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Constitutional Law: Validity of anti-Miscegenation Statute Under the Fourteenth Amendment

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CASE COMMENTS

CONSTITUTIONAL LAW: VALIDITY OF ANTI-MISCEGENATION STATUTE UNDER THE FOURTEENTH AMENDMENT

Perez v. Lippold, 198 P.2d 17 (Cal. 1948)

Petitioners, a Negro man and a white woman, sought by an original proceeding in mandamus to compel issuance of a marriage license even though a California statute¹ prohibited and declared void such a marriage. HELD, the statute was unconstitutional, principally because it contravened the Fourteenth Amendment of the United States Constitution. Peremptory writ granted, Justices Shenk, Schauer, and Spence dissenting.

The basic reasoning of the majority was that the right to marry is a fundamental right of the individual and that any state restriction based on race or color alone and not related to a legitimate legislative objective is discriminatory and irrational and, therefore, violates the equal protection clause of the Fourteenth Amendment. A concurring justice put his judgment on the "broader" ground that the right to marry is protected by the constitutional guarantee of religious freedom. The dissent maintained that the prohibition had a rational basis, falling within the state's power to provide for the general welfare and morals of the people.²

It is an open question today whether the Supreme Court of the United States would approve a state court's decision upholding an anti-miscegenation statute.³ The principles allowing segregation by state action on common carriers⁴ and in public schools⁵ were once fairly well established but

¹CAL. CIV. CODE §§60, 69 (1941).

²The principal case has been noted in: Notes, 17 GEO. WASH. L. REV. 262 (1949), 58 YALE L. J. 472 (1949); Comment, 22 SO. CALIF. L. REV. 31 (1948); 62 HARV. L. REV. 307, 3 MIAMI L. Q. 302 (1949), 97 U. OF PA. L. REV. 438 (1949). Excellent articles on Negro rights include: Waite, *The Negro in the Supreme Court*, 30 MINN. L. REV. 219 (1946), Comment, 21 SO. CALIF. L. REV. 358 (1948).

³Comments, 32 CALIF. L. REV. 269 (1944); 21 SO. CALIF. L. REV. 358 (1948).

⁴*McCabe v. Atchison, T. & S. F. Ry.*, 235 U. S. 151 (1914); *Plessy v. Ferguson*, 163 U. S. 537 (1896).

⁵*Sipuel v. Board of Regents*, 332 U. S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938); *Gong Lum v. Rice*, 275 U. S. 78 (1927); *Plessy v. Ferguson*, 163 U. S. 537 (1896).

today are tottering uneasily.⁶ Perhaps more important, there is today no legal means of preventing Negroes from purchasing and occupying property in the midst of a white section.⁷ Having recently dodged the issue of segregation per se in schools,⁸ and having made a serious inroad on the state's power to require segregation on common carriers in interstate commerce,⁹ the United States Supreme Court has exhibited a growing tendency to strike down any state action impairing personal rights when the action is based on race alone.¹⁰ The foregoing considerations involve social contact of the races. Of course, the rights to vote in federal elections,¹¹ to receive equal pay for equal qualifications as teachers paid by the state,¹² to have an impartially selected jury,¹³ and to have equal opportunities in any state function¹⁴ are well established.

The power to regulate marriage is part of the state police power. Regulation is valid as long as it is directed toward a proper end and is not unreasonably discriminatory.¹⁵ A prohibition of interracial marriage based on the supposed innate physical or mental inferiority of one race is doubtless without scientific basis in fact.¹⁶ But such a prohibition, when founded upon a desire to keep peaceful relations between the races¹⁷ in

⁶*Morgan v. Virginia*, 328 U. S. 373 (1946); *Mendez v. Westminster School Dist.*, 64 F. Supp. 544 (S. D. Cal. 1946), *aff'd*, 161 F.2d 774 (C. C. A. 9th 1947); Notes, 23 N. Y. U. L. Q. REV. 298 (1948), 23 NOTRE DAME LAW. 220 (1948).

⁷*Shelley v. Kraemer*, 334 U. S. 1 (1948); *Buchanan v. Warley*, 245 U. S. 60 (1917).

⁸*Sipuel v. Board of Regents*, 332 U. S. 631 (1948); 21 So. CALIF. L. REV. 397 (1948).

⁹*Morgan v. Virginia*, 328 U. S. 373 (1946); *Mitchell v. United States*, 313 U. S. 80 (1941).

¹⁰*Oyama v. California*, 332 U. S. 633 (1948). *But cf. Korematsu v. United States*, 323 U. S. 214 (1944).

¹¹*Smith v. Allwright*, 321 U. S. 649 (1944); *Rice v. Elmore*, 165 F.2d 387 (C. C. A. 4th 1947), *cert. denied*, 333 U. S. 876 (1948).

¹²*Thomas v. Hibbits*, 46 F. Supp. 368 (M. D. Tenn. 1942), noted in 21 N. C. L. REV. 217 (1943); *Alston v. School Board of Norfolk*, 112 F.2d 992 (C. C. A. 4th 1940), *cert. denied*, 311 U. S. 693 (1940).

¹³*Pierre v. Louisiana*, 306 U. S. 354 (1939); *Norris v. Alabama*, 294 U. S. 587 (1935); *Strauder v. West Virginia*, 100 U. S. 303 (1880). *But cf. Akins v. Texas*, 325 U. S. 398 (1945) (jury commissioner's practice of appointing one Negro juror only was upheld).

¹⁴*Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (C. C. A. 4th 1945); *Kern v. City Comm'r*, 151 Kan. 565, 100 P.2d 709 (1940).

¹⁵*Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Reynolds v. United States*, 98 U. S. 145 (1878).

¹⁶*Perez v. Lippold*, 198 P.2d 17, 22 (Cal. 1948).

¹⁷Compare with recent race riots in Detroit, Cleveland, and New York City. These