

EQUAL PROTECTION UNDER THE ALABAMA CONSTITUTION

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I. INTRODUCTION

"The question whether Sections 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the citizens of Alabama equal protection under the law remains in dispute."¹

The 1901 Constitution does not have an express "equal protection" clause. However, Alabama courts have construed or found equal protection for Alabama citizens under various sections, either combined or alone, of Article I of the 1901 Alabama Constitution.² By contrast, in

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1. *Hutchins v. DCH Reg'l Med. Ctr.*, 770 So. 2d 49, 59 (Ala. 2000).

2. See *Hamrick Const. Corp. v. Rainsville Hous. Auth.*, 447 So. 2d 1295 (Ala. 1984) (finding equal protection under article I, §§ 1 and 13, of the Alabama Constitution); *Crabtree v. City of Birmingham*, 299 So. 2d 282 (1974) (finding equal protection under article I, § 22, of the Alabama Constitution); *Reese v. Rankin Fite Mem'l Hosp.*, 403 So. 2d 158 (Ala. 1981) (finding equal protection by implication under §§ 1 and 6 of article I of the Alabama Constitution); *McCraney v. Leeds*, 1 So. 2d 894 (Ala. 1941) (construing the due process clause, Art. I, § 6, of the Alabama Constitution, to confer equal protection); *Pickett v. Matthews*, 192 So. 261 (Ala. 1939) (finding equal protection under article I, §§ 1, 6, and 22, of the Alabama Constitution); *City Council of Montgomery v. Kelly*, 38 So. 67 (Ala. 1904) (finding equal protection under

three opinions, the Alabama Supreme Court has found no equal protection guarantees.³

Equal protection is a fundamental principle upon which American legal theory is based and has long been recognized in Alabama courts. "Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.'"⁴

This Article will examine the status of equal protection under the Alabama Constitution. Part I introduces the subject. Part II addresses the proceedings of the Constitutional Convention of 1901 when the express equal protection guarantee of the 1875 Constitution was deleted from the 1901 Constitution. Part III.A discusses the concept of equal protection embraced within the fundamental principle of due process. Part III.B examines Alabama cases finding equal protection guaranteed under sections 1 and 35 of the Alabama Constitution. Part III.C discusses Alabama cases holding that sections 1, 6, and 22 combine to guarantee equal protection. Part III.D deals with equal protection under section 22 alone, and Part III.E addresses Alabama cases recognizing the right to equal protection under general constitutional principles.⁵ In Part III.F the Article discusses cases from other jurisdictions where provisions similar to the Alabama provisions have been construed to provide equal protection of the law. Part IV sets out the arguments against equal protection under the Alabama Constitution, and Part V states the authors' conclusion.

II. HISTORICAL BACKGROUND

On Tuesday, May 21, 1901, 155 delegates from across the State of Alabama met in Montgomery for Alabama's sixth constitutional convention.⁶ On Friday, July 5, 1901, the thirty-seventh day of the convention, the report from the Committee on Preamble and Declaration of Rights was presented to the convention.⁷ Mr. Lomax, a member of the Committee, presented section 2: "That all persons resident in this State, born in the United States, or who shall have legally declared their intention to become citizens of the United States, are hereby declared

article I, §§ 1 and 35, of the Alabama Constitution), *overruled on other grounds by* Standard Chem. & Oil Co. v. City of Troy, 77 So. 383 (Ala. 1917).

3. *McLendon v. State*, 60 So. 392 (Ala. 1912); Opinion of the Justices No. 102, 41 So. 2d 775 (Ala. 1949); *Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999).

4. *Beauvoir Club v. State*, 42 So. 1040, 1043 (Ala. 1907) (quoting JOHN LOCKE ON CIVIL GOVERNMENT, § 142).

5. *See id.*

6. THOMAS E. SKINNER, ALABAMA CONSTITUTION ANNOTATED, *preface* (1938).

7. 2 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1901, MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901, at 1621 (1940) [hereinafter PROCEEDINGS].

citizens of the State of Alabama, possessing equal civil and political rights."⁸ Mr. Lomax moved to adopt section 2.⁹

An amendment to the section was offered by Mr. Sanford, a delegate from Montgomery County, to strike the words "persons who have legally declared their intention of becoming citizens."¹⁰ Mr. Sanford reasoned that a person should not have the right to hold any state office based on simply declaring an intention to become a citizen.¹¹ Then, Mr. O'Neal, a delegate from Lauderdale County, commented that section 2 might conflict with the proposal from the Suffrage and Elections Committee.¹²

Mr. Lomax argued that section 2 did not affect the privilege of suffrage, nor did conferring citizenship grant the privilege of suffrage.¹³ He urged the convention not to accept the amendment because it would dissuade the "most desirable class of emigrants" from coming to Alabama since they would have to wait years for citizenship while, on the contrary, accepting the amendment would attract types of emigrants who cared nothing about the rights of citizenship.¹⁴

Mr. Coleman, a delegate from Greene County, made a motion that all of section 2 "be la[id] . . . on the table"—that is, to be omitted completely from the Declaration of Rights.¹⁵ Mr. Coleman reasoned that if Mr. Lomax correctly asserted the fact that section 2 did not affect suffrage rights, then it had no place in the constitution:

Delegates of the Convention, it seems to me this Section 2 of the Declaration of Rights is out of place in the Constitution of the State of Alabama. The Fourteenth Amendment to the Constitution of the United States protects all citizens in their privileges and immunities equally, and if these words have no meaning at all, the words "privileges and immunities" cover everything proposed to be covered or protected or made by the argument of the delegate from Montgomery [Mr. Lomax], the Chairman of the committee . . . In view of the fact that citizens of the United States have equal rights, privileges and immunities in Alabama, as much as according to [Mr. Lomax's] own

8. *Id.* at 1622.

9. *Id.* The proposed section 2 was brought forward from the Constitutions of 1868 and 1875 without change.

10. *Id.* at 1623.

11. *Id.* at 1624.

12. 2 PROCEEDINGS, *supra* note 7, at 1624. The Committee on Suffrage and Elections proposed that any person—referring to aliens, not United States citizens—who was not already qualified to vote, should have to reside in the state at least two years, in the county one year, and in the precinct or ward three months prior to the election in which he intends to vote.

13. *Id.* at 1625-26.

14. *Id.* at 1627.

15. *Id.* at 1628

argument the words have no force, I move to lay the section on the table.¹⁶

Then another delegate, Mr. Oates, supported Mr. Coleman's amendment to omit all of section 2 because he feared the language of section 2 would establish "suffrage mills" as in New York and Boston, which manufactured United States citizens from newly-arrived foreigners.¹⁷ "Those people up there [in the North] in those cities have had a great deal of trouble with the foreign element."¹⁸ Mr. Oates made his argument not in terms of denying foreigners citizenship indefinitely, but rather postponing their citizenship until they could throw off their allegiances to the country from which they came.¹⁹ Next Mr. Oates turned his attention to whether the wording "are hereby declared citizens of the State of Alabama, possessing equal civil and political rights," placed in conjunction with the two-year residency requirement proposed by the Suffrage and Elections Committee, would allow a foreigner to be an elector.²⁰ Mr. Oates agreed section 2 might allow a foreigner to become an elector.²¹ After a discussion on whether "political rights" involved the right to suffrage,²² Mr. Coleman amended his amendment to strike the words "and political" from section 2.²³

Debate continued the next day, Saturday, July 6, 1901, when Mr. Lomax, representing the Committee on Preamble and Declaration of Rights, took a different position on section Two.²⁴ Mr. Lomax spoke of his continued belief that the privilege of suffrage was not contained within the term "political rights" and that "everything in . . . [section 2] of the bill of rights is covered already by the Fourteenth Amendment and we could not change or alter it if we undertook to do so."²⁵ Mr. Lomax then retreated from his position of the previous day and stated, "I think this section ought to stand as it is written, and as it was adopted unanimously by the convention of 1875, or else it ought to go out altogether, and therefore I renew my motion to table both the amendments and the section."²⁶ By vote of forty-nine to forty-two, the

16. *Id.*

17. 2 PROCEEDINGS, *supra* note 7, at 1629.

18. *Id.*

19. *Id.* at 1630.

20. *Id.*

21. *Id.* at 1630.

22. Mr. Coleman argued that, based on decisions from the Supreme Court of California and the Court of Appeals of Kentucky, the constitutional convention should strike the words "and political" because both cases recognized political rights to include the right of suffrage. 2 PROCEEDINGS, *supra* note 7, at 1633.

23. *Id.*

24. *Id.* at 1634.

25. *Id.* at 1640.

26. *Id.* at 1642.

section and amendments were "laid upon the table" and omitted from the 1901 Constitution.²⁷

Thus, the convention delegates deleted section 2 because they believed it could grant foreigners immediate Alabama citizenship, which they feared would bestow upon the foreigner the "political right" of suffrage and the right to hold office. Interestingly, equal protection considerations never entered into the debate on deleting section 2 from proposed article I.

III. THE ARGUMENT FOR EQUAL PROTECTION

A. Due Process

Principles of equal protection permeate Alabama law. In *Zeigler v. South & North Alabama Railroad*, the Alabama Supreme Court explained: "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."²⁸ According to the Supreme Court of Tennessee in *Bank of the State v. Cooper*, "law of the land" means a general and public law, operating equally on every individual in the community.²⁹ The court further stated that "a partial law, tending, directly or indirectly, to deprive a corporation or individual of rights to property, or to the equal benefits of the general and public laws of the land is unconstitutional and void."³⁰

Indeed the phrase "law of the land" traces its genesis to the Magna Carta which provides in the words of Chapter 39: "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land*."³¹ Chapter 40 states: "To no one will We sell, to none will We deny or delay, right or justice."³² These two chapters became Chapter 29 of the Magna Carta in the form in which it was placed on the statute books of England.³³

What the Great Charter referred to as "law of the land" we would

27. *Id.*

28. 58 Ala. 594, 598 (Ala. 1877) (quoting from Daniel Webster's argument in *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (U.S. 1819)).

29. 10 Tenn. (2 Yer.) 599, available at 1831 WL 1032 (Tenn. 1831).

30. *Cooper*, 10 Tenn.(2 Yer.) at 605, available at 1831 WL 1032, at *13.

31. A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 388 (1968) (quoting the text of selected provisions of Magna Carta (1215)) (emphasis added).

32. *Id.*

33. *Id.* at 315.

designate "due process of law." Sir Edward Coke emphasized that "law of the land" and "due process of law" mean the same thing.³⁴

In *The Road from Runnymede*, Professor A.E. Dick Howard describes the relationship between due process and equal protection:

For seven hundred and fifty years due process and equal protection of the laws, by whatever names and with whatever functions, have never been far apart. In the Great Charter of King John, chapter 39 and chapter 40, side by side, promised the freemen of England due process of law and equal treatment in the courts of justice. Within a few years, by the time the Charter had taken the shape it was to have on the statute books of England, the two chapters had been merged into one: chapter 29. So they continued, down through the centuries, picking up as they went the glosses of Coke and Blackstone and others. Into the American States' constitutions went provisions typically drawing word for word on both of the principal parts of chapter 29. The nineteenth century saw due process being used to require legislatures to pass laws of general and equal application. And in our own century we see due process and equal protection, though each having its own area of jurisprudence, nevertheless touching and intertwining again and again.³⁵

In *Black v. Pike County Commission*, the Alabama Supreme Court found a violation of the right to equal protection and quoted with approval the following from *Yick Wo v. Hopkins*:³⁶

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised

34. E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (W. Hein & Co. 1986) (1809).

35. HOWARD, *supra* note 31, at 315.

36. 360 So. 2d 303 (Ala. 1978) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

either in the pressure of opinion, or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth "may be a government of laws and not of men."³⁷

In the early case of *In re Dorsey*, Justice Ormond stated:

The great object of all free governments has been to secure an equal administration of the laws.

. . . .
In England, when the principles of civil liberty were not as well understood, or as firmly established as they are at the present day, eminent men have at different times asserted that the parliament was not omnipotent, and fearlessly declared those principles of civil liberty, which have since then, in this country, been declared and placed beyond all doubt, by their assertion, as part of the organic law of the land.

. . . .
Thus, we find Lord Chief Justice Hobart asserting that "if a statute says that a man shall be a judge in his own cause, such a law, being contrary to natural equity, shall be void." And again, Lord Coke, in *Bonham's case* declared that "where an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law shall adjudge it to be void."

. . . .
In the case of *Calder v. Bull*, 3 Dall. 386, Judge Chase [opined] . . . 'An act of the legislature, for I cannot call it a law, contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.'³⁸

Referring to the last section of the Bill of Rights in the Constitution of 1819,³⁹ Justice Ormond stated:

37. *Black*, 360 So. 2d at 305.

38. 7 Port. 293, available at 1838 Ala. LEXIS 62, at *106-08 (Ala. June, 1838).

39. This section of the Bill of Rights of the Constitution of 1819 stated:

This enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights herein retained, or any transgression of the high powers herein delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto are void.

By this it appears, not only that the rights asserted in this instrument, are reserved out of the general powers of government, but also that this enumeration shall not disparage others not enumerated, and that any act of the legislature which violates any of these asserted rights, or which trenches on any of these great principles of civil liberty, or inherent rights of man, though not enumerated, shall be void.⁴⁰

. . . .
[The Constitution] is for the benefit of the whole, and should receive a large and liberal interpretation . . . it is the most solemn act of the people in the sovereign capacity—dictating the terms on which they are willing to be governed; and it is both our duty and interest to preserve it unimpaired.⁴¹

In the same case Chief Justice Goldthwaite stated the following:

I consider the declaration of rights, as the governing and controlling part of the constitution; and with reference to this, are all its general provisions to be expounded, and their operation extended or restrained. The declaration itself, is nothing more than an enumeration of certain rights, which are expressly retained and excepted out of the powers granted; but as it was impossible, in the nature of things, to provide for every case of exception—a general declaration was added, that the particular enumeration should not be construed to disparage or deny others retained by the people. What those other rights are, which are thus reserved, may be readily ascertained by a recurrence to the preamble to the declaration of rights. The object to be attained by the people . . . was to form a government with clearly defined and limited powers, in order that “the general, great and essential principles of liberty and free government might be recognized and established.”

The first section of the declaration of rights, announces the great principle which is the distinctive feature of our government, and which makes it to differ from all others of ancient or modern times: “All freemen, when they form a social compact, are equal in rights, and no man, or set of men, are entitled to exclusive separate public emoluments or privileges, but in consideration of public services.” This is no empty parade of words: *it means, and was intended to guarantee to each citizen, all the rights or privileges which any other citizen can enjoy or possess.* . . . As this general equality is thus expressly asserted and guaranteed as one of the fundamental rights of each citizen, it would seem to be clear, that the power to destroy this equality

Dorsey, 7 Port. at 377.

40. *Id.* at 378.

41. *Id.* at 378-79.

must be expressly given, or arise by clear implication, or it can have no legal existence."⁴²

In *Truax v. Corrigan*, Chief Justice Taft observed that due process included an element of equal protection:

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, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law.⁴³

The United States Supreme Court has reminded us that, if there were no Equal Protection Clause, due process could serve the same function. In *Bolling v. Sharpe*, the court applied the Due Process Clause of the Fifth Amendment to strike down segregation in the District of Columbia schools.⁴⁴ The Fourteenth Amendment does not apply to the federal government, but applying the Fifth Amendment, Chief Justice Warren used an equal protection analysis, observing "[l]iberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."⁴⁵

The Alabama Supreme Court has described due process of law as including equal protection of the law. In *Barrington v. Barrington*, the court stated:

Due process of law guaranteed by the Federal Constitution has been defined in terms of the equal protection of the laws, that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. . . . "In order that a statute may comply with the necessary requirements as to due process of law, it must not violate the limitations as to classification imposed by the constitutional inhibition as to the denial of the equal protection of the laws. *Thus the test with respect to the requirement of due process of law seems to be that if the law under consideration operates equally upon all who come within the class to be affected, embracing all persons who are or may be in like situation and circumstances, and the designation of*

42. *Id.* at 359-61 (emphasis added).

43. 257 U.S. 312, 332 (1921).

44. 347 U.S. 497, 500 (1953), *opinion supplemented by* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

45. *Bolling*, 347 U.S. at 499-500.

the class is reasonable, not unjust or capricious or arbitrary, but based upon a real distinction, the law does operate uniformly, and if, added to this, the law is enforced by usual and appropriate methods, the requirement as to 'due process of law' is satisfied."⁴⁶

In addition to the application of general principles of constitutional law, Alabama courts have found equal protection for Alabama citizens under sections 1, 6, 13, 22, and 35, either combined or alone, of article I of the 1901 Alabama Constitution.⁴⁷ Those sections provide in pertinent part:

Sec. 1. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

....
Sec. 6. That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either . . . ; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury . . . ; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law

....
Sec. 13. That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

....
Sec. 22. That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.

....
Sec. 35. That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and when the government assumes other functions it is usurpation and oppression.⁴⁸

46. 89 So. 512, 513 (Ala. 1921) (emphasis added) (citations omitted).

47. See generally sources cited *supra* note 2.

48. ALA. CONST. art. I.

B. Sections 1 and 35

Just four years after the 1901 Alabama Constitutional Convention, the Alabama Supreme Court, in *City Council of Montgomery v. Kelly*,⁴⁹ held that sections 1 and 35 of the constitution provided equal protection. The defendant, William Kelly, was a licensed Montgomery merchant who chose to advertise his business by offering a small gratuity to his customers in the form of trading stamps.⁵⁰ The Montgomery City Council passed an ordinance requiring merchants who issue trading stamps in connection with their business to pay a license tax of \$100 with a fixed penalty of \$100 for each stamp issued without the license.⁵¹ This tax was in addition to the privilege license already required to carry on a regular business.⁵² Kelly was arrested and fined for issuing the trading stamps without having obtained the necessary additional license.⁵³ A jury returned a verdict of not guilty and the City Council appealed.⁵⁴

The Alabama Supreme Court phrased the issue on appeal as: "[C]an the lawmaking department of the government, in providing for privilege occupation taxes, make such discrimination between parties engaged in like lines of business as to place additional burdens on one, which place him, to that extent, at a disadvantage, as compared with the others?"⁵⁵ Finding the ordinance unconstitutional, the court wrote:

Brickell, C.J., said: "We may concede that, when a tax is imposed on avocations or privileges, or on franchises of corporations, it must be equal and uniform. The equality and uniformity consists in the imposition of the like tax upon all who engage in the avocation, or who may exercise the privilege taxed." As a constitutional warrant for this expression of the Chief Justice, our Constitution provides that among the inalienable rights of every citizen "are life, liberty and the pursuit of happiness" (Const. Ala. § 1); also "that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and, when the government assumes other functions it is usurpation and oppression" (Const. Ala. § 35); while the fourteenth amendment to the Constitution of the United States prohibits a state from making or enforcing "any law which shall abridge the privileges or immunities of

49. 38 So. 67, 69 (Ala. 1905).

50. *Kelly*, 38 So. at 69.

51. *Id.*

52. *Id.* at 67.

53. *Id.*

54. *Id.*

55. *Kelly*, 38 So. at 68.

citizens," etc.⁵⁶

The line of cases that follow *Kelly* and its application of sections 1 and 35 to both equal protection analysis and legislative classification runs throughout the twentieth century.⁵⁷ An example is *Robert Burton Ass'n Ltd. v. Eagerton*.⁵⁸ The Alabama Legislature, in an effort to impede the marijuana trade, enacted a statute that imposed a privilege tax of \$.25 per package on gummed cigarette papers, but ungummed papers were not taxed.⁵⁹ Plaintiffs, the manufacturers and distributors of the paper, sought a judgment declaring that the act was unconstitutional because it violated sections 1 and 35 of the Alabama Constitution.⁶⁰ The record showed that gummed and ungummed cigarette papers barely differed and that the legislation as originally proposed included both types of papers.⁶¹ The court opined that, "[t]he taxing of gummed cigarette papers at a substantially higher rate than ungummed papers is an unreasonable classification not based upon a real and substantial distinction and constitutes an unequal treatment proscribed by the Constitution of this State, Article I, §§ 1 and 35."⁶²

C. Sections 1, 6, and 22

In 1939, the Alabama Supreme Court, in *Pickett v. Matthews*, held that sections 1, 6, and 22 of the 1901 Alabama Constitution combined to guarantee equal protection for Alabama citizens.⁶³ The issue in *Pickett* was whether the administrator of an estate could bring a wrongful death action against a tortfeasor under Alabama's guest statute.⁶⁴ The court wrote:

Sections 1, 6, 22, State Constitution; Amendment 14, Fed-

56. *Id.* (quoting *Phoenix Carpet Co. v. State*, 22 So. 628 (Ala. 1897)).

57. *Woco Pep Co. of Montgomery v. Butler*, 142 So. 509 (Ala. 1932); *City of Mobile v. Rouse*, 173 So. 266 (Ala. 1937); *Lisenba v. Griffin*, 8 So. 2d 175 (Ala. 1942); *Alabama Indep. Serv. Station Ass'n v. McDowell*, 6 So. 2d 502 (Ala. 1942); *Simonetti, Inc. v. State ex rel. Gallion*, 132 So. 2d 252 (Ala. 1961); *Bulova Watch Co. v. Zales Jewelry Co.*, 147 So. 2d 797 (Ala. 1962); *San Ann Tobacco Co. v. Hamm*, 217 So. 2d 803 (Ala. 1968); *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979); *State v. Colonial Pipe Co.*, 471 So. 2d 408 (Ala. Civ. App. 1984); *State ex rel. Galanos v. Mapco Petroleum, Inc.*, 519 So. 2d 1275 (Ala. 1987); and *State v. Alabama Mun. Ins. Corp.*, 730 So. 2d 107 (Ala. 1998).

58. 432 So. 2d 1267 (Ala. 1983).

59. *Robert Burton Ass'n*, 432 So. 2d at 1268.

60. *Id.*

61. The court found that the only difference between the two types of papers was that "[g]ummed ones adhere more readily." *Id.* at 1629. "It was only after a suggestion by one of the legislators that the proposed tax might place an unfair burden on 'an old South Alabama farmer that rolls his own cigarettes' that the bill was changed to apply only to gummed papers." *Id.*

62. *Id.*

63. 192 So. 261, 264 (Ala. 1939).

64. *Pickett*, 192 So. at 263.

eral Constitution, U.S.C.A.:

These taken together guarantee the equal protection of the laws, protect persons as to their inalienable rights [Section 1]; . . . and prohibit irrevocable or exclusive grants of special privileges or immunities [Section 22].

It is claimed that by those principles the legislature cannot legalize a negligent injury to one's person or property, thereby changing the rule of duty not to cause damage by a negligent act, whether that duty is a creature of the common law or statute. It is thought to do so deprives one of "life, liberty, or property" without due process (section 6, Constitution), because such rights are inalienable under section 1, and create a special privilege under section 22, and violate the equal protection of the Fourteenth Amendment.⁶⁵

Prior to *Pickett* Alabama courts had recognized equal protection only under sections 1 and 35 combined.⁶⁶ However, *Pickett* has provided the precedent for most of Alabama's equal protection decisions since it was decided.⁶⁷

1. Sections 1, 6, and 22 Involving Classification

Sections 1, 6, and 22 have been applied in determining the constitutionality of legislative classification.⁶⁸ These classifications range from medical malpractice cases to paternity cases, and from insurance agents and adjusters to cotenants and tenants in common.⁶⁹ *Pickett v. Matthews* provides not only the constitutional precedent for equal protection involving legislative classification, but also a factual precedent because the dispute in *Pickett* focused on an individual's right to sue under Alabama's 1935 guest statute.⁷⁰ In 1951, the Alabama Supreme Court established the test to determine whether a classification system met constitutional standards.⁷¹ Part of the test involved ensuring "that the class . . . must bring within its influence all who are *under the same conditions and apply equally* to each person or member of the class, or each

65. *Id.* at 264.

66. See, e.g., *City Council of Montgomery v. Kelly*, 38 So. 67 (Ala. 1905), *overruled on other grounds by* *Standard Chem. & Oil Co. v. City of Troy*, 77 So. 383 (Ala. 1917).

67. See, e.g., *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 165 (Ala. 1991); *Slagle v. Parker*, 370 So. 2d 947, 949 (Ala. 1979).

68. See, e.g., *Cackowski v. Wal-Mart Stores, Inc.*, 767 So. 2d 319 (Ala. 2000); *Plitt v. Griggs*, 585 So. 2d 1317 (Ala. 1991); *Opinion of the Justices No. 278*, 403 So. 2d 197 (Ala. 1981); *Pickett v. Matthews*, 192 So. 261, 264 (Ala. 1939).

69. See *Custard Ins. Adjuster, Inc. v. Youngblood*, 686 So. 2d 211 (Ala. 1996); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991); *Jolly v. Knopf*, 463 So. 2d 150 (Ala. 1985); *K.M. v. G.H.*, 678 So. 2d 1084 (Ala. Civ. App. 1995).

70. *Pickett*, 192 So. 261, 263.

71. See *State v. Pure Oil Co.*, 55 So. 2d 843 (Ala. 1951).

person or member who may become one of such class."⁷²

In *Mayo v. Rouselle Corp.*, the United States District Court for the Northern District of Alabama certified to the Alabama Supreme Court the question of the constitutionality of section 7-2-725 of the Alabama Code (adopted from section 2-725 of the Uniform Commercial Code (U.C.C.)), which governed claims involving equipment.⁷³ The plaintiff attacked the constitutionality of the U.C.C. section on six different equal protection grounds; however, most of the opinion focused on the statute of limitations of section 7-2-725, which began to run four years from the date the equipment was sold rather than from the date of the injury, and on the difference between commercial and consumer goods.⁷⁴ The court opined that it was the very nature of the U.C.C. to make classifications between commercial and consumer goods and the court upheld the statute of limitations.⁷⁵ Clearly basing its decision to uphold section 7-2-725 on the equal protection guarantee of sections 1, 6, and 22 of the 1901 Constitution, the court concluded its opinion by stating, "We find § 7-2-725 creates a valid classification and is not so arbitrary or unreasonable as to be violative of equal protection as found in §§ 1, 6, and 22 of the Alabama Constitution."⁷⁶

Less than two years later, in 1981, the Alabama House of Representatives requested an opinion from the Alabama Supreme Court on whether proposed legislation eliminating campaign contributions to elected officials except during a ninety-day period prior to an election would be constitutional.⁷⁷ The justices responded that the proposed amendment would violate both federal and state equal protection guarantees because the restriction applied only to elected public officials and denied those officials the right to receive contributions while non-incumbent candidates for office did not have the same fundraising constraint.⁷⁸ The opinion's significance for equal protection purposes lies with the court's balanced reference to both the federal and state consti-

72. *Pure Oil*, 55 So. 2d at 846 (emphasis added).

73. 375 So. 2d 449, 451 (Ala. 1979).

74. *Mayo*, 375 So. 2d at 452.

Plaintiff contends that equal protection of the law is violated by the creation of various unconstitutional classifications. These include: (1) a class of injured persons who sustain injury within four years from date of delivery of equipment; (2) a class of injured persons who sustain injury outside this four-year period; (3) a class of injured persons who are injured by consumer goods; (4) a class of persons whose injury arises from use of commercial goods; (5) a class of defendants consisting of manufacturers and distributors of commercial goods; and (6) a class of defendants consisting of manufacturers and distributors of consumer goods.

Id.

75. *Id.*

76. *Id.*

77. Opinion of the Justices No. 278, 403 So. 2d 197 (Ala. 1981).

78. Opinion of the Justices No. 278, 403 So. 2d at 198.

tution. "We perceive that Code 1975, § 36-25-6, as amended by House Bill 75, would be violative of both the United States and Alabama Constitutions. The United States Constitution in the Fourteenth Amendment and the Alabama Constitution in article 1 §§ 1, 6, and 22, guarantees equal protection under the laws."⁷⁹

Medical malpractice cases have furnished the basis for attacks by plaintiffs on a legislative classification system.⁸⁰ In *Plitt v. Griggs*, the administratrix of a deceased patient's estate brought a medical malpractice action against a physician who operated on the deceased just hours prior to his death.⁸¹ During trial, the plaintiff offered the testimony of a medical expert on whether the defendant physician's actions or procedures fell below the applicable standard of care.⁸² Counsel for the defendant objected, arguing that plaintiff's expert was not qualified under Alabama Code, section 6-5-548(c), which limits expert medical testimony to "similarly situated health care providers."⁸³ The plaintiff argued that section 6-5-548 deprived her of equal protection under both the United States and Alabama Constitutions because the statute only applied to medical malpractice actions and thus only restricted medical malpractice plaintiffs.⁸⁴ The court first determined the statute did not violate the Equal Protection Clause of the Fourteenth Amendment and then turned its focus to the equal protection guarantee under the Alabama Constitution.⁸⁵ The court observed:

Ms. Plitt also argues that § 6-5-548(c) violates her right of equal protection under the Constitution of Alabama. Sections 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the citizens of Alabama equal protection under the laws. However, Ms. Plitt states no reason, and we are aware of none, that our analysis of the equal protection issue under the United States Constitution should not be equally applicable to

79. *Id.* at 199.

80. *See, e.g.*, *Cackowski v. Wal-Mart Stores, Inc.*, 767 So. 2d 319 (Ala. 2000); *American Legion Post Number 57 v. Leahey*, 681 So. 2d 1337 (Ala. 1996) (not a medical malpractice case but involving the constitutionality of a state statute which governed evidentiary matters when civil suit was brought to recover medical or hospital expenses); *Smith v. Schulte*, 671 So. 2d 1334 (Ala. 1995); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991); *Plitt v. Griggs*, 585 So. 2d 1317 (Ala. 1991).

81. *Plitt*, 585 So. 2d at 1318.

82. *Id.* at 1323.

83. *Id.* (stating that "Dr. Griggs [defendant] is a licensed physician and, additionally, he is certified by the American Board of Otolaryngology. Dr. Lipman [plaintiff's medical expert] received his education and medical certification in his native country, South Africa. Thereafter, he emigrated to the United States, and, since 1977, he has been licensed to practice medicine in the state of Oregon. Although he is certified in otolaryngology by the South African Medical Council, he is not certified by the American Board of Otolaryngology, as is Dr. Griggs").

84. *Id.* at 1324.

85. *Id.*

her equal protection issue regarding the Alabama Constitution; therefore, we consider the above analysis [under the Fourteenth Amendment] to apply equally to that issue.⁸⁶

The Alabama Supreme Court not only found and upheld the equal protection guarantee under the 1901 Constitution, but held the analysis of equal protection under the Fourteenth Amendment and under sections 1, 6, and 22 to be equally applicable in determining the constitutionality of legislative classification.⁸⁷

In *Moore v. Mobile Infirmary Association*,⁸⁸ and in *Smith v. Schulte*,⁸⁹ the Alabama Supreme Court reviewed statutes which limited the monetary awards for plaintiffs in medical malpractice suits. In *Moore*, a plurality of the Alabama Supreme Court held that section 6-5-544 (b) of the Alabama Medical Liability Act, which limited non-economic losses including punitives to \$400,000 "violate[d] the principle of equal protection as guaranteed by §§ 1, 6, and 22 of the Constitution of Alabama."⁹⁰ Similarly, in *Smith*, the court struck down section 6-5-547, which limited recovery in certain wrongful death actions to \$1,000,000, because the statute violated the equal protection guarantee of the Alabama Constitution.⁹¹ The court found section 6-5-547 represented a form of class legislation (similar to section 6-5-544(b) in *Moore*) that was unreasonable because it assigned specific value to human life with respect to only one class of citizens: victims of medical malpractice resulting in death.⁹² In both instances, the court struck down the unconstitutional classifications of the medical liability statutes as violative of the equal protection guarantees found in the 1901 Alabama Constitution.

2. Sections 1, 6, and 22 Involving Jury Selection

Alabama courts have found an equal protection guarantee in the selection and striking of jurors.⁹³ In *Ex parte Jackson*, the Alabama Su-

86. *Plitt*, 585 So. 2d at 1325 (citations omitted).

87. *Id.*

88. 592 So. 2d 156 (Ala. 1991).

89. 671 So. 2d 1334 (Ala. 1995).

90. *Moore*, 592 So. 2d at 170 (Ala. 1991). The court found the alleged correlation between the damage caps imposed for the health and safety of the public and the reduction in health care costs to be remote and indirect. *Id.* In contrast, the court found that damage caps fell most heavily on those who were the most severely maltreated and most deserving of relief while those who were less severely injured were able to receive full compensation; in addition the court found that the most egregious tortfeasors were not punished to the full extent of their responsibility. *Id.*

91. *Smith v. Schulte*, 671 So. 2d 1334, 1342 (Ala. 1995).

92. *Smith*, 671 So. 2d at 1342.

93. See *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987); *Ex parte Jackson*, 516 So. 2d 768 (Ala. 1986); *Edwards v. State*, 515 So. 2d 86 (Ala. Crim. App. 1987).

preme Court held that the state constitution guaranteed to a criminal defendant equal protection of the laws and that the prosecution could not exercise its peremptory strikes to exclude jurors on the basis of race and thereby deny the accused equal protection of the laws.⁹⁴

Jackson involved a defendant sentenced to death following his conviction for first-degree murder and rape.⁹⁵ Jackson alleged his equal protection rights were violated during jury selection "when the prosecution used its peremptory challenges to strike all ten of the prospective black jurors from the venire."⁹⁶ The main issue was whether *Batson v. Kentucky* was to be applied retroactively.⁹⁷ Chief Justice Torbert wrote the majority opinion and addressed the question of retroactive application of *Batson* by placing it squarely upon the equal protection guarantee of the state constitution:

Although we know the United States Supreme Court has not yet ruled on whether *Batson v. Kentucky* is to be applied retroactively, this Court does not need to await revelation from the federal judiciary when *our own state constitution also guarantees to a criminal defendant the equal protection of the laws*. Sections 1, 6, and 22, Ala. Const. 1901, combine to guarantee equal protection of the laws. Analysis of equal protection issues under the United States Constitution is equally applicable to those same issues under the Alabama Constitution.⁹⁸

Thus, the Alabama Supreme Court took a step ahead of the federal courts and applied *Batson* retroactively, based solely on the 1901 Alabama Constitution.

The following year the Alabama Supreme Court and the Alabama Court of Criminal Appeals followed the *Jackson* rationale in *Ex parte Branch*⁹⁹ and *Edwards v. State*.¹⁰⁰ In both cases, the prosecution used peremptory challenges to eliminate all but one black juror from each jury venire.¹⁰¹ Both cases were remanded to the circuit courts with directions for the trial judges to hold hearings to determine whether the prosecutions' challenges were racially motivated.¹⁰² The Alabama Court of Criminal Appeals harmonized the equal protection guarantees under

94. See *Ex parte Jackson*, 516 So. 2d 768, 772 (Ala. 1986).

95. *Ex parte Jackson*, 516 So. 2d at 768.

96. *Id.* at 771.

97. *Batson v. Kentucky*, 476 U.S. 79 (1986).

98. *Ex parte Jackson*, 516 So. 2d 768, 772 (Ala. 1986) (emphasis added) (citation omitted).

99. *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987).

100. *Edwards v. State*, 515 So. 2d 86 (Ala. Crim. App. 1987).

101. In *Edwards*, the prosecution struck ten out of the eleven black jurors. 515 So. 2d at 94. The prosecution used its peremptory challenges to strike six out of seven blacks from the jury venire in *Branch*. 526 So. 2d at 610.

102. *Edwards*, 515 So. 2d at 97; *Branch*, 526 So. 2d at 631.

both the state and federal constitutions, opining, "Our Supreme Court has held that the equal protection guarantees of the state constitution, Sections 1, 6, and 22, Alabama Constitution 1901, require a result identical to that of the United States Constitution as stated in *Batson*." ¹⁰³

3. Sections 1, 6, and 22 Involving Discriminatory Enforcement

In 1977 and 1978, the Alabama Supreme Court decided three cases which applied equal protection guarantees to discriminatory enforcement under the 1901 Alabama Constitution.¹⁰⁴ In *City of Hueytown v. Jiffy Chek Co. of Alabama*, the Alabama Supreme Court affirmed the trial court's judgment directing a municipality to issue a local merchant a business license to sell table wine.¹⁰⁵ The City of Hueytown issued table wine licenses to three similar businesses located in the same proximity as Jiffy Chek, but had denied Jiffy Chek a table wine license.¹⁰⁶ The court wrote:

We agree with the trial court that Jiffy Chek has been denied equal protection of the laws.

Sections 1, 6, and 22 of the Alabama Constitution combine to guarantee equal protection of the laws. The essence of the theory of equal protection of the laws is that all similarly situated be treated alike. An individual cannot be subjected to arbitrary exercise of governmental powers.¹⁰⁷

Harrison v. Buckholt dealt with a municipal ordinance which prohibited the issuance of a license for the sale of whiskey, wine, malt or brewed beverages within 600 feet of any church or school establishment.¹⁰⁸ In addition, the ordinance contained a grandfather clause that allowed those who were already licensed, and their successors, to continue perpetually upon re-application, to sell alcoholic beverages.¹⁰⁹ The plaintiff appealed to the Alabama Supreme Court from the denial of a writ of mandamus to compel the city clerk to issue him a license to sell beer.¹¹⁰ The court held that the grandfather clause of the municipal ordinance was an arbitrary and unconstitutional classification that was not

103. *Edwards*, 515 So. 2d at 94.

104. See *Harrison v. Buckholt*, 364 So. 2d 283 (Ala. 1978); *Black v. Pike County Commission*, 360 So. 2d 303 (Ala. 1978); *City of Hueytown v. Jiffy Chek Co. of Alabama*, 342 So. 2d 761 (Ala. 1977).

105. *City of Hueytown v. Jiffy Chek Co. of Alabama*, 342 So. 2d 761, 762 (Ala. 1977).

106. *Jiffy Chek Co.*, 342 So. 2d at 762.

107. *Id.*

108. *Harrison*, 364 So. 2d at 284.

109. *Id.*

110. *Id.*

reasonably related to the intended purpose of the ordinance.¹¹¹ The court wrote, "We hold the ordinance arbitrary and unreasonably discriminatory; therefore violative of Sections 1, 6 and 22 of the Constitution of Alabama of 1901."¹¹²

The Alabama Supreme Court reversed the trial court's grant of summary judgment in *Black v. Pike County Commission*, where the plaintiff alleged arbitrary denial of a restaurant liquor license by the County Commission.¹¹³ After summary judgment was entered for the Commission, the plaintiff appealed.¹¹⁴ The record on appeal revealed: (1) only two other people had a liquor license in the same district; (2) no other application for a liquor license had ever been denied except for Black's; and (3) the Pike County Commission had no criteria, written or unwritten, for determining who is qualified to obtain the Commission's approval for a restaurant liquor license.¹¹⁵ Though the court recognized a broad regulatory power in the regulation of possession, sale, and distribution of liquor, it held that summary judgment was inappropriate.¹¹⁶ The court wrote, "Sections 1, 6 and 22 of the Alabama Constitution combine to guarantee equal protection of the laws. Governing bodies in the exercise of police power, may not arbitrarily deny citizens equal protection of the law."¹¹⁷

4. Sections 1, 6, and 22 Involving Gender

In *Peddy v. Montgomery*, the Alabama Supreme Court held unconstitutional title 34, section 73, of the Alabama Code, which denied a wife the power of alienating or mortgaging her lands without the assent or concurrence of her husband.¹¹⁸ Under this statute any contract made by a wife for the sale of her lands would be void without her husband's consent.¹¹⁹ The defendant (seller) asserted this statute to defeat the purchaser's suit for specific performance.¹²⁰ In its opinion the court noted the section in question was "the only statutory provision left in the law of Alabama limiting the right of a married woman to contract."¹²¹ The court relied on *Pickett v. Matthews*¹²² in holding that sections 1, 6, and

111. *Id.* at 284-85.

112. *Id.* at 284.

113. *Black v. Pike County Comm'n*, 360 So. 2d 303 (Ala. 1978).

114. *Black*, 360 So. 2d at 303, 304.

115. *Id.* at 304.

116. *Id.* at 305-06.

117. *Id.* at 306 (citations omitted).

118. *Peddy v. Montgomery*, 345 So. 2d 631 (Ala. 1977).

119. *Peddy*, 345 So. 2d at 632.

120. *Id.*

121. *Id.*

122. 192 So. 261 (Ala. 1939).

22 of article I combine to guarantee the equal protection of the laws.¹²³

Although recognizing that the original intent of the legislation, historically termed the Married Women's Property Act,¹²⁴ "was to protect the wife, and 'not limit her power of alienation,'"¹²⁵ the *Peddy* court found no justification for treating married landowner women different from single, divorced, and widowed landowner women:

We hold that Title 34, § 73, Code, limiting the freedom of a married woman to alienate or mortgage her lands, or any interest therein, without the assent and concurrence of her husband, violates the provisions of Article I, Constitution of 1901, in that it denies to that category of adult landowners rights guaranteed to all other adult landowners by the Constitution and laws of this state.¹²⁶

In *Peddy*, the Alabama Supreme Court, for the first time, used the Alabama equal protection guarantee to strike down the last vestige of discriminatory laws against married women's rights to convey property.

D. Section 22 (alone)

In *Crabtree v. City of Birmingham*, plaintiff, owner of a wrecker service, sought a declaratory judgment to have a municipal ordinance declared unconstitutional because it granted an exclusive contract to a competing wrecker service (Kemp's) by permitting Kemp's to use a short wave radio to monitor automobile wrecks and denying plaintiff the same privilege.¹²⁷ Plaintiff alleged the ordinance violated "§ 22, Constitution of Alabama of 1901, which guarantees the equal protection of the laws, protects persons as to their inalienable rights; prohibits one from being deprived of his inalienable rights without due process; and prohibits irrevocable or exclusive grants of special privileges or immunities."¹²⁸ The court upheld the ordinance applying an equal protection analysis and finding a rational basis for the exclusive contracts.¹²⁹

123. *Peddy*, 345 So. 2d at 633.

124. *Id.* at 633-35 (providing a brief history of the Alabama legislation and its counterparts throughout the rest of the nation).

125. *Id.* at 635 (citing *Newman v. Borden*, 194 So. 836 (Ala. 1940)).

126. *Id.* at 637.

127. *Crabtree v. City of Birmingham*, 299 So. 2d 282, 286 (Ala. 1974).

128. *Crabtree*, 299 So. 2d at 287.

129. *Id.* at 288. The court found a rational basis for the ordinance visualizing the total chaos that would ensue if each of Birmingham's sixty-four wrecker services sent a wrecker to each traffic accident. *Id.*

E. General Constitutional Principles

In addition to specific provisions of the Alabama Constitution that have been construed by the Alabama Supreme Court to guarantee equal protection to Alabama citizens, the court has recognized the right to equal protection under general constitutional principles. In *Hamilton v. Adkins*, the court stated:

[T]he right of any of the appellees to be protected against discrimination under the state constitution must be rested on lack of due process and the general idea of uniformity rather than on an express provision for equal protection. . . . [T]he effect of the equal protection clause of the Federal Constitution and state uniformity requirements are substantially similar and what violates the one will contravene the other.¹³⁰

The court also said, in *McCraney v. City of Leeds*, that "[a] municipality, in the exercise of its police power, may not, by arbitrary, discriminatory, and oppressive action deny the citizen the equal protection of the law, nor deprive him of personal or property rights without due process of law."¹³¹

In *Opinion of the Justices No. 102*, the justices noted the absence of an express equal protection clause in the Alabama Constitution, but then stated "while the due process and equal protection guarantees are not coterminous in their spheres of protection, equality of right is fundamental in both. Each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances."¹³² In *Bessemer Theatres v. City of Bessemer*, the Alabama Supreme Court observed that there is no equal protection clause in the Alabama Constitution "except as implied in other sections."¹³³

The Alabama Court of Appeals has also applied an equal protection analysis in upholding a local act imposing a vehicle license tax against the contention that the vehicle license tax was class legislation. In *Hudgens v. State*, the court stated, "We are unable to see wherein the section in question is class legislation. It makes no invidious distinctions, applying alike to all owners and possessors of vehicles used upon the public roads of Crenshaw County."¹³⁴

In *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, the Alabama Supreme Court held that the Legislature may

130. 35 So. 2d 183, 188-89 (Ala. 1948).

131. 1 So. 2d 894, 896 (Ala. 1941).

132. 41 So. 2d 775, 777 (Ala. 1949).

133. 75 So. 2d 651, 654 (Ala. 1954) (emphasis added).

134. 72 So. 605, 607 (Ala. Ct. App. 1916).

create classes and enact legislation governing each class, provided the classification is not arbitrary.¹³⁵ A statute conferring the power of eminent domain is not invalid as creating an illegal discrimination between members of the same class because it does not permit the condemnation of property of cotton factories necessary for their operation, or private residences and certain appurtenances within the curtilage or private residences.¹³⁶

Again applying an equal protection analysis, the court in *Huey v. Brock* held that a ruling of the trial court that rights of reversion were barred by laches "deprived appellants of neither due process nor equal protection of the law, nor does it in any wise contravene the Constitution of the United States or of this state."¹³⁷ In *Smith v. Wolf*, a statute requiring coal mine operators to keep at the mines stretchers, blankets, bandages and other items for use in emergencies was attacked as constitutionally invalid in an action brought by an injured plaintiff against a coal mine operator.¹³⁸ The defendant insisted that the statute is class legislation aimed solely at coal mine operators while other similar businesses are not affected. In upholding the validity of the statute, the court stated:

It must be conceded by all that the constitution does not forbid a reasonable and proper classification of the objects of legislation. . . . The proper test seems to be that "the reasonableness of a classification is that it must be based upon some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.

. . . Here it is certainly true that the statute operates on all coal mine operators, and it seems clear to us that they form, by themselves, a proper and legitimate class, with reference to the purposes of the act, and, upon reasonable grounds, that they are distinguishable from [other] operators. . . . [W]e conclude that the statute in question is a constitutional enactment, and must therefore be upheld.¹³⁹

As early as 1907, in *Beauvoir Club v. State*, the Alabama Supreme Court applied an equal protection analysis in construing section 23 of the 1875 Constitution, the same language as section 22 of the present constitution, observing:

135. 65 So. 287 (Ala. 1914).

136. *Alabama Interstate Power*, 65 So. at 291.

137. 92 So. 904, 905 (Ala. 1921) (emphasis added).

138. 49 So. 395 (Ala. 1909).

139. *Smith*, 49 So. at 397-98 (quoting *State v. Jacksonville Terminal Co.*, 27 So. 221, 224 (1899)).

[A]n act which should select a person or corporation and grant unto him or it immunity from the provisions or operation of a general law, or subject him or it to peculiar rules, or impose special obligations or burdens from which others in the locality or class are exempt, would be unconstitutional.¹⁴⁰

The Alabama Supreme Court recognized an equal protection right in *Birmingham-Tuscaloosa Railway & Utilities Co. v. Carpenter*, with reference to an act providing that contributory negligence of the driver of a motor vehicle shall be imputed to every occupant, but not to passengers for hire, holding that the statute denies equal protection to all persons similarly situated and "is an unwarranted discrimination."¹⁴¹ The court then stated:

[T]his constitutional guaranty does not forbid the legislature from making a reasonable classification in the operation of our laws; but such a classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any such substantial basis.¹⁴²

In *McLendon v. State*, the Alabama Supreme Court took note of the failure to bring section 2 of the 1875 constitution forward into the 1901 Constitution.¹⁴³ The court then applied a Fourteenth Amendment equal protection analysis to the case before the court.¹⁴⁴ Justice Mayfield, dissenting, stated in part:

I know it is contended by some that the omission from the Constitution of 1901 of section 2 of the Bill of Rights contained in the Constitution of 1875 has the effect to now authorize the state legislature to deny the equal protection of its laws to its citizens. I do not think so, and I am sure not a member of that convention had any such idea. This was not the purpose of the omission. Its only purpose was to prevent this section from being in conflict with the new article as to franchise and elections, and to authorize statutes to carry into effect the new provisions as to elections and the right to vote. It was never intended to authorize arbitrary discrimination against the civil rights of any citizen or class of citizens . . . [I]f we need an express provision against such statutes as the one in question, we have it in

140. 42 So. 1040, 1043 (Ala. 1907).

141. 69 So. 626, 628 (Ala. 1915).

142. *Birmingham-Tuscaloosa Ry.*, 69 So. at 628.

143. 60 So. 392, 393 (Ala. 1912).

144. *McClendon*, 60 So. at 394.

sections 1, 22, 35 and 36 of the state Constitution.¹⁴⁵

With reference to the provision of the statute under consideration, Justice Mayfield observed that the statute required a union soldier to pay a tax in order to practice a profession in his state while authorizing a confederate soldier to practice without paying any such license.¹⁴⁶ He commented:

I do not believe that the fundamental laws of this state or of this nation should or will allow or tolerate any such invidious distinctions and discriminations against one class of citizens. I believe—and so read the law—that both state and federal constitutions prohibit any such discriminations from being made by the lawmaking power either by general or special statutes. Such discriminations as are made in this statute are I take it certainly inconsistent with the spirit, if not with the letter, of all Bills of Rights in the American Constitutions.

Not only this; but, as has been repeatedly decided by state and federal courts, such statutes are inconsistent and incompatible with the fundamental principles of the American form of free and independent government, and, being so, need no express inhibition in the Constitutions to render them void.¹⁴⁷

Chief Justice Hooper's comments on this issue in *Ex parte Melof* are strikingly similar to Justice Mayfield's comments.¹⁴⁸ Chief Justice Hooper observed:

The general principle of equal protection of the laws, otherwise termed as the concept that all men are equal before the law, is written into the very warp and woof of American law. It is a cornerstone of western law itself.

In that sense, I believe that without equality before the law, there can be no law at all.

. . . .
. . . Finding no explicit equal protection clause in the Alabama Constitution of 1901, and looking at the history behind the constitutional convention of 1901, I cannot say that there presently exists an equal protection clause in our constitution. I can say that the courts of this state should apply the explicit protections of the 1901 Constitution, of which there are many (citing Sections 1, 6, and 22 as "just three examples of the many rights and protections" contained in the Constitution),

145. *Id.* at 404-05.

146. *Id.* at 396-97.

147. *Id.* at 397.

148. 735 So. 2d 1172 (Ala. 1989).

evenly and without partiality. . . . I can state an unequivocal belief that each person in this state that appears before our courts is equal before the law and is entitled to receive the same protections afforded by the law.¹⁴⁹

F. Construction of Other State Constitutions

Provisions similar to one or more of sections 1, 6, 13, 22, and 35 of the Alabama Constitution are found in the constitutions of other states and have been construed to provide equal protection of the laws.

1. General Provisions

Similar provisions to sections 1 and 35 are found in the constitutions of New Jersey, New Hampshire, Pennsylvania, Vermont, Wisconsin, Massachusetts, Wyoming, and Georgia. The New Jersey Constitution provides that "all persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."¹⁵⁰ In *Greenberg v. Kimmelman*, the New Jersey Supreme Court interpreted this provision to protect "against injustice and against the unequal treatment of those who should be treated alike. To this extent, [the statute] safeguards values like those encompassed by the principles of due process and equal protection."¹⁵¹

In the New Hampshire Constitution two sections have been held to guarantee equal protection:

All men are born equally free and independent: Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good.¹⁵²

All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this State on account of race, creed, color, sex or national origin.¹⁵³

In *Opinion of the Justices No. 78-102*, the New Hampshire Supreme

149. *Melof*, 735 So. 2d at 1187.

150. N.J. CONST. art. 1, ¶ 1.

151. 494 A.2d 294, 302 (N.J. 1985).

152. N.H. CONST. part 1, art. 1.

153. N.H. CONST. part 1, art. 2. The second sentence was added in 1974. *Id.*

Court held that article I guarantees equal protection.¹⁵⁴ To like effect is *State v. Pennoyer* (all men are viewed as equal, entitled to enjoy equal privileges, and to be governed by equal laws).¹⁵⁵

The Pennsylvania Constitution provides that "all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."¹⁵⁶ This provision was construed by the Pennsylvania Superior Court to guarantee equal protection in *Dansby v. Thomas Jefferson University Hospital*.¹⁵⁷

The provision of the Vermont Constitution construed to guarantee equal protection is as follows:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community, an indubitable, unalienable, and inalienable right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.¹⁵⁸

This section was construed to guarantee equal protection in *MacCallum v. Seymour's Administrator*¹⁵⁹ and *Brigham v. State*.¹⁶⁰

Wisconsin's Constitution provides that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to serve these rights, governments are instituted, deriving their just powers from the consent of the governed."¹⁶¹ The Wisconsin Supreme Court construed this provision to require that all persons be accorded the equal protection of the laws in *Haase v. Sawicki*¹⁶² and *Pauly v. Keebler*.¹⁶³

The Massachusetts Supreme Court has construed part 1, article 10, of the Massachusetts Constitution to provide equal protection of the laws in the absence of an express equal protection clause.¹⁶⁴ This provision is as follows:

154. 387 A.2d 333 (N.H. 1978).

155. 18 A. 878 (N.H. 1889).

156. PA. CONST. art. 1, § 1.

157. 623 A.2d 816 (Pa. Super. Ct. 1993).

158. VT. CONST. chap. I, art. 7.

159. 686 A.2d 935 (Vt. 1996).

160. 692 A.2d 384 (Vt. 1997).

161. WIS. CONST. art. 1, § 1.

162. 121 N.W.2d 876 (Wis. 1963).

163. 185 N.W. 554 (Wis. 1921).

164. Opinion of the Justices, 257 N.E.2d 94, 95 (Mass. 1970).

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of the Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.¹⁶⁵

The Wyoming Constitution provides "in their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."¹⁶⁶ The Wyoming Supreme Court interpreted this provision to guarantee equal protection of the law in *Mills v. Reynolds*.¹⁶⁷

Finally, the Georgia Constitution was construed to guarantee equal protection in *Georgia Railroad & Banking Co. v. Wright* when the court stated:

When the Constitution of this State declares that protection to person and property shall be impartial and complete, it but states in other language the same principle laid down in the Constitution of the United States when that instrument declares that no state shall deny to any person the equal protection of the laws.¹⁶⁸

2. Due Process

Other states have construed express due process provisions to guarantee equal protection of the law. In *Heninger v. Charnes*, the Colorado Supreme Court recognized that although its state constitution does not contain an explicit equal protection clause, equal protection under the law is a right constitutionally afforded state citizens and is included within the due process clause of the state constitution.¹⁶⁹

The West Virginia Constitution provides "[n]o person shall be de-

165. MASS. CONST. part 1, art. 10.

166. WYO. CONST. art. 1, § 2.

167. 837 P.2d 48, 52 (Wyo. 1992).

168. 54 S.E. 52, 57 (Ga. 1902) (interpreting GA. CONST. art.1, § 2).

169. 613 P.2d 884, 887 n.3 (Colo. 1980) (citing COLO. CONST. art. 2, § 25).

prived of life, liberty, or property, without due process of law."¹⁷⁰ In *Thorne v. Roush*, the West Virginia Supreme Court stated: "inherent in the due process clause of the state constitution are both the concept of substantive due process and the concept of equal protection of the laws."¹⁷¹

The Maryland Supreme Court observed, in *State v. Good Samaritan Hospital*, that the provision in the Declaration of Rights of the Maryland Constitution "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land," guaranteed equal protection of the laws.¹⁷²

Finally, the Oklahoma Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."¹⁷³ The Supreme Court of Oklahoma in *Ross v. Peters*¹⁷⁴ and in *Fair School Finance Council of Oklahoma, Inc. v. State*,¹⁷⁵ construed this provision to guarantee equal protection.

3. Privileges and Immunities

The largest group of states having no express equal protection clause but finding equal protection guarantees under other provisions of their constitutions have done so under the privileges and immunities clauses of their constitutions. For instance, the North Carolina Constitution provides "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."¹⁷⁶ In *State v. Fowler*, the North Carolina Supreme Court recognized that the quoted section guaranteed equal protection of the laws.¹⁷⁷ Similarly in *S.S. Kresgee Co. v. Davis*, the North Carolina Supreme Court stated:

This Court has said that the principle of the equal protection of the law, made explicit in the Fourteenth Amendment to the Constitution of the United States, was also inherent in the Constitution of this State even prior to the revision thereof at the General Election of 1970. By the above-mentioned revision, it has now been expressly incorporated in Art. I, § 19, of the

170. W. VA. CONST. art. III, § 10.

171. 261 S.E.2d 72, 74 (W. Va. 1979).

172. 473 A.2d 892, 900 n.7 (Md. 1984) (quoting MD. CONST. declaration of rights, art. 24).

173. OKLA. CONST. art. 2, § 7.

174. 846 P.2d 1107, 1114 n.29 (Okla. 1993).

175. 746 P.2d 1135, 1148 n.48 (Okla. 1987).

176. N.C. CONST. art. I, § 32.

177. 136 S.E. 709 (N.C. 1927).

Constitution of North Carolina.¹⁷⁸

In *Fountain Park Co. v. Hensler*, the Indiana Supreme Court observed that its citizens were guaranteed equal protection of the laws by the constitutional provision that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."¹⁷⁹

Oregon's Constitution provides "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities which, upon the same terms, shall not equally belong to all citizens."¹⁸⁰ In *Plummer v. Donald M. Drake Co.*, the Oregon Supreme Court understood this provision to guarantee equal protection of the laws.¹⁸¹

The South Dakota Constitution was cited in *Standard Oil Co. v. Jones* as "forbidding the granting to any citizen privileges or immunities which upon the same terms do not equally belong to all citizens or corporations," and held to guarantee equal protection of the laws.¹⁸²

Likewise, the Tennessee Supreme Court has applied equal protection in its analysis of the Tennessee Constitution. In *Tennessee Small School Systems v. McWhorter*, the Tennessee Supreme Court referred to the Tennessee Constitution, article I, section 8, and article II, Section 8, stating that "[t]hese two provisions of the Tennessee Constitution . . . together, guarantee equal privileges and immunities for all those similarly situated," and applying an equal protection analysis in a school-funding case.¹⁸³

In *Serrano v. Priest*, the California Supreme Court observed that constitutional provisions providing that no special privileges or immunity shall ever be granted, which may not be altered or repealed, are substantially the equivalent of the Equal Protection Clause of the Fourteenth Amendment.¹⁸⁴

The Arkansas Constitution provides: "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."¹⁸⁵ The Supreme Court of Arkansas interpreted this provision as guarantee-

178. 178 S.E.2d 382, 385 (N.C. 1971) (citing *State v. Fowler*, 136 S.E. 709 (N.C. 1927); see *supra* text accompanying note 177.

179. 155 N.E. 465, 466 (Ind. 1927) (quoting *Tenn. Small Sch. Sys. v. McWhorter*, 851 S.W.2d 139, 152 (Tenn. 1993) (internal citations omitted)).

180. OR. CONST. art. 1, § 20.

181. 320 P.2d 245, 248 (Or. 1958).

182. *Standard Oil Co. v. Jones*, 205 N.W. 72, 74 (S.D. 1925) (citing S.D. CONST. art. 6, § 18).

183. 851 S.W.2d 139, 152 (Tenn. 1993) (citations omitted).

184. 487 P.2d 1241, 1249 n.11 (Cal. 1971).

185. ARK. CONST. art. 2, § 18.

ing equal protection in *McClellan v. Paris Public Schools*.¹⁸⁶ In *Phoenix Newspapers, Inc. v. Purcell*, the Arizona Court of Appeals construed the following provision of the Arizona Constitution to provide the guarantee of equal protection: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."¹⁸⁷

The Idaho Constitution provides:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature.¹⁸⁸

In *Fisher v. Masters*, the Idaho Supreme Court held that this section guarantees equal rights, privileges and immunities to all persons within the bounds of the state.¹⁸⁹

The Iowa Constitution provides: "All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."¹⁹⁰ The Iowa Supreme Court has recognized that this provision guarantees equal protection of the laws in *State v. Ball*,¹⁹¹ *State v. Mann*,¹⁹² and *City of Waterloo v. Selden*.¹⁹³

A similar provision in the Kansas Constitution was recognized as guaranteeing equal protection by the Kansas Supreme Court in *Harris v. Shanchan*.¹⁹⁴

All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this

186. 742 S.W.2d 907, 909 (Ark. 1988).

187. 927 P.2d 340, 343 (Ariz. Ct. App. 1996) (citing ARIZ. CONST. art. 2, § 13).

188. IDAHO CONST. art. 1, § 2.

189. 83 P.2d 212, 217 (Idaho 1938).

190. IOWA CONST. art. 1, § 6.

191. 572 N.W.2d 910 (Iowa 1997).

192. 602 N.W.2d 785, 792 (Iowa 1999).

193. 251 N.W.2d 506, 509 (Iowa 1977).

194. 390 P.2d 772, 777 (Kan. 1964) (citing KAN. CONST. bill of rights, § 2).

power shall be exercised by no other tribunal or agency.¹⁹⁵

The Minnesota Constitution provides:

No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.¹⁹⁶

In *Thiede v. Town of Scania Valley*, the Supreme Court of Minnesota held that this section guarantees equal protection, saying:

The entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these are the right to be protected in life, liberty, and the pursuit of happiness; the right to acquire, possess, and enjoy property; and the right to establish a home and family relations—all under equal and impartial laws which govern the whole community and each member thereof. The rights, privileges, and immunities of citizens exist notwithstanding there is no specific enumeration thereof in State Constitutions.¹⁹⁷

The North Dakota Constitution has two provisions that have been construed together to guarantee equal protection.¹⁹⁸ Article I, section 21 provides, "[n]o special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."¹⁹⁹ Article I, section 22 provides that, "[a]ll laws of a general nature shall have a uniform operation."²⁰⁰ The North Dakota Supreme Court has applied the equal protection guarantee of *Baldock* in recent decisions.²⁰¹

The Washington Constitution contains a provision that "No law shall be passed granting to any citizen, class of citizens, or corporation

195. KAN. CONST. bill of rights, § 2.

196. MINN. CONST. art. 1, § 2.

197. 14 N.W.2d 400, 405 (Minn. 1944).

198. *Baldock v. N.D. Workers Comp. Bureau*, 554 N.W.2d 441, 444 (N.D. 1996) (noting that article I, §§ 21 and 22 of the North Dakota Constitution have "long [been] viewed as providing our state constitutional guarantee of equal protection.")

199. N.D. CONST. art. I, § 21.

200. N.D. CONST. art. I, § 22.

201. See, e.g., *Eagle v. North Dakota Workers Comp. Bureau*, 583 N.W.2d 97 (N.D. 1998) (citing *Baldock*, 554 N.W.2d at 444).

other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."²⁰² In *Darrin v. Gould*, the Supreme Court of Washington held that this provision guaranteed equal protection of the laws.²⁰³

Nebraska's Privileges and Immunities Clause²⁰⁴ was construed to guarantee equal protection first in *Distinctive Printing & Packaging Co. v. Cox*.²⁰⁵ Two years later, the Nebraska Supreme Court held true to that finding in *Haman v. Marsh*.²⁰⁶

The privileges and immunities clause of the Kentucky Constitution has also been construed to grant equal protection. In *Tabler v. Wallace*, the Kentucky Supreme Court held that sections 1, 2 and 3 of the Kentucky Constitution "suffice to embrace the equal protection clause of the Fourteenth Amendment."²⁰⁷

IV. THE ARGUMENT AGAINST EQUAL PROTECTION

Prior to 1991, the Supreme Court of Alabama had noted in three cases the absence of an express equal protection clause in the Alabama Constitution. In *McClendon v. State*, the Supreme Court of Alabama considered a statute that exempted ex-Confederate soldiers from paying certain privilege taxes.²⁰⁸ The issue was whether that statute violated sections 1, 6, 22, 29, 35, 211, or 217 of the Alabama Constitution.²⁰⁹ The court noted that section 2 of the Bill of Rights in the Constitution of 1875 had been dropped from the 1901 Constitution.²¹⁰ The court held that the exemption of Confederate veterans from the payment of the privilege tax was not in violation of any of the provisions of the Alabama Constitution, nor inconsistent with the principle requiring equal and uniform treatment in the imposition of privilege taxes.²¹¹ Thus, the court recognized that no express equal protection clause exists in the constitution, but observed that privilege taxes must be equal and uniform.²¹²

The Alabama Supreme Court also noted the absence of an express equal protection clause in the Alabama Constitution in *Hamilton v. Ad-*

202. WASH. CONST. art. 1, § 12.

203. 540 P.2d 882 (Wash. 1975).

204. NEB. CONST. art. 3, § 18.

205. 443 N.W.2d 566 (Neb. 1989).

206. 467 N.W.2d 836 (Neb. 1991).

207. 704 S.W.2d 179, 183 (Ky. 1986).

208. 60 So. 392 (Ala. 1912).

209. *McClendon*, 60 So. at 392-93.

210. *Id.* at 393.

211. *Id.*

212. *Id.*

kins.²¹³ In *Hamilton*, the plaintiffs attacked the system of taxation in Jefferson County as violating their equal protection rights.²¹⁴ Jefferson County was divided into four parts, and each year the tax assessor would review and equalize the property tax assessments in one of the parts.²¹⁵ Noting the absence of an express equal protection clause, the court held that the plaintiffs' rights to protection against discrimination had to be based on a lack of due process and "the general idea of uniformity" rather than on an express equal protection provision.²¹⁶

In *Opinion of the Justices No. 102*, the Supreme Court of Alabama issued an advisory opinion noting the absence of an express equal protection clause, but observing: "While the due process and equal protection guarantees are not coterminous in their spheres of protection, equality of right is fundamental in both. Each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances."²¹⁷

After almost a century of decisions which overwhelmingly supported the proposition that Alabama citizens enjoy equal protection under the state constitution even though the constitution contains no express equal protection clause, the issue became prominent in cases construing statutes providing for damages in certain tort actions.²¹⁸

In *Moore v. Mobile Infirmary Ass'n*, a plurality of the Alabama Supreme Court held that a statute limiting non-economic damages to \$400,000 was unconstitutional and violated the right to equal protection under sections 1, 6, and 22, of article I of the Alabama Constitution.²¹⁹ Justice Houston concurred in the result, but observed that there is no equal protection clause in the Constitution of 1901.²²⁰ In *Skate Palace, Inc. v. City of Irondale*, decided while *Moore* was pending in the supreme court, Justice Houston stated: "In my opinion, there is no equal protection guarantee under the Alabama Constitution of 1901. There was an equal protection clause in the Alabama Constitution of 1875, Art. I, § 2."²²¹

On equal protection grounds, the Alabama Supreme Court in *Smith v. Schulte* held unconstitutional a cap on punitive damages against a health care provider.²²² Dissenting, Justice Houston said, "The equal

213. 35 So. 2d 183 (Ala. 1948).

214. *Hamilton*, 35 So. 2d at 184.

215. *Id.*

216. *Id.* at 188.

217. 41 So. 2d 775, 777 (Ala. 1949).

218. See ALA. CODE §§ 6-11-1 to -30; 6-5-540 to -552.

219. 592 So. 2d 156, 170-71 (Ala. 1991).

220. *Moore*, 592 So. 2d at 174 (Houston, J., concurring specially).

221. 585 So. 2d 1352, 1355 (Ala. 1991) (Houston, J., concurring specially) (emphasis added).

222. 671 So. 2d 1334, 1342 (Ala. 1995).

protection challenge in this case is based *solely* on whatever guarantee of equal protection may be afforded by the Constitution of Alabama of 1901. There is none."²²³ A minority of the court continued to disagree²²⁴ with the reasoning of majority opinions upholding a guarantee of equal protection under the state constitution until 1999 when the supreme court decided *Ex parte Melof*.²²⁵

Melof involved a class action brought by taxpayers against state officials claiming that Alabama's retirement-benefit taxation classifications violated, among other things, equal protection guarantees provided by the Alabama Constitution.²²⁶ In an opinion written by Justice Houston, it appeared that the Alabama Supreme Court had finally garnered a majority to hold that the constitution did not provide a guarantee of equal protection to Alabama citizens.²²⁷ The court said:

The representatives claim that the retirement-tax structure also violates an "equal-protection provision" they say is made up of §§ 1, 6, and 22 of the Alabama Constitution of 1901. Because we hold that Alabama has no such "equal-protection provision," we conclude that the court, in entering the summary judgment, was not denying equal protection guaranteed by the Alabama Constitution.²²⁸

One should not read the majority opinion to support Justice Houston's conclusion that no equal protection guarantee is provided by the Alabama Constitution. Concurring specially, Justice Maddox clarified his dissenting opinion in *Smith v. Schulte*, stating:

[A]lthough I stated [in *Smith v. Schulte*] that I agreed with Justice Houston that the Alabama Constitution did not contain an *express* equal-protection clause, I did note that "[t]he reasoned debate between the Justices of this Court on the question whether the Alabama Constitution has an 'equal-protection' clause would seem to be more academic than germane." The separate opinions of the Justices show that the debate on the issue continues.

. . . [A]lthough I recognize that the framers of the Constitution did not include an equal-protection clause in the 1901 Con-

223. *Smith*, 671 So. 2d at 1348-49 (Houston, J., dissenting). Justice Maddox joined in the dissent, but clarified his position on equal protection in *Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999).

224. See, e.g., *Ex parte Bill Salter Adver., Inc.*, 658 So. 2d 451 (Ala. 1995); *Ex parte St. Vincent's Hosp.*, 652 So. 2d 225, 230 (Ala. 1994).

225. *Melof*, 735 So. 2d at 1173-74.

226. *Id.*

227. See *id.*

228. *Id.* at 1181.

stitution, this Court, on several occasions, has held specifically that Alabama's Constitution, particularly §§ 1, 6, and 22, guarantee equal protection of the laws. I have concurred in some of those opinions. See *Ex parte Jackson* and *Ex parte Branch*, which I wrote. Both of those cases state that §§ 1, 6, and 22, . . . combine to guarantee equal protection of the laws.²²⁹

Similarly, Chief Justice Hooper concurred specially. He stated: "The provisions of §§ 1, 6, and 22, are just three examples of the many rights and protections contained in the Alabama Constitution of 1901. We must apply those provisions, and the protections provided by the statutes passed by the legislature, *to all persons equally*."²³⁰

In a well-reasoned special concurrence, Justice See concluded:

The main opinion disposes of this claim [that subjecting Plaintiffs' retirement benefits to state taxation violates the equal protection provisions—Article I, §§ 1, 6, and 22] by stating that the Constitution of Alabama of 1901 does not contain an equal-protection provision. Although the main opinion correctly states that there is no single, express equal-protection provision in the Constitution of Alabama of 1901, I do not believe it follows that there can be no claim of denial of equal protection cognizable under the Constitution of Alabama. To accomplish the rule of law, all provisions of the Constitution of Alabama of 1901 are attended by principles of equal protection of the law. Any equal-protection claim, however, must be founded in the language of the constitution.²³¹

It is thus apparent that the conclusive language of the main opinion in *Melof* is significantly qualified by the concurring opinions.

Subsequent to *Melof*, in *Hutchins v. DCH Regional Medical Center*, the Alabama Supreme Court suggested that "[t]he question whether §§ 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the citizens of Alabama equal protection under the laws remains in dispute."²³² However, the court recognized an equal protection guarantee under the Alabama Constitution in *Cackowski v. Wal-Mart Stores, Inc.*, where the plaintiff argued that the Alabama Medical Liability Act, requiring the plaintiff to prove negligence by a higher standard (substantial evidence) than was required of the defendant to prove

229. *Id.* at 1188 (Maddox, J., concurring specially) (emphasis added) (internal citations omitted).

230. *Melof*, 735 So. 2d at 1187 n.4 (Hooper, C.J., concurring specially).

231. *Id.* at 1194 (See, J., concurring specially) (footnotes omitted).

232. 770 So. 2d 49, 59 (Ala. 2000).

contributory negligence (reasonable satisfaction), violated the plaintiff's equal protection guarantee under the Alabama Constitution.²³³ The court held that the language of the statute requiring proof by substantial evidence of all issues of fact had the effect of requiring Wal-Mart to prove the affirmative defense of contributory negligence by substantial evidence.²³⁴ The court stated, "[b]ecause each side was required to prove its case by substantial evidence, we conclude that § 6-5-549 does not violate the Equal Protection Clause of the United States Constitution, or §§ 1, 6, and 22 of Article I, Constitution of Alabama 1901."²³⁵

The substance of the argument against equal protection under the Alabama Constitution is the absence of an express equal protection clause and, therefore, no guarantee of equal protection. However, in no case has a majority opinion of the Alabama Supreme Court ever concluded that there is no guarantee of equal protection under the Alabama Constitution.

V. CONCLUSION

In considering issues relating to equal protection under the Alabama Constitution, the Alabama Supreme Court has taken three positions. First, the court has adopted an expansive and liberal interpretation based on historical constitutional principles and precedents in Alabama case law holding that specific sections of article I, singly or in combination, provide equal protection guarantees. This approach is supported by cases from other jurisdictions applying similar provisions of their state constitutions. Second, and more recently, the court has suggested that it will apply a more narrow and focused analysis to determine if particular statutes violate specific sections of the constitution such as sections 1, 6, and 22. Third, there is some sentiment on the court to deny any equal protection guarantee because of the absence of an express equal protection clause. However, this approach has never commanded a majority of the court.

One may conclude that Alabama citizens do enjoy the guarantee of equal protection of the laws under the Alabama Constitution though the ebb and flow of judicial philosophy will determine how expansively or how rigidly those rights will be applied in specific fact situations.

233. 767 So. 2d 319, 330 (Ala. 2000).

234. *Cackowski*, 767 So. 2d at 330.

235. *Id.*