574 (1911).) Although the court of criminal appeals seemed prepared to strike down state initiative and referendum even if adopted as a constitutional amendment, the Home Rule Amendment adopted in 1912 presumably settled the issue of municipal direct democracy along the line taken by the supreme court. (State initiative and referendum was proposed as an amendment to the constitution; it was voted down in November 1914.)

In some recent election cases the litigants have cited Section 2 but the cases have been disposed of on other grounds. A dictum in *Lydick v. Chairman of Dallas County Republican Executive Committee* (456 S.W.2d 740 (Tex. Civ. App.—Dallas 1970, *no writ*)) upheld against a challenge under Section 2 and other related sections of the Bill of Rights, a statute which prohibits write-in votes at a primary election for offices other than county chairman and precinct chairman.

Comparative Analysis

All 50 states guarantee popular sovereignty. Thirty-nine states recognize the right of the people to alter their governments but only a minority, those with older bills of rights, speak in such strong language as Section 2.

Author's Comment

Section 2 is essentially a statement of political theory. As such it would operate best as a guide to the interpretation of other constitutional provisions rather than the basis for decision making itself. Hence it might appear more appropriately in the preamble.

Sec. 3. EQUAL RIGHTS. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

History

Couched in language reminiscent of the United States Declaration of Independence, Section 3 is the natural-rights section of the Texas Bill of Rights. The framers of the Constitution of 1836 placed this section first in the Declaration of Rights. In the 1845 version the statement of equality shifted from "all men" to "all freemen" and the final phrase was added to note that the prohibition against exclusive public privilege or emolument did not preclude compensation for *public* services. While the section continued substantially unchanged in subsequent constitutions, the final phrase disappeared in 1869 and reappeared in 1876. In the present constitution "freemen" becomes "free men."

Explanation

This amendment seems to express at least two ideas: (1) that equal rights are based upon natural law and (2) that since these natural rights have been carried over into government, government shall not discriminate between men.

Texas courts wisely have not used the social compact phraseology of Section 3 as the basis of independent constitutional limitations. In fact the courts have been at pains to label Section 3 an "equal rights" clause and to treat concluding statements regarding separate public emoluments and privileges as illustrative of these "equal rights," in which there can be no governmental discrimination. Hence, Texas courts have considered Section 3 to be the Texas expression of these words in the Fourteenth Amendment to the United States Constitution: "no state shall deny to any person within its jurisdiction the equal protection of the laws." Frequently the

two constitutional guarantees are cited together and federal cases are treated as dispositive of both constitutional claims.

This homogenization process has a certain appeal. Since the state may not violate the Equal Protection Clause of the Fourteenth Amendment anyway, why not treat the apparently narrower equal rights clause of the Texas Constitution as the same thing and let the federal courts work out the construction? In the process of making the federal and state provisions mean the same thing, Texas courts have cleared what might have seemed to be an insurmountable hurdle. Long ago the United States Supreme Court performed a considerable feat of construction in finding that corporations are "persons" within the meaning of the Equal Protection Clause. (See *Santa Clara County v. Southern Pacific RR.*, 118 U.S. 394, 396 (1886) (statement by Chief Justice Waite speaking for the court at oral argument).) Section 3, however, does not refer to "persons" but to "men." Nevertheless, corporations are covered by Section 3. "It is well settled that a corporation is a 'person' within the meaning of section 3, art. 1, of the Constitution of this state and of section 1 of the fourteenth amendment of the Constitution of the United States." (*Beaumont Traction Co. v. State,* 122 S.W. 615, 616 (Tex. Civ. App. 1909, *no writ*).) Note, however, that this is only a matter of definition. A corporation may be covered but still treated differently from "natural" persons. Likewise, aliens, or nonresidents, are obviously "men," or "persons," but may sometimes be treated differently from citizens. (See *Pintor v. Martinez,* 202 S.W.2d 333, 335 (Tex. Civ. App.—Austin 1947, *writ ref'd n.r.e.*).) In both instances the question will be the reasonableness of differences in treatment as discussed below.

Thus, both the Equal Protection Clause and Section 3 forbid the denial of equal protection whether to citizen or alien, resident or nonresident, or natural person or corporation or other legal entity. (Except a governmental entity. A government is not a "person" under either provision. See *Harris County v. Dowlearn,* 489 S.W.2d 140, 145 (Tex. Civ. App.—Houston (14th Dist.) 1972, *writ ref'd n.r.e.*).) Yet the homogenization is not total. A state law that is unconstitutional under the Equal Protection Clause cannot be enforced in Texas notwithstanding a Texas court's opinion that the law does not violate Section 3. But a Texas court may find that a law is invalid under Section 3, in which case it is irrelevant whether the United States Supreme Court would invalidate the law under the Equal Protection Clause. Thus, a Texas court may control the meaning of Section 3 by relying only on the Equal Protection Clause if a statute is invalid under the Fourteenth Amendment but, in the Texas court's eyes, ought not to be invalid under Section 3 and by relying only on Section 3 when the Texas court thinks the statute ought to be invalid no matter what the United States Supreme Court thinks.

Until about 40 years ago homogenization was complete in theory simply because the rule of equal protection/equal rights was deceptively simple in the abstract: equality was not required but unequal treatment had to be reasonable. This rule is frequently cast in terms of "classification." For example, if a law regulating hours of work provides that men may work no more than twelve hours a day and women no more than eight hours, working people have been divided into two classes, each treated differently. If the classification is reasonable, Section 3 is satisfied. (Note that whether a law may regulate hours of work at all is a different question. This is a matter of substantive due process of law that is dealt with under Sec. 19. Note also that reasonableness of classification of governments is a constitutional issue but only in connection with general and local laws. This is dealt with under Sec. 56 of Art. III.)

The traditional rule of equal protection may be simple, but there is a catch in it. What is one man's "reason" is another man's "insanity." "Reasonable" is one of those accordion words of the law that permit a great range of different results in

different factual situations. In the constitutional world of days past, there seemed to be a subtle transference of "reasonable" and "unreasonable" into "good" and "bad." If judges thought a particular law involving unequal treatment was a bad idea, they found the unequal treatment unreasonable. Or at least this was what critics of the courts argued. Dissenting judges also argued this way frequently; naturally, the majority always denied it.

All this seemed to be true notwithstanding the rule that a law is presumed to be constitutional, which is to say that one who attacks a statute has the burden of proof. Moreover, the presumption of constitutionality traditionally has meant that unequal treatment is permissible—or a classification valid—if "there is any basis for the classification which could have seemed reasonable to the Legislature." (*San Antonio Retail Grocers, Inc. v. Lafferty,* 156 Tex. 574, 577, 297 S.W.2d 813, 815 (1957).) Taken literally, this rule erects an almost insuperable burden of proof, for one must prove that there is no reasonable argument in support of the law. Actually, as the subsequent discussion shows, the courts do not apply the rule literally.

Until about 40 years ago the rule of reasonable classification applied universally in the sense that it made no difference whether classification dealt with race, voting, education, the regulation of business, or any other subject. But, as mentioned above, critics of the court maintained that the rule was not followed, that the courts were acting as a superlegislature by finding no reasonable classification when, in the courts' eyes, the classification was not fair. This criticism was aimed principally at judicial invalidation of legislation regulating business. (It must be noted that the Due Process Clause of the Fourteenth Amendment was used more frequently than the Equal Protection Clause. See Sec. 19.) Beginning in 1934 the United States Supreme Court began to retreat from invalidating statutes regulating business. The court simply took the presumption of constitutionality literally. The retreat has been so complete that since about 1940 only one economic regulation has been invalidated under the Equal Protection Clause. In *Morey v. Doud,* the court struck down an Illinois licensing statute because it exempted the American Express Co. by name (354 U.S. 457 (1957) three justices dissenting).

This retreat created a problem for the court because it simultaneously began to strike down statutes in the areas of civil and social rights. In many cases a specific right—freedom of speech or press, peaceable assembly, double jeopardy, self-incrimination, right to counsel, for example—could be carried into the Fourteenth Amendment and protected without regard to the presumption of constitutionality simply because the right was specific. But in other cases there was nothing more specific to rely upon than the Equal Protection Clause. In order to avoid the consequences of the presumption of constitutionality, the court created a classification system of its own, so to speak. The principal device was to single out certain classifications as "suspect" and to shift the burden of proof by requiring the state to justify the classification. The most significant suspect classification is race. Indeed, the Fourteenth Amendment was adopted as one of the devices to wipe out any vestiges of the unequal racial treatment that was slavery. But as early as 1886 the Supreme Court extended the Equal Protection Clause to Chinese laundrymen who were discriminated against solely because they were Chinese (*Yick Wo v. Hopkins,* 118 U.S. 356). Classifications based on citizenship and residency are also suspect though perhaps not to the same degree as race.

The United States Supreme Court has also indicated that some things are more "fundamental" than others and that unequal treatment in a fundamental area is suspect. Voting is an example. The court looks closely at statutes that make it harder for some people to vote than for others or that make it more difficult for some people to run for office than for others. (For two examples arising out of

Texas, see *Carrington v. Rash.* 380 U.S. 89 (1965) (right to vote of military personnel stationed in Texas), and *Bullock v. Carter,* 405 U.S. 134 (1972) (high filing fees for running in a primary).)

In many areas, the "fundamental rights" cases are closely related to poverty. In many instances a governmental requirement results in unequal treatment only because poor people are at a disadvantage under the requirement. This was the significant point about requiring payment of a poll tax in order to vote. (A poll tax as such is not unconstitutional. See Art. VII, Sec. 3, *Explanation,* Taxes.) This was also the point of *Tate v. Short* (401 U.S. 395 (1971)), holding unconstitutional the Texas requirement that an indigent person unable to pay a fine could be jailed for a period not exceeding one day for every $5 of unpaid fine. Likewise, equal protection may demand that the state provide free some of the rights guaranteed to those accused of committing crimes. For example, it does an indigent little good to be guaranteed a right to have a lawyer represent him if he has to pay the lawyer.

In the field of education the court came within one vote of finding a denial of equal protection under a system of financing that favored wealthy school districts. (The famous *Rodriguez* case (*San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973)) is discussed elsewhere. See *Explanation*, Sec. 1, Art. VII.) Obviously, the court will never reach the point of requiring absolute equality regardless of wealth. But it is equally obvious that legislation that puts the poor at a disadvantage is suspect, especially if the purpose of the legislation appears to be discrimination against the poor. Under the traditional presumption of constitutionality, the true purpose of—or the motivation for—legislation is irrelevant, for any reason that could have motivated the legislature is adequate to support the legislation. But once the classification becomes "suspect," the burden shifts to the state to justify the classification. (In this context, of course, treating rich and poor alike is a "classification" for equal protection purposes.)

These are seminal days in the United States Supreme Court. It is neither easy nor wise to predict the future development of cases under the Equal Protection Clause. In any event, an exhaustive review would be out of place in this limited Annotation. Moreover, the United States Supreme Court has recently revived substantive due process (See *Explanation,* Sec. 19), which may mean that the court will use that clause in some instances that, in earlier days, would have been shoved under equal protection.

At the beginning of this *Explanation* it was noted that Texas courts have to follow the United States Supreme Court in invalidating laws but need not stop there. Under Section 3 a Texas court can find invalid laws that the United States Supreme Court would not invalidate under the Fourteenth Amendment. A study of recent Texas cases indicates that the Texas courts use Section 3 in cases involving economic regulation, the area that the United States Supreme Court has walked away from. In the areas where that court is active, the Texas courts appear to do only what they are forced to do. That is, they do not independently consider Section 3. For example, in *Gonzalez v. Texas Employers Ins. Ass'n,* (509 S.W.2d 423 (Tex. Civ. App.—Dallas 1974, *writ ref'd n.r.e.*)), the question was whether an illegitimate child could receive a death benefit under the workmen's compensation law. The decision was in favor of the child but only because of a United States Supreme Court ruling in an analogous situation arising in Louisiana (*Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972)). One may assume that the Texas court would not have so held except for the *Weber* case because no mention was made of Section 3.

Economic regulation is a different matter. Consider the case of *Humble Oil and Refining Co. v. City of Georgetown* (428 S.W.2d 405 (Tex. Civ. App.—Austin 1968, *no writ*)). Georgetown adopted an ordinance restricting to 1,400 gallons the

capacity of trucks delivering gasoline to filling stations. The probable reason for adopting the ordinance was to protect the business of local commission agents who would receive large shipments for storage and then deliver the gasoline to filling stations. Humble alleged that this was the purpose of the ordinance, Georgetown denied it, and the court never talked about it. The court accepted the standard rule that the ordinance was to be sustained if the city council could have had any reasonable basis for the restriction. (The discussion was cast in terms of "classification" because Humble proposed to deliver gasoline to its filling stations from an 8,000 gallon truck, the size truck that it would use to deliver to the commission agent's storage tanks.) The court could find no reasonable basis for the classification and invalidated the ordinance. The way in which this was done was to ignore the real reason for the ordinance and to concentrate on Georgetown's argument that the ordinance was to promote safety by decreasing the hazard of fire. On this basis the ordinance was not defensible because for a variety of technical reasons the larger trucks were safer and because, obviously, there would be less transportation and dispensing of gasoline if larger trucks were used.

In the old days the United States Supreme Court might very well have held the same way under the Fourteenth Amendment. Today the court would probably say that it would not concern itself with the validity of the reasons given for adopting the ordinance. Recently, the Oregon Supreme Court upheld a comparable city ordinance notwithstanding many cited state cases like the *Georgetown* case. "We believe that the reason for our disagreement with them is that we have felt bound, under the more recent decisions of the United States Supreme Court interpreting and applying the Due Process and Equal Protection Clause of the Fourteenth Amendment, to accord a wider latitude to the discretion of state legislative bodies in determining the propriety of measures deemed necessary to promote the safety, health and welfare of the community, than might have been considered permissible 30 or 40 years ago." (*Leathers v. City of Burns,* 251 Ore. 206, 213, 444 P.2d 1010, 1019 (1968).) Interestingly enough, the Oregon Supreme Court did not refer to the Oregon Constitution. Its Bill of Rights does not have a due process clause but does have a section comparable to Section 3. The court of civil appeals, by way of contrast, cited no United States Supreme Court cases and referred to the Fourteenth Amendment only when stating the grounds of attack put forth by Humble Oil.

A key to the difference in approach between the United States Supreme Court and state courts is the concept of the police power. In the area of economic regulation, the United States Supreme Court is content if the legislature had a rational basis for classification. "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." (*Ferguson v. Skrupa,* 372 U.S. 726, 732 (1963).) State courts tend to say that the classification must be a reasonable exercise of the police power—that is, a regulation to promote the health, safety, or morals of the public. (Sometimes, "welfare" is substituted for "morals" as in the quotation from the *Leathers* case set out earlier.) This means that an economic regulation designed to help one segment of the business community at the expense of another cannot stand unless a rational argument can be made in the name of health, safety, or morals. Although the court of civil appeals in the *Georgetown* case did not reason this way explicitly, its approach to the ordinance was implicitly based on this theory of the police power.

Yet this explanation of the difference in approach between the United States Supreme Court and state courts should not be overly relied upon. Consider the matter of statutes prohibiting sales below cost. They are designed to protect the small, independent retailers against the competition of the large chain stores. The United States Supreme Court unanimously upheld such an Oklahoma statute

(*Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n,* 360 U.S. 334 (1959)), whereas the Texas Supreme Court unanimously struck down a comparable Texas statute (*San Antonio Retail Grocers, Inc. v. Lafferty,* 156 Tex. 574, 297 S.W.2d 813 (1957)). In neither case was the police power mentioned. In the Oklahoma case the court was content to observe that it would "not interpose its own economic views or guesses when the State has made its choice" (p. 341) and that it was "not concerned with the soundness of the distinctions drawn" (p. 342). In the Texas case the court started with the standard rule quoted earlier (156 Tex. at 578, 297 S.W.2d at 816), but then found that there was no reasonable basis for limiting the statute to "grocery stores." In support of its finding the court noted that a "grocery store" was assumed to be any store that sold groceries and that a department store with a grocery department would come under the statute for all its departments whereas other department stores would not. The court further noted that a regular grocery store sells things also sold at drug stores and other places which would not be covered by the statute. It is not clear whether the Texas Supreme Court would have gone the same way as the United States Supreme Court had the Texas statute applied to all kinds of stores as in Oklahoma. Nor is it clear whether a carefully limited definition of "grocery store" would have saved the statute. It seems likely, however, that in the long run the Texas courts will move away from the concept of regulatory power limited to the health, safety, morals, or welfare of the public. (But see *Explanation,* Sec. 19.)

It must be conceded that generalizations are most dangerous when talking about broad, vague constitutional provisions like equal protection and due process. The recent case of *Texas Optometry Board v. Lee Vision Center, Inc.* (515 S.W.2d 380 (Tex. Civ. App.—Eastland 1974, *writ ref'd n.r.e.*).) seems to go as far as the United States Supreme Court does in upholding economic regualtions against an attack under equal protection and due process. In the course of its opinion the court stated that "Texas courts when confronted with questions involving the Due Course of Law and Equal Rights Clause of the Texas Constitution consistently apply the reasoning and rationale announced by the United States Supreme Court on questions of due process and equal protection" (p. 386).

The discussion so far—and in connection with due process—has flatly contradicted the court's observation. It has also been argued that in noneconomic matters Texas courts tend to follow the United States Supreme Court only to the extent required. Yet in 1967 the court of civil appeals in El Paso struck down Section 8 of Article 46a of the Revised Civil Statutes which provided: "No white child can be adopted by a negro person, nor can a negro child be adopted by a white person." (In re *Adoption of Gomez,* 424 S.W.2d 656 (Tex. Civ. App.—El Paso 1967, *no writ*).) The court did not do this because the United States Supreme Court had struck down a comparable statute but because the Texas statute was inconsistent with the trend of United States cases in matters of racial discrimination. Even more startling is the fact that the appealing party argued only that the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment. The court agreed but went on specifically to hold that the statute violated Section 3.

In sum, then, one can only say that equal protection in Texas is at least what the United States Supreme Court requires under the Equal Protection Clause in the areas of "suspect" classifications and fundamental rights. In the area of economic matters, Section 3 may or may not require more justification for discriminatory treatment than the United States Supreme Court requires under the Fourteenth Amendment. The rules set out earlier are clear enough. How courts will apply them in all situations is neither clear nor predictable.

Comparative Analysis

Nine states have an equal protection clause as such. (The *Model State Constitution* also has one.) Most of these are constitutions adopted or revised in the last two decades. Another 22 states have an equal rights section comparable to Section 3. There is no reason to believe that the courts in the other 19 states rely only upon the Fourteenth Amendment; some appropriate state constitutional provision is undoubtedly used to provide equal protection. For example, in Illinois prior to the adoption of its new constitution, equal protection was provided through the section prohibiting special laws on the theory that an unreasonable classification turned a "general" law into a "special" law. Note also that the United States Supreme Court uses the Due Process Clause of the Fifth Amendment to enforce equal protection in the District of Columbia and under acts of congress. The Equal Protection Clause as such applies only to the states.

Author's Comment

In the light of judicial equating of Section 3 and the Equal Protection Clause, it would seem sensible to rewrite Sections 3 and 3a along these lines:

No person may be denied the equal protection of the laws or discriminated against by law because of sex, race, color, creed, or national origin.

> Sec. 3a. EQUALITY UNDER THE LAW. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

History

Section 3a was added in 1972. It was one of 14 amendments voted upon at the general election. Of the 11 that passed, Section 3a received the largest majority—2,156,536 to 548,422.

Explanation

It is arguable that this section adds little or nothing to Section 3 construed as the Texas equivalent of the Equal Protection Clause. (It is obvious that the word "men" in Section 3 means "men" and "women"—and "children," for that matter.) But it is equally arguable that Section 3 means only what the courts say it means and that they might or might not continue to read it as broadly as they now do. (The same argument applies to the proposed Equal Rights Amendment. See *Comparative Analysis* following.) Moreover, even the present breadth of Section 3 is obscured by the overriding Equal Protection Clause of the Fourteenth Amendment. As noted in the *Introductory Comment,* Texas courts frequently decide cases on the basis of the Fourteenth Amendment without indicating how they would read the Texas Bill of Rights. Of course, Section 3a also means what the courts say it means, but the area for judicial maneuver is more restricted than under Section 3. At the very least a court can hardly come out and say that equality may be denied on the basis of sex, race, color, creed, or national origin whereas under the vague "equal protection of the laws" rubric a court can rationally permit inequalities.

In any event, there have been no Texas cases finding a violation of Section 3a. The section has been invoked, of course, but the argument has been far-fetched and unsuccessful. (For a recent example, see *Friedman v. Friedman,* 521 S.W.2d 111 (Tex. Civ. App.—Houston (14th Dist.) 1975, *no writ*).) It is likely that future equal protection cases will invoke the Equal Protection Clause of the Fourteenth Amendment, Section 3, and Section 3a. If the case involves sex, race, color, creed,

or national origin and if the court does not rely on the Fourteenth Amendment, the case will surely be decided on the basis of Section 3a and not Section 3.

Comparative Analysis

Approximately 14 states have an equal protection provision that speaks to one or more of the bases of discrimination enumerated in Section 3a. With the exceptions of Arkansas and Wyoming, these provisions have been adopted within the last quarter century. The 1874 Arkansas Constitution prohibits discrimination on the basis of race, color, or previous condition of servitude. The 1890 Wyoming Constitution provides that laws affecting political rights and privileges are to "be without distinction of race, color, sex, or any circumstance of condition whatsoever other than individual incompetence, or unworthiness duly ascertained by a court of competent jurisdiction." (Art. I, Sec. 3. It should be remembered that when Wyoming became a state in 1890, it made history by providing that the right to vote and hold office "shall not be denied or abridged on account of sex." Art. VI, Sec. 1.)

Most of the recent provisions cover only race, color, and religion; a few add national origin. Hawaii, Montana, and Virginia add sex. (Virginia provides further that "the mere separation of the sexes shall not be considered discrimination." Art. I, Sec. 11.) The 1970 Illinois Constitution prohibits discrimination in employment and housing on the basis of race, color, creed, national ancestry, or sex (Art. I, Sec. 17) and also provides that equal protection is not to be denied or abridged on account of sex (Sec. 18). Colorado has the same sex equality provision; New York has a similar provision concerning discrimination in employment but not housing and not including sex.

The first section of the proposed "Equal Rights Amendment" to the United States Constitution reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." As with Section 3a, it is arguable that this amendment adds nothing to the Equal Protection Clause of the Fourteenth Amendment. But it is equally arguable that the United States Supreme Court, which has read the Equal Protection Clause to prohibit discrimination on account of sex, could hardly overrule that line of cases in the face of an Equal Rights Amendment.

Author's Comment

The genius of "judicial supremacy" in our constitutional system has been the ease with which change can be accommodated. There is a danger in using the amending process to express disapproval of a single judicial ruling or even a line of cases. Section 3a is not an example of the danger. But it is an example of specifying detailed meaning in place of a general principle. Caution is advisable in getting too specific in a bill of rights. A democratic society survives only if there is a consensus on overriding general principles and if some relatively detached arbiter protects those principles. Hasty and emotional tampering with the details flowing from those principles can easily undermine a delicate consensus.

Sec. 4. RELIGIOUS TESTS. No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.

History

Freedom from religious test oaths for office is part of the American tradition of