SEXUALITY, GENDER, AND THE LAW

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SECTION 2

THE EXPANDING RIGHT TO MARRY

One consequence of privatization has been the decline of marriage. This relative decline is evidenced by the increased number of people who never marry and the shorter duration of their marriages when they do wed. Marriages are not for everyone and no longer for life, although the recidivism rate is high. As its popularity has done a slow swoon, marriage as an institution has also encountered unprecedented criticism, mainly from feminists and Marxists. Feminists have criticized marriage as stacked against women. Although these critics acknowledge that formal constraints against women have largely vanished, they maintain that some remain (such as more restrictive rules for defining rape when it is within marriage) and that the institution itself carries with it sexist expectations (man works outside the home, woman keeps house and raises the children).[a] Marxist critics of marriage argue that it has been an institution that apes the oppressive market, with its assumptions of "ownership" and "exclusivity."

Just as marriage has fallen into decline, barriers to entering it have decreased. Just as old barriers have fallen, new groups long excluded from the institution want to join up, and society has rejected them, under the aegis of protecting the institution. The first group to win the right to marry are "miscegenosexuals" (Samuel Marcosson's term), people of different races who love one another. Then came lesbians and gay men, and then transsexuals. Who will be next? Polygamists? Incestophiles?

PART A. THE CONSTITUTIONAL RIGHT TO MARRY

Richard and Mildred Loving v. Virginia

United States Supreme Court, 1967.
388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010.

■ CHIEF JUSTICE WARREN delivered the opinion of the Court.

[In 1958, two residents of Virginia, a black woman (Mildred Jeter) and a white man (Richard Loving), were married in the District of Columbia. Upon returning to Virginia and making their home there, they were prosecuted for violating the state anti-miscegenation statutes. After they

a. See, *e.g.*, Carole Pateman, *The Sexual Contract* ch. 6 (1988); Lenore J. Weitzman, *The Marriage Contract: Spouses, Lovers, and the Law* (1981); Margaret Shultz, "Contractual Ordering of Marriage: A New Model for State Policy," 70 *Calif. L. Rev.* 2 (1982).

pleaded guilty in 1959, the Virginia state trial judge imposed a one year jail sentence, but suspended the sentence for 25 years on condition that the Lovings leave Virginia and not return together for 25 years. In 1963, the Lovings requested that the state trial court vacate the conviction and sentence on the ground that the anti-miscegenation statutes violated the Fourteenth Amendment. The state trial and appellate courts denied the request, holding that the statutes were constitutional.]

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.[5] Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. * * *

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim*, 87 S.E.2d 749 * * *. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. *Id.* at 90. * * *

* * * [T]he 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 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 second argument advanced by the State assumes the validity of its equal application theory. 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.

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

5. * * * Over the past 15 years, 14 states have repealed laws outlawing interracial marriages. * * *

serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc. v. People of State of New York*, 336 U.S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a non-resident in a storage warehouse, *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources "cast some light" they are not sufficient to resolve the problem; "[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." *Brown v. Board of Education*, 347 U.S. 483, 489 (1954). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

The State finds support for its "equal application" theory in the decision of the Court in *Pace v. Alabama*, 106 U.S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each

participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin* [379 U.S.] at 188. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. * * *

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact 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.[11] We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

11. Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, "An Act to Preserve Racial Integrity," extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve "racial integrity." We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity" of all races. [*Editors' note*: The Virginia statutes stated that "the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons." In an earlier footnote, Chief Justice Warren explained this exception by quoting a 1925 publication by a state official, who wrote that it reflected " 'the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas.' "]

II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942). 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.

These convictions must be reversed.

John F. Singer and Paul C. Barwick v. Lloyd Hara

Washington Court of Appeals, 1974.
11 Wash. App. 247, 522 P.2d 1187, review denied, 84 Wash.2d 1008 (1974).

■ SWANSON, CHIEF JUDGE.

Appellants Singer and Barwick, both males, appeal from the trial court's order denying their motion to show cause by which they sought to compel King County Auditor Lloyd Hara to issue a marriage license to them. * * *

Appellants * * * argue that if, as we have held, our state marriage laws must be construed to prohibit same-sex marriages, such laws * * * violate[] the ERA which recently became part of our state constitution.[4] The question thus presented is a matter of first impression in this state and, to our knowledge, no court in the nation has ruled upon the legality of same-sex marriage in light of an equal rights amendment. The ERA provides, in relevant part:

> Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

In seeking the protection of the ERA, appellants argue that the language of the amendment itself leaves no question of interpretation and that the essential thrust of the ERA is to make sex an impermissible legal classification. Therefore, they argue, to construe state law to permit a man to marry a woman but at the same time to deny him the right to marry

4. HJR 61, commonly known as the 'equal rights amendment,' was approved by the voters November 7, 1972, and became effective December 7, 1972. Const. amend. 61, adding article 31. The language of the ERA is substantially similar to the federal ERA now before the states for ratification as the twenty-seventh amendment to the United States Constitution.