Loving v. Virginia and Same Sex Marriage: Mapping the Intersections

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Summary

The Supreme Court case, Loving v. Virginia (1967) legalized interracial marriage. More recently, the state of California allowed for the citizens to vote for or against same sex marriage. The author discusses the recent California state’s decisions for or against same sex marriage and how often it hinges upon the justice’s interpretation of Loving v. Virginia (1967) and whether it can be applied to same sex marriage arguments.

Introduction

On May 15th, 2008, the California Supreme Court’s ruling In re Marriage Cases (Ca. 2008) declared the denial of marriage rights to same sex couples to be unconstitutional in the state of California. Soon thereafter, on November 4th, 2008, California voters passed Proposition 8, a Constitutional revision defining marriage as a union only between a man and a woman. As the ever increasing number of cases over same sex marriage is heard in America’s court system, there is one constant argument—the holding’s reliance on the Loving analogy. Decisions for or against same sex marriage often hinge upon the justice interpretation of Loving v. Virginia (1967) and whether it can be applied to same sex marriage arguments. In my paper, I argue that Loving v. Virginia does indeed make laws restricting marriage to opposite sex couples only, unconstitutional. The struggles for same sex marriage and interracial marriage are very similar. Both arguments emerge from the belief that the freedom to marry the person of one’s choosing is an inherent right and is confined by the equal protection and due process clauses under the 14th Amendment. The cases that most recently legalized same sex marriage in America, Goodridge v. Dept. of Public Health (Mass. 2003) and In re Marriage Cases, cited the connections of same sex marriage to the interracial marriage struggle and the Loving case. Although many opponents say the issues in Loving and same sex marriage cases are not related because of Loving’s racial context; closer analysis shows their shared goal – the ability to choose one’s spouse without government intervention.

Loving v. Virginia

Before we examine the Loving analogy, we must first outline Loving v. Virginia itself. In June of 1958, Mildred Jeter, an African American woman, and Richard Loving, a white male, were married in the District of Columbia, where interracial
marriages were legal. After their marriage, the Lovings returned to Virginia. They were convicted of breaking Virginia’s anti-miscegenation statute: however, the trial judge suspended the sentence for 25 years if the Lovings promised to leave Virginia. The trial judge, Leon Bazile, justified his holding, “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.” (Loving 3)

The Lovings moved to the District of Columbia and appealed the earlier court decision to the Supreme Court. Chief Justice Earl Warren ruled that although anti-miscegenation laws may be equally enforced upon African Americans and Caucasian Americans, there original intention was mere racial discrimination. Furthermore, Chief Justice Warren ruled that denying the Lovings the right to marry because of their differing races violated their liberty right without due process as defined under the 14th Amendment’s due process clause. In his opinion, Warren states:

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 at the heart of the 14th Amendment, is surely to deprive all the State's citizens of liberty without due process of law. (p12)

Although Warren’s intent may seem rather explicit, since his ruling, the broader implications and applications of his words have continued to be argued throughout America’s courts.

**Loving Analogy**

But what is the “Loving analogy”? Arguments made using the Loving analogy claim that just as the Equal Protection and Due Process clause under the 14th Amendment protect interracial marriage, in the same way, such statutes should protect same sex couples’ rights to marriage. Law professor Lynn Wardle and lawyer Lincoln Oliphant claim there are several “garnishes” to the Loving analogy. These garnishes include comparing the suffering of racial minorities and gays, racism with homophobia, the social/legal discrimination against mixed race and same sex couples, the religious views used to justify racism and homophobia, and the general minority status of African Americans and gays. Although they use these “garnishes” to mock and discredit the Loving analogy, I think their observations of the various ways the case is utilized are important to acknowledge (Wardle, 2007). The NAACP’s Legal Defense and Educational fund released the following statement utilizing one such “garnish”:

The basic principles applied in Loving should be applied to any state effort to deny any person the right to marry the person he or she loves. It is undeniable that the experience of African Americans differs in many important ways from that of gay men and lesbians; the legacy of slavery and segregation is profound. But differences in historical experiences should not preclude the application of constitutional provisions to gay men and lesbians who are denied the right to marry the person of their choice. (Wolfson, 2007, p187)

In his piece promoting the Loving analogy, noted attorney and gay rights activist, Evan Wolfson cites the above quotation from the NAACP. He also cites the following personal statement Mildred Loving released on June 12, 2007, about the application of the Loving case for same sex marriage arguments:

I am still not a political person, but I am glad that Richard’s and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young
or old, gay or straight seek in life. I support the freedom to marry for all. That’s what Loving, and loving, are all about. (Wolfson, 2007, p192)

Wolfson includes both quotes to emphasize the support of the Loving analogy by the broader African American community, a point that needs emphasizing since many opponents to such analogies deny its support by other minority groups and cite the overwhelming racial minority support for anti-gay legislation such as Proposition 8. In the larger argument for same sex and interracial marriage parallels, some have begun to use the earlier California Supreme Court case Perez v. Sharp (1948), which banned anti-miscegenation laws in California, to clarify the nature of marriage rights at stake in Loving v. Virginia. Loving labels marriage as a “basic human right of man”, but focuses on the racist subtext behind anti-miscegenation laws. Perez engages race and its social construction and shows the need to marry a “person of one’s choice”. By emphasizing choice and self-expression, Perez shows the ways that anti-miscegenation laws serve to shape societal norms surrounding gender and race and validates the usage of the Loving analogy (Lenhardt, 2008).

**Baehr v. Lewin: First Successful Court Case**

The first court case to successfully make the Loving analogy between interracial and same sex marriage was Baehr v. Lewin (Hawaii, 1993). In Baehr, two lesbian couples and one gay couple filed against John Lewin, the head of Hawaii’s Department of Health, for refusing them marriage licenses. Although the court did not rule that same sex couples had a fundamental right to marriage, they did see the denial of marriage licenses to same sex couples as sex discrimination. The court cites Loving in its opinion and expounds upon the two cases historical connections, “we do not believe that trial judges are the ultimate authorities on Divine Will, and, as Loving amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.” (570)

In response to the court’s holding, Hawaii passed Amendment two to its State Constitution that explicitly defined marriage as a union between one man and one woman—much like the current Proposition 8 in California. Although the plaintiffs in Baehr were never issued the marriage licenses for which they had filed, the Baehr case will be remembered as the first case to rule in favor of same sex marriages and as a milestone in the gay rights movement (Gregory, 2007).

**Recent Court Cases that Legalized Same Sex Marriage**

The two American cases that most recently legalized same sex marriage, Goodridge v. Department of Public Health and In re Marriage Cases, both drew upon Loving and similar based rationales. In Goodridge, Justice Margaret Marshall ruled in support of same sex marriage because she felt such restrictions were discriminatory, “The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens (312).” Marshall later references the Loving analogy directly:

> For decades, indeed centuries, in much of this country … no lawful marriage was possible between white and black Americans. That long history availed … [when] the United States Supreme Court held that a statutory bar to interracial marriage violated the 14th Amendment, Loving v. Virginia. As … Loving make[s] clear, the right to marry means little if it does not include the right to marry the person of one’s choice. (327)

Similarly, Chief Justice of the California Supreme Court, Ronald George cited past
discrimination against interracial couples in his ruling on *In re Marriage Cases*:

Although the understanding of marriage as limited to a union of a man and a woman is undeniably the predominant one, if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions (853-54).

Some may object that I have misrepresented Justice George’s opinion on the *Loving* analogy, and I concede that he never directly affirms the *Loving* analogy. He even negates it being used to argue sex discrimination. However, I feel his overall comparison of the same sex marriage struggle to past treatment of other minorities allows for the inclusion of his opinion in an article discussing the *Loving* analogy and similar arguments.

Many have argued against the *Loving* analogy because it was called into question and defeated just four years after the original *Loving* ruling. In *Baker v. Nelson* (1971), two men asked a Minnesota clerk for a marriage license, but were deprived of it. They argued that *Loving* entitled them to a marriage license because denying same sex marriage is another form of “invidious discrimination”. The court ruled that traditional marriage laws are constitutional and that *Loving* applied only to racial discrimination. Yet upon closer inspection, one can see the discriminatory undertones of Justice Peterson’s opinion. Peterson reveals his heavily antiquated definitions of family and marriage in his opinion, “the institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis (312).”

The court eventually ruled that one only has a right to marry someone of the opposite sex, citing social tradition and procreation. It is clear from Peterson’s argument that he does not see sexual orientation as an intrinsic quality. In fact, Peterson never uses the word “sexual orientation” in his statement. Chief Justice Taney saw no wrong in his opinion in *Dred Scott v. Sandford* (1857) that African Americans could never become American citizens; similarly Justice Peterson is blind to his own prejudice and uses tradition to justify continued discrimination. Randall Kennedy, a Harvard Law Professor, discussed such prejudice in his 1997 article “Loving at Thirty.” He claims that overtime people will become less adverse to plights for same sex marriage, “Just as many people once found trans-racial marriage to be a loathsome potentiality well-worth prohibiting, so, too, do many people find same-sex marriage to be an abomination. This frightened, reflexive reaction will likely dissipate in many of the same way that antipathy to the idea of trans-racial marriage has dissipated.” As such discrimination dissipates; a case similar to *Baker* can be revisited in the near future without such bias from Justices (Kennedy, 1997). In the same way reactionary backlashes to pro-gay marriage rulings, such as Proposition 8 in California and Proposition 2 in Hawaii will lessen as generic intolerance in society diminishes. Until then, gay marriage advocates must wait and cling to the grounding of their argument—equality.

**Inherent Injustice**

*Loving v. Virginia* legalized interracial marriages because of an inherent injustice. The same laws that protect interracial couples’ right to marry must be applied to same sex couples. As society progresses towards full acceptance of gay and lesbian couples, we must look to the past for a roadmap to overcoming discrimination
and intolerance. Through understanding cases such as *Loving* that signaled the end of other eras of discrimination, we can learn how to overcome current discrimination, “that’s what *Loving*, and loving, is all about.” (Wolfson, 2007,192).

**Bibliography**


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