The Catholic Lawyer

Volume 5
Number 3 *Volume 5, Summer 1959, Number 3*

Article 11

Crime Comics; Zoning and the Exclusion of Churches; Recognition of Red Chin in order to Deport Alien; Anti-Miscegenation Statute; Right to Vote

Follow this and additional works at: https://scholarship.law.stjohns.edu/tcl

 Part of the Catholic Studies Commons

This Recent Decisions and Developments is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

RECENT DECISIONS AND DEVELOPMENTS

Crime Comics

In recent years much attention has been focused upon the relationship between the ever-increasing sale of crime comic books and the concomitant increase in juvenile delinquency.[1] As a result of one such inquiry, Los Angeles County, California enacted an ordinance[2] making the sale and circulation of such comics to children under the age of eighteen a misdemeanor. After an extensive preamble indicating the legislative findings as to the danger crime comics pose to the young, the ordinance proscribed the depiction in comic book form of several enumerated crimes such as arson, murder, rape and kidnapping. Newspapers and accounts of historical or scriptural occurrences were excepted.

The constitutionality of the ordinance was recently upheld by the California District Court of Appeal in *Katzev v. County of Los Angeles*.[3] The plaintiffs, magazine dealers, sought declaratory relief claiming that the ordinance violated the federal constitution[4] as an infringement of "Freedom of the Press."

The Court declined to base its decision on the ground that the subject of the ordinance was beyond the area of constitutionally protected speech.[5] The mere fact that such publications "do not form an essential part of any exposition of ideas [and] . . . have a very slight social value as a step toward truth. . . ."[6] has been held insufficient to withdraw them from the protection of the "preferred status" of First Amendment freedoms.[7]

Having rejected the argument that crime and horror comics were in a constitutionally unprotected category, the Court then had to deal with the determinants of the permissibility of legislation restricting freedom of the press, chiefly the implications of the "clear and present danger" test. This phrase has had a history of such varied application,[8] the greatest variations occurring in its place of origin, the Supreme Court,[9] that it is perhaps inaccurate to refer to it as a "test." Its present mode of

[1] See *Interim Report of the Subcommittee to Investigate Juvenile Delinquency to the Senate Committee on the Judiciary*, 84th Cong., 1st Sess. (1955).

[2] Los Angeles County, Cal., Ordinance No. 6633.

[3] 336 P.2d 6 (Cal. Dist. Ct. App. 1959).

[4] The plaintiffs put forth several grounds, principally lack of clear and present danger, overbroadness and vagueness. *Id.* at 9.

[5] "[I]t is our opinion that the time has not yet arrived to declare [crime comic books] . . . per se beyond the protection of the First and Fourteenth Amendments." *Id.* at 10.

[6] CHAFEE, FREE SPEECH IN THE UNITED STATES 150 (1941).

[7] Winters v. New York, 333 U.S. 507 (1948). "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.* at 510.

[8] See Corwin, *Bowing out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325 (1952).

[9] *Compare* Bridges v. California, 314 U.S. 252 (1941), *with* Kovacs v. Cooper, 336 U.S. 77 (1949). See Corwin, *supra* note 8.

application today was enunciated by Judge Learned Hand and adopted by the Supreme Court in *Dennis v. United States*:[10] "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[11] The value of the interest sought to be protected, and the extent to which it is threatened is now balanced against the value of the expression to be restricted.

Several factors enter into the interest-balancing process. The nature of the utterance under consideration is of importance. Although the Supreme Court in *Winters v. New York*[12] decided that publications of no apparent value to society are not beyond the protection of the First Amendment, it is reasonable to place a different value in any balancing process upon a crime comic book than upon an expression, the appeal of which is to reason.[13] In addition, the degree of control the state is permitted to exercise, even in restricting First Amendment liberties, is undoubtedly increased by the fact that the ordinance is directed toward the protection of children. In *Prince v. Massachusetts*[14] the Court said: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection."[15] The fact that the ordinance imposes a post-publication penalty rather than a prior restraint is also significant in view of the disfavor with which the Supreme Court has looked upon efforts at suppression prior to publication.[16]

An important consideration in dealing with legislation restrictive of free speech is the division of responsibility between the legislature and the court in determining whether a certain type of expression produces evil results. As the present case indicated, it is not the function of the court to debate the wisdom of the legislative determination that crime comic books can cause a moral deterioration in the young and a resultant tendency toward juvenile delinquency. In an area where the psychological data is so inconclusive, and the experts so divided, the policy decision is the legislature's, not the court's. This is not to say that the court cannot, in a due process case, find that the legislative inferences from available data are so unreasonable and arbitrary as to be invalid. It is submitted that the court's share of the responsibility is to accept the legislative judgment of the causal relationship between crime comics and societal evil as valid if not unreasonable, not to accept it as valid only if convinced it is sound.[17] Of course the resolution of the single question of the deleterious effect of crime comics does not decide the case. The court must then resolve the proper judicial issue; i. e., whether, as a conclusion of the balance of interests, the danger apprehended

[10] 341 U.S. 494 (1951).

[11] *Id.* at 510.

[12] 333 U.S. 507 (1948).

[13] See Nietmotko v. Maryland, 340 U.S. 268 (1951) (Frankfurter, J., concurring).

[14] 321 U.S. 158 (1944).

[15] *Id.* at 168; Near v. Minnesota, 283 U.S. 697 (1931).

[16] See, *e.g.*, Gitlow v. New York, 268 U.S. 652 (1925).

[17] See Dennis v. United States, 341 U.S. 494, 539-40 (1951). (Frankfurter, J., concurring). See also Richardson, *Freedom Of Expression and The Function Of Courts*, 65 HARV. L. REV. 1 (1951).

does not outweigh the suppression proposed and thus offends the due process clause.[18]

It will be noted that the present case is an action for declaratory relief, not a criminal prosecution under the ordinance. Thus the ordinance could not be invalidated on the Holmes-Brandeis theory of an evidentiary requirement of a clear and present danger "as applied,"[19] for the simple reason that the ordinance is here being applied to no one. For it to be invalidated in a declaratory action it must be shown to be void "on its face." The conclusion of the court in the present case was: "What we have here is a situation wherein the effect of an ordinance upon the exercise of freedom of the press is relatively small in contrast with the public interest to be protected, one of great magnitude."[20]

However, independent of the considerations that determine the issue when the ordinance is considered in the abstract, a different problem will arise when an individual is prosecuted for selling a crime comic book to a minor. How then, should clear and present danger be applied? While admittedly a defendant is entitled to show that the apprehended danger does not warrant the proposed suppression, he should not be able to disassociate himself from the class of harmful publications into which he has been reasonably included by the legislature, and contend that *this* magazine which he sold was not clearly and presently dangerous to society.[21] It is obvious that no single crime comic poses a significant threat to society, but rather it is the mass of such comics that causes concern. Hence it would be unrealistic and self-defeating for the court to apply a strictly here and now "in personam" test without taking notice of the cumulative effect of the prohibited matter. The better approach would be to heed the counsel of flexibility given by the Court in the *Dennis* case,[22] and determine whether the danger as seen by the legislature justifies the application of the ordinance to an individual within the class.

Having reached the conclusion that it is permissible to restrict the sale of crime comic books in order to preserve the moral fiber of the young and to combat incentives to crime, the technical problem of drafting suitable legislation is presented. It has proven to be a difficult task to write laws that are effective, yet neither vague nor

---

[18] *Cf.* Roth v. United States, 354 U.S. 476, 500-03 (1957) (Harlan, J., concurring).

[19] See Gitlow v. New York, *supra* note 16, at 672-73. (Holmes and Brandeis, JJ., dissenting); Whitney v. California, 274 U.S. 357, 574-79 (1927) (Brandeis and Holmes, JJ., concurring). Since the decisions in these cases the Court has accepted the Holmes-Brandeis approach, requiring that wherever speech was the evidence of a crime, a showing of a clear and present danger of impending evil was necessary. See Dennis v. United States, 341 U.S. 494 (1951).

[20] Katsev v. County of Los Angeles, 336 P.2d 6, 19 (Cal. Dist. Ct. App. 1959).

[21] This contention would be logically permissible under the Holmes-Brandeis philosophy. See Dennis v. United States, 341 U.S. 494, 506 (1951), where the Court interpreted the Holmes-Brandeis philosophy as insisting "that wherever speech was the evidence of the violation, it was necessary to show that *the speech* created the 'clear and present danger' of the substantive evil which the legislature had the right to prevent." *Ibid.* (Emphasis added.)

[22] 341 U.S. 494, 508 (1951). The Court recognized that a phrase has meaning only when associated with the considerations that gave birth to its nomenclature and that it should not be applied mechanically without regard to the circumstances of each case.

too broad in scope. In *Winters v. New York*,[23] the Supreme Court invalidated the statute which made it a misdemeanor to sell any magazine "principally made up of . . . accounts of criminal deeds . . . bloodshed, lust or crime." The Court, commenting on the construction given the statute by the state, remarked: "Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes.' Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."[24] Thus it appears that a statute construed in terms of tendency will have little chance of survival.

Another line over which the legislature must not step is that of overbroadness. If legislation purports to restrict expressions beyond constitutional bounds, as well as those within such bounds, it is invalid as to all. For example, in *Butler v. Michigan*[25] the Supreme Court invalidated a statute which forbade the sale to *anyone* of magazines tending to incite minors to violent or depraved acts. The statute drew the following comments from the Court: "Surely this is to burn the house to roast the pig. . . . We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[26]

Legislative efforts to steer between the shoals of vagueness and the reefs of overbroadness resulted in the preparation of a model comic book ordinance by the National Institute of Municipal Law Officers.[27] Section 7-603 of the ordinance recommends that several factors be present:

(1) Specifically designate the persons within its scope.

(2) Concern itself only with children under eighteen.

(3) Require that illustration be essential to the offense.

(4) Specifically designate the prohibited matter.

(5) Specifically cover a popular type of publication which the preamble purports to condemn and thus harmonize purpose and effect.

(6) Exclude accounts of crime that are part of the ordinary and general dissemination of news.

(7) Exclude legitimate historical accounts.

The ordinance considered in the principal case incorporates all of the recommendations of the model ordinance. It is felt that the decision in the principal case is a reflection of judicial tolerance of a prudent legislative attempt to cope with material categorized by Dr. Frederic Wertham as the "new pornography"[28] and by Chief Justice Vanderbilt of the Supreme Court of New Jersey, as "Our greatest concern with the upcoming generation. . . ."[29]

---

[23] 333 U.S. 507 (1948).

[24] *Id.* at 520.

[25] 352 U.S. 380 (1957).

[26] *Id.* at 383.

[27] National Institute of Municipal Law Offices, NIMLO Model Comic Book Ordinance; edited by Charles S. Rhyne (1954). Set forth in FEDER, COMIC BOOK REGULATION 57 (1955).

[28] WERTHAM, SEDUCTION OF THE INNOCENT (1954).

[29] Vanderbilt, *Impasses In Justice*, WASH. U.L.Q. 267, 302 (1956).

Zoning and the Exclusion of Churches

The exclusion of churches through zoning was highlighted in the recent Missouri case of *Congregation Temple Israel v. City of Creve Coeur,*[1] decided in the Supreme Court of that state. Plaintiff sought to build a temple to use for religious worship, Sunday school and other church purposes in a use district restricted to single family dwellings. The plaintiff made application to the local board for a variance as provided for in the zoning ordinance.[2] This was refused. Plaintiff contended that the ordinance provided no adequate standards as a guide to the board's decision and that interference with the use of the property constituted a restraint on religious freedom, and a denial of equal protection. The board relied on the state enabling act which empowered municipalities to regulate the "location and use of buildings, structures and land for trade, industry, residence or other purposes." The Court held that in view of the strong constitutional guaranty of religious worship, the state enabling act cannot be construed so broadly as to permit regulation of churches.

The extension of state power to include the enacting of zoning legislation is of recent origin. It was not until 1926 in the case of *Village of Euclid v. Ambler Realty Co.*[3] that the constitutional validity of a comprehensive zoning plan was put in issue. The Supreme Court held that zoning legislation in its general scope is not arbitrary and so is a proper subject of the state's power.[4] While giving this blanket approval to zoning laws generally, the Court pointed out that the validity of a *specific* regulation must be determined by the facts in each case.[5] The test for determining the validity of each regulation is its "substantial relation to the public health, safety, morals, or general welfare." Thus in a 1928 case, the Court held that the action of the zoning authorities as applied to the particular land involved had no substantial relation to the general welfare and as such violated the due process guaranties of the Fourteenth Amendment.[6]

The Supreme Court in the *Village of Euclid* case specifically omitted from its consideration the validity of zoning laws with respect to churches and schools,[7] and since then has never explicitly passed on the issue.[8] Most of the state court decisions which have refused to uphold the exclusion of churches by zoning have recognized that churches like other places of assembly produce noise, congestion, and traffic hazards, but regard these effects as offset by the social and moral values inherent in religious institutions.[9] Such state court holdings appear to be quite in line with the opinion of the Supreme Court as expressed in *Village of Euclid* case:

> It is not meant by this, [validating of zoning laws] however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of

[1] 320 S.W.2d 451 (Mo. 1959).

[2] Creve Coeur, Mo., Ordinance 105, June 23, 1954.

[3] 272 U.S. 365 (1926).

[4] *Id.* at 395.

[5] *Ibid.*

[6] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[7] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 385 (1926).

[8] Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451,455 (Mo. 1959); see Corporation of Latter-Day Saints v. City of Porterville, 338 U.S. 805 (1949), where the problem was specifically presented but the appeal was dismissed for want of a substantial federal question.

[9] See, *e.g.,* Diocese of Rochester v. Planning Bd., 1 N.Y. 2d 508, 136 N.E.2d 827 (1956); State *ex rel.* Synod of United Lutheran Church v. Joseph, 139 Ohio St. 229, 39 N.E.2d 515 (1942).

> the municipality that the municipality would not be allowed to stand in the way.[10]

Although interference with the constitutional guaranty of freedom of religious worship would seem to be the most likely basis for holding the exclusion of churches to be unconstitutional, the premise most commonly used by the courts is that the exclusion of churches bears no substantial relation to public health, safety, morals, or general welfare and therefore constitutes a deprivation of property without due process of law.[11] Since zoning ordinances must meet such strict due process requirements, ordinances that absolutely restrict churches without allowing for variances are infrequent and usually have been declared invalid. A Michigan court held such an enactment to be unconstitutional on its face as being unreasonable and an arbitrary exercise of the police power.[12]

In most of the cases, the ordinances involved did not flatly exclude churches from residential areas but required that special permits be obtained from an administrative board before they would be allowed.[13] Such ordinances, at times, grant discretion to the administrative board but provide no express standards or limitations on the board's exercise of that discretion. The courts have held that zoning ordinances which provide no express standards or limitations on the board's discretion are violative of the due process clause of the Fourteenth Amendment since the discretion may be exercised in a purely arbitrary manner or in the interest of a favored few.[14] Also, zoning ordinances which are so vague as to leave decisions to the whim or caprice of the administrative agency have been held unconstitutional by state courts.[15]

The problem of administrative discretion is complicated by the fact that it is difficult to draft a statute which embodies sufficient definiteness to insure uniform discretionary action by the local board.[16] An ordinance which permits an administrative body to exclude churches on grounds of public welfare or convenience might be regarded as sufficiently definite, but the majority of courts nevertheless find that a church adds to the public convenience and welfare and will not exclude churches on such grounds.[17] The words of the court in *State* ex rel. *Synod of United Lutheran Church v. Joseph*[18] typifies the attitude of the courts:

> The church in our American society has traditionally occupied the role of both teacher and guardian of morals. Restrictions against churches could therefore scarcely be predicated upon a purpose to protect public morals. . . . Fully to accomplish its great religious and social function, the church should be integrated into the home life of the community which it serves.

---

[10] Village of Euclid v. Ambler Realty Co., *supra* note 7, at 390.

[11] Board of Zoning Appeals v. Decatur Co. of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954) (no relation to general welfare); Brandeis School v. Village of Lawrence, 184 N.Y.S.2d 687 (Sup. Ct. 1959) (denial of due process).

[12] Mooney v. Village of Orchard Lake, 333 Mich. 389,53, N.W.2d 308 (1952).

[13] See, *e.g.*, State *ex rel.* Anshe Chesed Congregation v. Bruggemeier, 97 Ohio App. 67, 115 N.E.2d 65 (1953).

[14] Pentecostal Holiness Church v. Dunn, 248 Ala. 314, 27 So.2d 561 (1946).

[15] City of West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 30 So.2d 491 (1947); Concordia Collegiate Inst. v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950).

[16] State *ex rel.* Ludlow v. Guffey, 306 S.W.2d 552 (Mo. 1957).

[17] Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508, 136 N.E.2d 827 (1956). See also, West Hartford Methodist Church v. Zoning Bd. of Appeals, 143 Conn. 263, 121 A.2d 640 (1956).

[18] 139 Ohio St. 229, 39 N.E.2d 515 (1942).

> . . . To require that churches be banished into the business district . . . is clearly not to be justified on the score of promoting the general welfare.[19]

The Supreme Court in a recent condemnation case gave a much broader construction to the concept of general welfare.[20] The Court justified the taking of property on aesthetic considerations for the maintenance of an attractive and beautiful community. It has been argued that under this broad construction of public welfare, the undesirable incidences of having a church in the neighborhood might be sufficient to permit its exclusion on grounds of public welfare.[21] However, no state court has been found to have availed itself of a broad construction of public welfare as a basis for excluding churches.[22]

Zoning ordinances have provided more specific standards than the term "public welfare." For example, administrative boards have been empowered to exclude a church if it causes depreciation of the surrounding property values, or if it lacks adequate parking facilities, or if a certain percentage of the people in the community object to it. Although depreciation of property values has not usually been a valid basis for excluding churches,[23] a recent case held that, among other reasons, it was a valid factor.[24] The lack of adequate parking facilities has been considered to be outweighed by the social values of religion and the strong guaranty of religious worship.[25] However, a church must comply with ordinary building, fire, and sanitary standards.[26] Standards based on the objection or approval of a percentage of the people in a community are invalid as an arbitrary and uncontrolled violation of property rights.[27]

The peace, comfort and quiet of a residential area is a definite social value in our American society. Accordingly, a distinction might be drawn between ordinances which exclude churches from limited areas in residential neighborhoods and ordinances which exclude them from an entire town. Exclusion of churches from *limited areas* may be justified where reasonable alternative locations exist. Although such ordinances would involve a difficult question of degree, the Supreme Court has permitted slight interferences with First Amendment freedoms.[28]

---

[19] *Id.* at 248-49, 39 N.E.2d at 524.

[20] Berman v. Parker, 348 U.S. 26 (1954).

[21] *Churches and Zoning,* 70 HARV. L. REV. 1428 (1957).

[22] See, *e.g.,* Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508, 136 N.E.2d 826 (1956); Brandeis School v. Village of Lawrence, 184 N.Y.S.2d 687 (Sup. Ct. 1959). The *Berman* case, *supra* note 20, was cited in West Hartford Methodist Church v. Zoning Bd. of Appeals, 143 Conn. 263, 121 A.2d 640 (1956), but the court still refused to exclude the church on grounds of public welfare.

[23] See, *e.g.,* State *ex rel.* Anshe Chesed Congregation v. Bruggemeier, 97 Ohio App. 67, 115 N.E.2d 65 (1953).

[24] West Hartford Methodist Church v. Zoning Bd. of Appeals, 143 Conn. 263, 121 A.2d 640 (1956).

[25] See, *e.g.,* Board of Zoning Appeals v. Decatur Co. of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954).

[26] Community Synagogue v. Bates, 1 N.Y.2d 445, 136 N.E.2d 488 (1956); City of Sherman v. Simms, 143 Tex. 115, 183 S.W.2d 415 (1944).

[27] Washington *ex rel.* Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928).

[28] In American Communications Assn., CIO v. Douds, 339 U.S. 382, 397-98 (1950), the Court said, "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a

Private agreements restricting the use of property to exclude churches are unanimously enforced.[29] The courts hold that such private restrictions are not void as against public policy, explaining that the right of a church to acquire property rests on no higher ground than that of a private citizen.[30] Thus courts have allowed to be effected by private agreements what they have prohibited to be done by zoning. In a somewhat analogous area, the enforcement by the courts of private restrictions against Negroes has been held to be unconstitutional state action in *Shelley v. Kraemer,*[31] but as yet the Supreme Court has not extended *Shelley* beyond the situation there involved.

Private restrictions which allow commercial establishments but prohibit the building of churches have also been upheld.[32] It seems that state action in such cases, when considered in the light of the *Shelley* case, could very well be considered an unconstitutional denial of equal protection of the laws. Certainly state enforcement of a private agreement which excluded the churches of one religion while permitting churches of other faiths would present a situation closely analogous to that in *Shelley* and would call for the application of that doctrine.

The central issue in determining the validity of a zoning ordinance excluding churches has been the relation of the exclusion to public health, safety, morals, or general welfare. In applying such a test, the attitude of the courts has been that the undesirable effects of churches are outweighed by the social value of such institutions.[33] Courts are now going so far as to hold that such a test has no meaning at all when applied to churches because "Such institutions are regarded as occupying a status different from other uses."[34] Thus the use of such a test has so far defeated the purposes of zoning with relation to churches and has also led to inconsistent results.[35]

Although zoning legislation which excludes churches has never been considered in the light of the constitutional guaranty of freedom of religion, cases involving similar legislation with respect to the free exercise of religion have been decided explicitly on constitutional grounds.[36] The instant case of *Congregation Temple Israel v. City of Creve Coeur* leans heavily on the strong constitutional guaranty of freedom of religious worship to invalidate the zoning ordinance requiring churches to obtain special permits in order to build.[37] There is a defi-

---

municipal zoning ordinance preventing the building of churches in certain residential areas. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Porterville,* 338 U.S. 805 (1949)."

[29] See, *e.g.,* Smith v. First United Presbyterian Church, 333 Mich. 1, 52 N.W.2d 568 (1952).

[30] Evangelical Lutheran Church v. Sahlem, 254 N.Y. 161, 172 N.E. 455 (1930); Christ's Methodist Church v. Macklanburg, 198 Okla. 297, 177 P.2d 1008 (1947).

[31] 334 U.S. 1 (1948).

[32] Matthews v. First Christian Church of St. Louis, 355 Mo. 627, 197 S.W.2d 617 (1946).

[33] State *ex rel.* Synod of United Lutheran Church v. Joseph, 139 Ohio St. 229, 39 N.E. 2d 515 (1942).

[34] Brandeis School v. Village of Lawrence, 184 N.Y.S.2d 687, 695 (Sup. Ct. 1959).

[35] Corporation of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823, *appeal dismissed,* 338 U.S. 805 (1949).

[36] Kunz v. New York, 340 U.S. 290 (1951), holding invalid as a prior restraint on the free exercise of religion an ordinance requiring a permit to conduct religious services on the street; Cantwell v. Connecticut, 310 U.S. 296 (1941), holding invalid as a burden on the free exercise of religion an ordinance requiring a license to solicit funds for religious purposes.

[37] 320 S.W.2d 451, 454 (Mo. 1959).

nite public interest in the comfort and quiet of the community and the Supreme Court has allowed slight interference with First Amendment freedoms where "the public interest to be protected is substantial."[38] Perhaps a more consistent balancing of social interests would result if cases involving churches were considered on the fundamental constitutional basis of freedom of religion. An approach to the problem on such ground might help to accomplish the purposes of zoning by validating the exclusion of churches from limited residential areas while invalidating their exclusion from entire towns.

Recognition of Red China in order to Deport Alien

Recently the United States Court of Appeals for the Second Circuit sustained an order granting a writ of habeas corpus issued by the United States District Court for the Southern District of New York releasing the relator from the custody of the Director of Immigration. Though conceding that the relator is subject to deportation, the Court concluded that such deportation under any of the subdivisions of the Immigration and Nationality Act was subject to the condition that the country to which the alien is sent should be "willing to accept him into its territory." This entails a preliminary inquiry as to the willingness of said country to accept the alien. The Court stated that this condition was still in effect even if the "country" involved be Communist China, as was the case here, and even if such condition necessitated de facto recognition of the Communist government.[1]

Judicial review in the field of immigration and nationality is closely circumscribed; Congress has vested in the executive branch of government wide discretionary powers. But this is not to say that the courts may not intervene when an alien has been denied due process. In the principal case, however, the Court did not rule against the government solely on the basis of a lack of due process, but interpreted the appropriate clause of the Immigration and Nationality Act so as to nullify the decision of the Director of Immigration. In doing so it followed the reasoning in the leading case of *United States* ex rel. *Leong Choy Moon v. Shaughnessy*.[2] In that case the court interpreted "country," in the same statute as is here involved, to mean more than countries *legally* recognized by the United States, but any area or "place."[3]

Perhaps the most important question that this decision raises is the possible clash with our government's policy of non-recognition of Communist China. To answer this most serious difficulty a few preliminary inquiries must be determined. First, does this decision in effect force the United States to confer de facto recognition? "Governments," a leading authority tells us, "are again classified, according to the opinion or belief of the person using the term, into governments *de facto* and *de jure*. A *de facto* government is one actually existing in a state, and for the time possessing sufficient strength to exercise sovereign powers. . . . A *de jure* government is one which the person using the term believes to be the rightful government of the state."[4]

It would seem from the definition of a

[38] American Communications Assn., CIO v. Douds, 339 U.S. 382, 397-98 (1950).

[1] United States *ex rel.* Tom Man v. Murff, 264 F.2d 926 (2d Cir. 1959).

[2] 218 F.2d 316 (2d Cir. 1954).

[3] *Id.* at 319.

[4] DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 34 (4th ed. 1916).

de facto government that any act to be considered conferring de facto recognition would be an act which *concedes* that such a government exists and exercises sovereign powers.

There are many examples in American history of situations in which the United States was compelled or thought best to deal with a government which it had not "recognized."[5] For example, the Government dealt with the Huerta regime in Mexico, going as far as to demand from Huerta an apology in the name of Mexico for the Tampico incident, while still denying him a de jure character as an official.[6] This was also done in the case of the Soviet Government in Russia, which was established in 1917, but was not given de jure recognition by the United States until 1933, although indirect and unofficial relations were carried on during this interim period.[7] On the basis of these and other occurrences it would seem that formally requesting a country to accept an alien would be an act tending to confer de facto recognition, since the request must concede that the Communist Government does exercise sovereign control.

The next preliminary question that must be decided is whether an act of de facto recognition in any way alludes to, or tends to confer, de jure recognition.

It has been the practice of the United States Government to require the fulfillment of certain conditions by new governments as a prerequisite to recognition.[8] This general practice was described in a letter written by Secretary Hughes to labor leader Samuel Gompers in 1923, explaining the United States' position with regard to non-recognition of the Soviet Union.[9] After having discussed de facto recognition and all it entails, he states, "But while a foreign regime may have securely established itself through the exercise of control and the submission of the people . . . there still remain other questions to be considered. Recognition is an invitation to intercourse. It is accompanied on the part of the new government by the clearly implied or express promise to fulfill the obligations of intercourse. . . . In the case of the existing regime in Russia . . . the sentiment of our people is not deemed to be favorable to the acceptance into political fellowship of this regime so long as it denies the essential bases of intercourse."[10] The Secretary emphasized that it is quite possible to have such relations with a government that would, in effect, establish a de facto recognition and yet be secure in the conclusion that there are sound reasons for withholding de jure recognition.[11]

In none of the numerous instances in recent years, which in effect, bestowed de facto recognition did such bestowal in any way, via propaganda or otherwise, infringe upon our policy of non de jure recognition. But either because of, or in spite of, such de facto acts, the United States did *eventually* bestow de jure recognition on most of the governments with whom it so dealt.

One might conclude, therefore, that such acts are actually preludes to formal, legal recognition. But if the criterion of de jure recognition is "the rightful government,"[12]

---

[5] See FENWICK, INTERNATIONAL LAW 114-18 (2d ed. 1934).
[6] *Id.* at 117.
[7] *Id.* at 118-19.
[8] 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 174 (1940).
[9] *Id.* at 178-79.
[10] *Ibid.*
[11] *Ibid.*
[12] DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 34 (4th ed. 1916).

as Professor Davis suggests, or "intention to fulfill obligations"[13] as Secretary Hughes states, or even if it is a combination of both, is there in practice much difference between de facto and de jure recognition? If countries under either term negotiate with one another, fight one another, even trade with one another, is there any significance to de facto versus de jure?

The United States does not trade with Red China. However, some of our allies, such as England, do trade with her. We negotiate with her; for example, in the Warsaw meetings concerning the shelling of the Quemoy Islands; we have fought her in Korea; and we now are compelled to inquire as to whether she will accept an alien held by us. For all intents and purposes we have bestowed de facto recognition on Red China. Nevertheless, without discussing the merits of non-recognition versus recognition as a policy for the Government to follow, it is suggested that such acts as these of de facto recognition do *not* confer de jure status with all its implications. These acts are expedient, and are tolerated only because situations have arisen which have required them.

Anti-Miscegenation Statute

A recent case from the Louisiana Supreme Court has once more turned the spotlight of controversy on a basic issue that has perplexed this country since the earliest days of its founding. The defendants in this case, one Negro and one white, were convicted in the lower courts under a Louisiana statute which punished "marriage or habitual cohabitation, with knowledge of their difference in race, between a person of the Caucasian or white race and a person of the colored or negro race."[1]

On appeal, the Louisiana Supreme Court upheld the constitutionality of the statute, but reversed on other grounds. *State v. Brown,* 108 S. 2d 233 (La. Sup. Ct. 1959).

Article 79 of the Louisiana Criminal Code is an anti-miscegenation statute typical of those found, altogether, in 25 states of this nation.[2] Most of these statutes are found in the Southern states and date back to before the time of the Civil War.[3] The passing of the statutes closely paralleled the appearance of the Negro in this country and the spread of slavery in the South before the Civil War. After the war and during the subsequent period of rehabilitation, many of the statutes were repealed,[4]

[13] *Supra* note 9.

[1] LA. REV. STAT. § 14:79 (1950).

[2] ALA. CÓDE ANN. tit. 14, § 360 (1940); ARIZ. REV. STAT. § 25-101 (1956); ARK. STAT. ANN. § 55-104 (1947); COLO. REV. STAT. ANN. § 90-1-2 (1953); DEL. CODE ANN. tit. 13, § 101 (1953); FLA. CONST. art. 16, § 24; FLA. STAT. ANN. § 741.11 (1944); GA. CODE ANN. § 53-106 (1937); IND. ANN. STAT. § 44-104 (1952); KY. REV. STAT. ANN. § 402.020 (1955); LA. CIV. CODE ANN. art. 94 (West 1952); MD. ANN. CODE art. 27, § 416 (1957); MISS. CONST. art. 14, § 263; MISS. CODE ANN. § 459 (1942); MO. ANN. STAT. § 451.020 (1949); NEB. REV. STAT. § 42-103 (1943); NEV. REV. STAT. § 122.180 (1957); N. C. CONST. art. 14, § 8; N. C. GEN. STAT. § 51-3 (1950); OKLA. STAT. ANN. tit. 43, § 12 (1954); S. C. CONST. art. 3, § 33; S. C. CODE § 20-7 (1952); TENN. CONST. art. 11, § 14; TENN. CODE ANN. § 36-402 (1955); TEX. REV. CIV. STAT. ANN. art. 4607 (1951); UTAH CODE ANN. § 30-1-2 (1953); VA. CODE ANN. § 20-54 (1950); W. VA. CODE ANN. § 4701 (1955); WYO. COMP. STAT. ANN. § 50-108 (1945).

[3] 2 WHARTON, CRIMINAL LAW AND PROCEDURE 546 (1957).

[4] Iowa, 1851; Kansas, 1857; Maine, 1883; Massachusetts, 1840; Michigan, 1883; Montana, 1953; New Mexico, 1866; North Dakota, 1955; Ohio, 1877; Oregon, 1951; Rhode Island, 1881; South Dakota, 1957; Washington, 1867.

but those in the South remained and are still uniformly upheld today by Southern courts in spite of mounting pressure for their abolition.[5]

Statutory definitions of miscegenation itself vary immensely from state to state. In general, it consists of any mixture of the races in marriage, adultery or fornication.[6] Under earlier statutes, only members of the white race were liable, and even today the statutes are directed mainly against white-non-white marriages. Included, however, among the races which are prohibited from intermarrying are American Indians,[7] Chinese,[8] Japanese,[9] Mongolians,[10] Ethiopians,[11] "the Malay race,"[12] Hindus,[13] "half-breeds,"[14] and the "brown race."[15]

Some states attempt to define these racial terms (which sociologists themselves admit are extremely elusive of definition) in the language of Mendelian heredity.[16] In the past, other states defined the various degrees of descendancy and "admixture of the blood" necessary to bring a person within a race;[17] still others attempt no definition of these terms at all. The entire area is one of considerable confusion and uncertainty. It is significant, however, that a common feature of all the statutes is the prohibiting in particular of negro-white cohabitation and marriage. In addition to the prohibition of marriage, many far-reaching civil and criminal penalties are attached to the statutes.[18]

The constitutionality of these anti-miscegenation statutes has been assailed on several different grounds. Catholic parties

[5] See, *e.g.*, Arizona: State v. Pass, 59 Ariz. 16, 121 P. 2d 882 (1942); Colorado: Jackson v. City of Denver, 109 Colo. 196, 124 P. 2d 240 (1942); Mississippi: Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948); Oklahoma: Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924); Virginia: Naim v. Naim, 197 Va. 80, 87 S.E. 2d 749, *remanded*, 350 U.S. 891 (1955); *aff'd*, 197 Va. 734, 90 S.E. 2d 849, *app. dismissed*, 350 U.S. 985 (1956).

[6] Jackson v. State, 23 Ala. App. 555, 129 So. 306 (1927); Jones v. Commonwealth, 80 Va. 538 (1893).

[7] N. C. GEN. STAT. § 51-3 (1950); S. C. CODE § 20-7 (1952).

[8] NEB. REV. STAT. § 42-103 (1952).

[9] NEB. REV. STAT. § 42-103 (1952).

[10] NEV. REV. STAT. § 122.180 (1957); UTAH CODE ANN. § 30-1-2 (1953); WYO. COMP. STAT. ANN. § 50-108 (1945).

[11] NEV. REV. STAT. § 122.180 (1957).

[12] ARIZ. REV. STAT. ANN. § 25-101 (1956); MD. ANN. CODE art. 27 § 398 (1957); NEV. REV. STAT. § 122.180 (1957); UTAH CODE ANN. § 30-1-2 (1953); WYO. COMP. STAT. ANN. § 50-108 (1945).

[13] ARIZ. REV. STAT. ANN. § 25-101 (1956).

[14] S. C. CODE § 20-7 (1952).

[15] NEV. REV. STAT. § 122.180 (1957) (recently ruled unconstitutional).

[16] See, *e.g.*, OKLA. CONST. art. 23, § 11. See also note 17 *infra*.

[17] See, *e.g.*, CODE OF ALA., § 4189 as construed in Pace v. Alabama, 106 U.S. 583 (1882): "If any white person and any negro, or the descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person. . ." (The reference to degree of generation is no longer part of the statute.)

[18] Some states make the marriage void *ab initio*, see, *e.g.*, ARK. STAT. § 55-104 (1947) and bar the defense of marriage in rape, cohabitation, and vagrancy prosecutions. See, *e.g.*, Jackson v. City of Denver, 109 Colo. 196, 124 P. 2d 240 (1942). The children of miscegenous marriage may be declared illegitimate, FLA. STAT. ANN. § 741.11 (1944), and their property rights thereby affected. Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924). Closely akin to anti-miscegenation statutes, and often included with them in discussions of constitutionality, are those inflicting severer penalties on certain criminal acts when committed by a person not of the white race. Pace v. Alabama, 106 U.S. 583 (1882); *In re* Opinion of the Justices, 207 Mass. 601, 94 N.E. 558 (1911); Bailey v. State, 239 Ala. 2, 193 So. 873, *mandate conformed to*, 29 Ala. App. 161, 193 So. 871 (1940).

have successfully contended that such a statute violated their freedom of religion.[19] It has also been argued that the prohibitions are essentially discriminatory in nature, violate the due process and equal protection clauses of the Constitution, and impair the contract obligations of the parties to the marriage.[20]

The statutes have been constitutionally upheld on the ground that they constitute a proper exercise of the power of a state to make laws regulating the marriage of its own subjects.[21] Ultimately, this power rests on the nature of marriage not only as a contract, but as a status affecting the welfare of the state.[22] The state can therefore pass laws reasonably regulating marriage for the public health, morals, or general welfare of the community, provided that such legislation has a legitimate legislative end and is not discriminatory, irrational, or expressive of popular prejudice.[23]

For instance, the state can regulate marriages of feeble-minded persons or of persons with communicable diseases. In each case, the relationship between the prohibition and the legislation must be and is supported by known, obvious or demonstrable scientific proof that such marriages constitute a present or potential danger to society. The legislative objective must be reasonable, and there must be a reasonable connection between the legislation and the end sought.[24]

In the constitutional area, it has been said that every free man has a *fundamental* right to marry and that this right includes the freedom to choose his marriage partner.[25] While its exercise is subject to reasonable regulation by the state on proven grounds of the common welfare, the right to marry is also a *civil* right and is therefore within the scope of the equal protection of the laws clause of our Constitution.[26] As both a civil and a fundamental right, therefore, the right to marry is also subject to the prohibitions against classification by race as these have been defined by the

[19] Perez v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17 (1948). In a lengthy and historic 4-3 decision, the Court evaluated legal, biological, sociological and moral points and struck down a California miscegenation statute – the first time in this country such a statute has been held unconstitutional by a state court of last resort. The case is commented on in Riley, *Miscegenation Statutes – A Re-Evaluation of Their Constitutionality in Light of Changing Social and Political Conditions,* 32 So. CAL. L. REV. 28 (1958) and DOHERTY, MORAL PROBLEMS OF INTERRACIAL MARRIAGE 136-42 (1949).

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

[21] Perez v. Lippold, *supra* note 19, 198 P. 2d at 21; Naim v. Naim, 197 Va. 80, 87 S.E. 2d 749 (1955).

[22] Stevens v. United States, 146 F. 2d 120 (10th Cir. 1944); Green v. State, 58 Ala. 190 (1877).

[23] Perez v. Lippold, *supra* note 19, 198 P. 2d at 18-19, 36.

[24] *Ibid.*

[25] Perez v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17 (1948); see Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[26] Meyer v. Nebraska, 262 U.S. 390, 399 (1923). "The purpose of the (equal protection) clause . . . was to prevent hostile and discriminating State legislation against any person or class of persons. . . . Equality of protection under the laws implies . . . that in the administration of criminal justice . . . [a person] shall not be subjected, for the same offense, to any greater or different punishment." Pace v. Alabama, 106 U.S. 583, 584 (1882). Unfortunately, the Court did not follow its own reasoning, holding constitutional a statute imposing a severer penalty for adultery when one of the parties was colored. The Court apparently was concerned only with the evils of adultery and never even considered intermarriage, although the case is often erroneously cited in this regard. For the classic statement of the nature of the clause as it affects the rights of the Negro, see Brown v. Board of Educ., 347 U.S. 483, 490 (1954).

Supreme Court.[27]

> There can be no prohibition of marriage except for an important social objective and by reasonable means. . . . Legislation infringing such rights 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.[28]

It has often been argued by the state courts, in upholding the constitutionality of the statutes, that they do not violate the equal protection clause since they are applied equally to all races.[29] The penalty provisions of the statutes, it is true, are *enforced* equally on all the parties involved, without regard to race. But it is the original and general *classification* according to race, the inclusion of the color element as constituting a crime under the statute, that violates the equal protection clause.[30]

As Andrew D. Weinberger has said,

> The choice of a spouse is a subjective act, the act of individuals and not races. It would therefore follow that a classification by statute of those prohibited from marrying each other must be made on an individual basis and not on a group (racial) basis.[31]

The contention that such legislation is meant to apply equally to both white and black races in furtherance of the "separate but equal" doctrine enumerated in *Plessy v. Ferguson*[32] has been discarded in a long line of cases successively overruling more and more important areas of segregation.[33]

Courts in support of the statutes further argue that the racial classifications are reasonable in view of the legislative objectives of promoting the general peace, security, and welfare.[34] We have seen that the state's power in this area rests on known scientific proof of the imminent danger of certain marriages to society.[35] In general accord-

---

[27] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); *Ex parte* Virginia, 100 U.S. 339 (1879). The Supreme Court has never ruled squarely on the subject of the constitutionality of anti-miscegenation laws, although the question has presented itself twice. The Court refused certiorari in the first case, Jackson v. Alabama, 37 Ala. App. 519, 72 So. 2d 114, *cert. denied,* 348 U.S. 888 (1954), and the second one, Naim v. Naim, 197 Va. 80, 87 S.E. 2d 749, *remanded,* 350 U.S. 891, *aff'd* 197 Va. 734, 90 S.E. 2d 849, *appeal dismissed,* 350 U.S. 985 (1956), went off on procedural grounds.

[28] Perez v. Lippold, *supra* note 25, 198 P. 2d at 19. See also Jackson v. Alabama, *supra* note 27 and Oyama v. California, 332 U.S. 633, 646 (1948).

[29] *In re* Paquet's Estate, 101 Or. 393, 399, 200 P. 911, 913 (1921). "The statute does not discriminate. It applies alike to all persons, either white, negroes, Chinese . . . or Indians." Pace v. Alabama, 106 U.S. 583, 585 (1882) (The punishment of each offending person, black or white, is the same.) See also Rogers v. State, 37 Ala. App. 638, 73 So. 2d 389 (1954); Jackson v. City of Denver, 109 Colo. 196, 124 P. 2d 240 (1942).

[30] Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[31] Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes,* 42 CORNELL L. Q. 208, 215 (1957). See also Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938); Shelley v. Kraemer, 334 U.S. 1 (1948). The California court said in Perez v. Lippold, *supra* note 25, at 20: "The right to marry is the right of individuals, not of racial groups."

[32] 163 U.S. 537 (1896).

[33] Gayle v. Browder, 352 U.S. 903 (1956), *affirming* 142 F. Supp. 707 (D. Ala. 1956); Beal v. Holcombe, 193 F. 2d 384 (5th Cir. 1951), *cert. denied,* 347 U.S. 974 (1954); Brown v. Board of Educ., 347 U.S. 483 (1954); Shelley v. Kraemer, 334 U.S. 1 (1948); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Edwards v. California, 314 U.S. 160 (1941); Buchanan v. Warley, 245 U.S. 60 (1917); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Strauder v. West Virginia, 100 U.S. 303 (1880).

[34] See the dissent by Shenk, J. in Perez v. Lippold, *supra* note 25, at 35-36.

[35] Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes,* 42 CORNELL L. Q. 208, 216 (1957).

ance with this fact, miscegenation statutes were originally justified on purely "scientific" grounds. Thus, it was thought that the negro race was biologically inferior to the white, and that miscegenous marriages gave rise to biologically inferior offspring.[36] Nor was this conclusion without scientific background at the turn of the century, when "racial purity," "racial strength" and "white blood" were accepted scientific terms.[37] Early investigations in this field tended to "establish" the physical and intellectual inferiority of the Negro by equating biological with sociological differences, and the Southern courts quite understandably seized on this evidence to support their own conclusions of law.

The accumulation of scientific evidence today, however, strongly indicates that there is absolutely no biological inferiority of one race to another, nor are offspring of miscegenous marriages inferior in any biological sense.[38] The deeply ingrained notions of "corruption of blood" and "purity of blood" have been shown to have no sound biological foundation.[39]

Despite the overwhelming conclusions of fair, sound, and objective scientific study to the contrary, the idea that some races are biologically inferior still persists.[40] The courts, however, no longer rely heavily on the earlier biological studies. Today, prohibitions against interracial marriage are primarily social and psychological rather than biological, but the uneasy feeling persists that these are simply modern-day rationalizations of the older prejudices.[41]

Absent any biological basis for the miscegenation statutes, it would still be possible for the state, in promoting the general welfare, to regulate marriage for the purpose of combatting urgent and pressing sociological danger or to relieve unbearable tension between the races.[42] It has been reasoned in this connection that:

> . . . the necessity for them [segregation statutes] grows out of social habits and traditions of the Southern States and the situation of our people relative to the colored race, and the absolute and unchanging necessity of keeping the races separate.[43]

While it is true that numerous social problems and tensions exist in the segregated areas, there is, in fact, little tension between the races in the area of misce-

[36] Scott v. Georgia, 39 Ga. 321, 323 (1869); State v. Jackson, 80 Mo. 175, 179 (1883).

[37] See, *e.g.*, the scientific evidence quoted by the dissent in Perez v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17, 44-45 (1948), none of which is more recent than 1926. Today it has been established that Negro "inferiority" can be explained by differences in environment and social background rather than biological, hereditary or racial deficiencies. MYRDAL, AN AMERICAN DILEMMA 144-153 (1944).

[38] MYRDAL, AN AMERICAN DILEMMA 140-148 (1944); Weinberger, *op. cit. supra* note 36 at 218-221; CUSHING, INTERRACIAL JUSTICE 5; MADIGAN, THE CATHOLIC CHURCH AND THE NEGRO 23-24, (1941); ASHLEY-MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE 120 (1945). See also 58 YALE L. J. 472, 474-76, (1949).

[39] TWOMEY, HOW TO THINK ABOUT RACE 39 (1951).

[40] Naim v. Naim, 197 Va. 80, 90, 87 N.E. 2d 749, 756 (1956); State v. Brown, 108 So. 2d 233, 234 (Sup. Ct., La. 1959).

[41] Story v. State, 178 Ala. 98, 103, 59 So. 480, 482, (1912); CUSHING, INTERRACIAL JUSTICE 5-6. See also the court's language in State v. Brown, 108 So. 2d 233 (1959).

[42] Buchanan v. Warley, 245 U.S. 60, 81 (1917). This is becoming the most frequently used reason.

[43] Chaires v. City of Atlanta, 139 S.E. 559, 565 (Sup. Ct. Ga. 1927). See also Story v. State, 178 Ala. 98, 103, 59 So. 480, 482 (1912); State v. Brown, 108 So. 2d 233, 235 (Sup. Ct., La. 1959).

genation.[44] From a practical legislative viewpoint, the entire field of intermarriage is relatively unimportant. Miscegenous marriages are comparatively rare in the South, and a conviction is had under an anti-miscegenation statute only where the parties are either ignorant of the law or lack the train fare to another state.

Moreover, as has been statistically shown, neither race has the desire to intermarry.[45] Miscegenous marriages are rare, individual, and personal happenings. They have never taken place on a large scale, and it is doubted that they ever will. Gradual and almost complete intermixture in the course of thousands of years is indeed a probability, but one of absolutely no practical significance today.

The small group affected by the statutes is, in addition, the least potent social interest. Intermarriage itself, the most feared outcome of integration by the whites in the South, is the least important issue fought for by the Negro.[46] The problem occupies inverse positions of importance between the two races.[47]

Whatever tensions do exist in this area are caused and aggravated by the statutes rather than being relieved by them. As was said in the *Perez* case,

> It is no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension.[48]

It is also difficult to conceive how the legislative objectives of peace and security can be attained by the suppression of basic human rights guaranteed by the Constitution:

> Desirable . . . 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.[49]

While it is true that there may be great social pressure brought to bear on the parties of a miscegenous marriage, and that the children may be "unacceptable" either in colored or in white society, the parties are generally aware of this, and the contention that such pressure was ample justification for a miscegenation statute has been rejected by the California Supreme Court as an improper area for either the legislative or judicial functions.[50] Social acceptability is, at best, a transient factor that depends as much on appearance, health, wealth, and individuality as it does on color. Such social acceptance cannot and should not be legislated.[51]

Perhaps the most sensible attitude manifest toward the entire problem in its many

---

[44] Perez v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17, 26 (1948).

[45] MILLER, QUESTIONS ABOUT RACIAL SEGREGATION 11 (1956). This is true *even in integrated areas.* DOHERTY, MORAL PROBLEMS OF INTERRACIAL MARRIAGE 11, 45, 116-118 (1949). Furthermore, it is doubtful whether the statutes are effective at all in preventing intermarriage. Perez v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17, 35 (1948). Rather, they encourage concubinage, emigration, and extra-marital relations. DOHERTY, *supra* at 133-134; 36 YALE L. J. 862 (1927).

[46] Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes,* 42 CORNELL L. Q. 208, 210 (1957).

[47] *Ibid.*

[48] Perez v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17, 25 (1948).

[49] Buchanan v. Warley, 245 U.S. 60, 81 (1917).

[50] Perez v. Lippold, *supra* note 48, 198 P. 2d at 29, 30, 33.

[51] Several state constitutions provide that a citizen's social status shall never be the subject of legislation. It has nevertheless been held because of this that the legislature is forever powerless to repeal former miscegenation laws. Scott v. State, 39 Ga. 321 (1869).

aspects has been that of the Church. The Church does not believe that one race is inferior to another, or that children of miscegenous marriages are inferior to others.[52] For these reasons, she has never prohibited miscegenous marriages.[53]

However, the Church in its wisdom is cognizant of the sometimes unbearable social pressures brought to bear on the partners and children of an intermarriage. Pastors and personal confessors will often, for the parties' own sake, advise against the marriage because of these social considerations.[54] But the marriage itself is in no wise prohibited. Ultimately, the Church leaves the problem with the parties themselves, as a matter of personal discretion and prudence.[55]

In the final analysis, it must be conceded that this attitude is the more intelligent and practical one. The area of miscegenous marriages should be relegated, properly, to the exercise of personal prudence. To punish innocent parties to the marriage institution – on which the state is ultimately founded – because of an arbitrary element of color is to violate the fundamental precepts of our Constitution and the morality of all mankind.

[52] DOYLE, THE CATHOLIC CHURCH IS COLOR-BLIND 3; DELOS, RACE: NATION: PERSON 60 (1944). Discrimination can be sinful in certain circumstances, as when it is founded on conscious hate and an irrational belief in racial superiority rather than a genuine and sincere belief in discriminatory measures as proper or necessary from the standpoint of health or sociology.

[53] MILLER, QUESTIONS ABOUT RACIAL SEGREGATION 11 (1956); TWOMEY, HOW TO THINK ABOUT RACE 39 (1951); RYAN & BOLAND, CATHOLIC PRINCIPLES OF POLITICS 332 (1940).

[54] DOHERTY, MORAL PROBLEMS OF INTERRACIAL MARRIAGE 34 (1949); LA FARGE, THE RACE QUESTION AND THE NEGRO 195-8 (1945).

[55] O'Gara, *Integration, Why?*, 8 THE SIGN (Nov. 1958).

Right to Vote

That the right to the exercise of the voting franchise should be affected by a citizen's race is shocking to most Americans today. If it were necessary to clarify this point, it would seem that the constitutional amendments during the period of Reconstruction following the Civil War should have settled the issue. Yet the motive behind the passage of the Civil Rights Act of 1957[1] and the recent case of *United States v. Alabama*,[2] brought under that Act, are forceful reminders that the "racial criterion" is yet a very real one.

An action was brought by the United States Attorney General pursuant to provisions of the Civil Rights Act against the State of Alabama, the County Board of Registrars and two members of the Board for preventative relief against interference with the right to vote of certain citizens of the United States, who were of the Negro race. The action did not survive a motion to dismiss on the ground of failure of parties. The District Court held that the State of Alabama and the Board of Registrars were not "persons" within the meaning of the Act. Moreover, since the two named members of the Board had resigned prior to the institution of the action, they were not, as individuals, proper party defendants.

The fact that the Civil Rights Act deals with concepts deeply embedded in the political philosophy of our government emphasizes the significance of cases construing it. The right of free choice which a citizen has in the selection of the body which is to govern him is important not only as a means

[1] 71 STAT. 634 (1957), as amended, 42 U.S.C. § 1971 (Supp. 1958). Hereinafter cited as Civil Rights Act.

[2] 171 F. Supp. 720 (E.D. Ala. 1959).

of insuring that that body shall have the strength of popular support, but also to make certain that the governing body will consider the citizen's rights.[3]

To determine the degree to which the Fourteenth Amendment delimits and guarantees this fundamental principle of democratic government, one must consider the interpretation by the U. S. Supreme Court of the scope of the "privilege and immunities" clause of the Federal Constitution.[4] The states have the power to regulate the privileges and immunities of their citizens, yet in so legislating they may do nothing to abridge privileges and immunities arising by virtue of an individual's United States citizenship.[5]

"State action" within the meaning of the amendment comprehends not only an official act of the legislative, executive or judicial branches, but extends to every department of the state and every officer or agent through whom the state acts.[6] Moreover, the act of an individual officer may be state action even though the officer acts contrary to, or in excess of, his authority since "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state is action taken 'under color of' state law."[7]

The scope of the equal protection clause of the Fourteenth Amendment[8] is similar to that of the privileges and immunities clause. Hence in the area of civil rights, and in particular with regard to the administration of the voting process, the action of election boards or registrars to whom such administrative power is delegated is "state action."[9]

While it is clear that the Fourteenth Amendment protects the exercise of the right to vote, this fundamental right is specifically assured by the Fifteenth Amendment. "The right of citizens of the United States to vote shall not be abridged by the United States or by any State on account of race, color, or previous condition of servitude."[10] This amendment has given to citizens of the United States a new constitutional right in exempting them from discrimination in the exercise of the elective franchise on grounds of race. While the right to vote may come from the state, the right to its exercise free from racial discrimination comes from the federal government.[11] Whatever doubt there may be in other areas of civil rights, it is thus settled that the right to vote in any election is guaranteed to every otherwise qualified citizen without regard to his race or color.[12]

But the substantive content of a right and

---

[3] Rice v. Elmore, 165 F.2d 387, 392 (4th Cir. 1947).

[4] U.S. CONST. amend. XIV, § 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

[5] Colgate v. Harvey, 296 U.S. 404 (1935). Accord, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), holding that only rights of national citizenship received protection of the privileges and immunities clause.

[6] See Saunders v. Shaw, 244 U.S. 317 (1917).

[7] Baldwin v. Morgan, 251 F.2d 780, 786 (5th Cir. 1958).

[8] U.S. CONST. amend XIV, § 1.

[9] Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).

[10] U.S. CONST. amend. XV.

[11] Pope v. Williams, 193 U.S. 621 (1904). "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. . . . It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States." *Id.* at 632.

[12] Reddix v. Lucky, 252 F.2d 930 (5th Cir. 1958).

the elements of its violation are frustratingly academic unless a remedy for such violation is available. The Fifteenth Amendment states: "The Congress shall have power to enforce this article by appropriate legislation." Congress has implemented this amendment by the adoption of the Civil Rights Act of 1957, specifically section 1971.[13]

The background of civil rights legislation presents a disturbing picture of the workings of the election systems of some states. The poll tax, the white primary laws, and literacy laws requiring registrants to read, write, and interpret any article of the Constitution submitted to them by the Board of Registrars are either directed toward or tend to effect discriminatory registration.[14] The fact that only twenty-five per cent of Negroes of voting age are registered in eleven Southern states is, to say the least, suspicious.[15] It cannot be seriously contended that there is no need for effective civil rights legislation.

The Civil Rights Act of 1957 is not a product of haste but an act skillfully developed after much controversy and extended hearings.[16] The substantive content of the act is merely a reiteration of rights specifically or inferentially guaranteed by the Constitution. Like its predecessors, it prohibits any deprivation of voting rights by state officers or those acting under the authority of law.[17] The present act adds that *"no* person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce . . . any other person. . . ." for the purpose of interfering with his right to vote.[18]

The substantive provisions of the Act are limited by the fact that "person" under the statute relates only to acts done by individuals.[19] This limitation was emphasized by the Court in the principal case, and as the principal case indicates, has the effect of restricting the efficacy as well as the scope of the Act.

The core of the legislation is its procedural content. The federal government, acting through the Department of Justice, is authorized to institute action in order to secure the free exercise of an individual's right to vote in federal elections and to prevent discriminatory restriction of the right to vote in state elections.[20]

The authority of Congress to empower the Attorney General to restrain a private individual not acting in any official capacity from interfering with participation in an

---

[13] Civil Rights Act § 1971. The Civil Rights Act was passed in a proper exercise of power delegated to the federal government. See *In re* Wallace, 170 F. Supp. 63 (N.D. Ala. 1959).

[14] N. Y. Times, June 21, 1959, § 6 (Magazine), p. 5. Veteran Negro college teachers had been refused registration for failing literacy tests. *Id.* at 22.

[15] *Id.* at 22.

[16] Lane, *The Civil Rights Act of 1957,* 4 How. L. J. 36 (1958).

[17] See Civil Rights Act § 1971 (a).

[18] Civil Rights Act § 1971 (b). See Legislative History, 1957 *United States Code Congressional and Administrative News,* 1966, 1977. (Emphasis added.)

[19] *Ibid.* In Hewitt v. City of Jacksonville, 188 F.2d 423 (5th Cir. 1951), "person" did not include a state or its governmental subdivisions acting in their sovereign, as distinguished from their proprietary, capacity.

[20] "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute . . . a civil action or other proper proceeding for preventive relief. . . ." Civil Rights Act § 1971 (c).

election is not clear.[21] Perhaps this power may be inferred from Article I Section 4 of the Federal Constitution. The constitutionality of this authorization must await court construction.

Essentially then, the Civil Rights Act provides for a cheap, speedy and effective remedy where a citizen's right to vote is violated in a discriminatory manner. The United States Government bears the cost of the proceedings;[22] the injunctive remedy insures that the voter may participate in the electoral process. Further, temporary injunctions may be granted. Finally, it is not necessary to exhaust the state administrative remedies, for the district courts have jurisdiction "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."[23]

The principal case casts some doubt upon the efficacy of the Act. While it may be unfortunate that the State of Alabama and the County Board of Registrars are not proper party defendants since neither is a "person," such is the clear intention of the Act. This unhappy result is particularly frustrating in the case of the Board. Clearly it is the Board, acting through its members, which denies registration; it is the Board which has continuous control over its records; and it is in a suit against the Board that the most effective remedy could be obtained.

The citizen, deprived of his right to vote, has an effective remedy against the official who caused the deprivation if, as the principal case points out, the defendent is still in office. Further, where the officer resigns after the action has been initiated, his successor may be substituted as a party defendant pursuant to Rule 25 (d) of the Federal Rules of Civil Procedure.[24] Where, however, the position of the officer is terminated, as here, prior to the institution of the action, there is no party defendant. It is submitted that the result – the necessity of a further attempt to register – is not only cumbersome but also may result in a delay sufficient to disenfranchise the aggrieved party with respect to an election following immediately upon the registration period. Unless the provision of the Act authorizing preventative relief where there are "reasonable grounds to believe" that any person is about to engage in an act which would deprive a citizen of his right to vote[25] may be used to obtain at least temporary relief against the remaining Board members so that the citizen may be allowed to vote in an imminent election, the result of temporary disenfranchisement is inescapable. However, it is difficult to see how the provision would help in the hypothetical case presented: what facts would be alleged upon which a court could base a determination that there are such reasonable grounds; could the Board's records be obtained and

[21] 71 HARV. L. REV. 573 (1958). See also, Comment, 56 MICH. L. REV. 619 (1958). The control of the United States over individual action is based on activity under color of law.

[22] Civil Rights Act § 1971 (c).

[23] Civil Rights Act § 1971 (d).

[24] Fed. R. Civ. P. 25 (d). "[W]hen an officer of the United States . . . a State, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor. . . ."

[25] Civil Rights Act § 1971 (c). Under the authority of Reddix v. Lucky, 252 F.2d 930 (5th Cir. 1958), each individual action must be brought separately since a class action cannot be maintained.

analyzed with sufficient speed; would not the court be wary of giving relief in haste where there is a possibility that the citizen is *not* qualified and was refused registration in the proper exercise of clear right of the state to regulate the exercise of voting rights?

It is submitted that the Civil Rights Act of 1957 falls far short of its purposes. However, this effort by the Legislature to provide effective protection for citizens' voting rights is encouraging. Moreover, the establishment by the Act of the Civil Rights Commission to investigate claims of discriminatory practices in this area and to scrutinize the development of civil rights legislation[26] bodes well for more effective future legislation.*

---

[26] Civil Rights Act § 1975. See generally Comment, 56 MICH L. REV. 619, 627.

* After completion of this article, the report of a Georgia District Court decision was published wherein the court held that the Civil Rights Act of 1957 was unconstitutional on the ground that the Congress has no power to prohibit or punish purely individual and private actions depriving another of his right to vote on account of his race or color. U.S. v. Raines, 172 F. Supp. 552 (A.D. Ga. 1959). See note 21 and accompanying text. [Ed. note]