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Class Discrimination in Selection of Jurors

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Class Discrimination in Selection of Jurors

The United States Supreme Court handed down the *Hernandez v. Texas*[1] decision on May 3, 1954, and thereby resolved an additional facet of the controversial Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.[2] The background and precedents of the *Hernandez* case afford a comprehensive review of the historical growth and continual extension of the application of this Amendment.

In the *Hernandez* case, the defendant, a man of Mexican descent, was indicted for murder. Prior to trial, he moved to quash the indictment and the petit jury panel because, he alleged, persons of Mexican descent had been systematically excluded from jury service. Upon hearing, both motions were denied. At the trial, the motions were again denied, and defendant was convicted of murder. In affirming this conviction, the Texas Court of Criminal Appeals[3] held that the Fourteenth Amendment was ratified for the advantage of the Negroes only; that the denial of equal protection may not be inferred from a systematic exclusion except for the protection of Negroes; that Mexicans are of Spanish descent and therefore white; consequently, they may not prove a denial of equal protection without proof of express discrimination.

The Supreme Court of the United States granted certiorari[4] to review the substantial federal questions involved.

In an opinion delivered by Mr. Chief Justice Warren, the Court reversed because the respondent's general denial of discrimination was insufficient to rebut the defendant's *prima facie* case of systematic exclusion of Mexicans qualified to be jurors in the county. That these Mexicans were a distinct class within the county was sufficiently demonstrated. The Supreme Court therefore ruled that the Fourteenth Amendment requires an absence of systematic exclusion of any class, irrespective of natural origin or descent. Although the origination of the Amendment was based upon the need to protect Negroes, that was not the only purpose; and the Supreme Court justifiably applied the protection of the Fourteenth Amendment to a class other than the Negro race. This Amendment, more than any other, manifests by its growth the continual extension of the protection of the law when the need for such protection occurs.

Historical Background

Prior to the ratification of the Fourteenth Amendment, the Federal Government had no jurisdiction to reverse a State conviction when the defendant had

[1] 347 U.S. 475 (1954).

[2] U.S. CONST., XIV, S.1. ". . . Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

[3] 251 S.W. 2d 531 (Tex. Cr. 1953).

[4] 346 U.S. 811 (1952).

been subjected to racial discrimination in the selection of jurors. The Fifth Amendment to the Constitution was not available for this objection because it is effectual only against the Federal Government and contains no Equal Protection Clause.[5]

The Due Process Clause of the Fifth Amendment[6] is contained in the Fourteenth Amendment[7] and has been recognized in the common law since Magna Carta, 1215.[8] It is generally associated with the rights protected by *habeas corpus,* trial by jury, and protection of one's day in court. As noted in the case of *Truax v. Corrigan,*[9] it is a law

> . . . which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.
> . . . It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property.[10]

Due process, thus, is generally a protection against any "oppression by the Crown."[11] This protection obtained during the evolution of the common law. However, equal protection was first reduced to positive law in the Fourteenth Amendment, which was ratified by the several States and made a part of the United States Constitution on July 28, 1868.

The multifarious factors which contributed to the eventual ratification of the Fourteenth Amendment involve constitutional, political, sociological, and philosophical considerations. The *Dred Scott Decision*[12] in 1856 declared that, within the meaning of the Constitution, descendants of slaves were not citizens of the United States nor of the several states. This decision reflects the constitutional debilities which impaired the Federal Government's implementation of natural justice. Many people believed that, as a result of this decision, a constitutional amendment would be the requisite means to extend citizenship to Negroes. Others believed that only congressional legislation would suffice. Lincoln, in the first of the Lincoln-Douglas debates, August 21, 1858, manifested the school of thought which feared that the Court, having thus decreed that the people cannot

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[5] U.S. CONST., V. "No Person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

[6] *Ibid.*

[7] See note 2, *supra.*

[8] Chapter 39: "No free-man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, except by the legal judgment of his peers, or *by the laws of the land.*" (Emphasis supplied.) The phrase "laws of the land" is the origination of the present due process clause. See *United States v. Armstrong,* 265 F. 683 (Ind. 1920).

[9] 257 U.S. 312 (1921).

[10] *Id.* at 332.

[11] See *Truax v. Corrigan, supra,* note 9; *United States v. Armstrong, supra,* note 9; *Davidson v. New Orleans,* 96 U.S. 98 (1876); Warsoff, EQUALITY AND THE LAW, (1938).

[12] *Scott v. Sanford,* 19 How. 393 (1856). This case held also that since Negroes were not United States citizens, they could not sue in courts of the United States, and that the Constitution allows their being treated as property.

exclude slavery from the *Territories,* might subsequently decree that the people cannot exclude it from the *States.* He stated further, in presaging the Fourteenth and Fifteenth Amendments,

> . . . (T)here is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence,—the right to life, liberty, and the pursuit of happiness. I hold that he is as much entitled to these as the white man. . . . (I)n the right to eat the bread, without the leave of anybody else, which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every living man.

Of secondary interest was the inability of the Federal Government to correct discriminatory legislation and official actions by the States because due process at that time required only procedural safeguards and also because the Fifth Amendment was not applicable to the States. Furthermore, some politicians believed that the Amendment, by enabling Negroes to become citizens, would punish the South for the Civil War. One faction of the Republican Party, which was the Administration party, believed that if any legislation extending citizenship to the Negroes were constitutional, it would be repealed by the Democrats when they would be returned to power.[13] All these considerations were cognized by the proponents of the new Amendment and contributed to the final formulation of it. That the Negro race was not the class intended to be the sole beneficiary is manifested clearly by the wording of the Amendment, which states that a State may not ". . . deny to *any person* within its jurisdiction the equal protection of the law." (Emphasis supplied.) Had they considered only one beneficiary, they would probably have identified that race or class.

Initial Court Interpretations

The first Supreme Court decision concerning the Fourteenth Amendment was the *Slaughterhouse Cases,*[14] which interpreted the new Amendment as overruling the *Dred Scott Decision*[15] to the effect that Negroes may be citizens both of the states in which they reside as well as of the United States. The importance of this case in the subject presently being considered is that the Court expressly cognized that the protection was not intended for the exclusive protection of the Negro race (although that race was admittedly the moving cause):

> . . . The existence of laws in the States where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.
> If, however, the States did not conform their laws to its requirements, then, by the Fifth Section of the article of amendment Congress was authorized

[13] Warsoff, *supra,* note 11, pp. 50 f.f., writes extensively about the several causes of the Fourteenth Amendment.

[14] 16 Wall. 36 (1873). This case did not involve any discrimination issue. A Louisiana statute gave a private corporation exclusive rights to operate a slaughterhouse within a specified, restricted area.

[15] See note 12, *supra.*

> to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.[16]

By admitting the necessity of a "strong case" to apply the new protection to a class other than the Negro race, the Court here realized that there is at least a possibility that the new clause is distensible to protect other classes. Because the immediate exigencies were caused by the need to protect the Negroes, the Court recognized that the Negro was the immediate beneficiary—the Court could not imagine another class which might require the protection, but it did not preclude the extension of the protection for another class.

The case of *Strauder v. West Virginia*[17] is the first case decided by the Supreme Court in which the defendant, a Negro, had been convicted by a jury which, by State statute, had to be composed solely of white men. By reversing the lower court,[18] the Supreme Court incisively recognized that the protection offered by the Fourteenth Amendment included an assurance of Federal protection from legislation unfriendly to the Negroes as a class in order that they might enjoy the civil rights enjoyed by the white race. The protection is for civil rights only, not for political rights. That case enunciated the doctrine that States are denied the power to withhold the equal protection of the laws from the colored race. It held also that Congress may enforce the Amendment by appropriate legislation and stated that the equal protection clause protects a defendant from any discrimination which might tend to relegate his race to any social inferiority. The States may not withhold this equal protection, and the Federal Government will extend its protection to any defendant who is affected by any class discrimination by the States. The *Strauder* case, however, did not hold all jury limitations unconstitutional, rather, only those which are because of race or color.

Although the *Strauder* case[19] involved a Negro, the Court in a dictum extended the concept of equal protection:

> Nor if a law should be passed excluding all Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment.[20]

This oft-quoted concept expressly reflects the historic intention to preclude discrimination against any class, however restricted the class, however ingenious the means.

The Nature of the Denial of Equal Protection

That the equal protection clause guarantees protection by the Federal Gov-

[16] 16 Wall. 36, 81 (1873).
[17] 100 U.S. 303 (1880).
[18] 11 W. Va. 45 (1879).
[19] Note 17, *supra.*
[20] 100 U.S. 303, 308 (1880).

ernment against State denial thereof is clear. The *Strauder* case[21] conclusively settled that consideration. The denial of the protection is another problem, for the States operate only through individuals. *Virginia v. Rives*[22] defined how the denial may be effectuated: A state, being only a legal concept, must be operated by human agencies, through administrative, legislative, and judicial departments. Any discrimination because of race is prohibited by the equal protection clause; therefore, this clause is applicable when discrimination is authorized by state statutes or by individuals officially acting for the States.[23] The Supreme Court in the *Rives* case[24] held also that the discrimination against the colored race must be because of color to be a denial of the Amendment's protection. This prohibition against Negroes being excluded from jury service does not require proportional representation of defendant's class on the jury. It requires only an absence of exclusion because of defendant's class.

Although the denial of equal protection is effected through individuals, it must be based on state laws or official actions. In the *Hernandez* case, defendant was denied equal protection because members of his class had been systematically excluded from service as jury commissioners, grand jurors, and petit jurors by the manner in which the laws were implemented. There was no objectionable part of the statutes. Indicative of the difficulties involved in the application of the equal protection clause when there is an "exclusive" statute are *Neal v. Delaware*[25] and *Bush v. Kentucky*.[26]

The Delaware Constitution at the time of *Neal v. Delaware* (1881) provided, by an article enacted before the Fourteenth Amendment was ratified, that jurors must be selected from the group enjoying suffrage.[27] Suffrage was restricted to "free, white male citizens."[28] Subsequent to the ratification of the

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[21] Note 17, *supra.*

[22] 100 U.S. 313 (1880). The defendant was a Federal judge who had taken custody of a Negro defendant in a criminal case. The Negro had been convicted of murder by a jury composed solely of white men. The Virginia Supreme Court reversed the conviction. After the second conviction, the defendant here took custody by *habeas corpus cum causa* under the Removal Statute, Section 641.

The State of Virginia applied to the United States Supreme Court for a rule to show cause why a mandamus should not issue against this defendant to deliver the convicted Negro to the State of Virginia.

[23] The writ of mandamus was issued, and the prisoner was delivered to Virginia. The Supreme Court based this action on the fact that the State law was not discriminatory on its face; the subordinate officers of the State had acted in violation of the local statutes; consequently, ". . . it can with no propriety be said that he is denied, or cannot enforce 'in the judicial tribunals of the State' the rights which belong to him." *Id.* at 322.

See also *Ex Parte Virginia,* 100 U.S. 339 (1880). In that case, the defendant, a State judge, failed to select Negroes as jurors. He was convicted of officially excluding that race from jury service because of its race, contrary to 18 Stat. 3,336 (1875). The act was held constitutional: "It was to secure equal rights to all persons, and to ensure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation." 100 U.S. at 347.

[24] Note 22, *supra.*

[25] 103 U.S. 370 (1881).

[26] 107 U.S. 110 (1882).

[27] DEL. CONST., ART. 4, § 1 (1831).

[28] *Ibid.*

Fifteenth Amendment,[29] which extended suffrage to the colored race, the Delaware Court of Oyer and Terminer held that the restriction to a "white" citizen is without effect. The Supreme Court wisely distinguished between the abstract statute and the application thereof; for, although the statute was violative of the equal protection clause, the Delaware courts had vitiated its objectionable parts; and, consequently, there was no discrimination because of the Constitution or the statutes of the State.[30]

The United States Supreme Court then considered the exclusion of the Negroes and referred to the Delaware decision in the same case.[31] A defendant on trial for life, liberty, or property may not invoke the equal protection clause as a guarantee that his race shall be represented on the jury, nor is a mixed jury within the meaning of the clause. However, the clause does prohibit *discrimination* against a defendant because of his race. The State of Delaware offered neither evidence nor affidavits to rebut the affidavits which defendant had filed with his petition for removal (to the Federal District Court) and motion to quash. Defendant's affidavits established a long-continued exclusion of his race. This led the Supreme Court, in *Neal v. Delaware*,[32] to define a *prima facie* case of discrimination:

> The showing thus made, including, as it did, the fact (so generally known that the Court felt obliged to take judicial notice of it)[33] that no colored citizen had ever been summoned as a juror in the courts of the State . . . presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and the laws of the United States.[34]

This rule is the *prima facie* case by which the courts may infer that an unexplained, uniform exclusion of one class from jury service for many years is exclusion because of its class and therefore discriminatory. A dictum posited the possibility that the equal protection clause is not for the benefit of Negroes only.[35]

The *Bush* case[36] was an appeal from the denial of a motion to quash the

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[29] Ratified on March 30, 1870.

[30] Therefore, the petition for removal to a Federal Court for trial was denied. This removal, in conformity with and authorized by Section 641, Revised Statutes, must be based on a discrimination which results from the State constitutions or statutes. Here, the Delaware Constitution was compatible with non-discriminatory practices as the objectionable article was ". . . expounded by its highest judicial tribunal."

[31] The State admitted that Negroes had been excluded from jury service.

[32] Note 25, *supra.*

[33] The Delaware Chief Justice rationalized the exclusion by taking judicial notice that the discrimination was not due to color, and ". . . that none but white men were selected is in nowise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries." *Neal v. Delaware,* 103 U.S. 370, 402.

[34] *Neal v. Delaware,* note 25, *supra* at 397.

[35] ". . . (S)uch exclusion of the black race from juries because of their color was not less forbidden by law than would be the exclusion from juries, in the States where the blacks have the majority, of the white race, because of *their* color." *Neal v. Delaware,* note 25, *supra* at 386.

[36] Note 26.

indictment of murder because defendant's race, Negro, was statutorily prohibited from participating in jury service. The case is similar to *Neal v. Delaware*[37] in that the defendant was tried after the State Court of Appeals had declared unconstitutional an "exclusive" statute. However, the defendant had been indicted by a grand jury which had been selected prior to the time when the statute was declared unconstitutional.[38] Consequently, the Supreme Court reversed the conviction for the reason that:

> . . . the grand jurors who found the indictment were *selected* when statutes of Kentucky, re-enacted after the adoption of the fourteenth amendment, expressly restricted jury commissioners in their selection of grand jurors to white citizens. Further, they were selected at a time when, according to the highest court of Kentucky, it could be assumed that the officers charged with the duty of selecting grand jurors obeyed the local statute by excluding from the list, because of their race, all citizens of African descent.[39]

The Court inferred that the commissioners had followed the Kentucky statute, which was unconstitutional, and had thus denied the defendant equal protection of the laws.

While the courts were interpreting the new Amendment, Congress enacted the Civil Rights Act, on March 1, 1875. This law extended protection against private wrongs: anyone who denies equal facilities to another because of the latter's color shall be subject to pay $500 to the injured party.[40] The *Civil Rights Cases*[41] decided that the Civil Rights Act was unconstitutional because of the

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[37] Note 25.

[38] Rev. Stats., Ky., July 1, (1852), were in force when the Fourteenth Amendment was ratified. These statutes limited jury service to "free, white citizens." On December 1, 1873, the General Statutes were enacted to supersede the Revised Statutes. These General Statutes re-enacted the disqualification of colored persons for jury service. (Gen. Stat. Ky. 570). The indictment by the grand jury was returned, in May, 1880. *Commonwealth v. Johnson,* 78 Ky. 509, was decided on June 29, 1880. This case held unconstitutional the statutory exclusion of Negroes from jury service. This was in conformity with the recently adopted Fourteenth Amendment. However, the grand jury which returned the indictment against the defendant had already been selected in conformity with the General Statutes and the Criminal Code of Kentucky, Jan. 1, (1877), which reiterated the jury qualifications contained in the General Statutes. The latter law had not been ruled unconstitutional by the Kentucky Supreme Court. This statute, then, was effective and therefore the basis for removal to the Federal Courts, as provided for in Sec. 641, Revised Statutes.

(The Removal Statute, § 641, Revised Statutes, is presently in the United States Code, Title 28, § 1443.)

[39] Note 26, *supra* at 121.

[40] Civil Rights Act, (1875). Sec. 1: "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

Sec. 2: "That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, . . . shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; . . ."

[41] 109 U.S. 3 (1883). Mr. Justice Harlan, dissenting, agreed that Negroes are not the sole beneficiaries of the Amendment: "Today, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination." *Civil Rights Cases, supra* at 62.

fact that the Fourteenth Amendment affects only laws and actions of the States and is ineffectual against private wrongs. The Fourteenth Amendment could have been framed to enable Congress to operate immediately and directly upon individual subjects of the several States; as it was framed, however, it extended only a remedial power over State denials of equality. Federal legislation and judicial protection are therefore restricted to rendering nugatory any State denial of equal protection and may not be invoked when individuals acting without official status deny the equality.[42]

Races Other Than the Negro Race Have Been Protected

Various courts have extended the protection to classes other than the Negro race; but of these, relatively few have involved the precise question raised in the *Hernandez* case.[43] However, these few precedents, in addition to the extension of the protection expounded by the courts on other issues, afford a substantial argument for the protection of all classes.

As early as 1881, the Nevada Supreme Court acknowledged that the equal protection clause is not restricted to recognizing only two classes—the White and the Negro races—nor to offering protection solely to the Negro race. In *State v. Ah Chew,*[44] that Court held that Chinese might sometime be within the scope of the protection:

> The language used (in the Fourteenth Amendment) necessarily extends some of the provisions to all persons of every race and color; but their general purpose is so clearly in favor of the African race that it would require a very strong case to make them applicable to any other.[45]

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[42] One who acts under color of authority of a State or Territory to deprive another of a constitutional right, privilege, or immunity is civilly liable to the party injured. 42 U.S.C. 1983. Criminal liability is imposed by 18 U.S.C. 242. See Case Notes, 5 Catholic U. L. Rev. 112 (1955).

[43] Note 1, *supra. MacPherson v. Blacker,* 146 U.S. 1 (1892) is a case concerning a local election. The court recognized that Negroes are not the sole beneficiaries of the protection: "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 discrimination and hostile legislation." *Id.,* at 39.

In *Truax v. Corrigan,* 257 U.S. 312 (1921), the United States Supreme Court opined of equal protection: "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. . . . (It) was intended to secure equality of protection not only for all but against all similarly situated. . . . Immunity granted to a class, however limited, having to effect to deprive another class however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of rights permitted worked against, a larger class." *Id.* at 332.

[44] 16 Nev. 50, 40 Am. Rep. 488 (1881). Defendant, Chinese, was convicted of unlawful sale of opium. The Court observed that the Fourteenth Amendment extended citizenship to those Mongolians who are born in the United States. The conviction was affirmed, and the claim of the denial of equal protection was disallowed because the Mongolians in Nevada were excluded from jury service because they were aliens, not because they were Mongolians.

[45] *Id.* at 491.

The United States Supreme Court took cognizance of the complete equal protection clause in *Truax v. Raich,*[46] when it extended equal protection to an alien because the discrimination is of ". . . any person within its jurisdiction."[47] A quarter-breed Indian was held to be within the protection of the equal protection clause in *State v. Walters.*[48] The conviction in the latter case was affirmed because of the failure of the defendant to establish proof showing that the jury commissioners discriminated against "Indians, Negroes, Greeks, and Italians."[49] Because a defendant may object to discrimination only if it be against the race or class of which he is a member, the court considered the possible discrimination against only the Indian race. The Court held:

> It is well settled that a systematic and arbitrary exclusion of *any class or race* of people because of their race and color constitutes a denial of "the equal protection of the laws" to anyone falling within that class, who may be charged with crime and placed on trial therefor.[50] (Emphasis supplied.)

This definitely and unequivocally shows that protection for all peoples of all classes is not a novel concept.

Few cases have involved white men who had availed themselves of the equal protection clause. In *Buchanan v. Warley,*[51] the court iterated the protection in favor of white men as well as of Negroes. More precisely, *Kentucky v. Powers*[52] is a case in which the defendant was white. He claimed, before and after conviction of murder, that the White race had been subjected to a discrimination because of its race. After having been convicted, the defendant moved to have the case removed to Federal jurisdiction because of the discrimination issue. The prosecution contended that the removal law was unconstitutional and that the defendant, being white, could not invoke the equal protection clause. In reversing the United States Supreme Court upheld the constitutionality and stated:

> The cases to which we have adverted have reference, it is true, to alleged discriminations against Negroes because of their race. But the rules announced in them apply where the accused is of the white race. Section 641 [The Removal Statute], as well as the Fourteenth Amendment of the Constitution, is for the benefit of all of every race whose cases are embraced by its provisions and not alone for the benefit of the African Race.[53]

One may readily realize, after a review of these cases, that the equal pro-

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[46] 239 U.S. 33 (1915).
[47] *Id.* at 39.
[48] 61 Ida. 341, 102 P.2d 284 (1940).
[49] *Id.* at 286.
[50] *Ibid.*
[51] 245 U.S. 60 (1917). Suit for specific performance of a contract for conveyance of land. Plaintiff, white, sued to convey to vendee, Negro. The defendant pleaded that, as a Negro, he cannot live in that particular district because the city (Louisville, Kentucky) ordinance restricted the area to white men. The Kentucky Supreme Court held the ordinance valid. However, the United States Supreme Court stated, in reversing: "While a principal purpose of the (Fourteenth) Amendment was to protect persons of color, the broad language used was sufficient to protect all persons, white or black, against discriminatory legislation by the States. This is now the settled law." *Buchanan v. Warley, Id.* at 76.
[52] 201 U.S. 1 (1905).
[53] *Id.* at 32, 33.

tection is for the benefit of all peoples, irrespective of the race or class to which they belong, and that the Federal Government, by the ability to reverse convictions when the defendant establishes discrimination against a class of which he is a member, has remedial power to rectify any abuses by the States. This protection precludes any classification which is arbitrary, capricious, or oppressive; which is not directed against a class from which an evil is especially to be feared; which may imply any social inferiority; or which may cause or allow any deleterious effect to a definable class. This inhibition, however, does not vitiate classifications based on irrelevant facts (those factors which are not likely to influence the decisions of the jurors[54]) which, in jury selection, allow restrictions of jury service to people who have minimal educational qualifications, who are freeholders or citizens, or who are within specified ages.[55] Even these classifications must be in conformity with the requisites of due process.[56] The *Hernandez* case clarifies the selection of jurors—they must be designated without any cognizance having been taken of ancestry or national origin.

Equal Protection Limitations on Federal Actions

The Fifth Amendment contains no equal protection clause, as has been noted, and this has been repeatedly pointed out by the Supreme Court of the United States.[57] Because of the fact that this clause, inserted in the Fourteenth Amendment, is not controlling on the Federal Government, there appears a permissible inference that actions of the Federal Government are without restrictions other than the due process limitations. However, the converse result is preferred and has been reached through application of the due process clause.

Ostensibly, the only restriction on the Federal Government is that any discrimination must be in conformity with due process. This militates against inhibiting the Federal Government from racial discrimination. As in the *Hirabayashi* case,[58] the Supreme Court recognized that:

> Discriminations between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classifications or discriminations based on race alone have often been held to be a denial of equal protection.[59]

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[54] *Raulins v. Georgia*, 201 U.S. 638 (1890).

[55] *Strauder v. West Virginia*, note 17, *supra.*

[56] See *People of State of New York v. Zimmerman*, 278 U.S. 63 (1928).

[57] Cf. *Hirabayashi v. United States*, 320 U.S. 81 (1945).

[58] *Id.* at 100. This case arose during World War II. Defendant, Japanese, violated a curfew—an emergency war measure—which required all Japanese to be in their homes by 8:00 p.m. daily. The United States Supreme Court affirmed the conviction because the curfew was embraced within the emergency war powers.

[59] Mr. Justice Murphy, concurring, was conscious of the fact that that was ". . . the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry." *Id.* at 111. He concluded that equal protection allows reasonable classification: ". . . it by no means follows, . . . that there may not be discrimination of such an injurious character in the application of laws as to amount to a denial of due process of law as that term is used in the Fifth Amendment." *Id.* at 112.

On the other hand, several Federal cases, (admittedly the minority) have extended the equal protection restriction to the Federal Government in particular instances. In *Lappin v. District of Columbia,*[60] the court appreciated the freedom of Congress from restrictions as to equal protection as contained in the Fourteenth Amendment but rejected the claim of the absence of that restriction over the Federal legislation when the legislation militates against the citizens of a Federal District. In that case, the court said:

> . . . It does not follow that Congress, in exercising its power of legislation within and for the District of Columbia, may, therefore, deny to persons residing therein the equal protection of the laws.
> All of the guarantees of the Constitution respecting life, liberty, and property are equally for the benefit and protection of all citizens of the United States residing permanently within the District of Columbia.[61]

This manifests the effort of the courts to apply equal protection as a restriction over some Federal power. The Supreme Court had already decided *Davidson v. New Orleans,*[62] which initiated the extension of due process from solely procedural safeguards to substantial protection: "Can a state make anything due process of law which, by its own legislation, it chooses to declare such?"[63] Thereafter, a Federal Court held that equal protection is *implied* within the due process clause of the Fifth Amendment. In *Hamilton Bank v. District of Columbia,*[64] the court said:

> In spite of the fact that under the settled rule equal protection of the laws is not afforded by the Fifth Amendment, it is true, and ought to be true, that "The Fifth Amendment as applied to the District of Columbia implies equal protection of the laws."[65] . . . It is unthinkable that Congress, enacting statutes applicable only in this jurisdiction, does not violate the due process clause of the Fifth Amendment if it denies the people of this District equal protection of the laws, just as state legislation violates the "equal protection" clause of the Fourteenth Amendment if it does the same thing.[66]

The Federal courts prefer to couple equal protection and due process even though there is an applicable statute. In *United States v. Davis,*[67] the defendant, a Puerto Rican, was convicted of second degree murder by a jury composed solely of natives of the Virgin Islands. The Fifth Amendment had been supplemented by the Organic Act,[68] which provided the Virgin Islands with a Bill of Rights, including full guarantees of equal protection. Defendant proved that Puerto Ricans had been excluded from jury service because of their race. The defendant was convicted; he then applied for a writ of *habeas corpus,* and the judge—not

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[60] 22 App. D.C. 68 (1903). Congress had distinguished unreasonably between different types of brokers, which differences did not allow a substantial difference in the payment by residents of the District of Columbia of a fee for licenses to act as brokers.
[61] *Id.* at 76.
[62] Note 11, *supra.*
[63] *Id.* at 102.
[64] 176 F. 2d 624 (1949).
[65] Quoted from *Sims v. Rives,* 66 App. D.C. 24, 84, 84 F. 2d 871, 878 (1936).
[66] Note 64, *supra* at 630.
[67] 115 F. Supp. 392 (1953).
[68] 48 U.S.C. § 1406 (g).

content with the statutory guarantee of equal protection—indulged in the presumption that ". . . as applied to a territory, the due process clause of the Fifth Amendment implies equal protection of the laws."[69]

A further manifestation of that extension is the trend reflected by two recent Supreme Court decisions, *Hurd v. Hodge* and *Bolling v. Sharpe.*[70] In the first case, adjacent land owners (in the District of Columbia) effected a restrictive agreement not to sell land to Negroes. Negro petitioners purchased land so restricted, and the land owners sued for injunctive relief to enforce the terms of the restrictive agreement. The district court granted the injunction. The United States Supreme Court reversed because the Federal aid (through the court decree of injunction) was a denial of equal protection as guaranteed by the Civil Rights Act.

The *Bolling* case then arose. Negro petitioners challenged the validity of racial segregation in public schools of the District of Columbia. Their bill was dismissed in the district court, and the Supreme Court granted direct certiorari. The Court did not refer to the Civil Rights act but rather noted: that equal protection and due process are not mutually exclusive; that discrimination may be violative of due process; and that classifications are constitutionally suspect. The Court then held that segregation in schools is not reasonably related to a governmental function and thus is an arbitrary deprivation of liberty in violation of the Due Process Clause. The Court could have relied on the Civil Rights Act, as it did in the *Hurd* case, but it preferred to make legislative defer to constitutional protections.

This inclusion of the equal protection within the due process clause is for a definite purpose. The courts hesitate definitively to distinguish between the two legal concepts because such distinction may militate against some desirable result in the future. In his treatise, *Equality and the Law,*[71] Mr. Warsoff has analyzed the problem:

> . . . to avoid closing the door to an effective check on discriminatory Federal legislation, the court has adopted the simple expedient of joining the two phrases into one general guarantee of individual rights.

This continual extension of the protection of the Fifth Amendment will have an excellent effect on future Federal decisions involving denials of equal protection. Although the Fifth Amendment, historically considered, patently does not protect the people from more than "Oppression of the Crown," the courts have extended the protection to substantial guarantees and equal protection. Irrespective of this equating of equal protection and due process, occasionally Federal courts are appreciative of their historic distinctions, but they allow the

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[69] Note 67, *supra* at 396. *United States v. Davis* was reversed by the Circuit Court of Appeals, 212 F. 2d 681 (1954). The reversal was based on a lack of jurisdiction, but the Circuit Court opined that the district court ". . . will find the opinion of the circuit judge useful." *Id.* at 684.

[70] *Hurd v. Hodge,* 334 U.S. 24 (1947); *Bolling v. Sharpe,* 347 U.S. 497 (1954). See Comment, Racial Segregation in The Public Schools, Catholic U. L. Rev 141 (1955).

[71] Note 11, *supra,* at 166.

strictly analytical conclusions to be held in abeyance when the needs for substantial protection arise.

Texas Precedents and Conclusion

The *Hernandez* case arose in Texas, and when the Texas Court of Criminal Appeals affirmed the conviction,[72] it discussed some of the precedents which rationalized the decision rendered. Nevertheless, that State has a copious supply of decisions which subserve the argument for protection of all classes.

In *Juarez v. State,*[73] the defendant moved to quash the indictment because Roman Catholics had been systematically excluded from the grand jury. The Court of Criminal Appeals reversed the overruling of the motion and acknowledged: "Indictments returned by such a grand jury would be perfectly valid save those which charge crime to members of the class discriminated against."[74] The court then quoted with approval from the case of *American Sugar Refining Company v. State of Louisiana*:[75]

> Of course, if such discriminaation were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinion, [or] political affiliations, . . . such exemptions would be pure favoritism and a denial of the equal protection of the laws to the less favored classes.[76]

The court's inclusion of "color, race, nativity, religious opinion, [or] political affiliations" connotes a very pervasive protection.[77]

Texas, as have most other States, has dealt with the equal protection issue primarily when Negroes are claiming the protection. The Texas court approximated the extension of equal protection to Mexicans in *King v. State,*[78] in which the defendant, a Negro, pleaded the denial of equal protection but failed in the factual proof that Negroes had the prerequisite, legitimate qualifications to be jurors. The Court affirmed the conviction with the observation:

> We do not understand that the Fourteenth Amendment to the Federal Constitution . . . requires that in the selection of the grand jurors there must be some Negroes, Mexicans, Italians, or Greeks selected as grand jurors when any of such nationality is to be indicted or that he is entitled to a mixed jury. All that the law requires is that there must not be any discrimination practiced in the selection of grand and petit juries by reason of his race.[79]

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[72] Note 3, *supra.*
[73] 102 Tex. Cr. 297, 277 S.W. 1091 (1925).
[74] *Id.* at 1092.
[75] 179 U.S. 89 (1900).
[76] *Id.* at 92.
[77] The court quoted from *Ruling Case Law* also: "Its clauses securing the equal protection of the laws relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of a public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition." (6 R.C.L. § 368, p. 373).
[78] 143 Tex. Cr. 27, 152 S.W. 2d 342 (1941).
[79] *Id.* at 346.

Although the *King* case, *supra,* posited the possibility of protection of Mexicans against express discrimination, the same court three years later, in *Sanchez v. State,*[80] affirmed a Mexican's conviction of murder with the adventitious reasoning that, in the absence of a United States Supreme Court ruling, nationality will not be considered to bear the same relation as race within the meaning of the equal protection clause. Therefore, discrimination only inferred is not sufficient to invalidate the actions of juries so selected.

The *King* case, *supra,* was subsequent to *Carter v. Texas,*[81] in which the United States Supreme Court decided affirmatively that Negroes may not be excluded from grand jury service solely because of race or color and that an exclusion therefrom is a denial of equal protection. The *King* case was subsequent to *Norris v. Alabama*[82] also, in which there was enunciated the "rule of exclusion" concept, which enables a court to infer that when a particular class has been excluded from jury service for a long time, the absence is due to discrimination against that class. This is a reiteration of the *prima facie* case of discrimination originally formulated in *Neal v. Delaware.*[83] The Supreme Court in the *Norris* case reversed the conviction of a Negro because members of his race had been excluded from all jury service in the county for a long time. The court laid the "rule of exclusion"—"For this long-continued, unvarying, and wholesale exclusion of Negroes from jury service, we find no justification consistent with the constitutional mandate."[84]

Texas has been slow to recognize the Mexican's legitimate claims of denials of equal protection—this was mentioned by Mr. Chief Justice Warren in the *Hernandez* case.[85]

In 1946, the Court of Criminal Appeals of Texas affirmed the conviction of a Mexican who had claimed a denial of equal protection. In *Salazar v. State,*[86] the court tersely commented:

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[80] *Sanchez v. State,* 147 Tex. Cr. 436, 181 S.W. 2d 87 (1944). Express discrimination is made essential here to prove discrimination against Mexicans although the *prima facie* case or "rule of exclusion," which are applicable to protect Negroes, do not require proof of express discrimination. See also, *Neal v. Delaware,* note 25, *supra.*

The United States Supreme Court, in *Norris v. Alabama,* 294 U.S. 587 (1935), quoted part of the testimony of one of the jury commissioners who picked the jurors who tried the defendant. The Court so quoted to show that "mere generalities" alone will not rebut the inference of class discrimination after proof of a long continued, unexplained exclusion. The commissioner, as quoted by the Supreme Court, testified: "I do not know of any Negro in Morgan County over twenty-one and under sixty-five, who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude." *Id.* at 598, 599.

[81] 177 U.S. 442 (1900).

[82] 294 U.S. 587, 598.

[83] Note 25, *supra.*

[84] Note 80, *supra* at 597.

[85] Note 1, *supra* at 670.

[86] 149 Tex. Cr. 260, 193 S.W. 2d 211 (1946).

> The complaint is made of discrimination against nationality, not race. The Mexican people are of the same race as the grand jurors. We see no question presented for our discussion under the Fourteenth Amendment to the Constitution of the United States and the decisions relied upon by appellant, dealing with discrimination against race.[87]

Texas prefers to consider Mexicans as not ". . . a separate race but . . . white people of Spanish descent. . . ."[88] This acceptance of only two races (white and Negro) having been within the contemplated protection of the Fourteenth Amendment is an assumption of a non-existent fact. The clause prohibits class as well as race discrimination. So long as ethnic groups are distinguishable, so long as any class is definable, we should not allow such reasoning to deny a class substantial rights solely because they are of the "descent" of members of the jury.

Mere general denials of discrimination do not refute the presumption of discrimination, and State statutes respective of jury selection may be in conformity with the constitutional requirements and yet be effectual violations of equal protection. "The Fourteenth Amendment requires that equal protection to all must be given—not merely promised."[89] The objection that the jury commissioners who may pick a particular jury do not know any qualified members of a class (Negroes in the case referred to) was held in *Smith v. State of Texas*[90] not to militate against a presumption of discrimination if, in fact, qualified members of the class had not been selected for a time long enough to raise the presumption. To hold otherwise would be to say that ingenuous discrimination is valid but that conscious discrimination is not.

A similar difficulty arises when the jury commissioners purposefully limit the number of members of a particular class. In *Akins v. Texas*,[91] the jury commissioners arbitrarily limited the number of defendant's race (Negro) to one on the grand jury. The United States Supreme Court recognized that fairness does not require proportional representation and that mere lack of proportional representation does not establish a *prima facie* case of discrimination. The Court in the *Akins* case refused to determine whether a purposeful limitation, as contra-distinguished from arbitrary exclusion, is arbitrary. Mr. Justice Murphy, dissenting, believed that:

> "Racial limitation no less than racial exclusion in the formation of juries is an

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[87] *Id.* at 212.

[88] *Sanchez v. State*, 156 Tex. Cr. 468, 243 S.W. 2d 700, 701 (1951).

[89] *Smith v. State of Texas*, 211 U.S. 128, 130 (1940).

[90] Note 89, *supra*. To the same effect is *Hill v. Texas*, 316 U.S. 400 (1942), in which defendant, a Negro, proved that Negroes had not been on any grand jury for at least sixteen years. Respective of a *prima facie* case of denial of equal protection, the United States Supreme Court stated: ". . . chance or accident could hardly have accounted for the continuous omission of Negroes from the grand jury lists for so long a period as sixteen years or more. The jury commissioners omitted to place the name of any Negro on the jury list. They made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors, and if so who they were. They thus failed to perform their constitutional duty—recognized by section 4 of the Civil Rights Act of 1875." *Id.* at 404.

[91] 325 U.S. 398 (1945).

> evil condemned by the equal protection clause. 'The Amendment nullifies sophisticated as well as simple-minded discrimination.'[92][93]

This dissenting view was given majority weight several years later when, in *Cassell v. Texas*,[94] the United States Supreme Court conclusively expunged the possibility of the adoption of that anomaly. The validity of the premise that systematic exclusion is a denial of equal protection requires the same conclusion respective of arbitrary, systematic limitation, and:

> . . . an accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion of race.[95]

Mr. Justice Jackson dissented from the reversal in that case because it involved discrimination only on the grand jury. With much emphasis, he urged:

> This Court never has explained how discrimination in the selection of a grand jury, illegal though it be, has prejudiced a defendant whom a trial jury, chosen with no discrimination, has convicted. . . .
> It is obvious that discrimination exclusive from a trial jury does, or at least, may prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand. . . . The grand jury is a different institution. . . . The difference is all the difference between deciding a case and merely deciding that a case should be tried.[96]

The argument of the Justice fails to explain away the fact that equality requires that defendants are to be indicted as well as tried without any notice having been taken of differences based on classifications of other than irrelevant factors. Unless "equal protection" includes the opportunity and right of all otherwise qualified persons to participate in the administration of the law, through juries, without any exclusion—or inclusion—from *any* jury based on the accidents of ancestry, national origin, and class distinction, we have no substantial equality. If class discrimination be no substantial jeopardy to one's rights, there are no principles by which we are protected from any arbitrary exclusion or selection. A perpetuation of discrimination in particular cases—at any stage of the procedure—when the exigencies might suggest, will eventually authorize blanket restrictions. Cognizing the essential need for juries, and the concomitant rights of the accused, the Supreme Court in the *Hernandez* case wisely reiterated the interpretation which requires that all persons be guaranteed the protection of the Equal Protection Clause.

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[92] *Lane v. Wilson*, 307 U.S. 268, 275 (1939).
[93] Note 91, *supra* at 408.
[94] 339 U.S. 282 (1950).
[95] *Id.* at 287.
[96] *Id.* at 301.