

Marriage and Familial Relations

In *Zablocki v. Redhail*,²⁰⁰⁴ importing into equal protection analysis the doctrines developed in substantive due process, the Court identified the right to marry as a “fundamental interest” that necessitates “critical examination” of governmental restrictions that “interfere directly and substantially” with the right.²⁰⁰⁵ The Court struck down a statute that prohibited any resident under an obligation to support minor children from marrying without a court order; such order could only be obtained upon a showing that the support obligation had been and was being complied with and that the children were not and were not likely to become public charges. The plaintiff was an indigent wishing to marry but prevented from doing so because he was not complying with a court order to pay support to an illegitimate child he had fathered, and because the child was receiving public assistance. Applying “critical examination,” the Court observed that the statutory prohibition could not be sustained unless it was justified by sufficiently important state interests and was closely tailored to effectuate only those interests.²⁰⁰⁶ Two interests were offered that the Court was willing to accept as legitimate and substantial: requiring permission under the circumstances furnished an opportunity to counsel applicants on the necessity of fulfilling support obligations, and the process protected the welfare of children who needed support, either by providing an incentive to make support payments or by preventing applicants from incurring new obligations through marriage. The first interest was not served, the Court found, there being no provision for counseling and no authorization of permission to marry once counseling had taken place. The second interest was found not to be effectuated by the means. Alternative devices to collect support existed, the process simply prevented marriage without delivering any money to the children, and it singled out obligations incurred through marriage without reaching any other obligations.

Other restrictions that relate to the incidents of or prerequisites for marriage were carefully distinguished by the Court as neither entitled to rigorous scrutiny nor put in jeopardy by the deci-

²⁰⁰⁴ 434 U.S. 374 (1978).

²⁰⁰⁵ Although the Court’s due process decisions have broadly defined a protected liberty interest in marriage and family, no previous case had held marriage to be a fundamental right occasioning strict scrutiny. 434 U.S. at 396–397 (Justice Powell concurring).

²⁰⁰⁶ 434 U.S. at 388. Although the passage is not phrased in the usual compelling interest terms, the concurrence and the dissent so viewed it without evoking disagreement from the Court. *Id.* at 396 (Justice Powell), 403 (Justice Stevens), 407 (Justice Rehnquist). Justices Powell and Stevens would have applied intermediate scrutiny to void the statute, both for its effect on the ability to marry and for its impact upon indigents. *Id.* at 400, 406 n.10.