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17.245 The Supreme Court, Civil Liberties, and Civil Rights
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Discussion 24: Marriage Equality

Discussion of Loving v. Virginia, 1967
Loving, a white man who married a black woman in Washington DC and moved back to Virginia, challenges a Virginia statute banning inter-racial marriage on equal protection and due process grounds. The law banned all inter-racial marriages, but also specifically banned marriages that were formalized out-of-state by couples who then returned to Virginia to live a married life.

Article IV, section I of the Constitution arguably requires states to recognize each others' marriages licenses/certificates:
"Section 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." (US Constitution)

The lower court opinion intoned: *"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."* (Cited in Supreme Court opinion in Loving v. Virginia, www.findlaw.com)

The state appellate court offered a less racialist, more constitutionally nuanced decision:
"Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element [388 U.S. 1, 8] as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race…The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages." (Loving v. Virginia, www.findlaw.com)

What does marriage have a special status?
- Part of it is religious.
- Partly there is a historical tradition that states rather than federal government define and regulate the institution of marriage.
- There is also the argument that marriage is the only relationship whose intimacy justifies the special privileges afforded to married people.

The Court rejects the state's theory that there is no classification here: one may be denied a marriage license solely on the basis of race. The basic test to determine if there is a racial classification is: can the legitimacy of the activity or conduct be determined without knowing the race of the individuals? In this case, you cannot determine whether a marriage is legitimate in the eyes of Virginia unless you know the races of the participants, so it fails the

test. This allows the court to apply strict scrutiny: a racial classification necessarily is at work.

The Court further says that even if the state's argument is correct, there is no legitimate rational basis for the law:

"Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose." (Warren, majority opinion in Loving v. Virginia, www.findlaw.com)

Additionally, the Court finds a due process violation, invoking the language of fundamental rights in describing the freedom to marry:

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See also Maynard v. Hill, 125 U.S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State. (Warren, majority opinion in Loving v. Virginia, www.findlaw.com)

This due process ruling will play a critical role in later marriage cases (particularly at the state level).

Discussion of Zablocki v. Redhail, 1978

Wisconsin statute requires judicial permission before a non-custodial parent with child support obligations can get married. The law is intended to ensure parents are able to support the children they already have before getting into another relationship.

The District Court applies elevated scrutiny—the law must be *"supported by sufficiently important state interests and is closely tailored to effectuate only those interests."* (Marshall, majority opinion in Zablocki v. Redhail, www.findlaw.com)

The Court undertakes a "critical" examination, but does not appear to apply strict scrutiny.

"By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. See Califano v. Jobst, ante, p. 47; [434 U.S. 374, 387] n. 12, infra. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry."

Is there a principled distinction between qualifications for marriage (such as age limitation, familial relationship, etc.) and a total bar on an otherwise valid marriage?

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The Wisconsin statute appears to be a total bar on an otherwise valid type of marriage. This becomes an issue of income inequality—inability to pay or support a child does not justify deprivation or limitation of the right to marry. This is the major driving force behind the opinion.

Discussion of Goodridge v. Massachusetts Dept. of Public Health, 2003

Fourteen couples bring suit on equal protection and due process grounds alleging that the state policy preventing same-sex marriages is unconstitutional. Massachusetts Supreme Judicial Court rules that the Massachusetts Constitution does not tolerate a ban on same sex couples entering into civil marriage.

Plaintiffs argue first that the SJC should interpret state law to permit same sex marriages because the statute does not define "marriage". The Court says that the common definition of marriage does not allow this because that definition provides that marriage exists only between a man and a woman. Therefore, plaintiff's proposed interpretation is inconsistent with legislative intent.

The Court then evaluates the due process and equal protection claims made by the plaintiff.

- The Court claims that the laws do not survive rational basis review on either equal protection or due process grounds, leaving open the possibility that strict scrutiny may actually be appropriate.
    - The Court rejects the state's rationale that marriage is intended to create a favorable setting for pro-creation and child-rearing. Plaintiffs demonstrate that a family headed by same-sex parents is not necessarily or inherently inferior.
    - The Court also rejects the State's argument that the gay marriage ban is justified by the need to preserve scarce financial resources.
    - The Court decides that the current definition of marriage as applied in civil marriage laws denies equal protection under the Massachusetts state Constitution.

The dissent refutes the application of the U.S. Supreme Court's reasoning in Loving to this case:

The court concludes, however, that G.L. c. 207 unconstitutionally discriminates against the individual plaintiffs because it denies them the "right to marry the person of one's choice" where that person is of the same sex. Ante at. To reach this result the court relies on Loving v. Virginia, 388 U.S. 1, 12 (1967), and transforms "choice" into the essential element of the institution of marriage. The Loving case did not use the word "choice" in this manner, and it did not point to the result that the court reaches today. In Loving, the Supreme Court struck down as unconstitutional a statute that prohibited Caucasians from marrying non-Caucasians. It concluded that the statute was intended to preserve white supremacy and invidiously discriminated against non-Caucasians because of their race. See id. at 11-12. The "choice" to which the Supreme Court referred was the "choice to marry," and it concluded that with respect to the institution of marriage, the State had no compelling interest in limiting the choice to marry along racial lines. Id. The Supreme Court did not imply the existence of a right to marry a person of the same sex. To the same effect is Perez v. Sharp, 32 Cal.2d 711 (1948), on which the court also relies.

Unlike the Loving and Sharp cases, the Massachusetts Legislature has erected no barrier to marriage that intentionally discriminates against anyone. Within the institution of marriage,

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[FN3] anyone is free to marry, with certain exceptions that are not challenged. In the absence of any discriminatory purpose, the State's marriage statutes do not violate principles of equal protection. See Washington v. Davis, 426 U.S. 229, 240 (1976) ("invidious quality of a law claimed to be ...discriminatory must ultimately be traced to a ... discriminatory purpose"); Dickerson v. Attorney Gen., 396 Mass. 740, 743 (1986) (for purpose of equal protection analysis, standard of review under State and Federal Constitutions is identical). See also Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, supra. This court should not have invoked even the most deferential standard of review within equal protection analysis because no individual was denied access to the institution of marriage. (Goodridge v. Dept. of Public Health)

The gay marriage issue was recently addressed in the state of New Jersey as well. The New Jersey Supreme Court held that whatever term the state chooses to use in defining the set of rights associated with the thing we currently call marriage, it must be apply equally to both gay and straight couples. This in principle avoids the controversy over defining the institution of marriage in a way that would conflict with its religious meaning.

Is there an establishment clause issue in allowing the state to legislate a definition of marriage given that marriage is traditionally a religious institution and practice expressing religious values?

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