LOVING V. VIRGINIA: A TRIUMPH AND A FAILURE OF THE SUPREME COURT

Erwin Chemerinsky*

* Dean, Jesse H. Choper Distinguished Professor of Law, Berkeley Law.

LOVING V. VIRGINIA: A TRIUMPH AND A FAILURE OF THE SUPREME COURT

Erwin Chemerinsky

INTRODUCTION

I often hear from my students, especially my students of color, understandable frustration with how little progress society has made with regard to race. Yet, focusing on *Loving v. Virginia* on the occasion of its fiftieth anniversary powerfully shows how different the world was in 1967 compared to 2018.

In 1967, 16 states still had laws against interracial marriage. Virginia steadfastly defended its law in the United States Supreme Court and the decision of a trial judge who had declared,

> 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.

Virginia was determined to keep Mildred Jeter and Richard Perry Loving from having their marriage recognized in that state.[1]

In 1958, 96% of those surveyed said that they opposed interracial marriage.[2] In 1967, the year of *Loving*, 80% held that view.[3] That number has steadily declined. Today, only 11% of the population says that it disapproves of interracial marriage.[4] By contrast, 40% of those surveyed said that they would oppose a family member marrying someone of a different political party.[5]

This symposium provides an occasion for asking: How should we appraise the Supreme Court's decision in *Loving v. Virginia*? In these remarks I want to suggest that it should be regarded both as a triumph and a failure of the Supreme Court. We should simultaneously praise and

---

[1] Loving v. Virginia, 388 U.S. 1, 3 (1967). *See also* Fay Botham, ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, AND AMERICAN LAW 2 (2009) (discussing the opinion).

[2] Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP (July 25, 2013), *http://news.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx.*

[3] *Id.*

[4] *Id.* Karlyn Bowman, *Interracial Marriage: Changing Laws, Minds and Hearts*, FORBES (Jan. 13, 2017), https://www.forbes.com/sites/bowmanmarsico/2017/01/13/interracial-marriage-changing-laws-minds-and-hearts/#686c0e877c5.

[5] David Graham, *Really, Would You Let Your Daughter Marry a Democrat*?, THE ATLANTIC (Sept. 27, 2012), https://www.theatlantic.com/politics/archive/2012/09/really-would-you-let-your-daughter-marry-a-democrat/262959/.

criticize the Court for how it dealt with the issue of laws prohibiting interracial marriage.

I. *LOVING* AS A TRIUMPH

This symposium deservedly is to celebrate *Loving v. Virginia*. The Supreme Court unanimously declared unconstitutional the laws that existed in Virginia and 15 other states prohibiting interracial marriage. That is certainly worth celebrating. Laws prohibiting interracial marriage had existed throughout American history. Maryland adopted one in 1664 and Virginia in 1691. But in *Loving*, the Court emphatically declared: "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."[6]

There also is much to celebrate in the Court's reasoning. First, the Court rejected formal equality as the appropriate meaning of the equal protection clause of the Fourteenth Amendment. Virginia's primary argument before the Supreme Court was 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."[7] In fact, this was an argument that the Supreme Court had accepted in *Pace v. Alabama,* in 1883, which upheld an Alabama law that provided for harsher penalties for adultery and fornication if the couple were composed of a white and a black than if the couple were both of the same race.[8]

But in *Loving* the Court expressly repudiated the state's argument that the Virginia law was permissible because it burdened both whites and minorities. The Court said that "we reject the notion that the mere equal application of a statute concerning racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations."[9] The Court declared: "[W]e 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."[10] *Loving* established the important proposition that laws that are based on racial classifications must meet strict scrutiny even if they formally treat different races the same.[11]

Second, *Loving* establishes that a key purpose of the Equal Protection Clause is preventing racial subordination. The Fourteenth Amendment

---

[6] 388 U.S. at 12.

[7] *Id.* at 8.

[8] *Pace v. Alabama,* 106 U.S. 583 (1883).

[9] *Id.* at 8 (citations omitted).

[10] *Id.* at 11 n.11.

[11] Of course, it is dubious that laws prohibiting interracial marriage treat blacks and whites the same. If whites are 85% of the population and blacks are 15%, whites have vastly more individuals to marry than blacks if interracial marriage is prohibited.

prohibits the government from acting from the premise that one race is superior to another.[12] That, of course, was the underlying philosophy of laws forbidding interracial marriage. The Court forcefully rejected this:

> 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. 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.

Brown v. Board of Education should have established this proposition and explained that laws requiring segregation of the races are unconstitutional because they are based on the assumption of the superiority of one race and the inferiority of another.[13] That would have explained why *all* laws mandating segregation are unconstitutional. But that is not the opinion the Court issued in *Brown*; it focused instead on the effects of segregation in education. It was *Loving* that established anti-subordination as a key lens through which to understand the Equal Protection Clause.

Third, the Court recognized the right to marry as a fundamental right under the liberty of the Due Process Clause. This aspect of *Loving* was often overlooked until the litigation about marriage equality over the last 15 years. The Court addresses this in a separate section of the opinion, Part II, and begins its discussion by declaring: "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."[14] The Court went further and stated:

> Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. 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

---

[12] For an excellent development of this argument, *see* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004).

[13] *Loving v. Virginia*, 388 U.S. at 11-12; *Brown v. Board of Education*, 347 U.S. 483 (1954).

[14] 388 U.S. at 12.

> at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.[15]

The Court previously had indicated constitutional protection under the liberty of the Due Process Clause for rights of family autonomy. In the 1920s, the Court held that the liberty protected by the Due Process Clause protected the right of parents to control the upbringing of their children.[16] In *Skinner v. Oklahoma*, in 1942, the Court declared unconstitutional a state law requiring involuntary sterilization of those convicted three times of crimes involving moral turpitude, establishing the constitutional right to procreate, and declaring marriage is one of the "basic civil rights of man … fundamental to the very existence and survival of the race."[17] In *Griswold v. Connecticut*, in striking down a state law prohibiting the sale, distribution, or use of contraceptives, the Court declared:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Yet, it was *Loving* that explicitly held that the right to marry is protected as a fundamental right under the liberty of the Due Process Clause.[18] It was thus *Loving* that was the basis for the Court's decision in *Obergefell v. Hodges*.[19] Indeed, in *Obergefell*, in striking down state laws prohibiting same-sex marriage, the Court declared:

> The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is

---

[15] *Id.*

[16] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (declaring unconstitutional a state law prohibiting teaching of the German language on the ground that it interferes with the right of parents to control the upbringing of children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (declaring unconstitutional a state law prohibiting parochial school education on the ground that it interferes with the right of parents to control the upbringing of children).

[17] Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942).

[18] *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

[19] *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

> inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. Decisions about marriage are among the most intimate that an individual can make. This is true for all persons, whatever their sexual orientation.[20]

In a more subtle way, too, *Loving* was crucial to the Court's decision in favor of marriage equality for gays and lesbians. The primary argument in favor of laws prohibiting same-sex marriage was the long tradition of marriage being between a man and a woman. But there also was a long tradition in the United States of prohibiting interracial marriage. *Loving* established that a long tradition of discrimination is not sufficient to justify continuing to discriminate.

Thus, in addition to cheering the result in *Loving*, it is important to recognize ways in which it positively shaped the law concerning rights and equality.

II. *LOVING* AS A FAILURE

Yet, as we celebrate what *Loving* accomplished, we also must recognize that in another sense, *Loving* reflects a failure of the Supreme Court. It wasn't until 1967, 180 years into American history and almost exactly a century after the adoption of the Fourteenth Amendment, that the Court finally declared laws prohibiting interracial marriage to be unconstitutional. *Loving* did not come until 13 years after *Brown v. Board of Education* and not until after Congress had passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The Court did not lead the country in *Loving* with regard to civil rights as it would have had the decision come a decade earlier (or of course, much before that).

The Court had the opportunity to do exactly that in *Naim v. Naim* in 1956.[21] The case involved a Chinese man and a white woman. They had been married in North Carolina. She sought to have the marriage annulled in Virginia on the ground of the Virginia Racial Integrity Act of 1924, the same law invalidated in *Loving*. The Virginia Supreme Court upheld the Virginia law and the United States Supreme Court denied review. The United States Supreme Court declared: "The decision of the Supreme Court of Appeals of Virginia of January 18, 1956 . . . leaves the case devoid of a properly presented federal question."[22] In other words, the Court said that there was no substantial federal question presented by a state law prohibiting interracial marriage.

That, of course, was nonsense in 1956, as it was a decade later in 1967. The Court already had declared in 1942 in *Skinner v. Oklahoma* that

---

[20] *Id.* at 2589.

[21] *Naim v. Naim*, 350 U.S. 985 (1956).

[22] *Id.*

"marriage is one of the basic civil rights."[23] The racism of the Virginia law was apparent in its very title: The Racial Integrity Act. In fact, the case arose under the Supreme Court's mandatory jurisdiction; it was obligated to take the case under the jurisdictional statutes that existed at the time.[24]

The Court simply did not want to deal with the issue. Justice Tom Clark has been widely attributed as saying "[o]ne bombshell at a time is enough."[25] The Court felt that the country was not ready for it to declare unconstitutional laws prohibiting interracial marriage.

Lest one think that it was unimaginable for a court to declare an anti-miscegenation statute unconstitutional in 1956, it is important to remember that the California Supreme Court did exactly that eight years earlier. In declaring unconstitutional a long-standing California law prohibiting interracial marriage, the California Supreme Court concluded that the statute "violate[d] the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups."[26]

I think the Court made a huge mistake in not declaring the Virginia law unconstitutional in 1956 when the issue was before it in *Naim v. Naim*. First, this was the Court abdicating its proper role. The Court's role was to decide whether the Virginia law prohibiting interracial marriage denied equal protection, not to determine whether it would please the country or upset people. The importance of the issue made it incumbent on the Court to decide the question presented – and to declare the Virginia law unconstitutional as a clear denial of equal protection. As Professor Richard Delgado observed: "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."[27] I strongly disagree with those who praise the "passive virtues" of the Court avoiding difficult issues.[28] The Court's job is to enforce the Constitution and if a law violates equal protection to say so, whatever the public reaction. That is precisely why the justices are given life tenure under Article III of the Constitution, so that they will have the independence to decide cases without regard to public sentiments or opposition.

---

[23] Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942).

[24] MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 321–22 (2004).

[25] Richard Delgado, *Naim v. Naim*, 12 NEV. L.J. 525, 526 (2012).

[26] *Perez v. Lippold*, 32 Cal.2d 711, 731–32 (1948).

[27] Delgado, *supra* note 26, at 525.

[28] This phrase comes from the title of a famous law review article. Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961).

Second, I am skeptical that invalidating the Virginia law in *Naim v. Naim* would have intensified the massive resistance to the Court's desegregation orders. The reality is that Southern states did everything they possibly could to avoid desegregation.[29] To be sure, many Southerners would have seen invalidating laws prohibiting interracial marriages as another blow to their segregationist beliefs. But there was a key difference between a decision striking down the Virginia law and the rulings about school desegregation. If a person opposed interracial marriage, he or she could choose not to marry someone of a different race. But school desegregation orders were involuntary. Indeed, I think that helps to explain why there was such relatively quick acceptance of marriage equality. Allowing gays and lesbians to marry did not impose the slightest burden on anyone else. As I often said in talks before the Supreme Court's decision: if a person opposes same-sex marriage, then he or she should not marry someone of the same sex. But that was no reason to keep gays and lesbians from being able to marry.

Third, enormous positive benefits would have been gained if the Court had declared the Virginia law unconstitutional in *Naim v. Naim.* The Court would have provided what was missing in *Brown*: a clear statement that laws based on an assumption of racial superiority violate equal protection. There also would have been great social benefits to this. As Professor Delgado observed:

> 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. 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.

I thus come to the same conclusion as Professor Delgado: "*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."[30]

Ultimately, what the Court did in *Naim v. Naim*, and its waiting until 1967 to strike down laws prohibiting interracial marriage forces us to think about what we should expect of the Supreme Court. Some believe it

---

[29] Professor Klarman provides an excellent description of this. *See* Klarman, *supra* note 25.

[30] Delgado, *supra* note 26, at 527,. 531.

is unrealistic to expect the Court to do better.[31] I strongly disagree. Although I believe that the Court has often failed throughout American history, frequently at its most important tasks and at the most important times,[32] I think we should expect it to be better and should criticize its failures. Waiting until 1967 to strike down laws prohibiting interracial marriage was a failure on the part of the Court. It would have been so much more meaningful – for people's lives, for equal protection under the Constitution, and for society – if the Court had invalidated the Virginia law in 1956 (or much earlier).

CONCLUSION

Richard Perry Loving and Mildred Jeter decided not to attend the oral arguments in *Loving v. Virginia*. Richard gave his lawyer a note, "Mr. Cohen, tell the Court I love my wife, and it is just unfair that I cannot live with her in Virginia."

The Virginia law was unfair and it was wrong and it was a denial of equal protection. We should cheer the Court for saying so and saying so forcefully. But we should be critical that it took the Court so long to do so.

---

[31] *See, e.g.*, Gerald N. Rosenberg, *The Broken-Hearted Lover: Erwin Chemerinsky's Romantic Longings for a Mythical Court*, 69 VAND. L. REV. 1075 (2016); Corrina Barrett Lain, *Three Supreme Court "Failures" and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019 (2016).

[32] *See* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT (2014).

***