AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 7: The Republican Era—Equality/Race

**Pace v. Alabama, 106 U.S. 583** (1883)

*Tony Pace, an African-American man, and Mary Cox, a white woman, were arrested, tried and convicted for “living together in a state of adultery and fornication.” Both were sentenced to two years in prison under Section 4189 of the Alabama Penal Code, which declared that the punishment for a “white person and any negro” who lived “in adultery or fornication” was between two and seven years. Section 4184 of the Alabama Penal Code imposed a maximum sentence of six months for first time offenders of the same race. Pace claimed this sentence violated the equal protection clause of the Fourteenth Amendment. The Supreme Court of Alabama rejected his claim. Pace appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States unanimously held that Pace was constitutionally sentenced. Justice Stephen Field claimed no constitutional violation occurred because both Pace and Cox received the same two year sentence. How does Field interpret the equal protection clause? Why does he believe states could punish interracial sex more than intraracial sex? Justice Harlan, who dissented in* Plessy v. Ferguson *(1896) and the* Civil Rights Cases *(1883) silently concurred in* Pace. *What explains his apparently support for the majority opinion. In* Burns v. State *(Ala. 1872), the Supreme Court of Alabama declared that bans on interracial marriage violated the Fourteenth Amendment? What changes account for the difference between* Burns *and Pace*?

The counsel of the plaintiff in error compares sections 4184 and 4189 of the Code of Alabama, and assuming that the latter relates to the same offense as the former, and prescribes a greater punishment for it, because one of the parties is a negro, or of negro descent, claims that a discrimination is made against the colored person in the punishment designated, which conflicts with the clause of the fourteenth amendment prohibiting a state from denying to any person within its jurisdiction the equal protection of the laws.

The counsel is undoubtedly correct in his view of the purpose of the clause of the amendment in question, that it was to prevent hostile and discriminating state legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment. Such was the view of congress in the re-enactment of the civil-rights act, after the adoption of the amendment. That act, after providing that all persons within the jurisdiction of the United States shall have the same right, in every state and territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, declares that they shall be subject ‘to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.’

The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offense for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person. The two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.