OVERTURNING CALIFORNIA'S BAN ON INTERRACIAL MARRIAGES

By John S. Caragozian

California historians often see World War II as a pivot. The war industrialized the state's economy and paved the way for a population surge and suburbanization.

The war also changed California's legal culture. A critical example was the California Supreme Court's 1948 decision in *Perez v. Sharp*, 32 Cal. 2d 711. There, the court struck down California's so-called anti-miscegenation statutes that for almost 100 years had barred whites and persons of color from marrying one another.

By way of background, laws barring interracial marriages existed in America even before nationhood. In 1664, Maryland barred marriages between whites and Native Americans. In 1691, Virginia enacted a law providing that a marriage between a white person and a "Negro, mulatto, or Indian" was an "abomination." By the early 1700s, most British and French colonies in North America barred marriages between whites and African-Americans. After the Revolutionary War, most states enacted similar laws. *See generally*, Sheryll Cashin, "*Loving*: Interracial Intimacy in America and the Threat to White Supremacy" (2017), 42-97.

In keeping with this pattern, California's first legislature in 1850 prohibited marriages between whites and "negroes or mulattoes" and further provided criminal penalties for persons who entered into or solemnized such marriages.

In 1872, the California Legislature eliminated the criminal penalties, but re-enacted the prohibitions. Civil Code Section 60 provided, "All marriages of white persons with negroes or mulattoes are illegal and void." Civil Code section 69 barred county clerks from issuing licenses for such marriages.

In 1880 and 1905, the Legislature amended Sections 69 and 60, respectively, to add "Mongolians" to the list of persons whom whites could not marry.

These Civil Code sections were examined in 1933, when a Filipino man and a white woman applied unsuccessfully to a county clerk for a marriage license. A California Court of Appeal held

that Filipinos were "Malays," which were considered a race separate from Mongolians when the latter were added to Sections 60 and 69. Accordingly, no bar to a white-Filipino marriage existed, and the court ordered the license issued. *Roldan v. Los Angeles County*, 129 Cal. App. 267, 268-69 (1933). Three California Supreme Court justices voted to accept the county's appeal, but lacked the necessary fourth vote.

The Legislature reacted quickly to *Roldan*. The same year, it amended Sections 60 and 69 at add Malays to the persons whom whites could not marry.

So matters stood until World War II. During the war, some employers bowed to the heavy demands of wartime production and relaxed their prior practices of racially segregating workforces. As these workplaces became more integrated during the war, so did employees' social lives.

One of California's major wartime employers was Lockheed Aircraft's Burbank plant. It eventually had 90,000 employees, including women and persons of color.

Two Lockheed employees, Mexican-American Andrea Perez and African-American Sylvester Davis met during the war. They decided to marry and applied to the county clerk for a license. *See* Peggy Pascoe, "What Comes Naturally: Miscegenation Law and the Making of Race in America" (2009), 205-07. At the time, Mexican-Americans were legally classified as white, so the clerk denied issuance of a license on the grounds that whites and African-Americans were barred from marrying each other.

Perez and Davis challenged the clerk's denial under the 14th Amendment's equal protection clause. The California Supreme Court heard the matter in 1948.

In a 4-3 decision, the court struck down Civil Code Sections 60 and 69 and ordered the county clerk to issue the license to Perez and Davis. Justice Roger Traynor, later to become California's chief justice, wrote the majority opinion. The majority began by noting that individuals' right to marry a person of one's choice is "fundamental" and one of the "basic rights of man." Only a "clear and present peril" and the "most exceptional circumstances" should allow race to affect fundamental rights. *Perez v. Sharp*, at 715-19.

The majority stated that the only purpose of Sections 60 and 69 was the prevention of "contamination" of the white race. They rejected this purpose and added that the laws led to absurd vagaries. For example, what is the definition of a mulatto? Under an 1850 law in California, a person with one-eighth or more of African-American ancestry was considered a mulatto, but the law had been repealed in 1872 with no new definition having been enacted. More generally, the majority asked how terms such as Mongolian and Malay applied to persons of mixed ancestry. Did race depend on "physical appearance" or "genealogical research"? What about Mexican-Americans who were classified as white but often had mixed ancestry? What about "Hindus," who were not barred from marrying whites, but may have had darker skin than some people who were barred? *Id.* at 721-29.

Still, a difficulty that the majority faced was *Pace v. Alabama*, 106 U.S. 583 (1883), where the U.S. Supreme Court unanimously upheld a state law barring marriage or sexual relations between whites and African-Americans. (Coincidentally, *Pace* was written by former California Supreme Court Chief Justice Stephen Field.) The *Perez* majority could only note that the actual conduct in *Pace* was sexual relations, and, accordingly, *Pace*'s holding re marriage was dicta. *See id.* at 726.

Justice Jesse Carter was a critical fourth vote in *Perez*. He joined the majority, but also wrote a solo concurrence that expressly raised World War II's lessons. He quoted Adolf Hitler's "Mein Kampf" about the dangers of "blood-mixing" and the importance of racial purity. Carter then wrote that such views were from "a madman, a rabble-rouser, a mass-murderer .... Let us not forget that this was the man who plunged the world into a war in which, for the third time, Americans fought, bled, and died for the truth of the proposition that all men are created equal." *Id.* at 739.

The *Perez* dissent emphasized that (a) traditionally, states had primacy in regulating marriage, (b) 30 of the then-48 states had laws barring whites from marrying people of color, and (c) all such laws had been upheld by an "unbroken line" of federal and state courts. The dissent added that racial "amalgamation" proponents should seek redress from the Legislature, rather than from the courts. *Id.* at 742-52, 760.

Thus, California became the first state to strike down interracial marriage restrictions as equal protection violations, though other states had previously repealed their restrictions by legislation.

Perez long reverberated throughout the nation as well as within California. In 1967, the U.S. Supreme Court unanimously invalidated all interracial marriage restrictions in the U.S., citing *Perez* as the first such decision. *Loving v. Virginia*, 388 U.S. 1, 5 n.5 (1967).

Decades later, in 2008, the California Supreme Court repeatedly cited to *Perez* in striking down California's statutory ban on same-sex marriage. *In re Marriage Cases*, 43 Cal. 4th 757. *Marriage Cases* praised a lesson of *Perez*, namely that long-standing marriage prohibitions — whether interracial or same-sex — may be overturned without catastrophic results. "[H]istory alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee [of marriage]. The decision in *Perez*, although rendered by a deeply divided court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized." *Id.* at 781.

To be sure, later in 2008, Proposition 8 overruled *Marriage Cases* via a state constitutional ban on same-sex marriages. However, the U.S. Supreme Court eventually invalidated all bans on same-sex marriages throughout the nation. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). While not cited in *Obergefell*, *Perez* — which had held the fundamental feature of marriage to be an individual's right of choice — resonated throughout it.

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