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Let's Celebrate The Right To Marry Who We Like

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Fifty years ago today the Supreme Court struck down Virginia's ban on interracial marriage.

Mildred Jeter, a black woman (though she also had Native American heritage and may have preferred to think of herself as Indian), married Richard Loving, a white man, in the District of Columbia in 1958. When they returned to their home in Caroline County, Virginia, they were arrested under Virginia's anti-miscegenation statute, which dated to colonial times and had been reaffirmed in the Racial Integrity Act of 1924. The Lovings were indicted and pled guilty. They were sentenced to a year in jail; the state's law didn't just ban interracial marriage, it made such marriage a criminal offense. However, the trial judge suspended the sentence on the condition that they leave Virginia and not return together for 25 years. In his opinion, the judge stated:

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.

Five years later they filed suit to have their conviction overturned. The case eventually reached the Supreme Court, which struck down Virginia's law unanimously. Chief Justice Earl Warren wrote for the court,

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.

Here's how ABC News reported the case on June 12, 1967:

The Loving case was a milestone in the progress toward a country that truly guarantees every citizen life, liberty, and the pursuit of happiness and equal protection of the laws. The story of the case has been told in a documentary, a feature films, books, and many a law school symposium. And of course it played a key role four decades later in the legal recognition of same-sex marriage.

David Boies and Ted Olson, the two lawyers who led the challenge to California's Proposition 8, which outlawed same-sex marriage in 2008, connected the Loving case to the case of *Perry* v. *Schwarzenegger* here:

In 2011, as their case proceeded through the federal courts, Boies and Olson spoke at the Cato Institute, joined by John Podesta, then president of the Center for American Progress, and Robert A. Levy, chairman of Cato. Podesta and Levy served as co-chairs of the advisory committee of the American Foundation for Equal Rights, the nonprofit group that brought the Perry case. They wrote in the Washington Post in 2010:

Now, 43 years after *Loving*, the courts are once again grappling with denial of equal marriage rights — this time to gay couples. We believe that a society respectful of individual liberty must end this unequal treatment under the law….

Over more than two centuries, minorities in America have gradually experienced greater freedom and been subjected to fewer discriminatory laws. But that process unfolded with great difficulty.

As the country evolved, the meaning of one small word — "all" — has evolved as well. Our nation's Founders reaffirmed in the Declaration of Independence the self-evident truth that "all Men are created equal," and our Pledge of Allegiance concludes with the simple and definitive words "liberty and justice for all." Still, we have struggled mightily since our independence, often through our courts, to ensure that liberty and justice is truly available to all Americans.

Thanks to the genius of our Framers, who separated power among three branches of government, our courts have been able to take the lead — standing up to enforce equal protection, as demanded by the Constitution — even when the executive and legislative branches, and often the public as well, were unwilling to confront wrongful discrimination.

In his remarks at Cato, and in this newspaper column, Levy argued that it would be best to get the government out of marriage entirely—let marriage be a private contract and a religious ceremony, but not a government institution, a point that I have also made. For some, that's a libertarian argument against laws and court decisions that would extend marriage to gay couples: it would be better to privatize marriage. But Levy goes on to say:

Whenever government imposes obligations or dispenses benefits, it may not "deny to any person within its jurisdiction the equal protection of the laws." That provision is explicit in the 14th Amendment to the U.S. Constitution, applicable to the states, and implicit in the Fifth Amendment, applicable to the federal government.

In the end the Supreme Court did find in 2015 that same-sex couples have a right to marry, in the case of *Obergefell v. Hodges*. I rather wished the Court had made the parallel case of *Love v. Beshear* (or better yet *Love v. Kentucky*) the main case, so that the *Loving* decision could be followed by the *Love* decision.

As those cases proceeded through the courts, there were legitimate objections based on federalist and democratic principles. One might say that marriage law has always been a matter for the states, and it should stay that way. Let the people of each state decide what marriage will be in their state. Leave the federal courts out of it. Federalism is an important basis for liberty, and that's a strong argument. There's also a discomfiting argument that a Supreme Court decision striking down bans on gay marriage is undemocratic, that it would be better to let the political

process work through the issue. Some people, even supporters of gay marriage, warned that a court decision could be another *Roe v. Wade*, with decades of cultural war over an imposed decision.

Those are valid objections. Not all issues have an obvious right side. In this case, I always ask critics of the federal court decisions striking down gay marriage bans, How do you feel about the *Loving* case? Do you think the Court should have declined to strike down state bans on interracial marriage (which were still highly popular in 1967, according to the Gallup poll)? And if you do support the *Loving* decision, then how are these cases different? The Cato Institute urged the Court, in an amicus brief, to find that bans on same-sex marriage violate the equal protection clause of the Constitution.

Here is one more video, featuring the speakers from the Cato forum on *Perry v. Schwarzenegger* (plus me):

Going forward, I believe we will recognize both *Loving* and *Obergefell* as landmark decisions that extended liberty and justice—and the freedom to marry—to all. Today we celebrate the late Richard and Mildred Loving, and their lawyers, and the victory that they won for all Americans.

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