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Miscegenation Statutes and the Fourteenth Amendment

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Miscegenation Statutes and the Fourteenth Amendment

UNDER the common law of England, difference in race was not a disability rendering parties incapable of contracting marriage.[1] In the United States, however, statutes prohibiting interracial marriages were enacted from the first introduction of the Negro to the American Colonies;[2] and at the present time twenty-nine states have such laws.[3] Despite many attacks on their constitutionality since the adoption and ratification of the Fourteenth Amendment to the Federal Constitution, they had, until 1948, been consistently upheld as valid.

In the recent case of *Perez v. Sharp*[4], however, the Supreme Court of California declared that a California statute prohibiting the marriage of a white person with a Negro, Mulatto, Mongolian or member of the Malay race was unconstitutional on the ground that it violated the equal protection clause of the Fourteenth Amendment. It is the purpose of this note (1) to present briefly the attitude of the courts in the past toward statutes prohibiting interracial marriages; (2) to examine the reasoning of the California Supreme Court in the *Perez* case; (3) to attempt to determine the power of a state to prohibit marriage on the basis of race alone, in view of the restrictions imposed upon the states by the Fourteenth Amendment.[5]

The Decisions in the Past

Following the Civil War there appeared much confusion concerning the status of the Negro, especially with regard to discriminatory statutes which still remained in effect in the southern states.

[1] 1 BL. COMM. *433-37.

[2] 2 KENT'S COMM. *258, note (a).

[3] These statutes in the main prohibit and declare null and void marriages between white persons and Negroes or Mulattoes. Some, however, extend the prohibition to marriages between white persons and members of other races including Hindus, Mongolians, Indians, Japanese, etc. The states which have enacted miscegenation laws are: Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming. See 1 VERNIER, AMERICAN FAMILY LAWS 206-08 (1931).

[4] 32 Cal. 2d 711, (reported as Perez v. Lippold in) 198 P. 2d 17 (1948), *rehearing denied*, October 28, 1948.

[5] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

The Fourteenth Amendment had been but recently ratified, and its effect, as well as that of the Civil Rights Bill,[6] was not as yet clear. Two early decisions in Texas declared that statutes prohibiting marriage between white persons and Negroes were a part of the institution of slavery and that the fall of that institution nullified these statutes.[7] This view was not adopted elsewhere, and was subsequently abandoned even in Texas. The later decisions in Texas denied that the Fourteenth Amendment or the Civil Rights Bill, which made no allusion to such intermarriages, deprived the states of the important power of regulating matters of such great consequence and delicacy within their own borders. The courts declared that the power of the states to control the marital status is a governmental prerogative common to all sovereign states, a power unaffected by the abolition of slavery.[8]

The Civil Rights Bill was also involved in another respect. This Act conferred the right to contract on all citizens of the United States, which now included the Negro. The misleading statement in Blackstone's *Commentaries*[9] that under the English law marriage was considered in no other light than as a civil contract, was seized upon for support by those who contended that statutes prohibiting the contracting of marriage between white persons and Negroes contravened the Federal Act. While this contention was sustained in one case,[10] it was later overruled; and the court in the later case declared that marriage is more than a mere civil

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1.

[6]14 STAT. 27 (1866). This Act was passed by Congress before the Fourteenth Amendment had been ratified. Its provisions, however were incorporated by reference in Section 18 of a later statute, 16 STAT. 140 (1870). It provided for equal legal privileges and protections for persons of every race and color.

[7]"The law in question was simply one of a system, brought into existence by the institution of slavery and designed for its support, and which like all other laws on the subject, disappeared along with that institution .... It ceased to exist when the reason for it no longer existed." State v. Webb, 4 CENT. L.J. 588, 589 (Tex. 1877); *Ex parte* Brown, 5 CENT. L.J. 149 (Tex. 1877). It should be noted, however, that these decisions did not deny that the states possessed the power to prohibit such marriages. In fact, they intimated (dictum) that if the legislature passed such a law with the object of preventing the amalgamation of the races, the law might be constitutional.

[8]*Ex parte* Francois, 9 Fed. Cas. 699 No. 5047 (C.C.W.D. Tex. 1879), *overruling Ex parte* Brown, 5 CENT. L.J. 149 (Tex. 1877); Frasher v. State, 3 Tex. App. 263 (1877). For Notes concerning these cases, see 5 Cent. L.J. 2, and *Id* at 174 (1877).

[9]1 BL. COMM. *433.

[10]Burns v. State, 48 Ala. 195 (1872).

contract, that it is a civil institution of great public concern and hence subject to regulation and control by the states. The court further stated that the Civil Rights Bill plainly was not intended to enforce social equality, but only civil and political equality; but that if the meaning of its terms were doubtful, the policy of prohibiting the intermarriage of the two races was so well established and the wishes of both races so well known, there could be no hesitation in declaring the policy paramount to any doubtful contrary construction.[11]

Attacks on miscegenation statutes were also based on certain specific provisions of the Federal Constitution and the Fourteenth Amendment. It was contended that such statutes were unconstitutional because (1) they impaired the obligation of contracts; (2) they abridged the privileges of citizens of the United States; (3) they deprived persons of liberty without due process of law; and (4) they denied persons equal protection of the laws. The response of the courts to each of these allegations will be considered separately.

(1) *They impaired the obligation of contracts.* To this contention the courts uniformly replied that marriage contracts were not the type of contracts contemplated in Article 1, Section 10 of the Federal Constitution.[12] They adopted the reasoning of Chief Justice Marshall in the *Dartmouth College* case[13] in which he stated that the only contracts intended were those respecting property or some object of value, conferring rights which might be asserted in a court of justice. They reiterated that marriage is more than a mere civil contract, and declared that the states were free to regulate the marital status as a matter of purely local concern.[14]

(2) *They abridged the privileges of citizens of the United States.* In disposing of this argument, the courts declared that the rights

[11]Green v. State, 58 Ala. 190 (1877), *overruling* Burns v. State, 48 Ala. 195 (1872); *Ex parte* Francois, 9 Fed. Cas. 699, No. 5047 (C.C. W.D. Tex. 1879); *In re* Hobbs, 12 Fed. Cas. 262, No. 6550 (C.C.N.D. Ga. 1871); State v. Gibson, 36 Ind. 389 (1871); State v. Hairston, 63 N.C. 451 (1869); Lonas v. State, 3 Heisk. (50 Tenn.) 287 (1871); Frasher v. State, 3 Tex. App. 263 (1877).

[12]"No State shall . . . pass any . . . law impairing the obligation of contracts."

[13]Trustees of Dartmouth College v. Woodward, 4 Wheat. (17 U.S.) 514 (1819).

[14]State v. Tutty, 41 Fed. 753 (C.C.S.D. Ga. 1890); *Ex parte* Kinney, 14 Fed. Cas. 602, No. 7825 (C.C.E.D. Va. 1879); *In re* Hobbs, 12 Fed. Cas. 262, No. 6550 (C.C.N.D. Ga. 1871); Lonas v. State, 3 Heisk. (50 Tenn.) 287 (1871). The statutes prohibited interracial marriages and declared them null and void. Assuming the validity of the statutes in all other respects, it would have been possible to argue that since no valid contract arose in the first instance, there could be no impairment of the obligation of a contract. This aspect was never discussed in the cases.

which a person has as a citizen of the United States were to be distinguished from those which he has as a citizen of a state. They viewed marriage not as a right inuring to citizens of the United States, but rather as a right pertaining to citizens of a state. They declared that over such a right the states have the usual powers belonging to government—powers extending to all matters which in the ordinary course of affairs concern the lives, liberties and properties of the people, or the internal order, improvement and prosperity of the state. State regulation of divorce and other matters relating to the family was cited by the courts as examples of the extensive control exerted by the states over the marital status; and they declared that control of miscegenation is also proper, and not prohibited by the constitutional provision protecting the privileges and immunities of citizens of the United States.[15]

(3) *They deprived persons of liberty without due process of law.* This argument was answered by one court with the statement that due process of law meant the application of the law as it existed in the fair and regular course of administrative procedure, thus confining the concept of due process to questions of procedure.[16] In other cases, reference was made to the power of the states to prohibit consanguineous marriages or bigamy, and it was reasoned that if a state had power to control the marital status with respect to those matters, it could also forbid interracial marriages.[17] Most courts declared that the infringement of liberty involved was proper under the police power of the states; that the state of the domicile of the parties, being interested in the marriage status to be created, had the right to determine, by legislative enactment, the competency of the parties to enter into the marriage relation.[18]

(4) *They denied persons equal protection of the laws.* To this contention the courts replied that the prohibition against mixed marriages was as applicable to white persons as to members of

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[15]Cases cited note 14 *supra;* State v. Jackson, 80 Mo. 175 (1883); Frasher v. State, 3 Tex. App. 263 (1877).

[16]Frasher v. State, 3 Tex. App. 263 (1877).

[17]*Ex parte* Kinney, 14 Fed. Cas. 602, No. 7825 (C.C.E.D. Va. 1879); Scott v. Georgia, 39 Ga. 321 (1869); State v. Jackson 80 Mo. 175 (1883).

[18]*Ex parte* Kinney, 14 Fed. Cas. 602, No. 7825 (C.C.E.D. Va. 1879); *Ex parte* Francois, 9 Fed. Cas. 699, No. 5047 (C.C.W.D. Tex. 1879); *In re* Hobbs, 12 Fed. Cas. 262, No. 6550 (C.C.N.D. Ga. 1871); Green v. State, 58 Ala. 190 (1877); *In re* Walker's Estate, 5 Ariz. 70, 46 Pac. 67 (1896); State v. Gibson, 36 Ind. 389 (1871); *In re* Shun T. Takahashi's Estate, 113 Mont. 490, 129 P. 2d 217 (1942); State v. Kennedy, 76 N.C. 251 (1877); Eggers v. Olsen, 104 Okla. 297, 231 Pac. 483 (1924); Lonas v. State, 3 Heisk. (50 Tenn.) 287 (1871); Francois v. State, 9 Tex. App. 144 (1880); Frasher v. State, 3 Tex. App. 263 (1877); Kinney v. Commonwealth, 30 Grat. (71 Va.) 858 (1878).

the other races named in the statutes, and that since the members of all races received equal treatment, there was no denial of equal protection.[19]

The great majority of cases involving the constitutionality of miscegenation laws have appeared in state courts. The few federal courts which have considered the problem have merely cited state court decisions, and, adopting their reasoning, have upheld miscegenation statutes.[20] It is worthy of note that no case, from either set of tribunals, was ever taken to the United States Supreme Court.

The Decision in Perez v. Sharp

In the *Perez* case, a white woman and a Negro had applied for a marriage license. The clerk refused the license, invoking California Civil Code Section 60, which forbade the issuance of licenses for the marriage of a white person with a Negro, Mulatto, Mongolian or member of the Malay race; and Section 69, which declared such marriages null and void. The applicants thereupon petitioned the California Supreme Court for a writ of mandamus to compel the issuance of the license. They contended that the statutes in question were unconstitutional on the ground that they prohibited the free exercise of their religion and denied to them the right to participate fully in the sacraments of that religion. They were members of the Roman Catholic Church and maintained that since the church had no rule forbidding marriages between Negroes and Caucasians, they were entitled to receive the Sacrament of Matrimony. It was held, three judges dissenting, that the statutes were unconstitutional and that the peremptory writ should issue.

The court declared that while the regulation of marriage was a proper function of the state, laws which were discriminatory and irrational unconstitutionally restricted not only religious liberty but the liberty to marry as well. The court stated that marriage is a fundamental right of free men, and that legislation infringing such a right must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws. The court further stated that the constitutionality of state action must be tested according to whether the rights of an indi-

[19]Cases cited note 18 *supra;* Stevens v. U.S., 146 F. 2d 120 (C.C.A. 10th 1944); State v. Tutty, 41 Fed. 753 (C.C.S.D. Ga. 1890); *In re* Hobbs, 12 Fed. Cas. 262, No. 6550 (C.C.S.D. Ga. 1871); State v. Jackson, 80 Mo. 175 (1883); State v. Hairston, 63 N.C. 451 (1869).

[20]See the Federal court decisions cited in notes 18 and 19 *supra.*

vidual are restricted because of his race. Conceding that statutes requiring segregation in law schools and on transportation facilities had been upheld by the United States Supreme Court, provided substantially equal facilities had been afforded to the members of all races, the court declared that a holding that such segregation does not impair the right of an individual to ride on trains or to enjoy legal education is clearly inapplicable to the right of an individual to marry. The court stated that in the present case there was no redress for the serious restriction of the right of Negroes, Mulattoes, Mongolians and Malayans to marry; that certainly there was none in the corresponding restriction of the right of Caucasians to marry. The court declared that a state law prohibiting members of one race from marrying members of another race is not designed to meet a clear and present peril arising out of an emergency, and that in the absence of an emergency, the state clearly cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups. The court concluded that the California statute, by restricting the individual's right to marry on the basis of race alone, violated the equal protection clause of the Fourteenth Amendment.[21]

The three dissenting judges declared that the equal protection clause was not violated since the miscegenation statutes did not discriminate against persons of either the white or the Negro races. They declared that each petitioner had the right and privilege of marrying within his or her own group, and that there was no lack of equal treatment. They stated that the underlying factors that justified the prohibition of miscegenation closely paralleled those which sustained the prohibitions against incestuous marriages and bigamy. They cited the many decisions in the past which had sustained miscegenation statutes, and declared that since some authorities maintained that inferior progeny were produced by such

[21]Perez v. Sharp, 32 Cal. 2d 711, (reported as Perez v. Lippold in) 198 P. 2d 17 (1948). The court also declared that even assuming that such a classification could validly be made under the equal protection clause in circumstances besides those arising from an emergency, the question would remain whether the statute's classification of racial groups was based on differences between racial groups bearing a substantial relation to a legitimate legislative objective. The court took judicial notice of the fact that there was no scientific proof that one race was superior, mentally or physically, to another race, or that inferior offspring would result from interracial alliances, and declared that the statute was an unreasonable restriction of the right to marry. The fact that tension among relatives and throughout the community might result from such marriages was dismissed by the court with the observation that the California statute would perpetuate the very prejudices causing the tensions between races in the first instance.

marriages, and there was evidence that tension among relatives and throughout the community would result, a legislative finding that such alliances should be prohibited could not be declared arbitrary. They declared that only the wisdom of the policy of prohibiting such marriages was involved, and that with this wisdom the courts were not concerned. They concluded that the statutes of California were constitutional, and that arguments for change should be addressed to the legislature.

The Power of a State to Prohibit Marriage on the Basis of Race Alone

In *Maynard v. Hill,* the United States Supreme Court declared that "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."[22] In *Meyer v. Nebraska,* however, the same body, in discussing the liberty guaranteed by the Fourteenth Amendment, said that this included the "right of the individual . . . to marry, establish a home and bring up children . . . ." [23]

In the light of these pronouncements, it is apparent that the problem presented by miscegenation statutes is essentially that of determining where, under the Constitution, the liberty of the individual ends and the power of the state begins.

In *Lochner v. New York,*[24] the United States Supreme Court invalidated a New York statute which limited the hours of work in bakeries and confectionery establishments. The court declared that there was no adequate justification for this infringement of the private rights of the employer. But Mr. Justice Holmes in a dissenting opinion declared:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[25]

This dissenting opinion of Justice Holmes was later adopted by the Supreme Court in cases involving statutes similar to that in the *Lochner* case.[26] While these cases involved the liberty of contract phase of the due process clause, the same line of reasoning would seem applicable when the liberty to marry is concerned.

[22] 125 U.S. 190, 205, 8 Sup. Ct. 723, 726 (1888).
[23] 262 U.S. 390, 399, 43 Sup. Ct. 625, 626 (1923).
[24] 198 U.S. 45, 25 Sup. Ct. 539 (1905).

This would mean that when the dominant opinion in a state is expressed in a statute prohibiting interracial marriages, and there is conflict among the authorities as to the effect of such alliances on the offspring and on the community, then the statute should be held not to violate the *due process* clause in this respect.

But legislation which classifies individuals into separate groups on the basis of race alone is by its very nature odious to a free society whose institutions are founded upon the doctrine of equality.[27] In the absence of an emergency, such legislation infringing the liberty of individuals should be declared unconstitutional as a violation of the due process and equal protection clauses of the Fourteenth Amendment.[28] It will not do to declare that statutes prohibiting interracial marriages do not deny equal treatment since they apply with equal force to white persons as well as to the members of the other races specified. The fact remains that such statutes are based solely on race and are predicated on the superiority of the white race. There is no scientific proof that one race is superior, mentally or physically to another,[29] or that inferior progeny would result from interracial alliances.[30] The only real argument for prohibiting such marriages rests upon the notion that tension among relatives and throughout the community would result unless they were prohibited. But the elimination of this tension cannot be achieved by legislation perpetuating the discrimination which is the very source of the tension. A law which would have that effect is contrary to our principles of equality and a state should therefore be denied the power to prohibit marriage on the basis of race alone in the absence of an emergency.

Since no clear and present danger was sought to be averted by the California miscegenation statute in the *Perez* case, the California Court arrived at a sound conclusion in declaring the statute unconstitutional.

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[25]*Id.* at 321, 25 Sup. Ct. 539 at 547.

[26]Muller v. Oregon, 208 U.S. 412, 28 Sup. Ct. 324 (1908) (upholding the Oregon ten-hour law for women); Bunting v. Oregon, 243 U.S. 426, 37 Sup. Ct. 435 (1917) (sustaining the Oregon ten-hour law applicable to industrial employees generally.)

[27]Hirabayashi v. United States, 320 U.S. 81, 63 Sup. Ct. 1375 (1942) (legislation discriminating against the Japanese upheld, but only because of the emergency of World War II).

[28]*Ibid.*

[29]1 MYRDAL, AN AMERICAN DILEMMA 83, c. iv-vi (1944). See also authorities cited by the majority in the *Perez* case.

[30]*Ibid.*