William & Mary Law Review

Volume 4 (1963)
Issue 1

Article 4

January 1963

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THE PRESENT STATUS OF MISCEGENATION STATUTES

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With the influx of so called "civil rights" cases in recent years it seems that a reappraisal of state legislation and constitutional prohibitions concerning intermarriage of persons of different races is in order.

A total of twenty-four states currently have prohibitions against miscegeneous marriages,[1] fourteen more have repealed such laws,[2] and the supreme courts of two states have held that their miscegenation statutes are in violation of the Fourteenth Amendment of the United States Constitution,[3] but one of these reversed itself five years later.[4] The highest courts of twelve other states have affirmed the constitutionality of their respective statutes.[5] The Supreme Court of the United States has once had the opportunity to rule upon the question in recent years but sidestepped the issue.[6]

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[1] ALA. CONST., art. IV, § 102; ALA. CODE tit. 14, § 360 (1940); ARIZ. REV. STAT. ANN., § 25-101 (1956); ARK. STAT. § 55-104 (1947); DEL. CODE ANN. tit. 13, § 101 (1930); FLA. CONST. art. 16, § 24; FLA. STAT. § 741.11 (1955); GA. CODE ANN. § 53-106 (1935); IDAHO CODE ANN. § 32-206 (1948); IND. ANN. STAT. § 44-104 (1952); KY. REV. STAT. ANN. § 402.020 (1955); LA. REV. STAT. § 14-79 (1950); MD. CODE ANN. art. 27, § 398 (1957); MISS. CONST. art. 14, § 263; MISS. CODE ANN. § 459 (1942); MO. REV. STAT. § 451.020 (1949); NEB. REV. STAT. § 42-103 (1943); NEV. REV. STAT. § 122.180 (1957); N. C. CONST. art. XIV, § 8; N. C. GEN. STAT. § 51-3 (1950) (1953); OLKA. STAT. tit. 43, § 12 (1951); S. C. Const. art. 3, § 33; S. C. CODE § 20-7 (1952); TENN. CONST. art. 11, § 14; TENN. CODE ANN. § 36-402 (1956); TEX. REV. CIV. STAT. art. 4607 (1925); UTAH CODE ANN. § 30-1-2 (1953); VA. CODE ANN. § 20-54 (1950); W. VA. CODE ANN. § 4701 (1) (1955); WYO. STAT. ANN. § 20-18 (1957).

[2] Iowa, Kansas, Maine, Massachusetts, Michigan, New Mexico, Ohio, Rhode Island, the state of Washington, North Dakota, South Dakota, Oregon, Colorado, and Montana.

[3] Perez v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948); Burns v. State, 48 Ala. 195 (1872).

[4] Green v. State, 58 Ala. 190 (1877).

[5] State v. Pass, 59 Ariz. 16. 121 P.2d 882 (1942); Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1875); Jackson v. City and County of Denver, 109 Colo. 196, 124 P.2d 240 (1942); Scott v. State, 39 Ga. 321 (1869); State v. Gibson, 36 Ind. 389 (1871); State v. Brown, 236 La. 562, 108 So.2d 233 (1959); Miller v. Lucks, 203 Miss. 824, 36 So.2d 140 (1948); State v. Jackson, 80 Mo. 174 (1883); State v. Kennedy, 76 N.C. 251 (1877); Eggers v. Olson, 104 Okla. 297, 231 P. 483 (1924); Lonas v. State, 50 Tenn. 287 (1871); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955).

[6] Naim v. Naim, 350 U.S. 891 (1955), 350 U.S. 985 (1956).

The statutes, while varied in scope and legal consequences for violation are unanimous in condemning marriage between Negroes and whites. Three representative statutes are those of Virginia,[7] Maryland,[8] and Arkansas.[9] Both Maryland and Virginia have criminal penalties as well as civil prohibitions and both declare the parties to a miscegenous marriage to be felons.[10] Arkansas declares such a marriage to be illegal and void.[11] Virginia prohibits the marriage of whites with colored persons;[12] Arkansas, white persons with Negroes or mulattoes;[13] and Maryland forbids any intermarriage between members of the white, Negro or Malayan races.[14] Virginia describes a "white person" as one with no other admixture of blood other than white or one-sixteenth or less American Indian blood.[15]

The challenge of the constitutionality of these and other state miscegenation statutes has been made and met in the state courts,[16] but as yet the United States Supreme Court has not seen fit to make a final judgment. What are the major factors to be discussed and when will the court meet the challenge?

Marriage as a Creature of the State

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.[17]

Upon this foundation the states have built a tremendous body of law. Every state of the fifty United States has legislation governing capacity of its domiciliaries to marry. The

[7] VA. CODE ANN. § 20-54 (1950).

[8] MD. CODE ANN., Art. 27, § 398 (1957).

[9] ARK. STAT. ANN., § 55-104 (1947).

[10] Note 9, *supra;* VA. CODE ANN. § 20-59.

[11] Note 9, *supra.*

[12] VA. CODE ANN., § 20-54.

[13] Note 9, *supra.*

[14] Note 8, *supra.*

[15] Note 12, *supra.*

[16] Note 7, *supra.*

[17] U.S. CONST. amend. X.

interpretation of this legislation is the task of the supreme courts of the various states.[18]

> 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 (state) legislatures.[19]

As Chief Justice Marshall stated in the famous case of *Dartmouth College* v. *Woodward*:[20]

> All our marriage and divorce laws . . . are state laws and state statutes; the national power with us not having legislative or judicial cognizance of the matter within these localities.

That marriage is under the general control of the state cannot be disputed, but do miscegenation statutes violate the Fourteenth Amendment? The answer to this question has not been made clear by the United States Supreme Court. In *Meyer* v. *Nebraska*,[21] the court said:

> The liberty thus guaranteed by the fourteenth amendment . . . denotes the right of the individual . . . *to marry* . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (Emphasis added.)

Yet, an earlier pronouncement, more directly in point, by the same body said:

> Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state.[22]

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[18] Meister v. Moore, 96 U.S. 76 (1877).

[19] Maynard v. Hill, 125 U.S. 190 (1887).

[20] 4 Wheat. (17 U.S.) 518 (1819).

[21] 262 U.S. 390 (1923).

[22] Plessy v. Ferguson, 163 U.S. 537, 545 (1895). This case was overruled as to the "separate but equal" doctrine by Brown v. Board of Education, 347 U.S. 483 (1954), which relied upon changing conditions in the field of education as justification.

The precise question has never been discussed by the Supreme Court; thus authority of the state and lower federal courts remains the only guide as to the question of constitutionality. These decisions have been almost unanimous in declaring miscegenation statutes within the control of the states and outside the prohibitions of the Fourteenth Amendment.[23]

Extension of the Fourteenth Amendment

In recent years the fourteenth amendment has been given ever widening application in decisions of the United States Supreme Court. In areas once deemed the private preserves of the state legislatures, the court has found violations of the sacred precepts of "equal protection" and "due process".

The most recent major decision in this category is *Baker* v. *Carr*,[24] in which the Supreme Court applied the equal protection clause of the fourteenth amendment to state reapportionment legislation. This was the initial invasion into the apportionment field, heretofore solely controlled by the states. The most widely known decision and that having had the widest repercussions, of course, was the case of *Brown* v. *Board of Education*,[25] in which the public schools which had been governed solely by the states were ordered desegregated. In this decision the "separate but equal" test of *Plessy* v. *Ferguson*[26] was rejected, Mr. Chief Justice Warren stating that separate but equal facilities in public schools could not in fact exist. Another of the more notable recent cases in this area is the momentous decision of *Mapp* v. *Ohio*[27] reversing *Wolf* v. *Colorado*.[28] This case, by means of the fourteenth amendment, extended the illegal search and seizure provisions of the fourth amendment to the state courts. Numerous other decisions in the field of civil rights have been handed down in recent years. It would not be a long step to extend the reasoning prevalent in these cases to the miscegenation situation.

[23] See note 7 *supra;* 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); Ex Parte Kinney, 14 Fed. Cas. 602 (No. 7825) (C.C. E.D. Va. 1879); State v. Tutty, 41 F. 753 (1890); Stevens v. U.S., 146 F.2d 120 (10th Cir. 1944).

[24] 369 U.S. 186 (1962).

[25] 347 U.S. 483 (1954).

[26] 163 U.S. 537 (1895).

[27] 367 U.S. 643 (1961).

[28] 338 U.S. 25 (1949).

Defense of Miscegenation Statutes

The argument for the constitutionality of miscegenation statutes is that the establishment of marriage is one historically governed by the states and protected from federal interference by the police power of the state. Thus, in *Reynolds* v. *United States*,[29] a conviction for bigamy was allowed to stand despite a conflict with religious principles of the accused which encouraged polygamous marriages. A general, valid, public policy opposing polygamous marriages gave the state (or in this case a territory), the right to legislate against such marriages as a valid exercise of the police power. The existence of the police power of the states under the Constitution is not controverted. The major question to be decided is whether miscegenation statutes serve a valid public purpose.

Miscegenation statutes were enacted to prevent the amalgamation of the races, to preserve racial integrity. The Supreme Court has never passed on this particular subject, but it has passed on numerous occasions on the broader topic of the validity of a public purpose to separate the races from social contact. In the field of public education, as has been noted, segregation has been fully rejected.[30] The Supreme Court in 1958 while unanimously reaffirming *Brown* v. *Board of Education*,[31] quoted *Buchanan* v. *Warley*[32] as follows:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

The case quoted, concerning municipal statutes restricting certain residential areas as to race, stated that the statutes could not be upheld because it furthers the public policy[33] based on the undesirability of miscegenation.

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[29] 98 U.S. 145 (1878).

[30] Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

[31] Cooper v. Aaron, 358 U.S. 1 (1958).

[32] 245 U.S. 60, 81 (1917).

[33] *Ibid.*

The Supreme Court has moved forward, without exception, striking down public policy arguments whenever racial issues have been involved. State and Federal courts may not enforce private agreements to exclude persons of a designated race from use or occupancy of residential real estate.[34] In the recent "sit-in" cases, the court decided that the public policy of the state to discourage inter-racial mixing in restaurant facilities[35] and bus terminals[36] in itself was insufficient to sustain convictions of demonstrators for disturbing the peace. The Court disapproved of enforced segregation in public beach and bathhouse facilities being a proper exercise of the police power.[37] State statutes denying colored and white boxers the right to appear on the same card have been declared unconstitutional.[38] In *Burton* v. *Wilmington Parking Authority*,[39] it was held that a privately managed restaurant in a building, partially constructed with public funds, could not refuse service to a customer because of race.

The instances in the preceding two paragraphs, with one exception, involved state statutes, the purpose of which was to prevent the mixing of the races. The one exception involved judicial enforcement of individual contracts.[40] All had a basis of public policy declared by the states to be a valid exercise of the police power. In all of the cases the public policy argument was declared not to have a valid public purpose.

Thus the effectiveness of a public policy argument in defense of miscegenation statutes stands on very weak ground today. The mind of the modern Supreme Court was well expressed by Mr. Chief Justice Vinson in *Shelley* v. *Kraemer*, when he stated: "Equal protection of the laws is not achieved through indiscriminate imposition of equalities."[41]

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[34] Shelley v. Kraemer, 334 U.S. 1 (1947); Hurd v. Lodge, 334 U.S. 24 (1948).

[35] Garner v. Louisiana, 368 U.S. 157 (1961).

[36] Taylor v. Louisiana, 370 U.S. 156 (1962).

[37] Dawson v. Baltimore, 220 F.2d 386 (4th Cir. 1955); *aff'd.*, 350 U.S. 877 (1955).

[38] Dorsey v. State Athletic Commission, 168 F. Supp. 149 (1958); *aff'd.*, 359 U.S. 533 (1958).

[39] 365 U.S. 715 (1961).

[40] See note 35 *supra*.

[41] 334 U.S. 1, 22 (1947).

Hesitancy of the Supreme Court to Hear Miscegenation Cases

The first case involving a miscegenation statute to reach the United States Supreme Court and the only one to be decided on the merits to date was *Pace* v. *Alabama.*[42] This case was tried under an indictment charging the defendants, a white and a Negro, with cohabitation in violation of the Alabama Code. The Code provided heavier penalties for inter-racial cohabitation than for the same offense between members of the same race. The court speaking through Mr. Justice Field in ruling the statute constitutional, said:

> Indeed, the offense . . . cannot be committed without involving the persons of both races in the same punishment . . . The punishment of each offending person, whether white or black, is the same.[43]

While the question decided did not directly involve marriage between the races and has been so distinguished,[44] the principle involved has been abundantly cited by state and federal courts in upholding such statutes.[45]

The Supreme Court has once granted certiorari to a case directly involving an invalidated miscegeneous marriage. In *Naim* v. *Naim,*[46] an annulment action, the plaintiff declared the marriage invalid under the Virginia Code[47] since the marriage was between a Chinese and a white person. The Virginia Supreme Court of Appeals had ruled that the Virginia statute did not violate the Fourteenth Amendment.[48] The United States Supreme Court remanded the case for further proceedings to determine the relationship of the parties to the Commonwealth of Virginia. The Virginia Supreme Court of Appeals thereupon stated that it had no machinery for such a remand and then affirmed its prior decision.[49] The United States

[42] 106 U.S. 583 (1882).

[43] *Id.* at 585.

[44] Perez v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948).

[45] See note 24, *supra.*

[46] 350 U.S. 891 (1955).

[47] VA. CODE ANN. § 20-54 (1950).

[48] Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955).

[49] 197 Va. 734, 90 S.E.2d 849 (1956).

Supreme Court then refused the motion to recall the mandate stating that the Virginia decision left the case devoid of a properly presented federal question.[50] The Supreme Court had denied certiorari to a case involving an Alabama miscegenation statute only a few months earlier.[51]

In summary, the weight of authority is in favor of the constitutionality of miscegenation statutes. It would be unrealistic, however, to conclude that this state of affairs will remain static in light of the United States Supreme Court's growing tendency to extend the applicability of the equal protection clause to matters formerly considered as solely state questions.

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[50] 350 U.S. 985 (1956).

[51] Jackson v. State, 348 U.S. 888 (1954).