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Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875

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a) Miscegenation as the direct or logical result of desegregation. Democrats argued that the logic of desegregation naturally extended to a right of racial intermarriage. Thus, North Carolina Democrat James Harper stated in the House:

> If Congress has the power to pass this bill and make it a law it has the power to enact laws to regulate the minutest social observances of domestic or fashionable life. If it has the right to say to my neighbor, 'You must ride in the same car, eat at the same table, and lodge in the same room with a negro,' it can also say that you must not interpose an objection on account of his color to any advances he may make toward your children or family.[21]

Beyond merely asserting that the bill implied a *power* to ban anti-miscegenation laws, the Democrats were quick to observe that the removal of all distinctions between the races would necessarily *require* the removal of anti-miscegenation laws. Opponents attacked this vulnerability most directly during a debate over § 5 of Sumner's original bill, submitted to the Senate as an amendment to the Amnesty Bill. This section provided the following:

> That every law, statute, ordinance, regulation, or custom inconsistent with this act, or making any discriminations against any person on account of color, by use of the word "white," is hereby repealed and annulled.[22]

While § 5 merely declared Sumner's general goal of "color-blind"[23] laws and statutes, Senator Thomas Norwood, a Georgia Democrat who was particularly fixated on the miscegenation question, called "the special attention of Senators" to its effect.[24] According to Norwood, "I have met with no one yet who does not agree with me that the effect of passing this law would be to abolish every State law which inhibits marriage between whites and blacks."[25]

This section, according to its opponents, was not just an isolated provision but was the written embodiment of the policy underlying the bill. Norwood contended that the "same familiar association" imposed on the children in the schools and churches "continues from childhood up to manhood, and when they have arrived at manhood you then, by your statute, say that if they see fit to join in matrimony there shall be no impediment to it."[26] When the issue was raised in the House version of Sumner's bill, Representative Andrew King, a Missouri Democrat, declared that "[i]t is on this clause [§ 5] that the Senator from

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21. Cong Globe App, 42d Cong, 2d Sess 372 (1872) (Rep. Harper).

22. Cong Globe, 42d Cong, 2d Sess 819 (1872).

23. This, of course, was not his term. It was made famous in Justice Harlan's dissent in *Plessy*, 163 US at 559.

24. Cong Globe, 42d Cong, 2d Sess 819 (1872).

25. Id.

26. Id.

Massachusetts [Mr. Sumner] bases his social equality bill, by which . . . a white man shall have the right to marry a negro woman, if the negro is willing."[27] Congressman John Rice of Kentucky complained that § 5, "more shamelessly than even the proceeding ones, parades the scheme of social equality" and "is the inauguration of a mixed generation."[28] Rice's colleague from Kentucky, Representative Henry McHenry, went so far as to suggest that § 5 was "intended, and will have the effect, to repeal the statutes in force in all the States preventing the intermarriage of whites and blacks. . . . Its scope and intent is to establish perfect equality, legal and social."[29]

After the debate over § 5, Democrats continued to argue that the underlying policy of desegregation naturally extended to a right of interracial marriage. Senator Norwood argued that it was hypocritical to advocate social contact while opposing miscegenation:

> But it is said, "Admit it, then what of it? We do not mean that blacks and whites shall marry." Well if you do not, then be consistent, be logical. Let precept and example be in harmony. If you would not marry them, then coerce no conditions in life among the poor, who cannot protect themselves, by which you increase the danger of such relation. You would not encourage marriage between the two races, but you compel them to associate in every *social* condition.[30]

Congressman John Atkins of Tennessee posed the converse of this question to illustrate the contradiction. "If, then, the marriage of the races brings decay and death, and must be prohibited by law . . . why have not the States the power to keep the races apart in the schools and elsewhere?"[31]

Sometimes the direct attack was phrased as a metaphor that only slightly blunted its force. Senator Norwood was particularly enamored with this form of argument:

> [F]or eight long years [the Republican party] has been coquetting with and affianced to the American branch of the Ethiopian family, commonly known as the "colored people. . . ." His Uncle Sam has lost confidence in his finances, his friends are falling off, creditors are sweeping his estates, and his colored inamorata charges that he has trifled with her affections, and threatens to abandon him, unless he will call in the high priest (Congress) at once, and solemnize the marriage. And now, Mr. President, these "two high contracting parties" are before us for the sixth time to be made one political flesh. . . . Ranged beside [the bride] again stand her ever-faithful bridesmaids clothed in white, symbolic that in this union, as in a ray of light, all color will be absorbed, and this dark bride shall be pure white. Foremost and first among them is one bearing over her serene

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27. Cong Globe App, 42d Cong, 2d Sess 383 (1872).
28. Id at 599.
29. Id at 219.
30. 2 Cong Rec App 237 (1874).
31. 2 Cong Rec 453 (1874).

bosom the general motto "Without distinction of race, color, or previous condition of servitude."[32]

Democrats often relied less on the bill's logic and more on its practical effect in their attack against the bill. Seizing upon statements that through desegregation, "this prejudice against race and color will be removed and the idea of universal human equality . . . substituted in place of this unnatural and unjust prejudice,"[33] Democrats charged that barriers to miscegenation would also fall. Senator John Stockton, a New Jersey Democrat whose exclusion from the Senate in 1866 gave Republicans the requisite two-thirds majority necessary to pass the Fourteenth Amendment,[34] zeroed in on a suggestion by Republican Senator George Boutwell of Massachusetts, a member of the House during the Fourteenth Amendment debates,[35] that both races should be educated together so that "this prejudice against race and color will be removed."[36] From this statement, Stockton demanded to know whether Boutwell meant "practical amalgamation or not?" or "miscegenation or not?"[37]

Democratic Senator Saulsbury also played on this theme when he defiantly stated, "[c]all it prejudice if you please; it exists, and I hope and trust it may forever exist. It is the only security which you have against the dire consequences which would result from its abolition; I mean the intermixture and amalgamation of races."[38] Representative Robert Vance of North Carolina deduced that "by placing the colored race and the white race continually together, by throwing them into social contact, the result will be more or less that the distinction between them will be broken down, and that miscegenation and an admixture of the races will follow."[39] Similarly, Vance's fellow North Carolina Democrat, Senator Merriman, complained that this result was the purpose and "practical effect" of the bill because "[i]t seeks to bring by statutory provision two populous races constantly and perpetually together, under such circumstances as certainly tend to bring the masses of the races and sexes in familiar contact and break down the distinctions set up by nature itself."[40]

Democrats claimed that the bill did not merely weaken prejudice but attempted to subvert the Divine plan for the races. Under this legislation, charged the Democrats, "it is sought to reverse the decrees of the Almighty, to make white people out of black, to take away from people those instincts implanted by the Deity and intended to keep these races apart and prevent their amalgamation

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32. 2 Cong Rec App 234 (1874).

33. 2 Cong Rec 4169 (1874) (Senator Boutwell).

34. See Avins, 52 Va L Rev at 1249 (cited in note 10); Cong Globe, 40th Cong, 2d Sess 823 (1868).

35. Congressional Quarterly, *Guide to Congress* 47, 305 (1991).

36. 2 Cong Rec 4169 (1874).

37. Id.

38. Id at 4160.

39. Id at 556.

40. 2 Cong Rec App 316 (1874).

and degradation."[41] Senator Merriman warned that any legislative attempt to mix the races "is defying to the Almighty, and any people who shall do so may certainly expect His curse."[42]

Few seemed to notice the inherent contradiction in the Democrats' argument. At the same time that Democrats were arguing that the bill would weaken prejudice and result in amalgamation, fellow Democrats proclaimed with equal vigor that the bill was "vain legislation" which "cannot execute itself, and can never be executed."[43] Several Democrats argued that such prejudice against miscegenation was "inveterate and difficult to eradicate,"[44] that "[e]ducation does not subdue it [and] Christianity does not abate it,"[45] and that any legislative attempt to eradicate it will "be a dead letter."[46]