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## Equal Protection in Florida Constitutional Law

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# EQUAL PROTECTION IN FLORIDA CONSTITUTIONAL LAW

WILLIAM EATON\*

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## I. INTRODUCTION

The Florida Constitution's Declaration of Rights, section 1, which reads "all men are equal before the law . . .," is the source of Florida's equal protection inhibition.<sup>1</sup> This clause, of course, does not bar all legislative classifications for few, if any, laws apply to all persons in the same manner. "Equal protection demands only reasonable conformity in dealing with parties similarly circumstanced,"<sup>2</sup> and basically the requirement for a legislative classification is that it be reasonable.<sup>3</sup> There must, under our Florida Charter, be "some just relation to, or reasonable basis in, essential difference of conditions and circumstances with reference to the subject regulated, and [the statute] should not merely be arbitrary. . . ."<sup>4</sup> In addition, a class should include all those similarly situated, unless there are practical differences sufficient to warrant a special classification.<sup>5</sup>

In applying these standards the court has two choices. It can adhere to a strong presumption of legislative validity, upholding any classification for which the legislature believed it had valid reasons. On the other hand, the court can substitute its own discretion, requiring that there not only be some reasonable basis for a particular classification, but that the classification be reasonable to the court. Under this second approach the extent of judicial legislation is limited only by judicial discretion. It will be seen that, while paying lip service to the first of these approaches,<sup>6</sup> which neces-

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1. *Georgia So. & Fla. Ry. v. Seven-up Bottling Co.*, 175 So.2d 39, 40 (Fla. 1965), quoting from *Davis v. Florida Power Co.*, 64 Fla. 246, 60 So. 759 (1913).

The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person, or class of persons, from being singled out as a special subject for arbitrary and unjust discrimination and hostile legislation.

2. *Hunter v. Flowers*, 42 So.2d 435, 437 (Fla. 1949).

3. *Rodriguez v. Jones*, 64 So.2d 278 (Fla. 1953). But when both due process and equal protection are argued, the court frequently fails to distinguish between the reasonableness of the police power exercise and reasonableness of the classification of the statute. See *Miami v. Kayfetz*, 92 So.2d 798, 804 (Fla. 1957).

4. *Eslin v. Collins*, 108 So.2d 889, 891 (Fla. 1959).

5. See *Georgia So. & Fla. Ry. v. Seven-up Bottling Co.*, *supra* note 1.

6. "The matter of the wisdom or good policy of a legislative act is a matter for the legislature to determine." *Lee v. Bank of Georgia*, 159 Fla. 481, 483, 32 So.2d 7, 10 (Fla. 1947).

sarily involves a strong adherence to the principle of separation of governmental functions, the Florida Supreme Court often succumbs to the temptation to substitute its own judgment for that of the legislature.

Implicit in the court's judgment of reasonableness is a determination of the strength of the state's police power (under substantive due process) over the area sought to be regulated. Where that power has been strengthened by the court, the equal protection guaranty has been correspondingly weakened.<sup>7</sup> Consequently, it is often difficult to isolate these two concepts (state power under the substantive due process and equal protection limitations) in any one decision.

## II. PROFESSIONAL AND BUSINESS REQUIREMENTS

An excellent example of the Florida Supreme Court's approach to legislative classification establishing professional requirements is *Florida Accountants Ass'n v. Dandelake*.<sup>8</sup> The statute in question restricted the practice of public accounting to those persons holding certificates as certified public accountants and to those persons who had been issued certificates to practice public accounting prior to 1927. This classification contained only seven hundred and fifty-one members. By broadly defining public accountancy, the statute in effect required non-certified accountants to entitle themselves "bookkeepers" rather than accountants, or in the alternative, to be employed by those entitled to engage in public accountancy under the statute.

The court invalidated the statute, taking judicial notice of the small number of persons included within the classification and the resulting monopolistic conditions. The court judicially determined a field of professional operation within which no distinction could be made by the state between certified and non-certified accountants. To prohibit non-certified accountants from doing routine accounting work in their own offices, rather than in that of an employer, would serve no purpose in the court's view. Such an arbitrary regulation of non-certified accountants denied to them the equal protection of the laws.

Another statutory classification required each applicant for a real

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7. *E.g.*, in a suit challenging the validity of FLA. STAT. § 454.031(3) which provides,

No person shall be entitled to admission to practice [law] without an examination . . . provided, that any person enrolled on or before the 25th day of July 1951, as a student in any law school . . . obtaining the degree of Bachelor of Laws . . . within three years . . . either of his enrollment or of the effective date of this Act . . . [shall be entitled to admission. . . .]

The court held the statute valid, despite a vigorous dissent maintaining that it was unreasonable, arbitrary and capricious to make enrollment date, rather than the date of graduation, the cut-off. The majority believed that the classification was reasonable despite the fact that it might work some hardship, in view of the fact that the practice of law is not a right but a privilege—another way of emphasizing the strong police power of the legislature in this area. *Fuller v. Watts*, 74 So.2d 676 (Fla. 1954).

8. 98 So.2d 323 (Fla. 1957).

estate broker's license, in counties with a population exceeding two hundred sixty thousand (only Dade met this requirement), to demonstrate that he had served an apprenticeship as a salesman under a registered broker for at least one year.<sup>9</sup> The Florida Supreme Court reiterated<sup>10</sup> its view that such a regulation must be state-wide "unless some valid basis for classification clearly appears." No such basis was found and the statute was invalidated.

In 1927 the legislature authorized a state board to license naturopaths. A 1957 act abolished the board and forbade further licensing. The presently licensed naturopaths who had practiced less than two years could no longer practice naturopathy, while those who had practiced more than two years but less than fifteen could renew their licenses to practice, subject to the condition that they could no longer administer and prescribe drugs. Those who had practiced more than fifteen years could continue to administer and prescribe drugs. The plaintiff, a member of the second class prohibited from administering and prescribing drugs, sought to invalidate this statute because of the privileges granted those naturopaths in practice more than fifteen years.

The court implied that a grandfather clause might have been valid, but held that creation of a closed class within a closed class was unreasonable since members of both classes "take the same training and pass the same examination." Since the court was unable to approve any reasonable basis for the granting of special privileges to those naturopaths who had been practicing more than fifteen years, the classification was held unreasonable as a denial of equal protection of the law.<sup>11</sup>

An example of a valid professional requirement was presented in *State v. Canova*.<sup>12</sup> The statute in question required that an applicant to be a pharmacist had to be a graduate of an accredited four-year college of pharmacy to be eligible for examination. However, the statute exempted those pharmacists already licensed.<sup>13</sup> The plaintiff had graduated from a two-year program and had practiced in another state since 1925. He challenged this grandfather clause, asserting that it created an arbitrary classification between those with similar academic training, a classification depending upon whether or not the pharmacist was previously registered in Florida. Here, at least, the court admitted that the "expediency or wisdom of the standard of qualification fixed" was a matter for legislative judgment and it declined to declare arbitrary the legislative theory that those individuals already registered had demonstrated evidence of their skill and competency equivalent to a four-year program of education.

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9. *State v. Florida Real Estate Comm'n*, 99 So.2d 582 (Fla. 1956).

10. A similar statute was invalidated on equal protection grounds in *Hollenbeck v. State*, 91 So.2d 177 (Fla. 1956).

11. *Eslin v. Collins*, 108 So.2d 889 (Fla. 1959).

12. 123 So.2d 672 (Fla. 1960).

13. FLA. STAT. § 465.071(1)(b) (1965).

Recently the court considered a statute<sup>14</sup> which, for purposes of regulation, classified farmers according to whether they sold cleaned and packaged seed or uncleaned, unpackaged seed. The statute exempted from its provisions the latter and required compliance from the former. A further classification exempted, according to gross receipts, the small seller. The court upheld the classification as having “. . . a just, fair and practical basis . . . based on a real difference which is reasonably related to the subject and purpose of the regulation.”<sup>15</sup> It was further noted that such a classification was valid even though another classification, or no classification, would have appeared more reasonable.

In *Rabin v. Conner*<sup>16</sup> the court considered portions of a celery marketing order and a statute authorizing and awarding allotments on the basis of production in prior years.<sup>17</sup> In the face of findings of fact by the legislature that marketing of celery is affected with a public purpose and that this particular exercise of its police power was for the purpose of protecting the health, peace, safety and general welfare of the people of the state, the court invalidated. The classification was one “for which we can find no justification in any legitimate public policy. . . .”<sup>18</sup> Notice was taken that the effect was to create a monopoly, denying others the right to participate, in any reasonably large scale, in the marketing of celery.<sup>19</sup> An unjust and discriminatory distinction was drawn between those who were producers during the representative period and those who were not.

Perhaps the most important invalidation in the past year occurred in *Georgia So. & Fla. Ry. v. Seven-up Bottling Co.*<sup>20</sup> The court struck down the comparative negligence statute for railroads, reasoning that a railroad comparative negligence statute was reasonably confined to railroads only if railroads were the single major dangerous instrumentality. The court felt changing circumstances, such as the rise of the automobile and other dangerous instrumentalities, had made it an arbitrary exercise of state power to single out railroads for special liability. Since a statute can only be reasonable with regard to the subject matter regulated, a substantial change in the circumstances may make a once valid statute invalid. Unfortunately, the court failed to recognize a significant differentiating factor between railroad companies and automobile owners—only the railroad company is a licensed public utility.

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14. FLA. STAT. § 578.011 (1963).

15. *Finlayson v. Conner*, 167 So.2d 569, 571 (Fla. 1964).

16. 174 So.2d 721 (Fla. 1965).

17. FLA. STAT. ch. 573 (1963).

18. *Supra* note 16, at 725.

19. The court noted *Eskind v. City of Vero Beach*, 159 So.2d 209 (Fla. 1963), in determining the validity of legislation and orders of the kind involved here; the vital factor to be considered is the practical effect and impact thereof.

20. 175 So.2d 39 (Fla. 1965).

## III. SUNDAY LAWS

The area in which the Florida Supreme Court gives least effect to the presumption of legislative validity is that of Sunday (or Blue) Laws. It appears to be impossible for the legislature to enact a valid Sunday Law. When presented with such a statute, the court invariably responds with an invalidation.<sup>21</sup> The federal experience, with a considerably more outrageous classification, goes another way.<sup>22</sup>

A Sunday Law of fairly general application was considered in 1957.<sup>23</sup> Florida Statutes sections 855.01 and 855.02 read:

855.01 Whoever follows any pursuit, business or trade on Sunday . . . unless the same be a work of necessity, shall be punished . . . provided, however, that nothing contained in the laws . . . shall . . . prohibit . . . printing . . . any newspaper . . . nor shall [this section] apply to theaters in which moving pictures are shown.

855.02 Whoever keeps open store . . . on Sunday . . . shall be punished. . . In cases of emergency or necessity, however, merchants . . . and others may dispose of the comforts and necessities of life . . . without keeping open doors.

The court invalidated although noting that “. . . the closing of all business houses on Sunday . . . bears a rational relationship to the public health, safety, morals or general welfare. . . ,” but “it does not follow that laws containing the exemption of many businesses and vocations . . . can be said to bear such relationship.” The Justices failed to find a valid and substantial reason for the legislative classification, *i.e.*, the exemption from operation of the law of newspapers, theaters and merchants under emergency or necessity.

The legislature responded to this holding with a Sunday Law which made it unlawful for any person or firm to engage in the business of buying, selling, trading or exchanging new or used cars, “on the first day of the week, commonly called Sunday, or on legal holidays. . . .”<sup>24</sup> Cognizant of the judicial aversion to Sunday Laws, the legislature provided, in the preamble to the act, findings of fact to justify the selective exercise of the state’s police power. The court noted that even though legislative findings of fact are presumed to be correct, they carry no presumption of correctness if “obviously contrary to proven and firmly established truths of which courts may take judicial notice.” Since the court found the legislative findings of fact to be “obviously contrary” to fact, it was apparently free to determine that there was no valid and substantial reason which

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21. *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952).

22. *E.g.*, *Allied Stores v. Bowers*, 358 U.S. 522 (1959).

23. *Kelly v. Blackburn*, 95 So.2d 260 (Fla. 1957).

24. FLA. STAT. § 320.272(2) (1959).

would allow the Legislature to regulate only this business, rather than all businesses.<sup>25</sup>

The outlook is less than bright for any Sunday Closing Law short of an outright ban on all business activity which is probably a political impossibility. Any exceptions, regardless of the reasons advanced by the Legislature, are tantamount to invalidation since the court considers the only "reasonable" motivation behind such a law to be that of health—providing a day of rest for all workers. Unless the court can be convinced that there are some classes of workers who do not need the day of rest, future Sunday Laws are doomed.

#### IV. TAXATION AND ASSESSMENT

In contrast to the weak presumption of legislative validity recognized in Sunday Closing Law statutes, the court grants a vigorous presumption under the state taxation power.<sup>26</sup> This presumption extends to the power of the legislature both to select subjects of taxation and to provide for exemptions from taxation. However, excise or license taxes cannot be unreasonable or arbitrary, either as to the basis of classification or the amount of the tax imposed.<sup>27</sup> In addition, the "classifications are to be compared not only in relation to each other but also in relation to the amount of license fees imposed or not imposed."<sup>28</sup> Obviously equal protection does not require that an excise tax be equal under all conditions.<sup>29</sup>

Omission of property from assessment rolls or assessment of property at a lower rate than other property of the same class operates as a denial of equal protection.<sup>30</sup> Likewise a statute which allows a tax assessor to systematically omit some property within a classification while including other property is invalid.<sup>31</sup>

A major invalidation, delineating one of the limits on legislative discretion in tax matters, occurred in the case of *Volusia County Kennel Club v. Haggard*.<sup>32</sup> At issue was a tax on the dog racing operators' "take," based on the amount of daily gross receipts, with a different rate imposed on

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25. *Moore v. Thompson*, 126 So.2d 543 (Fla. 1960).

26. As examples, consider *Gasson v. Gay*, 49 So.2d 525 (Fla. 1950) and *City of Orlando v. National Gas & Appliance Co.*, 57 So.2d 853 (Fla. 1952). In the *Gasson* case the court upheld the exemption of newspapers from a sales tax when newsmagazines were not given a like exemption. In *Orlando* the court validated a statute which permitted municipalities to tax natural gas and electricity while exempting fuel oil and kerosene, despite contentions that common characteristics (as use for heating) made the classification arbitrary. In an approach unlike that under substantive due process the court answered that if this classification must include fuel oil and kerosene one might as well say you must tax wood.

27. *State v. Gerrell*, 137 Fla. 324, 188 So. 812 (1939), quoted in *State v. City of Pensacola*, 126 So.2d 566 (Fla. 1961).

28. *Segal v. Simpson*, 121 So.2d 790, 792 (Fla. 1960).

29. *Heriot v. City of Pensacola*, 146 So. 654, 108 Fla. 480 (1933).

30. *Folsom v. Greenwood*, 120 So. 317, 97 Fla. 433 (1929).

31. *Cassady v. Consolidated Naval Stores Co.*, 119 So.2d 35 (Fla. 1960).

32. 73 So.2d 884 (Fla. 1954).

each daily pool according to its amount. The court decided to "eliminate . . . any theory that the tax is imposed under police power" by rejecting any contention that the state has a greater police power over legitimate gambling than over other businesses. Then, on rehearing, the court reiterated its holding that "any attempted tax . . . based solely on the amount of the gross receipts of a business heretofore recognized by the Legislature as being a legitimate business constituted a denial of the Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States and the Declaration of Rights of the State of Florida."<sup>33</sup> It would probably be unwise to view the approach here taken as very general in scope, since underlying this decision was the proximity of a tax based closely on income to the constitutionally forbidden income tax. But on its face, this decision would appear to bar a tax on any legal business which could clearly distinguish income.

A decision invalidating a license tax, one undiluted by overtones of a forbidden income tax, occurred in *Segal v. Simpson*.<sup>34</sup> At issue was a statute<sup>35</sup> levying a license fee of twenty-five dollars a day on commercial establishments offering live entertainment and permitting consumption of alcoholic beverages, and not holding a valid beverage license permitting consumption on the premises. Noting that the fee imposed, approximately ten times that imposed on an ordinary bar, created a sharp discrimination, the court held the statute to be "flagrant preferment through omission, of establishments basically similar to appellants."

*Cassady v. Consolidated Naval Stores Co.*<sup>36</sup> involved a statute providing for separate taxation of mineral rights when owned in fee simple separately from the ownership of the surface. It provided that if a return were not made by the owner of subsurface rights, a duty was imposed upon the tax assessor to assess such rights. But this separate assessment was required only when an owner of some record interest in the land filed a written request for it. The court held that the "effect of the Statute is to authorize the tax assessor to . . . systematically and intentionally omit from the tax rolls property of the same classifications as plaintiff's."<sup>37</sup> Such an omission by the assessing officer operated as a denial of equal protection of the law.<sup>38</sup>

A recent tax assessment case in which a denial of equal protection was

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33. *Volusia County Kennel Club v. Haggard*, 73 So.2d 884, 898-899 (Fla. 1954). "These two sections are 'kindred provisions.'" *State v. City of Pensacola*, 126 So.2d 566, 569 (Fla. 1961).

34. 121 So.2d 790 (Fla. 1960).

35. FLA. STAT. § 561.34(13) (1959).

36. 119 So.2d 35 (Fla. 1960).

37. *Id.* at 37.

38. The court first found the statute to be an invalid delegation of the legislative power, and then noted that the exercise of that delegated power by the assessor would constitute a denial of equal protection.



pleaded was *Lanier v. Overstreet*.<sup>39</sup> Owners of agricultural lands sought to invalidate and set aside assessment of their lands by the county tax assessor. They contended that the assessor failed to comply with section 193.11(3) of the Florida Statutes which provides, *inter alia*, that:

(3) All lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis, regardless of the fact that any or all of said lands are embraced in a plat of a subdivision or other real estate development. . . .

In arriving at his evaluation, the assessor considered other potential uses besides the land's actual use for agriculture. The court noted that, "[a]s in the case of other legislative classifications, if a legislative directive designed to secure a just valuation of a particular class of taxable property is reasonable, not arbitrary or unjustly discriminatory, and applicable alike to all similarly situated, it should be upheld by the courts."<sup>40</sup> The statute was valid as a classification designed to secure a just valuation of agricultural lands.<sup>41</sup> The discrimination, implicit in the statute, against non-agricultural lands did not alarm the court.

A 1955 statute<sup>42</sup> grants to all dog tracks a credit of one hundred seventy dollars per race, per day to cover their daily initial expense of operation; this amount is deducted by each track from the seventeen per cent of the pari-mutuel pools withheld by the track, and is to be deducted before any taxes are imposed on the track.<sup>43</sup> In a 1965 case appellants asserted that the deduction was capricious and arbitrary and discriminated against them and other taxpayers generally who are not allowed similar credit out of taxes imposed upon them. The court validated the statute since the only requirement of equality recognized was that there be no arbitrary and judicially unreasonable discrimination among the class, that is among the dog track operators.<sup>44</sup>

## V. ZONING

The general principles applicable to the consideration of a zoning ordinance's validity under equal protection are twofold. First, the classi-

39. 175 So.2d 521 (Fla. 1965). At issue were both the federal equal protection clause and FLA. CONST. art. IX, § 1, providing for a "uniform and equal rate of taxation." See also *Tyson v. Lanier*, 156 So.2d 833 (Fla. 1963).

40. 175 So.2d 521, 523 (1965).

41. The statute was held valid under FLA. CONST. art. IX, § 1, since the court found a legislative intent, consistent with other directives to assess property according to the land's actual character during the tax year.

42. FLA. STAT. § 550.162 (1965).

43. It is to be noted that excise taxes are treated differently than property taxes.

Exemptions in excise tax statutes which ordinarily are classifications specifying the nature and extent of imposition of the excise tax are not subject to the limitations of uniformity and equality or restricted to the exemption purposes applying to the taxation of real and personal property. *Willis v. Morgan*, 176 So.2d 73, 75 (Fla. 1965).

44. *Willis v. Morgan*, 176 So.2d 73 (Fla. 1965).

fiction must be related to the health, safety, general welfare or morals of the public; second, the court utilizes a presumption of legislative validity disguised as the "fairly debatable" test. Under this test, an ordinance will be upheld if the court finds its necessity and reasonableness fairly debatable.<sup>45</sup> Recent decisions indicate, however, that this presumption has been at least severely limited, if not obviated.<sup>46</sup>

An excellent example of an equal protection problem encountered in zoning occurred in *Sunad, Inc. v. City of Sarasota*.<sup>47</sup> Sarasota, motivated by aesthetics, enacted an ordinance limiting the size of signs in business and industrial districts. Signs were classified as "point of sale" and "non-point of sale."

The court construed the ordinance so that "at the point of sale the wall sign could be of any size desired, but all other signs could be but 180 square feet, while at another place a wall sign could be only 300 square feet and roof and other signs only 180 square feet."<sup>48</sup> In the opinion of the court, such a classification was not designed to preserve the city's beauty in support of the legislature's alleged aesthetic purpose. Two reasons were advanced. First, the court thought it unreasonable that a wall sign of three hundred square feet at point of sale would be any more aesthetically pleasing than one of the same size on a billboard. Additionally, the language of the ordinance was construed to permit signs of unlimited peripheral measurement within the square footage limitations.<sup>49</sup>

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45. *Town of Bay Harbor Islands v. Burk*, 114 So.2d 225 (Fla. 3d Dist. 1959). Despite a great deal of testimony as to the wisdom of the ordinance, the court held that the fairly debatable rule required validation. Recent cases, however, indicate that the fairly debatable rule has gone the way of the general presumption of legislative validity.

46. In *Burritt v. Harris*, 172 So.2d 820 (Fla. 1965), the supreme court overruled a district court determination that the zoning ordinance was fairly debatable. In effect, the reasonableness of the ordinance was treated de novo. The importance of this decision was underlined by the Second District Court of Appeal in *Lawley v. Town of Golfview*, 174 So.2d 767 (Fla. 2d Dist. 1965). In discussing the *Burritt* decision the district court said that,

[B]y this holding the Supreme Court had created an innovation in the zoning law of Florida by casting on the zoning authority the burden of establishing by a preponderance of evidence that the zoning restrictions under attack "bear substantially on the public health, morals, safety or welfare of the community."

In effect, the presumption of validity has become one of invalidity. For a more thorough analysis of this matter see Harris, *Zoning in Florida*, 20 U. MIAMI L. REV. 195 (1966).

47. 122 So.2d 611 (Fla. 1960).

48. *Id.* at 614.

49. The City of Sarasota amended its ordinance, still providing for the classification of "point of sale" and "non-point of sale." Both classes were limited in size to one hundred and eighty square feet, but "non-point of sale" signs were required to be at least twenty-five feet from any other of the same type, except for "V-type" signs. In *City of Sarasota v. Sunad, Inc.*, 181 So.2d 11 (Fla. 2d Dist. 1965), the district court invalidated the amended ordinance. The reasons advanced were these: there was no prohibition of grouping of "point-of sale" signs as there was for "non-point of sale," and there still was no peripheral measurement limitation, which would allow "skeletonized" signs so long as the total area of the lettering did not exceed 180 square feet.

## VI. RACIAL OR RELIGIOUS PROBLEMS

In this area Florida's equal protection inhibition is clearly subordinate to the fourteenth amendment of the Federal Constitution. Rarely, if ever, is a decision based on Florida's constitutional clause. There are good reasons for this. In contrast to the actions of the United States Supreme Court in *Brown v. Board of Educ.*,<sup>50</sup> *Shelley v. Kraemer*,<sup>51</sup> and other decisions,<sup>52</sup> which have given tremendous vitality to the fourteenth amendment, the Florida Supreme Court has declined to extend the application of section 1 of the Declaration of Rights into areas of racial or religious discrimination. At best, the Florida Supreme Court could be described as slow to recognize the range of fourteenth amendment protection; at worst, the court might be suspected of foot-dragging.<sup>53</sup>

Conversely, the vigor of the fourteenth amendment removes much of the motivation to seek a remedy under Florida's clause. After all, if a case can be won on the basis of the federal clause, there is little reason to plead Florida equal protection, and additionally, little prospect of success.

With a few exceptions this article has dealt with Florida decisions construing Florida's equal protection provision. In order, however, to present a picture of Florida courts' treatment of equal protection in racial and religious cases, it will be necessary to resort to decisions in which the federal clause was pleaded and construed.

A series of cases in which both equal protection clauses were pleaded commenced with *State v. Mayo*.<sup>54</sup> Petitioner there argued that the death penalty imposed on him was discriminatory since that penalty had been meted out, to those in his age group, only to members of his race. As evidence of this discrimination he cited statistics showing that in twelve years, seven non-whites (in the fifteen to nineteen year age group) and no white youths were executed. Petitioner asserted that the statute requiring the death penalty, absent an affirmative recommendation of mercy by the jury, was at fault and should be declared unconstitutional. The court rejected this assertion, finding the evidence to be inconclusive.

This argument was again rejected in *Thomas v. State*,<sup>55</sup> in which petitioner demonstrated that in a twenty year period twenty-three negroes were executed for rape, but only one white was executed.

50. 347 U.S. 483 (1954), *modified*, 349 U.S. 294 (1955).

51. 334 U.S. 1 (1948).

52. *E.g.*, *Evans v. Newton*, 86 S. Ct. 486 (1966).

53. For example, consider the many cases in which a negro sought entrance to the University of Florida College of Law. See Alloway, *Florida Constitutional Law*, 10 *MIAMI L.Q.* 143 (1956), and 12 *U. MIAMI L. REV.* 288 (1958).

54. 87 So.2d 501 (Fla. 1956).

55. 92 So.2d 621 (Fla. 1957).

Most recently, in *Williams v. State*,<sup>56</sup> the appellant presented evidence that since 1925 thirty-three negroes had received the death penalty in rape cases. Again the argument was rejected, and this time the court pointed out that appellant failed to indicate how many had been tried for the crime.

In an allied case, the court rejected a contention that systematic exclusion of negroes from the grand jury that indicted an appellant deprived him of equal protection under the fourteenth amendment.<sup>57</sup> Evidence that 10.8 percent of the registered voters were negro, while only 1.2 percent of the list from which grand jury members were chosen were negro, was held to be inconclusive.

Perhaps the most illustrative case in this area is presented by *McLaughlin v. State*.<sup>58</sup> The statute in question provided:

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 nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.<sup>59</sup>

The defendants, a negro man and a white woman, were convicted under this statute. They argued a denial of equal protection of the laws because first, the statute was a specific proscription of cohabitation solely for persons of different races, and second, higher penalties were imposed on persons of different races under this statute than were imposed under the general fornication statute for the same act. The Florida Supreme Court held that the statute did not violate the equal protection clauses. Based on the authority of *Pace v. Alabama*,<sup>60</sup> the court held the statute constitutional since "punishment of each offending person, whether white or black, is the same."<sup>61</sup>

Typically, this decision was reversed when it went to the United States Supreme Court. There it was noted that "Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court."<sup>62</sup>

Florida's consideration of those cases dealing with religious, rather than racial, discrimination reveals a somewhat different approach.

56. 110 So.2d 654 (Fla. 1959).

57. *Porter v. State*, 160 So.2d 104 (Fla. 1963).

58. 153 So.2d 1 (Fla. 1963).

59. Although there is no comparable statute prohibiting cohabitation of persons of the same race, FLA. STAT. § 798.03 (1965) lists imprisonment not exceeding three months or a fine of not more than thirty dollars for fornication by a "man" with a "woman."

60. 106 U.S. 583 (1883).

61. *McLaughlin v. State*, *supra* note 58, at 2 quoting from *Pace v. Alabama*, *supra* note 60, at 585.

62. *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964).

*MacGregor v. Florida Real Estate Comm'n*<sup>63</sup> considered a proceeding to discipline a real estate broker for selling to a Jewish person property listed with him subject to the restriction that it should be sold only to a Christian. Further, it was alleged that the broker had represented to the vendor that the purchaser was in fact a Christian. Appellant contended that, under *Shelley v. Kraemer*,<sup>64</sup> such a listing contract was unenforceable—that such enforcement would constitute state action within the purview of the fourteenth amendment. This argument was avoided since the court interpreted the proceedings, not as enforcement of a discriminatory agreement, but as a disciplining of a breach of faith.<sup>65</sup>

Along similar lines was a case involving restrictive covenants affecting the sale and occupancy of a lot in a subdivision.<sup>66</sup> These covenants provided that no lot should be sold to or occupied by one not a member of the property owner's association.<sup>67</sup> When defendants purchased, the by-laws of the corporation provided that no member could sell or lease to a non-white or a non-Christian. Additionally, the by-laws provided that an owner or lessee of property within the subdivision could be denied membership if he "is not a Gentile or is not of the Caucasian race or has been convicted of a felony."<sup>68</sup>

Defendant, a Jew, constructed an expensive home and assumed occupancy. The corporation filed suit to compel him to vacate, alleging that he was not a member of the corporation. Defendant argued that the restriction requiring membership in the corporation, together with the by-laws requiring a member to be a Caucasian or Gentile, denied him the equal protection of the law.

The Florida Supreme Court held that the restrictive covenant had the effect of prohibiting purchase or occupancy by a Jew. Finding *Shelley v. Kraemer*<sup>69</sup> applicable, the court believed that enforcing the restrictive covenant would amount to state action under the fourteenth amendment.<sup>70</sup>

Together, the *Harris* and *MacGregor* cases seem to define the extent

63. 99 So.2d 709 (Fla. 1958).

64. 334 U.S. 1 (1948).

65. "Enforcement of a perhaps discriminatory contract is one thing; punishment of admitted breach of trust, bad faith, deception, and infidelity to his known duty is quite another." *MacGregor v. Florida Real Estate Comm'n*, 99 So.2d 709, 712 (Fla. 1958).

66. *Harris v. Sunset Islands Property Owners, Inc.*, 116 So.2d 622 (Fla. 1959).

67. These included:

2. Ownership. No lot . . . shall be sold . . . to any one not a member in good standing of Sunset Islands Property Owners. . . .

3. Occupancy. No lot . . . shall be used or occupied by anyone not a member in good standing of Sunset Island Property Owners, Inc. *Id.* at 623.

68. *Ibid.*

69. *Supra* note 64.

70. The court specifically noted that it was not characterizing either the requirement of membership in the corporation, or the limitation on membership of people of good moral character as a prohibited restraint on alienation. In another setting such a requirement might be entirely legitimate.

to which the Florida Supreme Court accepts the decision in *Shelley v. Kraemer*.

One Florida statute<sup>71</sup> provides that, while jurors are to be taken from male and female electors, no female's name shall be taken for jury service unless she has registered her desire to be placed on the jury list with the county clerk. Appellant, a woman, was convicted of second-degree murder by an all male jury. She contended that the statute by imposing upon women the burden of an affirmative registration which had not been imposed upon men, deprived appellant of equal protection of the laws under the fourteenth amendment. The court found no such deprivation, reasoning that the requirement of voluntary registration was based on reasonable rationale. Notwithstanding the equal protection limitation, the Florida legislature could adopt a jury duty policy which recognized a benefit in keeping women at home.<sup>72</sup>

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71. FLA. STAT. § 40.01 (1965) Qualifications and disqualifications of juror.

(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months, and who are duly qualified electors of their respective counties; provided, however, that the name of no female person shall be taken for jury service unless such person has registered with the clerk of the circuit court her desire to be placed on the jury list.

72. *Hoyt v. State*, 119 So.2d 691 (Fla. 1959), *aff'd*, 368 U.S. 57 (1961).