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Permissible Classification by Race

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NOTES

PERMISSIBLE CLASSIFICATION BY RACE

Racial discrimination is dependent upon ability to distinguish by race. Classification, being the legal equivalent of distinguishment, is therefore at the very heart of racial discrimination. It is hardly surprising then that when courts are pursuing a policy of striking down racial discriminations, their holdings will be interpreted to stand for the invalidity of all state-drawn racial classifications. Such a conclusion has been reinforced by the often imprecise wording of the Supreme Court's opinions in this area. Little wonder then to find legal writers saying: "Laws based on race are necessarily discriminatory, and discriminatory legislation is unconstitutional per se."[1] Neither the assumption nor the conclusion of that statement correctly reflects the Supreme Court's decisions. For laws classifying by race are *not* necessarily discriminatory, nor is all discriminatory legislation necessarily unconstitutional.

Confusion surrounding the issue of whether a state may undertake any classification by race, and if so, under what circumstances, stems in large measure from the Court's failure to discuss the distinction between racial and other forms of classification. While the Court has consistently delimited racial classifications by "some" more rigid test,[2] it has sustained the power of the state to classify generally with impunity under the fourteenth amendment so long as the following test was met: The distinction drawn by the state must (1) treat all similarly situated alike, (2) rest upon a real difference which bears some reasonable relation to the objective of the legislation, and (3) be a part of legislation the objective of which falls within a permissible state function.[3] In addition, it is presupposed that a complainant, to have standing before the court, must allege that the classification drawn has a substantially injurious effect on him, and is not merely a technical and unsubstantial discrimination.[4] In non-racial areas then, even though a plaintiff is able to show that a classification discriminates against him,[5] if it reasonably relates to the purpose of the state action involved the classification is upheld as not being violative of equal protection—unless the purpose itself is in violation of due process. Thus, the Court has taken the position that a classification that is discriminatory does not necessarily violate the equal protection and due process requirements imposed on the states by the fourteenth amendment.

Such has not appeared to be the Court's position in the area of classifications based on race. Here the Court has by and large limited its attention to the issue of whether a racial classification is in fact discriminatory, and where

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[1] BLAUSTEIN & FERGUSON, DESEGREGATION AND THE LAW 153 (2d ed. rev. 1962).

[2] The nature and development of the test applied to racial classifications is considered in detail subsequently in this note.

[3] Quaker Cab Co. v. Pennsylvania, 277 U.S. 389, 406 (1928).

[4] See Bank Comm'r v. Abilene Nat'l Bank, 179 Fed. 461, 465-66 (8th Cir. 1910), *aff'd*, 228 U.S. 1 (1913).

[5] "It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public." Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899).

it was found to be such, the classification was held invalid. Judicial inquiry did not on the whole consider whether such a racially discriminatory classification might nevertheless be valid as bearing a reasonable relationship to a valid state function.[6]

History of the Supreme Court's Position on Racial Classifications

The earliest cases under the fourteenth amendment interpreted it to mean that a racial classification could not be used to place a burden on the minority not equally placed on the majority; nor could it be used to grant a benefit to the majority not also accorded the minority.[7] Only a racial classification that did not violate this benefit-burden principle could conceivably be upheld. It was within this context that the case of *Plessy v. Ferguson*[8] addressed itself to the question of racial segregation. By finding that segregation did not in and of itself violate the benefit-burden principle, the Court in *Plessy* upheld such racial classifications as not being discriminatory.[9] *Plessy* then was concerned only with an appropriate definition of "discrimination."[10] Specifically, the case stood for two propositions: (1) The minority's right must be equal to that of all citizens,[11] and (2) the separation of the minority from the majority in the exercise of that right did not constitute a denial or diminution of the right. As a result of this ruling dual lines of precedent evolved. Where the racial classification served merely to segregate, so long as separate facilities were provided which in all points of comfort and convenience were equal to those made available to the majority, the classification was upheld on the ground that it was not discriminatory.[12] But racial classifications that impaired the benefit itself, such as the right to a fair trial by a representative jury,[13] the right to vote[14] and to hold public office,[15] or the right to convey property,[16] were held invalid on the ground that they were discriminatory.

Brown v. Board of Educ.[17] addressed itself only to the first of these lines of precedent—can separate ever be equal? Or, put another way, is a classification

[6] The succeeding section will develop the point in its historical context.

[7] See, *e.g.*, Virginia v. Rives, 100 U.S. 313, 317-18 (1879). *Cf.* Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899).

[8] 163 U.S. 537 (1896).

[9] *Separate but Equal*, 1 RACE REL. L. REP. 283 (1956).

[10] In simplest terms, was segregation discrimination?

[11] "Right" is used here rather than "benefit" to conform to the facts of the *Plessy* case, but the principle is the same in either event. If the right or benefit was granted, or the burden was imposed, on an unequal basis, then there was discrimination. This shall serve as the functional definition of "discrimination" as used in this note.

[12] See Boyer v. Garret, 183 F.2d 582 (4th Cir.), *cert. denied*, 340 U.S. 912 (1950) (recreation); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (education); McCabe v. Atchison, T. & S.F.R.R., 235 U.S. 151 (1914) (transportation).

[13] See Atkins v. Texas, 325 U.S. 398 (1945) (dictum); Neal v. Delaware, 103 U.S. 370, 394 (1880).

[14] See Guinn v. United States, 238 U.S. 347 (1915).

[15] *Cf.* Garner v. Board of Pub. Works, 341 U.S. 716, 725 (1951) (dicta in concurring opinion).

[16] See Buchanan v. Warley, 245 U.S. 60 (1917).

[17] 347 U.S. 483 (1954).

that has the effect of segregating the races inevitably discriminatory?[18] In *Brown* the Court answered this question in the affirmative insofar as public education was concerned.[19] That holding was later extended to apply to public facilities generally.[20] The effect of *Brown* then was to reverse the *Plessy* ruling that segregation was not discrimination.

Nowhere in the *Brown* line of decisions did the Court ever imply that a racially discriminatory classification might not be violative of the fourteenth amendment if it were shown that it reasonably related to a valid state function. However, three other Court decisions—two prior to *Brown*, and one at the same time—made specific reference to the necessity for such additional judicial inquiry. The cases of *Hirabayashi v. United States*[21] and *Korematsu v. United States*,[22] dealing with extraordinary burdens imposed on residents of Japanese ancestry during World War II, upheld the racially discriminatory classifications there involved. Said Mr. Justice Black in the *Korematsu* opinion: "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. . . . Pressing public necessity may sometimes justify the existence of such restrictions."[23] And in *Bolling v. Sharpe*,[24] the companion case to *Brown*, decided under the fifth amendment because the fourteenth was not applicable to the District of Columbia, Mr. Chief Justice Warren acknowledged that a right could be restricted where such restriction served a proper governmental objective, but that segregation in public education is not reasonably related to *any*

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[18] "Does *segregation* . . . solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive . . . the minority group of equal educational opportunities?" *Id.* at 493. (Emphasis added.) This wording should be contrasted with the wording in DESEGREGATION AND THE LAW, *supra* note 1, at 115: "The specific question before the Court was whether race *per se* is an invalid classification when measured against the equal protection clause." The issue before the Court in *Brown* and the cases following *Brown* was not a broad, nebulous "discrimination"—nor was it the entire question of classification. It was but one facet of each of these categories—segregation. The importance of this distinction is that *Brown* did not therefore encroach on the standard already being applied to cases not involving segregation; nor did it, in one fell swoop, settle the entire classification question.

[19] "Separate educational facilities are inherently unequal." 347 U.S. at 495.

[20] See Burton v. Wilminton Parking Authority, 365 U.S. 715 (1961) (public restaurant); State Athletic Comm'n v. Dorsey, 168 F. Supp. 149 (E.D. La. 1958), *aff'd mem.*, 359 U.S. 533 (1959) (athletic contests); Gayle v. Browder, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd mem.*, 352 U.S. 903 (1956) (bus transportation); Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir. 1955), *remanded mem.*, 350 U.S. 879 (1955), *vacating*, 124 F. Supp. 290 (N.D. Ga. 1954) (golf courses); Dawson v. Mayor & City Council of Baltimore, 123 F. Supp. 193 (D. Md. 1954), *rev'd per curiam*, 220 F.2d 386 (4th Cir. 1955), *aff'd mem.*, 350 U.S. 877 (1955) (bathing beaches); Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir. 1953), *affirming mem. sub nom.* Sweeney v. City of Louisville, 102 F. Supp. 525 (W.D. Ky. 1951), *vacated and remanded mem.*, 347 U.S. 971 (1954) (entertainment facilities).

[21] 320 U.S. 81 (1943).

[22] 323 U.S. 214 (1944).

[23] *Id.* at 216.

[24] 347 U.S. 497 (1954).

legitimate governmental objective.[25] Thus the Court was essentially saying that a racial classification that segregates is unconstitutional because it is necessarily discriminatory, *and* because it cannot be reasonably related to any valid governmental objective. The implication was clear that racial classifications that do not segregate, and yet are otherwise discriminatory, may be constitutionally upheld if they reasonably relate to a valid governmental function. Unlike *Brown*, in these three cases the Court was adjudicating the issue of racial classification within the framework of analysis applied to classification issues generally.[26]

The fact that racial classification cases subsequent to *Brown* and *Bolling* were largely decided under the precedent of *Brown* resulted in widespread acceptance of the theory that once a racial classification is found to be discriminatory it is necessarily unconstitutional. This, added to the Court's pronouncements that a racial classification is constitutionally suspect,[27] led some to interpolate still further and conclude that a racial classification is conclusively presumed to be discriminatory, and therefore is unconstitutional per se.[28]

It was not until its current term that the Court made a clear attempt to reconcile its decisions in the area of racial classifications with its decisions as to classifications generally. The case in point is *McLaughlin v. Florida*.[29]

The McLaughlin *Test of Permissible Racial Classification*

McLaughlin presented the Court with what is perhaps the most basic and controversial issue underlying racial discrimination—the validity of state imposed racial classifications designed to maintain purity of race. The antimiscegenation statutes here involved, which are in effect in nineteen states,[30] prohibit intermarriage between white and Negro.[31] Three of them, including the Florida statute under attack, prohibit in addition interracial cohabitation,

[25] *Id.* at 499-500.

[26] See text accompanying note 3 *supra*.

[27] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[28] See, *e.g.*, BLAUSTEIN & FERGUSON, DESEGREGATION AND THE LAW, *supra* note 1; St. Antoine, *Color-Blindness but Not Myopia*, 59 MICH. L. REV. 993, 994 (1961); Wollett, *Race Relations*, 21 LA. L. REV. 85, 92 (1960); Notes and Comments, 38 CHI.-KENT L. REV. 169, 184 (1961).

[29] 379 U.S. 184 (1964).

[30] ALA. CONST. § 102; ALA. CODE tit. 14, § 360 (1958); ARK. STAT. § 55-104 (1947); DEL. CODE ANN. tit. 13, § 101 (1953); FLA. CONST. art. XVI, § 24; FLA. STAT. § 741.11 (1961); GA. CODE ANN. § 53-106 (1933); IND. ANN. STAT. § 44-104 (1952); KY. REV. STAT. § 402.020 (1943); LA. CIV. CODE art. 94 (Dart. 1945); MD. ANN. CODE art. 27, § 398 (1957); MISS. CONST. art. 14, § 263; MISS. CODE ANN. § 459 (1942); MO. REV. STAT. § 451.020 (1959); N.C. CONST. art. XIV, § 8; N.C. GEN. STAT. § 51-3 (1953); OKLA. STAT. tit. 43, § 12 (1961); S.C. CONST. art. 3, § 34; S.C. CODE § 20-7 (1952); TENN. CONST. art. (11), § 14; TENN. CODE ANN. § 36-402 (1956); TEX. REV. CIV. STAT. art. 4607 (1948); VA. CODE ANN. § 20-54 (1953); W.VA. CODE ANN. § 4697 (1961); WYO. STAT. § 20-18 (1957).

[31] All the statutes apply to those of Negro, African or Mulatto descent; also covered in one or another statutes are Orientals, Mongolians, Malayans, and American and Asiatic Indians. See Cummins & Kane, *Miscegenation, the Constitution, and Science*, 38 DICTA 24, 53-54 (1961).

or provide a separate and more severe punishment for interracial illicit cohabitation, adultery, and fornication.[32] While these statutes have been constitutionally challenged in the highest state courts a number of times,[33] only California invalidated its miscegenation law as being unconstitutional.[34] The Supreme Court, since upholding Alabama's interracial adultery and fornication statute in 1882,[35] has consistently shied away from considering the question[36] until it accepted the *McLaughlin* case at its current term.

In this case a white woman and Negro man were convicted under Florida's interracial cohabitation statute.[37] There is no precisely corresponding criminal statute making a similar act of cohabitation a crime when the couple are members of the same race.[38] Thus the racial classification drawn makes an act criminal which otherwise would not be. Florida based its position on the precedent of *Pace v. Alabama*,[39] an early case in which the Court upheld a statute similar to the one in issue in this case on the ground that it treats the members of both races alike and therefore the classification is not *racially* discriminatory. In *McLaughlin* the Court rejected this argument, saying that mere equal application to the class defined is not enough.[40] In holding the Florida statute unconstitutional, the Court at last discussed in detail the standard to be applied in the adjudication of racial classification questions under the fourteenth amendment.

First the opinion sets forth the approach applied to classifications generally: If a law deals alike with all of a certain class, and if the classification is based

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[32] ALA. CODE tit. 14, § 360 (1958); ARK. STAT. § 41-806 (1947); FLA. STAT. §§ 798.04, 798.05 (1961).

[33] Green v. Alabama, 58 Ala. 190 (1877); State v. Pass, 59 Ariz. 16, 121 P.2d 882 (1942); Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1895); Jackson v. City & County of Denver, 109 Colo. 196, 124 P.2d 240 (1942); Scott v. Georgia, 39 Ga. 321 (1869); State v. Gibson, 36 Ind. 389 (1871); Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948); State v. Jackson, 80 Mo. 175 (1883); State v. Kennedy, 76 N.C. 232 (1877); Eggers v. Olson, 104 Okla. 297, 231 P. 483 (1924); Loams v. State, 50 Tenn. 247 (1871); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955).

[34] Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948).

[35] Pace v. Alabama, 106 U.S. 583 (1882).

[36] Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, *remanded* 350 U.S. 891 (1955) (record incomplete as to domicile of parties), *aff'd*, 197 Va. 734, 90 S.E.2d 849 (Sup. Ct. of App. refused to comply with mandate to return to trial court), *motion for recall of mandate denied*, 350 U.S. 985 (1956) (want of fed. question); Jackson v. State, 37 Ala. App. 519, 72 So. 2d 114, *cert. denied*, 348 U.S. 888 (1954); In re Monk's Estate, 48 Cal. App. 2d 603, 120 P.2d 167 (Dist. Ct. 1941), *appeal dismissed*, 317 U.S. 590 (1942) (not filed within allowable time).

[37] "Any Negro man and white woman, or any white man and Negro woman, who are not married to each other, who shall habitually live in and occupy in the night-time the same room, shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars." FLA. STAT. § 798.05 (1961).

[38] *But see* FLA. STAT. § 798.03 (1961), the general fornication statute, which provides for three months imprisonment and $30 fine, and FLA. STAT. § 798.04 (1961), the comparable interracial fornication statute, which provides for twelve months imprisonment and $1,000 fine.

[39] 106 U.S. 583 (1882).

[40] 379 U.S. 184, 190-91 (1964).

upon a real difference which bears a reasonable and just relation to the purpose of the legislation, then the law, though it may be discriminatory in effect, is not obnoxious to the equal protection clause; and further, if the legislative purpose falls within a valid governmental function, the law is not violative of due process.[41] Using this as a starting point, the Court then proceeds to distinguish its approach when the classification is based on race. It points out that while normally legislatures are allowed a wide discretion in drawing classifications,[42] such an approach cannot be applied to classifications based on race; for the central purpose of the fourteenth amendment was to eliminate racial discriminations arising out of state-drawn classifications, and therefore any such classification is "constitutionally suspect,"[43] *i.e.*, is presumed to bear no reasonable relation to any constitutionally acceptable legislative purpose. The opinion goes on to state that racial classifications embodied in criminal statutes, as in this case, will be subjected to particularly rigid scrutiny—there must be some overriding statutory purpose *requiring* the racial classification to be drawn.[44]

In evaluating the racial classification in this case, the Court determines that the objectives of the statute may be the enforcement of "basic concepts of sexual decency" or the enforcement of Florida's law prohibiting intermarriage between the races. The court accepts the first as a legitimate purpose, and, for the sake of argument, assumes the second constitutional without expressing an opinion on the point. It then asks whether the racial classification drawn is *necessary* and *essential* to the accomplishment of either of these purposes. It concludes that it is not because the general and nonracial illicit cohabitation statute serves those purposes equally as well.[45]

Unfortunately the opinion is not precise in one particular. The Court considered in detail if and under what circumstances a discriminatory racial classification might be upheld under the fourteenth amendment, for the Florida statute in issue was clearly discriminatory in effect on its face. The Court took no notice, however, of the possibility that a racial classification need not inevitably be discriminatory. Based on the facts before it, it was natural for the Court to ignore the problem of a cause and effect relationship between classification and discrimination, and to speak only to the issue of proper constitutional justification for the discrimination.

In the past the Court has said that, as to racial classifications, once the plaintiff has established a prima facie case of discrimination, the burden of justifying the classification falls forthwith upon the state.[46] And, as to classifica-

[41] *Ibid.*

[42] *Ibid.*

[43] *Id.* at 192.

[44] *Ibid. But see* the concurring opinion of Mr. Justice Stewart, joined in by Mr. Justice Douglas, at 198: ". . . [T]he Court implies that a criminal law of the kind here involved might be constitutionally valid if a State could show 'some overriding statutory purpose.' This is an implication in which I cannot join, because I cannot conceive of a valid legislative purpose . . . for a state law which makes the color of a man's skin the test of whether his conduct is a criminal offense . . . . Discrimination of *that* kind is invidious *per se*."

[45] *Id.* at 193-96.

[46] Avery v. Georgia, 345 U.S. 559, 563 (1953).

tions generally, a discrimination which is merely technical, and in no sense substantial, does not render a statute void.[47] Within this context, then, is it enough for the plaintiff to allege that the state has used the designation "Negro," or must he point to discriminatory effects threatened by the designation before a court will proceed with the test set forth in *McLaughlin*?[48] The *McLaughlin* opinion gives no precise answer.[49] But prior opinions of the Court clearly seem to say that mere designation is not enough.[50] True—courts will be inclined to presume discriminatory effects where they find a racial designation;[51] but, where not dictated by precedent, such presumption is not conclusive and is subject to being overcome by the state.[52] Certainly it can be argued that the entire line of precedent under *Plessy* and *Brown* make sense only if racial discrimination, and not merely racial designation, must be alleged.

Thus, although there is this impreciseness in the opinion, *McLaughlin* would seem to settle the question of what test the Court is applying to racial classifications. It is applying the same test that is applied to other classification questions under the fourteenth amendment—with the qualifications that there is a presumption of invalidity rather than validity of the statute,[53] and that the state has the burden of establishing a *necessary* rather than a merely reasonable relation to a valid governmental objective.[54] Specifically, under this test, the courts will analyze a racial classification issue in three steps: (1) Is there a prima facie showing that the classification is discriminatory? If no, then the classification is upheld; if yes, then (2) has the state sustained its burden of showing that the classification is necessary to achieve the statutory objective? If no, the classification is invalid; if yes, then (3) has the state sustained its

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[47] Bank Comm'r v. Abilene Nat'l Bank, 179 Fed. 461, 465-66 (8th Cir. 1910), *aff'd*, 228 U.S. 1 (1913).

[48] There is clear authority for the proposition that the plaintiff need not point to an actual discriminatory result—a threatened discriminatory effect being enough. See, *e.g.*, Anderson v. Martin, 375 U.S. 399, 402 (1964).

[49] Though in its language the opinion does state the issue in terms of whether the discrimination is an " . . . arbitrary or invidious discrimination . . ." 379 U.S. 184, 191 (1964).

[50] "In the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by . . . [requiring that the ballot designate the race of all candidates] . . . the State furnishes a vehicle by which racial prejudice may be . . . aroused . . . . The vice lies . . . in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls." Anderson v. Martin, 375 U.S. 399, 402 (1964); "Even if the white and yellow tickets . . . [designating race] . . . were . . . [selected] . . . without discrimination, opportunity was available to resort to it . . . and where not a single Negro [juror] was selected . . . we think petitioner established a prima facie case of discrimination." Avery v. Georgia, 345 U.S. 559, 562 (1953). In each of these cases the Court took pains to look beyond the racial designation for an actual or threatened discriminatory effect.

[51] See Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944).

[52] See Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964).

[53] See text accompanying note 51 *supra*.

[54] 379 U.S. 184, 196 (1964).

burden of showing that the legislative objective falls within a constitutionally valid state function. If yes, the classification is valid; if no, it is invalid.[55]

The McLaughlin *Test Applied*

To demonstrate the *McLaughlin* test, it is useful to apply it to a variety of current racial classification issues faced by the Supreme Court prior to the *McLaughlin* opinion.

In *Hamm v. Virginia State Bd. of Elections*[56] several Negro and white citizens of Virginia brought action to have certain of the State's constitutional and statutory provisions declared unconstitutional. The provisions challenged were in three categories: (1) voting record laws,[57] (2) property ownership and taxation statutes,[58] and (3) a statute relative to divorce decrees.[59] The laws of the first two categories required that state officials keep racially *separate* records, and the statute of the third category required designation of the parties' race in every divorce decree. A three-judge Federal District Court struck down the requirement for separate records, and upheld the divorce statute. In so doing the court reasoned that: "The infirmity of the provisions [struck down] . . . lies in their mandate of *separation*[60] of names by race."[61] The court went on to point out that the classification serves no legitimate governmental purpose—"[they] serve no other purpose than to classify and distinguish official records on the basis of race or color."[62] As to the divorce statute, the court reasoned that designation of race serves a useful purpose, and that the procurement and classification of vital statistics is a legitimate state function.[63] The Supreme Court affirmed the lower court's ruling in each instance without opinion, and without hearing.[64]

Were the *McLaughlin* test to be applied to this case, its application to the first two categories of statutes might well differ from its application to the third. Thus, as to the voting, property, and taxation statutes, it would be held that (1) by showing the requirement of segregation, the plaintiffs made a prima facie

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[55] This order of analysis is the most logical in most fact situations. It is also in line with the Court's traditional preference for reviewing legislative enactments under the narrower grounds of equal protection, rather than questioning the legislature's exercise of its discretionary authority under due process. However, steps (2) and (3) can be interchanged where the facts or surrounding circumstances of a case so dictate.

[56] Tancil v. Woolls, 379 U.S. 19, *affirming per curiam*, Hamm v. Virginia State Bd. of Elections, 230 F. Supp. 156 (E.D. Va. 1964).

[57] VA. CONST. art. II, § 38; VA. CODE of 1950, §§ 24-28, 24-120 as amended 1963. The appropriate excerpts are set forth in note 1 of 230 F. Supp. 156, 157 (E.D. Va. 1964).

[58] VA. CODE OF 1950, §§ 58-790, 58-802 (para. b-d,h), 58-880. The appropriate excerpts are set forth in note 2 of 230 F. Supp. 156, 157 (E.D. Va. 1964).

[59] VA. CODE of 1950 § 20-101. The appropriate excerpt is set forth in note 3 of 230 F. Supp. 156, 157 (E.D. Va. 1964).

[60] Emphasis the court's.

[61] 230 F. Supp. 156, 158 (E.D. Va. 1964).

[62] *Ibid.*

[63] *Ibid.*

[64] 379 U.S. 19 (1964).

showing of a discriminatory racial classification,[65] (2) segregation of records based on race is not necessary to the legislative objective of collecting and maintaining vital statistics.[66] Thus, even though (3) the legislative objective of collecting and maintaining vital statistics is a permissible state function, the racial classification involved is invalid. As to the divorce statute, there are two bases upon which the court might have validated the statute. It might be held that the mere showing of a racial designation does not establish a prima facie case of discrimination, and hence plaintiff has no standing before the Court.[67] Or, more probably: (1) the Court is willing to presume a prima facie showing of discrimination by the showing of the racial classification in official state records,[68] but (2) designation by race is necessary to the collection and maintenance of vital statistics, and (3) the collection and maintenance of vital statistics is a permissible state function. Hence, the racial classification, even though presumed discriminatory, is found to be valid.

The *Hamm* case is an interesting example of the *McLaughlin* test if for no other reason than that it scrutinizes segregation carried to what must be its most extreme boundary—separation not of people, but of their statistical facsimiles. Perhaps a more significant application of the test relates to the question of whether a state may classify according to race in order to attempt to alleviate problems which have developed as a result of past discriminations and segregation. Again, the current term of the Court has presented an instructive decision. In *Balaban v. Rubin*[69] the Court refused to review a New York Court of Appeals decision allowing a school board to classify according to race in order to remedy *de facto* segregation. The Court of Appeals of New York upheld the racial classification drawn on the basis that it was not discriminatory in effect, saying: "The simple fact as to the plan adopted . . . is that it excludes no one from any school and has no tendency to foster or produce racial segregation."[70]

Under the *McLaughlin* test it is obvious that here the classification was upheld under the first step of analysis, and there was no occasion to go further. That is, the plaintiffs did not make out a prima facie case that the classification was discriminatory in effect.

Another case of interest in illustrating the utility and applicability of the *McLaughlin* test is *Anderson v. Martin*.[71] Here the statute put to constitutional scrutiny provided for the designation of the race of all candidates on the ballot.

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[65] The *Brown* line of cases had established that segregation was discrimination. Here the court applied this principle, though the racial segregation was limited to official records. Inasmuch as there would not appear to be any actual, present discrimination implicit in such a purely clerical segregation, the court was taking judicial notice of threatened discriminatory effects. See note 48 *supra*.

[66] Which is in line with the Court's prior edict that segregation is not reasonably related to any proper governmental objective. Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

[67] This avenue remains open to the courts. See, *e.g.*, Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964).

[68] See text accompanying note 51 *supra*.

[69] 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964).

[70] 14 N.Y.2d 193, *supra* note 69, at 199.

[71] 375 U.S. 399 (1964).

A District Court held that since the race of all candidates had to be noted, there was no discrimination, and so sustained the statute.[72] On direct appeal the Supreme Court reversed. In its opinion the Supreme Court explained that while "in the abstract . . . [the statute] . . . imposes no restriction upon anyone's candidacy . . . ," yet the designation "placed the power of the State behind a racial classification that induces racial prejudice at the polls."[73] And, said the Court, there is no relevance in the state pointing up the race of the candidate as bearing upon the state's legitimate function of informing the electorate as to the candidates' qualifications for office.[74]

Again, under the *McLaughlin* test the logic would be: (1) there is a prima facie showing that the classification threatens a discriminatory effect, and (2) there is no necessary relationship between the classification and the objective of the legislation. Thus, even though (3) informing the electorate as to the candidates' qualifications for office is a permissible state function, the classification is invalid.

Conclusion

As noted at the beginning of this article, discrimination is in large measure dependent upon classification. It by no means follows, however, that every classification invariably leads to discrimination. Nor does it follow that even a racially discriminatory classification may not under extraordinary circumstances be upheld as necessary to some overriding general welfare objective. To apply any such pat standard as that represented by the slogan "the Constitution is color blind"[75] is to close the eyes of the state to situations in which it must take cognizance of color in order to act effectively. There can, for example, be no ameliorative action with regard to *de facto* segregation, or to discrimination itself, if the state cannot recognize racial distinctions.[76] Even the Civil Rights Commission must survey individuals according to race in order to have accurate data on which to set policy.[77] The relevance of race in adoption proceedings is self-evident.[78] In another vein, it might be quite reasonable to select diplomatic personnel for some of the African nations with a view to race as well as qualifications. In short, the best interests of the state and of the individual members of the minority and the majority cannot be effectively protected through an inflexible position holding all racial classifications invalid per se. Rather, these questions

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[72] 206 F. Supp. 700 (D.C. La. 1962).

[73] 375 U.S. 399, 402 (1964).

[74] *Id.* at 403.

[75] "Our Constitution is color-blind . . . ." Mr. Justice Harlan's dissenting opinion in Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

[76] "Whether the Fourteenth Amendment should be read to outlaw race or color as determinants of all official action must be tested not alone by the effect of such a principle on state-required segregation but also by its impact upon measures that take race into account to equalize job opportunity or to reduce de facto segregation . . . ." Wechsler, *Introduction* to PRINCIPLES, POLITICS AND FUNDAMENTAL LAW at xiv (1961).

[77] See Storey, *The Report of the Commission on Civil Rights*, 46 A.B.A.J. 39, 41 (1960) (author was co-chairman of Comm'n).

[78] In re Adoption of a Minor, 228 F.2d 446, 448 (D.C. Cir. 1955).