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# Naim v. Naim Symposium: The Worst Supreme Court Case Ever

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# *Naim v. Naim*

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*Naim v. Naim*[1] is famous as the case that never was. In it, the Supreme Court declined, in 1955, to accept review of a case that would have enabled it to set aside a Virginia law forbidding interracial marriage.[2] At the time, many states had on the books similar laws, which were beginning to come under challenge, and ruling them illegal would seem to have been a straightforward application of *Brown v. Board of Education*.[3] After all, if school segregation is unconstitutional, separating the races on the marriage altar would appear to be so as well.

Federal courts were striking down discriminatory laws and practices in a host of settings, ranging from segregated buses[4] to golf courses,[5] public beaches, bathhouses, and swimming pools,[6] while Congress was enacting legislation banning discrimination in housing, employment, and voting.[7] Even then it was clear that *Brown* marked a turning point in the nation's history, unleashing forces that would lead to the civil rights era of the sixties and seventies.[8]

Yet in June 1955, the Court declined to review a law providing for one of the most galling and discriminatory of practices, the prohibition of marriages between blacks and whites, one that signaled black inferiority as plainly and unmistakably as any other. For if whites and nonwhites cannot marry and make lives together, what does it matter if they can attend the same movie theater or swim in the same public pool? The prohibition of intermarriage would seem to violate *Brown*'s mandate as glaringly as any other.

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[1] Naim v. Naim, 87 S.E.2d 749 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849 (Va. 1955), *motion to recall mandate denied and appeal dismissed*, 350 U.S. 985 (1956).

[2] It did so on the basis of a procedural technicality that it could easily have circumvented. *See id*; *see also* Jackson v. Alabama, 348 U.S. 888 (1954) (Court denied certiorari in a similar case arising from a different Southern state).

[3] *See* Brown v. Bd. of Educ. (Brown I), 347 U.S. 483 (1954).

[4] Gayle v. Browder, 352 U.S. 903 (1956).

[5] Holmes v. City of Atlanta, 350 U.S. 879 (1955).

[6] Mayor of Baltimore City v. Dawson, 350 U.S. 877 (1955).

[7] *See* Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 How. L.J. 705, 710 (2004) ("*Brown* helped galvanize the political coalition that secured passage of historic legislation banning discrimination in employment, public accommodations, voting, and housing."); *see also* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 Harv. L. Rev. 1841, 1844 (1994).

[8] On this period, see, e.g., Juan F. Perea et al., Race and Races: Cases and Resources for a Diverse America 163–71 (2d ed. 2007).

One common explanation for the Court's inaction is that it believed that "[o]ne bombshell at a time is enough."[9] Attributed to Justice Clark, the remark suggests that the Court believed that *Brown v. Board of Education* had inflamed public opinion, particularly in the South, sufficiently that a further decision in a sensitive area such as marriage would have eroded the Court's legitimacy.[10] With long entrenched social practices, such as miscegenation, gradualism is often in order.[11] When the Court gets out ahead of the times, these commentators suggest, the result always disappoints.

For these incrementalists, *Roe v. Wade*[12] is a prime example of a decision that came too soon. In 1973, the movement for women's procreative liberties was still at an early stage. The public discussion of abortion was not complete. The country was not ready for a sweeping decision, so it should come as no surprise that subsequent courts predictably cut back the newly protected right, while a vigorous pro-life movement sprang up to challenge it. As a result, women today enjoy a degree of procreative freedom scarcely higher, in real terms, than that which they enjoyed in 1973.

By the same token, the Court was correct in waiting nearly thirteen years after *Brown* to rule, finally, in *Loving v. Virginia*,[13] that anti-miscegenation laws were unconstitutional.[14] By then, the civil rights movement was in full force and had been so for the better part of a decade.[15] Protesters had sat in at restaurants, bus stations, and lunch counters.[16] Martin Luther King had led mass marches and delivered a series of stirring speeches.[17] Federal troops and intrepid students had integrated formerly all-white colleges and universities.[18] Chicano students had staged walk-outs at public high schools in Los Angeles and Denver.[19] The American Indian Movement was stirring.[20]

By 1967, the Supreme Court could safely rule, in *Loving v. Virginia*, that a statute aimed at maintaining the genetic purity of the white race was legally intolerable. In the same state, Virginia, where the Naim couple had received short shrift twelve years earlier, the Supreme Court could declare that a regime of racial separation in the institution of marriage was unconstitutional.[21]

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[9] *See* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 193 (1964).

[10] *See* LUCAS POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 71–73 (2000).

[11] *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 321 (2004) (discussing this prudential position); CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 127–39 (2009); Cass R. Sunstein, *If People Would be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007) (positing that it may be legitimate for judges, at times, to consider the likelihood of a public backlash to their rulings).

[12] Roe v. Wade, 410 U.S. 113 (1973).

[13] Loving v. Virginia, 388 U.S. 1 (1967).

[14] *Id.* at 12.

[15] *See* PEREA ET AL., *supra* note 8, at 163–71 (describing this era).

[16] *See generally id.*

[17] *See id.* at 168–70.

[18] *See generally id.* at 163–68.

[19] *See generally id.* at 329–33.

[20] *See id.* at 227–39.

[21] *See supra* note 13 and accompanying text.

Was *Naim v. Naim* correctly decided, then? Was the Supreme Court wise and prudent in denying review and requiring interracial couples to wait a dozen years before being able to marry legally? *Naim* and *Loving* are very similar on the facts.[22] It would seem as though the commentators are correct in observing that the main reason why the Court waited so long was that it feared the consequences of a second major decision—a second bombshell—coming on the heels of *Brown*.

But was delay sensible and wise? In the remainder of this Essay I argue, contrary to the usual view, that it was not. The Court may have managed to preserve its own dignity and the appearance of being above the fray.[23] But ponder what society and many individual couples lost in return.

During those twelve years, in many states mixed-race couples, their relationship forged most likely on a picket line, a civil rights march, or other such event, could not marry. If they were a devoted couple, they would be forced to live together without the benefit of marriage, to conceal their relationship from others much of the time, and, probably, refrain from having children.[24]

They were not the only ones to lose out. Society did, as well. It missed the opportunity to see twelve years worth of mixed-race couples and their children at schools, on sidewalks, in markets, and in the many ordinary interactions of life. It lost the opportunity, multiplied many times, to see how normal interracial friendship can be.[25]

The costs included doctrinal setbacks as well. Deprived of a ruling that could have clarified the breadth and scope of the Equal Protection Clause, the civil rights movement was forced to proceed piecemeal.[26] Legal progress came more slowly than it would have had the Court clarified early on that equality meant that the races stood on the same footing with respect to the deepest form of interpersonal commitment.

Finally, the delay produced an unintended effect. The Southern resistance movement could fool itself into believing, for a crucial thirteen years (the interval from *Brown* to *Loving*), that, no matter what Congress and the lower courts were saying about registering to vote or taking a swim in a public pool, at least they were safe against the ultimate indignity—seeing their daughters and those of their friends linked in marriage to black men.[27] Because the Supreme Court did not spell out early on that their defeat would eventually be total, white southerners fought on, litigating first the right to ride a city bus, then the inte-

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[22] Both turned on the constitutionality of state laws forbidding marriages between whites and members of certain nonwhite races.

[23] *See generally* Sunstein, *supra* note 11; KLARMAN, *supra* note 11.

[24] "Living together" was not as acceptable an option then as it is today.

[25] The social-contact theory holds that experiences such as these are powerful ways of countering stereotypes and reducing the amount of racism in society. *See, e.g.*, GORDON W. ALLPORT, THE NATURE OF PREJUDICE 252–60 (1958).

[26] That is, first school integration in colleges and universities; then the lower grades; then in Latino schools; then in swimming pools and bus terminals. *See supra* notes 4–8 and accompanying text.

[27] Occasionally, a Southern white man would seek to marry a black woman. But these cases were much rarer and less feared than the opposite combination.

gration of swimming pools, then county hospitals, giving ground as slowly as possible.[28]

Resisters learned an important lesson. Hold on as long as possible, and the opposition will tire. And, eventually it did. Weary of raucous protests, long-haired students, and singing and chanting, the country, by the early seventies, was ready for business as usual. Civil rights organizations like the National Association for the Advancement of Colored People ("NAACP") and the Mexican American Legal Defense and Education Fund ("MALDEF") soldiered on, of course. But increasingly they played to empty houses.[29]

Moreover, when *Loving v. Virginia* arrived, it ended up meaning less than it would have had it come at an earlier point during the civil rights decade. In 1954 or 1955, a Supreme Court decision setting aside laws against interracial marriage would have electrified the country. It would have seemed logical and right. It would have enabled the United States to seize the moral high ground in the fight for human freedom.[30] The country would have reaped even more of the Cold War gains that accrued when the Supreme Court handed down *Brown*.[31]

But by the time *Virginia v. Loving* came down, interracial marriage was practically a moderate practice, even a conservative one.[32] By then, Black Power had appeared on the scene.[33] The Brown Beret movement was leading Latinos toward brown nationalism.[34] Blacks in civil rights organizations were beginning to insist that whites cede leadership.[35] Stokely Carmichael was warning that movements like the Student Nonviolent Coordinating Committee ("SNCC") might not remain nonviolent much longer.[36]

Students were marching in the streets.[37] The Black Panther Party was beginning to carry guns and speak of black self-determination.[38] Now, a black man and a white woman finding true love in each other's company and deciding to spend their lives together sent a message that mainstream society must

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[28] *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 45–71 (1991) (describing Southern resistance to desegregation mandates).

[29] *See, e.g.*, DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 54–56 (6th ed. 2008).

[30] How much better than the "all deliberate speed" mandate of Brown II. *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) ("Brown II," ordering that desegregation proceed at a measured pace).

[31] *See generally* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (documenting role of establishment figures in inducing the Supreme Court to hand down a decision in favor of blacks in order to burnish the country's international appearance and increase its credibility with uncommitted nations in the struggle against world Communism).

[32] I do not mean that it was popular with the American public. It was not, and still is not today. I mean, rather, that it carried a different connotation. *See* text and notes immediately *infra*.

[33] *See, e.g.*, PEREA ET AL., *supra* note 8, at 1211.

[34] *See, e.g.*, IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 20 (2003) (describing this early activist period).

[35] *See* PEREA ET AL., *supra* note 8, at 170 (describing this nationalist period).

[36] *See id.* at 170, 1211–12.

[37] *See id.* at 168–71, 1203–12.

[38] *See, e.g.*, Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1789–90 (1992).

have found comforting—a return to the old ways.[39] Formerly anathema to an entire region,[40] interracial love and romance now emerged as a relatively tame, even conventional act. Marriage across racial lines signaled the hope that the races could put aside their disagreements and histories and be friends. Like lions and lambs lying down together, their union symbolized peace, which was what America then wanted and longed for.

The Supreme Court could now legalize interracial marriage secure that it would evoke little protest. The second bombshell was so long in arriving that, when it did, the world heard little more than a slight bang.[41]

More significantly, when the Supreme Court, in 1967, permitted Mildred Jeter and Richard Perry Loving to live as a married couple in Virginia, it signaled the beginning of a new direction. Colorblind jurisprudence would be the new talisman, marking the start of a long, slow slide with opinions like *Bakke v. University of California,*[42] *Adarand Constructors, Inc. v. Pena*,[43] and *People Involved in Community Schools v. Seattle School District Number One*[44] ushering in an era of indifference toward race-based claims and a redefinition of "equality" to mean the formalistic refusal to consider race even for remedial purposes.

Although *Loving* contains language condemning white supremacy,[45] it betrays a calculated note, as though the authors knew that it was coming too late to do much good.[46] Its result would have been radical, surprising, and brave in the mid nineteen-fifties. By 1967, it was practically passé. Indeed, it may have laid the basis for a new philosophy that would soon be turned against blacks and Latinos and used to limit affirmative action and redress for discrimination.[47]

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[39] That is, to the early days of the civil rights movement, when marches were peaceful, orderly, and decorous, and sit-ins were prayerful, with the participants wearing suits and ties and singing songs of peace and brotherhood.

[40] That is, the South.

[41] *See supra* note 10 and accompanying text (observing that at least one Supreme Court justice agreed with the decision to evade review of *Naim v. Naim* on this ground).

[42] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (striking down a University of California affirmative action plan that reserved a small number of seats for minority applicants).

[43] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny").

[44] Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723–35 (2007) (holding school district's use of racial classification in student assignment plans could not be justified by declared compelling interest of diversity in higher education when the district failed to show that "they considered methods other than explicit racial classifications to achieve their stated goals").

[45] For example, "that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." Loving v. Virginia, 388 U.S. 12, 14 (1967).

[46] For example: "Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry'"—scarcely thundering language and citing as support two Japanese internment cases, both of which found such a distinction fully justified during times of national security threat. *Id.*

[47] *See supra* notes 41–44 and accompanying text (describing the shift to colorblind jurisprudence). *Loving* may have marked the beginning of this trend since it turned on the notion of

Throughout civil rights history, this has been the fate of a succession of brave doctrines and mottoes. In "ideological drift,"[48] what might have been surprising and emancipatory in one era often finds itself put to entirely different use in a later one.[49] Conservatives are fond of quoting Martin Luther King's famous lines about judging persons by the content of their character, not the color of their skin. But they do so not to deplore racism, segregated neighborhoods, unequal school funding, or to rally support for ethnic-studies courses, departments, and programs. Rather, they deploy the phrase to argue against affirmative action and other race-conscious remedies.[50]

Similarly, intermarriage today is not the powerful force it might have been in 1955. Instead, it serves interests that are decidedly self-centered and technocratic. A multiracial movement, consisting largely of white mothers who bore children with black or Latino fathers, is clamoring for recognition and a separate census category, much to the chagrin of the black and Latino communities, which need their numbers.[51] Many college applicants with little connection to communities of color discover their ancestry on the eve of submitting their college applications. These "box checkers"[52] often receive special consideration at elite schools in preference to applicants with longstanding minority ties.[53] At some elite colleges and universities, the number of foreign-born—usually African, Caribbean, or Latin American-born—and mixed-race minority students exceeds the number of those with long roots in America.[54]

Suppose that a major Supreme Court decision invalidating laws against intermarriage had arrived in the mid-fifties, just as the civil rights movement was gathering force. Might not a courageous judicial decision attacking one of the strongholds of Southern resistance have provided the movement and the momentum it needed to accomplish lasting gains?[55] The population, the faces one sees in America today, and the color of its leaders might today be radically different.[56] A president like Barack Obama might have arrived earlier.[57] The inevitable right-wing backlash might have been less ferocious and less able to

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equal treatment: couples of like and unlike race received the same treatment under applicable law.

[48] *See* J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 870–71 (1993) (describing the process by which liberal ideas can, over time, take on conservative overtones).

[49] *Id.*

[50] *See, e.g.*, SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 111–25 (2000).

[51] *See, e.g.*, PEREA ET AL., *supra* note 8, at 85–86, 91–92, 811, 969–72.

[52] On box-checking, see, e.g., John Martinez, *Trivializing Diversity: The Problem of Over-inclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER L.J. 49, 49 (1995); Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1156, 1215 (2007).

[53] *See* Onwuachi-Willig, *supra* note 52, at 1156.

[54] *See* Darryl Fears, *In Diversity Push, Top Universities Enrolling More Black Immigrants: Critics Say Effort Favors Elite Foreigners, Leaves Out Americans*, WASH. POST, March 6, 2007, at A02.

[55] *See generally* ROSENBERG, *supra note* 28.

[56] That is, the faces one sees in the course of the day would be different, with more color, more mixing, and more individuals of indeterminate or mixed ethnicity.

[57] Obama became the nation's first black president a full 54 years after *Brown*.

tap middle-class indignation. In short, we might be a different nation if the Supreme Court had been less concerned about appearances and more about doing the right thing in 1955.

*Naim v. Naim*, then, was not a prudent exercise in judicial discretion but a timid act that misjudged the times. Emanating from a court that ought to be in the business of articulating social and legal values—and not waiting until it is safe or convenient to do so—it was a jurisprudential error comparable in some ways to *Brown II*.[58]

[58] Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 301 (1955) (ordering that desegregation proceed at all deliberate speed).