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The Equal Protection of the Laws

*Joseph Tussman and Jacobus tenBroek**

NOTHING in the annals of our law better reflects the primacy of American concern with liberty over equality than the comparative careers of the due process and equal protection clauses of the Fourteenth Amendment. The former, after a brief germinal period, flourished mightily. The latter, characterized by Mr. Justice Holmes as "the last resort of constitutional lawyers" has long been treated by the Court as a dubious weapon in the armory of judicial review. But after eighty years of relative desuetude, the equal protection clause is now coming into its own. While it still has not reached the pre-eminence or attained the scope its framers intended, recent decisions of the United States Supreme Court unmistakably indicate its growing importance.

The doctrine of equality is, of course, embodied in the Declaration of Independence. The incorporation of that doctrine into the Fourteenth Amendment, recent research indicates, was largely affected by the forces of organized abolitionism.¹ We now know that the equal protection clause was designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights—especially life, liberty, and property—and to do so equally. We also know that the equal protection clause, the only clause of section one of the Fourteenth Amendment that added new language to the Constitution, was originally regarded as the most basic and sweeping of the three, although they were admittedly overlapping and duplicatory. It alone is found in virtually all the forms of the proposed amendment in the Thirty-ninth Congress. Embodied explicitly in the Freedman's Bureau, Civil

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¹ GRAHAM AND TENBROEK, ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (to be published in the near future).

Rights, and other bills, sponsored alike by Bingham, Stevens, Trumbull, Sumner, and Wilson, the equal protection clause was the common meeting ground of those who carried the Amendment through the Thirty-ninth Congress.

But the purposes of these framers received short shrift at the hands of the Supreme Court. The revolution in the federal system, which was the Amendment's principal goal, fell victim to the Court's doctrine that only state action was reached. The privileges and immunities clause was officially killed in the *Slaughter-House* cases.² The due process clause, though also hampered by the state-action doctrine, became the cornerstone of the judicial defense of property and the system of natural liberty. While the equal protection clause, its natural-rights sweep and state-inaction coverage completely ignored, was relegated to a secondary position.

The recent increased use of the equal protection clause by the Court, in a context which suggests further development, calls for an analysis of its present status and possibilities and a critique of its use by the Court.

The injunction that no state "shall deny to any person within its jurisdiction the equal protection of the laws" might appear at first glance to be simply a demand for administrative fairness, the historically familiar assertion that all men must stand equal before the law, that justice must be blind to wealth or color, to rank or privilege. But early in its career, the equal protection clause received a formulation which strongly suggested that it was to be more than a demand for fair or equal enforcement of laws; it was to express the demand that the law itself be "equal." In *Yick Wo v. Hopkins*, Mr. Justice Matthews said that "The equal protection of the laws is a pledge of the protection of equal laws."³ This has been frequently cited with approval and has never been challenged by the Court. It is a statement that makes it abundantly clear that the quality of legislation as well as the quality of administration comes within the purview of the clause.

The subsequent career of the equal protection clause as a standard for the criticism of legislation has moved along several lines. First, it has operated as a limitation upon permissible legislative classification. This is its most familiar role. Second, it is used to oppose "discriminatory" legislation. And third, it shares with due process the

² (1873) 16 Wall. 36.

³ (1886) 118 U. S. 356, 369.

task of imposing "substantive" limits upon the exercise of the police power.

1. EQUAL PROTECTION AND CLASSIFICATION

a. *The Problem*

In the years immediately following the adoption of the Fourteenth Amendment, with its apparent requirement of equality, the United States Supreme Court found it necessary to reaffirm the right of state legislatures to pass "special" legislation. A state, said the Court, is not compelled to "run all its laws in the channels of general legislation";⁴ "the Fourteenth Amendment . . . does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate";⁵ and, "Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be attained by it."⁶

The classical statement of this unchallenged view is found in *Barbier v. Connolly*: ". . . neither the [Fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good."⁷

The contrast here is between "general" legislation which applies without qualification to "all persons" and "special" legislation which applies to a limited class of persons. It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons. The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals.

We thus arrive at the point at which the demand for equality con-

⁴ *Bachtel v. Wilson* (1907) 204 U. S. 36, 41.

⁵ *Hayes v. Missouri* (1887) 120 U. S. 68, 71.

⁶ *Home Insurance Co. v. New York* (1890) 134 U. S. 594, 606.

⁷ (1885) 113 U. S. 27, 31.

fronts the right to classify. For it is the classification which determines the range of persons affected by the special burden or benefit of a law which does not apply to "all persons." "It is of the essence of classification," said Mr. Justice Brewer in 1898, "that upon the class are cast . . . burdens different from those resting upon the general public Indeed, the very idea of classification is that of inequality. . . ."⁸

Here, then, is a paradox: The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And "the very idea of classification is that of inequality." In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification.⁹

The essence of that doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same.¹⁰ But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated. The difficulties concealed in this proposition will be analyzed in the following section.

b. *Reasonable Classification*

We begin with an elementary proposition: To define a class is simply to designate a quality or characteristic or trait or relation, or any combination of these, the possession of which, by an individual, determines his membership in or inclusion within the class. A legislature defines a class, or "classifies," when it enacts a law applying to "all aliens ineligible for citizenship," or "all persons convicted of three felonies," or "all citizens between the ages of 19 and 25" or "foreign corporations doing business within the state."

This sense of "classify" (i.e., "to define a class") must be distinguished from the sense in which "to classify" refers to the act of determining whether an individual is a member of a particular class, that is, whether the individual possesses the traits which define the

⁸ *Atchison, Topeka & S. F. R. R. v. Matthews* (1899) 174 U. S. 96, 106.

⁹ This doctrine of course existed in American constitutional law long before the Fourteenth Amendment. For early examples see *Holden v. James* (1814) 11 Mass. 396; *Vanzant v. Waddel* (Tenn. 1829) 2 Yerger 260, 270.

¹⁰ *Tigner v. Texas* (1940) 310 U. S. 141, 147.

class. Our concern in this essay is with "legislative classification," the first of these senses, since it is the defining of the class to which the law applies which constitutes the distinctly legislative classificatory activity to which the Court refers in conceding that the power to classify belongs to the legislature.

It is also elementary that membership in a class is determined by the possession of the traits which define that class. Individual *X* is a member of class *A* if, and only if, *X* possesses the traits which define class *A*. Whatever the defining characteristics of a class may be, every member of that class will possess those characteristics.

Turning now to the reasonableness of legislative classifications, the cue is to be taken from our earlier reference to the requirement that those similarly situated be similarly treated. A reasonable classification is one which includes all who are similarly situated and none who are not. The question is, however, what does that ambiguous and crucial phrase "similarly situated" mean? And in answering this question we must first dispose of two errors into which the Court has sometimes fallen.

First, "similarly situated" cannot mean simply "similar in the possession of the classifying trait." All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test. Yet is it instructive to listen to Mr. Justice Harlan in *Powell v. Pennsylvania*: "The objection that the statute is repugnant to the clause of the Fourteenth Amendment forbidding the denial by the State to any person within its jurisdiction of the equal protection of the laws, is untenable. The Statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business."¹¹

What is striking about this statement is the easy dismissal of the equal protection issue on the grounds that the law applies equally to all to whom it applies. The law imposes a limitation on the class of "makers . . . of margarine." The requirement of equality is held to be satisfied simply because it applies to all makers of margarine. By the same token a law applying to red-haired makers of margarine would satisfy the requirements of equality.¹²

¹¹ (1888) 127 U. S. 678, 687.

¹² We note also that the above decision antedates the full development of the implications of the shift from equal protection of the laws to the "protection of equal laws."

The second error in the interpretation of the meaning of similarly situated arises out of the notion that some classes are unnatural or artificial. That is, a classification is sometimes held to be unreasonable if it includes individuals who do not belong to the same "natural" class. We call this an error without pausing to fight the ancient controversy about the natural status of classes. All legislative classifications are artificial in the sense that they are artifacts, no matter what the defining traits may be. And they are all real enough for the purposes of law, whether they be the class of American citizens of Japanese ancestry, or the class of makers of margarine, or the class of stockyards receiving more than one hundred head of cattle per day, or the class of feeble-minded confined to institutions.

The issue is not whether, in defining a class, the legislature has carved the universe at a natural joint. If we want to know if such classifications are reasonable, it is fruitless to consider whether or not they correspond to some "natural" grouping or separate those who naturally belong together.¹³

But if we avoid these two errors, where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.

The purpose of a law may be either the elimination of a public "mischief" or the achievement of some positive public good. To simplify the discussion we shall refer to the purpose of a law in terms of the elimination of mischief, since the same argument holds in either case. We shall speak of the defining character or characteristics of the legislative classification as the trait. We can thus speak of the relation of the classification to the purpose of the law as the relation of the Trait to the Mischief.

A problem arises at all because the classification in a law usually does not have as its defining Trait the possession of or involvement with the Mischief at which the law aims. For example, let us suppose that a legislature proposes to combat hereditary criminality—an ad-

¹³ For examples of this error see *Pacific Express Co. v. Seibert* (1892) 142 U. S. 339, 354: "In the nature of things . . . they belong to different classes." And *Gulf, Colorado & S. F. Ry. v. Ellis* (1897) 165 U. S. 150, 156, which quotes with approval a state court decision, *Debrill v. Morris' Heirs* (Tenn. 1891) 15 S. W. 87, 95, saying, ". . . if it [a statute] attempts to create distinctions and classifications between citizens of this State, the basis of such classification must be natural and not arbitrary."






mitted mischief—and that the sterilization of transmitters of hereditary criminality is a permissible means to that end. Now if the legislature were to pass a law declaring that for the purpose of eliminating hereditary criminality, all individuals who are tainted with inheritable criminal tendencies are to be sterilized, and if it provided for proper administrative identification of transmitters of hereditary criminality, our problem would largely disappear. The class, being defined directly in terms of the Mischief, automatically includes all who are similarly situated with respect to the purpose of the law.

This procedure requires, however, delegation of considerable discretion to administrators to determine which individuals to sterilize. Legislators, reluctant to confer such discretion, tend to classify by Traits which limit the range of administrative freedom. Suppose then, that they pass a law providing for the sterilization of all persons convicted of three felonies. The “reasonableness” of this classification depends upon the relation between the class of three-time felons and the class of hereditary criminals.

In other words, we are really dealing with the relation of two classes to each other. The first class consists of all individuals possessing the defining Trait; the second class consist of all individual possessing, or rather, tainted by, the Mischief at which the law aims. The former is the legislative classification; the latter is the class of those similarly situated with respect to the purpose of the law. We shall refer to these two classes as *T* and *M* respectively.

Now, since the reasonableness of any class *T* depends entirely upon its relation to a class *M*, it is obvious that it is impossible to pass judgment on the reasonableness of a classification without taking into consideration, or identifying, the purpose of the law. That the Court has erred seriously in attempting to do this will be shown subsequently.

There are five possible relationships between the class defined by the Trait and the class defined by the Mischief. These relationships can be indicated by the following diagrams:

- (1)  : All *T*'s are *M*'s and all *M*'s are *T*'s
- (2)  : No *T*'s are *M*'s
- (3)  : All *T*'s are *M*'s but some *M*'s are not *T*'s
- (4)  : All *M*'s are *T*'s but some *T*'s are not *M*'s
- (5)  : Some *T*'s are *M*'s; some *T*'s are not *M*'s; and some *M*'s are not *T*'s

One of these five relationships holds in fact in any case of legislative

classification, and we will consider each from the point of view of its "reasonableness."

The first two situations represent respectively the ideal limits of reasonableness and unreasonableness. In the first case, the classification in the law coincides completely with the class of those similarly situated with respect to the purpose of the law. It is perfectly reasonable. In the second case, no member of the class defined in the law is tainted with the mischief at which the law aims. The classification is, therefore, perfectly unreasonable. These two situations need not detain us.

Classification of the third type may be called "under-inclusive." All who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include. Since the classification does not include all who are similarly situated with respect to the purpose of the law, there is a *prima facie* violation of the equal protection requirement of reasonable classification.

But the Court has recognized the very real difficulties under which legislatures operate—difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to reshape—and it has refused to strike down indiscriminately all legislation embodying the classificatory inequality here under consideration.

In justifying this refusal, the Court has defended under-inclusive classifications on such grounds as: the legislature may attack a general problem in a piecemeal fashion; "some play must be allowed for the joints of the machine";¹⁴ "a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset . . .";¹⁵ "the law does all that is needed when it does all that it can . . .";¹⁶ and—perhaps with some impatience—the equal protection clause is not "a pedagogic requirement of the impracticable."

These generalities, while expressive of judicial tolerance, are not, however, very helpful. They do not constitute a clear statement of the circumstances and conditions which justify such tolerance—which justify a departure from the strict requirements of the principle of equality. Mr. Justice Holmes, in urging tolerance of under-inclusive classifications, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for

¹⁴ *Missouri, K. & T. Ry. v. May* (1904) 194 U.S. 267, 270.

¹⁵ *Keokee Coke Co. v. Taylor* (1914) 234 U.S. 224, 227.

¹⁶ *Buck v. Bell* (1927) 274 U.S. 200, 203.

the law which would not require with equal force its extension to those whom it leaves untouched.¹⁷ But what is a "fair reason" for over-riding the demand for equal treatment?

Forewarned about the dangers of pedagogic impracticability, and fully aware that we cannot subject legislatures to the demands of an impossible perfectionism, we suggest that there are two general sorts of practical considerations to which weight must be given in determining when and how far departures from ideal standards of classification are justified. The first sort raises administrative, the second, political questions.

The legislature cannot very well be required to impose upon administrative agencies tasks which cannot be carried out or which must be carried out on a large scale at a single stroke. While it may be desirable to sterilize all feeble-minded persons, administrative difficulties might justify limiting the law to the sterilization of the institutionalized feeble-minded. The bird in hand may sometimes be plucked before snares are set for those in the bush.

The "piecemeal" approach to a general problem, permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt to treat the old. Administrative expedients must be forged and tested. Legislators, recognizing these factors, may wish to proceed cautiously, and courts must allow them to do so.

This is not to say that any plea of administrative inconvenience or impossibility should receive automatic deference. Nor that the legislative right to "experiment" is very wide. The Magna Carta for legislative curiosity is not to be found even in the Holmesian dictum that "all life is an experiment." But, abuses apart, these factors have weight in justifying under-inclusive classifications.

The political considerations are more difficult to deal with, and at the same time more significant in their implications. The legislature, to be sure, "has done all that is needed when it has done all that it can." But when has it done that? It is one thing to say "this is all we can do within the limits of administrative possibilities." It is quite another thing to say, "this is all we can do within the limits set by certain political considerations, such as the necessity of winning re-

¹⁷ *Supra* note 14 at 269.

election or appeasing powerful pressure groups." Probable retribution at the polls in a coming election unless farmers, for example, are given special classificatory treatment in a law, may set limits to what a legislature thinks it can do—and still be re-elected. But does a legislature have a "right to re-election" to which a court must defer? Does the resentment of the farm vote, or the labor vote, constitute a "fair reason" for failing to extend operation of a law to these groups if they are otherwise tainted with the mischief at which the law aims? Can the legislature successfully plead pressure?

The answer to these questions raises fundamental issues about the theory of legislation and the state. If we accept the pressure group theory, a law is properly the resultant of pressures exerted by competing interests. If so, does it not follow that the stronger groups will succeed in winning legislation of a favorable or "unequal" character? The demand for equal laws becomes meaningless in this context. The legislature, on this view, is simply the focal point of competing forces—a social barometer faithfully registering pressures. Can the Court demand of a barometer that it ignore pressure?

It would appear that the requirement that laws be equal rests upon a theory of legislation quite distinct from that of pressure groups—a theory which puts forward some conception of a "general good" as the "legitimate public purpose" at which legislation must aim, and according to which the triumph of private or group pressure marks the corruption of the legislative process.

The development and evaluation of these alternative theories is an enterprise that falls outside the scope of this essay. We would suggest, however, that the pledge of the protection of equal laws is intelligible only within the framework of the second of these alternatives, and that the pressure theory of legislation and the equal protection requirement are incompatible. Accordingly, if this is true, we must conclude that legislative submission to political pressure does not constitute a fair reason for failure to extend the operation of a law to those similarly situated whom it leaves untouched.

Yet it is impossible altogether to ignore the pressure situation in which legislatures operate. Everything that emerges from the legislative forum is tainted by its journey through the lobby. And the demand for perfection must inevitably compromise with the hard facts of political life. What is at stake here is the extent to which compromise is necessary or desirable. It is not the purpose of this analysis to suggest that the mechanical application of convenient formulae

can be substituted for the complex and creative act of judgment. We must rely, as at so many other points, upon judicial statesmanship.

It is probably true, however, that nowhere more than in the area of equal protection does tolerance towards deviation from great principle go by the name of statesmanship. Appreciation of difficulties and sympathetic tolerance are needed. But judicial statesmen are also concerned to strengthen and guard the integrity of the legislative process. This may well require the testing of legislation by higher standards than legislatures sometimes adopt for themselves. With respect to under-inclusive classifications this means that the Court, while giving weight to pleas of administrative difficulties, must stand guard against an overconcern for mere "convenience"; and, while recognizing the facts of pressure politics, must place a barrier in the path of over-eager acquiescence.

A final word about under-inclusive classification. It is possible to avoid the charge of under-inclusiveness by the simple device of giving a narrower formulation of the purpose of the law. But while it may be possible to evade the unreasonable classification charge by this device, it is not possible to escape the equal protection requirement. For that requirement is not limited to reasonable classification. It has other aspects, some of which, as we shall see, are brought into play precisely by the narrow formulation of purpose. Consequently, an attempt to get around the equal protection clause by this evasion of its classificatory requirements will prove futile.

The fourth type of classification imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims. It can thus be called "over-inclusive." Herod, ordering the death of all male children born on a particular day because one of them would some day bring about his downfall, employed such a classification. It is exemplified by the quarantine and the dragnet. The wartime treatment of American citizens of Japanese ancestry is a striking recent instance of the imposition of burdens upon a large class of individuals because some of them were believed to be disloyal.

The *prima facie* case against such departures from the ideal standards of reasonable classification is stronger than the case against under-inclusiveness. For in the latter case, all who are included in the class are at least tainted by the mischief at which the law aims; while over-inclusive classifications reach out to the innocent bystander, the hapless victim of circumstance or association.

It should be noted that such classifications fly squarely in the face of our traditional antipathy to assertions of mass guilt and guilt by association. Guilt, we believe, is individual, and to act otherwise is to deprive the individual of due process of law. But while the courts have preferred to deal with this situation in due process terms, the reasonable classification requirement of the equal protection clause is also violated.

But in spite of the flagrant injustice of over-inclusive classifications, there are circumstances in which legislation of this character has been, and perhaps must be, sustained. The circumstances are those of emergency, which must be grave and imminent if the impositions are harsh and onerous—as in the case of the wartime evacuations of Japanese-Americans—or less grave but still “emergency” if the impositions are relatively mild—as in the case of a police road block. The problem for the court is simply whether there exists or existed a genuine emergency situation calling for emergency measures and whether there was “good faith” in the attempt to deal with it.

The nature of this justification for sustaining over-inclusive classification suggests a further consideration. A genuine emergency will usually involve the exercise of emergency power by some non-legislative agency. The legislative process is not particularly designed for dealing with emergencies. We would expect to find, therefore, very few cases of legislative classification which can successfully plead emergency justification, and it may well be held that the initial presumption, in the case of legislation, should run against the emergency plea.

The final situation to be considered is one in which the previously discussed factors of under-inclusiveness and over-inclusiveness are both present. While it may seem paradoxical to assert that a classification can be at once over-inclusive and under-inclusive, many classifications do, in fact, fall into this category, that is, they can be challenged separately on both grounds.

For example, in the *Hirabayashi*¹⁸ case, the classification of “American citizens of Japanese ancestry” for the purpose of meeting the dangers of sabotage can be challenged both on the grounds that it is under-inclusive, since others—American citizens of German or Italian ancestry—are equally under the strain of divided loyalties, and that it is over-inclusive, since it is not supposed that all American citizens of Japanese ancestry are disloyal. The sustaining of this

¹⁸ *Hirabayashi v. United States* (1943) 320 U. S. 81.

classification, therefore, requires both the finding of sufficient emergency to justify the imposition of a burden upon a larger class than is believed tainted with the Mischief and the establishment of "fair reasons" for failure to extend the operation of the law to a wider class of potential saboteurs.

No problems that have not already been discussed, however, arise in connection with classifications of this type.

Thus far we have spoken of reasonable classification in its bearing upon legislative activity. But it is obvious that the analysis extends to administrative action also. This is true not only because there is delegation of legislative power to non-legislative agencies, but because in the execution of legislatively determined policy there is a considerable range of classificatory discretion remaining in administrative hands. The exercise of that discretion can be judged reasonable or unreasonable by the same criteria as are relevant to the judgment of legislative activity. The reasonable classification requirement applies, in fact, to any classificatory activity involving "state action." Some interesting possibilities are suggested by the discernible tendency to broaden the meaning of "state action."

c. *Forbidden Classification*

The bearing of the equal protection clause on the problem of classification is not exhausted by the reasonable classification requirement. The assertion of human equality is closely associated with the denial that differences in color or creed, birth or status, are significant or relevant to the way in which men should be treated. These factors, the egalitarian asserts, are irrelevant accidents in the face of our common humanity. To these differences in the supplicants before her bar, Justice must be blind. Laws which classify men by color or creed or blood accordingly, are repugnant to the demand for equality, and therefore, such traits should not be made the basis for the classification of individuals in laws. Speaking of "indigence," for example, Mr. Justice Jackson has said, "The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color."¹⁹

"Constitutionally an irrelevance"! How much can be made of this phrase? Does it not suggest that there are some differences between men which cannot constitutionally be recognized, that classifications based upon such irrelevancies are repugnant to the Constitu-

¹⁹ *Edwards v. California* (1941) 314 U.S. 160, 184.

tion? The analysis in the previous section has shown that classifying traits must have a reasonable relation to the purpose of a law. We now suggest the possibility that there are some traits which can never be made the basis of a constitutional classification.

There is here a possible parallel between the equal protection and the due process clauses. The latter in its "substantive" development is interpreted to say that there are some rights which legislatures cannot impair by any process. It would be an analogous development if the courts were to supplement the reasonable classification doctrine with the assertion that there are some classifications which can never be made no matter how reasonably they may be related to a legitimate public purpose.²⁰

The Supreme Court has barely avoided an explicit affirmation of the forbidden classification doctrine. It has come close enough, in some statements, to suggest that the doctrine actually is implicit in the Court's thinking. For example, in his dissent in the *Kotch* case, Mr. Justice Rutledge, joined by Messrs. Justices Reed, Douglas, and Murphy, says:

"The result of the decision . . . is to approve as constitutional state regulation which makes admission to the ranks of pilots turn finally on consanguinity. Blood is, in effect, made the crux of selection. That, in my opinion, is forbidden by the Fourteenth Amendment's guaranty against the denial of the equal protection of the laws."²¹

"It is not enough to avoid the Amendment's force," says Mr. Justice Rutledge, "that a familial system may have a tendency or, as the Court puts it, a direct relationship to the end of securing an efficient pilotage system. Classification based on the purpose to be accomplished may be said abstractly to be sound. But when the test . . . in fact is race or consanguinity, it cannot be used constitutionally to bar all except a group chosen by such a relationship from public employment. That is not a test; it is a wholly arbitrary exercise of power."²²

And after granting that a familial system might even be the most effective way of securing "the highest degree of skill and competence," Rutledge concludes: "It is precisely because the Amendment forbids enclosing those areas by legislative lines drawn on the basis of race,

²⁰ The equal protection clause, so interpreted, would not be the only constitutional ban against certain classifying traits. For Art. VI, § 3, in barring religious tests, declares in effect that religious belief cannot be employed as a classifying trait in determining qualifications for public office.

²¹ *Kotch v. Pilot Comm'rs.* (1947) 330 U. S. 552, 565.

²² *Ibid.*

color, creed, and the like, that, in cases like this, the possibly most efficient method of securing the highest development of skills cannot be established by law."²³

This is about as close as the Court has come to the statement that, even if a public good is aimed at, a classification based on a "forbidden" trait invalidates a law. The argument does not deny that the classification in question may be reasonably related to a legitimate public purpose, but asserts that even if it is so related it is invalid. While it cannot be advanced as an established and matured judicial doctrine, it is, nevertheless, worth consideration as an emerging one.

Perhaps the chief value of the doctrine would lie in its possible use as the basis for a frontal judicial attack upon segregation laws. Such laws have avoided the condemnation of the equal protection clause under the stubbornly persistent "separate but equal" doctrine. The forbidden classification doctrine would offer a way out. Segregation laws of all types, based upon racial, religious, or other such "constitutionally irrelevant" traits would fall by reason of the employment of those traits alone, and no "separate but equal" argument could save them.

Tempting as this possibility appears to those who are concerned with the perennial struggle for equality, the doctrine also presents difficulties. Chief among these, perhaps, is the problem of determining which traits to treat as forbidden. Candidates for this position today might be designated with relative ease—race, alienage, color, creed. Some of these might be challenged and others offered as candidates. One would hesitate to close the list arbitrarily and foreclose the future. Another epoch might discover constitutional irrelevancies of which we are unaware.

Difficulties of this sort seem theoretically insurmountable. It should be remembered, however, that substantive due process is faced with exactly the same difficulties, and that they have not prevented a flourishing career for that doctrine. It appears, as equal protection and due process are compared, that we are far less hesitant about the claims of liberty and property than the claims of human equality.

Two possible forms of this doctrine must be distinguished. The first is the assertion that there are some traits which never in fact bear a reasonable relation to any legitimate public purpose and are consequently always "irrelevant" in this sense. Such an a priori assertion of universal irrelevance would be difficult to defend. Moreover, if

²³ *Id.* at 566.

there are such traits, their use in classifications would never pass the reasonable relation test. This form of the doctrine is both indefensible and gratuitous.

The significant formulation, suggested by the Rutledge dissent in the *Kotch* case, is that even if the classification is reasonably related to a legitimate public purpose, the employment of a forbidden trait invalidates it.

d. *Suspect Classification*

If the forbidden classification doctrine seems too extreme to give promise of further judicial development, there is a milder form of that doctrine which is in effect. It is the doctrine which establishes a presumption of unconstitutionality against a law employing certain classifying traits.

Speaking for the Court in the *Korematsu* case, Mr. Justice Black said, "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that the courts must subject them to the most rigid scrutiny."²⁴

Presumably, this "rigid scrutiny" is also called for by classifications other than those which curtail the civil rights of any single racial group. But an attempt at an exhaustive listing of suspect classifications would be pointless. It suffices to say that this is of necessity a rather loose category. Its content, at any particular time, will depend upon the area in which the principle of equality is struggling against the recurring forms of claims to special and unequal status—whether along racial, religious, economic, or even political, lines.

But if there are "suspect" classifications requiring "rigid scrutiny," of what are they suspect and for what are they rigidly scrutinized? The answer leads in two directions. On the one hand, the reasonable relation test must be strictly applied. On the other hand, the Court must satisfy itself on the question of the discriminatory character of the regulation. The first of these has already been discussed. The problem of discriminatory legislation will be considered in the following section.

2. DISCRIMINATORY LEGISLATION

The equal protection clause has been used by the courts chiefly as a basis for the criticism of legislative classification. In this capa-

²⁴ *Korematsu v. United States* (1944) 323 U. S. 214, 216.

city the clause, while it has required the identification of the "purpose" of the law, has not involved or required a criticism of that purpose. But the court has gone beyond the use of the equal protection clause as a classification requirement. It has interpreted the clause as a ban against "discriminatory" legislation, and thus has become involved in the criticism of legislative purpose.

The history of the declaration that the equal protection clause prohibits legislation which is discriminatory takes us from the *Yick Wo*²⁵ to the *Takahashi*²⁶ cases. The doctrine is variously phrased. Sometimes it is expressed in the rule that, at least when touching civil rights, legislation must be "based on more than prejudice." Sometimes the Court condemns "oppressive discrimination" or "unreasonable and arbitrary discrimination"²⁷ against certain groups. In *Yick Wo v. Hopkins* the discrimination struck down was one for which no reason existed "except hostility to the [Chinese] race and nationality" and which, therefore, "in the eye of the law is not justified."²⁸ In *Truax v. Raich* Mr. Justice Hughes said that "It is no answer to say, as it is argued, that the act proceeds upon the presumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself . . ."²⁹ And to permit this, Hughes adds, would be to convert the equal protection clause into "a barren form of words."³⁰ In *Korematsu v. United States* this doctrine was repeated with emphasis: "Pressing public necessity may sometimes justify the existence of such restrictions" curtailing "the civil rights of a single racial group. . . ." "Racial antagonism never can."³¹ Again, in *Takahashi v. Fish and Game Commission* the Court asserted that a statute of Congress and the Fourteenth Amendment "protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color."³² Finally, in *Kotch v. Board of River Pilot Commissioners* Mr. Justice Black stated: "This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on

²⁵ *Yick Wo v. Hopkins* (1886) 118 U.S. 356.

²⁶ *Takahashi v. Fish & Game Com'n.* (1948) 334 U.S. 410.

²⁷ *Perez v. Sharp* (1948) 32 Cal. (2d) 711, 198 P. (2d) 17.

²⁸ *Supra* note 25 at 374.

²⁹ (1915) 239 U.S. 33, 41.

³⁰ *Ibid.*

³¹ *Supra* note 24 at 216.

³² *Supra* note 26 at 420.

grounds wholly irrelevant to the achievement of the regulation's objectives. An example would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no reasonable relation to the regulated activities."³³

What is striking about these statements is the use of such notions as "hostility" and "antagonism." Laws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals. The *Korematsu* case is a particularly forceful example. In justifying the war-time measures against American citizens of Japanese ancestry the Court found it necessary to assert that the aim of Congress and the Executive was protection against sabotage and that "Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire. . . ."³⁴ This is surely a judgment about legislative and executive motive, and apparently the case turns upon whether the exclusion order is an expression of racial prejudice.

It is indeed difficult to see that anything else is involved in these discriminatory legislative cases than questions of motivation. Hostility, antagonism, prejudice—these surely can be predicated not of laws but of men; they are attitudes, states of mind, feelings, and they are qualities of law-makers, not of laws.³⁵

Viewed in this light the prohibition against discriminatory legislation is a demand for purity of motive. It erects a constitutional barrier against legislative motives of hate, prejudice, vengeance, hostility, or, alternatively, of favoritism, and partiality. The imposition of special burdens, the granting of special benefits, must always be justified. They can only be justified as being directed at the elimination of some social evil, the achievement of some public good. When and if the

³³ *Supra* note 21 at 556.

³⁴ *Supra* note 24 at 223.

³⁵ It is perhaps necessary to point out that there are two senses of the term "discrimination" which are often confused. In one sense, to exercise discrimination is simply to be discerning, to be quick at recognizing differences, to be cognitively alert. In the second sense, discriminatory action is action which is biased, prejudiced, unfair. It should be clear that legislators must, in the first sense, be discriminating. They must discern and recognize relevant distinctions and differences, they must draw lines, they must, in short, classify—and classify reasonably. What is forbidden as discriminatory is the bias and prejudice suggested by the second sense of that term.

proscribed motives replace a concern for the public good as the "purpose" of the law, there is a violation of the equal protection prohibition against discriminatory legislation.³⁶

But only to state or clarify the meaning of the discriminatory legislation doctrine in these terms is to understand the Court's reluctance to use this doctrine freely. Whenever it does so it is in the unenviable position of calling into question the integrity of legislative motive. Mr. Justice Murphy, concurring in the *Oyama* opinion, was perfectly willing to invalidate California's alien land law as an expression of "racism,"³⁷ as "spawned of the great anti-Oriental virus."³⁸ He was ready to examine the circumstances surrounding the original enactment of the alien land law to over-ride California's disclaimer of "any implication that the Alien Land Law is racist in its origin, purpose, or effect."³⁹ But the majority of the Court has been less willing than Mr. Justice Murphy to follow this line. Should the temper of the Court change, it could, no doubt, find that segregation laws aim at white supremacy or are spawned of the great anti-Negro virus and thus make belated amends for the shameful history of the "separate but equal" evasion.

But more than a reluctance to question the integrity of legislative motive is at stake. To become involved in the search for motives, in the analysis or psychoanalysis of legislative behavior, is a task any sensible mortal might well shun in the easiest of circumstances. Add the fact that we are dealing with a sizeable body of men and the task becomes virtually hopeless. For it cannot be taken for granted that any particular law is the product of a common rather than the resultant of conflicting motives.

Moreover, the very demand for a non-partisan and impartial attitude on the part of legislators meets with opposition from the widespread view that a disinterested legislator is in fact betraying the special interests of his constituents, which it is his chief function to promote.

³⁶ The fact that the Court sometimes speaks of laws as discriminatory in "result" does not really broaden the discriminatory legislation category beyond the field of motive. For this situation is generally one in which—as for example in the *Yick Wo* and *Kotch* cases—the challenged statute on its face is quite innocuous. Only its application reveals the result that the classification falls along lines of race or consanguinity. This result raises the question of whether the classification, treated as "suspect," meets the reasonable relation test or whether it is the expression of a discriminatory motive. It is thus, apart from the classification problem, purely a question of motive.

³⁷ *Oyama v. California* (1948) 332 U. S. 633, 650.

³⁸ *Id.* at 651.

³⁹ *Id.* at 650.

Finally, the consideration of motive is complicated by the fact that it is altogether possible for a law which is the expression of a forbidden motive to be a good law. What is to be done with a law which, passed with the most questionable of motives, still makes a positive contribution to the public good? Suppose the legislature decides to "get" Standard Oil, or Lovett, or Petrillo, but does so through a law which hits all monopolies, all government employees, or all labor unions. Does the forbidden motive vitiate a law that may operate generally and to the public advantage?

That, in the face of these difficulties, we can still speak of a judicial prohibition against discriminatory legislation is a minor miracle.

There are three situations which call the doctrine of forbidden motives into operation: First, of course, is the situation in which a law employs a suspect classification—a classification falling along lines of color, race, ancestry, etc. Second, there is the situation in which the purpose or end of a law is "narrowly" formulated. Virtually every purpose or goal at which a law aims can be regarded as part of a wider or more inclusive purpose. No single act could be formulated, for example, wholly to protect the public health, safety, or morals. These objectives must be achieved by partial and intermediate steps. The degree of generality required of laws is, of course, not determined by the doctrine of discriminatory legislation. But narrowly formulated objectives may give rise to the suspicion that they originated in a spirit of partiality and that the very narrowness of the formulation is an attempt to evade classification requirements. Third, there is the case of under-inclusive classifications. It has been pointed out that not all under-inclusive classifications are overthrown. But when a classification is under-inclusive, the Court must satisfy itself that there is "no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched."⁴⁰ It is relevant to inquire, in this connection, whether the failure to extend the law to others similarly situated is due to the presence of forbidden legislative motive.

A recent case illustrating this situation is *Goesaert v. Cleary*.⁴¹ A Michigan statute provides that bartenders are to be licensed in cities over 50,000 population, but that no female may be so licensed unless she is the wife or daughter of the male owner of a licensed liquor establishment. The majority opinion deals in a rather jocular and off-

⁴⁰ *Missouri, K. & T. Ry. Co. v. May* (1903) 194 U.S. 267, 269.

⁴¹ (1948) 335 U.S. 464.

hand way with the problems of the "sprightly and ribald alewife" and, in an interesting display of goodnatureed male solidarity, finds it "entertainable" that "Michigan has not violated its duty to afford equal protection of the laws."⁴² It refuses to "give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."⁴³

But Mr. Justice Rutledge, joined by Messrs. Justices Douglas and Murphy in dissent, finds an arbitrary line drawn between male and female owners of liquor establishments, which would allow a wife and daughter to work as bar maids while the male owner may be always absent and prevents a female owner from working herself and employing her daughter as a barmaid even if a man is always present to keep order.

"This inevitable result of classification," says Mr. Justice Rutledge, "belies the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being of women who, but for the law, would be employed as bar maids. Since there could be no other conceivable justification for such discrimination against women owners of liquor establishments, the statute should be held invalid as a denial of equal protection."⁴⁴

The doctrine of discriminatory legislation—in essence a demand for purity or integrity of purpose or motive—though meaningful enough in many contexts is poorly adapted to the task of judicial review. Yet there are "viruses"—anti-oriental and others—to which legislatures are not immune and to which a ban on discriminatory legislation seems a partial antidote.

Even if the use of the discriminatory legislation doctrine were abandoned, the Court would not be wholly precluded from placing checks upon legislative purpose or motivation. For, first, where it finds or suspects that a law has its origin in a spirit of discrimination or partiality, it can apply the classification doctrine more rigorously. And second, it is developing a doctrine according to which the equal protection clause is held to prohibit the achievement of certain purposes or ends. This last development will be considered in the following section.

3. SUBSTANTIVE EQUAL PROTECTION

The final doctrinal development of the equal protection clause to be considered may well be called its substantive development. The

⁴² *Id.* at 466.

⁴³ *Id.* at 467.

⁴⁴ *Id.* at 468.

parallel with due process suggested by this term is deliberate and appropriate. This is not only because the equal protection clause is being used to preclude the attainment of certain results by the exercise of the police power but also because the results prohibited, or rather, the very rights guaranteed by the equal protection clause have, in the past, been considered as part of the guarantee of substantive due process.

This is a development to which the recent opinions of the United States Supreme Court in the restrictive covenant cases have given marked impetus.⁴⁵ The striking thing about these cases is that they were explicitly decided on equal protection grounds without reaching the due process clause urged by counsel. Yet the argument used is typical due process argument. Heavy reliance is placed on the *Buchanan*,⁴⁶ *Harmon*,⁴⁷ and *Deans*⁴⁸ cases, in which municipal restrictive covenant ordinances were struck down because they denied the "rights of white sellers and Negro purchasers of property, guaranteed by the due process clause of the Fourteenth Amendment."⁴⁹ The *Oyama* case is cited for the proposition that "a state law which denied equal enjoyment of property rights to a designated class of citizens of a specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws."⁵⁰ Finally, it is asserted that the discriminations imposed by the state courts in the restrictive covenant cases cannot "be justified as proper exertions of the state police power."⁵¹ Here the equal protection clause is placed in opposition to the state's police power in a manner typical of the use of substantive due process.

These cases thus reveal a decided judicial preference for the equal

⁴⁵ *Shelley v. Kraemer* (1948) 334 U. S. 1; *Hurd v. Hodge* (1948) 334 U. S. 24. In *Reagon v. Farmers' Loan & Trust Co.* (1894) 154 U. S. 362, 399, appears this remarkable statement: "The equal protection of the laws, which by the Fourteenth Amendment no state may deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public." Mr. Justice Hughes, in *Truax v. Raich*, virtually took the same position. Referring to the equal protection clause, he said, "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." (1915) 239 U. S. 33, 41.

⁴⁶ *Buchanan v. Warley* (1917) 245 U. S. 60.

⁴⁷ *Harmon v. Tyler* (1927) 273 U. S. 668.

⁴⁸ *City of Richmond v. Deans* (1930) 281 U. S. 704.

⁴⁹ *Hurd v. Hodge*, *supra* note 45 at 29.

⁵⁰ *Shelley v. Kraemer*, *supra* note 45 at 21.

⁵¹ *Ibid.*

protection clause carried to the extent of subsuming traditional due process argument under it. This conclusion is strengthened by the Court's handling of the District of Columbia restrictive covenant case.⁵² In the *Hirabayashi* case, the Court pointed out that "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation . . . as amounts to a denial of due process."⁵³ But from the Court's opinion in this and the closely related *Korematsu*⁵⁴ case, it is difficult to see that the absence of the equal protection clause impeded in any way the consideration of equal protection questions. The opinion in the more recent *Lea Act* case⁵⁵ comes close to an open avowal that the due process clause of the Fifth Amendment embodies all of the classification requirements of the equal protection clause of the Fourteenth. In the light of these cases, the Court's rejection of the Fifth Amendment—strongly urged by counsel—in the District of Columbia case is suggestive. The Court preferred another approach. It found judicial enforcement of restrictive covenants to be a violation of the specific language of Section 1977 of the Revised Statutes derived from Section One of the Civil Rights Act of 1866. But the Court went further to make equal protection a part of that section and a part of the public policy of the United States. It would not be consistent with that public policy, the Court said, "to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws."⁵⁶ Thus, the Court in the restrictive covenant cases not only reads due process arguments into the equal protection clause but goes out of its way to use the equal protection clause in preference to due process.

How is this development to be explained? Is it simply a product of judicial confusion encouraged by easy reference to the Fourteenth Amendment which contains both clauses? Is it a deliberate attempt to blur distinctions between equal protection and due process in order to facilitate the use of equal protection as a check upon federal action? While these possibilities are entertainable, there is perhaps a more significant alternative explanation.

When California attempted to hinder the movement of indigents

⁵² *Hurd v. Hodge*, *supra* note 45.

⁵³ *Hirabayashi v. United States* (1943) 320 U. S. 81, 100.

⁵⁴ *Korematsu v. United States* (1944) 323 U. S. 214.

⁵⁵ *Petrillo v. United States* (1947) 332 U. S. 1.

⁵⁶ *Hurd v. Hodge*, *supra* note 45 at 35.

into that state, the United States Supreme Court, in 1941, invalidated its statute as violative of the commerce clause.⁵⁷ Four justices, while concurring in the result, evidenced some misgivings.⁵⁸ Mr. Justice Jackson wrote that the movement of indigents did not fit very well into his notion of commerce, expressed concern over the "denaturing of human rights," and turned, therefore, "away from principles by which commerce is regulated to that clause of the Constitution by virtue of which Duncan is a citizen of the United States and which forbids any state to abridge his privileges or immunities as such."⁵⁹ This reluctance to shield human rights under the commerce clause may be equally expressed in the preference for equal protection over due process.

Due process is, after all, a weapon blunted and scarred in the defense of property. The present Court, conscious of its destiny as the special guardian of human or civil rights may well wish to develop some alternative to due process as a sanctuary for these rights. The equal protection clause has much to recommend it for this purpose. It was placed in our Constitution as the culmination of the greatest humanitarian movement in our history. It is rooted deep in our religious and ethical traditions. Is any other clause in the Constitution so eminently suited to be the ultimate haven of human rights?

Whatever the reasons, however, the substantive use of the equal protection clause is a fact. In this role it takes under its protection certain rights and prohibits their infringement. Thus the rights of white sellers and Negro buyers may not be interfered with, and it is no answer to say that the rights of Negro sellers and white buyers are equally interfered with. The equal protection clause is held to be violated simply by the invasion of this substantive right no matter how "equally" the invasion is conducted.

It should be noted, of course, that shifting a right from the protection of due process to the protection of the equal protection clause neither clarifies or simplifies the problem of the "absolute" character of a right nor eases the problem of determining what particular rights are to be regarded as enjoying this absolute protection.

The transference of substantive rights to the equal protection clause by shifting the emphasis from equality to protection has implications for the Federal System. It undermines the doctrine that the

⁵⁷ *Edwards v. California* (1941) 314 U. S. 160.

⁵⁸ *Id.* at 182.

⁵⁹ *Ibid.*

Fourteenth Amendment forbids only state action. If the clause guarantees substantive rights, then it requires their protection by the state. The failure of the state to supply that protection is accordingly a violation of the clause. Hence, by the Fifth Section of the Fourteenth Amendment, congressional power to enforce the Amendment by appropriate legislation can fill the gap left by state inaction. What happens then to the Court's oft reiterated assertion that the Fourteenth Amendment did not disturb the existing division of power between the states and the Nation?

4. THE WORK OF THE COURT

a. *The Judicial Task*

The attempt to understand the scope and significance of the equal protection clause is complicated by the fact that we tend to think of it primarily as a "judicial" doctrine. Its meaning, therefore, is developed with an eye upon the special problems raised by the institution of judicial review. While we are chiefly concerned with equal protection in its judicial context and application, it is well to remember that all branches of the government have the responsibility of acting within the limits imposed by the Constitution, and that legislators, no less than judges, are bound by the "pledge of the protection of equal laws." Seen through the eyes of a legislator, the equal protection clause is uncomplicated by the problems which face a modest judge diffidently passing upon the work of the elected representatives of the people.

To the conscientious legislator, the equal protection clause is a demand that, as he promulgates laws, the classifications he creates be reasonably related to the purpose of the law. If he departs from the ideal in varying degrees of under- or over-inclusiveness, he will do so only with due regard for the factors which justify such deviations. And further, the equal protection clause reminds the legislator that he must guard himself against favoritism or inequality of purpose; that as he imposes special burdens or confers special benefits he must do so only because of their contribution to the general good. All this is, perhaps, easier said than done, but its relative simplicity will be apparent as we turn to the task of the judge.

One's view of the judge's task will depend to a large extent upon whether one thinks of judicial review in terms of a system of functional differentiation or in terms of a system of checks and balances. These are by no means the same, although they are often confused. The "functional" view rests upon the assumption that the judicial task differs radically from the legislative task, and that for the judiciary

to address itself to the same questions that the legislature has answered is an invasion of the legislative function by the courts. The theory of "checks," on the other hand, really requires that the court reconsider the same questions that the legislature has already considered.

Both theories have their difficulties. The functional theory is hard pressed to delineate distinct functions. The theory of checks has to win its way against the undemocratic character of judicial lawmaking. The United States Supreme Court attempts to meet these difficulties by maintaining that it is not its function, as it reviews legislation, to substitute its views about what is desirable for that of the legislature. It thus bows in the direction of the functional separation theory. But at the same time the Court speaks of judicial self-restraint as the answer to the undemocratic aspects of the check and balance system. Kept apart from each other, the essential incompatibility of these two attitudes often escapes notice. For self-restraint is no virtue if the Court has a unique function to perform. If, on the other hand, the self-restraint is justified, the belief in a unique judicial function is untenable. These difficulties plague the Court at every stage in the process of applying the equal protection clause.

Since it is impossible to judge the reasonableness of a classification without relating it to the purpose of the law, the first phase of the judicial task is the identification of the law's purpose. The purpose of a law may or may not be explicitly stated. When it is not explicit the Court may 1) conclude that there is no legitimate public purpose, or 2) assume that there is a legitimate public purpose but refuse to look for it, or 3) draw some inference as to what it is. In the first case, it strikes down the law as an illegitimate exercise of the police power. In the second case, the Court declines to exercise the power of review. In both cases, the Court stops short of equal protection. But if the Court attempts an inference about legislative purpose it is involved in all the difficulties, theoretical and practical, which surround that task—difficulties, it must be said, which do not prevent the Court from making such inferences.

On the other hand, if the law contains an explicit statement of purpose, the Court must either accept it at its face value or challenge the integrity of the legislative declaration. While the Court often asserts that it will not do the latter, it nevertheless sometimes looks behind the stated purpose to the "real" purpose. In such cases, what is at stake is the discriminatory character of the legislation.

It is thus evident that the attempt to identify the purpose of a law—an attempt made mandatory by the equal protection requirement—involves the Court in the thornier aspects of judicial review. At best, the Court must uncritically and often unrealistically accept a legislative avowal at its face value. At worst, it must challenge legislative integrity and push beyond the express statement into unconfined realms of inference. Having accepted or discovered the elusive “purpose” the Court must then, under the discriminatory legislation doctrine, make a judgment as to the purity of legislative motive and, under substantive equal protection, determine the legitimacy of the end. Only after the purpose of the law has thus been discovered and subjected to this scrutiny can the Court proceed with the classification problem.

The judicial task with respect to the classification problem is first to determine which of the five possible relationships between the classifying trait and the purpose exists. Except when the class in the law is itself defined by the mischief, the assertion that any particular relation holds between the two classes is an empirical statement. The mere assertion that a particular relation exists does not establish the truth of that assertion. A legislature may assert that all “three-time felons” are “hereditary criminals” and that all “hereditary criminals” are “three-time felons.” But whether this is the case is a question of fact, not of fiat.

Consequently, the Court, in determining the actual relation between the classes is engaged in fact-finding or in criticism of legislative fact finding. Thus the Court is confronted with a number of alternative formulations of the question: 1) what is the legislative belief about the relation between the classes? and, 2) is this belief reasonable? or simply, 3) what relation exists between the two classes?

To approach the problem via questions one and two suggests an attitude of deference to legislative judgment of fact. The Court can simply infer or discover the legislative view or assumption about the relation between the classes from the general context of the problem or from legislative sources and records, and having done so, may refuse to challenge it on the ground that the determination of fact is peculiarly a legislative function. The Court’s reluctance openly to challenge legislative fact-finding may take the form of asking, not whether the legislative belief is true or false, but whether this belief is “reasonable” or “entertainable” or such that a reasonable man might well hold it. But again, the Court must either assume that the

legislature is "reasonable" and push the matter no further, or it must determine the reasonableness of the belief by considering the evidence of its truth or falsity. That is, it must attempt to answer the third question—What relation in fact exists between the classes? It is difficult to see that there is any intermediate point between complete deference to legislative fact-finding and independent judicial judgment about the facts. The view that the Court does not concern itself with the truth of a belief but only with its reasonableness seems a plausible compromise only if we fail to see that the reasonableness of a belief depends upon the evidence for its truth. If the possibility of a distinctly "judicial" role is thus dismissed with regard to the determination of fact, the only alternatives are refusing to review factual judgments of legislatures or reviewing them. The final phase of the judicial task thus is a determination of the actual relationship between the class defined in the law and the class defined by the purpose, and the application of the rules and considerations developed in Section I of this paper.

b. *Judicial Performance*

There are broad areas in which the Court's use of the equal protection clause can only be described as an abandonment of it.

Public utilities and tax cases are the most striking examples. Mr. Justice Frankfurter's statement that "the states . . . may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate . . ." ⁶⁰ is not, on its face, a departure from the general equal protection doctrine. It is only when one considers what the "distinctive characteristics and functions" are which are held to justify special treatment and considers the sort of special treatment that these are thought to justify that the difficulties appear.

Public utilities, the Court tells us, are free from competition; they are more intricately and indispensably connected with the life of the community than other enterprises; they enjoy government-conferred rights of property, franchises and powers—such as eminent domain—not given to others. Even if true, however, do these characteristics warrant any and all special treatment in legislation aimed at any and all goals? Does it justify, for example, imposing on railroads and not upon roadways the obligation not to let Johnson grass or Russian thistle go to seed on the right-of-way; ⁶¹ or imposing upon railroads

⁶⁰ *Nashville, C. & St. L. Ry. v. Browning* (1940) 310 U. S. 362, 368.

⁶¹ *Missouri, K. & T. Ry. v. May* (1903) 194 U. S. 267.

alone the responsibility for building fences and cattle guards;⁶² or imposing attorney's fees upon them when they are unsuccessful defendants;⁶³ or making proof that a fire was started by sparks from a railroad prima facie evidence of negligence?⁶⁴ How are the "distinctive characteristics" of railroads related to the mischiefs at which these enactments were directed? They must be "reasonably related" in public utility as in other cases if the equal protection requirement is applied.

The Frankfurter dictum is quite misleading if it suggests that the Court is really concerned with the "appropriateness" of the separateness with which utilities are treated in any particular case. The Court seems rather to be approaching the position, if it has not already reached it, that the "characteristics and functions" of railroads and utilities are so distinctive as to give them a special or exceptional status. This special status appears to justify special classificatory treatment quite apart from any questions of reasonableness or appropriateness. It is so special that it places railroads and utilities beyond the protection of the equal protection clause.

The tax cases come to the same result, though for different reasons. Originally, the Court did not regard the equal protection clause as having any bearing upon taxation. In *Davidson v. New Orleans*, in 1887, Mr. Justice Miller, referring to a tax law, said, "It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard."⁶⁵ Again, ". . . we know of no provision in the Federal Constitution which forbids . . . unequal taxation by the States."⁶⁶ By 1889, however, the Fourteenth Amendment had been discovered, and in *Bell's Gap R. R. Co. v. Penn.*, Mr. Justice Bradley laid down the oft-quoted dictum that "the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation."⁶⁷ Mr. Justice Bradley's dictum at least recognizes the relevance of equality to the allocation of tax burdens. It couples that recognition, however, with an attitude of complete judicial deference to legislative judgment. The Miller and Bradley statement, hence, have the same effect as far

⁶² *Missouri Pac. Ry. Co. v. Humes* (1885) 115 U. S. 512.

⁶³ *Atchison, T. & S. F. Ry. v. Matthews* (1899) 174 U. S. 96.

⁶⁴ *Gulf, Colorado & S. F. Ry. v. Ellis* (1897) 165 U. S. 150.

⁶⁵ (1887) 96 U. S. 97, 105.

⁶⁶ *Id.* at 106.

⁶⁷ (1890) 134 U. S. 232, 237.

as judicial review is concerned—a failure to subject tax legislation to judicial scrutiny under the equal protection clause.⁶⁸

Judicial deference to legislative judgment has been only slightly less complete in the broad field of regulation and control of economic activity. This is the area in which the great due process battles were fought over the legitimacy of government action. Once an objective is decided to be within legislative competence, however, the working out of classifications has been only infrequently impeded by judicial negatives. The Court's attitude has been that equal protection would be a futile requirement if it meant that the state either had to regulate all businesses, or even all related businesses, and in the same way or not at all. An effort to strike at a particular economic evil could not be hindered by the necessity of carrying in its wake a train of vexatious, troublesome, and expensive regulations covering the whole range of connected or similar enterprises.

The essential feature of the greater part of these cases is that they involve under-inclusive classification and raise the problem of justifying the exclusion from the regulation of persons and activities similarly situated but left untouched. How much of a problem it is to supply the justification may be illustrated by these typical cases in which a permitted line was drawn: 1) between manufacturers and vendors of mixed paints and manufacturers and vendors of mixed paints composed of pure linseed oil, carbonate of lead, or oxide of zinc, turpentine, Japan drier, and pure colors;⁶⁹ 2) between agricultural and commercial combinations in restraint of trade;⁷⁰ 3) between

⁶⁸ No doubt the Court has been impelled to this position by the technical complexity of the subject and the impracticability of judicial intervention. But, in addition, taxation raises very difficult problems for equal protection analysis. These center around the question of purpose. If the purpose of taxation is taken to be simply the raising of money for the support of government, the relevant trait would seem to be ability to pay. But many persons are excused who possess the ability. Some are not taxed because their income is too low. Others are excused from taxes because of the effect on business. Still others are not taxed because they do not use certain items, such as cigarettes or whisky. Thus, considerations other than simple ability to pay are immediately involved, and the purpose of taxation is not merely the raising of revenue. The graduated income tax is an attempt to distribute the burden in proportion to ability to pay. Property taxation, however, seems flagrantly out of conformity with this principle. To what legitimate purposes of taxation are the differences between real and personal property relevant that the state may tax one and not the other? What purpose justifies railroad and utility property assessment at full value and other property at far less? How is a special tax to be justified on all public utilities doing business in the city when the proceeds are to be used for unemployment relief for which the utilities have no peculiar responsibility?

⁶⁹ *Heath & Milligan Co. v. Worst* (1907) 207 U. S. 338.

⁷⁰ *Tigner v. Texas* (1940) 310 U. S. 141.

banks receiving deposits of money averaging more than five hundred dollars per deposit and those receiving deposits averaging less than that amount;⁷¹ 4) between junk dealers and other buyers or receivers of "any wire, cable, copper, lead, solder, iron or brass used by or belonging to a railroad, telephone, telegraph, gas or electric light company;⁷² 5) between those who for the purpose of destroying competition sell, after allowing for shipping costs, at lower price in one part of the state than in another, and those who, having but one outlet, cut prices for the purpose of destroying competition or having several outlets cut prices uniformly in all of them;⁷³ 6) between those who force-pump carbonic acid gas from wells bored into rock for the purpose of selling the gas otherwise than with the mineral water and those who either pump from wells not penetrating rock or who pump for any other purpose than selling the gas apart from the water.⁷⁴

What are the great reasons of state which impelled the Court to allow these departures from a strict standard of equality as measured by the Court's own doctrine of classification? What are the "fair reasons" for non-extension? Was the Court in any of these cases faced with the alternatives of either permitting the law to stand or forcing the legislature to choose between inaction or perfection? Was the fair reason for non-extension of the classification to all who were tainted by the mischief political impossibility or administrative unfeasibility?⁷⁵

⁷¹ *Engel v. O'Malley* (1911) 219 U. S. 128.

⁷² *Rosenthal v. New York* (1912) 226 U. S. 260.

⁷³ *Central Lumber Co. v. South Dakota* (1912) 226 U. S. 157.

⁷⁴ *Lindsley v. Natural Carbonic Gas Co.* (1911) 220 U. S. 61.

⁷⁵ The "fair reasons" given by the Court were these: in the carbonic gas case, a presumption of constitutionality; in the price cutting case, a statement by Mr. Justice Holmes that "if a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law"; in the junk dealer case, that junk dealers provide an important market for stolen merchandise of the kinds mentioned and, because of their experience, are peculiarly fitted to detect whether property offered is stolen; in the money deposit case, that when the amount of the average deposit is above five hundred dollars, "we know that we have not before us the class of ignorant and helpless depositors, largely foreign, whom the law seeks to protect"; in the mixed paint case, that the purpose of the labeling requirement was to prevent adulteration of the paint and deception of the public and that the "classification was founded in public opinion among the users of paint, and this justified it even though it might not stand the test of scientific analysis of paints or the views of progressive paint manufacturers"; in the restraint of trade case, that farmers really are different from city people engaged in commerce and industry in a way which makes combination among them less likely and the "threat" from them "may be" of a different order.

Some of these cases present striking instances of the doctrine that the legislature may hit the evil where it is most felt,⁷⁶ that it may select for separate treatment "conspicuous examples" of an evil, even though, except for their conspicuousness, they are "otherwise and merely logically not distinguishable" from other instances of the evil.⁷⁷ Why should the legislature be allowed to punish adulteration and deception in all mixed paints but one, even though adulteration and deception are believed by paint users to be less likely in that one? If restrictions are imposed on banks receiving small deposits to protect the depositors against fraud, why not on all banks? If junk dealers are placed under criminal liability to make diligent inquiry of the right of the vendor to sell certain items, why should other purchasers of the same items be freed of that responsibility? The legislature might prevent waste of mineral waters or excessive withdrawals by a single owner from a common underground pool, but why should the ban not cover those who do these things other than by drilling in the rock or other than for the purpose of selling the accompanying gas apart from the water?

One might concede that there is a good deal in what the Court says: That the economic mechanism is highly sensitive and complex; that many problems are "singular and contingent"; that "laws are not abstract propositions," do not relate to "abstract units" and are not to be measured by "abstract symmetry"; that "exact wisdom and nice adaptation of remedies" cannot be required; that "Judgment on the deterrent effect of the various weapons in the armory of the law . . . is largely a prophecy based on meagre and uninterpreted experience,"⁷⁸—one might concede all that and not be deflected from the conclusion that these cases stand as the reminder that in this area the Court does not take the equal protection requirement seriously; not so seriously, at least, as the difficulties of judicial review. The surrender was made quite explicit by Mr. Justice McKenna in the mixed paint case: "A classification may not be merely arbitrary," he said, "but necessarily there must be great freedom of discretion, even though it result in 'ill-advised, unequal and oppressive legislation.'"⁷⁹

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In the utilities, tax, and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legisla-

⁷⁶Keokee Coke Co. v. Taylor (1914) 234 U.S. 224, 227.

⁷⁷Central Lumber Co. v. South Dakota, *supra* note 73 at 161.

⁷⁸Tigner v. Texas, *supra* note 70 at 148.

⁷⁹Heath & Milligan Co. v. Worst, *supra* note 69 at 354.

tive judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events—self-limitation can be seen to be the path to institutional prestige and stability.

The Court is aware, too, of its own remoteness and lack of familiarity with local problems. Classification is dependent on legislative purpose. Legislative purpose is dependent on the peculiar needs and specific difficulties of the community. The needs and difficulties of the community are constituted out of fact and opinion beyond the easy ken of the Court.

But many of these compulsions are inoperative when the Court is dealing with human, civil or individual rights. A requirement of "abstract symmetry" is not quite so ridiculous, familiarity with local conditions not so all important. The constitutionality of the sterilization of three-time felons may easily be abstracted from its special context in Oklahoma. Equality to minorities of race, creed, color, blood or alienage is not so constitutionally a matter of time or place, not so dependent upon community variants peculiarly within the knowledge of the legislatures on the spot. Knowledge about civil and individual rights, unlike some economic data, is neither so technical nor so esoteric as to lie beyond the legitimate cognizance of the Court.

The decisions in the *Skinner*, *Oyama*, *Shelley*, *Hurd* and *Takahashi* cases, the doctrinal elaboration in the Japanese evacuation and *Kotch* cases, the interesting prominence given the equal protection clause by these and many other opinions and decisions, all show that the Court feels less constrained by consideration of judicial deference in the field of human and civil rights than in that of economic regulation, and that it is making a vigorous use of the equal protection clause to strike down legislative action in this area. Yet there has been no consistency of craftsmanship in manipulating the elements of the doctrine and the Court's use of the clause has been remarkably clumsy. Taking the recent Japanese cases as a whole, this judgment is hard to avoid.

The curfew and evacuation cases clearly involved situations in which not all American citizens of Japanese ancestry were "disloyal" and in which presumably there were citizens of other than Japanese ancestry who were potential saboteurs. The chief factor, however, is

the over-inclusiveness of the classification and the "emergency" justification for its employment. Whatever deference is due to military judgment in the situation, the Court can hardly be said to have made an adequate investigation of the genuineness of the emergency and of good faith in dealing with it—at least in the evacuation case. "Our task," says Mr. Justice Black speaking for the Court, "would be simple, our duty clear were this a case . . . of racial prejudice . . . [But] to cast this case into outlines of racial prejudice . . . merely confuses the issue. Korematsu was not excluded . . . because of hostility to him or his race . . . [But] because we are at war with the Japanese Empire . . ." ⁸⁰ One wonders about the basis for Mr. Justice Black's confident assertion as to the purpose of the exclusion order. The long-standing anti-Oriental animus on the West Coast would justify less confidence.

The *Oyama* and *Takahashi* decisions are more clearly inadequate—not in result but in the handling of the equal protection requirement.

In *Oyama v. California*, the issue before the Court was the validity of California's statutory presumption that when an alien ineligible for citizenship paid the consideration for land conveyed to a citizen or eligible alien there was a prima facie case of evasion of the Alien Land Law. The classifying trait among such consideration-payers was thus ineligibility for citizenship. The purpose of the classification was to prevent evasion of the Alien Land Law.

It is hard to deny that if the prevention of evasion of the Alien Land Law is a legitimate legislative purpose, then this classification is perfectly reasonable. It places the burden of proof precisely upon the class of individuals with motives for evasive transfer. The presumption could be overcome by those making bona fide gifts. So that if the Alien Land Law is constitutional, the classification in question is perfectly sound. If, therefore, the law was to be struck down on equal protection grounds, attacking the legitimacy of the purpose was the one possible way of doing it; and that was the one thing the Court steadfastly refused to do.

In *Takahashi v. Fish and Game Com'n.*, the Court struck down a California law barring aliens ineligible to citizenship from commercial fishing privileges in the coastal waters. The law violated the equal protection requirement, the Court said, whether its purpose was "to conserve fish in the California coastal waters, or to protect California

⁸⁰ *Korematsu v. United States* (1944) 323 U. S. 214, 223.

citizens engaged in commercial fishing from competition by Japanese aliens, or for both reasons."⁸¹ But it is plain that these two purposes violate different aspects of the equal protection clause—the first raises classification, the second, discriminatory legislation problems. To conserve fish is a legitimate objective. But given that purpose, the classification based on ineligibility for citizenship does not pass the “reasonable relation” test.

On the other hand, if the purpose is to protect citizens from competition by Japanese aliens, the classification is quite adequately designed to achieve that end. Accordingly, if the California law violates the equal protection in the light of the second of its alternative purposes, it can only be because that purpose itself is illegitimate—that is, discriminatory.

Despite the point of view of the *Oyama* and *Takahashi* decisions and the tradition of *Yick Wo* and *Truax v. Raich* alienage classifications are not always nullified. There is a group of cases in which they have been sustained, though not always after a full examination of the equal protection requirement.

The judicially asserted basis in these cases is “some special interest” on the part of the State or its citizen populations. In those cases involving the regulation or distribution of the public domain, or of the common property or resources of the State—in which aliens are excluded from the killing of wild game,⁸² receipt of public relief,⁸³ employment on public works⁸⁴—the “special interest” is mainly proprietary; and the holding is, in effect, that the state as proprietor may be more arbitrary than the state as sovereign. Exclusion of aliens from the franchise, public office, jury service, the practice of law,⁸⁵ leadership in labor unions is upheld in part on the ground that the equal protection requirement applies only to civil and not to political rights and in part on the ground that the citizen’s attachment to the political system warrants confining participation in the government or in the exercise of public or quasi-public power to him. So too, with the alien land laws. They are rested on the proposition that the quality and *allegiance* of those who own, occupy and use farm lands are matters of highest importance and affect the power and safety of the

⁸¹ *Takahashi v. Fish & Game Com'n.* (1948) 334 U. S. 410, 418.

⁸² *Patson v. Pennsylvania* (1914) 232 U. S. 138.

⁸³ (1938) 52 STAT. 809, 813.

⁸⁴ *Heim v. McCall* (1915) 239 U. S. 175.

⁸⁵ *McGOVNEY, CASES ON CONSTITUTIONAL LAW* 477 (2d ed. 1935) and cases cited therein.

state itself. Finally, the operation of pool and billiard halls is, to the Court, one of those instances in which "alien race and allegiance . . . bear . . . such a relation to a legitimate object of legislation as to be made the basis of a permitted classification."⁸⁶

Thus the justification for the special treatment of aliens rests upon two distinct grounds: 1) the special status of citizens in relation to political rights and public proprietary interests and 2) belief in the existence of alienage-linked traits—chiefly disloyalty. The first of these notions, at least as regards political rights, is part of the tradition which reaches back to Aristotle, who defined as a citizen of a state one "who has the power to take part in the deliberative and judicial administration of that state." In this tradition citizens have a claim simply by virtue of their citizenship to participation in certain rights which is denied to aliens—not as a matter of qualification but as a matter of status.

As concerns the common property and resources of the state, the special status of the citizen is a conception of diminishing vitality. The Court itself has recognized that, with respect to wild birds, property in the state is "a slender reed on which to lean";⁸⁷ with respect to fish in coastal waters, it has repudiated the doctrine altogether.⁸⁸ Public works, as a common calling of the community, are, by these cases, permitted lower standards of equality than private employment.⁸⁹ Public assistance in the form of money grants or other aid is based on need—which aliens may have no less than citizens—or on need plus prior productive and tax contribution, which are more properly associated with residence than with citizenship. On the whole, considering the area of exclusion and the fact that citizens of other states may also constitutionally be barred, the foundation of these decisions is more properly laid in residence than in allegiance.

The belief in alienage-linked traits is also under increasing attack. That citizenship is a test of loyalty and alienage of disaffection, even when alienage is coupled with ineligibility for citizenship, is a claim, as Mr. Justice Murphy observes, "outlawed by reality". Such "matters of the heart" are not necessarily settled by political status.⁹⁰ The ground is also being cut from under this view by the apparent abandonment of it by the legislative and executive branches of govern-

⁸⁶ *Clarke v. Deckebach* (1927) 274 U. S. 392, 396.

⁸⁷ *Missouri v. Holland* (1920) 252 U. S. 416, 434.

⁸⁸ *Takahashi v. Fish & Game Com'n.*, *supra* note 81.

⁸⁹ *Heim v. McCall*, *supra* note 84.

⁹⁰ *Oyama v. California* (1948) 332 U. S. 633, 666.

ment. The increase of loyalty-testing procedures rests squarely on the assumption that citizenship and loyalty are not necessarily connected. In the absence of any such factual connection between alienage and disloyalty, the bar of the equal protection clause cannot be hurdled.

Not all civil or human rights cases involve the familiar problems of race, creed, or color. *Skinner v. Oklahoma*⁹¹ raises questions involving "fundamental human rights" of a different character. Since the Court here used the equal protection clause to strike down legislation invading human rights in an area uncomplicated by social tensions and traditional discrimination, it may be illuminating to examine the opinion in some detail.

In the *Skinner* case, the United States Supreme Court struck down as a violation of the equal protection clause Oklahoma's Habitual Criminal Sterilization Act. The Act defined an habitual criminal as a person who was convicted of three or more crimes "amounting to felonies involving moral turpitude."⁹² It provided for the sterilization of habitual criminals where that could be done without detriment to health. It exempted from its operation "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses"⁹³

What was the purpose of this law? Was sterilization intended to be added punishment or was it aimed at reducing the number of criminals by preventing transmission of hereditary criminality? The Court answered this imperative question, not by discovering and accepting an explicit legislative declaration in the law, not by following out a chain of inferences from extrinsic sources, but by a simple assumption. Writing against the background of *Buck v. Bell*,⁹⁴ the Court assumed that the Oklahoma law was directed at the transmission of "criminal traits."

At one point, the majority opinion obliquely refers to Nazi genocidal practices. It speaks of the "subtle, far-reaching and devastating effects" of an exercise of the power to sterilize. "In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."⁹⁵ These ominous remarks, however, are only relevant as a prelude to an investigation of the propriety of the legislative motive. But the Court made no search to see if there

⁹¹ (1942) 316 U. S. 535.

⁹² *Id.* at 536.

⁹³ *Id.* at 537.

⁹⁴ (1927) 274 U. S. 200.

⁹⁵ *Supra* note 91 at 541.

had been a deliberately invidious discrimination, a violation of the doctrine against discriminatory legislation. These matters were mentioned "merely in emphasis of our view that strict scrutiny of the classification . . . in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."⁹⁶

Having thus assumed the law's purpose, and having ignored the possibility of a discriminatory, oppressive or otherwise forbidden motive, the Court next lightly passed over the substantive equal protection problem. "Undoubtedly," said Mr. Justice Stone in a concurring opinion, "a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies."⁹⁷ The majority, in disclaiming any intention to re-examine the scope of the police power of the state, apparently accepted this conclusion and *Buck v. Bell* as applicable without question, though the acknowledgment that "one of the basic civil rights of man" was here involved⁹⁸ might well have called for a deliberate inquiry into the legitimacy of the end.

Given this assumption of legitimate purpose, the question which next confronts the Court is—is the classification reasonably related to it?

One can infer that the Court does not assume complete identity between the two classes (a case of ideal classification) for it is apparently saying that embezzlers are "similarly situated" but not included in the classification. On the other hand, the Court is not saying that no felons are hereditary criminals—for if it said that, the classification would fall as perfectly unreasonable without reaching the embezzler question. Nor does the majority opinion raise the question of whether there are some three-time felons who do not possess inheritable criminal traits. So that as the Court deals with the case, it seems concerned only with the under-inclusiveness of the three-time felon classification, that is, it attempts to show that there is no significant difference between felons and embezzlers which justifies sterilization in one case and exemption from sterilization in the other.

"Oklahoma," says the Court, "makes no attempt to say that he

⁹⁶ *Ibid.*

⁹⁷ *Id.* at 544.

⁹⁸ *Id.* at 541.

who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks."⁹⁹ And, it continues, "We have not the slightest basis for inferring that the line [between embezzlement and felony] has any significance in eugenics," ¹⁰⁰ The nature of the two crimes is "intrinsically" the same, says the Court, and the difference between them "turns not on the intrinsic quality of the act but on when the felonious intent arose" ¹⁰¹ The line was conspicuously artificially drawn.

The Court thus holds—without passing on the genetic significance of "felony"—that what distinguishes felony from embezzlement is itself without genetic significance.

Granting that the Court is correct in its scientific conclusion, all that it has done is to establish the under-inclusiveness of the felony classification. This alone does not establish its invalidity. Yet the Court assumed that the demonstration of the under-inclusiveness of the classification brought its task to an end. The judicial task had really just begun.

If it were concerned with the genocidal implications of the act, with the dangers of invidious discrimination in a case that "touches a sensitive and important area of human rights"¹⁰² it would carefully examine the basis or justification for Oklahoma's failure to extend the law to embezzlers. It would consider and evaluate the "administrative" or "political" reasons which are relevantly arguable here. It would raise questions of invidiously discriminatory purpose. And it could, of course, place the burden of proof on Oklahoma. But it did none of these things. The consideration of the reasonableness of the classification stopped short of the real issue with the assertion that the classification was under-inclusive.

In short, while few would challenge the result, the Court in this case made no attempt to justify its inference as to the law's purpose, passed lightly and with some irrelevant comments over the discriminatory question, failed altogether to reconsider the vital issue of the scope of the police power, and stopped short of the decisive classification questions.

What emerges from this brief survey of the work of the Supreme Court is a striking disparity between the judicial task and judicial performance. In broad areas, an appeal to the clause is bootless. And

⁹⁹ *Ibid.*

¹⁰⁰ *Id.* at 542.

¹⁰¹ *Id.* at 539.

¹⁰² *Id.* at 536.

where the clause is held to govern, its application is halting, indecisive, and unpredictable.

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We began this essay with the suggestion that Americans have been more concerned with liberty than with equality. Alvin Johnson, in a recent article in the *Yale Quarterly*, goes so far as to say that the idea of equality is no part of the authentic "American Ideology".¹⁰³ But whatever our past or present preferences, it is certain that a concern with equality will be increasingly thrust upon us. We have tended to identify liberty with the absence of government; we have sought it in the interstices of the law. What happens, then, when government becomes more ubiquitous? Whenever an area of activity is brought within the control or regulation of government to that extent equality supplants liberty as the dominant ideal and constitutional demand.

Even in areas in which constitutional restraints have been traditionally read as prohibitions, this tendency is discernible. The First Amendment, for example, has long been regarded as a guarantee of the freedoms of speech, assembly, and religious worship against encroachment by government action. But the course of events has radically altered the social context of the First Amendment and made necessary positive administrative action to promote and secure these rights. To think primarily in terms of protection against encroachment by public authority is now to commit the sin of irrelevance.

When we seek to administer limited radio—and now television—channels so as to provide balanced opportunities for political discussion, when we try to provide, through governmental action, for "equal rights" of speech for employer and union, when government intervenes to make available the streets of a company town as a public forum or to make available to a union a meeting hall owned by the company—when we do these things we are promoting, not hindering, the exercise of the rights of free speech. We are thinking not in terms of the "absence of government," but in terms of equality, deliberately fostered by government action.

The *McCullum* case¹⁰⁴ has recently brought to the fore the issue over the meaning of the "establishment of religion" clause. Significantly, one of the chief criticisms of the Court's current interpretation is that it fails to read the clause merely as a prohibition against preferential or "unequal" treatment of religions. Thus critics of the

¹⁰³ Johnson, Alvin, *Party and Ideology in America*. YALE REVIEW (1948).

¹⁰⁴ *McCullum v. Board of Education* (1948) 333 U.S. 203.

Court in effect maintain that the First Amendment, as it deals with religion, must be read as if it were an equal-protection clause.¹⁰⁵

In the closely related field of political organization, the demand is again, not so much for the removal of government restraints—although this is certainly involved—as for positive government action to provide equal treatment for minority groups, parties, or organizations whose rights are too easily sacrificed or ignored in periods of popular hysteria. Responsibility in these and other fields is increasingly placed upon public authority. It must act to promote rights which, in an earlier day, its action seemed most to threaten and, thus acting, redeem the “pledge of equal laws.”

The equal protection clause of the Fourteenth Amendment appears thus to be entering the most fruitful and significant period of its career. Virtually strangled in infancy by post-civil-war judicial reactionism, long frustrated by judicial neglect, the theory of equal protection may yet take its rightful place in the unfinished Constitutional struggle for democracy.

¹⁰⁵ See generally (Winter 1949) 14 *LAW AND CONTEMP. PROB.* No. 1.