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Domestic Relations: The Constitutionality of Oklahoma's Miscegenation Statutes

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determine that substantial employee interests require a limited revival of the "equal time" doctrine.\textsuperscript{18}

\textbf{Bill York}

\section*{DOMESTIC RELATIONS: THE CONSTITUTIONALITY OF OKLAHOMA'S MISCEGENATION STATUTES}

Oklahoma's Supreme Court recently upheld the constitutionality of Oklahoma's miscegenation statutes\textsuperscript{1} in \textit{Jones v. Lorenzen}.\textsuperscript{2} The petitioners sought a writ of mandamus to require the clerk of Canadian County, Oklahoma, to issue a marriage license. One applicant was Mexican, the other a Negro, placing them within the purview of the statute forbidding such marriages. Assuming original jurisdiction,\textsuperscript{3} the supreme court declared the issue to be whether they should overrule \textit{Blake v. Sessions}\textsuperscript{4} and hold the miscegenation statutes unconstitutional as being in violation of the first and fourteenth amendments of the Constitution.

Historically, miscegenation statutes have been attacked under the "equal protection of the laws" clause of the fourteenth amendment. Such attacks date from the 1882 case of \textit{Pace v. Alabama}\textsuperscript{5} where the United States Supreme Court held that an Alabama Statute, which prohibited a white person and a Negro from living together in adultery or fornication, was not in conflict with the Constitution, although it prescribed more severe penalties than those to which the parties would be subject, were they of the same color and race. This decision advanced the theory that since there was equal punishment there was no discrimination. Oklahoma cases on the subject not only have upheld the constitutionality of the statute\textsuperscript{6} but also have described the intended purpose of the statute as applying "...to all persons, citizens, residents, and transients in the state, and are intended to prohibit marriage of the descendents of the African race.

\textsuperscript{18} Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951).

\textsuperscript{1} \textsc{Okla. Stat. tit. 43, § 12 (1961)}: "The marriage of any person of African descent, as defined by the Constitution of this State, to any person not of African descent, or the marriage of any person not of African descent to any person of African Descent, shall be unlawful and is hereby prohibited within this State." \textsc{Okla. Stat. tit. 43, § 13}: "Any person who shall marry in violation of the preceding section, shall be deemed guilty of felony, and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars, and imprisonment in the penitentiary not less than one nor more than five years."

\textsuperscript{2} 36 \textsc{Okla. B. A. J.} 2237 (1963).

\textsuperscript{3} \textsc{Okla. Const. art. VII § 72}.

\textsuperscript{4} 94 \textsc{Okla. 59, 220 Pac. 876 (1923)}.

\textsuperscript{5} 106 U.S. 583 (1882).

\textsuperscript{6} Blake v. Sessions, \textit{supra} note 4.
with any other race in this state." Only California has declared this type statute in violation of the "equal protection" clause of the fourteenth amendment. Speaking for the court, in Perez v. Lippold, Mr. Justice Traynor pointed out that marriage is one of the rights protected by the fourteenth amendment, as declared by the United States Supreme Court in Meyer v. Nebraska and that, "In the absence of an emergency the state clearly cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups." 

The Jones decision relied heavily on past decisions, particularly the leading federal case of Stevens v. United States. In the Stevens case the Oklahoma miscegenation statute was held not to be in violation of the fourteenth amendment. Pace and its equal punishment theory were the primary basis for the decision. Since the United States Supreme Court had not decided the question confronting the Oklahoma court, the principle that decisions of lower federal courts on federal questions, though not controlling, are highly persuasive was applied, and the court echoed the results of the Stevens case. Thus, in the Jones case, the miscegenation statutes were once again declared to be constitutional.

Little, if any, consideration was given to McLaughlin v. Florida, which held that a Florida Statute, which prohibited the cohabitation of a Negro and a white person of different sexes, to be unconstitutional. Speaking through Mr. Justice White, the court said:

Because the section applies only to a white person and a Negro who commit the specified acts and because no couple other than one made up of a white and a Negro is subject to conviction upon proof of the elements comprising the offense it prescribes, we hold § 798.54 invalid as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

While this decision dealt with interracial cohabitation as opposed to interracial marriage, it did set out a test which the court might apply to statutes differentiating between racial groups and dealing with fundamental rights guaranteed by the fourteenth amendment. The Court said,

Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise. Without such

7 Eggers v. Olson, 104 Okla. 297, 231 Pac. 483, 484 (1925).
8 32 Cal. 2d 711, 198 P.2d 17 (1947).
9 262 U.S. 390 (1923).
10 Perez v. Lippold, supra note 8, at 198 P.2d at 20.
11 146 F.2d 120 (10th Cir. 1944).
12 Pace v. Alabama, supra note 5.
15 Fla. Stat. § 798.05.
16 McLaughlin v. Florida, supra note 14, at 184.
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justification the racial classification . . . is reduced to an
invidious discrimination forbidden by the Equal Protection
Clause. 17

It was also pointed out in McLaughlin that the interpretation of the equal
protection clause handed down in Pace had been swept away by subse-
quent decisions of the Court. With the overruling of the effect of Pace,
the basis of the Stevens case and ultimately the basis for upholding the
miscegenation statutes like that in Oklahoma was greatly diminished.

Where are state courts to turn? The Oklahoma court was faced with
abundant precedent upholding the constitutionality of these statutes and
at the same time faced with a liberal trend on a national level, which can
only be resolved by the United States Supreme Court which has been
reluctant to decide this issue. The Court had an opportunity to decide the
question in Naim v. Naim, 18 but refused certiorari on a procedural point.
Likewise, as indicated above, they had an opportunity to go more directly
to the issue at hand in McLaughlin, but chose not to.

The next move is up to the Supreme Court, because of the reluctance
of the state courts to lead in changing and the vast amount of case law
supporting constitutionality. Until the highest Court either upholds or
voids these laws, they will continue in force on this uncertain footing.
In forecasting the outcome of this situation, Mr. Justice Stewart's con-
curring opinion in McLaughlin should be noted, for he indicated that
"... it is simply not possible for a state law to be valid under our Con-
stitution which makes the criminality of an act depend upon the race of
the actor. Discrimination of that kind is invidious per se." 19

Problems of racial discrimination are of growing concern in our coun-
try. The civil rights of all citizens of the United States must be protected
in an equal manner. As long as laws exist which make it a crime to marry
another because one is a member of the African race and the other is of
another race, or which prohibit marriage for the same reason, it cannot
be said that equal protection exists.

John Turner

PATENTS: ACTION BY UNITED STATES GOVERNMENT
FOR INFRINGEMENT OF GOVERNMENT PATENT

The United States Court of Claims held in the recent case of Tektronix
Inc. v. United States 1 that the general policy of free-use of government
patents over the past 100 years gives an unlicensed user an implied license

17 Id. at 192-93.
1 351 F.2d 630 (Ct. Cl. 1965).