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THE FIFTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION

KENNETH L. KARST†

Given today's prominence of the equal protection clause as a limitation on the states, the Constitution's omission of any explicit parallel guarantee against the federal government seems anomalous. To the framers of the fourteenth amendment, however, no such anomaly would have been apparent. Above all, they sought to empower Congress to impose national guarantees of racial equality on the states; it would not have been obvious to them that Congress itself should be

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I am grateful for this chance to join the North Carolina Law Review in honoring Frank Strong. Even if I had never met Frank, I should want to pay tribute to his contributions to constitutional law scholarship. There are only a tiny handful of scholars who can be classed as Frank's peers when it comes to the analysis of the institutional/structural side of constitutional law: the interrelations among courts, administrative agencies and legislatures. During recent years, when the vogue in writing on constitutional law has often been elsewhere, Frank has continued to focus on these fundamental issues, bringing to them an especially keen sense of the uses of history in sorting out the components of live problems. His casebook, American Constitutional Law (1950) was, and remains, an advanced text on constitutional theory; I keep it handy, and refer to it regularly, and always with profit.

This sophistication is not the first thing one notices upon meeting Frank Strong. He is a big and hearty man, and his manner suggests little of the complexity of thought that lies beneath that surface. The warmth, of course, is genuine; if any one word captures Frank, it is "genuine." There is no pretense about the man, and no pretension, either. You don't have to guess about what he thinks, or who he is; he will tell you, in plain language. (Well, sometimes not so plain. In conversation, he can construct sentences that are breathtakingly complex. At the end, though, the subject connects to the verb, and every clause in between has all its buttons. I said he was keen on structure.)

The main reason I feel honored to join this tribute is yet to be stated. Frank was the Dean when I joined the Ohio State law faculty as its youngest member, and the generosity that he and Gertrude showed to me and my family is something we shall always remember. It was characteristic of Frank that he assigned me to teach the course he had been teaching for a generation. (At alumni gatherings, I became acutely aware of the size of the shoes I was trying to fill.) It is, finally, his humanity that makes the man what he is. I know a lot of people who talk about brotherhood, but very few who really assume that everyone is part of their family. Frank is one of those. As one who has drawn nourishment of the mind and spirit from him, I want to say thanks as I join this salute.

limited by a constitutional guarantee of equal protection. Only in the mid-twentieth century, when the equal protection clause was emerging as a significant self-executing limitation on the states, did the anomaly appear. Not surprisingly, the Supreme Court found a way to remedy the textual omission, concluding that the fifth amendment's due process clause prohibited arbitrary discrimination by the federal government. It was fitting that this act of statecraft was performed in the course of invalidating racial segregation in the public schools of the District of Columbia. The case, of course, was Bolling v. Sharpe, and the year was 1954.

In the two decades since that decision, the Court has extended the fifth amendment's guarantee of equal protection well beyond its initial application to federally sponsored racial discrimination. The process of doctrinal extension had gone so far that the Court could say, two years ago: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Except for the hyperbole in the word "always," that statement was, in 1975, a fair summary of Supreme Court doctrine. The very next year, however, saw an important qualification, announced by the Court in the context of the treatment of aliens by the federal government:

Although [the Fifth and Fourteenth] Amendments require the same type of analysis, . . . the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.

The apparent tension between these two recent pronouncements prompts this article's exploration of the current state of fifth amendment equal protection doctrine. We begin at the historical and analytical beginnings.

I. ORIGINS AND SOURCES

The doctrine of fifth amendment equal protection entered the
Constitution a little at a time, in a series of decisions that gradually came to acknowledge its existence even while refusing to apply it. The camel, in other words, backed into the tent. If there is irony here, it is irony of a familiar kind; some of the most significant doctrinal developments of the twentieth century proceeded in exactly the same way. Thus the fourteenth amendment's protection of the freedom of speech against the states was born in a decision that sent the speaker to prison,\(^7\) and the "suspect" nature of racial classifications was announced in an opinion upholding harsh wartime restrictions on some 100,000 persons of Japanese descent.\(^8\) The decision in Bolling v. Sharpe, in any event, did not so much create the doctrine of fifth amendment equal protection as ratify it.

As recently as the 1920s, the Supreme Court tossed off equal protection claims against the federal government as if they were frivolous. When a taxpayer attacked the World War I excess profits tax law for its "baseless and arbitrary discriminations," claiming a violation of the due process clause of the fifth amendment, the Court answered with little more than a shrug: "Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment . . . ; but clearly they are not in point. The Fifth Amendment has no equal protection clause, and the only rule of uniformity [for federal taxes] is the territorial uniformity required by Art. I, § 8."\(^9\) Thus at the zenith of judicial intervention to protect property and enterprise in the name of substantive due process—and, less frequently, in the name of equal protection—the idea of guaranteeing equality against federal invasion lay dormant.\(^10\)

Yet even as that Sleeping Beauty, substantive due process, was

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9. La Belle Iron Works v. United States, 256 U.S. 368, 392 (1921) (citations omitted). Later in the same year, however, the Court decided Truax v. Corrigan, 257 U.S. 312 (1921). In his opinion for the Court, Chief Justice Taft recognized that to the extent due process sets a "minimum of protection for every one's right of life, liberty and property," it "tends to secure equality of law." He added, "Our whole system of law is predicated on the general, fundamental principle of equality of application of the law." 257 U.S. at 332. This statement was not an endorsement of a principle that due process includes a guarantee of equal protection, but it does suggest that Taft was aware of some overlap of the functions of due process and equal protection. The idea that the fifth amendment might contain an equal protection guarantee was not unknown during this time. See, e.g., United States v. Yount, 267 F. 861, 863 (W.D. Pa. 1920).  
10. The due process clause of the fourteenth amendment, however, was pressed into service in a case involving racial discrimination. Buchanan v. Warley, 245 U.S. 60 (1917).
being laid to rest,\textsuperscript{11} the Court hinted in a series of dicta that the fifth amendment might, after all, prohibit arbitrary federal discrimination. The ritual recital in all these opinions was that "the Fifth [Amendment] contains no equal protection clause"\textsuperscript{12}—as if the point might otherwise escape even careful readers. But the Court would go on, saying that it assumed for argument that federal discrimination, if completely unjustified, might violate the due process clause of the fifth amendment. At the same time, the Court continued to assure us, the legislation before it did no such thing.\textsuperscript{13}

The critical opinion in this series was written by Chief Justice Stone in \textit{Hirabayashi v. United States},\textsuperscript{14} a case of tragic irony. Persons of Japanese ancestry were required by military order to obey a curfew in West Coast areas during the early months of World War II. When an American citizen of Japanese parentage violated the curfew, he was prosecuted and convicted; the Court upheld his conviction, on the basis of what it perceived to be a wartime emergency. The decision richly deserves Eugene Rostow's characterization of it as a disaster.\textsuperscript{15} But the opinion pointed the way to the adoption by the Court of the doctrine of fifth amendment equal protection. As this passage shows, Chief Justice Stone began where the Court had always begun; however, the Court's previous "No" had turned to "No, but . . . ": "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. . . . Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so ur-

\textsuperscript{11} The doctrine slumbered for 28 years before being awakened by the kiss of Griswold v. Connecticut, 381 U.S. 479 (1965).

\textsuperscript{12} E.g., Detroit Bank v. United States, 317 U.S. 329, 337 (1943).

\textsuperscript{13} Detroit Bank v. United States, 317 U.S. 329 (1943); Currin v. Wallace, 306 U.S. 1, 13-14 (1939); Steward Mach. Co. v. Davis, 301 U.S. 548, 585 (1937); cf. United States v. Carolene Prods. Co., 304 U.S. 144 (1938). In \textit{Carolene Products} the Court upheld a federal law prohibiting the interstate shipment of "filled milk" (skimmed milk compounded with fat other than milk fat). The statute was attacked on a number of grounds, including an equal protection ground based on its failure to cover oleomargarine or other dairy substitutes. The Court rejected this argument, saying:

\textsuperscript{14} The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another.

304 U.S. at 151. Four fourteenth amendment cases were cited. Neither the citations nor the comment about states' power were necessary if the Court meant to hold strictly to the view that the fifth amendment offered no protection whatever against federal discrimination.

\textsuperscript{15} Rostow, \textit{The Japanese American Cases—A Disaster}, 54 \textit{Yale L.J.} 489 (1945).
Here the Chief Justice cited a 1914 opinion by Justice Holmes, upholding a state law against a fourteenth amendment equal protection attack. The citation was relevant only if there was something to be learned from the fourteenth amendment in determining what sort of discrimination by Congress might amount to a denial of due process under the fifth amendment.

The Hirabayashi opinion went on to remark that discriminations based on ancestry are "odious to a free people whose institutions are founded upon the doctrine of equality." For this proposition, the Chief Justice cited three previous decisions, two state discrimination cases arising under the equal protection clause of the fourteenth amendment, and one case decided under the Philippine Bill of Rights. Concluding the fifth amendment discussion, he said, "We may assume that these considerations would be controlling here were it not for [the war emergency]." A similar assumption seems to have made a year later in Korematsu v. United States, when a narrow majority of the Court upheld an order excluding persons of Japanese descent from the West Coast. Only the dissenters sought to identify the constitutional provision that was in play. Justice Jackson merely referred to "the due process clause," but for Justice Murphy, the exclusion order was a deprivation "of the equal protection of the laws as guaranteed by the Fifth Amendment."

The slate was thus far from blank when Chief Justice Warren wrote for a unanimous Court in Bolling v. Sharpe. Drawing on the Court's repeated assumption—always stated in dicta and "for argument"—that the fifth amendment prohibits arbitrary federal discrimination, the Chief Justice announced that "discrimination may be so un-

16. 320 U.S. at 100 (citations omitted).
18. Chief Justice (then Associate Justice) Stone was, of course, also the author of United States v. Carolene Prods. Co., 304 U.S. 144 (1938), discussed in note 13 supra.
19. 320 U.S. at 100.
22. 320 U.S. at 100.
24. Id. at 245.
25. Id. at 234-35. See also United States v. Petrillo, 332 U.S. 1 (1947).

The Court passed up an opportunity to reach the issue of fifth amendment equal protection in Hurd v. Hodge, 334 U.S. 24 (1948), the companion case to Shelley v. Kraemer, 334 U.S. 1 (1948). Hurd arose in the District of Columbia. Instead of holding that a federal court injunction enforcing a racially restrictive covenant violated the fifth amendment, the Court held that such an injunction violated (a) the Civil Rights Act of 1866, and (b) "the public policy of the United States." 334 U.S. at 35.
justifiable as to be violative of due process.\textsuperscript{26} Drawing on dicta in Hirabayashi and Korematsu, he stated that racial classifications were suspect, demanding careful judicial scrutiny. And, since school segregation was “not reasonably related to any proper governmental objective,”\textsuperscript{27} he concluded that it deprived the segregated black children of their liberty in violation of the due process clause of the fifth amendment.

The Bolling opinion appealed chiefly to precedent. And the precedent on which the Court relied was anything but rock-solid, as this sketch has shown.\textsuperscript{28} As if recognizing this weakness, the Chief Justice closed his discussion of fifth amendment equal protection with a comment that looked in another direction: “In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”\textsuperscript{29} Once the textual omission of an equal protection clause in the fifth amendment was seen as a serious anomaly, then, the Court supplied its interpretive remedy. But its failure to bolster a rather assertive short opinion with argument addressed to “the text, the history, or the political structure of the Constitution”\textsuperscript{30} lay the Court open to the charge that what it found “unthinkable” was the political implication of a contrary decision, rather than an anomaly of constitutional principle.\textsuperscript{31} At this distance, we cannot know what the Court had in its collective mind when it decided Bolling v. Sharpe, or what Chief Justice Warren had in mind when he wrote the opinion. What we can see in the perspective of two decades, however, is that the decision, and

\begin{itemize}
\item \textsuperscript{26} 347 U.S. at 499. The opinion also cited Buchanan v. Warley, 245 U.S. 60 (1917). \textit{id.}
\item \textsuperscript{27} 347 U.S. at 500.
\item \textsuperscript{28} One particularly shaky appeal to precedent was the Court’s quotation from Gibson v. Mississippi, 162 U.S. 565 (1896). In that opinion, the first Justice Harlan said that the Constitution forbade, “so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race.” \textit{id.} at 591. This pious statement (dictum as to the federal government, since the case involved a fourteenth amendment claim against a state) must have seemed hollow to Gibson, a black man accused of murdering a white. The Court denied removal under the existing civil rights removal statute, despite the showing that: about 7000 blacks and 1500 whites were eligible for jury service in the county; of the 200 names on the list of those selected for the jury panel, all were white; and for several years no black had served on the grand jury. The irony in drawing the Bolling result from Gibson thus surpasses even the irony in relying on Hirabayashi.
\item \textsuperscript{29} 347 U.S. at 500 (footnote omitted).
\item \textsuperscript{30} Linde, \textit{supra} note 3, at 233-34.
\item \textsuperscript{31} \textit{id.} Professor Linde does not argue that Bolling was wrongly decided.
\end{itemize}
the principle of fifth amendment equal protection on which it rests, are amply justified by text, by structure and by history.

It has been obvious ever since the fourteenth amendment became law that its guarantees of due process and equal protection overlap in a large number of cases. Justice Bradley explained the point in his dissent in the Slaughter-House Cases, and modern commentators have refined the analysis. Thus, to the degree that a statute is (in equal protection language) "overinclusive," it also invites a due process attack, since it restricts liberty without justification. And the case that Tussman and tenBroek chose to illustrate their concept of "substantive equal protection" was Hirabayashi, a fifth amendment due process decision. A number of decisions before Bolling v. Sharpe invalidated state laws on equal protection grounds, when due process would have served just as well; similarly, some pre-Bolling due process decisions now seem to have been equal protection decisions in disguise.

This intermixture of claims to liberty and equality has ancient roots. Aristotle, in a famous passage, said:

The basis of a democratic state is liberty; which, according to the common opinion of men, can be enjoyed only in such a state;

. . . . Every citizen, it is said, must have equality, and therefore in a democracy the poor have more power than the rich, because there are more of them, and the will of the majority is supreme. This, then, is one note of liberty which all democrats affirm to be the principle of their state.

And Magna Carta itself, which the framers of the fifth amendment surely thought to be the ancestor of the due process clause, has also

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32. 83 U.S. (16 Wall.) 36, 112-21 (1873).
34. The first amendment overbreadth doctrine typifies the due process approach to "overinclusive" statutes. Justice Douglas, concurring in the first amendment decision in Erznoznik v. City of Jacksonville, 422 U.S. 205, 218 (1975), even referred to the ordinance in question as "fatally overinclusive in some respects and fatally underinclusive in others."
35. 320 U.S. 81 (1943).
36. Tussman & tenBroek, supra note 33, at 361-63.
38. E.g., Buchanan v. Warley, 245 U.S. 60 (1917). For a modern illustration of this overlap, see the debate between Justices Harlan and Douglas in Boddie v. Connecticut, 401 U.S. 371 (1971), over the question whether due process or equal protection was the appropriate ground to justify a result they both agreed was proper.
39. This passage from Jowett's translation of the Politics is reprinted in F. Coker, Readings in Political Philosophy 87 (rev. ed. 1938).
been received into the American legal tradition as a guarantee of equal protection.\textsuperscript{40} The "law of the land," with which due process was assumed to be synonymous,\textsuperscript{41} was a legacy of the common law, with emphasis on the word "common." Daniel Webster, following Blackstone, said, "By the law of the land is most clearly intended the general law. . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."\textsuperscript{42} If the civil rights movement has marched in the name of "freedom," and the women's movement claims equality in the name of "liberation," there is venerable precedent.

Webster's reference to "every citizen" also reminds us that the very idea of citizenship implies some measure of equality. The principle derives from the social contract theory that was so prominent in the minds of the framers of the original Constitution. Rousseau's formulation is explicit:

\begin{quote}
[T]he social compact establishes among the citizens such an equality that they all pledge themselves under the same conditions and ought all to enjoy the same rights. Thus, by the nature of the compact, every act of sovereignty, that is, every authentic act of the general will, binds or favors equally all the citizens . . . .

[T]he sovereign never has a right to burden one subject more than another, because then the matter becomes particular and his power is no longer competent.\textsuperscript{43}
\end{quote}

One of the main purposes of the Constitution was to form a new social contract among all the people of the nation. It was "We, the People of the United States" who ordained and established the Constitution.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{40} See A. Howard, The Road from Runnymede 307-15 (1968). On the line of descent from Magna Carta to due process, see F. Strong, American Constitutional Law 43-51 (1950).
\item \textsuperscript{41} See A. Howard, supra note 40, ch. XVI. Julius Goebel has argued that the terms were not synonymous, but he does not dispute that the framers so regarded them. See J. Goebel, Cases and Materials on the Development of Legal Institutions 168-72 (1946). See also J. Goebel, Antecedents and Beginnings to 1801, at 101 (1971) (vol. 1 of History of the Supreme Court of the United States, P. Freund, gen. ed.).
\item \textsuperscript{42} Quoted in A. Howard, supra note 40, at 308. See also Davidson v. New Orleans, 96 U.S. 97, 101 (1877).
\item \textsuperscript{44} U.S. Const. Preamble. Compare Wesberry v. Sanders, 376 U.S. 1 (1964), in which the Supreme Court held that the provision in art. I, § 2 that representatives in Congress be chosen "by the People of the several States" requires equality in the population of congressional districts. The actual degree of popular support for the Constitution in 1787-1789 is a matter of some debate. See C. Haines, The Role of the
From the beginning it was assumed that the new national government would have a direct relationship with individuals. As Marshall said, the national government is "emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."45 This new direct relationship gave the national government both powers and responsibilities.46 Hamilton, defending the Constitution against the criticism that it lacked a Bill of Rights, quoted the Preamble's statement that the Constitution was ordained and established by "the People," and added: "Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights . . . ."47

There were, to be sure, some who questioned whether the people were citizens of the United States as well as citizens of the states,48 but the prevailing view, certainly by Webster's time, held that they were both.49 The Supreme Court's opinion in Dred Scott v. Sandford50 is scorned today, and properly so, for the racist assumptions that produced its racist conclusions. But Chief Justice Taney uttered no heresy when he said, "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing . . . . They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty."51 It is quite proper, then, to read the original Constitution as conferring national citizenship on the people—with the exception of the ugly blemish of slavery. And, as Charles Black has eloquently argued, national citizenship implies some substantial measure of equality among the nation's citizens.52
Consider again the words of Justice Bradley:

A citizen of the United States has a perfect constitutional right to go and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; . . . . He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. . . . If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States. 53

That Bradley was speaking in dissent—and, indeed, in defense of a theory of economic due process that has been out of vogue for four decades—does not detract from the good sense of these passages of his opinion. It also makes no difference to this thesis that Justice Bradley was focusing on the fourteenth amendment. For, as he said, even before that amendment was enacted, "the citizens of each of the States and the citizens of the United States would be entitled to certain privileges and immunities as citizens, at the hands of their own government . . . ." 54

To say that the "liberty" protected by the due process clause implied some measure of equal liberties, and that the same implication follows from the idea of national citizenship, is not to say that the framers of the fifth amendment envisioned anything resembling today's use of the amendment's due process clause as a guarantee of equal protection. 55 The point is merely that the original Constitution implied some measure of equality among citizens, and that the due process clause of the fifth amendment was an appropriate receptacle for that concept. The measure of equality commanded by the principle of equal citizenship has, of course, increased enormously—not because the principle is a recent invention, but because our conception of what it means to be a citizen has grown.
If, after the Civil War, there could be any lingering doubt that we were all citizens of the United States, that doubt was removed by the fourteenth amendment's explicit declaration. But if that statement were repealed tomorrow, the fact of national citizenship would remain in the sense that we should continue to think of ourselves primarily as citizens of the nation, and only secondarily as citizens of the several states. We are all part of one economy; we are highly mobile, both in capacity and in inclination; a national system of communications hands us the same news and the same entertainment; we look to the national government as the chief arena for the interplay of political forces. It has long been obvious to us that these aspects of our nationhood demand a generous view of the powers of the national government. And as those expanded powers have been exercised, we have come to perceive the obligations of citizenship as running primarily to the national polity. It would have been extraordinary if this growth in the sense of national citizenship had not been accompanied by an expanded view of the rights of citizens against the national government.

Thus, while the principle of equal national citizenship finds its justification in the origins and structure of the national government, it is history that justifies the expansion of that principle's content—the same history that justifies an expanded reading of the commerce clause as a source of national power. The newer ingredient in this doctrinal

56. Section 1 of the amendment begins by saying: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Justice Bradley, commenting on the amendment's privileges and immunities clause, said: "It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens . . . . Their very citizenship conferred these privileges, if they did not possess them before." 83 U.S. (16 Wall.) at 119. Bradley, of course, was of the view that citizens did possess those privileges before the fourteenth amendment was adopted.

Justice Jackson, speaking of the privileges and immunities clause, said, "This clause was adopted to make United States citizenship the dominant and paramount allegiance among us." Edwards v. California, 314 U.S. 160, 182 (1941) (concurring opinion).


58. E.g., military service, and the relative burdens of those taxes that most touch our consciousness. Above all, loyalty runs primarily to the nation.

59. Charles Fairman, in speaking approvingly of Justice Bradley's view of national citizenship, has captured the point:

The conception is not static. As the nation experiences change—in its transportation, commerce and industry—in its political practices—in the way in which people live and work and move about—in the expectations they entertain about the quality of American life—surely the privilege of membership in this national community must broaden to include what has become essential under prevailing circumstances.

C. FAIRMAN, supra note 1, at 1388.
mix is the primacy of national citizenship. Recognition of this primacy has led the Supreme Court to two conclusions that have given life to the equal protection guarantee of the fifth amendment. First, it would trivialize the principle of equal national citizenship to limit its use to the correction of abuses by the states; the heart of the principle is that citizens have a right to equal treatment by the national government. Secondly, the primacy of national citizenship means that in the absence of special concerns about the place of the Congress and the President in the structure of government, the fifth amendment's guarantee of equal protection must be no less protective than the equal protection clause of the fourteenth amendment.

_Bolling v. Sharpe_, of course, presented no special considerations of a structural kind that would justify departure from the basic rule of congruence of fifth and fourteenth amendment equal protection. Indeed, racial discrimination was the foremost target of the fourteenth amendment's reaffirmation of the principle of national citizenship. Chief Justice Warren committed no extravagance when he said that any other result in the case would be unthinkable.

II. THE BASIC RULE OF CONGRUENCE

The Supreme Court's most recent effort to spell out the relation between the fifth amendment's guarantee of equal protection and the fourteenth amendment's equal protection clause was made last year in _Hampton v. Mow Sun Wong_. 60 Five aliens were denied federal jobs because a rule of the Civil Service Commission barred aliens from employment in the federal civil service. Their challenge to this rule succeeded in the Supreme Court on a narrow ground, but the Court hinted broadly that it would have upheld a congressional statute limiting eligibility for the federal service to citizens. 62 Since the Court had previously struck down a state law denying all aliens employment in

60. 426 U.S. 88 (1976).
61. The Court held that, since the rule would violate the equal protection clause if adopted by a state, due process required "that there be a legitimate basis for presuming that the rule was actually intended to serve" the "overriding national interest" that arguably justified the rule. *Id.* at 103. Since the rule had not been expressly adopted by the President or Congress, and since the Civil Service Commission had not stated reasons identifying the national interest which it sought to promote, the Court held that due process had been violated.
62. While two Justices who joined the opinion of the Court noted that they would reserve this question for later decision, *id.* at 117, the other three Justices of the majority would surely be joined on this issue by the four dissenters.
the state civil service, its suggestion in *Hampton* called for explanation.

The Court began by reinforcing the general principle of fifth amendment equal protection: "The federal sovereign, like the States, must govern impartially." But, said the Court in a passage quoted earlier, "overriding national interests" may justify federal legislation that would be forbidden to a state. "On the other hand," said the Court,

when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause [of the fifth amendment] has been construed as having the same significance as the Equal Protection Clause.

In this case we deal with a federal rule having nationwide impact. Thus a "simple extension" of the holding in the state-civil-service decision was inappropriate, since "overriding national interests may provide a justification for a citizenship requirement in the federal service . . . ."

There are three separate references in this passage to "special" or "overriding" interests of the national government that might justify classifications in federal law that would be forbidden to the states. Those references are a crucial qualification to the other distinction suggested by the Court, between federal legislation for a limited territory and federal legislation with "nationwide impact." In other words, *Bolling v. Sharpe*—despite the Court's citation of it to illustrate fifth amendment limits on legislation in the first category—cannot be contained within the borders of the District of Columbia. The whole course of the Court's fifth amendment equal protection decisions points to a basic rule of congruence with the fourteenth amendment's equal protection clause, modified only when "overriding national interests" justify departure from the rule.

The texts of the two amendments differ, as the Court remarked in *Hampton*; the fourteenth amendment does, indeed, contain both a due process clause and an equal protection clause. But it does not

64. 426 U.S. at 100.
65. See text accompanying note 6 supra.
66. 426 U.S. at 100 (footnote omitted).
67. Id. at 101.
68. In a footnote, the Court said: "Since the Due Process Clause appears in both
follow from this difference that the main function of the equal protection clause "differs from, and is additive to" that of the due process clause of the fifth amendment. If the latter clause is an appropriate vessel for the principle of equal national citizenship, as I have argued,\textsuperscript{69} then it necessarily performs a function in limiting the national government that is similar to the function of the equal protection clause in limiting the states.\textsuperscript{70} To speak of "the Due Process Clause" as if it were the same in both amendments\textsuperscript{71} is to miss this critical point—or perhaps to assume that the adoption of the fourteenth amendment worked a partial repeal of the fifth amendment, removing much of its function as a guarantee of the rights of equal national citizenship. An interpretation that makes more sense, and one that has been persuasive to observers from Justice Bradley\textsuperscript{72} to Tussman and tenBroek,\textsuperscript{73} is that the due process and equal protection clauses of the fourteenth amendment are not logically separate, but are overlapping guarantees, both designed to reinforce the amendment's confirmation of national citizenship. At the very least, the constitutional text does not foreclose the conclusion that the equal protection guarantees of the fifth and fourteenth amendments are fundamentally congruent.

When we turn to the opinions of the Supreme Court, we find that they uniformly point to the basic rule of congruence. In case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling. A recent example is Washington \textit{v. Davis},\textsuperscript{74} decided just six days after \textit{Hampton}. The case presented the question whether a federal law that has a racially discriminatory impact is, for that reason, a denial of equal protection. Since the case arose in the District of Columbia, it can be fitted into the \textit{Hampton} opinion's suggested distinction between federal legislation governing a limited area and laws of "nationwide impact."\textsuperscript{75} But the opinion shows no evidence that this distinction was ever con-
sidered. Instead, after noting that the fifth amendment's due process clause "contains an equal protection component prohibiting the United States from invidiously discriminating between individuals and groups," the Court stated the question as whether "a law or other official act . . . is unconstitutional solely because it has a racially disproportionate impact."77

The decisions on sex discrimination and on illegitimacy illustrate the Court's consistent practice of treating the fifth and fourteenth amendments' guarantees of equal protection as interchangeable, even when the challenged federal law has "nationwide impact." In Frontiero v. Richardson,78 where the issue was the validity of a federal statute defining a military "dependent" in sex-discriminatory terms, eight Justices agreed that the controlling precedent was Reed v. Reed,79 a fourteenth amendment equal protection decision.80 And in Jimenez v. Weinberger81 and Mathews v. Lucas,82 both involving equal protection attacks on discrimination against illegitimates in the Social Security program, majority and dissenting opinions alike treated fourteenth amendment equal protection decisions83 as authoritative, along with fifth amendment decisions. The discussion of opinions following this pattern could be prolonged, but I shall spare the reader by relegat-

after Hampton, the Court held invalid a Puerto Rican statute permitting only United States citizens to practice privately as civil engineers. The Court held the law invalid on equal protection grounds, expressly refusing to specify whether it was the fifth or the fourteenth amendment that provided the protection. Id. at 2281. The Court said that the law would violate either guarantee, but did not refer to Hampton's distinction between federal statutes with merely local or nationwide impact. Justice Rehnquist, dissenting, cited Hampton and chided the Court for failing to be more precise. Id. at 2285. The Examining Board case and Washington v. Davis show, at the least, that Hampton's suggestion of a local-nationwide distinction is not in the forefront of the Court's equal protection consciousness.

77. 426 U.S. at 239. Almost all the cases discussed by the Court in this section of its opinion are fourteenth amendment equal protection decisions.
82. 96 S. Ct. 2755 (1976).
There is a striking stylistic uniformity in these opinions. In the text, they tend to refer generally to "equal protection" or to speak of the "equal protection component" of the fifth amendment; most of them speak to the relation between the fifth and fourteenth amendment equal protection guarantees in footnotes, and it is remarkable how often the same footnote appears: "While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'"

Two quotations will suffice to close this review of recent opinions. In *Richardson v. Belcher*, the Court upheld a provision of the Social Security Act against a fifth amendment equal protection attack on its classification of persons eligible for disability benefits. The principal authority relied on by the Court was *Dandridge v. Williams*, a fourteenth amendment equal protection decision. After citing *Dandridge*, the Court said: "While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment. Cf. *Boiling v. Sharpe* . . . ." Such a conclusion, of course, would be entirely consistent with the view that the fifth amendment's equal protection guarantee was less extensive than that of the fourteenth amendment. But just a few years later, in *Johnson v. Robison*, eight Justices joined in an opinion of the Court rejecting a fifth amendment equal protection attack on a fed-

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84. In addition to the cases discussed in text, see United States v. MacCollom, 96 S. Ct. 2086 (1976); Hills v. Gautreaux, 425 U.S. 284 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam); Marshall v. United States, 414 U.S. 417 (1974); United States Dept. of Agr. v. Moreno, 413 U.S. 528 (1973); United States v. Kras, 409 U.S. 434 (1973). These opinions are reminiscent of the pre-*Bolling* opinions that assumed (for argument) the existence of a fifth amendment equal protection guarantee, and cited fourteenth amendment decisions to show that no such guarantee was violated. See text accompanying notes 12-25 supra.


87. 404 U.S. 78 (1971).


89. 404 U.S. at 81. Justice Marshall, dissenting, commented that he would use "essentially the same approach" in deciding equal protection questions under either amendment. Id. at 90 n.4.

eral statute denying certain veterans' benefits to conscientious objectors who perform alternative service. After setting out the ubiquitous footnote quoted above,91 the Court added: "Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment. See Richardson v. Belcher..."92

What does it mean to say that the basic rule of fifth amendment equal protection is one of congruence with the equal protection clause of the fourteenth amendment? It means, as the Court said in Weinberger v. Wiesenfeld,93 that the Court's "approach" to the two types of claims is "precisely the same."94 The critical question in modern equal protection cases is the standard of review: "strict scrutiny," "rational basis," or something in between.95 What the Court sought to do in the sex discrimination cases and the illegitimacy cases was to develop coherent doctrinal analyses that would provide standards of review for both fifth and fourteenth amendment decisions.

Part of the problem of the standard of review is the determination whether a particular law does or does not amount to racial discrimination, or discrimination based on sex, or the like. In making that determination, the same considerations are relevant whether the case arises under the equal protection clause of the fourteenth amendment or the fifth amendment's equal protection guarantee. Thus it was proper for the Court in Washington v. Davis96 to seek guidance from the whole range of decisions on the relevance of legislative motive and racially discriminatory impact, including fourteenth amendment decisions, in arriving at its conclusion in a fifth amendment case.97 And it was proper in Geduldig v. Aiello,98 where a state law was challenged under...

91. See text accompanying note 86 supra.
92. 415 U.S. at 364 n.4. A similar congruence is to be found in the application of the doctrine of "irrebuttable presumptions." Fifth amendment limitations on the federal government have been treated in exactly the same manner as fourteenth amendment limitations on the states. See, e.g., United States Dep't of Agr. v. Murry, 413 U.S. 508 (1974), and Weinberger v. Salfi, 422 U.S. 749 (1975), both fifth amendment decisions looking primarily to fourteenth amendment precedents. The doctrine of irrebuttable presumptions purports to derive from procedural due process, but as Justice Powell convincingly showed in his concurring opinion in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974), the doctrine is a variety of equal protection in masquerade.
94. See also Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam) (equal protection "analysis" the same under both amendments).
96. 426 U.S. 229 (1976).
the equal protection clause as an unconstitutional sex discrimination, 
to examine both fifth and fourteenth amendment precedents.\textsuperscript{99} Whatever one may think of the Court's conclusions in those two cases,\textsuperscript{100} its “approach” to both decisions was sound in following the basic rule 
of congruence of fifth and fourteenth amendment equal protection.

III. The “Overriding National Interests” Exception

In the \textit{Hampton} opinion, the Supreme Court said that the presence 
of “overriding national interests” might justify federal legislation even 
though a similar state law would fail the test of the fourteenth amend-
ment.\textsuperscript{101} This language bears a stylistic resemblance to the “com-
pelling state interest” formula, used when the fifth or fourteenth 
amendment demands strict scrutiny of a legislative classification. But 
\textit{Hampton} itself strongly indicates that a congressional statute forbidding 
the employment of aliens in the federal service would be subjected only 
to minimal judicial scrutiny despite the fact that a similar state law 
would be invalid absent a showing of a compelling state interest.\textsuperscript{102} The “overriding national interests” formula, then, seems designed to 
permit a narrow category of fifth amendment equal protection cases to 
be decided under a rational basis standard, even though a parallel state 
law would have to pass the test of strict scrutiny. While the Court in 
\textit{Hampton} did not seek to spell out what it meant by “overriding national 
interests,” two very narrow classes of exceptions to the basic rule of 
fifth and fourteenth amendment congruence are identifiable. In one 
group of cases, the national interests that “override” the rule of con-
gruence derive from federalism, and in the other, they derive from the 
separation of powers at the level of the national government.

A. The Federalism Exception

When a fifth amendment equal protection issue is closely bound 
up with an issue of federalism, it may be appropriate to use a more

\begin{itemize}
\item[99.] The key citations were to Frontiero v. Richardson, 421 U.S. 677 (1973), and 
Reed v. Reed, 404 U.S. 71 (1971).
\item[100.] What I think is that they were both wrongly decided. I have spelled out my 
position on the problem of \textit{Washington v. Davis} in my article, \textit{Not One Law at Rome 
and Another at Athens: The Fourteenth Amendment in Nationwide Application}, 1972 
\item[101.] See text accompanying note 6 supra for quotation from this opinion.
\item[102.] In Sugarman v. Dougall, 413 U.S. 634 (1973), the Court left open the 
opportunity that such a compelling interest might be found, even in some contexts of state 
public service.
\end{itemize}
relaxed standard of review than would be proper in testing a state law against the demands of the fourteenth amendment. Just such a problem divided the Court in *Shapiro v. Thompson*, 103 one of the Warren Court's most celebrated encounters with equal protection theory.

In *Shapiro*, two states and the District of Columbia had limited welfare benefits to persons who had been state (or District) residents for a year; the Court held all three statutes invalid on equal protection grounds, making no distinction between the demands of the fifth and fourteenth amendments. The statutes must be subjected to strict scrutiny, the Court said, because they inhibited the exercise of the constitutional right to travel interstate. In dissent, Chief Justice Warren and Justice Black argued that Congress had authorized the states to impose their residence requirements. 104 The majority responded by denying that Congress had prescribed a one-year waiting period for the states, but said that even if it had done so, "Congress may not authorize the States to violate the Equal Protection Clause." 105

That truism, like most truisms, is unassailable as logic but unhelpful in resolving problems. The conclusion that the state laws in *Shapiro* violated the equal protection clause rested on the assumption that they must pass the test of strict scrutiny. 106 This exacting standard of review was said to be appropriate because the state laws burdened the exercise of the constitutional right to travel interstate. But the right to travel is based in part on the commerce clause's allocation of powers in the federal system; to this extent, it is obviously not a limitation on Congress but a source of congressional power. In this federalistic dimension, then, there is no reason why the right to travel should trigger strict scrutiny of an act of Congress.

This is not to say that the result in *Shapiro* was wrong, or even that the Court's truism was inapt. If the right to travel interstate is one of the rights of equal national citizenship included by the fifth amendment's guarantee of equal protection, 107 the Court's remark is perfectly appropriate. Alternatively, if the "fundamental" interest in *Shapiro* was the interest in minimum subsistence—something the Court

104. Id. at 644, 647-54.
105. Id. at 641.
106. The majority did say also that the one-year residence requirements lacked any rational basis, id. at 638, but that statement is hard to swallow, given the arguments of administrative convenience and budgetary control made by the states.
later disavowed\textsuperscript{108}—then strict scrutiny would be the proper standard of review no matter what Congress might authorize. But the Court was not prepared to pursue either of these lines of analysis.

Perhaps the Shapiro majority was so persuaded of its interpretation of the federal statute that it thought extended discussion of the issue of congressional power unnecessary. In any case, the Court's off-hand treatment of what it took to be a non-issue should not be regarded as its last word on the subject. In a fifth amendment equal protection case, the basic rule of congruence with the fourteenth amendment does not require strict scrutiny of a federal statute when the interest at stake is one that derives from federalistic limits on the states.\textsuperscript{109}

B. The Separation-of-Powers Exception

The Hampton case itself required the Court to identify a class of national interests that might be "overriding," justifying a departure from the basic rule of congruence of the fifth and fourteenth amendment guarantees of equal protection. This excepted class of cases appears to be extremely narrow. Indeed, it may extend no further than the regulation of aliens by the federal government.\textsuperscript{110} It is clear, for example, that the excepted class does not include the full range of areas of exclusive federal legislative power. The operation of the military services, for example, has been subjected to fifth amendment equal protection limitations that are congruent with those of the fourteenth amendment.\textsuperscript{111} And even the World War II restrictions on persons of Japanese ancestry were subjected to the test of strict scrutiny—or so the Court assured us.\textsuperscript{112} This excepted category does not even extend to the entire reach of congressional power over persons who have come from foreign countries, since Schneider v. Rusk\textsuperscript{113}—the routine citation in decisions following the rule of fifth and fourteenth amendment con-


\textsuperscript{109} See generally Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 STAN. L. REV. 603 (1975).

\textsuperscript{110} It would not be the first time a doctrine was invented for application in only one factual context. Cf. Flast v. Cohen, 392 U.S. 83 (1968) (federal taxpayers have standing to challenge federal spending that violates the establishment clause).


\textsuperscript{112} Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

\textsuperscript{113} 377 U.S. 163 (1964).
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gruence—invalidated a federal law providing for the denaturalization of a naturalized citizen who lived abroad for three years.

This second branch of the "overriding national interests" category derives not so much from the relative importance of federal and state interests in the regulated subject matter as from the relationship between Congress and the federal judiciary. It is a relative of the "political question" doctrine, arising out of the Court's view that the regulation of aliens is an aspect of the nation's foreign relations, chiefly demanding discretion rather than principle in the resolution of issues. The point found its fullest expression in the Court's unanimous opinion in a case decided on the same day as Hampton:

"The responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. . . . The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."

It is worth noting that the Court did not say that such decisions are unreviewable, or that they must be accepted by the courts without question, as courts accept State Department recognition of foreign governments. Instead, this exception to the rule of congruence merely limits the courts to using a rational basis standard when they review the decisions of the political branches of the federal government. The difference would not be significant if the rational basis standard used here were the equivalent of that used to test, say, the power of Congress to regulate interstate commerce. But the Court has shown that it is capable of giving "rational basis" a bite, above all in the equal protection area. We should not assume that the Court, in the name of deference to the political branches, will be as permissive in the context of equal protection as it is in the context of the allocation of powers

114. This factor, of course, is present in cases dealing with the regulation of aliens. Some state regulations have been held invalid partly on the ground of the federal government's power to control immigration. E.g., Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).


116. See Gunther, supra note 95, at 18-20.
between Congress and the states. A federal system of "Big Brother" surveillance of aliens, for example, would seem vulnerable on fifth amendment equal protection grounds, even though some conceivable basis for it were arguable.\textsuperscript{117}

The very narrowness of the two identifiable "overriding national interests" exceptions gives emphasis to the basic congruence between the equal protection guarantees of the fifth and fourteenth amendments. It is no accident that this rule of congruence came into clear relief during the same time when the guarantees of the Bill of Rights were being incorporated into the fourteenth amendment and applied to the states. Both developments are part of a larger phenomenon, the expansion of our concept of the rights of national citizenship.\textsuperscript{118}

The fifth amendment's guarantee of equal protection began as a throw-away line, a casual remark that such a right might exist, uttered when the Court had no intention of vindicating it. Remarks of that kind, however, have a way of being taken seriously as promises—and we are all the beneficiaries. Much of the growth of our constitutional liberty has resulted when the downtrodden and the disadvantaged have called the rest of us to account, insisting that we live up to our stated principles. Looking back, we can see the development of fifth amendment equal protection as an indispensable ingredient in the growth of nationhood. By recognizing the claims of equal national citizenship, we have fostered the idea of a national community. In a diverse and volatile society, that is no trifling goal.

\textsuperscript{117} Cf. Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976) (fourth amendment probably bars Immigration and Naturalization Service from systematically entering and searching dwellings, and stopping and interrogating persons of Mexican descent).

\textsuperscript{118} See note 59 supra.