Marquette Law Review

Volume 48
Issue 4 *Spring 1965*

Article 12

1965

Recent Decisions: Constitutional Law: Miscegenation Laws

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Constitutional Law: Miscegenation Laws: The defendants were convicted under section 798.05 of the Florida statutes, which prohibited nighttime cohabitation of the same room by a Negro and a white of different sexes.

On appeal, their conviction was affirmed by the Florida Supreme Court in *McLaughlin v. Florida*[1] because it felt bound by the decision of the United States Supreme Court in *Pace v. Alabama*[2] and the decisions of many state courts upholding similar statutes.[3] Both *Pace* and *McLaughlin* involve nearly corresponding statutory schemes. The Alabama statutes applicable in the *Pace* decision not only contained a statute which prohibited fornication by persons of different races,[4] but also a general non-racial fornication statute.[5] Similarly, the Florida statutes, aside from prohibiting interracial cohabitation, held adultery and fornication by people of the same race a crime.[6]

Due to the established precedent and the similarities of the two situations, the Florida court adopted the *Pace* reasoning that the statute, although it contained racial classifications, was not discriminatory because both the Negro and the white received the same punishment.[7] Secondly, the court viewed the offense committed by persons of different racial descent as an entirely distinct offense from one committed by persons of the same race, and one to which the general sections of the statutes are applicable.[8] Therefore, the Florida court found that both the statutes are necessary in order to enforce the legislative purposes involved.

An entirely opposite reasoning was adopted by the United States Supreme Court in its consideration of the *McLaughlin* case.[9] The reasoning of *Pace v. Alabama* was overruled and a more realistic test for determining the validity of a statute containing racial classifications was substituted.[10] This test, as applied to the cohabitation law, involves a determination of whether the classifications are *necessary* and not merely *related* to the accomplishment of a permissible state policy.[11] If the classifications are not necessary, then the statute obviously serves no other purpose than to draw attention to the racial classification and is therefore repugnant to the equal protection clause of the fourteenth amendment.[12]

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[1] 153 So. 2d 1 (Fla. 1963).
[2] 106 U.S. 207 (1883).
[3] McLaughlin v. Florida, *supra* note 1, at 3.
[4] ALA. CODE tit. 14, §360 (1958).
[5] ALA. CODE tit. 14, §16 (1958).
[6] FLA. STAT. ANN. §798.01 (1941) deals with adultery, §798.02 with lewd and lascivious behavior, and §798.03 with fornication.
[7] McLaughlin v. Florida, *supra* note 1, at 2.
[8] *Ibid.*
[9] McLaughlin v. Florida, 85 Sup. Ct. 283 (1964).
[10] *Id.* at 287.
[11] *Id.* at 290-91.
[12] *Id.* at 288.

Before this test could be properly applied to the *McLaughlin* case, the Court had to determine the legislative purpose which the cohabitation law was intended to enforce.[13] It simply rejected the argument that the cohabitation statute was intended to enforce its law forbidding interracial marriages[14] merely because it serves the same purpose and is ancillary to that law.[15]

Rather than advancing that legislative purpose, the Court decided that the purpose of section 798.05 is the same as that of the rest of chapter 798: namely, the prevention of breaches of the basic concepts of sexual decency. Further, it reasoned that a situation involving two different races is no different from one in which the persons are of the same race, with the general sections of the chapter sufficient to carry out the legislative purposes in both instances.[16] Therefore, the cohabitation statutes' racial classifications are unnecessary and violative of the fourteenth amendment.

The contention advanced by the appellant that Florida's anti-miscegenation law barred the defense of common law marriage was also rejected.[17] While this contention might have been disposed of on procedural grounds in this case, it did point out the basic issue in the case, the constitutionality of Florida's established legislative policy of forbidding interracial marriages, which is found in both its constitution and statutory law. By refusing to consider this contention and by finding that the legislative purpose of the discriminatory cohabitation law was the same as that of the other sections of chapter 798, the Court avoided the fundamental question at issue, other than to cast some doubt on the constitutionality of the antimiscegenation law. The Court, by limiting its decision to the question of the constitutionality of the racial classifications, followed its established policy of resolving cases by the determination of the narrowest constitutional issue necessary to adjudicate the controversy.

While the decision quite properly ensures that everyone in Florida will be subject to a non-discriminatory fornication law, Florida's legislative purpose of forbidding interracial marriages, which was reflected in the invalid cohabitation law, is not questioned. The individual's right to marry remains limited to the right to marry only someone of the same race, with the legislative policy now enforced by the antimiscegenation law and the general sections of chapter 798.[18]

This question whether a state can properly have a policy of forbidding interracial marriages has never been directly considered by the

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[13] *Id.* at 289.
[14] FLA. STAT. ANN. §741.11 (1941); also FLA. CONST. art. 16, §24.
[15] McLaughlin v. Florida, *supra* note 9, at 290.
[16] *Id.* at 289.
[17] *Id.* at 286; see note 6.
[18] *Id.* at 291.

United States Supreme Court. In fact, it seems to have carefully avoided it.

Certiorari was denied to a case in 1954, involving the conviction of a white and a Negro under an Alabama statute punishing intermarriage, adultery, and fornication between white and Negro.[19] A year later, it refused to consider a case dealing directly with the validity of Virginia's antimiscegenation law. That case, *Naim v. Naim*,[20] involved a suit to annul a marriage between a white person and one of Chinese descent. Their marriage had been found void under a Virginia statute forbidding interracial marriages. Racial classification, the Virginia court said, was necessary to carry out the prevention of interracial marriages, and so long as this is a proper governmental objective, the classification was also proper.[21] In order to obtain more evidence on relevant factors in the case, the United States Supreme Court sent the case back to Virginia. When the Virginia Supreme Court refused to send the case back to the circuit court on the grounds that it lacked the power to do so, the United States Supreme Court refused to consider the case because it was devoid of any federal question. As mentioned earlier, neither the *McLaughlin* nor the *Pace* cases deal directly with the basic policy question, but only with the problems encountered in enforcing it.

In the *McLaughlin* case, the Court said that a law using racial classifications, even to enforce a valid state interest, will be upheld only if these classifications are *necessary* for the accomplishment of that policy. Obviously, this was an application of the reasonable legislative purpose test which has been used under both the due process and equal protection clauses of the fourteenth amendment.[22] Here it was applied under the equal protection clause, since the case dealt with racial classifications.

The validity of the antimiscegenation law itself could also be questioned under the fourteenth amendment by requiring the showing of a reasonable legislative purpose for its enactment.[23] There is serious doubt that any valid reason could be shown for this type of statute. In fact, the three basic arguments which are often advanced to support these statutes; namely, that the children of these marriages would be inferior, that social tensions and domestic problems are lessened, and

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[19] Jackson v. Stat, 37 Ala. App. 519, *cert. denied*, 348 U.S. 888 (1954).

[20] 197 Va. 80, 87 S.E. 2d 749, *vacated and remanded*, 350 U.S. 891, *motion to recall denied*, 350 U.S. 985 (1955).

[21] Naim v. Naim, *supra* note 20, 87 S.E. 2d at 755.

[22] Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L. J. 49, 70 (1964), in 14 L. REV. DIGEST 1, 14 (1964).

[23] Applebaum, *supra* note 22, at 68-70; 14 L. REV. DIGEST at 13-14; Cummins & Kane, *Miscegenation, The Constitution and Science*, 38 *Dicta* 24, 32 (1961); Riley, *Miscegenation Statutes—A Re-Evaluation of Their Constitutionality in Light of Changing Social and Political Conditions*, 32 So. CALIF. L. REV. 28, 44-48 (1958); Note and Comment, 5 SW. L. J. 452, 459-61 (1951); 62 HARV. L. REV. 307, 308 (1948).

that psychological hardships to the offspring are avoided, have been discredited.[24] Therefore the application of a reasonable legislative purpose test would most likely lead to a finding of unconstitutionality under the equal protection clause of the fourteenth amendment, especially since the usual presumption of a valid legislative purpose is not applied to cases dealing with racial classifications.[25]

However, a better approach might be to recognize that the right of the individual to marry is a fundamental right, protected under the clear and present danger test.[26] Surely it is a right which can be considered as important to the individual as is his right to own property or his freedom of speech. The United States Supreme Court has acknowledged that marriage and procreation are fundamental to the very existence and survival of the race.[27]

This test has been applied to the right of the individual to own property, mentioned in the first part of the fourteenth amendment.[28] Another right mentioned in this part of the amendment is the right to liberty, to which the clear and present danger test has also been applied.[29] The right to marry has been recognized as being embodied in the concept of liberty under the fourteenth amendment.[30]

In *Shelly v. Kraemer*,[31] rights under the first part of the fourteenth amendment were recognized as personal rights guaranteed to the individual. The freedoms of speech and press are also recognized to be of this character.[32] Where legislation collides with the principles embodied in both the first and fourteenth amendments, it is proper to apply the clear and present danger test.[33]

While admittedly this approach has not been applied in any of the appeals to the United States Supreme Court to consider the question of the validity of a legislative policy forbidding interracial marriages, Mr. Justice Harlan's concurring opinion in the *McLaughlin* case, in which he said: "The necessity test which developed to protect free

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[24] Perez v. Sharp (also known as Perez v. Lippold), 32 Cal. 2d 711, 198 P. 2d 17, 23-26 (1948); Applebaum, *supra* note 22, at 71-78; 14 L. REV. DIGEST at 15-19; Riley, *supra* note 23, at 32-40; Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 CORNELL L. Q. 208, 215-22 (1957); 58 YALE L. J. 472 (1949).

[25] McLaughlin v. Florida, *supra* note 9, at 288; Applebaum, *supra* note 22, at 83; 14 L. REV. DIGEST at 22; Cummins & Kane, *supra* note 23, at 43; *Anti-Miscegenation Laws in The United States*, 1 DUKE L. J. 39.

[26] Applebaum, *supra* note 22, at 83; 14 L. REV. DIGEST at 22; Riley, *supra* note 23, at 40-44; Note and Comment, 5 SW. L. J. 452, 455-457 (1951); Note, 1 STAN. L. REV. 289, 293 (1949); 33 MINN. L. REV. 530, 532 (1949).

[27] Skinner v. Oklahoma, 316 U.S. 535, 541 (1941).

[28] Oyama v. California, 332 U.S. 633, 647 (1947).

[29] Korematsu v. United States, 323 U.S. 214, 216-18 (1944).

[30] Meyer v. Nebraska, 262 U.S. 390, 399 (1922).

[31] 344 U.S. 1, 22 (1947).

[32] Schneider v. State, 308 U.S. 147, 161 (1939).

[33] Perez v. Sharp, *supra* note 24, 198 P. 2d at 20; see also separate opinion of Justice Edmonds, *id.* at 34, referring to the opinion of Mr. Justice Jackson in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1942).

speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the fourteenth amendment,"[34] seems to indicate the Court might well take a favorable reaction to this approach.

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[34] McLaughlin v. Florida, *supra* note 9, at 291.