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Constitutional Law—Anti-Miscegenation Statutes Held to Violate Equal Protection and Due Process

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CONSTITUTIONAL LAW—ANTI-MISCEGENATION STATUTES HELD TO VIOLATE EQUAL PROTECTION AND DUE PROCESS.

In 1958 a white male and a Negro female, both residents of Virginia, were legally married in the District of Columbia. Shortly thereafter they returned to Virginia and were convicted of violating a state statute prohibiting interracial marriage.[1] Both were sentenced to one year in jail, but their sentences were suspended on the condition that they leave Virginia and not return together for a period of twenty-five years. The Supreme Court of Appeals of Virginia upheld the constitutionality of the statute and affirmed the convictions.[2] On appeal, the Supreme Court of the United States reversed unanimously. *Held*, the statute is unconstitutional since it is based on invidious racial discrimination in violation of the equal protection clause of the fourteenth amendment. The Court also found that the statute violated due process. *Loving v. Virginia*, 388 U.S. 1 (1967), *rev'g* 206 Va. 924, 147 S.E.2d 78 (1966).

The power of the states to regulate the capacity to marry is well recognized.[3] This capacity is defined as either the ability of the individual to make a contract or his right to obtain a marriage license.[4] Several criteria, derived from canon and civil law, have been used by the states to determine the capacity to marry. In a given instance, these criteria may be used alone or in conjunction with other criteria to determine this capacity.[5] State regulation of marriage serves various social purposes. For example, nonage has been used to protect minors by barring their marriage without the consent of a parent or guardian, but it has been held that a minor may overcome this presumption of incompetence by showing that he is capable of assuming marital duties, such as supporting a family, and that his marriage is in the best interests of society.[6] Also, mentally incompetent persons are not allowed to marry, and physical incompetence may be treated in the same manner or may merely make the marriage voidable.[7] In most countries of the world, race is not a criterion used to determine the capacity to marry.[8] Its use is approximately three centuries old, and

1. Va. Code Ann. § 20-58 (1960) states: "If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished. . . ." Section 20-59 provides that the punishment for violation shall be confinement to the penitentiary for from 1 to 5 years.

2. Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78 (1966).

3. *See* Maynard v. Hill, 125 U.S. 190, 205 (1888); Stevens v. United States, 146 F.2d 120, 123 (10th Cir. 1944); Leon v. Torruella, 99 F.2d 851, 855 (1st Cir. 1938); *see generally* Lanham v. Lanham, 117 N.W. 787 (Wis. 1908); P. Ryan & D. Granfield, Domestic Relations (1963).

4. *See* Mich. Stat. Ann. § 25.2 (1957); Okla. Stat. Ann. tit. 43 § 1 (1954); Wis. Stat. Ann. § 245.01 (1957); *cf.* Tenn. Code Ann. § 36-411 (1955); *but cf.* General Am. Life Ins. Co. v. Cole, 195 F. Supp. 867 (D.C. Mo. 1961); R. Peck, Domestic Relations 3 (1913).

5. 1 J. Bishop, Marriage, Divorce and Separation 112 (1891); *see also* H. Clark, Domestic Relations 80-102 (1965).

6. *See* N.Y. Dom. Rel. Law § 7(1) (Supp. 1964); *but see* Idaho Code Ann. 32-202 (1947).

7. Rosander v. Rosander, 177 Kan. 45, 276 P.2d 338 (1954); Ala. Code tit. 34, § 101(b-1) (1953); Mo. Rev. Stat. § 451:020 (1949); N.C. Gen. Stat. § 51-3 (1966).

8. *See* J. Bishop, *supra* note 5.

the United States is one of only two nations in the world where it is used to determine this capacity.[9]

In determining the capacity to marry, states are permitted to establish statutory classifications to effectuate any legitimate legislative purpose.[10] To uphold these classifications, the state must first show a legally valid purpose such as promotion of public health, safety or welfare.[11] But when a statute with a legally valid purpose inflicts a substantial injury on a person, such as denying him the right to do business, the state must meet the requirement of equal protection, which places two limitations on the classification or capacity. First, classifications must be based on differences in character or situation that justify the distinction, and second, the distinctions and differences must bear a reasonable relation to the classification.[12] For example, in *Skinner v. Oklahoma*,[13] a statute which required the sterilization of persons convicted of a felony more than twice was invalidated on the grounds that the classification of a person as a felon, *vis-à-vis* other criminals, was not justifiable for this purpose. Even assuming the classification is otherwise valid, a statute is nevertheless constitutionally suspect if the classification is based on race.[14] This presumption of unconstitutionality operates much in the manner of the requirements of due process by holding the statute to very high legal standards.[15] A state may overcome this presumption only by showing an overriding state interest, such as preventing the spread of serious disease.[16] The person challenging the validity of the statute must then demonstrate that it imposes invidious discrimination.[17] The arbitrariness and intention necessary to prove the discrimination invidious are shown when persons who have committed intrinsically the same offense are treated differently by the law,[18] when extrinsic evidence is introduced showing a legislative scheme to favor one class of persons over another,[19] or when there is no reasonable basis to justify the classification.[20] Due process now requires a state to show the classification is absolutely necessary to the accom-

9. The other nation is the Union of South Africa.

10. *See* District of Columbia v. Brooke, 214 U.S. 138, 149 (1909); United States v. McNeill, 294 F.2d 117 (2d Cir. 1961).

11. *See* Louisiana v. United States, 380 U.S. 145, 153 (1965); Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

12. Cunningham v. United States, 256 F.2d 467, 473 (5th Cir. 1958); *see also* Baxstrom v. Herold, 383 U.S. 107, 113 (1966).

13. 316 U.S. 535 (1942).

14. Korematsu v. United States, 323 U.S. 214, 216 (1944); *cf.* Goss v. Board of Education, 373 U.S. 683, 686 (1963).

15. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

16. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

17. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Hughes v. Heinze, 268 F.2d 864 (9th Cir. 1959); Bush v. Martin, 224 F. Supp. 499, 510 (S.D. Tex. 1963); Spahos v. Mayor & Councilmen of Savannah Beach, 207 F. Supp. 688 (S.D. Ga. 1962); Sanders v. Gray, 203 F. Supp. 158, 168 (S.D. Ga. 1962).

18. Yick Wo v. Hopkins, 118 U.S. 356 (1886); *cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942).

19. Hoffman v. Halden, 268 F.2d 280, 290 (9th Cir. 1959); *cf.* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

20. Goesaert v. Cleary, 74 F. Supp. 735 (E.D. Mich. 1947); *cf.* McGowan v. Maryland, 366 U.S. 420, 426 (1961).

plishment of a legitimate legislative purpose.[21] For example, protecting the health of its citizens is a valid basis for state legislation, but where out-of-state milk is proved to be of the same quality as milk produced in the state, the state may not discriminate between the two unless it can prove that this is the only feasible means of protecting its citizens' health.[22]

Miscegenation statutes are infrequently enforced, and their constitutionality has not been litigated as often as has that of racially restrictive statutes in the areas of education and public housing.[23] While there has been little recent litigation, miscegenation statutes have been held constitutional, with one exception,[24] by all the state and federal courts which have considered the question,[25] but until *Loving*, the United States Supreme Court had not passed on this issue. Recently, in a Virginia case where one partner to the marriage sought to have it annulled on the grounds that it violated the state's anti-miscegenation statute, the Court, *per curiam*, remanded the case for clarification because the record did not disclose sufficient information to enable the Court to clearly consider the constitutional question.[26] On remand, the Supreme Court of Appeals of Virginia affirmed without reopening the case, and the United States Supreme Court, again *per curiam*, dismissed further appeal on the grounds that the second decision of the Virginia court left the record devoid of a properly presented federal question.[27] In another recent case, the Court, in a memorandum opinion, denied certiorari to review an Alabama decision upholding that state's anti-miscegenation statute.[28] In *McLaughlin v. Florida*, a Florida statute prohibiting interracial cohabitation and fornication was invalidated on the grounds that it violated the equal protection clause of the fourteenth amendment; but, although the point was urged, the Court declined to extend its holding to strike down Florida's anti-miscegenation statute.[29]

Various theories have been advanced to justify anti-miscegenation statutes. The first, which was rejected by the state courts some time ago and has not been argued in the federal courts, is that under the tenth amendment marriage is of

21. McLaughlin v. Florida, 379 U.S. 184, 196 (1964).
22. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).
23. *See generally* L. Schuyler, The Caucasian Problem 220 (1944); Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 Cornell L.Q. 208, 211 (1957); Comment, 1 Duke B.J. 26, 40 (1951); Comment, 11 W. Res. L. Rev. 93, 101 (1960).
24. Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948) (4-3 decision: Traynor, J., writing for the majority).
25. *See, e.g.*, Stevens v. United States, 146 F.2d 120 (10th Cir. 1944); *Ex parte* Francois, 9 F. Cas. 699 (No. 5047) (C.C.W.D. Tex. 1879); Matter of Hobbs, 12 F. Cas. 262 (No. 6549) (D. Mass. 1871); State v. Tutty, 41 F. 753 (S.D. Ga. 1890); Jackson v. State, 72 So. 2d 114, *cert. denied*, 348 U.S. 888 (1954); Story v. State, 178 Ala. 98, 59 So. 480 (1912); Green v. State, 58 Ala. 190, 29 Am. R. 739 (1877); State v. Pass, 59 Ariz. 12, 121 P.2d 882 (1942); Scott v. Georgia, 39 Ga. 321 (1869); State v. Brown, 236 La. 562, 108 So. 2d 233 (1959); State v. Jackson, 80 Mo. 175, 50 Am. R. 499 (1883); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, *vacated and remanded*, 350 U.S. 891 (1955), *on remand*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956).
26. Naim v. Naim, 350 U.S. 891 (1955).
27. Naim v. Naim, 350 U.S. 985 (1956).
28. Jackson v. Alabama, 348 U.S. 888 (1954).
29. 379 U.S. 184 (1964).

such fundamental concern to the states that the fourteenth amendment does not apply to statutes regulating it.[30] The contention that the record of Congressional debates indicates that the framers of the fourteenth amendment never intended it to apply to anti-miscegenation statutes has been advanced, but not accepted by the courts.[31] Another theory states that anti-miscegenation statutes do not violate equal protection because they punish both offenders equally. This argument was accepted by the United States Supreme Court in an early case dealing with a statute punishing interracial cohabitation and fornication,[32] but in *McLaughlin*, with the same type of statute at issue, the Court rejected this theory.[33] While it has also been rejected by the Court when applied to the area of public housing,[34] its applicability to anti-miscegenation statutes is still untested. Today, the principal justification offered for anti-miscegenation statutes rests on the contention that legislatures have a reasonable basis for enacting them and the wisdom of the legislature in so doing is not a justiciable question.[35] The older ground set forth as providing this basis, formerly accepted by some courts[36] but not persuasive today,[37] maintains the Caucasian race is superior to the Negro race and intermarriage begets inferior progeny. Therefore, it was contended, anti-miscegenation statutes serve the valid purpose of preserving racial integrity.[38] The more modern argument asserts that racial intermarriage creates serious social problems, such as high divorce rates and strains on the progeny of such a marriage, and these problems should be proper targets for legislative action.[39] The difficulty with this theory lies in the fact that it applies equally to ethnic and religious intermarriage, and it would not be accepted by the courts to uphold bans against these types of marriages.[40]

Arguments against the validity of anti-miscegenation statutes begin with the contention, applicable only where the right to marry is defined solely as the right to contract, that they constitute an impairment of the right of a citizen to enter into a contract.[41] Anti-miscegenation statutes also are alleged

30. *See* State v. Gibson, 36 Ind. 389, 10 Am. R. 42 (1871); State v. Jackson, 80 Mo. 175, 50 Am. R. 499 (1883).

31. *See generally* Avins, *Anti-Miscegenation Law and the Fourteenth Amendment: The Original Intent*, 52 Va. L. Rev. 1224 (1966); *see also* Cong. Globe, 39th Cong., 1st Sess., part I, 332, 420, 505, 632 (1865).

32. Pace v. Alabama, 106 U.S. 583 (1882).

33. 379 U.S. 184 (1964).

34. Shelley v. Kraemer, 334 U.S. 1, 22 (1948); *see also* Cummings & Kane, *Miscegenation, the Constitution and Science*, 38 Dicta 24, 29 (1961).

35. *Cf.* Boineau v. Thornton, 235 F. Supp. 175 (E.D.S.C. 1964).

36. *Cf.* Scott v. Georgia, 39 Ga. 321 (1869); State v. Jackson, 80 Mo. 175, 50 Am. R. 499 (1883); Lonas v. State, 50 Tenn. 287 (1871).

37. *See* Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948).

38. Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1202 (1966); *see also* Scott v. Georgia, 39 Ga. 321 (1869); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955).

39. *See* Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17, 25 (1948); State v. Brown, 236 La. 562, 108 So. 2d 233 (1959); Blake v. Sessions, 94 Okla. 59, 220 P. 876 (1923); *see generally* A. Gordon, Intermarriage: Interfaith, Interracial and Interethnic 334-73 *passim* (1964); Note, 58 Yale L.J. 472, 478 (1949).

40. *Cf.* Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17, 20-30 (1948).

41. *See* State v. Gibson, 36 Ind. 389, 10 Am. R. 42 (1871); Comment, 8 Wm. & Mary L. Rev. 133, 135 (1966).

to deny freedom of religion by preventing the person from participating in the marriage ceremony provided by his religion,[42] but this theory is limited by the fact that marriage can exist totally outside of any religious context.[43] One of the two major theories opposed to anti-miscegenation statutes relies on the premise that the state can show no overriding legislative purpose to support the use of racial classifications in regulating marriage, and concludes that these statutes impose invidious discrimination which violates the equal protection clause of the fourteenth amendment.[44] The other major theory asserts that marriage is a fundamental legal right and may be regulated only by a statute that is a legitimate exercise of the state's police power in pursuit of a valid objective.[45] Advocates of this position maintain that anti-miscegenation statutes do not meet this test and, therefore, deny due process.

In the instant case, the Supreme Court found the classifications in the Virginia statute were based solely on race, and noted that the fourteenth amendment was intended to eliminate state-imposed invidious discrimination.[46] Rejecting the notion that equal punishment meets the requirement of equal protection,[47] the Court declared that denying the right to marry on the basis of race violates the equal protection clause of the fourteenth amendment.[48] It went on to state, "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[49] Marriage being a "fundamental freedom, [and a] basic civil right of man,"[50] any denial of it on unsupportable grounds is "directly subversive of the principle of equality at the heart of the Fourteenth Amendment, [and] . . . surely . . . deprive[s] all the State's citizens of liberty without due process of law."[51] These principles, which had been annunciated in two prior concurring opinions, were found persuasive by the majority of the *Loving* Court.[52] They are founded on the idea that marriage is one of the rights assured by the penumbra of the Bill of Rights, and is therefore protected by due process.[53]

Concurring, Mr. Justice Stewart reiterated his position that no statute making the criminality of an act depend on the race of the actor can be constitutionally valid.[54] He asserted that in this type of case discrimination in the

42. *See* Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 Geo. L.J. 49, 65-67 (1964); *cf.* Reynolds v. United States, 98 U.S. 145 (1878).
43. Wadlington, *supra* note 38, at 1217.
44. *See generally* Wadlington, *supra* note 38, at 1219-22; Applebaum, *supra* note 42, at 68-70; Cummings & Kane, *supra* note 34, at 32-33; *cf.* Griswold v. Connecticut, 381 U.S. 479, 486, 500 (1965).
45. *See, e.g.*, Applebaum, *supra* note 42, at 68-70; Wadlington, *supra* note 38, at 1216-19; *cf.* McLaughlin v. Florida, 379 U.S. 184 (1964).
46. Instant case at 11-12.
47. *See* Pace v. Alabama, 106 U.S. 583 (1882).
48. Instant case at 11-12.
49. *Id.* at 13.
50. *Id.*
51. *Id.*
52. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (Harlan & White, J.J., concurring); Skinner v. Oklahoma, 316 U.S. 535 (1942) (Stone, C.J., concurring).
53. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).
54. McLaughlin v. Florida, 379 U.S. 184, 198 (1964).

statute is invidious *per se*, and the state is barred from showing any overriding legislative purpose.[55] His opinion, however, is limited to the ground that the statute violates the equal protection clause.[56]

Commentators have pointed to the unconstitutionality of miscegenation statutes for some time, and that they are now held to deny equal protection was not totally unexpected.[57] But for a lack of interest on the part of the dominant interest groups,[58] and the lack of a properly presented case,[59] these statutes probably would have been struck down a decade ago. Viewed in perspective, this decision represents an inevitable conclusion, rather than a major breakthrough, of the Negroes' quest for equal rights. Nonetheless, fifteen states still retain anti-miscegenation statutes.[60] These states have long been aware that the courts will invalidate any statute not affording equal protection, and must now realize that this applies to statutes regulating marriage. Moreover, as *Loving* holds that there can be no overriding legislative purpose behind these statutes, it is predictable that the states cannot redraft their anti-miscegenation statutes so as to comply with the requirement of equal protection.[61]

The unportended result of the instant case is that marriage is now a fundamental legal right entitled to the protection of the concept of those liberties secured by due process. Thus, the legal requirements for statutes regulating marriage will be much stricter than if the right to marry was entitled only to equal protection requirements. Statutes regulating the capacity to marry must not abridge, or curtail by an arbitrary and unjustified use of the state's police power, the right to marry. The state can no longer show an overriding legislative purpose to uphold these statutes. In order not to constitute an abridgement of the right to marry, statutes regulating marriage now must be justifiable in light of all the factors bearing on the situation[62] and absolutely necessary to the accomplishment of some valid legislative purpose.[63]

This gives rise to the question of what will be held to constitute an abridgement of the right to marry. For example, it would not seem that requiring a

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55. *Id.*
56. *Id.* n.*.
57. J. Greenberg, Race Relations and American Law 345 (1959); Cummings & Kane, *supra* note 34, at 52; Weinberger, *supra* note 23, at 222; Note, 25 Md. L. Rev. 41, 48 (1965); *cf.* Hager, *Some Observations on the Relationship Between Genetics and Social Science*, 13 Psychiatry 371, 375 (1950); *but see* Walton, *The Present Status of Miscegenation Statutes*, 4 Wm. & Mary L. Rev. 28, 35 (1963).
58. *See generally* L. Logan, A Negro's Faith in America 27 (1945); G. Myrdal, An American Dilemma 60-61 (1944); Comment, 1 Duke B.J. 26, 40 (1951); *but cf.* F. Fanon, The Wretched of the Earth 32 (1963).
59. *See, e.g.*, Naim v. Naim, 350 U.S. 985 (1956).
60. Ala. Code tit. 14, § 360 (1958); Ark. Stat. Ann. § 55-104 (1947); Del. Code Ann. tit. 13, § 101 (1953); Fla. Stat. Ann. 741.11 (1964); Ga. Code Ann. § 53-106 (1961); Ky. Rev. Stat. Ann. § 402.020 (Supp. 1962); La. Civ. Code Ann. art. 94 (West, 1952); Miss. Code Ann. § 459 (1956); Mo. Rev. Stat. § 451:020 (Supp. 1967); N.C. Gen. Stat. § 14-181 (1966); Okla. Stat. Ann. tit. 43, § 12 (1954); S.C. Code Ann. § 20-7 (1962); Tenn. Code Ann. 36-402 (1955); Tex. Pen. Code art. 492 (1952); W. Va. Code Ann. § 4697 (1961).
61. *Cf.* Applebaum, *supra* note 42, at 49; Note, 20 S. Cal. L. Rev. 80, 84 (1946).
62. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191 (1964).
63. *Id.* at 193-94.

blood test as a prerequisite to obtaining a marriage license is an abridgement of this right. This requirement simply sets forth certain procedures that must be followed before this right may be exercised and, given that the purpose of this requirement is to prevent the spread of serious disease, these statutes are a justifiable exercise of the state's police power.[64]

However, other statutes regulating the capacity to marry, such as those determining mental capacity, may present greater problems. These statutes define mental incompetency in such terms as idiot, imbecile, moron, lunatic, feeble-minded, weak-minded, of unsound mind, incurably insane and hereditarily insane.[65] Initially, the state will have to demonstrate a valid legislative purpose in denying mentally incompetent persons the right to marry. Where due process is at issue, courts have held that the prevention of possible harm to the progeny of a marriage and the prevention of social problems are not sufficiently valid purposes to justify the abridgement of a fundamental right.[66] The states will have to show the possibility of more serious harm by proving that the marriage of a mental incompetent is injurious either to some individual or society in general.

Assuming arguendo that the state can show a valid legislative purpose, such statutes must still be proved absolutely necessary to the accomplishment of that purpose. It may be difficult for a state to show that the marriage of, *e.g.*, a feeble-minded person, would violate this legislative purpose. The state will have to prove that there is a justifiable distinction between mentally incompetent persons and normal persons. Insofar as these statutes impose penal sanctions, they are now subject to challenge on the ground that the language by which they define mental incompetency is so indefinite as to require reasonable men to guess at its meaning.[67]

In addition, the state will have to demonstrate that the means chosen to achieve its purpose are absolutely essential to the accomplishment of that purpose. If the state wishes to protect society from the problem of an abundance of mentally incompetent persons, it must prove that, considering the present state of knowledge on the subject, prohibiting these persons from marrying is the *sine qua non* of this end. It is highly questionable whether this burden of proof can be satisfied, and it is equally doubtful that these statutes are now

64. Comment, 37 Va. L. Rev. 339, 342 (1952); *cf.* Peterson v. Widule, 157 Wis. 614, 147 N.W. 966 (1914).

65. *See, e.g.*, Del. Code Ann. tit. 13, § 101(b-1) (1953); Ind. Ann. Stat. § 44-104 (1965); Me. Rev. Stat. Ann. tit. 19, § 32 (1964); Mass. Ann. Laws ch. 207, § 5 (1955); Mich. Stat. Ann. § 25.6 (1957); Mo. Rev. Stat. § 451:020 (Supp. 1966); N.J. Stat. Ann. § 37:9-1 (1937); N.C. Gen. Stat. § 51-12 (1966); Pa. Stat. Ann. tit. 48, § 1-5(d) (1965); R.I. Gen. Laws Ann. § 15(1)(5) (1956); Tenn. Code Ann. § 36-411 (1955); Va. Code Ann. § 20-47 (1960); Wash. Rev. Code Ann. § 26.04.030 (1961); W. Va. Code Ann. § 48-2-1 (1966).

66. *Cf.* Wright v. Georgia, 373 U.S. 284, 292-93 (1963); Buchanan v. Warley, 245 U.S. 60, 81 (1917); Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17, 26 (1948).

67. Ashton v. Kentucky, 384 U.S. 195, 200-01 (1966); Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961); Winters v. New York, 333 U.S. 507, 515-18 (1948); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

on any firmer ground than statutes requiring the sterilization of certain types of criminals.[68]

The states will now have to re-evaluate their procedural apparatus for determining the mental capacity to marry. It is doubtful that allowing a licensing clerk to make this determination is satisfactory.[69] Some states now have procedures whereby this determination is made only after consideration of the complete medical history of the person and on the recommendation of several competent medical experts and, in some cases, judges.[70] It is likely that all such statutes will now be held to at least this standard.

One type of statute that probably will fall in the wake of the instant decision is that denying an epileptic the right to marry.[71] Some states have presaged the Court in this area by repealing or amending such statutes regulating the capacity to marry.[72] In light of the amount of medical knowledge presently available on the subject, denying a person the right to marry by classifying him as an epileptic is no more supportable than denying him this right by classifying him as a Negro.

It seems that, in present day American society, the words "pursuit of happiness" and the penumbra of rights assured by the first amendment, and secured by the fifth and fourteenth amendments, embrace the right to advance in society. As marriage, along with education and employment, is one of the primary paths of advancement,[73] there is no reason for holding statutes regulating it to a lesser standard than statutes regulating these other areas. While this has been recognized in the case of Negroes, there is no reason to so limit the principle. The most beneficial effect of this decision may be the impetus it gives the states to review their statutes regulating marriage with regard to the requirements of due process.

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68. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

69. Miss. Code Ann. § 461(f), *as amended*, [1957] Miss. Laws ch. 17, § 1; Tenn. Code Ann. § 36-411 (1955).

70. Iowa Code Ann. § 595.20 (1946); Mass. Ann. Laws ch. 207, § 5 (1955); N.Y. Dom. Rel. Law § 7(5) (Supp. 1964); *but cf.* N.C. Gen. Stat. § 51-12 (1953) which provides that a person adjudged mentally incompetent may marry if he consents to sterilization.

71. Mo. Rev. Stat. § 451:020 (Supp. 1966); N.C. Gen. Stat. § 51-12 (1953); Va. Code Ann. § 20-47 (1960); W. Va. Code Ann. § 48-2-1 (1966).

72. Del. Code Ann. tit. 13, § 101(b-1) (1953), *as amended*, 54 Del. Laws ch. 34 (1963); Mich. Stat. Ann. § 25.6 (1957), *as amended*, [1962] Mich. Pub. Acts No. 107; N.J. Stat. Ann. § 37:1-9 (1937), *as amended*, [1958] N.J. Laws ch. 158; *see also* Wis. Stat. Ann. § 245.035 (1957), which was amended by [1953] Wis. Laws ch. 63 to overrule Kitzman v. Kitzman, 167 Wis. 308, 166 N.W. 789 (1918).

73. *See generally* R. Bendix & S.M. Lipset, Class, Status and Power, 371-500 (1953); R. Winch, The Modern Family 91-109 (1952).