

Race, Marriage, and Sovereignty in the New World Order

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Racially restrictive marriage laws lay at the intersection of state claims of domestic sovereignty and federal obligations to protect the constitutional rights of citizens. In 1948, California overturned its anti-miscegenation law, citing, in addition to the Fourteenth Amendment, the United Nations Charter. This decision sparked a contentious discussion about the relationship of human rights norms to racial conventions in the United States, and triggered a debate about the peril of international law that resulted in an effort to amend the Constitution and limit the treaty-making powers of the president. Both the constitutional and the international logics of individual human rights threatened local custom and energized political opposition. American stigmatization of international human rights norms and treaties was rooted directly in the civil rights struggles in the United States and reflected the potential of international organizations to assault domestic racial conventions at their foundations.

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INTRODUCTION

After 1945, as it warmed to its new role as "leader of the free world," the United States found it convenient to portray the Jim Crow South, with its separate and unequal segregated schools, its "white" and "colored" waiting rooms, its low-wage agricultural economy and its disenfranchised African-American population, as a legal outlier in America. Northern schools were segregated according to residential patterns rather than by law; public transportation was open to all; and black votes were courted — and counted — by urban politicians in the North and West. Detroit and Los Angeles may not have been paradise, but a man could get a job there and raise a family free from the stifling white supremacist environment of the South.

The postwar South's system of legal discrimination by race was exceptional in many ways. But southern states' regulation of interracial marriage was entirely normative. In 1948, when the California Supreme Court became the first court since Reconstruction to rule an anti-miscegenation law unconstitutional, thirty of forty-eight states had racially restrictive marriage laws on their books.¹ Adopted in colonial America in the late seventeenth century, racially restrictive marriage laws played an essential role in establishing stable categories of blackness and whiteness, and therefore stable categories of slave and free, until the Civil War. After the war and Reconstruction, state anti-miscegenation laws, and the racial identity laws that upheld them, became the cornerstone for the post-emancipation world of racial segregation and discrimination. The stability of that world depended on whites' ability to maintain these laws through their dominance of state legislatures and Congress, and the Supreme Court's studied willingness to ignore them.

Racially restrictive marriage laws were a particularly vital balance point for America's federal system in the mid-twentieth century because of their foundational importance to white dominance everywhere (and to "the

¹ Perez v. Sharp, 198 P. 2d 17 (Cal. 1948). During Reconstruction, six Republican state legislatures in the South either repealed their states' restrictive marriage laws or found them unconstitutional under the Fourteenth Amendment. See Burns v. State, 48 Ala. 195 (1872); *Ex parte Francois*, 9 F. Cas. 699 (C.C.W.D. Tex. 1879) (No. 5047); Hart v. Hoss & Elder, 26 La. Ann. 90 (1874). Three states repealed their anti-miscegenation laws (South Carolina, Louisiana and Mississippi) and two others omitted them when drafting new codes of law (Arkansas and Florida). PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE AND LAW — AN AMERICAN HISTORY 80 (2003).

southern way of life" in particular) and their location at the intersection of state claims of domestic control and federal obligations to protect the constitutional rights of citizens. Unless and until the Supreme Court reviewed anti-miscegenation laws (which it delayed doing until 1967), California's 1948 reversal of precedent posed little threat to other states with restrictive marriage laws. Two aspects of the California decision in *Perez v. Sharp* were troubling to defenders of white dominance, however. First, in addition to overturning the statute as ineffectual, the California court made a constitutional claim when it argued that marriage was a fundamental right that could not be regulated according to race under the Fourteenth Amendment's equal protection clause.² Second, and potentially more troubling, one of the concurring opinions in *Perez* cited the United Nations Charter, which had been ratified by the U.S. as a treaty in 1946 and which prohibited all forms of racial discrimination.

The California Supreme Court's interpretation of the Fourteenth Amendment had no influence outside its own state jurisdiction. But the court's citation of the U.N. Charter revealed the potential of international law to shape domestic law. This was, for white Southerners, an unwelcome reminder of their region's vulnerability to imported weapons. In the five years following *Perez*, champions of local sovereignty used the decision to illustrate the danger that universal human rights norms posed to racial conventions in the United States, and triggered a debate about the peril of international law that resulted in an effort to amend the Constitution and limit the treaty-making powers of the President. At the same time, proponents of racial equality in America called on international law to buttress their own liberal interpretations of the Constitution. Disputes over interracial marriage provide powerful examples of the conflict-laden history of legal imports, the ways in which different groups use international law (or the threat of international law) in domestic disputes, and the protectionist measures such importation can produce — measures whose lasting legacy is felt still.

I. *PEREZ V. SHARP*

Andrea Perez, who (as a Mexican-American) was legally white, met Sylvester Davis, who was African-American, on the floor of a Lockheed

² Article 1, section 7(a) of the California Constitution guarantees equal protection of the laws. In the majority opinion, Justice Roger Traynor also invoked the Fourteenth Amendment of the federal Constitution.

Aviation factory in 1944. In 1947 the couple was denied a marriage license by the Los Angeles county clerk, who cited California's anti-miscegenation law, which forbade "all marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes."³ In October 1948, the California Supreme Court ruled four to three for the plaintiffs. Justice Roger J. Traynor wrote the majority decision for his colleagues, two of whom wrote concurring opinions that stressed different legal reasoning. Conscious that he was writing for a national legal audience and that a judge's decision must, "if possible, allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it," Traynor crafted a tight decision on the narrowest grounds possible while still mounting a frontal assault on scientific racism, unconstitutional racial discrimination, and obsolete precedents that denied some Americans access to a fundamental right of citizenship.⁴

Conceding at the outset that "the regulation of marriage is considered a proper function of the state," Traynor rejected the plaintiffs' narrow First Amendment argument that anti-miscegenation laws violated religious liberty ("although freedom of conscience and the freedom to believe are absolute, the freedom to act is not") in favor of a broader assertion that restrictive marriage laws violated the due process clause of the Fourteenth Amendment. "If the miscegenation law under attack in the present proceeding is directed at a social evil and employs a reasonable means to prevent that evil," Traynor wrote, "it is valid regardless of its incidental effect upon the conduct of particular religious groups. If, on the other hand, the law is discriminatory and irrational, it unconstitutionally restricts not only religious liberty but the liberty to marry as well." Noting mildly that the due process clause "protects an area of personal liberty not yet wholly delimited," Traynor listed those rights, including marriage, recognized by the Supreme Court as "essential to the orderly pursuit of happiness by free men." Marriage, Traynor concluded, "is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means."⁵

3 CAL. CIV. CODE § 69 (West 1906) (amended 1937, 1959); CAL. CIV. CODE § 60 (West 1906) (amended 1937, repealed 1959).

4 Roger Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 166 (1960), cited in BEN FIELD, ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR 10 (2003). Legendary for his reform of product liability law and divorce, Traynor is considered one of the leading American jurists of the twentieth century.

5 Perez, 198 P.2d at 18-19.

When he pronounced marriage a "fundamental right of free men," Traynor appealed to the idea that the "dignity of the person and worth of the human being are special objects of solicitude under the Constitution of the United States,"⁶ and relied on a string of Supreme Court rulings that protected the personal rights of individuals under the Fourteenth Amendment. These cases — *McCabe v. Atchison, Topeka & Santa Fe Railroad Company*,⁷ *Missouri ex rel. Gaines v. Canada*⁸ and the recently-decided restrictive covenant case *Shelley v. Kraemer*⁹ — represented three decades of legal effort on the part of the NAACP and others to establish that the restriction, solely on the basis of race, of an individual's right to ride on a train or acquire an education or buy a house violated the equal protection of the laws clause of the Constitution. Next, Traynor turned to two rulings that explicitly counted marriage as a civil right: *Myer v. Nebraska*,¹⁰ which included among those rights protected by the Fourteenth Amendment the right "to marry, establish a home and bring up children,"¹¹ and *Skinner v. Oklahoma ex rel. Williamson*,¹² in which the Court, in the process of ruling against mandatory sterilization of felons, defined marriage and procreation together as "one of the basic civil rights of man."¹³ Observing that in upholding racial segregation laws the Court had ruled that the state was obliged to provide equal facilities regardless of race so that no substantive right could be impaired, Traynor rejected the applicability of any notion of "separate but equal" to marriage. "Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute necessarily impairs the right to

6 Noel T. Downing, *Protection of Human Rights Under the United States Constitution*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 96, 100 (1946). Downing was Nash Professor of Law at Columbia University, and a former special assistant legislative counsel to the United States Senate.

7 235 U.S. 151 (1914).

8 305 U.S. 337 (1938).

9 334 U.S. 1 (1948).

10 262 U.S. 390 (1923).

11 *Id.* at 399.

12 316 U.S. 535 (1942).

13 *Id.* at 541. Traynor also relied on *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as well as three cases that originated in California: *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in which the Court wrote that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"; *Hirabayashi v. United States*, 230 U.S. 81 (1943), which held that racial discriminations might be allowable in a national emergency such as a war; and *Oyama v. California*, 322 U.S. 633 (1948), which established that only the most exceptional circumstances could excuse racial discrimination in the face of the equal protection clause.

marry,"¹⁴ Traynor concluded. "Human beings," he added, revealing a hint of the moral passion that underlay his decision, "are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains."¹⁵

Having established marriage as a fundamental civil and human right, Justice Traynor asked if the state could classify individuals according to their race in legislation regulating their fundamental rights. Only five years earlier this question had been answered in the affirmative when the Supreme Court upheld the interment of Japanese-Americans in racially-defined detention camps. In the intervening years, however, and most recently in a case that originated in California, the Supreme Court had proclaimed that the intent of the Fourteenth Amendment was "to prevent state legislation designed to perpetuate discrimination on the basis of race or color."¹⁶ The Court did not go so far as to repudiate all legislation that differentiated among citizens on the basis of race or color, but it did render such laws suspect by announcing that they had to be backed by a "compelling justification" capable of sustaining racial discrimination.¹⁷ Sections 60 and 69 of the California Civil Code passed this test, according to the state, because they were designed to protect the precious commodity of whiteness by prohibiting the contamination of the Caucasian race by races whose members were physically and mentally inferior to whites. Citing Nobel laureate Gunnar Myrdal, Traynor dismissed the first assumption, that of the inherent physical inferiority of non-Caucasians, as being "without scientific proof."¹⁸ As for the question of mental inferiority, the justice called on an impressive array of recent scientific literature to rebut any correlation between race and intelligence, noting in passing that "in any event the Legislature has not made an intelligence test a prerequisite to marriage."¹⁹ Finally, Traynor rebutted the claim that racially restrictive marriage laws played a vital role in maintaining the public peace. Citing similar language from the Supreme Court's decision in *Buchanan v. Warley*,²⁰ Traynor concluded that "it is no

14 *Perez*, 198 P.2d at 21.

15 *Id.* at 25.

16 *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945).

17 *Id.*; *Oyama v. California*, 332 U.S. 633 (1948).

18 *Perez*, 198 P.2d at 24.

19 *Id.* at 25.

20 245 U.S. 60, 81 (1917) ("[A]s 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.").

answer to say that race tension can be eradicated through the perpetuation of the prejudices that give rise to the tension."²¹

Even if anti-miscegenation laws were considered justifiable, though, California's was impossible to implement, Traynor argued in conclusion, because it failed to define any of its racial categories. "The fact is overwhelming," he remarked, "that there has been a steady increase in the number of people in this country who belong to more than one race Some of these persons have migrated to this state; some are born here illegitimately; others are the progeny of miscegenous marriages valid where contracted and therefore valid in California."²² The apparent purpose of the statute, Traynor continued, "is to discourage the birth of children of mixed ancestry within this state. Such a purpose, however, cannot be accomplished without taking into consideration marriages of persons of mixed ancestry. A statute regulating fundamental rights is clearly unconstitutional if it cannot be reasonably applied to accomplish its purpose."²³ By failing to define any of its racial categories, including the mixed-race group of mulattoes, the California law was too vague and uncertain to accomplish its task. How, Traynor asked, could racial identity be determined? And who was supposed to do it? The courts could not do it without trespassing on the province of the legislature, and other state officials could not act without legal guidance. Noting that "if no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one,"²⁴ Traynor held that California's restrictive marriage statutes were too vague and uncertain to be enforceable regulations of a fundamental right, and that they were unconstitutional "by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups."²⁵

Traynor's rejection of racially-restrictive marriage laws spoke for a fragile majority of four. Two of the three justices who supported Traynor published their own separate, and divergent, concurring opinions. The freedom of religion argument appealed to one; another anchored his views, as we shall see, in a variety of texts. The three-judge dissent, on the other hand, was united in support of anti-miscegenation laws. Written by Justice John W. Shenk, the dissent was a masterful example of doctrinal logic. Restrictive marriage laws had been valid in California for nearly one hundred years,

21 *Perez*, 198 P.2d at 25.

22 *Id.* at 28. Unlike many states with anti-miscegenation laws, California recognized mixed-race marriages contracted elsewhere according to law.

23 *Id.*

24 Citing *In re Di Torio*, 8 F.2d 279, 281 (N.D. Ill. 1925).

25 *Perez*, 198 P.2d at 29.

Shenk noted, and valid elsewhere for far longer. California's law had been reaffirmed and broadened to apply to Filipinos in the 1930s.²⁶ Challenged as unconstitutional, such laws had been uniformly upheld across the nation. Traynor had not proved that the Constitution "confers upon a citizen the right to marry any one who is willing to wed him."²⁷ Insisting that anti-miscegenation laws "have a valid legislative purpose even though they may not conform to the sociogenetic views of some people,"²⁸ Shenk defended the sovereignty of states with regard to marriage and argued that there was a great deal of evidence to support the California legislature's conclusion that "intermarriage between Negroes and white persons is incompatible with the general welfare and therefore a proper subject for regulation under the police power."²⁹

A majority of the California Supreme Court Justices disagreed with this line of reasoning. By 1948, racial restrictions on marriage had become anathema to four of the seven justices, who agreed that they were unconstitutional. What the justices could not agree on was *why* anti-miscegenation laws violated not only their own moral sense but the Constitution as well. For all its grace, Traynor's majority opinion was a grab-bag of constitutional arguments designed to bolster the idea that marriage was a fundamental right. Like the Supreme Court's decision on marriage and reproduction in *Skinner v. Oklahoma* cited by Traynor, *Perez* represented a way-station on the road to fundamental interests equal protection analysis.³⁰ Traynor's embrace of marriage as a fundamental right and his radical rejection of racialist thought may seem far-sighted today, but in 1948 these views were far beyond where most jurists were willing to go. When civil morals and the law are both in flux, however, it is sometimes possible to bluff. Andrea Perez and Sylvester Davis got their marriage license two months later.³¹

26 *Roldan v. Los Angeles County*, 18 P.2d 706 (1933), defined Filipinos as "Malays" under the anti-miscegenation law. On Filipinos and California's anti-miscegenation regime, see Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000).

27 *Perez*, 198 P.2d at 40 (Shenk, J., dissenting).

28 *Id.* at 35.

29 *Id.* at 45.

30 On the intersection of equal protection and implied fundamental rights jurisprudence, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 768-844 (5th ed. 2005). Traynor's opinion also anticipated a "shock to conscience" analysis of the Fourteenth Amendment.

31 *Interracial Wedding Set*, N.Y. TIMES, Dec. 14, 1948, at 37.

II. SHALL THAT BE REASON HERE THAT IS NOT REASON IN ANY PART OF THE WORLD BESIDES?

Roger Traynor's majority decision in *Perez* was rooted entirely in American constitutional law and made no reference to international norms beyond suggesting that there were universal rights and marriage was one of them. Traynor's colleague on the bench Jesse Carter was less restrained in his concurrence, citing in support of the decision the Declaration of Independence, Thomas Jefferson, the Charter of the United Nations and, for good measure, the Apostle Paul. In coming years, the Acts of the Apostles would assume unanticipated political significance with regard to questions of racial mixing, but in 1948 the U.N. Charter was the more oft-cited text. Explaining that "[t]he rest of the world never has understood and never will understand why and how a nation, built on the premise that all men are created equal, can three times send the flower of its manhood to war for the truth of this premise and still fail to carry it out within its own borders,"³² Carter made a plea for bringing the United States into accord with world opinion as well as its own basic law. "Pray let us so resolve Cases here," Carter quoted Lord Nottingham from 1682, "that they may stand with the Reason of Mankind when they are debated abroad. Shall that be Reason here that is not Reason in any part of the World besides?"³³

Exhorted by President Truman at the organizational meeting for the United Nations in 1945 to "build a new world — a far better world — one in which the eternal dignity of man is respected,"³⁴ the representatives of many Latin American and Asian states, backed by such organizations as the Council of Christians and Jews and the NAACP, had pressed for an unequivocal statement of racial equality and disavowal of discrimination in the U.N. Charter.³⁵ They succeeded in defining the United Nations as being

32 *Perez*, 198 P.2d at 34 (Carter, J., concurring).

33 *Id.*

34 Address to the Delegates of the United Nations Conference on International Organization (Apr. 25, 1946), available at http://www.trumanlibrary.org/whistlestop/study_collections/un/large/documents/index.php?pagenumber=1&documentdate=1945-04-25&documentid=86&studycollectionid=UN.

35 In a rare moment of unity, the British, American and Soviet delegates to the Dumbarton Oaks Conference had fought and ultimately killed a Chinese proposal to uphold the principle of the equality of all states and races. PAUL GORDON LAUREN, *POWER AND PREJUDICE* 148 (1996); see also Tentative Chinese Proposals for a General International Organization (Aug. 23, 1944), in 1 U.S. DEP'T OF STATE, *FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS* 718 (1944). The

dedicated to the goal of achieving human rights and fundamental freedoms "for all without distinction as to race, sex, language, or religion" (article 1 and article 13) and of promoting respect "for the principle of equal rights and self-determination of peoples" (articles 55, 62 and 68).

Respecting human rights was one thing; enforcing that respect was another. Even the nations that supported the elevation of human rights in the Charter balked at the abridgement of national sovereignty required to protect them. Worried about the social and economic rights being read into an ever-expanding definition of human rights, America's senior foreign policy advisor in San Francisco, John Foster Dulles, insisted on an escape clause as the price of American support for the treaty. Led by the American and British delegations, with the enthusiastic support of the Soviets, article 2, paragraph 7 was inserted into the Charter, which read: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement."³⁶ Responsibility for human and civil equality remained lodged in the individual states that made up the United Nations.

Wherever their jurisdiction lay, the fundamental human rights enshrined in the U.N. Charter remained undefined at the close of the San Francisco meeting. The U.N.'s Economic and Social Council (ECOSOC) created a Commission on Human Rights and appointed a nine-member subcommittee charged to draft an international bill of rights that would, it was hoped, ultimately produce a binding covenant to protect those rights. Chaired by Eleanor Roosevelt, the remaining members of the subcommittee were, as the president of the conservative American Bar Association noted darkly, "foreigners."³⁷

While the *Perez* case wended its way through the California legal system in 1947 and 1948, the Human Rights Commission debated the fundamental rights of mankind and struggled to compose a Universal Declaration of Human Rights acceptable to everyone. The drafting committee worked from two fundamental premises: first, "that every human being has a right to be treated like every other human being," and second, that the Declaration should base its universal rights on the "great fundamental principle of the

Inter-American Conference on Problems of War and Peace, which met in Mexico City during March 1945, passed a resolution condemning racial discrimination and supported a declaration of human rights and duties.

³⁶ U.N. Charter art. 2, para. 7.

³⁷ PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS 209-11 (2003).

unity of all the races of mankind."³⁸ As Eleanor Roosevelt, who supported both of these principles, well knew, they were anathema to a great number of Americans. In particular, she knew that they were rejected by many of the men who roamed the halls of the United States Senate.

The mid-twentieth century Senate remained dominated by southern Democrats, men who had done their best to insure that the New Deal was for whites only, who had choked off debate on NAACP-initiated anti-lynching bills, and who considered the Fair Employment Practices Committee an unprecedented threat to "states' rights." Masters of the Senate in the 1930s and early 1940s, overtly white supremacist senators had become by 1948 a domestic political liability for the Democrats, whose voter pool now included substantial numbers of urban African-Americans in the North and West restless for progress on civil rights issues. More importantly for Eleanor Roosevelt and the U.N. Commission on Human Rights, the southern senators, and the Jim Crow regime they represented, were fast becoming a foreign policy liability for the nation at large.

The distance between universalistic American goals and discriminatory American practices, the distance between "All men are created equal" and the nation's intricate system of legal discrimination by race, had long left the United States vulnerable to charges of hypocrisy by its own citizens and outsiders alike. The USSR had for years held up racial violence and discrimination in America as proof of the bankruptcy of democracy, as had Germany and Japan during the war. Suddenly the Soviets had a vastly expanded audience in the form of the U.N. and the new nations emerging from colonial systems in Africa and Asia. The goodwill that accrued to the United States by virtue of its Declaration of Independence and its robust constitutional democracy was eroded in many parts of the world by reports of domestic racial violence, disenfranchisement, segregated housing and schools, and restrictive marriage laws. A 1947 State Department report on "Problems of Discrimination and Minority Status in the United States" stated forthrightly that Jim Crow practices were "obviously in conflict with the American creed of democracy and equality of opportunity for all."³⁹ Eleanor

38 Quotes from MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 67 (2002).

39 Problems of Discrimination and Minority Status in the United States (Jan. 22, 1947) (Box 43, File SD/E/CN.4I-43, Lot File 82D211); see Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 84 (1988); CAROL ELAINE ANDERSON, *EYES OFF THE PRIZE* 74-75 (2003). The State Department's Special Subcommittee on Legal Problems was among the many groups drafting declarations of human rights during the war and one of the few to address the issue of enforcement. The Subcommittee's draft declaration ended, "These human

Roosevelt confirmed that the nation's "race problem" had become a foreign policy liability, and admitted that America's open racial discrimination was "the one point which can be attacked and to which the representatives of the United States have no answer."⁴⁰

As relations between the United States and the Soviet Union descended into rancor and competition for world influence in 1947 and 1948, the deliberations of the Human Rights Commission became an irresistible forum for Communist exposure of American dilemmas about racial equality. American social practices left the nation vulnerable to criticism on many fronts — unequal educational opportunities, discriminatory housing laws, segregated public accommodations with their photogenic "for Whites" and "for Colored" signs, and always most shocking of all, the acts of unspeakable violence perpetrated upon African-Americans. The United States had signaled its commitment in theory to human equality when it signed the United Nations Charter in 1946. Now America's antagonists addressed the question of practice by raising the issue of freedom of marriage.

Since the publication of Mary Wollstonecraft's *A Vindication of the Rights of Woman* in 1792, the institution of marriage has been critiqued as oppressive to women. In the context of the post-WWII/United Nations rights revolution, however, marriage was considered by many to be enunciative of liberty. In the deliberations of the Human Rights Commission, freedom of marriage was linked indissolubly with citizenship and, more broadly, with a sense of state membership. It was easy for America's antagonists to portray anti-miscegenation laws as emblematic of the broader Jim Crow regime and to use them as a quick shorthand for critique of America as a whole.⁴¹

Restrictive marriage statutes were not the most prominent racially discriminatory laws in America or a favorite target of the foreign press, which tended to highlight segregated facilities, disfranchisement and racial violence. But because the Human Rights Commission included freedom

rights shall be guaranteed by and constitute a part of the supreme law of each state and shall be observed and enforced by its administrative and judicial authorities, without discrimination on the basis of nationality, language, race, political opinion, or religious belief, any law or constitutional provision to the contrary notwithstanding."

40 Roosevelt quoted in THOMAS BORSTELMANN, THE COLD WAR AND THE COLOR LINE 76 (2001).

41 GLENDON, *supra* note 38, at 194. Freedom of Movement is included in article 13. The Soviets argued strenuously and repeatedly against this. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 74-75 (1999).

of marriage on its list of fundamental human rights, America's anti-miscegenation laws provided a sturdy platform from which to launch accusations of hypocrisy and to discredit Western democracy. Egypt, for example, portrayed the United States as occupying a position on the periphery of world moral opinion when it supported a Mexican proposal to alter the article on marriage by adding that men and women had the right to marry "without any limitation due to race, nationality or religion."⁴² (When adding the non-discrimination clause, Mexico's Campos Ortiz had remarked that "there had been notorious cases of discrimination in marriage, particularly" — but not exclusively — "by the Nazis."⁴³) Understanding but not supporting the opposition to this wording by a number of Muslim nations on religious grounds, Egypt's representative explained his delegation's view that religious limitations on freedom to marry did not "shock the universal conscience, as did, for instance, the restrictions based on nationality, race or colour, which existed in certain countries and which were not only condemned but unknown in Egypt."⁴⁴

Like the American Declaration of the Rights and Duties of Man, adopted at the Ninth International Conference of American States in the spring of 1948, which upheld the equality of all human beings before the law without distinction of race, sex, language, creed "or any other factor" and announced that "Every person has the right to establish a family, the basic element of society,"⁴⁵ the final text of article 16, section 1 of the Universal Declaration of Human Rights read: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." Both the American and the British representatives argued unsuccessfully against article 16, insisting that its contents were covered elsewhere in the Declaration.⁴⁶ That the nondiscrimination prohibition of article 2 was repeated nowhere else in the Declaration but in article 16 is an indication of how reprehensible restrictive marriage laws were to the authors of the Declaration.

Article 16 made headlines even at the drafting stage ("Mixed Marriages Win a U.N. Vote," announced the *New York Times*) and was prominent in other reporting. When considered in combination with the Declaration's

⁴² Egypt quoted in GLENDON, *supra* note 38, at 154.

⁴³ Ortiz quoted in MORSINK, *supra* note 41, at 89.

⁴⁴ GLENDON, *supra* note 38, at 154.

⁴⁵ American Declaration of the Rights and Duties of Man arts. 2, 6, May 2, 1948, O.A.S. Res. XXX. The conference met in Bogotá between March 30 and May 2, 1948.

⁴⁶ MORSINK, *supra* note 41, at 255.

article 2, which announced that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," it did not take a very great leap of imagination to consider article 16 in particular and the United Nations in general a serious threat to the South's segregated society.⁴⁷

III. WHITE SUPREMACY IS IN PERIL

With no enforcement mechanisms, the Universal Declaration of Human Rights had no real power over any of the nations that upheld its principles.⁴⁸ The United Nations Charter, which as a treaty did carry binding obligations for its signatories, posed a far more potent threat to American racial practices. To those worried about the erosion of national sovereignty, the omens were ill. In early 1947 the General Assembly denounced South Africa's apartheid regime and declared that the Charter "imposed upon each member an obligation to refrain from policies based upon race discrimination."⁴⁹ Any hope that the U.N. would not draw attention to violations of marriage rights evaporated in 1949, when the General Assembly censored the Soviet Union for its refusal to allow Soviet women married to non-Soviets to leave the USSR.⁵⁰ Supporters and opponents of African-American civil and human rights raced to the same conclusion: if the USSR could be censored and South Africa investigated and denounced, why not the U.S.? The domestic jurisdiction clause inserted in the Charter at the behest of the United States was designed to shield nations from "promiscuous international action" in matters of local concern.⁵¹ But as the international effort brought to bear against South Africa and the Soviets suggested, the U.N. was alert to violations of individual rights whether or not they occurred within the realm of domestic sovereignty. Indeed, dissolving the boundary that fell between a nation's citizens and the citizens of the world, particularly where fundamental rights were concerned, was a

47 The addition of "colour" to the list reflected increasing uncertainty about the possibility of establishing a scientific definition of "race." *Id.* at 102-03.

48 The General Assembly vote in 1948 affirmed the principles contained in the Declaration and committed the members to work toward the creation of a covenant of binding obligations in the future. The United States refused to sign the covenant.

49 ANDERSON, *supra* note 39, at 88; LAUREN, *supra* note 35, at 168-72.

50 GLENDON, *supra* note 38, at 194.

51 John Foster Dulles' description of the clause he had designed. Quoted in ANDERSON, *supra* note 39, at 87.

founding purpose of the United Nations. After 1948, what had previously been condemned by supporters of African-American civil rights as a violation of American ideals was liable to be indicted as human rights abuse.⁵²

Whereas a significant cadre of foreign policy analysts considered American race politics dangerous for the nation's role in global politics,⁵³ the guardians of Jim Crow considered American participation in international organizations such as the United Nations a threat to the established social order. Petitions aside, the danger to the sovereign status quo lay in the interpretive possibilities of the U.N. Charter and its relationship to American law. Howard Law School dean William H. Hastie — who had resigned from the Roosevelt administration in 1943 over the issue of segregated troops and training — lost no time in explaining how the Charter affected American public policy. In a 1946 challenge to segregated interstate transportation, Hastie argued that when the United States had ratified the U.N. Charter America had "embedded in its national policy a prohibition against racism and pledged itself to respect fundamental freedoms for all without distinction as to race, sex, language or religion."⁵⁴ This position was reinforced in 1948, as the Human Rights Commission prepared to release the Universal Declaration, California annulled its restrictive marriage laws, and four Justices of the U.S. Supreme Court included references to the U.N. Charter in their opinion in *Oyama v. California*,⁵⁵ a challenge to part of that state's alien land laws. Noting that the United States had recently pledged "to 'promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,'" Justice Hugo Black asked, "How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"⁵⁶

In a speech before the State Bar of California in 1948, Frank Holman, the president of the American Bar Association, warned that the Human

52 The NNC's Max Yergan, who was in San Francisco, recognized this as early as 1946, when India challenged South Africa's proposal to absorb South-West Africa. The Indian action, Yergan wrote, broke "the barrier of national sovereignty — the international equivalent of the 'states' rights' obstacle." GLENDA ELIZABETH GILMORE, DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919-1950, at 407 (2008).

53 See MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS (2000).

54 *Hastie Seeing Court Reversal*, WASH. TRIB., Apr. 2, 1946, quoted in GILMORE, *supra* note 52, at 407.

55 332 U.S. 633 (1948).

56 *Id.* at 649-50.

Rights Commission headed by Mrs. Roosevelt was formulating "a so-called bill of rights program" that if ratified as a treaty by the U.S. Senate would "supersede any conflicting state constitutions and state legislative enactments."⁵⁷ This was because article VI of the U.S. Constitution proclaimed all treaties made under the authority of the United States "the supreme Law of the Land," and instructed further that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." After posing a number of legal questions (such as: how far could a treaty affect or nullify a state statute? The provisions of state constitutions? Judicial decisions of state supreme courts?), Holman noted that executive treaty power raised "important legal-political questions" as well. "How far can a treaty increase the powers of the Federal Government at the expense of the States?" Holman asked. "In the field of so-called civil rights, it has been definitely suggested that this can be done." Granting that "treaty-making power is an admitted attribute of sovereignty," Holman warned nonetheless that international treaties on human rights had the potential to seriously disrupt American social conventions.⁵⁸

Dismissed at the time as an alarmist, Holman's point of view was received more favorably two years later, after the California District State Court of Appeals in Los Angeles, in *Sei Fujii*,⁵⁹ found the state's remaining restrictions on alien ownership of land unconstitutional on the grounds that they conflicted with the Universal Declaration of Human Rights and the U.N. Charter, which, as a federal treaty, prevailed over state law. In a unanimous opinion, Justice Emmet H. Wilson explained that when the United States ratified the Charter it pledged to uphold the opinions expressed in the Charter, including racial equality. The restrictions contained in the alien land law were clearly "in direct conflict with the plain terms of the Charter," Wilson argued, and therefore "the Alien Land Law must . . . yield to the treaty as the superior authority."⁶⁰ When the California Attorney General petitioned for a rehearing, the Court refused,

57 Frank E. Holman, *Treaty Law-Making: A Blank Check for Writing a New Constitution*, 1950 A.B.A. J. 708, 710. Note that this article is from 1950, in which Holman reminiscences about what he supposedly said in his speech of 1948. In 1948, the ABA, under Holman's leadership, passed a resolution condemning the Universal Declaration of Human Rights. See Margaret E. Galey, *The Universal Declaration of Human Rights: The Role of Congress*, 31 PS: POL. SCI. & POL. 524, 524-29 (1998).

58 *Id.*

59 *Fujii v. California*, 217 P.2d 481 (Cal. App. 1950), *reh'g denied*, 218 P.2d 595 (Cal. App. 1950).

60 *Id.* at 488.

but elaborated on its thinking. The justices had not meant to suggest that any sovereign rights of the government had been surrendered when it ratified the U.N. Charter, since the sovereignty of the member states was expressly recognized by the Charter. But the justices also argued that to ensure the "rights and benefits" of U.N. membership, the member nations were obliged to "fulfill in good faith" the standards and agenda set by the organization.⁶¹ In this the California court echoed the conclusion of the President's Commission on Civil Rights, which had noted in its 1947 report that the doctrine of the supremacy of treaties had "an obvious importance as a possible basis for civil rights legislation," and the U.S. Justice Department, whose *amicus curiae* brief in the NAACP's 1948 challenge to restrictive housing covenants reminded the Supreme Court that international treaties, including specifically the U.N. Charter, constituted components of public policy.⁶²

The District Court's "subservience to the Charter" decision was quickly undone by the California Supreme Court, which, under significant pressure, ruled that the United Nations Charter "was not intended to, and does not, supersede existing domestic legislation,"⁶³ but it was too late: the appellate court decision caused an immediate uproar. It also received an extraordinary amount of attention in the nation's leading law journals, where scholars debated the finer points of treaty law and the relevance of the U.N. Charter to racially discriminatory state legislation.⁶⁴ The *Sei Fujii* decision was denounced in Congress; U.S. Senators complained that it paved the way for Congress to legislate issues that the Constitution had reserved for the states. Noted *New York Times* editorial writer Arthur Krock warned that the same reasoning that upheld *Sei Fujii* would apply to racial segregation

61 *Fujii v. California*, 218 P.2d 595 (Cal. App. 1950) (on respondent's petition for rehearing). See Mark Philip Bradley, *The Ambiguities of Sovereignty: The United States and the Global Human Rights Cases of the 1940s and 1950s*, in *THE STATE OF SOVEREIGNTY: TERRITORIES, LAWS, POPULATIONS* 124, 146 n.35 (Douglas Howland & Luise White eds., 2009).

62 TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 110-12 (1947); Brief for the United States as Amicus Curiae at 97-102, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 72).

63 *Fujii v. California*, 242 P.2d 617, 650 (Cal. 1952).

64 Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation*, 69 IOWA L. REV. 901, 927-28 (1984). The crucial question was whether or not the Charter, as a treaty, was self-executing, which would require the United States to fulfill its pledge to promote respect for and observance of human rights and freedom, or whether it required enabling legislation by Congress to take effect. For an early example, see Charles Fairman, *Finis to Fujii*, 46 AM. J. INT'L L. 682 (1952).

in America.⁶⁵ By the time Holman reminded everyone in September that the 1948 decision overturning California's anti-miscegenation law had rested in part on the U.N. Charter, the ground was well-tilled for the argument that the United Nations posed the greatest threat to "states' rights" since the Army of the Potomac.

Roger Traynor had not mentioned the U.N. Charter in his majority decision in the *Perez* case. This did not prevent opponents of American adherence to international standards of human rights from associating the United Nations Charter and the Universal Declaration with the *Perez* decision, or discourage them from suggesting that judges, by respecting treaties as the supreme law of the land, could effect domestic social reform without the participation and against the wishes of state and federal legislatures.⁶⁶ In an editorial in the American Bar Association's monthly journal, Holman referred to Jesse Carter's concurring opinion in *Perez* to remind his readers that the "precedent shattering 4 to 3 decision" of the California Supreme Court rested "in part on the United Nations charter," and warned that "many laws relating to women, to miscegenation (intermarriage of races), to citizenship or property qualifications for numerous purposes, veterans' preference laws, possibly even state laws undertaking to outlaw the Communist party" were imperiled by the U.N. treaty.⁶⁷ The editors of the *Chicago Tribune* duly informed their readers that the laws that governed Americans would soon be drafted by foreigners.⁶⁸ The Golden State was having none of this: in a stunt worthy of South Carolina, the California State Senate signaled its resistance to any authority but its own and voted twenty-five to eight to keep the state's anti-miscegenation law on the books in defiance of the *Perez* ruling and a State Assembly bill to dissolve the statute.⁶⁹

However far-fetched some of the interpretations of the effect of the *Sei Fujii* decision may have been — Russians would buy up all of California;

65 Arthur Krock, *In the Nation: The U. N. Charter and the Discrimination Issue*, N.Y. TIMES, May 16, 1950, at 27; Arthur Krock, *In the Nation: More on Treaty Supremacy Over Existing Laws*, N.Y. TIMES, May 23, 1950, at 27.

66 It is worth noting that Andrea Perez and other Mexicans were legally white under the terms of the Treaty of Guadalupe Hidalgo (1848).

67 Holman excerpted in *Fears Nation's Laws Imperiled by U.N. Charter*, CHI. DAILY TRIB., Sept. 11, 1950, at B12.

68 *Can U.N. Lay Down the Law of the Land?*, CHI. DAILY TRIB., Apr. 27, 1950, at 22.

69 *Racial Bill Retained*, N.Y. TIMES, May 17, 1951, at 33. The legislature finally revised the statute in 1959, after repeated demands by Augustus Hawkins, a black assemblyman from Los Angeles. Dana Orenstein, *V for Vagueness: Mexicans and the Collapse of Miscegenation Law in California*, 74 PACIFIC HIST. REV. 401 (2005). See 1959 Cal. Stat. ch. 146, at 2043-44.

Africans would write the laws that governed white men's family life — the question of the relationship of the U.N. Charter and the Universal Declaration of Human Rights to American law was momentous. In January 1951 a leading international lawyer defended the California court's interpretation of the Charter. "It is difficult, if not impossible," wrote University of Chicago political scientist Quincy Wright, "to say that a Member is acting in cooperation with the United Nations 'for the achievement' of 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,' if its courts are enforcing in its own jurisdiction laws which make such discriminations in respect to matters described as human rights in a formal declaration by the principal organ of the United Nations."⁷⁰ Although not a treaty, Wright continued, the Universal Declaration of Human Rights was "of great interpretative value," constituting "an authoritative interpretation of the words 'human rights and fundamental freedoms' in articles 55 and 56 of the Charter."⁷¹ It was the duty of judges to contribute to observance of human rights by refusing to apply laws that violated them, as the Ontario High Court had done in 1945 when, citing the Charter, it refused to enforce a restrictive residential covenant against Jews.⁷² As for state sovereignty, Wright concluded that enforcing human rights and fundamental freedoms under the U.N. Charter was a mere variation of the way "American courts, in applying the 14th Amendment, have done much to achieve respect for, and observance of, Constitutional guaranties within the States of the Union."⁷³

By empowering judges, federal treaties, like the Constitution, threatened majoritarian rule (in this case, the rule of the racist majority). Little could be done about the Fourteenth Amendment at this late date, but in 1952 the omnipresent Frank Holman teamed up with Ohio Senator John Bricker to severely constrain the executive treaty-making powers of the President. The timing was not insignificant, and not unrelated to recent interpretations of the Fourteenth Amendment. Over the previous five years, judges outside of California had begun overturning racially discriminatory laws. California quietly desegregated its public schools in 1947, in response to a suit brought by the League of United Latin American Citizens (LULAC). In 1947 South Carolina District Court Judge J. Waties Waring ruled against his state's contrived efforts to preserve the white primary despite the Supreme Court's

70 Quincy Wright, *National Courts and Human Rights — The Fujii Case*, 45 AM. J. INT'L L. 62, 72 (1951).

71 *Id.*

72 *In re Drummond Wren*, [1945] 4 D.L.R. 674.

73 Wright, *supra* note 70, at 78.

1944 ruling outlawing it.⁷⁴ Two years later Waring all but dared the NAACP to mount a frontal assault on segregated education in his dissent in *Briggs v. Elliott*,⁷⁵ a South Carolina school equity case that would eventually be bundled together with *Brown v. Board of Education*.⁷⁶ In addition to being the year of the *Sei Fujii* decision, 1950 was the year of the NAACP's Supreme Court trifecta — in three unanimous opinions the Court undermined the "separate but equal" rule in higher education (*Sweatt*⁷⁷ and *McLaurin*⁷⁸) and ruled against segregated intrastate transportation (*Henderson*⁷⁹).

Human rights principles and rhetoric were also becoming more prominent in domestic politics. In 1945, fifty bills proposing either permanent state Fair Employment Practices Commissions or delegation of anti-discrimination authority to existing agencies were introduced in twenty-one state legislatures.⁸⁰ During 1946 and 1947, a number of Northern states desegregated their National Guard units and fought the Army's continued segregation of troops.⁸¹ By 1948 — the year that President Truman issued an executive order calling for equality of opportunity for all races in the Armed Forces⁸² — the Democratic Party was coming apart at the seams over questions of racial equality. At the Democratic National Convention that July, thirty-five delegates from Mississippi and Alabama stalked out and formed the States' Rights Democratic Party after Minnesota senator Hubert Humphrey pressed for a strong civil rights plank and proclaimed that "[t]he time has arrived for the Democratic Party to get out of the shadow of states' rights and walk . . . into the sunshine of human rights."⁸³ While segregationists were reeling from all

74 *Smith v. Allwright*, 321 U.S. 649 (1944).

75 98 F. Supp. 529 (E.D.S.C. 1951).

76 347 U.S. 483 (1954).

77 *Sweatt v. Painter*, 339 U.S. 629 (1950).

78 *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

79 *Henderson v. United States*, 339 U.S. 816 (1950).

80 In February 1949 the Arizona Council for Civic Unity issued a pamphlet urging repeal of that state's ban on interracial marriage and an end to school segregation. Louis C. Kesselman, *The Fair Employment Practice Commission Movement in Perspective*, 31 J. NEGRO HIST. 30, 42 (1946); *Civil Rights Bills Considered in Arizona and New Mexico*, N.Y. TIMES, Feb. 20, 1949, at E8.

81 New York, New Jersey and Minnesota all prohibited racial segregation in state National Guard units. The American Veterans Committee, an integrated alternative to the Veterans of Foreign Wars, fought against the Army's segregation of desegregated National Guard units into the 1950s. See, e.g., Telegram from Michael Straight, president AVC to President Harry Truman (Jan. 14, 1951) (Folder 2, Box 329, Record Group 407, NARA).

82 Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

83 Humphrey quoted in ANDERSON, *supra* note 39, at 124.

this, the U.N. Educational, Scientific and Cultural Organization (UNESCO) pushed defenders of racial hierarchy closer to the wall when it endorsed a report of eight scientists announcing that "race discrimination has no scientific foundation in biological fact," that all human races were essentially alike, and that no biological harm came from mixed marriages.⁸⁴

In 1952 Senator Bricker proposed a Constitutional amendment that would have severely limited the executive treaty-making power of the president and Senate (which ratifies treaties). Under the terms of the Bricker Amendment, treaties would have to be passed by the House of Representatives as well as the Senate and ratified by two-thirds of state legislatures. This populist move was designed to insulate cherished local social institutions, such as restrictive marriage laws and segregated schools. Students of the Bricker Amendment have noted that there is good evidence that opposition to civil rights was a driving motivation in the effort to limit federal treaty-making power. As Frank Holman explained in Senate testimony, "[A treaty] can increase the power of the Federal Government at the expense of the States. For example, in the so-called field of civil rights, a treaty can do what the Congress has theretofore failed to do."⁸⁵ In a monumental understatement, Holman added, "The Congress has to date refused to enact the civil rights program."⁸⁶

Once it became clear that the Bricker Amendment had some traction in Congress, the Eisenhower administration acted forcefully against it, but not before making an enormous concession. In testimony before the Senate in 1953, Secretary of State John Foster Dulles (who had done his best to protect American national sovereignty in San Francisco in 1945) announced that

84 *Group Reports All Races Basically Alike*, CHI. DAILY TRIB., July 18, 1950, at 7. The group was headed by Ashley Montagu, and issued a report entitled *The Race Question* on July 18, 1950. For the text, see Honest Thinking, UNESCO on Race, <http://www.honestthinking.org/en/unesco/> (last visited Mar. 1, 2009).

85 Holman quoted in Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309, 324 (1988).

86 *Id.*; cf. *Treaties and Executive Agreements: Hearings on S.J. Res. 130 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 82d Cong. (1952); and *Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 83rd. Cong. (1953) (Bricker Amendment hearings). The amendment was championed by the ABA via its Standing Committee on Peace and Law Through United Nations, but the ABA's own section of International and Comparative Law opposed it. See Glendon Austin Schubert, Jr., *Politics and the Constitution: The Bricker Amendment During 1953*, 16 J. POL. 257, 261-62 (1954).

the United States would not ratify any U.N. human rights treaties, such as the pending Genocide Convention. "We do not ourselves look upon a treaty as a means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty," explained America's ambassador to the world. In an oblique reference to the NAACP's strategy of exposing America's racial regime through petitions to the U.N. and hoping to distance Eisenhower from human rights-driven agendas at home, Dulles announced that the administration would welcome "a reversal of the trend toward trying to use the treaty-making power to effect internal social changes."⁸⁷

CONCLUSION

In 1950 *Ebony* magazine asked a dozen African-American newspapers to write the headline they would most like to see on their front pages. The *Philadelphia Tribune* wanted to see all southern colleges opened to Negroes; the Norfolk *Journal and Guide* had the same hope for labor unions. The *Pittsburgh Courier* wanted black diplomat Ralph Bunche to be named Secretary of State. L.C. Bates of Little Rock's *Arkansas State Press* had a more holistic vision: "South Abolishes All Jim Crow."⁸⁸

Bates' vision of the destruction of *all* Jim Crow included necessarily an assault on the most guarded redoubt of racial hierarchy in America: the restrictive marriage laws that still prohibited the marriage of "whites" with "non-whites" in thirty states of the Union. By 1950, as we have seen, there was an established constitutional logic in the courts of the United States as well as an articulated international logic of human rights that treated the complete dismantling of racially discriminatory regimes, including the abolition of anti-miscegenation laws, as normative. The increased visibility of these logics and the willingness of certain courts to entertain them was a cause for optimism: in this context L.C. Bates looks as much a realist as a visionary.

Such optimism was, however, premature. Bates would see his headline become a reality, but not immediately — that would take another seventeen years, a coordinated assault on the law of inequality, and a mass movement of citizens in which he and his wife Daisy played leading roles. Neither the

87 Dulles quoted in Bradley, *supra* note 61, at 138.

88 GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 150 (2007).

Perez decision nor the Universal Declaration of Human Rights or the U.N. Charter had demonstrable effect on race-based prohibitions on marriage in the United States. Anti-miscegenation laws were never challenged as part of a mass movement, nor were they of special interest to the NAACP, Congress or the executive. Only in 1967 would the Supreme Court declare such laws unconstitutional, in its only civil rights decision ever to appeal to fundamental principles of "vital personal rights."⁸⁹

Although the civil rights struggle proved victorious in the long term, by 1950 both the constitutional logic of marriage as a civil right protected by the Fourteenth Amendment and the argument that international human rights norms might trump discriminatory local practices had outpaced the domestic political will to support those rights and had, instead, inspired strenuous resistance — as demonstrated by the Bricker Amendment and a mounting rhetoric of local sovereignty/"states's rights." In addition to the domestic cost of delaying the destruction of Jim Crow, there was an international price to this resistance: American stigmatization of international human rights norms and treaties was rooted directly in the civil rights struggle in the United States and reflected the potential of international organizations to assault domestic racial conventions at their foundations. The speed with which the two-pronged threat posed by the constitutional and international logics of individual human rights merged in the minds of Dixie's defenders was apparent from the billboards they erected in 1954 after the Supreme Court overturned segregated public education in *Brown*: "Impeach Earl Warren" and "U.S. Out of U.N." were tied together both logically and pragmatically.

⁸⁹ Loving v. Virginia, 388 U.S. 1 (1967). This case was sponsored not by the NAACP but by the American Civil Liberties Union.

