The Burger Court Opinion Writing Database

Zablocki v. Redhail

434 U.S. 374 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 5, 1978

Dear Thurgood:

Re: 76-879 Zablocki v. Redhail

I do not see that John's concurring opinion--which I like and agree with--is in conflict with your opinion. Your first full paragraph on page 12 seems to me to put you and John on the same wave length.

If John could see his way clear to join your opinion, I would also join him.

Absent that I now join you.

Regards,

WEB

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 13, 1978

MEMORANDUM TO THE CONFERENCE:

Re: 76-879 Zablocki v. Redhail

I will add the following:

Mr. Chief Justice Burger concurring:

I join Justice Marshall's opinion for the Court. With all deference, Justice Stevens' opinion does not persuade me that the analysis in the Court's opinion is in any significant way inconsistent with the Court's unanimous holding in Califano v. Jobst, 76-860, November 8, 1977. Unlike the intentional and substantial interference with the right to marry affected by the Wisconsin statute at issue here, the Social Security Act provisions challenged in Jobst did not constitute an "attempt to interfere with the individual's freedom to make a decision as important as marriage," Califano v. Jobst, supra, slip op. at 7, and, at most, had an indirect impact on that decision. It is with this understanding that I join the Court's opinion today.

Regards,

WEB

Wm Brennan
OCT 77

Supreme Court of the United States
Washington, D. C. 20543

(2)

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 31, 1977

RE: No. 76-879 Zablocki v. Redhail, etc.

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 3, 1977

Re: No. 76-879, Zablocki v. Redhail

Dear Thurgood,

I plan to write separately in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 17, 1977

Re: No. 76-879 - Zablocki v. Redhall

Dear Thurgood,

My apologies for being so slow. I hope to get something out by next week.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

11/22/77

No. 76-879, ZABLOCKI v. REDHAIL

MR. JUSTICE STEWART, concurring in the judgment.

I cannot join the opinion of the Court. To hold, as the Court does, that the Wisconsin statute violates the Equal Protection Clause seems to me to misconceive the meaning of that constitutional guarantee. The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 60 (concurring opinion). The paradigm of its violation is, of course, classification by race. McLaughlin v. Florida, 379 U.S. 184; Loving v. Virginia, 388 U.S. 1, 13 (concurring opinion).

Like almost any law, the Wisconsin statute now before us affects some people and does not affect others. But to say that it thereby creates "classifications" in the

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated:

Recirculated: NOV 28 1977

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc.	On Appeal from the United States District Court for the Eastern District of Wisconsin.

[November —, 1977]

MR. JUSTICE STEWART, concurring in the judgment.

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Like almost any law, the Wisconsin statute now before us affects some people and does not affect others. But to say that it thereby creates "classifications" in the equal protection sense strikes me as little short of fantasy. The problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom. I think that the Wisconsin statute is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protection by the Due Process Clause of the Fourteenth Amendment.

I

I do not agree with the Court that there is a "right to marry" in the constitutional sense. That right, or more

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 3, 1977

Re: No. 76-879 - Zablocki v. Redhail

Dear Thurgood:

I shall await the dissent in this case.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

(3)

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 25, 1977

Re: No. 76-879 - Zablocki v. Redhail

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

Copies to Conference

✓

Changes pp. 2, 3, 4, 5, 6, 13, 14, 15, 16

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: OCT 28 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc.	On Appeal from the United States District Court for the Eastern District of Wisconsin.

[October —, 1977]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of a Wisconsin statute, Wis. Stat. §§ 245.10 (1), (4), (5) (1973), which provides that members of a certain class of Wisconsin residents may not marry, within the State or elsewhere, without first obtaining a court order granting permission to marry. The class is defined by the statute to include any "Wisconsin resident having minor issue not in his custody and which he is under an obligation to support by any court order or judgment." The statute specifies that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order "are not then and are not likely thereafter to become public charges." No marriage license may lawfully be issued in Wisconsin to a person covered by the statute, except upon court order; any marriage entered into without compliance with § 245.10 is declared void; and persons acquiring marriage licenses in violation of the section are subject to criminal penalties.[1]

[1] Wis. Stat. § 245.10 provides in pertinent part:

"(1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 1, 1977

Re: No. 76-879, Zablocki v. Redhail

Dear Harry:

Pursuant to your suggestion, I will delete the citation of Maher v. Roe near the top of page 9.

Sincerely,

T. M.

Mr. Justice Blackmun

cc: The Conference

Wm Brennan
0c177

Changes pp. 9, 14 Nov. 2, 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc.	On Appeal from the United States District Court for the Eastern District of Wisconsin.

[October —, 1977]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 16, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-879, Zablocki v. Redhail

It has been some three weeks since the proposed opinion in this case was circulated. What can I do to get it off dead center?

T. M.

pp. 8, 12, 13

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc.	On Appeal from the United States District Court for the Eastern District of Wisconsin.

[January —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 31, 1977

Re: No. 76-879 - Zablocki v. Redhail

Dear Thurgood:

I am glad to join your opinion in this case.

Sincerely,

HAB.

Mr. Justice Marshall

cc: The Conference

[postscript to Mr. Justice Marshall only]

P.S. I would feel a good bit happier if the citation of Maher v. Roe near the top of page 9 were eliminated. The citation, I suppose, is accurate enough, but despite giving lip service to the rule the Court, I feel, in that case disregarded serious infringement of fundamental liberties, and I prefer not to cite it. I suspect that you probably feel the same about that case.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Rochester, Minnesota
December 8, 1977

Re: No. 76-879 - Zablocki v. Redhail

Dear Thurgood:

I am still with you.

Sincerely,

H. A. B.

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 17, 1977

No. 76-879 Zablocki v. Redhail

Dear Thurgood:

I should have advised you sooner that, after too much delay, I am writing a concurring opinion.

My view of the appropriate constitutional analysis differs rather substantially from yours, although I am with you on the judgment.

I'll try to be more dutiful next time!

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: NOV 29 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc.	On Appeal from the United States District Court for the Eastern District of Wisconsin.

[November —, 1977]

MR. JUSTICE POWELL, concurring in the judgment.

I concur in the judgment of the Court that Wisconsin's restrictions on the exclusive means of creating the marital bond, erected by Wis. Stat. §§ 245.10 (1), (4), and (5) (1973), cannot withstand applicable constitutional standards. I write separately because the majority's rationale sweeps too broadly in an area which traditionally has been subject to plenary state regulation. The Court apparently would subject all state regulation which "directly and substantially" interferes with the decision to marry in a traditional family setting to "critical examination" or "compelling state interest" analysis. Presumably, "reasonable regulations that do not significantly interfere with the decision to enter into the marital relationship may legitimately be imposed." Slip. op. 12. The Court does not present, however, any principled means for distinguishing between the types of regulations. Since state regulation in this area typically takes the form of a prerequisite or barrier to marriage or divorce, the degree of "direct" interference with the decision to marry or to divorce is unlikely to provide either guidance for state legislatures or a basis for judicial oversight.

I

On several occasions, the Court has recognized the importance of the marriage relationship to the maintenance of values essential to organized society. "This Court has long recog-

stylistic changes
4, 6, 7

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

2nd DRAFT

Circulated: _____

Recirculated: DEC 1 1977

SUPREME COURT OF THE UNITED STATES

No. 76-879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[November —, 1977]

MR. JUSTICE POWELL, concurring in the judgment.

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Stylistic Changes

P. 6

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: DEC 20 1977

SUPREME COURT OF THE UNITED STATES

No. 76-879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[November —, 1977]

MR. JUSTICE POWELL, concurring in the judgment.

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I

On several occasions, the Court has ~~recognized~~ acknowledged the importance of the marriage relationship to the maintenance of values essential to organized society. "This Court has long recog-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 3, 1977

Re: No. 76-879 - Zablocki v. Redhail

Dear Thurgood:

I am sorry to have delayed in preparation of my dissent in this case. I anticipate it will be around by the end of next week.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 16, 1977

Re: No. 76-879 Zablocki v. Redhail

Dear Thurgood:

I again apologize for the lateness of my dissent in this case. I faithfully promise, subject to the vagaries of the printers, to have it circulated by Friday, and think I may be able to get it curculated tomorrow afternoon.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: NOV 18 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc.	On Appeal from the United States District Court for the Eastern District of Wisconsin.

[November —, 1977]

MR. JUSTICE REHNQUIST, dissenting.

I profoundly disagree with the analysis which the Court constructs for the resolution of the issue presented by this case. In effect it takes one of an expansive list of "rights" which the Court held in *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), to be protected against arbitrary legislative abrogation under the Due Process of the Fourteenth Amendment, and declares that the enumeration of the right to marry in that context makes it a "fundamental" right requiring strict scrutiny under the Equal Protection Clause of that same Amendment. It then employs this tool to strike down a legislative limitation on the capacity of some Wisconsin citizens to enter into a marriage relationship recognized by the State.

I think that under the Equal Protection Clause the statute need pass only the "rational basis" test, *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970), and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 491 (1955); *Ferguson* v. *Skrupa*, 372 U. S. 726, 733 (1963) (Harlan, J., concurring). While reasonable minds may differ as to the fate of Wisconsin's rather unusual statute under these tests, the decision reached by the Court as to the constitutionality of this particular statute is considerably less important than the process by which it reaches that decision.

Complete Withdrawn

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: DEC 16 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc.	On Appeal from the United States District Court for the Eastern District of Wisconsin.

[November —, 1977]

MR. JUSTICE REHNQUIST, dissenting.

I substantially agree with my Brother POWELL's reasons for rejecting the Court's conclusion that marriage is the sort of "fundamental right" which must invariably trigger the strictest judicial scrutiny. I disagree with his imposition of an "intermediate" standard of review, which leads him to conclude that the statute, though generally valid as an "additional collection mechanism" offends the Constitution by its "failure to make provision for those without the means to comply with child-support obligations." *Ante,* at 5. For similar reasons, I disagree with my Brother STEWART's conclusion that the statute is invalid for its failure to exempt those persons who "simply cannot afford to meet the statute's financial requirements." *Ante,* at 4. I would view this legislative judgment in the light of the traditional presumption of validity. I think that under the Equal Protection Clause the statute need pass only the "rational basis test," *Dandridge* v. *Williams,* 397 U. S. 471, 485 (1970), and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective, *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 491 (1955); *Ferguson* v. *Skrupa,* 372 U. S. 726, 733 (1963) (Harlan, J., concurring). The statute so viewed is a permissible exercise of the State's power to regulate family life and to assure the support of minor children, despite its possible imprecision in the extreme cases envisioned in the concurring opinions.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 16, 1977

Re: 76-879 - Zablocki v. Redhail

Dear Thurgood:

My apologies for not responding promptly. I have difficulty with some of the broad language on pages 12 and 13 of your circulation and spent some time trying to draft a possible suggested revision. Then, when I learned that Potter was writing separately, I decided to wait for his circulation. As soon as Potter circulates his draft, I'll give the case priority attention.

Respectfully,

Jn

Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: DEC 15 '77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc.	On Appeal from the United States District Court for the Eastern District of Wisconsin.

[January —, 1978]

MR. JUSTICE STEVENS, concurring in the judgment.

Because of the tension between some of the language in MR. JUSTICE MARSHALL's opinion and the Court's unanimous holding in *Califano* v. *Jobst*, 76-860, Nov. 8, 1977, a further exposition of the reasons why the Wisconsin statute offends the Equal Protection Clause of the Fourteenth Amendment is necessary.

When a State allocates benefits or burdens, it may have valid reasons for treating married and unmarried persons differently. Classification based on marital status has been an accepted characteristic of tax legislation, selective service rules, and Social Security regulations. As cases like *Jobst* demonstrate, such laws may "significantly interfere with the decision to enter into the marital relationship." *Ante*, at 12. That kind of interference, however, is not a sufficient reason for invalidating every law reflecting a legislative judgment that there are relevant differences between married persons as a class and unmarried persons as a class.[1]

[1] In *Jobst, supra*, we pointed out that "it was rational for Congress to assume that marital status is a relevant test of probable dependency . . . ." We had explained:

"Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand

pp. 2-4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

2nd DRAFT

Recirculated: DEC 19 1977

SUPREME COURT OF THE UNITED STATES

No. 76-879

Thomas E. Zablocki, Milwaukee County Clerk, Etc., Appellant, *v.* Roger C. Redhail, Etc. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[January —, 1978]

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J V

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 5, 1977

RE: 76-879 - Zablocki v. Redhail

Dear Chief:

Although I am sincerely gratified by your favorable reaction to my opinion, I am afraid that I do have a problem with the Court opinion which I cannot quite overcome. As I read page 12 of Thurgood's draft, he implies that any regulation that significantly interferes with the marriage decision would require strict scrutiny. I cannot accept that formulation because I believe the social security regulation involved in Jobst did significantly interfere with the marriage decision. I am afraid, therefore, that a difference of substance separates me from the Court. I am, however, pleased to note that Thurgood will now have a Court opinion because, apart from our one point of difference, I think he has written a most persuasive opinion.

Respectfully,

JPS

The Chief Justice

Copies to the Conference