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Law and the Politics of Marriage: Loving v. Virginia after 30 Years Introduction

Robert A. Destro
The Catholic University of America, Columbus School of Law

LAW AND THE POLITICS OF MARRIAGE: *LOVING v. VIRGINIA* AFTER 30 YEARS INTRODUCTION

*Robert A. Destro**

Just over 30 years ago, it was a crime for interracial couples in Virginia to marry, or to live as husband and wife.[1] The Supreme Court's decision

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* Professor, The Catholic University of America, Columbus School of Law. B.A., 1972 Miami University; J.D., 1975, University of California, Berkeley; Associate Attorney, Squire, Sanders & Dempsey, Ohio, 1975-77; General Counsel, Catholic League for Religious and Civil Rights, 1977-81; Adjunct Assistant Professor, 1978-80, Adjunct Associate Professor, 1980-82, Marquette University; Columbus School of Law since 1982; Commissioner, United States Civil Rights Commission, 1983-89.

1. The two statutes under which Mr. and Mrs. Loving were convicted were part of a comprehensive statutory scheme designed to prohibit and punish interracial marriages. Section 20-58 of the Code of Virginia (1960) provided:

> *Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

Loving v. Virginia, 388 U.S. 1, 4 (1967). Section 20-59 defined the penalty for miscegenation:

"*Punishment for marriage.* —If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years." *Id.* Other provisions in Virginia's statutory scheme were § 20-57, which automatically voided all marriages between 'a white person and a colored person.' No judicial proceeding was necessary. Sections 20-54 and 1-14, respectively, which defined 'white persons,' 'colored persons and Indians':

> *Intermarriage prohibited; meaning of term 'white persons.'*—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, 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. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter. Code of Virginia § 20—54 (1960 Repl. Vol.).

Id. at 4–5 & n.4.

Section 1-14 of the Code of Virginia provided:

> *Colored persons and Indians defined.*—Every person in whom there is ascertain-

in *Loving v. Virginia*[2] put an end to that, and invalidated the anti-miscegenation laws in force in fifteen other states.[3] In the process, the Court repudiated the eugenic racism embodied in the statute, describing it as "odious to a free people whose institutions are founded upon the doctrine of equality."[4] *Loving* also affirms the abiding importance of the marriage relationship to the marriage partners, to families, and to society as a whole.

Given the importance of *Loving* in American constitutional law, we were somewhat surprised to learn that no commemorative conferences or symposia had been planned to mark the thirtieth anniversary of the decision. We designed our conference, "Law and the Politics of Marriage: *Loving v. Virginia* After 30 Years," to fill that gap.

The conference was held at The Catholic University of America's Columbus School of Law, 19-21 November 1997, and was co-sponsored by three institutions, each having a unique and abiding interest in the subject matter: The Catholic University of America, the Howard University School of Law, and the J. Reuben Clark School of Law at Brigham Young University.

The goal of the conference, and of the papers it encouraged, was to explore the implications of the *Loving* decision for Mr. and Mrs. Loving, for the United States in the late 1960s, and for American family and constitutional law today and in the future. This issue of the *Catholic University Law Review* contains some of the papers presented at that confer-

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able any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians. Va. Code Ann. §1 – 14 (1960 Repl. Vol.).

Id. at 5 n. 4.

2. 388 U.S. 1 (1967).

3. *See id.* at 6 n.5. The following state constitutional and statutory provisions were invalidated: Alabama, ALA. CONST., art. 4, § 102, ALA. CODE, tit. 14, § 360 (1958); Arkansas, ARK. STAT. ANN. § 55-104 (1947); Delaware, DEL. CODE ANN., tit. 13, § 101 (1953); Florida, FLA. CONST., art. 16, § 24, FLA. STAT. § 741.11 (1965); Georgia, GA. CODE ANN. § 53-106 (1961); Kentucky, KY. REV. STAT. ANN. § 402.020 (Supp. 1966); Louisiana, LA. REV. STAT. § 14:79 (1950); Mississippi, MISS. CONST., ART. 14, § 263, MISS. CODE ANN. § 459 (1956); Missouri, MO. REV. STAT. § 451.020 (Supp. 1966); North Carolina, N.C. CONST., Art. XIV, § 8, N.C. GEN. STAT. § 14-181 (1953); Oklahoma, OKLA. STAT., tit. 43, § 12 (Supp. 1965); South Carolina, S.C. CONST., art. 3, § 33, S.C. CODE ANN. § 20-7 (1962); Tennessee, TENN. CONST., art. 11, § 14, TENN. CODE ANN. § 36-402 (1955); Texas, TEX. PEN. CODE, art. 492 (1952); West Virginia, W.VA. CODE § 4697 (1961).

Id.

4. *Id.* at 11.

ence. Others are printed in Volume 12 of the *Brigham Young University Journal of Public Law*, and Volume 41 of the *Howard University Law Journal*. Read together, they shed considerable light on the history, significance, and contemporary understanding of the Court's decision in *Loving*.

I. THE IMPORTANCE OF LOVING AS PRECEDENT

Loving v. Virginia is, by any definition, a landmark case. Depending on who is reading it—and for what purpose—the case can be characterized as a "race" case, a "eugenics" case, a "marriage" case, or a "substantive due process" case. Given the importance of *Loving* in contemporary debates over the law of marriage and family, it is appropriate to begin with a brief discussion of the basis for each possible characterization and then turn to a brief examination of the way in which each possible characterization of the case might affect our understanding of its importance.

First, however, a brief word about the process of "characterization" is in order.

A. Characterization as a Process

1. Characterization in General

Characterization is the process by which a case is classified or categorized for purposes of legal analysis.[5] Lawyers engage in the practice each time they utilize alternative legal theories in pleading the facts of a case. By choosing from among a range of alternative analytical categories, ("categorical" analysis),[6] judges and Justices engage in the same process. By choosing the appropriate category, they can select the rule to govern the decision of a case.

British scholars Peter North and J.J. Fawcett provide a good description of the process:[7]

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5. For purposes of this essay, the terms "characterization," "classification," and "categorization" are synonymous.

6. Recent interpretive disputes among the Justices of the Supreme Court have contributed to an increase in the amount of attention given the subject by constitutional scholars. *See* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994); Stephen E. Gottlieb, *The Paradox Of Balancing Significant Interests*, 45 HASTINGS L.J. 825 (1994); Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1 (1992); Frederick Schauer, *A Comment On The Structure Of Rights*, 27 GA. L. REV. 415 (1993); Matthew S. Steffey, *Separable Principles Of Equality, Subsidy, Endorsement, and Church Autonomy*, 75 MARQ. L. REV. 903 (1992); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).

7. The most extensive literature on the process of characterization is found in the

> What is meant by the "classification of the cause of action" is the allocation of the question raised by the factual situation before the court to its correct legal category, and its object is to reveal the relevant rule for the choice of [the applicable] law. The rules of any given system of law are arranged under different categories, some being concerned with status, others with succession, procedure, tort and so on, and until a judge, faced with a case involving a foreign element, has determined the particular category into which the question before him falls, he can make no progress, for he will not know what . . . rule to apply. He must discover the true basis of the . . . claim.[8]

In a products liability case, for example, it is possible to characterize the legal issues as arising in tort, contract, and insurance. By choosing the category for analysis, the judge chooses the body of law that will govern the outcome of the case. This body of law will supply the "rule of decision." Application of the rule of decision to the facts of the case will supply the "holding," or "rule of the case."

In most cases, the analytical category and applicable norm(s) are clear. In cases where there is a possibility of multiple characterizations, the most common approach is to analyze the facts under each one, and to decide the case accordingly.

> Occasionally, however, the matter is far from simple. In the first place, it may be a case near the line in which it is difficult to determine whether the question falls naturally within this or that judicial category. Secondly, it may be a case where [different jurists or systems] hold diametrically opposed views on the correct classification. There may, in other words, be a conflict of classification. . . . The crucial question, therefore, is–on what principles do . . . judges classify the cause of action?[9]

When there is a conflict of characterization, or when important differential policy outcomes attach to the choice of category, the determination of the "appropriate" characterization is, itself, a policy question of the highest order. A judge or Justice confronting a set of facts that permits alternative characterizations must choose the "controlling" norm (or norms) from a range of equally plausible alternatives. This is, at least in part, the essence of "judgment."

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field of conflict of laws. *See generally* PETER M. NORTH & J.J. FAWCETT, CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW 43-52 (12th ed. 1992); SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 40-67 (1998) (describing the traditional American approach in conflicts cases).

8. NORTH & FAWCETT, *supra* note 7, at 44.

9. *Id.* at 44-45.

Unfortunately, judges do not generally give reasons for the rule-selection aspects of their judgment.[10] In many cases, the rule-selection implicit in characterization is simply a *fait accompli*.[11] To the extent that there are principles that govern the process,[12] the approach of a particular court, judge, or Justice may be discernable only from a study of series of decisions.

Over time, a pattern of characterization choices will reveal a considerable amount of information about a court or jurist's views for future cases having similar facts. It also will provide considerable information concerning the court's views on the role of the judiciary in ensuring the orderly development of the law.

2. Characterization in American Constitutional Law

In American constitutional law, the question – On what principles do

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10. In *The Paradox of Balancing Significant Interests*, Professor Stephen E. Gottlieb notes that leaving the reasons for the choice of method unstated is understandable, for three reasons:

> First, the methods are not often determinative. Second, the methods can often be translated into one another. Third, . . . the dispute is miscast because the decision between balancing and not balancing is illusory. The only "real" decisions are when intuitive judgments, whether described as balancing or otherwise, should be allowed to enter the analysis, which assumptions should be articulated, and which should be left inchoate.

Gottlieb, *supra* note 6, at 838.

11. Sometimes the parties will select the rules. This can be done by artful (or shoddy) pleading, by agreement (as in a choice of law clause in a contract), or by simple inadvertence (as in an uninformed choice of forum). The focus of this essay is on situations in which the *judge* chooses from a range of plausible alternatives.

12. Michael C. Dorf & Charles F. Sabel, in *A Constitution of Democratic Experimentalism*, note that

> [T]he categorization of particular cases as calling for either deference or close scrutiny is, at best, a political makeshift. It demonstrates to the polity that the Court is aware of its place in the constitutional order, even if by a sad paradox each decision taken by itself seems to suggest that it is not, and even if, by a more perilous paradox, the balancing act underscores just how much that order depends on the Court's ability to maintain its poise. Indeed, on rare occasions we actually see the Court teetering. It worries that the application of a standard in a particular case will undermine the integrity of the standard in others. The Court's falterings reveal its fundamental dilemma. For if the Court abandons deference too often for the alternatives of heightened scrutiny or hard look review, and in the bargain recognizes openly that it is engaged in balancing incommensurate public and private goods, it interferes with the political process and risks its own legitimacy. But if the Court chooses deference instead, it risks protecting itself at the cost of the fundamental values it is meant to safeguard.

98 COLUM. L. REV. 267, 394-95 (1998); *see also* Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997).

judges classify causes of action?– generally has been subsumed within the much larger topic of judicial review. This result is unfortunate. Characterization is a critically important component of constitutional analysis.[13]

When a constitutional case can be characterized in more than one way, the choice of the "appropriate" category has an enormous impact. It will determine the applicable constitutional norm (rule of decision), the analytical framework utilized in the factual inquiry, and the meaning of the precedent.[14]

Just as in other fields of law, sometimes the character of the action is obvious. (*e.g.*, a state regulation of interstate commerce that is in direct conflict with congressional policy on the same subject). In cases such as these, the choice of the applicable category resolves the case.[15]

> Categorization is the taxonomist's style—a job of classification and labeling. When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's justification for the infringement.[16]

In other cases, there may be alternative modes of analysis, and the choice made will give important clues concerning the policy perspectives of the Court.

3. The Role of Characterization in Loving

Viewed from a perspective that recognizes the connection between characterization and rule-selection, *Loving* is a paradigm case. Though all the Justices agreed that Virginia's statute was unconstitutional, they

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13. The Court has been very clear on this point. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, for example, the Court stated that it was "not bound to decide a matter of constitutional law based on a concession by the particular party before the Court as to the proper legal characterization of the facts." 518 U.S. 604, 622 (1996); *see also* Edwards v. South Carolina, 372 U.S. 229, 235-238 (1963) (holding that the State may not avoid First Amendment's strictures by applying the label "breach of the peace" to peaceful demonstrations); NAACP v. Button, 371 U.S. 415, 429 (1963) (reasoning that the government "cannot foreclose the exercise of constitutional rights by mere labels").

14. In *Young v. United States*, it gave the reason: "[O]ur judgments are precedents," and the proper understanding of matters of law "cannot be left merely to the stipulation of parties". 315 U.S. 257, 259 (1942).

15. *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); Brent E. Marshall, Note, *The Unseen Regulator: The Role of Characterization in First Amendment Free Exercise Cases*, 59 NOTRE DAME L. REV. 978 (1984).

16. Sullivan, *supra* note 6, at 293.

disagreed on two key points: 1) which constitutional norms were applicable under the circumstances; and 2) the appropriate formulation of the rule(s) of decision.

Justice Stewart's concurring opinion in *Loving* is both short and to the point. Since the words of the statute "ma[de] the criminality of an act depend upon the race of the actor,"[17] Justice Stewart classified the cause of action as a race-based equal protection claim.

Given that characterization, *Loving* was an easy case. By limiting the analytical category to race, Justice Stewart focuses the reader's attention on the rule of decision in race cases. In his view, the applicable rule of decision was stated in *McLaughlin v. Florida*.[18]

McLaughlin involved an appeal from a conviction under a Florida statute that made it a crime for "a white person and a Negro [to] habitually occupy the same room at nighttime."[19] Insofar as the state law was concerned, the Florida law involved in *McLaughlin* was identical to the Virginia law at issue in *Loving*. Both "ma[de] the criminality of an act depend upon the race of the actor."

The facts of the two cases, however, were different. The defendants in the Florida case, Mr. McLaughlin and Ms. Hoffman, were not husband and wife. The Lovings were married.

For the majority in *Loving*, this distinction was important enough to warrant recognition of a separate analytical category: "the right to marry." For Justice Stewart in *Loving*, the marital status of the parties was irrelevant, given his categorization of the case as a race-based equal protection claim.

This raises an important question: What factors influenced the Court's characterization of the legal questions presented in *Loving*?

The answer appears to reside in an ongoing debate within the Court concerning the appropriate standard of review for cases alleging discrimination "on the basis of race." Unlike Justice Stewart, the majority in *Loving* was unwilling to hold that the Equal Protection Clause operates as a categorical negative on race-based laws. Following its traditional approach, the majority opinion by Chief Justice Warren stated that statutes containing racial classifications are subject to a "very heavy burden of justification."

> Balancing is more like grocer's work (or Justice's) [than

17. Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J., concurring in the judgment) (citation omitted).

18. 379 U.S. 184 (1964).

19. 379 U.S. at 186 (quoting § 798.05 of the Florida Statutes).

> characterization] – the judge's job is to place competing rights and interests on a scale and weigh them against each other. Here the outcome is not determined at the outset, but depends on the relative strength of a multitude of factors.[20]

The Court thus entertained at least the theoretical possibility that a State might, in some future case, be able to make such a showing.[21]

Justice Stewart took a dim view of the Court's "balancing" approach, and castigated the majority for attempting to maintain flexibility on matter where he believed that there should have been a categorical rule.

> I concur in the judgment and agree with most of what is said in the Court's opinion. But the Court implies that a criminal law of the kind here involved might be constitutionally valid if a State could show "some overriding statutory purpose." This is an implication in which I cannot join, because I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense.... And I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious per se.[22]

This is an important debate in its own right, but had the discussion been limited to the appropriate standard of review in race cases, *Loving* would not have been the focus of a conference on the "politics of marriage." It is the new analytical category introduced in Part II of *Loving* – the "right to marry" – that brings us here.

We do not know why the Court chose to use *Loving* to expound its views on the importance of "the right to marry." We do know, however, that its characterization of a couple's interest in contracting a marriage is an important one. The existence of such a liberty interest under the Due Process Clause of the Fourteenth Amendment makes it possible for the Court to review any state statute that allegedly imposes a burden on that interest. By classifying the "right to marry" as "fundamental," the Court also selects the applicable rule of decision – the same "balancing" analysis commonly applied in cases involving "fundamental rights."

In *Loving*, the Court's characterization has two primary effects. The

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20. *See* Sullivan, *supra* note 6, at 293-94.

21. This hypothetical, but unlikely, possibility gave rise to Professor Gerald Gunther's aphorism: "'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

22. *McLaughlin*, 379 U.S. at 198 (Stewart & Douglas, JJ., concurring) (footnote and citations omitted).

most obvious one is that the "strength" of the right to marry weighs heavily in the "balance" struck against anti-miscegenation laws. Whatever interest a state might have been able to assert would pale in significance when compared to one of our most basic social institutions.

The second effect was precedential. By recognizing a "right to marry" as an aspect of liberty under the Due Process Clause, the Court also made a jurisdictional point about family law. Henceforth, the Court would be willing, at least in theory, to develop substantive federal constraints on the family law powers of the States.[23]

Both of these effects illustrate another basic point about characterization: as a rational process, it necessarily involves consideration of the implications of the judicial task.

> Categorization is often balancing; it requires deciding which category to put things in, and that is often done by noticing the consequences and deciding (often subconsciously) if they are tolerable, better, or worse than certain alternatives.[24]

In *Loving*, the majority used both characterization and balancing as explicit devices to make several points about American constitutional law, the legal and moral repugnance of racial discrimination, and the importance of the marriage relationship. Those points have become the legacy of *Loving*.

The title of the conference—Law and the Politics of Marriage: *Loving v. Virginia* After 30 Years—was chosen in order to highlight the political context and dimensions of the case, both in 1967 and today. The decision in *Loving* represents the federal government's belated[25] judgment that the Nation should no longer tolerate the eugenic racism embodied in Virginia's anti-miscegenation statute, its commitment to a "flexible" approach in deciding cases involving government-sponsored racial discrimination, and its willingness to exercise oversight jurisdiction in matters involving marriage and family.

Had *Loving* been decided on the relatively inflexible nondiscrimination grounds suggested by Justice Stewart, the content of our conference would have been very different; but the Court did not opt for certainty.

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23. *See* Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859); *see generally* Anthony B. Ullman, Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824 (1983).

24. *See* Gottlieb, *supra* note 6, at 846 (footnote omitted).

25. The anti-miscegenation law involved in *Loving* was adopted in 1924, but its historical pedigree dates to 1691. *See infra* note 39. Of the States that had adopted anti-miscegenation statutes, California was the first to hold that they were unconstitutional. *See* Perez v. Lippold, 198 P.2d 17 (1948).

As it has in many other race cases, the Court in *Loving* opted for flexibility. Our conference, therefore, set out to examine what was said in *Loving* and how it should be understood in today's debates over law and the politics of marriage.

The Latin axiom, *Quidquid recipitur ad modum recipientis recipitur* ("What is received is received according to the mode of the receiver.") was particularly relevant in planning a conference commemorating the thirtieth anniversary of *Loving*. Present-day judges, advocates, and scholars must interpret the "meaning" of the Court's decision whenever it arguably is relevant to the issues before them. As such, they – and you – are the "receivers" of whatever message the Court sought to send.

Today's judges, advocates, and scholars use the case, and the rules it announced, as precedent. It has become a tool used to shape the future course and direction of marriage and family law. Given this background, we thought it appropriate to assume at the outset that much of what we know as family law is, and has always been, the result of an ongoing debate about "law and the politics of marriage." We hope that the papers presented here, and in the *BYU Journal of Public Law* and the *Howard Law Journal*, will provide some new insights into that age-old debate.

B. Characterizing the Holding: What Did the Court Decide in Loving*?*

In order to determine the actual "holding" in *Loving*, it will be necessary to identify the parts of the opinion that appear to be controlling.

Part I of the decision concludes with the observation that "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."[26] This looks like a fairly standard "equal protection" analysis. Had the Court stopped with these words, *Loving* would be a clear example of a "race" case.

The Court, however, did not end its analysis at this point. Part II of the decision holds that:

> 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. . . . 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

26. Loving v. Virginia, 388 U.S. 1, 12 (1967).

State.[27]

Which rationale states "the rule" of *Loving*? The issue is important because it drives both the characterization of the precedent, and the message "received" and applied by courts, scholars and advocates.

If *Loving* is a race case and the discussion of the "the freedom to marry or not marry" merely adds weight to the equal protection holding, the Court's remarks about marriage are not so significant. Like a generalized discussion of the community's interest in assuring nondiscriminatory access to safe and affordable housing in a housing discrimination case, the discussion of marriage in *Loving* can be read as underscoring the intensely personal nature of the damage inflicted on Mr. and Mrs. Loving. The Court has indicated on many occasions that marriage is an important relationship, but generalized statements concerning the importance of marriage would not necessarily provide the basis for federal oversight of State laws governing marriage, divorce, and child custody.

If, however, *Loving* announces a *dual* holding, the analysis is different. Part II of the opinion deals with the Court's understanding of the concept of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. If it is an independent ground for the Court's decision, it then becomes necessary to determine the level of generality at which to characterize the liberty under consideration.

The Court's formulation of that liberty was that "the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State." This formulation can be read in two ways:

1. As a statement that the "freedom to marry" protected by the Due Process Clause may not be abridged by discrimination that is either irrational, or otherwise forbidden by the Constitution; or
2. As a statement that the "freedom to marry" protected by the Due Process Clause is an individual liberty interest that "resides with the individual and cannot be infringed by the State."

Read in light of the racial classification involved in *Loving*, the first reading would be a more limited conception of the Due Process right. In this interpretation, the "freedom to marry" recognized by the Court would not be a generalized right to marry anyone, under any circumstances, but one that is bounded by otherwise rational restrictions that define the nature, incidents, and duration of the marital relationship.

If the holding in *Loving* is read at a higher level of generality – that is, without regard to the caveat "of another race" – the result is a far more

27. *Id.*

flexible characterization of the liberty interest. If "the freedom to marry or not marry, a person resides with the individual and cannot be infringed by the State," *all* State policies alleged to impose an undue burden on that liberty are (or should be) subject to a balancing test. Such a liberty interest would then become a powerful tool for the "reform" of the myriad laws and rules that govern the nature of marriage, divorce, cohabitation, and sexual relationships.

An Introduction such as this one is no place to attempt a resolution of these questions. My task is to explain the questions discussed during the conference, and to highlight briefly the ways in which the papers printed as a part of this symposium seek to answer them.

II. THE PURPOSE OF THE CONFERENCE AND SYMPOSIUM

The purpose of the Conference was to provide historical, legal, and interdisciplinary background to scholars and practitioners who are interested in the ways that courts, advocates, and scholars use the Court's holding in *Loving v. Virginia*.

A review of the case law, briefs, and scholarship paints a rather clear picture of the importance of the case. A "right to marry," conceived broadly as a substantive due process right of "marital"[28] or "intimate"[29] association, would provide a significant basis for federal oversight of State power to define, regulate, and order sexual, marital, and family relationships.[30]

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28. The term was first used by the United States Supreme Court in *Sosna v. Iowa*, 419 U.S. 393, 419 (1975) (Marshall & Brennan, JJ., dissenting).

29. The term "intimate association" appears also to have been coined by Professor Karst. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629-47 (1980) (arguing that the freedom to create, maintain, and terminate intimate associations is a necessary component of a meaningful right to privacy). It is broader than the right to "marital association" because it includes relationships that do not depend on marital status. The early literature utilizing the term focused on extending the concept of "marital association" to homosexual relationships. *See id.* (arguing that the right to marry be extended to homosexuals); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982); Catherine E. Blackburn, Comment, *Human Rights in an International Context: Recognizing the Right of Intimate Association*, 43 OHIO ST. L.J. 143 (1982). More recently, the term "intimate association" has been utilized to make the case for broader constitutional protection of the rights of parents vis à vis the state. *See generally* David Fisher, Note, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399, 400 (1997).

30. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Eisenstadt v. Baird, 405 U.S. 438, 452-55 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); *cf.* United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973). *But see* Bowers v. Hardwick, 478 U.S. 186 (1986); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

The "narrower" reading of *Loving*—that it is, first and foremost, a case that affirms the inherent irrationality of the concept of "race"—has not received nearly as much attention. "Race" is a concept much-discussed in the literature. Though there is considerable difference of opinion, most contemporary scholarship assumes that the construct has some meaning, and all agree that, however it is defined, the idea of "race" has social significance.[31] The thirtieth anniversary of *Loving* thus presented us with an opportunity to explore the concept of "race" and its relationship to the law and politics of marriage and family.

A. Eugenics: Regulating Marriage and Family to Assure Racial Purity

The first and most obvious way to characterize *Loving* is as a "race" case. The racial basis for the law was clear on its face:

> If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.[32]

America's long-standing fixation on "race" as a means of organizing and defending social hierarchy has its roots in religion. Before the voyages of Columbus, the concept of race was used to distinguish among Christians, Jews, and Pagans (i.e. the "Christian race", or the "Pagan races"). The concept of race-as-color developed in the early 1500s when British and Dutch slave traders, condemned on religious grounds by the Vatican, developed a *post hoc* Biblical defense for their actions.[33] That justification became the basis for the United States Supreme Court's

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31. *See generally* R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992); Robert S. Chang, *Toward an Asian-American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1266-67 (1993); Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39; *see also generally* Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CALIF. L. REV. 315 (1998) (distinguishing between "proxy" and "non-proxy" discrimination).

32. Loving v. Virginia, 388 U.S. 1, 4 (1967) (quoting the Code of Virginia §20-59).

33. One justification was that "'the Negro was a heathen and a barbarian, an outcast among the peoples of the earth, a descendant of Noah's son Ham, cursed by God himself and doomed to be a servant forever'" because of the sin of looking upon his father's nakedness. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 12 (1978); *accord*, D. Marvin Jones, *"We're All Stuck Here for a While": Law and the Social Construction of the Black Male*, 24 J. CONTEMP. L. 35, 72-73 (1998); *see generally* 6 THE BIBLICAL AND "SCIENTIFIC" DEFENSE OF SLAVERY: RELIGION AND "THE NEGRO PROBLEM" (John David Smith ed., 1993).

holding, in *Dred Scott v. Sandford*,[34] that persons of African descent were:

> beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro [sic] might justly and lawfully be reduced to slavery for his benefit.[35]

By the end of the Nineteenth Century, the alleged Biblical justification for racial differences was replaced by the pseudo-sciences of Social Darwinism and eugenics.[36] Arguing that there was a "scientific" basis for observable physical, economic, and cultural differences among nationality groups, eugenics advocates urged Congress and the State legislatures to adopt legislation designed to protect Whites from "defective germ plasm."[37] Virginia responded on March 20, 1924 by adopting "The Eugenical Sterilization Act,"[38] and the "Virginia Racial Integrity Act."[39]

The *Loving* Court, however, did not hold that Virginia's foray into the fever swamps of racial eugenics was irrational *ab initio* because it had no biological significance. It did not discuss the fact that the social "meaning" of "race" depends on historical and cultural context.[40] It would take

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34. 60 U.S. (19 How.) 393 (1856).

35. *Id.* at 407.

36. *See* Emily Field Van Tassel, *"Only the Law Would Rule Between Us": Antimiscegenation, The Moral Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873 (1995).

37. *See infra* note 42.

38. Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 6 & n.28 (citing the Eugenical Sterilization Act, Act of March 20, 1924 ch. 394 1924 Va. Acts 569-70). The Eugenical Sterilization Act was challenged—and upheld—in *Buck v. Bell*, 274 U.S. 200 (1927). Oklahoma passed a similar statute in 1935, naming it the "Habitual Criminal Sterilization Act." *Id.* at 6 & n.33 (citing the Sterilization of Habitual Criminals, 1935 Okla. Sess. Laws ch. 26, art. I). The Court invalidated this statute on equal protection grounds in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *Buck v. Bell* has not been overruled. *See generally* Eric M. Jaegers, Note, *Modern Judicial Treatment of Procreative Rights of Developmentally Disabled Persons: Equal Rights to Procreation and Sterilization*, 31 U. LOUISVILLE J. FAM. L. 947 (1992).

39. Lombardo, *supra* note 37, at 6 & n.28 (citing the Virginia Racial Integrity Act, Act of March 20, 1924 ch. 371, 1924 Va. Acts 534). Virginia's laws against interracial marriage, however, have a much longer pedigree. As early as 1681, Virginia punished interracial marriage by banishing the white person involved in the marriage. Interracial fornication was punishable as well. *See* Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 499 n. 132 (1998).

40. There is a considerable body of literature discussing the influence of eugenics on the Court's jurisprudence. *See generally* Lombardo, *supra* note 37; *see also* Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitu-*

twenty years – until 1987 – for the Court even to address the legal "meaning" of the concept of "race."[41] The *Loving* Court focused instead on the obvious. The express purpose of Virginia's anti-miscegenation law was to safeguard the alleged "purity" of the white "race" alone. The alleged "purity" of other races was not, for obvious reasons, a matter of concern to the 1924 Virginia legislature.

Viewed as a race/eugenics case, the teachings of *Loving* are clear: Mr. & Mrs. Loving were the victims of a eugenics policy designed to keep them from reproducing mixed-race children.[42] Two questions follow from

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tional Law, 71 IOWA L. REV. 833 (1986) (discussing Holmes' support of eugenics); Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 282-91 (1963). Rogat noted that Holmes' maintained "intense eugenicist views." *Id.* at 282.

41. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (inquiring whether 42 U.S.C. § 1981 applies to a person of Arabian descent); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (inquiring whether 42 U.S.C. § 1982 applies to persons of Jewish ancestry).

42. The American eugenics movement was mirrored in Europe by the Nazi eugenics program, and shared many of its pseudo-scientific views concerning the "integrity" of individuals of Nordic extraction. Paul Lombardo has written that:

> The Federal Immigration Restriction Act of 1924 was adopted in the banner year in the history of the American eugenics movement. The Act's major provisions were crafted by Harry Laughlin, and prominent eugenicists advocated its passage. The law was meant to combat the "rising tide of defective germ-plasm" carried by suspect groups migrating from Southern and Eastern Europe, most notably Jews and Italians. The eugenicists thought these immigrants would threaten public morality, poison the "American" gene pool, and were "liable to become ... public charge[s]." The Act was signed by President Calvin Coolidge, whose commentary in favor of such laws echoed eugenic rhetoric: "America must be kept American [because] [b]iological laws show ... that Nordics deteriorate when mixed with other races." The eugenic intent of the Act, and the national origins quota system it enforced, remained in place until they were repealed by the Immigration and Nationality Act of 1965.

Lombardo, *supra* note 37, at 5-6 (quoting, among other sources, Frances Hassencahl Ph.D., *Harry H. Laughlin, 'Expert Eugenics Agent' for the House Committee on Immigration and Naturalization, 1921-1931* (1970) (unpublished Ph.D. dissertation, Case Western Reserve University)).

Like their Nazi counterparts, American eugenics advocates branded minorities and persons with developmental disabilities as genetically undesirable, "socially inadequate and a constant menace to the white race and society at large." Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Socio-Political Choices*, 11 HARV. BLACK LETTER J. 115, 130 (1994) (citing ELAINE ELLIS, STERILIZATION: A MENACE TO THE NEGRO 155 (1937)).

The Supreme Court's preference for the cultural and religious traditions of Northern and Western Europe mirrored the public sentiments that eventually led to the adoption of the Immigration Restriction Act. *See* Reynolds v. United States, 98 U.S. (8 Otto) 145, 164 (1878) (upholding polygamy conviction, and noting that "[p]olygamy ha[d] always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people").

this observation.

The first is whether the link between *Loving* and reproduction limits or broadens what has become known in the literature as "The *Loving* Analogy." The second is the nature and extent of the "right to marry" recognized in Part II of *Loving*. I will explore "The *Loving* Analogy" in Part II.B below. Part II.C is devoted to a brief discussion of the "right to marry."

*B. Exploring the "*Loving *Analogy"*

The second possible characterization of *Loving* classifies it as a case involving either privacy, sexuality, or "intimate association." So characterized, the case has significance beyond the fields of race relations and marriage law.

The basic purpose of Virginia's anti-miscegenation law was to foster racial "purity" among "whites." Although the social segregation of the races was the primary device for maintaining racial hegemony,[43] controls on the reproductive behavior of consenting adults underscored the importance Virginia attached to racial "purity." Courts and commentators therefore place *Loving* in the line of cases dealing with sexual and reproductive issues that began with *Griswold* v. *Connecticut*.[44]

On the surface, *Loving* and *McLaughlin v. Florida* appear to have much in common with *Griswold* and *Eisenstadt v. Baird*. Both *Loving* and *Griswold* involved married couples. Like *Eisenstadt*, *McLaughlin* was a case involving unmarried persons. But the grim reality of racial politics made it clear that the purpose of both statutes was to criminalize conduct that would increase the likelihood of a sexual relationship. Sexual contact was not a necessary element of the "crimes" alleged to have been committed in either *Loving* or *McLaughlin*. Neither case would, therefore, seem to add much weight to the *Griswold-Eisenstadt* line of precedent.

A number of commentators have argued, however, that *Loving* does, in fact, require stricter scrutiny of laws regulating adult sexual behavior. Noting that the Virginia statute involved in *Loving* was designed to fos-

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43. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding as constitutional a segregation statute).

44. 381 U.S. 479 (1965); *see generally* Carey v. Population Services, 431 U.S. 678 (1977) (extending *Griswold's* reasoning to minors); Roe v. Wade, 410 U.S. 113 (1973) (extending *Griswold* to include abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the holding in *Griswold* to unmarried persons). *But see* Michael H. v. Gerald D., 491 U.S. 110 (1989) (refusing to extend the reasoning of *Griswold* to cases involving children conceived during marriage by unfaithful spouses).

ter the social subordination of an entire class of citizens, a number of commentators have argued that the racial animus displayed in *Loving* has its analog in laws prohibiting homosexual sexual activities. According to this view, the refusal of State authorities to provide official sanction to same-sex relationships is a direct result of invidious discrimination against homosexuals. These arguments form the basis of what has become known as "The *Loving* Analogy."

Until recently, most state and federal courts have been reluctant to extend the reasoning and result in *Griswold* and *Eisenstadt* to cases involving consensual homosexual activity.[45] In *Bowers v. Hardwick*,[46] the United States Supreme Court refused to accept the argument altogether.

Controversial from the start, there has been considerable debate in the literature over the validity of "The *Loving* Analogy." One goal of the conference and the symposium was to provide a forum where that debate could continue.

First identified by Professor Andrew Koppelman in his student note entitled *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*,[47] the argument is that "*Loving* demonstrated the unsoundness" of the Court's refusal in *Bowers* to give equal credence to consensual heterosexual and homosexual activity. Koppelman argued that:

> miscegenation laws discriminated on the basis of race, and they did so in order to maintain white supremacy. Similarly, sodomy laws discriminate on the basis of sex—for example, permitting men, but not women, to have sex with women—in order to impose traditional sex roles. The Court has deemed this purpose impermissible in other contexts because it perpetuates the subordination of women. The same concern applies with special force to the sodomy laws, because their function is to maintain the polarities of gender on which the subordination of women depends. Thus, if the Court is to maintain the commitment to equality that has animated the equal protection jurisprudence of the past thirty-five years, it cannot uphold the sodomy laws and was wrong to do so in *Bowers*. . . .[48]

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45. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (finding that there was no fundamental right to engage in sodomy).

46. 478 U.S. 186 (1986).

47. 98 YALE L.J. 145 (1988).

48. Koppelman, *supra* note 47, at 147. In a footnote to his opinion in *Bowers*, Justice Blackmun observed that

> The parallel between *Loving* and this case is almost uncanny. There, too, the State relied on a religious justification for its law . . . . There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions . . . . There,

> Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexuality is threatening because it calls into question the distinctive and superior status of being male.[49]

Professor William Eskridge has adapted and refined Koppelman's position. He draws a direct analogy between the anti-miscegenation laws invalidated in *Loving* and the legitimacy of recognizing (or refusing to recognize) same-sex unions as "marriages." Eskridge argues, in essence, that *Loving* overruled Virginia's ban on interracial marriage because the classification was based on an ideology of white supremacy. In his view, anti-miscegenation laws were rejected as standing in contradiction with the purpose of the Fourteenth Amendment. Courts should therefore overrule bans on the recognition of same-sex unions as "marriages" because the classifications on which they are based rest on sexist and heterosexist ideologies. These ideologies too, he believes, are contradicted by the Fourteenth Amendment's purpose.[50]

In a more recent submission, Professors Eskridge and Sheila Rose Foster argue that the use of the "*Loving* Analogy" has strategic importance:

> We make the race analogies because of *Loving*. We make the sex analogies because that's the way you connect *Loving* with the equal rights amendment in Hawaii. We also make the religion analogy. Typically, the traditionalist response to race and sex is that those are immutable and that sexual orientation is chosen. I think all three of those categories are mutable and none of the three of them are chosen in any conscious (or subconscious) way. But I think the important analogy among race, sex, sexual orientation and religion, if we look at them as a cluster, is that they are irrational classifications. When they are used to segregate people or to penalize people, that our traditional reason for that has been prejudice, then the result of that has been unproductive anger and empowering society's worst people; people who are bigots. And I think that's more the message

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> too, at the time the case came before the Court, many of the States still had criminal statutes concerning the conduct at issue . . . . Yet the Court held, not only that the invidious racism of Virginia's law violated the Equal Protection Clause, but also that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."

Bowers, 478 U.S. at 211 n. 5 (Blackmun, J., dissenting) (citations omitted).

49. Koppelman, *supra* note 47 at 159-60.

50. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE at 159-61 (1996); *see also* David Orgon Coolidge, Essay, *Same-Sex Marriage?* Baehr v. Miike *and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997) (discussing the Eskridge position).

to make.

> It seems to me also that when you make these sort of analogies, you are trying to destabilize the status quo. People say, "you can't have same-sex marriage," and you remind them to think about thirty or forty years ago. Forty years ago in West Virginia, where I grew up, it was UNTHINKABLE for a different-race couple to marry. . . . The point to be made from that is the "constructedness" of marriage, and lines for cordoning people off within marriage. One reason we play the race card or religion card or sex card is to remind people that none of this is written in stone. It's not like the Ten Commandments. Go back and read them. They don't forbid same-sex marriage. There's no natural law principle against it. Look at how marriage as an institution has evolved, even within our lifetimes. It seems another reason why we want to play these kinds of cards.[51]

The analogies drawn between *Loving*, *Bowers*, and discrimination on the basis of sex and religion are controversial. They are also influential. The Hawaii Supreme Court explicitly relied on the "*Loving* Analogy" in *Baehr v. Lewin*.[52]

Noting that "constitutional law may mandate, like it or not, that customs change with an evolving social order,"[53] the Hawaii court held that the State's refusal to issue marriage licenses to same-sex couples should be viewed as discrimination "on the basis of sex" unless a compelling state interest for the State's position could be demonstrated; a burden the State failed to meet.

Given the importance of "the *Loving* Analogy" to the debate over the recognition of same-sex unions as "marriages," several presentations were devoted to a discussion of the importance of *Loving* in that context. Among the papers on this topic were David Orgon Coolidge's submission, *Playing the* Loving *Card, Same-Sex Marriage and the Politics of Analogy*,[54] Richard F. Duncan's *From* Loving *to* Roemer*: Homosexual Marriage and Moral Discernment*.[55] Professors Peter Lubin and Dwight Duncan provide an historical perspective on the debate in *Follow the*

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51. William N. Eskridge, Jr. & Sheila Rose Foster, *Remarks, Discussion Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 329, 333-334 (1998).

52. 852 P.2d 44 (Haw. 1993), *reconsideration granted in part by*, 875 P.2d 225 (Haw. 1993); *and on appeal after remand* Baehr v. Miike, 910 P.2d 112 (Haw. 1996); *on remand* NO. CIV. 91-1394, 1996 WL 694235 (Hawai'i Cir. Ct., Dec. 3, 1996), *order aff'd* 950 P.2d 1234 (Haw. 1997) (table).

53. Baehr v. Lewin, 852 P.2d at 63.

54. 12 BYU J. PUB. L. 201 (1998).

55. 12 BYU J. PUB. L. 239 (1998).

Footnote, or the Advocate as Historian.[56]

C. Current Developments in the Law of Marriage and Family: The Enduring Importance of Loving *in Marriage, Divorce, Adoption, and Child-Custody Cases*

The last way to characterize *Loving* is as a "marriage" case. This characterization has significance in three distinct areas: marriage, divorce, and matters of child custody.

1. Marriage & Divorce

In Part II of *Loving*, the Court makes reference to "the freedom to marry," noting that it "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[57] This characterization of the *Loving* precedent raises an important federalism question. What limit does the "freedom to marry" impose on the discretion of the States to define the nature, obligations, incidents, and duration of the marital relationship?

The question is formulated in this manner for a simple reason. Legislative jurisdiction over matters of domestic relations and family law are among the powers reserved to the States. Federal oversight of State lawmaking authority must derive, if at all, from either the Fourteenth Amendment, or another provision of the Constitution that grants lawmaking authority to Congress.[58]

There is no question that the Fourteenth Amendment is the source of the Court's statement in *Loving* that "the freedom to marry, or not marry . . . resides with the individual and cannot be infringed by the

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56. 48 CATH. U. L. REV. 1271 (1998).

57. Loving v. Virginia, 388 U.S. 1, 12 (1967).

58. In *Pennoyer v. Neff*, 95 U.S. 714, 734-735 (1878), the Court stated that a State "has the absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." This division of authority has a long pedigree, and was affirmed as recently as 1995. *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (rejecting the proposition that the Commerce Clause might support a finding of federal legislative jurisdiction over "family law (including marriage, divorce, and child custody)").

Read together with the "domestic relations" exception to federal diversity jurisdiction, *see generally supra* note 23 and sources cited therein, the role of the federal courts in matters of family law was minimal. Until *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court rarely exercised federal oversight jurisdiction in family law matters, and, when it did, it generally affirmed the existence of State power.

State."[59] In *Zablocki v. Redhail*,[60] the Court places *Loving* in the line of "privacy" cases that begins with *Griswold*, and describes it as "[t]he leading decision of this Court on the right to marry."[61] As a result, it is arguable that all State regulations that "significantly interfere with decisions to enter into the marital relationship" should be subjected to "rigorous scrutiny."

The federal case law, however, has been far from clear on this point. In some instances, the United States Supreme Court describes marriage as "the most important relation in life."[62] In divorce cases, however, marriage is viewed as a "status," thus allowing the state of the domicile of one party to dissolve the legal relationship without first having to demonstrate that it has jurisdiction over both of the parties to the action.[63] Even though marriage is said to be "the foundation of the family and of society, without which there would be neither civilization nor progress,"[64] the marriage relationship – once contracted – has less protection than the partners' interests in property or child custody.[65]

The Court, in fact, has not been clear concerning either the nature of the "right to marry," or the degree to which it will intervene to override state policy in this sensitive area of law. In *Sosna v. Iowa*,[66] for example, the Court reaffirmed its longstanding position regarding the "comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States."[67] Just two years later, however, in *Zablocki*, the Court invalidated a Wisconsin statute[68] that required court approval before a marriage license could be issued to any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judg-

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59. Loving v. Virginia, 388 U.S. 1, 12 (1967).

60. 434 U.S. 374 (1978).

61. *Id.* at 383 (1978).

62. Maynard v. Hill, 125 U.S. 190, 205 (1888).

63. *See* Williams v. North Carolina (I), 317 U.S. 287 (1942); *see also* Bell v. Bell, 181 U.S. 175 (1901) (holding that actual good faith domicile of at least one party is essential to confer authority and jurisdiction on the courts of a state to render a decree of divorce that will be entitled to extraterritorial effect under the Full Faith and Credit Clause); *cf.* Andrews v. Andrews, 188 U.S. 14 (1903) (same, even if both parties personally appear).

64. Maynard v. Hill, 125 U.S. 190, 211 (1888).

65. *See* May v. Anderson, 345 U.S. 528 (1953) (child custody); Estin v. Estin, 334 U.S. 541 (1948) (requiring personal jurisdiction for adjustment of property interests); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (requiring "minimum contacts" with the State to be subject to "*in personam*" jurisdiction).

66. 419 U.S. 393 (1975).

67. *Id.* at 404.

68. *See Zablocki*, 434 U.S. at 375 (citing WIS. STAT. §§ 245.10(1), (4), (5) (1973)).

ment." In the Court's view, conditioning receipt of a marriage license on proof that the non-custodial parent had complied with all support obligations, and that his or her children "[were] not then and [were] not likely thereafter to become public charges" was a violation of the Equal Protection Clause.[69]

The connection between *Loving* and contemporary disputes over the nature and character of marriage and family was the primary focus of the conference because there have been a number of recent developments that call the meaning of *Loving* into question. A series of federal and state cases raise important questions concerning the right to marry.[70] Legislative developments regarding divorce reform[71] and "covenant marriage"[72] also make it clear that the debate over state power in the field of marriage and family is far from over.

Four of the papers presented in this symposium discuss the constitutional status of marriage: Katherine Shaw Spaht's, *Beyond* Baehr

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69. *Id.*

70. *Compare* Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (rejecting the contention that there is a "right to marry" a person of the same sex), *and In re* Ladrach, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (1987) (rejecting an application for a marriage license to allow postoperative male to female transsexual to marry a male), *with* Baehr v. Miike, 910 P.2d 112 (Haw. 1996) (accepting the possibility that recognition of same-sex unions may be required under Hawai'i's equal rights amendment), *and* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *3 (D. Alaska, Feb 27, 1998) (holding that the state must "have a compelling purpose before it can define marriage to exclude partners of the same sex").

71. Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879 (1988); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997); Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607 (1997); Robert M. Gordon, Note, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435 (1998); Jodi M. Solovy, Comment, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493 (1996).

72. *See* LA. REV. STAT. §§ 9:224-:225, :234, :245, :272-:275, :307-:309, and LA. CIV. CODE arts. 102-103 (West 1991 & Supp. 1998). The Louisiana covenant marriage allows unilateral divorce only for fault or after a lengthy separation. Divorce cannot be granted except on the fault grounds provided in the statute. *See* LA. REV. STAT. Ann. § 9:307. LA. REV. ST. §9-272 defines "covenant marriage" as follows:

> A covenant marriage is a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship. Parties to a covenant marriage have received counseling emphasizing the nature and purposes of marriage and the responsibilities thereto. Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized.

Id. at § 9:272.

Strengthening the Definition of Marriage,[73] and Lynne Marie Kohm's, *Liberty and Marriage* – Baehr *and Beyond: Due Process in 1998*;[74] Lynn Wardle, Loving v. Virginia *and the Constitutional Right to Marry*,[75] and Margaret Brinig, *The Supreme Court's Impact on Marriage, 1967-90*.[76]

2. Racism and Family Law: Child Custody, Foster Care, and Adoption

Although the Court has repeatedly reaffirmed its rejection of race-based classifications for contracting marriage, and has refused to permit race to be taken into account in child custody controversies, there remains one area where the rationale of *Loving* appears to have met with some resistance: transracial adoption.[77]

Although the issue of transracial adoption was not addressed specifically at the conference, the papers presented by Dr. Robert A. Pratt, Professor of History at the University of Georgia, and Prof. Steven Carter addressed the problem of racism in family law.

Dr. Pratt, whose paper appears in the *Howard Law Journal*,[78] was in a unique position to address this question. Having grown up down the street from Richard and Mildred Loving's home, Dr. Pratt's remarks opened the conference with the human and political story behind the case. Rounding out his remarks were papers by Professor Margaret Brinig of George Mason University School of Law on *The Supreme Court's Impact on Marriage, 1967-90*,[79] and Laurence C. Nolan of Howard University, *The Meaning of* Loving: *Marriage, Due Process and Equal Protection*.[80] Professor Carl Schneider of the University of Michigan Law School presented useful, but as yet unpublished, remarks on the relationship between family law and constitutional law.

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73. 12 BYU J. PUB. L. 277 (1998).

74. 12 BYU J. PUB. L. 253 (1998).

75. 41 HOW. L.J. (forthcoming Sept. 1998).

76. 41 HOW. L.J. (forthcoming Sept. 1998).

77. *See generally* Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181 (1996); Cynthia G. Hawkins-Leon, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201 (1998) (arguing that race and ethnicity should be taken into account in adoptions); Rebecca Varan, Comment, *Desegregating the Adoptive Family: In Support of the Adoption Antidiscrimination Act of 1995*, 30 J. MARSHALL L. REV. 593 (1997) (contra).

78. *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 HOW. L.J. (forthcoming Sept. 1998).

79. *See* Brinig, *supra* note 76.

80. 41 HOW. L.J. (forthcoming Sept. 1998).

III. CONCLUSION

There is much more that can be said and written about *Loving v. Virginia*, and its impact on the present "law and politics of marriage." The "politics" of marriage and family law is a contemporary issue of significant importance – to the United States, and around the world. It was our hope that we could present at least one paper on the comparative law aspects of *Loving*, and another on the impact that the recognition of a "right to marry" has on federalism and separation of powers. Two such papers were presented at the conference,[81] but neither was ready for publication as these remarks go to press.

We trust that you, the readers of these papers, will find them useful and informative.

81. *See* Iain T. Benson, *Some Canadian Aspects of the Law and Politics of Marriage: Is There a Principled Pluralistic Response to the Dispute Over Same-sex Recognition?* (1998) (unpublished manuscript, on file with author); Robert A. Destro, *Law & The Politics of Marriage: Judicial Policy Making and Its Impact on the Political Process* (1998) (unpublished manuscript, on file with author).