

Equal Protection Outside the Clause

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WHEN the Declaration of Independence stated that "all men are created equal" it but documented the idea of equality which has ancient roots in Western civilization.¹ The idea seems to have first passed from the philosophical to the juridical in American history in Charles Sumner's argument against school segregation in *Roberts v. Boston* in 1850.² The constitutional responsibility for ensuring the equality of equals is principally cast in the equal protection clause of the Fourteenth Amendment, but judicial misinterpretation and conceptualism have prevented the clause from playing its full role, and it is limited to state action by its very terms. This is a study in other supra-statutory judicial methods for ensuring equality and an analysis of relative advantages in areas where they, as well as the equal protection clause, are applicable.

Equality under the Due Process Clause of the Fifth Amendment

Since there is no equal protection clause binding upon the Federal Government, the basic right of equals to equality must be secured under the Fifth Amendment due process clause. Mr. Chief Justice Taft in 1921 said that "the due process clause . . . of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which *the Congress* or the Legislature may not withhold."³ In 1937 Mr. Justice Cardozo, speaking for the Supreme Court, said in a tax case, "we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."⁴ However, the Court has at times suggested that the Fifth Amendment "provides no guaranty against discriminatory legislation by Congress."⁵ It is suggested that such statements are inaccurate. For instance, at the next term of court following this, the latest of such statements, Mr. Chief Justice Stone clearly implied that congressional legislation may be so discriminatory as to violate the due process clause of the Fifth Amendment.⁶ Again this was intimated the following year by Mr. Justice Roberts.⁷ Then, in *Korematsu v. United States* in 1945, the majority of the Court definitely suggested that the due process clause of the Fifth

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¹ Sullivan, *The Antecedents of the Declaration of Independence*, 1 ANN. REP. AM. HIST. ASS'N. 65, 80 (1902); WORMUTH, *THE ORIGINS OF MODERN CONSTITUTIONALISM*, c. 2 (1949).

² 5 Cush. 198 (Mass. 1850). Sumner's argument is reprinted in 2 WORKS OF CHARLES SUMNER 327 (1875). For an interesting commentary see Frank and Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COL. L. REV. 131 (1950).

³ *Truax v. Corrigan*, 257 U.S. 312, 331 (1921).

⁴ *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937).

⁵ *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943). *Semble*: *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 401 (1940); *La Belle Iron Works v. United States*, 256 U.S. 377, 392 (1921).

⁶ *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

⁷ *See Ex parte Endo*, 323 U.S. 283, 310 (1944) (concurring opinion).

Amendment contains a limitation upon congressional classification,⁸ and in the same case Mr. Justice Murphy was emphatic that racial discrimination under the federal law deprived "all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment."⁹ The Supreme Court's *Petrillo* opinion further indicates that the Fifth Amendment contains all the demands of equality found in the equal protection clause of the Fourteenth.¹⁰ And, the following year, 1948, the Court, although not specifically referring to the Fifth Amendment, indicated very positively that equal protection is "a part of the public policy of the United States." In this case, *Hurd v. Hodge*, the Court stated that it would violate this policy "to permit federal courts in the Nation's capital to exercise general equity powers to compel action denied the states where such action has been held to be violative of the guarantee of equal protection of the laws."¹¹

Other federal courts have provided further assurance that equal protection is guaranteed under the due process clause of the Fifth Amendment. One court states: "It seems reasonably clear that the due process of law provision of the Fifth Amendment is broad enough in its scope and purpose to include the 'equal protection of the laws' which no state may deny to any person under the provisions of the Fourteenth."¹² Another federal court, speaking of alleged discrimination by the federal government, has added, "every citizen is entitled to the equal protection of the laws."¹³ Equality of treatment by the federal government and freedom from discrimination and unreasonable classification is insisted upon by the federal courts, especially in the selection of grand and petit juries. Here a federal court states: "A violation of the [due process] clause occurs if there is a systematic or arbitrary exclusion of, or a discrimination between, persons of a particular race."¹⁴ When in 1948 a United States attorney used nineteen of his twenty peremptory challenges to excuse all nineteen Negroes on the jury panel, the Court of Appeals for the District of Columbia admitted that due process under the Fifth would be violated if there were systematic exclusion from the jury list, but in a deplorable¹⁵ decision, no unconstitutional unfairness could be detected by the majority of the court.¹⁶ And, in 1950, in a case involving alleged discrimination in educational opportunities in the District, the same Court of Appeals recognized the due process clause's demand for equality and even applied, from equal protection clause case law, the 'separate but equal' concept.¹⁷ "It is settled," observes one writer, "that in the

⁸ 323 U.S. 214, 234, 235 (1944).

⁹ *Id.* at 235.

¹⁰ *Petrillo v. United States*, 332 U.S. 1 (1947).

¹¹ 334 U.S. 24, 35 (1948).

¹² *United States v. Yount*, 267 Fed. 861 (W.D. Pa. 1920).

¹³ *Neild v. District of Columbia*, 110 F.2d 246, 256 (D.C. Cir. 1940).

¹⁴ *Wong Yim v. United States*, 118 F.2d 667, 669 (9th Cir. 1941), *cert. denied*, 313 U.S. 589 (1941); *Mamaux v. United States*, 264 Fed. 816 (6th Cir. 1920).

¹⁵ See Notes, 24 IND. L. J. 262 (1949), 48 COL. L. REV. 953 (1948), 61 HARV. L. REV. 1455 (1948).

¹⁶ *Hall v. United States*, 168 F.2d 161 (D.C. Cir. 1948), *cert. denied*, 334 U.S. 853.

¹⁷ *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1950).

District of Columbia the Fifth Amendment implies equal protection of the laws."¹⁸

Surely the right of equals to equality of treatment is so basic to the American tradition and the democratic thesis that it must be deemed "fundamental" and protected against unreasonable and discriminatory treatment by the federal government. The due process clause of the Fifth Amendment is the proper constitutional sword for the judicial arm in holding Congress and the national administration to the requirements of equal protection of the laws.

Equality under the Due Process Clause of the Fourteenth Amendment

On a number of occasions the United States Supreme Court, as well as others, has utilized the due process clause of the Fourteenth Amendment, rather than the companion equal protection clause, to insure equality of treatment by the states. Because due process is more historically and traditionally concerned with procedural protection than is equal protection, it is not surprising to find such judicial preference. Although the equal protection clause had served fairly well in protecting members of minority racial and other groups from discriminatory jury selection,¹⁹ the Court in 1950 appears to have chosen the due process clause to condemn trial of a Negro after indictment by a grand jury from which members of his race had been systematically or arbitrarily excluded.²⁰ In systematic exclusion of members of the accused's race from the trial jury, the Court also seemingly prefers to invalidate the imposed inequality through use of the due process clause.²¹

It is not alone in procedural matters that state-imposed inequalities have been invalidated under the Fourteenth Amendment due process clause. As early as 1896 Mr. Justice Harlan, in his famous dissent in *Plessy v. Ferguson*, stated that segregation on a racial basis amounted to an interference with personal liberty without due process of law.²² Twenty years later, when a colored man was denied his equal right to purchase land because of a municipal ordinance, the legislation was invalidated by the Supreme Court with the statement that the *seller's* liberty was denied without due process of law.²³ On further occasions of this kind the judicial preference for the due process clause can be noted,²⁴ yet in 1948 the Court preferred the equal protection clause when it ruled unconstitutional state court enforcement of private restrictive covenants aimed at Negroes.²⁵

¹⁸ Note, 24 IND. L. J. 262, 263 (1949). "The Fifth Amendment as applied to the District of Columbia implies equal protection of the laws." *Sims v. Rives*, 84 F.2d 871, 878 (D. C. Cir. 1936); *O'Connor v. District of Columbia*, 153 F.2d 225 (D.C. Cir. 1946).

¹⁹ *Hale v. Kentucky*, 303 U.S. 613 (1938); *Hill v. Texas*, 316 U.S. 400 (1942); *Patton v. Mississippi*, 332 U.S. 463 (1947).

²⁰ *Cassell v. Texas*, 339 U.S. 282 (1950).

²¹ *Shepherd v. Florida*, 341 U.S. 50 (1951).

²² 163 U.S. 537, 563 (1896).

²³ *Buchanan v. Warley*, 245 U.S. 60 (1917).

²⁴ *Harmon v. Tyler*, 273 U.S. 668 (1927); *City of Richmond v. Deans*, 281 U.S. 704 (1930).

²⁵ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

In 1923 the Supreme Court, in a case not involving racial discrimination, utilized the due process clause to guarantee teachers of German equality of right with those teaching Greek or Latin.²⁶ And two years later, through use of the due process clause of the Fourteenth, parochial and private schools were accorded equality of opportunity with public schools in their right to teach our youth.²⁷ Then, in 1927, a distributor of leftist literature was held entitled, under this clause, to equal opportunity with more conservative publishers to peddle his wares and ideas.²⁸ The use in the *Fiske* case of the due process clause, standing alone, to invalidate this unequal denial of freedom of the press is interesting since at that time it had already been established that the First Amendment is applicable through the Fourteenth to state abridgement of freedom of communication. The following year inequality in the permitted use of land under a zoning ordinance was invalidated by the Supreme Court through use of the due process clause.²⁹ Discriminations in permitted property uses are involved in many zoning cases, as when property is unfairly districted. The United States Supreme Court, like the state courts, has invalidated zoning ordinances or their application under due process as being arbitrary or having no reasonable relation to the public health or safety.³⁰ There are abundant further illustrations that state-imposed inequalities, especially upon non-residents, are invalidated by the United States and state courts under due process clauses.³¹

Why should the judiciary prefer the due process clause to the equal protection clause in such instances? The reasons are not convincing. Some justices, it is clear, would prefer that the procedural right to a fair trial be deemed the particular, if not the sole, responsibility of the due process clause. Historically there is merit to the argument that the equal protection clause was intended primarily to ensure equality to the Negroes and that non-racial discriminations involving, for instance, corporations or taxation, are not to be resolved under this clause. On the other hand, it can be doubted that the due process clause has any claim to utilization in most situations involving state-imposed inequalities. Tussman and tenBroek have written:³²

Due process is, after all, a weapon blunted and scarred in the defense of property. The present Court, conscious of its destiny as the special guardian of human or civil rights may well wish to develop some alternative to due process as a sanctuary for these rights. The equal protection clause has

²⁶ *Meyers v. Nebraska*, 262 U.S. 390 (1923).

²⁷ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

²⁸ *Fiske v. Kansas*, 274 U.S. 380 (1927).

²⁹ *Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928). The decision was posited upon the unconstitutional delegation of police powers to private persons who could condone the inequality by refusing to give consents to deviations.

³⁰ *Nectow v. Cambridge*, 277 U.S. 183 (1928). Ribble, *The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation*, 16 VA. L. REV. 689 (1930).

³¹ *Southern Lines v. City of Corbin*, 272 Ky. 787, 115 S.W.2d 321 (1938); *Woolf v. Fuller*, 87 N.H. 64, 174 Atl. 193 (1934); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950); Dykstra, *Legislative Favoritism before the Courts*, 27 IND. L. J. 38, 53 (1951).

³² Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 364 (1949).

much to recommend it for this purpose. It was placed in our Constitution as the culmination of the greatest humanitarian movement in our history. It is rooted deep in our religious and ethical traditions. Is any other clause in the Constitution so eminently suited to be the ultimate haven of human rights?

Nevertheless, it seems safe to forecast, perhaps because the Supreme Court is not clear whose equal protection is being denied, especially in the procedural cases,³³ that equal claims to justice will from time to time be safeguarded by the due process clause rather than the equal protection clause. The claim of unreasonableness will seldom succeed in invalidating under due process federal or state legislation imposing classifications, but there is every assurance that discriminations and unreasonable classifications will be voided by the state courts in the future, as in the past, under due process clauses.³⁴

Equal Protection under the First Amendment

Equality in freedom of expression has been frequently demanded by the Court through utilization of the First Amendment, made binding upon the states through the vehicle of the due process clause of the Fourteenth. Unorthodox religious groups, unpopular political parties, opposition newspapers, aliens, unions and employers have all benefited in their claims to equality of freedom of communication through the First Amendment.

For example, Jehovah's Witnesses, representative of the less orthodox religious bodies, have been held entitled to equal use of public streets and parks notwithstanding the disturbing nature of their propagandizing,³⁵ and their children have been given their equal right to public education in spite of a reluctance to participate in flag salutes.³⁶ Members of unpopular political parties have been held entitled to a fair measure of equality in the use of public grounds³⁷ and even schools,³⁸ as well as in private assembly,³⁹ but they have so far seldom achieved full equality in the use of the ballot,⁴⁰ or in the dissemination of their literature and ideas.⁴¹ In *Grosjean v. American Press Co.*, although equal protection was also argued in opposition to a discriminatory tax imposed upon anti-administration newspapers, the United States Supreme Court preferred to use the First Amendment to annul the inequality, saying "we deem it unnecessary to consider the further

³³ Especially *Cassell v. Texas*, *supra* note 20, See Note, 49 MICH. L. REV. 759 (1951).

³⁴ Paulsen, *supra* note 31.

³⁵ *Lovell v. Griffin*, 303 U.S. 444 (1930); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Sellers v. Johnson*, 163 F.2d 877 (8th Cir. 1947).

³⁶ *Board of Education v. Barnette*, 319 U.S. 624 (1943).

³⁷ *Meyerson v. Samuels*, 74 F. Supp. 315 (E.D. Pa. 1947).

³⁸ *Danskin v. School District*, 28 Cal. 2d 536, 171 P.2d 885 (1946). But compare *Stanton v. Board of Education*, 190 Misc. 1012, 76 N.Y.S.2d 559 (Sup. Ct. 1948).

³⁹ *DeJonge v. Oregon*, 299 U.S. 353 (1937).

⁴⁰ *Communist Party v. Peek*, 20 Cal. 2d 536, 127 P.2d 889 (1942); *Feinglass v. Reinecke*, 48 F. Supp. 438 (N.D. Ill. 1942); *State ex. rel. Huff v. Reeves*, 5 Wash. 2d 637, 106 P.2d 729 (1940). Note, 25 NOTRE DAME LAW. 319 (1950).

⁴¹ *Debs v. United States*, 249 U.S. 211 (1919); *Dennis v. United States*, 341 U.S. 494 (1951).

ground assigned that it also constitutes a denial of equal protection of the laws."⁴²

Unions and union organizers have been held entitled to equal opportunities to speak,⁴³ to use public grounds for assemblage,⁴⁴ to publicize by picketing their grievances against employers,⁴⁵ and to engage in political activity.⁴⁶ Since unions are entitled to freedom of expression in the industrial situation, notions of equality suggest that a similar right in employers be recognized, and courts have so held under the First Amendment,⁴⁷ one stating: "Unless the right of free speech is enjoyed by employers as well as employees, the guaranty of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person."⁴⁸

Theoretically, naturalized citizens are entitled to equal freedom of expression with their native-born brethren, and the Supreme Court has even said: "It is plain that citizenship obtained through naturalization carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government."⁴⁹ Similarly, the Court has indicated that equality of freedom of expression is the right of aliens who are lawfully with us.⁵⁰ However, attainment is far short of aspiration, and the long record of deportations and even denaturalizations for daring to express unpopular or unorthodox ideas or joining the less conservative political parties must make any naturalized citizen or alien seeking citizenship wonder whether theirs are second-class rights.⁵¹

In First Amendment decisions some unjust and unfortunate inequalities have been condoned. The second-class freedom of expression of the naturalized citizen is shared by hundreds of thousands of public employees.⁵² When a racial minority sought equality of employment opportunities from a private employer by picketing, punishment was allowed despite this Amendment.⁵³ When producers of films sought equal freedom of expression

⁴² 297 U.S. 233 (1936).

⁴³ *Thomas v. Collins*, 323 U.S. 516 (1945).

⁴⁴ *Hague v. CIO*, 307 U.S. 496 (1939).

⁴⁵ *Thornhill v. Alabama*, 310 U.S. 88 (1940).

⁴⁶ *United States v. CIO*, 335 U.S. 106 (1948); *Bowe v. Secretary of the Commonwealth*, 320 Mass. 230, 69 N.E.2d 115 (1946).

⁴⁷ *NLRB v. Virginia Power Co.*, 314 U.S. 469 (1941); *NLRB v. Ford Motor Co.*, 114 F.2d 905 (6th Cir. 1940), *cert. denied* 312 U.S. 689.

⁴⁸ *Midland Steel Products Co. v. NLRB*, 113 F.2d 800, 804 (6th Cir. 1940).

⁴⁹ *Knauer v. United States*, 328 U.S. 654, 658 (1946).

⁵⁰ "Freedom of speech and of press is accorded aliens residing in this country. *Bridges v. California*, 314 U.S. 252." Douglas, J., for the Court, *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

⁵¹ *In re Saderquist*, 11 F. Supp. 525 (S.D. Me. 1935), *aff'd. sub nom. Sorquist v. Ward*, 83 F.2d 890 (1st Cir. 1936). Black, *Disloyalty and Denaturalization*, 29 Ky. L. J. 143 (1941). Note, 44 Col. L. Rev. 80 (1944).

⁵² *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811, 821 (1950). Notes, 47 Col. L. Rev. 295 (1947), 47 Col. L. Rev. 1161 (1947).

⁵³ *Hughes v. Superior Court*, 339 U.S. 460 (1950).

with publishers of newspapers and magazines the Amendment was, until this year, held entirely inapplicable as to them.⁵⁴ So, too, although the distinction is unsound, "commercial" distributors of literature receive far less protection under the Amendment than their non-commercial counterparts.⁵⁵ Lastly, the unorthodox religious, especially those who are opposed to war, have been denied equality in many opportunities, such as admission to the bar,⁵⁶ largely through the unfortunate nonsense of "privilege" ratiocination.

Although the record of condoned inequalities in freedom of expression under the First Amendment is not good, there is no reason to believe that equal protection arguments would have been more availing. Furthermore, the presumption of constitutionality attaching to state legislation under equal protection attack is probably and properly not applicable when the First Amendment freedoms are abridged. There is good reason, then, to continue attacks upon, and judicial examination of, denials of equality in expression and belief by use of the First Amendment rather than the equal protection clause.

Finally it should also be noted that, under the companion First Amendment establishment of religion clause and state equivalents, children attending religious schools will probably be denied certain equalities.⁵⁷ It is of even greater interest to note the equal protection argument running through the commentaries critical of the *McCullum* decision⁵⁸ under this clause. If these writers are correct, the establishment of religion clause is intended only to prevent preference by organized government of one faith over others.⁵⁹

Equality under the Privileges and Immunities Clauses

Under Article IV, Section 2, of the United States Constitution, non-citizens of a state are assured that in their "fundamental" privileges and

⁵⁴ *Mutual Film Corp. v. Industrial Comm'n. of Ohio*, 236 U.S. 230 (1915); *RD-DR Corp. v. Smith*, 183 F.2d 562 (5th Cir. 1950), cert. denied 340 U.S. 853 (1950). Kupferman and O'Brien, *Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L. Q. 273 (1951). Notes, 60 YALE L. J. 696 (1951), 100 U. OF PA. L. REV. 268 (1951). Comment, 49 YALE L. J. 87 (1939). However, in 1952, First Amendment protection was apparently extended to motion pictures. *Burstyn v. Wilson*, 343 U.S. 495 (1952).

⁵⁵ *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Breard v. City of Alexandria*, 341 U.S. 622 (1951). But compare *Winters v. New York*, 333 U.S. 507 (1948). For extended criticism of the "commercial" test see Antieau, *Judicial Delimitation of the First Amendment Freedoms*, 34 MARQ. L. REV. 57, 61 (1950).

⁵⁶ *Re Summers*, 325 U.S. 561 (1945). But cf. *Girouard v. United States*, 328 U.S. 61 (1946) on admission to citizenship of conscientious objector.

⁵⁷ *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E.2d 576 (1938) (no transportation to school); *Visser v. Nooksack Sch. Dist.*, 33 Wash.2d 699, 207 P.2d 198 (1949) noted in 25 NOTRE DAME LAW. 366 (1950) and 11 U. OF PITTS. L. REV. 318 (1950). Note that *Everson v. Board of Education*, 330 U.S. 1 (1947) only upholds the practice if local authorities so authorize and if the practice is not deemed repugnant to the state constitution.

⁵⁸ *McCullum v. Board of Education*, 333 U.S. 203 (1948).

⁵⁹ Manion, *The Church, the State and Mrs. McCullum*, 23 NOTRE DAME LAW. 456 (1948); Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROB. 92 (1949); Meiklejohn, *Educational Cooperation between Church and State*, 14 LAW & CONTEMP. PROB. 61 (1949); Fahy, *Religion, Education and the Supreme Court*, 14 LAW & CONTEMP. PROB. 73 (1949); Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23 (1949); Drinan, *The Novel 'Liberty' Created by the McCullum Decision*, 39 GEO. L. J. 216 (1951).

immunities they will be accorded equality with citizens of the state,⁶⁰ although by judicial interpretation the "fundamental" privileges and immunities are indeed rare.⁶¹ *Toomer v. Witsell*,⁶² which gave non-citizens equality of access to fish in the marginal seas, is the rare case in recent years which has accorded substantial protection to non-citizens under this privilege and immunities clause. There the Court clearly pointed out that the clause "does bar discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states."⁶³

Although the Fourteenth Amendment privileges and immunities clause would have been given legal significance by Mr. Justice Harlan,⁶⁴ and although in our own time Justices Douglas,⁶⁵ Black,⁶⁶ Murphy,⁶⁷ Jackson,⁶⁸ Roberts,⁶⁹ and Hughes⁷⁰ have indicated a willingness to make this privileges and immunities clause a meaningful guarantee of protection and equality against state inroads, there seems little likelihood at this writing that any substantial equal protection will flow from this clause.⁷¹ It has been suggested by Warren and others that the use of the privileges and immunities clause of the Fourteenth Amendment to invalidate inequalities would be preferable to use of the equal protection clause because the states are forbidden to pass "any" law abridging privileges and immunities.⁷² This literalism, however, seems naively to disregard the fate of other absolutely expressed Constitutional provisions, such as the First Amendment or the contract clause. There is little reason to prefer use of the privileges and immunities clause over equal protection unless one is inclined to decrease the judicial protection of corporations from state regulation, and there have been worthy Supreme Court justices who believed that artificial persons were not entitled to the protection of either the equal protection or the due

⁶⁰ *Corfield v. Coryell*, 6 Fed. Cas. No. 1312 at 551 (E.D. Pa. 1823).

⁶¹ *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553 (1920); *Douglas v. New York Rr.*, 279 U.S. 377 (1929); *Chambers v. Baltimore & Ohio Rr.*, 207 U.S. 142 (1907); *LaTourette v. McMaster*, 248 U.S. 465 (1919); *In re Lockwood*, 154 U.S. 116 (1894); *Ward v. Maryland*, 12 Wall. 418 (U.S. 1870). But cf. *Chalker v. Birmingham & Northwestern Ry.*, 249 U.S. 522 (1919); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920). Generally see Meyers, *The Privileges and Immunities of Citizens in the Several States*, 1 MICH. L. REV. 286 (1903); Note, 28 COL. L. REV. 347 (1928).

⁶² 334 U.S. 385 (1948) (with Frankfurter and Jackson, JJ. objecting to use of the clause).

⁶³ *Id.* at 396.

⁶⁴ *Plessy v. Ferguson*, *supra* note 22 at 555, 560; *The Civil Rights Cases*, 109 U.S. 3 (1883).

⁶⁵ See *Edwards v. California*, 314 U.S. 160, 178 (1941) (concurring opinion).

⁶⁶ *Ibid.*; see also *Hague v. CIO*, *supra* note 44 at 512 (concurring opinion).

⁶⁷ See *Edwards v. California*, *supra* note 65 (concurring opinion).

⁶⁸ *Ibid.*

⁶⁹ See *Hague v. CIO*, *supra* note 44 at 512 (concurring opinion).

⁷⁰ *Ibid.*

⁷¹ It protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Slaughter House Cases*, 16 Wall. 36, 79 (U.S. 1873). Generally see McGovney, *Privileges or Immunities Clause—14th Amendment*, 4 IOWA L. BULL. 219 (1918); Morris, *What Are the Privileges and Immunities of Citizens of the United States?*, 28 W. VA. L. Q. 38 (1921). But for an optimistic forecast see Note, 34 ILL. L. REV. 998, 1002 (1940).

⁷² Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 463 (1926). Note, 42 COL. L. REV. 139 (1942).

process clauses.⁷³ Since not only associations but aliens would suffer from emasculation of the equal protection clause in favor of the privileges and immunities clause of the Fourteenth, revivification of the corpse is hardly justified.

Equal Protection under the Commerce Clause

Although the equal protection, due process, and privileges and immunities clauses were also argued, the Supreme Court in *Edwards v. California*⁷⁴ chose to use the commerce clause to give non-resident indigents an equal opportunity to appreciate California's clime. Justices Douglas, Black, Murphy and Jackson concurred in the result but indicated a preference for the privileges and immunities clause, Mr. Justice Jackson stating that "the migrations of a human being . . . do not fit easily into my notions as to what is commerce To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights."⁷⁵ However, since the instant prosecution was not against the migrating human being but his transporter, there is some question as to whether the latter can avail himself of another's privileges and immunities or whether the transporter has a privilege and immunity to carry others, a matter not quite so settled as the concurring justices assume. The idea that the commerce clause is suitable to insure equal protection in interstate transportation is not new, Chief Justice Chase and Justice Clifford both being of the opinion in *Crandall v. Nevada* in 1867 that this clause should be used to invalidate the state tax on passage through the state.⁷⁶

Again in 1946 the commerce clause was used to accord equal protection in movement across state lines, this time to Negroes rather than the indigent. Here, in *Morgan v. Virginia*,⁷⁷ the Supreme Court invalidated state-imposed "Jim Crow" patterns of enforced segregation on interstate carriers.

And, since at least as early as 1876, it has been accepted law that discriminations against the persons or products of interstate commerce will be invalidated under the commerce clause.⁷⁸ Furthermore, as the solicitor⁷⁹

⁷³ "The liberty referred to in that (the Fourteenth) Amendment is the liberty of natural, not artificial, persons"; Harlan, J., in *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906). For similar statements see: *Western Turf Assn. v. Greenberg*, 204 U.S. 359, 363 (1907) (Harlan, J.); *Hague v. CIO*, *supra* note 44 at 527 (Stone, C.J.); *Connecticut Life Ins. Co. v. Johnson*, 303 U.S. 77, 83-90 (1938) (Black, J., dissenting).

⁷⁴ *Supra* note 65.

⁷⁵ See *id.* at 181-2 (concurring opinion).

⁷⁶ 6 Wall. 35, 49 (U.S. 1867).

⁷⁷ 328 U.S. 373 (1946). Compare *Mitchell v. United States*, 313 U.S. 80 (1941) where the unequal facilities in interstate transportation were held invalid under the Interstate Commerce Act.

⁷⁸ *Welton v. Missouri*, 91 U.S. 275 (1875); *Minnesota v. Barber*, 136 U.S. 313 (1890); *Brimmer v. Rehman*, 138 U.S. 78 (1891); *Voight v. Wright*, 141 U.S. 62 (1891); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

⁷⁹ *Real Silk Hosiery Mills v. Portland*, 268 U.S. 325 (1925); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940).

and natural resources⁸⁰ cases indicate, state regulations aimed at deterring out-of-state enterprisers will quite readily be found to constitute undue and unconstitutional burdens upon interstate commerce.

What are the relative advantages and disadvantages of utilizing the commerce clause rather than equal protection or some other clause to guarantee equality to Negroes, the poor, non-residents and other groups? First, properly understood, the commerce clause and congressional legislation implementing it can set aside *private* impositions of inequality so long as they constitute unreasonable burdens upon interstate commerce.⁸¹ Even with an expanding "state action" concept under the Fourteenth Amendment, this is an important advantage. Next, the commerce clause, as a positive grant of power, authorizes federal action to remove inequalities,⁸² something not usually possible under the Fourteenth Amendment, as the Civil Rights Cases indicate.⁸³ Thirdly, some discriminations and classifications which might be held reasonable and sustained under the equal protection clause will be invalid under the commerce clause because they amount to unreasonable burdens upon interstate commerce. The *Edwards* case is a fine illustration of this. Some commentators are of the opinion that the classification apart of indigents is reasonable and quite constitutional under equal protection,⁸⁴ and historical materials somewhat justify their contention. Fourthly, some justices (probably including the author of the *Edwards* opinion) have preferred using the commerce clause, lest by using privileges and immunities (and semble, the equal protection clause) the "frightful consequences" forecast in the *Slaughter House* case might come to pass. Fifthly, once agreed that the subject is "commerce" and interstate or national in nature, there is no presumption of rationality and constitutionality to aid the state statute imposing inequality.⁸⁵ And, because under this clause, unlike under the Fourteenth Amendment clauses, the weighing is not between the state interest and what is too often considered private interest, but between state and national interests, the chances of discriminatory state legislation surviving the national Supreme Court are probably less. Lastly, until the disgraceful "separate and equal" nonsense can be removed from the equal protection clause, it is easier for the Court to in-

⁸⁰ *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Foster-Fountain Packing Co. v. Haydel*, *supra* note 78; *Toomer v. Witsell*, *supra* note 62.

⁸¹ *Mitchell v. United States*, *supra* note 77; *Whiteside v. Southern Bus Lines*, 177 F.2d 949 (6th Cir. 1949) noted, 45 ILL. L. REV. 671 (1950). *Contra* and in error are: *Day v. Atlantic Greyhound Lines*, 171 F.2d 59 (4th Cir. 1948) noted, 62 HARV. L. REV. 1389 (1949), and *Simmons v. Atlantic Greyhound Lines*, 75 F. Supp. 166 (W.D. Va. 1947).

⁸² *Mitchell v. United States*, *supra* note 77; *Gibbons v. Ogden*, 9 Wheat. 1 (U.S. 1824); *Houston, East & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914); *Railroad Commission v. Chicago, B. & Q. Rr.*, 257 U.S. 563 (1922). Comment, 40 MICH. L. REV. 711, 728 (1942). Note, 42 COL. L. REV. 139, 140 (1942).

⁸³ *Supra* note 64.

⁸⁴ Comment, 40 MICH. L. REV. 711, 727 (1942). A contrary conclusion is reached by Silverman, *Human Cargo Still on the Go*, 10 GEO. WASH. L. REV. 528, 555-6 (1942).

⁸⁵ *Dean Milk Co. v. City of Madison*, *supra* note 78; *Baldwin v. Seelig*, 294 U.S. 511 (1935); *Hood & Sons v. DuMond*, 336 U.S. 525 (1949).

validate racial segregation in the overlapping area by use of the commerce clause.⁸⁶

On the other hand, use of the commerce clause will probably produce the unfortunate circumstance of sustaining segregation, and inequalities generally, on carriers so long as they are engaged in purely intrastate traffic.⁸⁷ Proper use of equal protection, or even privileges and immunities, could rectify this evil. And, again, in a situation like the *Edwards* case the commerce clause could probably not get at a California law expelling the indigent or denying him relief until he has been resident within the state, let us say, for twenty years. Here, too, equal protection might be more satisfactory. And, to one like Mr. Justice Black, not at all inclined to use the commerce clause to invalidate state regulations unless clearly discriminatory against the persons or products of interstate commerce, the equal protection or privileges and immunities clauses might seem far preferable. And, although historically sound to remove discriminations against non-resident travelers under the commerce clause, there is, as Mr. Justice Jackson indicated in the *Edwards* case and Mr. Justice Burton suggests in the *Morgan* case,⁸⁸ good reason why the human rights should be protected under the humanitarian clauses of the Fourteenth Amendment, rather than under the commerce clause. For the moment, the unfortunate judicial emasculation of the privileges and immunities clause of the Fourteenth and the perpetuation of the disgraceful separate and equal notion under the equal protection clause prevent these clauses from performing their ordained mission in our constitutional society. Although it is fortunate that the case precedent indicated the availability of the commerce clause in the *Edwards* and *Morgan* cases, it should never have been necessary to turn there to protect the fundamental human right of equality.

Equal Protection under Bi-party Treaties, the United Nations Charter, and the Supremacy Clause

It is by now abundantly clear that aliens suffering under state-imposed inequalities in owning and enjoying land, in taxation, and in opportunities to work can be protected under valid treaties providing for equality to which the United States is signatory.⁸⁹

Likewise, it is established that certain state-imposed unequal burdens upon aliens can be annulled under the supremacy clause of the Constitution.⁹⁰ A good illustration is found in *Hines v. Davidowitz*, in which the

⁸⁶ *Morgan v. Virginia*, *supra* note 77.

⁸⁷ *Chiles v. Chesapeake & O. Ry.*, 218 U.S. 71 (1910). It is open to question whether this is still the law. "The difficulty of considering the segregation question under the Commerce Clause with the possible unfortunate result that segregation is not permitted in interstate commerce but is valid in intrastate commerce could easily be avoided by invoking the aid of the 'equal protection' clause of the Fourteenth Amendment." Note, 45 MICH. L. REV. 209, 212 (1946). The comment assumes that the equal protection clause be properly interpreted, without indulgence in the separate but equal fallacy.

⁸⁸ *Morgan v. Virginia*, *supra* note 77.

⁸⁹ *Asakura v. Seattle*, 265 U.S. 332 (1924); *Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Geofroy v. Riggs*, 133 U.S. 258 (1889); *Nelson v. Johnson*, 279 U.S. 47 (1929); *Baker v. Portland*, 2 Fed. Cas. 472, No. 777 (D. Ore. 1879); *Opel v. Shoup*, 100 Iowa 407, 420 (1896); *In re Naka's License*, 9 Alaska 1 (D. Alaska 1934). Comment, 37 COL. L. REV. 1361 (1937).

⁹⁰ Article VI, clause 2.

Court set aside a Pennsylvania statute requiring the registration of aliens, on the reasoning that the federal alien registration laws left no room for state complementation.⁹¹ Furthermore, there recurs from time to time the view that innate federal power over aliens is exclusive and hence, whether or not there is federal statutory occupation of the field, there is no room for state imposition of inequality or burden upon aliens properly admitted under federal law.⁹²

Although the California Supreme Court invalidated its alien land law under the equal protection clause of the Fourteenth Amendment, and specifically denied the United Nations Charter was self-executing and capable of invalidating conflicting state laws,⁹³ it is worth remembering that the California appellate court had ruled the alien land law unconstitutional because violative of the Charter. Recalling that Chapter IX, Article 55 of the Charter requires that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," and that in the following articles the member nations pledge themselves to take action to accomplish these purposes, the appellate court stated: "Clearly such a discrimination against a people of one race is contrary both to the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every state in conflict with it."⁹⁴ It should be noted that Mr. Justice Black has indicated that he considers the alien land laws unconstitutional because in violation of the United Nations Charter.⁹⁵

Similarly, the rights of a religious minority to equal opportunity of land enjoyment were protected by a Canadian appellate court which held that a covenant restrictive of ownership by a religious group was contrary to the public policy of the Dominion of Canada as found, in large part in this instance, in the United Nations Charter.⁹⁶ The earlier-noted language of the United States Supreme Court in *Hurd v. Hodge* most assuredly indicates that there is an identical public policy in the United States.⁹⁷ Influenced, too, by the principles of human rights recognized and contained in the United Nations Charter, the Supreme Court of Oregon invalidated the alien land laws of that state under the Fourteenth Amendment.⁹⁸ Finally,

⁹¹ 312 U.S. 52 (1940).

⁹² *Henderson v. City of New York*, 92 U.S. 259 (1875); *People v. Compagnie Generale Transatlantique*, 107 U.S. 59 (1882); *Arrowsmith v. Voorhies*, 55 F.2d 310 (E.D. Mich. 1931); *Ex parte Ah Cue*, 101 Cal. 197, 35 Pac. 556 (1894).

⁹³ *Sei Fujii v. California*, 38 A.C. 817, 242 P.2d 617 (1952). Some commentators are in accord that the United Nations Charter Articles 55 and 56 are not self-executing and hence not properly binding rules of law upon which a court may rely in overruling state laws. Hudson, *Charter Provisions on Human Rights in American Law*, 44 AM. J. INT'L. L. 543, 545 (1950); Comment, 23 ROCKY MOUNT. L. REV. 197 (1950); Notes, 35 MINN. L. REV. 333 (1951), 36 VA. L. REV. 804 (1950).

⁹⁴ *Sei Fujii v. California*, 217 P.2d 481, 488 (1950). Recalling, too, Article 17 of the Declaration of Human Rights: "Everyone has the right to own property . . ."

⁹⁵ *Oyama v. California*, 332 U.S. 633, 647, 649-50 (1948).

⁹⁶ *Re Drummond Wren*, [1945] Ont. L. Rep. 778, 4 D.L.R. 674 (Ont. H.C.).

⁹⁷ *Supra* note 11 at 35.

⁹⁸ *Namba v. McCourt*, 185 Ore. 579, 610, 204 P.2d 569, 582 (1949). "We deem it our duty . . . to hold that state legislation concerning the acquisition of land by aliens is subject to the

Mr. Justice Carter of the California Supreme Court has suggested that since our adoption of the Charter, state miscegenation laws are no longer constitutionally permissible.⁹⁹

Occasional cases indicate the possibilities inherent in the equal protection clause for insuring some substantial equality of protection and opportunity to the aliens whom we have willingly accepted,¹⁰⁰ but the whole host of cases upholding classification of aliens apart from citizens attest the inadequacy of the clause, under the United States Supreme Court's older interpretation, to assure these people a decent equality.¹⁰¹ For example, under the latest expression directly in point,¹⁰² the United States Supreme Court has sustained alien land laws such as have more recently been invalidated by the supreme courts of California and Oregon.¹⁰³ Happily, the Court appears to be trending away from its earlier position and, wonderfully given true enlightenment as to the meaning of the equal protection clause of the Fourteenth Amendment by the state courts, the United States Supreme Court may yet fashion of the Clause an adequate weapon for invalidating inequalities and injustices imposed upon our alien guests. To the extent that the spirit of the United Nations Charter stimulates the Court into an adequate utilization of the equal protection clause, it becomes itself an unnecessary judicial weapon in the armory of equality.

Equal Protection under the Thirteenth Amendment

In the Civil Rights cases Mr. Justice Harlan argued, quite correctly it is suggested, that as to Negroes the Thirteenth Amendment invalidates "all discriminations against them, because of their race, in respect of such civil rights as belong to freemen of other races."¹⁰⁴ Nevertheless, the Supreme Court of 1883 held that "inere" racial discrimination is not ipso facto involuntary servitude such as is outlawed by that Amendment.¹⁰⁵ However, when the racial discrimination or other imposed inequality amounts to peonage, the Thirteenth Amendment perforce strikes down the inequality.¹⁰⁶ In this limited area utilization of the Thirteenth is far superior to the equal protection clause since under legislation implementing the former, private actions can, it is eminently clear, be set aside and punished.¹⁰⁷

due process clause, the equal protection clause and to the superior powers of the Federal Government over aliens and immigration."

⁹⁹ Concurring in *Perez v. Sharp*, 32 Cal. 2d 711, 732, 198 P.2d 17, 29 (1948).

¹⁰⁰ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Truax v. Raich*, 239 U.S. 33 (1915); *Sei Fujii v. California*, *supra* note 93; *Namba v. McCourt*, *supra* note 98.

¹⁰¹ *Clarke v. Deckebach*, 274 U.S. 392 (1927); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Heim v. McCall*, 239 U.S. 175 (1915); *Wright v. May*, 127 Minn. 150, 149 N.W. 9 (1914); *Bloomfield v. State*, 86 Ohio St. 253, 99 N.E. 309 (1912); *DeCano v. State*, 7 Wash. 2d 613, 110 P.2d 627 (1941). Note, 83 U. OF PA. L. REV. 74 (1934). Comment, 56 YALE L.J. 1017, 1026 (1947).

¹⁰² *Terrace v. Thompson*, *supra* note 101; *Porterfield v. Webb*, *supra* note 101.

¹⁰³ *Supra* notes 93 and 98.

¹⁰⁴ Civil Rights Cases, *supra* note 64.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Taylor v. Georgia*, 315 U.S. 25 (1942); *Pollock v. Williams*, 322 U.S. 4 (1944); *Bailey v. Alabama*, 219 U.S. 219 (1911); *United States v. Reynolds*, 235 U.S. 133 (1914).

¹⁰⁷ "It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except

Equal Protection under the Fifteenth Amendment

The Fifteenth Amendment was intended to give equal right to vote to all citizens regardless of color and it has generally been successful in protecting the rights of Negroes to the suffrage, even in state elections. Like the equal protection clause, this Amendment requires "state action," but a liberal and realistic judicial interpretation has given vigor to the Amendment in invalidating inequalities against Negroes in many aspects of the right to vote.¹⁰⁸

Since there was no voting discrimination against Negroes in *Breedlove v. Suttles*,¹⁰⁹ the decision in that case is not authority for the constitutionality of poll taxes aimed at, and accomplishing, the disenfranchisement of Negroes. Such a poll tax statute may well be unconstitutional under the Fifteenth Amendment.¹¹⁰ It is very clear that any ingenious device, such as literacy tests and "understanding the Constitution" requirements, will be unconstitutional under the Fifteenth Amendment, as well as under the equal protection clause, when its purpose is the disenfranchisement of the Negro or when this is the practical result of a seemingly fair statute's application with an unequal and discriminatory hand.¹¹¹

The Fifteenth Amendment is limited in its use to an important but narrow area of inequality and its advantages are limited to members of the Negro race. The possibilities of the equal protection clause are far greater, given only a liberal and realistic interpretation of the "state action" qualification.

Equal Protection under Article I, Section 4

Inequalities in voting in federal elections, including primaries, can be successfully removed under Article I, Section 4 of the Constitution and complementary congressional legislation.¹¹² Since here there is no Constitutional requirement of "state action," this clause has potentiality within the limited area of federal elections far superior to either the equal protec-

as a punishment for crime We entertain no doubt of the validity of this legislation, or of its applying to the case of any person holding another in a state of peonage, and this whether there be ordinance or state law sanctioning such holding. It operates directly on every citizen of the Republic, wherever his residence may be." *Clyatt v. United States*, 197 U.S. 207, 218 (1905). See also Note, 10 GEO. WASH. L. REV. 748 (1942).

¹⁰⁸ *Smith v. Allwright*, 321 U.S. 649 (1944); *Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied* 333 U.S. 875 (1948); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939).

¹⁰⁹ 302 U.S. 277 (1937).

¹¹⁰ Kallenbach, *Constitutional Aspects of Federal Anti-Poll Tax Legislation*, 45 MICH. L. REV. 717 (1947); Report, *The Geyer Poll Tax Bill*, 3 NAT. LAW. GUILD Q. 102 (1940); Note, 47 COL. L. REV. 76 (1947). That the purpose of the poll tax is to deny the right to vote because of race or color seems clear. See Ratliff v. Beale, 74 Miss. 247, 266, 20 So. 865, 868 (1896), and Note, 53 HARV. L. REV. 645, 649 (1940).

¹¹¹ *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949) *aff'd. per curiam*, 336 U.S. 933 (1949), discussed ably in Hamilton, *The Negro Recovers the Ballot*, 7 NAT. B. J. 422 (1949).

¹¹² *United States v. Classic*, 313 U.S. 299 (1941); *Ex parte Yarbrough*, 110 U.S. 651, 663 (1884); *United States v. Mosley*, 238 U.S. 383, 386 (1915); *Ex parte Siebold*, 100 U.S. 371, 383 (1880); *Swafford v. Templeton*, 185 U.S. 487 (1902); *In re Coy*, 127 U.S. 731 (1888); *Ex parte Clarke*, 100 U.S. 399 (1879).

tion clause or the Fifteenth Amendment. A disadvantage exists in that hereunder there is no possibility of relief from state-imposed discriminations in state elections. It is confidently expected that privately-imposed discriminations and inequalities, laden with inequalities for racial or other groups, can be reached and punished under federal legislation authorized by this clause.¹¹³

Equal Protection under Other Constitutional Provisions

The Nineteenth Amendment, of course, guarantees that there will be equality of voting among the sexes. And, theoretically, the Sixth Amendment in its requirement of an "impartial jury" is a guardian of some equality in the trial situation in federal courts, but unfortunately the record indicates that but too small a measure of equal protection can be expected under this provision.¹¹⁴ It seems very doubtful if equal protection is given an accused tried by jurors all of whom are employed by the prosecuting government. That the demand here for equality before the law bows at other times before the necessities of the moment is well illustrated in the majority state court rule permitting taxpayers to sit as jurors when the governmental unit is being sued in damages by a private litigant.¹¹⁵

Within a limited area equality has been guaranteed under many state constitutional uniformity of taxation clauses under which disparate tax burdens have been set aside.¹¹⁶ And, in the area of municipal law, many ordinances imposing inequality of burden or obligation upon non-residents are annulled by state courts under the ultra vires concept, which may seem to be but statutory interpretation, but which is more probably in reality a supra-statutory judicial technique to ensure equality.¹¹⁷

Conclusion

Since there is no equal protection clause, as such, binding upon the Federal Government, equality must and will be ensured through the due

¹¹³ *Ex parte* Yarbrough, *supra* note 112; *Logan v. United States*, 144 U.S. 263 (1892). Note, 41 COL. L. REV. 1101 (1941); Note, 10 GEO. WASH. L. REV. 625 (1942); Note, 36 ILL. L. REV. 475, 478 (1942).

¹¹⁴ *Frazier v. United States*, 335 U.S. 497 (1948); *Dennis v. United States*, 339 U.S. 162 (1950) criticized in Note, 49 MICH. L. REV. 130 (1950).

¹¹⁵ *Ward v. City of Florence*, 144 S.C. 76, 142 S.E. 48 (1928); *State v. Hudson Paving & Construction Co.*, 95 W.Va. 610, 122 S.E. 173 (1924); *Letson v. State*, 7 Ga. App. 745, 68 S.E. 60 (1910). In the last century the majority rule was otherwise. *Bailey v. Town of Turnbull*, 31 Conn. 581 (1863); *Hearn v. City of Greensburgh*, 51 Ind. (22 Black) 119 (1875); *Garrison v. City of Portland*, 2 Ore. 123, 2 Wils. 112 (1865); *Gibson v. City of Wyandotte*, 20 Kan. 156 (1878).

¹¹⁶ FLA. CONST. Art. IX, § 1; ILL. CONST. Art. IX, § 1; MICH. CONST. Art. X, § 3; N. J. CONST. Art. IV, § 7; ORE. CONST. Art. IX, § 1; S. C. CONST. Art. X, § 1; TEX. CONST. Art. VIII, § 1. *Levy v. Smith*, 4 Fla. 154 (1851); *State v. Lathrop*, 10 La. Ann. 398 (1855); *Chicago, R. I. & P. Ry. v. Young*, 60 S.D. 291, 244 N.W. 370 (1932); *Milwaukee & M. Rr. v. Supervisors*, 9 Wis. 431, 6 Vil. & Br. 399 (1859). Note, 46 HARV. L. REV. 1000 (1933).

¹¹⁷ *City of Rockford v. Hey*, 366 Ill. 526, 9 N.E.2d 317 (1937); *Higgins v. City of Galesburg*, 401 Ill. 87, 81 N.E.2d 520 (1948); *Dean Milk Co. v. City of Aurora*, 404 Ill. 331, 88 N.E.2d 827 (1949); *Prescott v. City of Borger*, 158 S.W.2d 578 (Tex. Civ. App. 1942). "One of the barriers which municipal ordinances . . . have occasionally found insurmountable is that created by the narrow interpretation of the authority delegated to municipalities by the legislature This approach suggests a lack of judicial sympathy for the enactments involved." Dykstra, *Legislative Favoritism before the Courts*, 27 IND. L. J. 38, 47 (1951).

process clause of the Fifth Amendment. The due process clause will probably be utilized to guarantee equality in procedural affairs, and there is no reason for preferring the equal protection clause in state trials. The former will probably be little used by the United States Supreme Court to secure equality in substantive law, although there is reason to believe its counterpart in state constitutions will have continued vitality in setting aside unreasonable classifications by the state and municipal governments. Inequality of freedom of expression will continue to be the particular concern of the First Amendment and, since judicial deference to the legislative or councilmanic will is less here than in the equal protection controversy, there is every reason for the continued resolution of inequalities in communication under the First Amendment. There is no good reason for reviving the privileges and immunities clause in preference to its companion equal protection clause, unless it is believed that jurisprudentially the claim of artificial persons to equality before the law is less substantial than that of natural persons. Unless "state action" under the equal protection clause can be given a much more expansive and proper interpretation, there will be need to utilize the commerce clause to reach privately-imposed discriminations in transportation. Until prejudice perpetuated in the precedent of "separate but equal" notions can be discarded, and until our courts and our people more clearly see the wisdom of subordinating provincial norms to the standards of the socio-political group representative of Western civilization, the attainment of real equality by Negroes and aliens whom we have welcomed to our shores will be in doubt. Since there is considerable opinion that the applicable sections of the United Nations Charter are not self-executing, it is probably preferable for a state court to avoid their use and hope to re-educate the United States Supreme Court into a proper interpretation of the equal protection clause, as is seemingly intended by the supreme courts of California and Oregon in invalidating their alien land laws under equal protection. There is no reason to believe that the equal protection clause is less valuable than the Fifteenth Amendment in securing equality of right to vote, given to the former the same realistic interpretation of state action that has been accorded to the latter. However, since there is no constitutional requirement of state action implicit in Article One, Section Four, of the Constitution, it reaches any and all impositions of inequality in voting for federal officers, making its use far preferable to utilization of the equal protection clause.

As is illustrated well by decisions of courts in states without equal protection clauses and by federal courts not subject to an equal protection clause, constitutional clauses will be found and judicial tools forged to attain the substantial equality of free and equal men—a necessity fundamental to Western man, basic and inherent in every religion and ethos common to our culture.