-miscegenation laws, legislative deliberations featured personal stories, and expressions of religious conviction.

285. ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."). This provision was struck down in federal court in 2014. Hamby v. Parnell, 56 F. Supp. 3d 1056, 1073 (D. Alaska 2014) ("This Court finds that Alaska's same-sex marriage laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment . . . .").

286. Baker v. State, 744 A.2d 864, 886 (Vt. 1999) ("[P]laintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.").

287. Lewis v. Harris, 908 A.2d 196, 220–21 (N.J. 2006) ("[U]nder the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.").

288. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").

289. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (ruling Connecticut's civil union statute violated the state constitutional equal protection guarantee).

290. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (extending marriage rights to same-sex couples under the Iowa Constitution).

291. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (holding California's domestic partnership law failed to provide equal rights to same-sex couples).

292. Conaway v. Deane, 932 A.2d 571 (Md. 2007) (upholding Maryland law prohibiting two persons of the same-sex from marriage).

293. Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (upholding New York's limitation of marriage rights between opposite-sex couples).

294. Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006) (en banc) (affirming the constitutionality of Washington law's limitation of marriage rights to heterosexual couples).

295. MD. CODE ANN., FAM. LAW § 2-201 (West 2015) ("Only a marriage between two individuals who are not otherwise prohibited from marrying is valid in this State."); N.Y. DOM. REL. LAW § 10-a (McKinney 2011) ("A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex."); WASH. REV. CODE ANN. § 26.04.010 (West 2015) ("Marriage is a civil contract between two persons who have each attained the age of eighteen years, and who are otherwise capable.").

296. *See*, *e.g.*, *supra* notes 286–95 and accompanying text.

But, as was the case in the 1950s and 1960s, constitutional tradition and history significantly undergirded the legislative movement. Some legislators in Vermont, for example, rejected civil unions in favor of equal marriage in 2009, drawing parallels between the state's failure to provide marriage rights and separate-and-unequal segregated schools before *Brown v. Board*.[297]

After a conservative wave gave Republicans control of the New Hampshire General Court in 2010, some legislators hoped to capitalize on the new majorities and repeal the Granite State's 2009 same-sex marriage law. Invoking lessons from litigation over California's vacillation between same-sex marriage recognition and prohibition, many New Hampshire legislators reasoned that the state could not revoke a right once granted, tracking the same rationale adopted by Ninth Circuit's decision voiding Proposition 8.[298] Legislators looking to enact same-sex marriage also contemplated case law from the civil rights era, including *Griswold* and *Loving*, other states' legislation, and contemporary judicial decisions addressing same-sex marriage.

The historical evidence reveals a similar pattern throughout the 1950s and early 1960s between the California Supreme Court's decision in *Perez* and the final resolution of the constitutional question in *Loving*. Throughout this period, there was a pattern of dialectic collaboration between judicial actors, political branches, and citizens that fueled interstate policy diffusion and the expansion of family law rights.

From the history, we can draw a number of lessons. As an initial matter, overstating the impact of judicial actors in eradicating race-based marriage discrimination is a trap to be avoided, particularly given the regularity with which courts dodged anti-miscegenation litigation and offered churlish rejections of interracial couples' constitutional claims.

Mindful of that caveat, while courts did not provide final resolution for most state miscegenation prohibitions, some accounts of history fail to capture the scope of judicial influence fully. This glossing over of courts may have occurred for two reasons. First, trial court decisions were unpublished and, second, legislatures intervened during the appellate process. History may also under-appreciate the influence of courts because scholars have not extensively examined legislators' motivations to end race-conscious family laws, many of which were jurisprudential in nature.

Ultimately, the era of marriage law liberalization pre-*Loving* was more dynamic and more similar to years preceding *Obergefell* than a cursory reading of the periods may suggest. Indeed, the history of how rights for interracial households developed is a strong rejoinder to recent

297. *See* Kreis, *supra* note 283, at 754–55.

298. Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012) *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) ("Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.").

claims that judicial influence in shaping the meaning of family is ahistorical.