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# CONSTITUTIONAL LAW-EQUAL PROTECTION-MISCEGENATION STATUTE DECLARED UNCONSTITUTIONAL

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CONSTITUTIONAL LAW—EQUAL PROTECTION—MISCEGENATION STATUTE DECLARED UNCONSTITUTIONAL—Petitioners, a female white and a male Negro, applied to respondent, county clerk of Los Angeles County, for a marriage license. Respondent refused to issue the license, relying on sections 60 and 69 of the California Code.[1] Petitioners brought a mandamus proceeding to compel respondent to issue the license, contending that the statutes relied on by respondent were unconstitutional in that they prohibited the free exercise of their religion.[2] *Held,* in a four to three decision, the statute is unconstitutional. Three justices of the majority found that the statute violated the equal protection clause of the United States Constitution and was too vague and uncertain to be enforcible. A fourth justice found an unconstitutional interference with religious freedom. *Perez v. Lippold,* (Cal. 1948) 198 P. (2d) 17.[3]

Twenty-nine states, besides California, have statutes prohibiting marriage because of racial difference.[4] Such statutes withstood so many attacks on their constitutionality in the latter part of the last century[5] that their validity under the state police power had come to be taken as a matter of course.[6] Regulation of marriage has always been considered a proper function of the state.[7] The minority of the court relies strongly on the rule that all presumptions favor constitutionality of a legislative enactment and that a statute should not be disturbed if any constitutional basis can be found. Following the lead of earlier cases, the minority would classify the statute under attack with statutes prohibiting incestuous or bigamous marriages. In order to so classify miscegenation statutes, courts have found that they involve no racial discrimination because they apply equally to both races.[8]

[1] Calif. Civil Code (1941) § 60: "All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void." Calif. Civil Code (1941) § 69: ". . . no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."

[2] Petitioners, both members of the Roman Catholic Church, maintained that since their church had no rule forbidding interracial marriage they were entitled to receive the sacrament of matrimony.

[3] Review by the United States Supreme Court is precluded by the rules of that Court, since the case became moot when a marriage license was issued to the original petitioners.

[4] For an analysis of the statutes, see 1 VERNIER, AMERICAN FAMILY LAWS, § 44 (1931); MANGUM, THE LEGAL STATUS OF THE NEGRO, c. 10 (1940); 32 CAL. L. REV. 269 (1944).

[5] In re Hobbs, 12 Fed. Cas. No. 6550 (C.C. Ga. 1871); State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42 (1871); State v. Jackson, 80 Mo. 175, 50 Am.Rep. 499 (1883). Burns v. State, 48 Ala. 195, 17 Am.Rep. 34 (1872), apparently the only contrary decision, was directly overruled five years later in Green v. State, 58 Ala. 190, 29 Am.Rep. 739 (1877).

[6] See 8 R.C.L. 349 (1915); 36 AM. JUR., p. 452 Miscegenation § 3 (1941).

[7] Maynard v. Hill, 125 U.S. 190, 8 S.Ct. 723 (1888); Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087 (1948).

[8] The United States Supreme Court has never passed directly on the question involved in the principal case. However, in considering an Alabama statute which imposed a more severe penalty for adultery when the parties were a white person and a Negro, the Court found no discrimination because both races and both participants were treated alike. Pace v. Alabama, 106 U.S. 583, 1 S.Ct. 637 (1883). The minority also relied on Re Paquet's Estate, 101 Ore. 393, 200 P. 911 (1921), in which a statute declaring marriages between white persons and Indians void was found non-discriminatory.

The majority of the court refuses to accept such reasoning, pointing out that the rights protected by the equal protection clause are the rights of individuals, not of racial groups; inasmuch as the statute under attack prohibits an individual from marrying the person of his choice on the basis of his race it is certainly discriminatory.[9] Once it is determined that the statute does involve racial discrimination, recent decisions of the United States Supreme Court indicate that the legislation must be subjected to the most rigid scrutiny with no presumption of validity.[10] The majority view in the principal case would seem to require that any statutory discrimination based on race alone be designed to meet a clear and present danger arising out of an emergency.[11] Since miscegenation statutes are surely not drawn to meet an emergency, a finding of discrimination must amount to a finding of unconstitutionality under this criterion. Even assuming that discriminatory racial classification can be valid under the equal protection clause in the absence of an emergency, the majority would still require exceptional circumstances to justify such legislation.[12] In weighing respondent's arguments in favor of the statute, the majority finds no exceptional circumstances to justify it.[13]

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[9] In Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948), it was urged that since the courts enforced restrictive covenants excluding white persons, there was no denial of equal protection of the laws in enforcing covenants excluding Negroes. In rejecting this contention and holding the state's enforcement invalid, the Court, id. at 22, said: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

[10] "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." Korematsu v. United States, 323 U.S. 214 at 216, 65 S.Ct. 193 (1944). See also notes 11 and 12, infra.

[11] The court cites Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375 (1943). Wartime emergency was there found sufficient to justify the Japanese curfew.

[12] See Oyama v. California, 332 U.S. 633, 68 S.Ct. 269 (1948), where the Court found unconstitutional certain statutory presumptions in the California Alien Land Law.

[13] Respondent attempted to justify the legislation on the grounds that the white race was physically, mentally and socially superior, and that the miscegenation statute promoted public peace by preventing race conflicts.