Winter 1-1-1995

The Changing Meaning of Equality in Twentieth-Century Constitutional Law

William E. Nelson

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Civil Rights and Discrimination Commons

Recommended Citation
The Changing Meaning of Equality in Twentieth-Century Constitutional Law

William E. Nelson*

Table of Contents

I. Introduction .................................. 4

II. Equality as the Protection of Ethnic and Cultural Minorities ... 7
   A. European Minorities in the Aftermath of World War I ... 7
   B. The Attainment of Political Power by American
      Immigrant Groups .................................. 8
   C. The Persistence of Ethnic and Cultural Discrimination .. 10
      1. The Free Speech Cases ............................ 11
      2. Police Searches and Brutality .................... 17
   D. The 1938 Convention and the Emergence of a
      New Conception of Equality ...................... 19
   E. Egalitarian Propaganda During World War II .......... 26

III. Gradual Assimilation: The Initial Mechanism for Ending
     Inequality ...................................... 28
   A. Early Judicial Resistance to the Recognition of Rights .. 29
   B. Providing Space for Minority Institutions ............... 39
   C. Assimilation as Quid Pro Quo for Equality ............. 53

* Joel and Anne Ehrenkranz Professor of Law, New York University. A.B., Hamilton College, 1962; LL.B., New York University, 1965; Ph.D., Harvard University, 1971. The author is indebted to all of the members of the Legal History and Constitutional Theory Colloquia at New York University, but especially to Louis C. Anthes, Ronald Dworkin, Christopher Eisgruber, Martin S. Flaherty, Hendrik Hartog, and Lawrence G. Sager for their comments and criticisms. Paul Berman and Norman Williams, both members of the J.D. Class of 1995 at New York University, volunteered invaluable editorial assistance. Research support was provided by the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund of New York University School of Law.
I. Introduction

Equality has been the central issue of American constitutional law in the twentieth century, and *Brown v. Board of Education* has been the central case. The emphasis that constitutional scholars have given to *Brown* has resulted, however, in their losing sight of a richer and fuller portrait of equality. This Article seeks to recover the portrait that we have lost.

My approach in the Article will be to examine in detail an extensive body of twentieth-century New York case law concerning equality issues. These New York cases constitute a central part of the equality story, especially for the decades prior to *Brown*. These New York cases establish that *Brown* did not mark the beginning of modern equality law, but only a shift in its direction, albeit a very important shift.

The Article is divided into three main analytical parts. Part I considers the emergence in the late 1930s of today’s conception of equality. Until then, people conceptualized equality in class-centered and geographically-oriented terms. In American history, for example, concern about inequality arising from class distinctions can be traced back to the political thought of early Federalists, who often worried that wealthy property holders would be victimized in the political process by masses of the poor.1 Class-centered equality analysis also appeared at the heart of the debates over the abolition of slavery, in which opponents of slavery typically focused on the need to eliminate an underclass of slaves without seeing any corresponding need to end the racism and racial prejudice in which anti-slavery advocates

---

themselves participated. 3 Another large body of nineteenth and early twentieth-century equality doctrine, reflected in numerous Supreme Court opinions, 4 concerned discrimination by one state against another or against residents of the other.

In contrast, by the end of the 1930s, equality jurisprudence had begun to focus on what remains the paradigmatic concern of egalitarians today: how to address and remedy problems that arise when a culturally or ethnically distinctive minority finds itself disadvantaged in its relationship to mainstream social groups and turns to law to remedy the disadvantage. Part I of this Article will trace how cultural and ethnic discrimination emerged as the central issue influencing the development of equality jurisprudence during the 1920s and the 1930s. Then the Article will turn to the starkly different approaches toward ending such discrimination adopted by New York courts during the next four decades. Part II will focus on the first of these approaches, while Part III will focus on the second.

Part II will show that, at first, equality was seen as an eventual goal toward which society as a whole should strive without the judiciary playing any special or immediate role in its attainment. Until approximately 1960, New York judges believed that their primary mandate was to enable the legislature to take steps that would enhance the well-being of subordinated groups. Under special circumstances, some judges would exceed this mandate in order to interpret state constitutional and legislative provisions in a fashion that would give subordinated classes weapons against municipalities or other entities seeking to maintain their subordination. Or, they would manipulate legal rules to give victims of prejudice and discrimination weapons that they could use in their efforts to enter the mainstream of New York's political, economic, and social life. These same judges, however, consistently refused to hold that subordinated individuals possessed a constitutionally derived right to equality that the courts would enforce. Even more significantly, judges prior to the 1960s did not believe that an equal


society required people with different cultural values to interact on an equal basis; equality required only that subordinated groups be given the opportunity to shed their existing identities and to assume the identity of their oppressors. Equality, in short, meant the gradual assimilation of diverse groups into a pre-existing cultural mainstream.

Following the decision in Brown, understandings of equality began to change in ways that Part III will elaborate. After 1960, equality was transformed into a judicially protected, formal legal right. Litigation for the purpose of obtaining a judicial order protecting a legal right to equality became commonplace. Assimilation, in turn, came to be viewed as a problematic vision of equality. Although some people continued to adhere to that vision even after 1960, an alternative approach, which is best described as multicultural, arose. This new multicultural approach cherished racial, religious, ethnic, gender, and other distinctions and proposed to organize society along group lines in a manner that allowed each group to achieve an equal share of wealth and power. In connection with this new approach to equality, subordinated groups began presenting their demands for equality more forcefully. During the decades in the middle of the twentieth century, when equality meant assimilation, those wanting to assimilate typically made polite requests for admission into the mainstream. But later, when multiculturalism came into vogue, people making egalitarian demands frequently presented them in a manner that appeared offensive and occasionally even threatening to dominant groups.

As I elaborate on these developments in the pages below, this Article will, I believe, offer a paradigm for thinking about twentieth-century constitutional law that is somewhat different from the current received wisdom. I make no claim, however, that normative debates about constitutional law should immediately be reframed to fit within the lenses of my New York paradigm rather than the existing conventional one. My claim is a much more limited one: namely, that the current wisdom, which is derived from close analysis of a small number of leading cases decided in the highly rarified setting of the United States Supreme Court, presents a distorted picture of the twentieth-century development of constitutional principles of equality. In particular, the current wisdom loses sight of a vibrant body of New York law that emerged in the middle of the twentieth century and contributed significantly to some peoples' attainment of their goal of equality, even while refusing to grant them a right to equality. If, as seems likely, other states adopted doctrinal approaches to equality similar to that of
mid-century New York,⁵ the state law that contemporary constitutional scholarship has tended to ignore may be important to a fuller understanding of equality in the United States.

The main task of this Article is to recover this body of state constitutional law. Once the forgotten law has been exhumed, it then will be possible to begin comparing a richer vision of equality to the more traditional analysis of equal protection doctrine derived from Supreme Court cases decided from 1960 to today. The result of the comparison, I believe, will raise questions which, when addressed by other scholars, may eventually lead to the rejection of much of our contemporary constitutional wisdom and to the construction of a new and more appropriate paradigm within which to continue our contemporary constitutional debates.

II. Equality as the Protection of Ethnic and Cultural Minorities

During the early 1920s, a new conception of equality that required the protection of ethnic and cultural minorities began to enter New York politics. As it did, older concerns about class conflict lost their hold on New Yorkers' imaginations with the result that by the end of the 1930s, the newer conception had become triumphant. At least three developments contributed to this result.

A. European Minorities in the Aftermath of World War I

The first development was an outgrowth of the efforts of American diplomats in the aftermath of World War I to draft peace treaties for Central and Eastern Europe establishing national boundaries along ethnic and cultural lines. There is much reason for thinking that New York law may have been similar to the law of other states during the period under study in this Article. For most of that period, New York was the most populous state and the economic and cultural leader of the nation. It was also, in one important respect, more typical of the nation as a whole than was any other single state: with its metropolitan center on the Atlantic coast, its upstate industrial cities little different from those of the Midwest, its expanding suburbs, and its rural farmlands and environmentally protected woodlands, New York contained locales similar to those in all the rest of the nation except the Deep South and the Far West. One would accordingly expect to find a wider variety of the socio-political forces that shape law in New York than in other jurisdictions. Of course, those forces might converge differently in New York than elsewhere, and thus we cannot be certain that the law in New York was typical of that in other jurisdictions. But at least until scholars examine in detail states, such as California, Texas, and a southeastern state like Georgia, the conclusions about New York law explicated by this Article should serve as preliminary hypotheses about more general nationwide developments in the concept of equality on the state level.
cultural lines. Unfortunately, this effort at national self-determination was less than totally successful. It often proved impossible to disentangle minorities living in the midst of majorities, and when disentanglement was impossible, the diplomats found themselves confronted with disappointed peoples who not only had been denied their own nation-state, but also had good reason to fear oppression by groups living among them in greater numbers. Even when they were unable to grant any relief to the disappointed minorities, the diplomats who were redrawing the map of Europe could not avoid realizing that the minorities had legitimate complaints. Nor could they avoid the recognition that similar ethnic and cultural minorities living in the United States had similar complaints.\(^6\)

**B. The Attainment of Political Power by American Immigrant Groups**

The second development contributing to a new conception of equality occurred when urban immigrant minorities began to attain significant political power in the 1920s, as first Alfred E. Smith, then Franklin D. Roosevelt, and later Herbert H. Lehman won and held onto the governor’s chair from 1923 through 1942. The new politics created by Smith and his successors made no effort to separate issues of class from those of ethnicity and culture, but instead moved back and forth freely among them. For example, Smith, who had been born and raised in the immigrant ghettos of Manhattan’s Lower East Side, tended to emphasize ethnicity and culture. He thereby convinced immigrants and their descendants that he "was one of them, up from the city streets, and his career was the living demonstration of the falsity of the accusations against them."\(^7\) In the words of one 1927 commentator, "[t]he enormous mass of immigrants rightly look[ed] upon him as their mouthpiece," as "he proclam[ed] a new Americanism in which the Nordic Protestant tradition count[ed] for nothing."\(^8\) Under Smith’s leadership, "the foreign population [felt] for the first time that [it had] access to power and honours."\(^9\) As a result, Smith was able in 1922 to assemble the Catholic, Jewish, and liberal patrician coalition that he, Roosevelt, and Lehman personified and that kept them and the Democratic

---

9. Id.
CHANGING MEANING OF EQUALITY

Party in power in New York and the nation for two decades. Even in his losing bid for the Presidency in 1928, Smith proved so attractive to the urban masses that for the first time in history, the Democratic Party won a plurality of the votes in the nation's twelve largest cities.

Roosevelt and Lehman continued Smith's practice of courting the urban immigrant vote, although FDR's appeals, in particular, were cast more in terms of class than ethnicity. Placing his "faith in the forgotten man at the bottom of the economic pyramid," Roosevelt argued that it was the "responsibility of the State" to aid "large numbers of men and women incapable of supporting either themselves or their families because of circumstances beyond their control" and that aid should be granted "not as a matter of charity but as a matter of social duty." Lehman similarly spoke on behalf of immigrants when he urged that "group isolation" was "no longer possible in a well ordered body politic." He firmly "insisted that freedom and liberty, political and economic self-determination must never tolerate artificial barriers of race, creed, color, sex or geography."

Although the Democratic Party's rhetoric began to contain at least some appeals along ethnic lines, its legislative program focused almost entirely on the regulation and redistribution of wealth. The three Democratic governors — Smith, Roosevelt, and Lehman — all used their power to obtain enactment of regulatory and social legislation that redistributed wealth and power from established WASP elites to their lower class constituencies. Smith began the process. "If he was noted for one thing throughout the nation, it was for legislation he had proposed or encouraged which provided workmen's compensation, shortened the workweek for men, women, and children, safeguarded working conditions, and provided for the widows and orphans of the working class." Smith was also a pioneer in highway

11. See JOSEPHISON & JOSEPHISON, supra note 8, at 399.
13. Franklin D. Roosevelt, Message to the Legislature (August 28, 1931) quoted in FRIEDEL, supra note 12, at 217
construction,\textsuperscript{17} public housing,\textsuperscript{18} and the elimination of railroad grade crossings.\textsuperscript{19} As governor, Roosevelt continued Smith's approach by supporting old-age pensions, public power, and unemployment relief.\textsuperscript{20} Lehman added such items as public housing, regulation of the dairy industry, unemployment insurance, and utility regulation.\textsuperscript{21}

The established elites and business interests that bore the brunt of this new social legislation, of course, fought back. Relying on constitutional claims about the limited nature of the police power, they brought a series of cases that sought to invalidate statutes either on their face or as applied to particular plaintiffs. Thus, New York gave birth to a series of important police power cases that typically, although not invariably, overruled claims of deprivation of property rights, sustained the constitutionality of redistributive regulatory and social legislation, and thereby advanced the redistributational goals of Governors Smith, Roosevelt, and Lehman and their Democratic supporters. Even today, similar police power cases continue to proliferate at the state level and to set the framework for much regulatory law.

I do not plan to discuss these cases in the present Article, however: first, because they require far more extensive analysis than I can possibly give them here; and second, because in essence they define equality in the context of class conflict and understand the remedy for inequality to be redistribution of wealth. I mean to focus instead on lines of cases that were peripheral to the great police power struggle of the 1920s and the 1930s, but nonetheless comprise the third factor contributing to the emergence of a new concept of equality that sought to provide a cure for discrimination against ethnic and cultural minorities.

\textit{C. The Persistence of Ethnic and Cultural Discrimination}

These cases arose because Jewish and Roman Catholic immigrants and their descendants, who "had been under attack, in the long debate over immigration restriction," continued to be "stigmatized as members of inferior races, barred from desirable trades, and challenged as to their capacity for

\footnotesize{17 \textit{See Josephson \& Josephson, supra} note 8, at \textit{214.}}  
\footnotesize{18 \textit{See id.} at \textit{329-31.}}  
\footnotesize{19 \textit{See O'Connor, supra} note 16, at \textit{160.}}  
\footnotesize{20 \textit{See Friedel, supra} note 12, at \textit{41-46, 100-19, 217-27}}  
\footnotesize{21 \textit{See Ingalls, supra} note 15, at \textit{249-55; Nevins, supra} note 14, at \textit{141-42, 167-68.}}
citizenship."\textsuperscript{22} Regrettably, the cases made no effort to halt the discrimination. Consider, for example, \textit{Judd v Board of Education}.\textsuperscript{23} It held state legislation authorizing local school districts to provide free transportation to students in parochial schools unconstitutional on the ground that "denominational and sectarian schools" were "no part of and [were] not within the system of common schools" funded by public money. In an earlier case, the appellate division likewise had struck down state legislation authorizing local school boards to provide free books to students after one board had attempted to use this law to give books to students attending a Roman Catholic parochial school.\textsuperscript{25}

Even more important were cases dealing with what we would now label free speech and search and seizure issues. Their outcomes also reflected deep and longstanding patterns of discrimination against Roman Catholics and Jews. These cases are especially important to the story that this Article relates because the issues they raised were central to the discussions of the late 1930s, in which today's conception of equality, with its central focus on discrimination against ethnic and cultural minorities, took shape.

\section*{1. The Free Speech Cases}

\textit{Gitlow v New York}\textsuperscript{26} is the most famous of the free speech cases. In July 1919, less than two years after the Bolshevik coup in St. Petersburg, Gitlow published "the Left Wing Manifesto" in a publication "devoted to the international Communist struggle."\textsuperscript{27} After expressing support for the

\begin{itemize}
\item \textsuperscript{22} HANDLIN, \textit{ supra} note 7, at 82-83.
\item \textsuperscript{23} 278 N.Y 200, 15 N.E.2d 576 (1938).
\item \textsuperscript{24} Judd v. Board of Educ., 278 N.Y 200, 205-06, 15 N.E.2d 576, 579 (1938).
\item \textsuperscript{25} See Smith v Donahue, 195 N.Y.S. 715 (App. Div. 3d Dep't 1922). But see People ex rel. Lewis v. Graves, 245 N.Y. 195, 156 N.E. 663 (1927) (sustaining legislation permitting children in public schools to be released for one-half hour each week to attend religious instruction); Miami Military Inst. v. Leff, 220 N.Y.S. 799 (Buffalo City Ct. 1926) (holding that private boarding school had breached its contract with Jewish student when it demanded that he attend Christian religious services on Sunday and then expelled him for failing to do so). For a case legitimating gender as distinguished from religious subordination, see \textit{In re Grilli}, 179 N.Y.S. 795 (Sup. Ct. Kings County 1920) (declaring that Nineteenth Amendment's conferral on women of right to vote conferred no corresponding right to sit on juries).
\item \textsuperscript{26} 268 U.S. 652 (1925).
\end{itemize}
extremist "policy of the Russian and German Communists," the manifesto observed "that strikes [were] developing which verge[d] on revolutionary action, and in which the suggestion of proletarian dictatorship [was] apparent, [as] the striker workers tr[ied] to usurp the functions of municipal government."\textsuperscript{28} The centerpiece of the manifesto, however, was its call for "a new state in which ‘the proletariat as a class alone counts.’"\textsuperscript{29} The new state would be achieved by "starting with strikes of protest, developing into ‘mass political strikes, and then into revolutionary mass action’" and ultimately by "the introduction of ‘the transition proletarian state, functioning as a revolutionary dictatorship,’ which [was] necessary ‘to coerce and suppress the bourgeois’" who were to be "completely expropriated ‘economically and politically.’"\textsuperscript{30}

Unless the elite judges who sat on the courts that heard Gitlow’s case had been prepared to treat the manifesto as "a mere academic and harmless discussion," they had little choice but to fear it as "advocacy of action by one class, which would destroy the rights of all other classes."\textsuperscript{31} They took seriously the call to recast America on the model of Russia, where, they noted, "the most barbaric punishment, torture, cruelty, and suffering are inflicted upon the bourgeois" and where those who did not submit were "either starved to death or shot."\textsuperscript{32} The judges also understood that, in the minds of the revolutionaries, their success in Russia depended on their spreading "the revolutionary struggle world-wide," especially into Western "industrial centers, where the proletariat greatly outnumber[ed] the bourgeois."\textsuperscript{33} In sum, the judges found Gitlow and his fellow revolutionaries to be "positively dangerous men" who "intend[ed] to destroy the state, murder whole classes of citizens, [and] rob them of their property."\textsuperscript{34}

Difficult as it may be after observing the whimper with which communism died in Red Square during the summer of 1991, we need to

\textsuperscript{28} Gitlow, 187 N.Y.S. at 788.
\textsuperscript{29} Id. at 789.
\textsuperscript{30} Id. at 789-90.
\textsuperscript{32} Gitlow, 187 N.Y.S. at 791-93.
\textsuperscript{33} Id. at 791-93.
\textsuperscript{34} Thomas C. Mackey, The Lost Court Documents of Benjamin Gitlow and James Larkin Before the New York City Magistrates’ Court, 1919, 69 N.Y.U.L. Rev 421, 433 (1994).
treat this rhetoric seriously even though it is utterly foreign to our sensibilities. The judges writing these words without the benefit of our seventy years of hindsight may well have quivered beneath the fear they expressed; even if they did not, they must have assumed that their stated fears would strike a chord in the relatively sophisticated audience that reads judicial reports. Indeed, the judges had every reason to rely on the persuasiveness of their rhetoric because it fit within a traditional conceptualization of equality derived from a focus on issues of class conflict.

At the same time that we take seriously the articulated rhetoric of these judges, however, we must also be aware of their almost indistinguishable anti-Semitic subtext. The fact is that Gitlow and other cases from the period involved overlapping discrimination on both class and religious grounds. Jews, for example, were seen by many in the 1920s, as several historians have noted, as "inflamed radical[s] responsible for Communist revolution in eastern Europe [and] a vast conspiracy designed to enslave America." As the appellate division observed, radical "doctrines [were] principally advocated by those who come from Russia and bordering countries and their descendants," as did Gitlow himself and the majority of then recent Jewish immigrants. Because the United States and New York, in particular, had become "the abiding place of foreigners who, without understanding our institutions, had brought with them views and prejudices and doctrines which, if put into effect, would subvert organized government," strong action was needed. When a man as prominent as Henry Ford could issue repeated warnings against the "Jewish menace" and a man as cultivated as Henry James could express shock at the "Hebrew conquest of New York" that was transforming the city into a "new Jerusalem," it is not surprising that a group of Ku Klux Klansmen in 1924 could, under apparent police protection, kidnap a Jewish pharmacist in a village twenty-five miles outside New York and order him to relocate to the city. Nor is it surprising that when a Catholic church

35. OSCAR HANDLIN, RACE AND NATIONALITY IN AMERICAN LIFE 173-74 (1948). On the connection of Jews to socialist movements, see also GLAZER & MOYNIHAN, supra note 10, at 169.
37 Id. at 792-93.
was built two years later in the immediately adjacent village, a cross was burned in its parking lot. After all, as a minister had recently told a Klan rally, the Catholic Church was merely a political party in disguise bent on destroying American liberty.40

The Supreme Court of the United States was not much different from the WASP elite of New York and the rest of the country. Feeling as threatened as their brethren below, a seven-justice majority in *Gitlow v New York*41 agreed that a "single revolutionary spark [could] kindle a fire that, smoldering for a time, [could] burst into a sweeping and destructive conflagration."42 The majority also agreed that it was necessary and appropriate for government "to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration."43 Even a justice as liberal as Harlan F Stone, the former dean of Columbia Law School and future author of *United States v Carolene Products Co.*,44 could join in an opinion focused like *Gitlow* on the repression of class conflict.

Indeed, only four of the twenty-four judges who sat in the *Gitlow* case at all levels were sufficiently unafraid to dissent; they probably shared what is in retrospect the sage view of Justice Holmes that "whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration" given "the admittedly small minority who shared" its views.45 Several years after the threat of anarchy had passed, the few dissenters could focus with precision on the bad grammar of the manifesto or, in the case of the two dissenters on the New York Court of Appeals, on the fact that the statute under which Gitlow was convicted prohibited only anarchy and not revolutionary socialism.46 But for people closer to the class

---


41. 268 U.S. 652 (1925).
43. *Id*.
44. 304 U.S. 144 (1938).
46. See People v *Gitlow*, 234 N.Y 134, 154, 136 N.E. 317, 326 (1922), aff'd sub nom.
CHANGING MEANING OF EQUALITY

struggles of 1919, the communist hope of immediate success, on the one hand, and the fear of it, on the other, threatened class violence and made repression of the lower classes seem appropriate.

*Gitlow* was no isolated case. Although it arose out of earlier facts, *Lorch v State* similarly involved a "threatening crowd" of perhaps as many as 2,000 strikers and sympathizers, who were hurling "stones, bricks, and other missiles" at about seventy-five policemen and National Guard troops, who opened fire and wounded an innocent bystander. Several years later, *People v Makvorta* sustained the conviction of a defendant who had distributed a circular urging workers to "speak to our ruling class the only language they understand," "[d]isregard, disobey, break every injunction," and "[t]reat every injunction as a scrap of paper." Radical action was needed because

[deadly blows [were] now being struck against every working man and working class family by the capitalist dictatorship. The same capitalist courts and judges who murdered Sacco and Vanzetti, who [were] keeping Mooney and Billings in the California jails, [were] now handing down injunction orders to jail the miners of Colorado, to evict the miners of Ohio, to starve the miners of Pennsylvania, to terrorize and smash the union ranks of the New York traction workers.

In the face of this call for disobedience to court orders, the appellate division quoted the language of the *Gitlow* majority, which outlawed "action by mass strike, whereby government is crippled, the administration of justice paralyzed, and the health, morals, and welfare of a community endangered for the purpose of bringing about a revolution in the state," and affirmed the defendant's conviction.

Similarly, the Court of Appeals approved a New York City ordinance requiring a permit to expound atheism in public streets out of fear that the


47. Two earlier cases circumscribing radical speech during the World War I era were *Frama* v. United States, 255 F 28 (2d Cir. 1918), and *Masses Publishing Co. v. Patten*, 246 F 24 (2d Cir. 1917) (reversing now classic, speech-protective district court opinion of Learned Hand); *cf.* *Masses Publishing Co. v. Patten*, 244 F 535 (S.D.N.Y 1917) (requiring postmaster to deliver copies of radical magazine).

48. *Id.* at 280-82.

49. *Id.* at 283-84 (quoting Gitlow v. New York, 268 U.S. 652 (1925)).
"passion, rancor, and malice sometimes aroused by sectarian religious controversies and attacks on religion seem[ed] to justify especial supervision." It also upheld a Mount Vernon ordinance prohibiting any assemblies on city streets — an ordinance that the mayor planned to enforce by "grant[ing] no further permits for Socialists' meeting[s]," while the appellate division sustained a judgment against another defendant for "addressing [an] assemblage in favor of Socialism." Even somewhat innocuous picketing in support of a "Rent Strike Against Fire Trap Conditions" led in 1934 to the conviction of a woman for disorderly conduct because "the lawful and orderly manner of the tenants was to file their complaints with" an appropriate city agency rather than picket. For judges of the 1920s and 1930s, polite presentation of grievances was the only appropriate way for an underclass to make its case.

The New York courts similarly pursued a policy of repressing speech that threatened the peace and security of elites in a series of noncriminal

58. It should be noted in fairness to the judges that they stood steadfastly against the threat of street violence whether it originated from the radical left or the radical right. In particular, they were as ready to help suppress the Ku Klux Klan as socialist labor groups. Thus, they reversed a conviction against a woman who was distributing an NAACP pamphlet entitled, "Stop the Ku Klux Klan Propaganda in New York," on the ground that the Klan was "stirring up prejudices and animosities against certain races and religions in this country" and that it "would be a dangerous and un-American thing to sustain an interpretation of a city ordinance which would prohibit the free distribution by a body of citizens of a pamphlet setting forth their views against what they believed to be a movement subversive of their rights as citizens." People v. Johnson, 191 N.Y.S. 750 (General Sess. N.Y County 1921). Even more important, the state courts and ultimately the United States Supreme Court upheld the constitutionality of a state statute requiring secret societies such as the Klan to provide the secretary of state with a list of their members and officers. People ex rel. Bryant v. Sheriff of Erie County, 206 N.Y.S. 533 (Sup. Ct. Erie County 1924), aff'd sub nom. People ex rel. Bryant v. Zimmerman, 210 N.Y.S. 269 (App. Div. 4th Dep't 1925), aff'd, 241 N.Y. 405, 150 N.E. 497 (1926), aff'd, 278 U.S. 63 (1928). Observing that the Klan "was conducting a crusade against Catholics, Jews and Negroes and stimulating hurtful religious and race prejudices," 278 U.S. at 76, the Justices implicitly approved the lower court's holding that the legislature had "to protect its citizens from malicious discrimination and wanton intimidation." 210 N.Y.S. at 273. It was "not required to await active violations before enacting legislation," but could "anticipate them," 206 N.Y.S. at 535.
cases. Thus, they sustained the refusal of the Secretary of State to amend the certificate of incorporation of the Lithuanian Workers' Literature Society when they found that it consisted of socialists who favored "the attainment of the desired revolution by forcible means" and concluded that no court could "approve the formation or the existence of any society which, in its declared objects, embraces the purpose to overthrow by force organized government in this country." Likewise, they sustained an injunction against the American Socialist Society's operation of the Rand School of Social Science on the ground that it was "within the power of the Legislature to enact statutes to prevent the teaching of doctrines advocating the destruction of the state by force" and that the Rand School had not established that it did not teach such doctrines. Finally, they sustained censorship of radical newspapers such as Benjamin Gitlow's *Revolutionary Age* and even of motion picture newsreels.

### 2. Police Searches and Brutality

Repression of the urban, immigrant underclasses during the 1920s and 1930s occurred not only in the context of freedom of expression, but also in reference to rules of constitutional criminal procedure. The impact was especially visible in Prohibition cases. The Eighteenth Amendment and the Volstead Act — products of the Puritan progressivism of WASP elites — altered a good deal of legal doctrine, and immigrant underclasses in New York City were particularly vulnerable. The text includes several legal citations to support these points:


64. *See, e.g., Boer v. Garcia*, 193 N.Y.S. 814, 815 (Sup. Ct. N.Y County 1922)
York resisted the alterations. In response, many judges, believing that they could "not tolerate nullification, in particular sections or by special classes," of the constitution, which was "the creature and will of the people,"65 began to cut back on the procedural protections accorded to Prohibition's violators. For example, they declared that a violator of the prohibition laws would not be subjected to double jeopardy by being prosecuted in both federal and state court.66 In addition, both federal and state cases ruled that liquor could be seized under defective search warrants67 or even without a warrant.68

What has since become the most important issue in search and seizure law — whether the fruits of a warrantless search are admissible in evidence — arose in numerous Prohibition cases. But the issue was not definitively decided until People v Defore.69 Although not a Prohibition case, Judge Benjamin N. Cardozo wrote his opinion with Prohibition very much in mind only three years after the New York legislature had nullified

(making unregulated transshipment of liquors from Havana to Netherlands via New York illegal), aff'd, 204 N.Y.S. 895 (App. Div 1st Dep't 1924), aff'd, 240 N.Y. 9, 147 N.E. 231 (1925); People v Cook, 188 N.Y.S. 291, 294 (App. Div. 4th Dep't 1921) (subjecting people unlawfully in possession of liquor to prosecutions in state court under state law), aff'd, 236 N.Y. 505, 142 N.E. 260 (1923).


66. See Wade, 214 N.Y.S. at 782-83.

67 See People v Three 100-Gallon Stills, 197 N.Y.S. 882, 883 (Kings County Ct. 1922); People v 738 Bottles of Intoxicating Liquor, 190 N.Y.S. 477, 480 (Saratoga County Ct. 1921).

68. See United States v Two Soaking Units and Various Other Articles, 48 F.2d 107, 109-10 (2d Cir.), cert. denied, 284 U.S. 627 (1931); Stork Restaurant Corp. v McCampbell, 55 F.2d 687, 689 (S.D.N.Y 1932); United States v Maggio, 51 F.2d 397, 399 (W.D.N.Y 1931); People v Diamond, 233 N.Y 130, 135-36, 135 N.E. 200, 202-03 (1922) (dictum). Cf. Lee Kwong Nom v. United States, 20 F.2d 470, 472 (2d Cir. 1927) (upholding seizure of opium). But the officer making the seizure had to make a return thereof with reasonable promptness or the seizure was void. See In re No. 32 East Sixty-Seventh Street, Borough of Manhattan, City of New York, 96 F.2d 153, 155 (2d Cir. 1938); Diamond, 233 N.Y at 135-36, 135 N.E. at 202-03. Documents and papers, however, could not be seized, and courts would compel their return, see In re No. 191 Front Street, Borough of Manhattan, City of New York, 5 F.2d 282, 285 (2d Cir. 1924); United States v Kraus, 270 F 578, 580-81 (S.D.N.Y 1921), unless suit for the return thereof was brought against an official who did not have custody See Weinstein v Attorney General of the United States, 271 F 673, 675 (2d Cir. 1921).

69. 242 N.Y 13, 150 N.E. 585 (1926).
federal policy by repealing the state's laws criminalizing possession of alcoholic beverages.\textsuperscript{70} \textit{Defore}, in effect, was an anti-nullification opinion that rejected the exclusionary rule because it would have given the "pettiest peace officer power, through overzeal or indiscretion, to confer immunity upon the offender for crimes the most flagitious."\textsuperscript{71} Although Cardozo recognized that "unless the evidence is excluded," the statutory protection against warrantless searches could become "a form and its protection an illusion,"\textsuperscript{72} he still declined to create a system in which the "criminal" went "free because the constable [had] blundered"\textsuperscript{73} or which otherwise effectively failed to enforce sovereign law.

\textbf{D The 1938 Convention and the Emergence of a New Conception of Equality}

The \textit{Defore} case did not, however, satisfactorily resolve the exclusionary rule issue. On the contrary, \textit{Defore} raised issues of inequality and repression that would not disappear. Ultimately, \textit{Defore} induced New York liberals to separate clearly their concerns about ethnic and cultural discrimination from issues of class conflict, and thereby to articulate a new vision of equality as the protection of discrete ethnic and cultural minorities.

\textsuperscript{70} See \textit{Josephson & Josephson}, supra note 8, at 291-96.


\textsuperscript{72} \textit{Id.} at 24, 150 N.E. at 589.

\textsuperscript{73} \textit{Id.} at 21, 150 N.E. at 587 Later cases held not only that a warrantless search did not preclude the use of evidence, but also that it gave no basis for the owner of what had been seized to demand its return. \textit{See} People v. Hawkins, 230 N.Y.S. 152, 154 (Niagara County Ct. 1928). \textit{Cf.} Triangle Mint Corp. v Horgan, 233 N.Y.S. 570, 575 (Kings County Mun. Ct. 1929) (slot machines illegal and hence not returnable whether or not seized unlawfully by police); \textit{see also} Times Amusement Corp. v. Moss, 290 N.Y.S. 794 (Sup. Ct. N.Y. County) (license commissioner has discretion to deny license for pinball machines used in conjunction with the giving of prizes, thereby making them unlawful), \textit{aff'd}, 287 N.Y.S. 327 (App. Div. 1st Dep't 1936). Unlike the state courts, the federal courts adhered consistently throughout the period to the exclusionary rule. \textit{See} Nardone v. United States, 302 U.S. 379, 384 (1937); United States v. Lefkowitz, 285 U.S. 452, 465-66 (1932); Go-Bart Importing Co. v United States, 282 U.S. 344, 358 (1931); Agnello v. United States, 269 U.S. 20, 32 (1925); Gouled v. United States, 255 U.S. 298, 310 (1921). But evidence unlawfully seized by a state official was admissible in federal court. \textit{See} Katz v. United States, 7 F.2d 67, 68 (2d Cir. 1925); Schroeder v. United States, 7 F.2d 60 (2d Cir. 1925).
Despite the unanimous defeat they had suffered in the Court of Appeals, representatives of urban labor and immigrant groups continued their fight and made Defore a special target at New York State's 1938 Constitutional Convention. At the behest of George Meany, president of the state Federation of Labor, a proposal was introduced on the convention floor to incorporate into the state constitution a rule excluding the fruits of any unlawful search or wiretap from evidence in a criminal case.\textsuperscript{74} The proposal, which was ultimately defeated on a vote of 72 in favor and 89 opposed,\textsuperscript{75} was hotly debated, with both sides aware that its passage would determine whether or not a constitutional provision against warrantless searches and wiretaps, on which they both agreed, would be effectively enforced.

Opponents of the exclusionary proposal did "not like these New Deal crackpots to write us a Constitution"\textsuperscript{76} and in the process to ignore the opponents' practical concerns and fears that an exclusionary rule would give tight-knit, especially Italian, immigrant communities an increased capacity to nullify Puritanical law-enforcement machinery.\textsuperscript{77} As Hamilton Fish, a Republican elder statesman who, in his own words, had "learned all [his] political principles back in 1912 at the feet of Theodore Roosevelt,"declaimed, the Convention was "playing with fire" in a state that was "at war with organized crime[ — u]nscrupulous, clever, backed by great wealth."\textsuperscript{78} To adopt the exclusionary rule would offer "a cloak" and "a hideout" for criminals and lead to "the greatest single celebration in the City of New York among the crooks and gangdom and racketeers that was ever known in that city."\textsuperscript{79} From "far and wide," he added, "all the other racketeers and murderers and kidnappers and embezzlers [would] all collect to celebrate this famous victory of the forces of evil."\textsuperscript{80}

Other delegates, who did not want to see the erection of new "walls of

\textsuperscript{74.} See RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, at 395, 404 (1938) [hereinafter RECORD OF THE CONSTITUTIONAL CONVENTION]; see also \textit{id.} at 513-14.

\textsuperscript{75.} See \textit{id.} at 879. On an earlier tentative vote, the margin had been 67 in favor and 84 opposed. See \textit{id.} at 616.

\textsuperscript{76.} \textit{Id.} at 612.

\textsuperscript{77} See GLAZER & MOYNIHAN, supra note 10, at 196-97, 210-12.

\textsuperscript{78.} RECORD OF THE CONSTITUTIONAL CONVENTION, supra note 74, at 607

\textsuperscript{79.} \textit{Id.} at 606.

\textsuperscript{80.} \textit{Id.} at 606-07
CHANGING MEANING OF EQUALITY

"technicality" that would "form a chief defense for organized crime," gave examples of murderers and other violent criminals who might have escaped conviction but for the use of unlawfully obtained evidence. The leading opponent of the exclusionary proposal, however, was Manhattan District Attorney Thomas E. Dewey, who had built his political career on his successful prosecution of organized crime and had played a leading role in securing legislation that made criminal prosecution easier and punishment more severe. He made the main point clearly and succinctly. The exclusionary proposal, according to Dewey, would "protect no one except the guilty criminal" and would "subject them [i.e., the people of the state] to the depredations of organized crime."

Supporters of the proposal, like the opponents, also made their point by way of examples. One example involved a member of President Franklin D. Roosevelt’s Cabinet who tapped the wires of his supporters; a second, wiretapping by a prosecutor investigating ambulance chasing in New York City; and a third, "political persecution" through wiretapping of a "priest who was interested in certain phases of charity, certainly not a criminal, surely an innocent man." But more was at stake for supporters of the exclusionary rule than the use of wiretapping in an investigation of ambulance chasing or even of an innocent priest. They worried about "the threats which dictatorship countries [were] making against Democratic countries" and about "the dangers which [were] threatening our people throughout the entire world today."

The "working man, the American Federation of Labor, the laboring people, the honest business man, the private citizen," who would be "protected in the privacy of [their] homes" and "office[s] and business[es]," supported adoption of an exclusionary rule because it would "re-affirm our faith in democracy; preserve the principles upon which that democracy is found[ed], and strengthen so far as we can, the basic principles of a

81. Id. at 522.
82. See id. at 468.
84. RECORD OF THE CONSTITUTIONAL CONVENTION, supra note 74, at 405, 407.
85. Id. at 461-62.
86. Id. at 462.
87 Id. at 577.
free people." 88 "In a world gone mad in the direction of dictatorship" and in the "suppression of democratic rights," there was "no more important consideration facing the Constitutional Convention" than "to preserve and strengthen all the guaranties contained in the Bill of Rights." 89

Nothing so far quoted fully captures, however, why organized labor and its urban immigrant members deemed an exclusionary rule of such "great importance" that they vowed to "press for its passage." 90

Nothing yet explains why urban members of the New Deal coalition should have been so much more concerned about the "suppression of democratic rights" and protection of the Bill of Rights than their Republican opponents. Nothing accounts for why the debate over the exclusionary rule became such a central focus of concern at the 1938 Constitutional Convention.

The debate became so important because it served as a surrogate for what one Republican delegate in his speech against the exclusionary rule labelled a struggle "of law and order against lawlessness," between "real Americans [who] stand for law and order" and "those using lawless means to seek some advantage over their fellow citizens." 91 In particular, the Republican delegate expressed his concern about the "temporary periods of disorder and lawlessness" that "several communities" had recently experienced — "experiences" that were "distasteful and objectionable to the vast majority of our people." 92

Although the delegate's meaning may not be entirely clear to today's reader, it was crystal clear to his listeners. By his reference to "temporary periods of disorder and lawlessness," the delegate could have been referring to nothing other than recent strikes and labor unrest associated especially with the CIO's organization of the auto and steel industries. 93

Unionism was, of course, one "lawless means" that "real Americans" feared others would use to "seek some advantage over their fellow

88. Id. at 463.
89. Id. at 514.
90. Id. at 515.
91. Id. at 546-47
92. Id. at 547
citizens." But it was not the only "lawless means" used by organized labor and its immigrant supporters to attain their ends. Even more significant was the lawlessness that old-line Republicans found in the redistributive legislation of President Franklin Roosevelt's New Deal and Governor Herbert Lehman's Little New Deal.

Equally revealing from an opposite perspective was the speech of the Convention's Harlem delegate, who focused on the relationship between racial discrimination and police brutality. He told, for example, of one innocent man who was arrested without a warrant and taken "to the 135th Street Police Station," where the police "proceeded to work on him."94 The delegate reported that when the police saw "an individual of negro origin fairly well dressed and out in the day time," they would "suspect" him as "a policy collector" and would "push him into a hallway, strip him of his clothes, take off his shoes even, in quest of policy slips," and when they found none, "push him out."95 There was also "the case of a poor woman with a child home in her bed late at night" while "her husband [was] out at work."96 When the police broke in, "the children [became] hysterical" and she became "sick."97 Even though the police found nothing, there was "[n]o one" who was "going to pay for it."98 There were "thousands of other cases, thousands and thousands where illegal evidence [was] not found, where illegal searches [were] permitted day after day and no evidence [was] obtained."99

A report to Mayor LaGuardia on a 1935 riot in Harlem continued the tale. It told of how "the police of Harlem" often invaded "the personal rights of its citizens ... when white and colored people [were] seen consorting together." Although the report indicated that police interference was most likely when "a colored man [was] with a white woman," it told of one case of a man who was arrested "because he was walking with a colored woman" and held "until he could prove to the officer that he was a colored man." The report also brought out the fact that "the police attempted to impress" on whites "by words and acts of brutality that whites were not to associate with 'the black bastards in Harlem.'" Although the

94. RECORD OF THE CONSTITUTIONAL CONVENTION, supra note 74, at 488.
95. Id.
96. Id. at 487
97 Id. at 487-88.
98. Id.
99. Id. at 487
"citizens of Harlem" appreciated that "the slight regard shown for their lives was due not only to the fact that they were Negroes, but also to the fact that they were poor and propertyless and therefore defenseless," they understood at the same time that something in addition to economic justice was at stake. They knew that they had to put an end not merely to their poverty but also to "the estimation of the police" that "the life of a Negro was cheap." 100

Examination of this rhetoric makes it clear that today's conception of equality had begun to enter political discourse and to divide Democrats from Republicans and liberals from conservatives, in a significant way. Republicans, who at least in New York tended to represent "real Americans" of WASP extraction, conjoined majoritarian political power, labor activism, and actual crime as forms of lawlessness that Democrats would use to deprive them of the independence, wealth, and social pre-eminence that they had always enjoyed. They feared an egalitarian revolution carried out under the forms of government, but in the end not radically different from the violent one that Benjamin Gitlow and his fellow Bolsheviks had plotted in 1919. In contrast, the Democrats, who represented urban Catholic and Jewish immigrants and their descendents, feared in the year of Kristallnacht that Nazi-like repression might spread to America through police and other abuses of governmental power. Ultimately, the core issue in the 1938 debate over the exclusionary rule was whether urban Catholics and Jews and perhaps even blacks would gain an equal share of the American dream or whether WASP elites would keep them in subordination.

The entry into politics of today's conception of equality was marked even more clearly by another suggested amendment to the state's Bill of Rights. As originally proposed, the new amendment to the Bill simply declared that "[n]o person shall be demed the equal protection of the laws of this State or any subdivision thereof." 101 This proposal was scarcely debated on its way to passage, but one extraordinary speech by Senator Robert F. Wagner bears quotation at length. In a prophecy of the future course of equal protection jurisprudence, Wagner declared:


101. RECORD OF THE CONSTITUTIONAL CONVENTION, supra note 74, at 1120.
As we reflect sorrowfully on the turn in world events, we pose in our own minds the essential governmental problem of our time. In the 18th and 19th centuries, that problem was how to establish the will of the majority in representative government. In the world of today, the problem is how to protect the integrity and civil liberties of minority races and groups. The humane solution of that problem is now the supreme test of democratic principles, the test indeed, of civilized government.

We in America have long cherished the picture of a great melting pot. That picture, we must all admit, is marred in this State by certain manifestations of racial intolerance and prejudice. The beastly manifestations of anti-semitism abroad are happily absent from our national scene. We cannot, however, be blind to the forms of anti-semitism prevalent at home. These manifestations have been vigorously challenged by spokesmen of all creeds, and many notorious instances have met with effective protest.

Far less effective in marshalling informed public opinion and suffering from discrimination and prejudice so deep-seated as to be taken for granted by the community at large, are the half million Negroes in the State.102

Wagner then graphically described the discrimination that victimized African Americans in New York in the 1930s, concluding that "[i]n the final analysis the so-called Negro problem, or any other minority problem, is but another aspect of man's eternal struggle for freedom and justice, a problem that solves itself when democracy is extended into every phase of our material life."103

As of 1938, no one had yet seen the future as clearly as did Wagner in his convention speech, but others were beginning to develop a coherent vision. Justice Harlan Fiske Stone, for example, had become "deeply concerned about the increasing racial and religious intolerance which seem[ed] to bedevil the world" and might "be augmented in this country" and for this reason had thought it necessary in footnote four of Carolene Products104 to explain that "the program of 'judicial reform'" on which the majority of the Court had embarked in giving greater deference to legislation would not result in diminished judicial enforcement of "the guarantees of individual liberties."105 And, as we have seen, other liberal Democrats at the

102. Id. at 1121 (emphasis added).
103. Id. at 1123.
New York convention had expressed concerns about the danger of Nazi-like repression, without, however, placing their concerns in as perceptive a theoretical framework.

E. Egalitarian Propaganda During World War II

As the 1930s drew to a close, a modern conception of equality, which required an end to ethnic and cultural discrimination, was thus beginning slowly to permeate the societal fabric. The New Deal's demand for economic opportunity was gradually being transformed into a demand for full legal and social equality not only for Catholic and Jewish children of immigrants, but even, perhaps, for African Americans. Even more important was the impact that continuing events in Nazi Germany would have on the development of this new egalitarian ideology. Indeed, these events were so important that their impact must be traced in detail.

One historian, at least, finds that a number of organizations, ranging from the Foreign Language Information Service through the National Conference of Christians and Jews to the American Jewish Committee, self-consciously took advantage of the Nazi threat and of a growing American interest in unity and democracy to promote their own missions. By working together to explain to Americans "the true nature, implications, consequences and dangers of Nazism," these groups and others hoped to bring about "the education and assimilation of all of us" and to produce a spirit of "unity" in which "all Americans work[ed] and liv[ed] together harmoniously" and fully appreciated the fact "that an attack on the rights of any one group in the country subjects all other groups to similar attacks."  

106. For an example of the judiciary's growing sensitivity to issues of religious prejudice, see Bowen v Mahoney Coal Corp., 10 N.Y.S.2d 454, 456 (App. Div. 1st Dep't 1939) (mention of possibly prejudicial reference to opposing co-counsel being Jewish).  


111. Report from Maurice Wertheim & David Rosenblum, American Jewish Committee,
When World War II came a few years later, government propagandists joined in the effort and made "this a 'people's war for freedom" in a self-conscious attempt to "help clear up the alien problem, the negro problem, the anti-Semitic problem." The central racial doctrines espoused by Hitler made the propagandists' task easy by illustrating to Americans "where we end up if we think that the shape of the nose or the color of the skin has anything to do with human values and culture." Egalitarian propaganda efforts such as these were quite successful, and it became a commonplace that "in a commonwealth like New York, teeming with every race and creed," every effort had to be made to undo "the existence of racial or religious discrimination especially [during] a war being waged to defend the American principle that all men are entitled to equal opportunity " As President Franklin D Roosevelt proclaimed, the goal of the War was to "conquer racial arrogances" and promote "justice and tolerance and good-will among all people." The experience of the millions who served in the military reaffirmed what American propaganda had been saying. With an army composed of "Yugoslavs and Frenchmen and Austrians and Czechs and Norwegians," the battlefield produce[d] a brotherhood as the "common bond of death [drew] human beings toward each other over the artificial barriers of rank." "The caldron of war," in short, tended to "dissolve all ethnic, class, and racial enmities." Even for those, especially the young, who stayed at home, the values proclaimed during wartime, whether or not shaped by propaganda, left a permanent imprint on their collective psyche.
The massive postwar American move to the suburbs ratified the war's dissolution of ethnic and religious barriers, at least among whites. Old ethnic neighborhoods in New York City were depopulated as Italians, Jews, and Scandinavians moved to the suburbs and became each others' neighbors. Nassau County, a close suburb of New York City, furnishes an example. The scene of anti-Catholic and anti-Semitic Ku Klux Klan activities in the 1920s, the county witnessed an enormous influx of Catholics and Jews during the late 1940s and 1950s. The resulting integration of cultures that occurred, together with earlier experiences in World War II, made ethnic and cultural discrimination appear increasingly pernicious.

III. Gradual Assimilation: The Initial Mechanism for Ending Inequality

In short, the years immediately surrounding World War II witnessed new societal realities and a new ideology, in which ethnic and cultural discrimination were identified as the paradigms of inequality. Elaboration of this new understanding of inequality did not, however, automatically generate doctrinal mechanisms for its elimination. As we shall see in the remainder of this Article, two dramatically different approaches for curing inequality emerged. This Part will elaborate the early approach that dominated New York case law from the late 1930s into the 1960s.

This early approach, which emphasized the gradual elimination of distinctions between the WASP mainstream and the minority victims of ethnic and cultural discrimination followed by the eventual assimilation of

120. See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 234-38, 278-82 (1985); see also POLENBERG, supra note 112, at 145.

121. See supra notes 39-40 and accompanying text; infra notes 211-15 and accompanying text.

122. Because census data do not report religious affiliations, the best measure of this influx is the founding of new houses of worship — a phenomenon that is also a precondition of suburban migration because without parishes and synagogues, Catholics and Jews would have had to give up their faiths in order to move into the suburbs. The numbers, in fact, are striking: more than half of all synagogues in Nassau County and approximately one-fourth of all Roman Catholic parishes were founded between the end of World War II and the end of the 1950s. See "THAT I MAY DWELL AMONG THEM"—A SYNAGOGUE HISTORY OF NASSAU COUNTY (Tobie Newman & Sylvia Landow eds., 1991) [hereinafter "THAT I MAY DWELL AMONG THEM"]; JOAN DE L. LEONARD, RICHLY BLESSED: THE DIOCESE OF ROCKVILLE CENTRE 1957-1990, at 331-48 (1991).
the minorities into the mainstream, did not emerge fullblown overnight. Three distinct steps, each of which must be examined in some detail, led to the elaboration of this gradualist, assimilationist approach to equality. First, in the 1940s and even into the early 1950s, New York courts refused to hold that individual victims of ethnic or cultural discrimination possessed a judicially enforceable right to immediate equal treatment. Next, the judiciary began to protect minority institutions, especially churches, synagogues, and parochial schools in order to ensure the inclusion of the institutions, and the people belonging to them, in all communities in the state. Finally, the judiciary made it clear that minorities were entitled to inclusion into the mainstream only after they had abandoned their own discordant values and accepted mainstream culture.

A. Early Judicial Resistance to the Recognition of Rights

Even as the link between urban immigrant groups and politically-threatening speech grew increasingly attenuated and new attitudes toward those groups emerged, New York’s judges continued to pursue familiar patterns of repressing speech and political activity that they found even minimally threatening to the maintenance of social stability. Consider, for example, *People v. Vogt,* a 1942 case in which the defendant had made the following statement at a bar and grill to “a uniformed sailor in the United States Navy”:

> “What are you doing, fighting? And what are you fighting for? This is a capitalistic war. Why do you want to go out there and fight for a bunch of capitalists? Hitler wants his ‘new order,’ and Roosevelt has a ‘New Deal.’ What have you to choose from?”

The sailor to whom these words were addressed immediately and without incident "walked away from the defendant,” but, shortly thereafter, another man who had overheard the conversation "called a police officer, and caused the defendant’s arrest.”

These facts created an analytical problem for the court. Because there was no evidence of any violence or threat of violence at the bar and grill, the Supreme Court’s rationale in *Chaplinsky v. New Hampshire* authorizing punishment for fighting words could not provide any basis for Vogt’s conviction. The court had to find some other ground on which to rest his

123. 34 N.Y.S.2d 968 (Magis. Ct. N.Y County 1942).
125. *Id.*
126. *Id.*
127 315 U.S. 568 (1942).
guilt. In fact, the court did find another ground when it explained, "[c]ourts may place an injunction upon the public expression of seditious statements in a time of war and of national danger which incite or tend to incite disloyalty." 128

Almost a decade later a plurality of the Supreme Court, in *Dennis v United States*, 129 another case arising out of New York, agreed. Speaking for the plurality, Chief Justice Vinson "reject[ed] any principle of governmental helplessness in the face of preparation for revolution" and expressed no doubt that it was "within the power of Congress to prohibit acts intended to overthrow the Government by force and violence." 130 In concurring opinions, Justices Frankfurter and Jackson likewise refused to "hold that the First Amendment deprive[d] Congress of what it deemed necessary for the Government's protection" or to "doubt that Congress has power to make" criminal "advocating or teaching overthrow of government by force or violence." 131 It thus seems clear that if seditious speech posed even the slight threat to law and order that Vogt's did in the New York bar and grill in 1942 or that the Communist Party's did in America in 1951, judges were willing to repress it. 132

The Vogt and Dennis cases were not, of course, alone. In *In re Albertson*, 133 the New York Court of Appeals held that because the Communist Party had been declared illegal, the Party would not be permitted to pay unemployment taxes for its office staff and other workers, 134 even though its employees could collect unemployment compensation if they found themselves unemployed. 135 There was also a long line of well-known

---

128. Vogt, 34 N.Y.S.2d at 971.
131. Id. at 551 (Frankfurter, J., concurring); id. at 570 (Jackson, J., concurring); accord United States v Lebron, 222 F.2d 531 (2d Cir.), cert. denied, 350 U.S. 876 (1955); cf. United States v Rosenberg, 195 F.2d 583, 591 (2d Cir.) (holding statute that forbade communication of secret material connected with national defense to foreign governments valid under First Amendment), cert. denied, 344 U.S. 838 (1952).
132. *But see* Williamson v. United States, 184 F.2d 280, 283 (2d Cir. 1950); ACLU v Town of Cortlandt, 109 N.Y.S.2d 165, 168 (Sup. Ct. Westchester County 1951) (striking down as unconstitutionally vague an ordinance that prohibited "assemblies for the purpose of breaking down law enforcement").
133. 8 N.Y.2d 77, 168 N.E.2d 242 (1960).
135. Id. at 82, 168 N.E.2d at 243. This was probably neither the first nor the last time
CHANGING MEANING OF EQUALITY

cases upholding denaturalizations and job deprivations on account of Communist affiliations or refusals to answer questions about such affiliations. The same had earlier been true with regard to Nazi affiliations.

Criminal convictions were also upheld in picketing cases. In one such case, a group carrying placards declaring "No American shall die for Churchill's empire" and "No American Sweat Blood and Tears for a Churchill's World War 3," picketed City Hall during Winston Churchill's attendance at a 1946 official reception. In another case, a trial judge convicted two Puerto Ricans for picketing the United Nations and distributing leaflets which declared that the United States had "committed the crime of genocide" in Puerto Rico, although the Court of Appeals ultimately reversed. Likewise, a lower court repressed speech when it upheld the refusal of the Yonkers Board of Education to allow the Yonkers Committee for Peace to meet in a public school building.

*People v Feiner,* I believe, can also be seen in the context outlined above as a case affirming the right of "the State [to] protect and preserve

---


137. See United States v. Hauck, 155 F.2d 141 (2d Cir. 1946) (holding that inquiry about Nazi affiliation was constitutional and relevant in action to cancel naturalization certificates for fraud); cf. Long v. Somervell, 22 N.Y.S.2d 931 (Sup. Ct. N.Y. County 1940) (involving employee discharged for refusing to sign statement denying Nazi affiliation), aff'd, 27 N.Y.S.2d 445 (App. Div. 1st Dep't 1941).


140. See Ellis v Dixon, 118 N.Y.S.2d 815 (Sup. Ct. Westchester County 1953).

141. 300 N.Y. 391, 91 N.E.2d 316 (1950).
its existence.\(^{142}\) Although Fener's conviction was upheld both by the Court of Appeals and by the United States Supreme Court on the finding that his street-corner speech threatened to provoke violence, it has always been difficult to distinguish *Femer* on that ground from its companion case of *Kunz v New York*,\(^{143}\) which reversed the conviction of a speaker whose street-corner antics had in, in fact, led to "trouble."\(^{144}\) Perhaps what distinguished the cases was the content of what the speakers said.\(^{145}\) As we shall see in discussing the case below,\(^{146}\) *Kunz* did not attack the government. Fener, however, did. He called the mayor of Syracuse "a champagne [sic] sipping bum and President Truman a bum,"\(^{147}\) and, even worse, he "said that the Negro people did not have equal rights and that they should rise up in arms and fight for them."\(^{148}\) In addition to attacking government officials, Fener basically called for a form of political action that some judges, in light of past and future race riots, might have found threatening to public order. Such an effort to induce the most repressed of American underclasses to rise up and subvert the established structure of authority simply could not be tolerated in the name of free speech values.

144. People v Kunz, 300 N.Y 273, 277, 90 N.E.2d 455, 457 (1949).
145. I fully appreciate the inconsistency of such an interpretation with the central canon of today's First Amendment jurisprudence. Judges during the 1940s and 1950s did, however, exclude broad categories of speech, such as commercial speech, from First Amendment protection — an exclusion that has since come to be seen as content-based discrimination. See Limmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 98 (1977). For New York cases denying constitutional protection to commercial speech, see Gold Sound, Inc. v City of New York, 89 N.Y.S.2d 860, 866 (Sup. Ct. N.Y County 1949); People v LaRollo, 24 N.Y.S.2d 350, 354 (Mags. Ct. Bronx County 1940); *see also* Christie v 46th Street Theatre Corp., 39 N.Y.S.2d 454 (App. Div 3d Dep't 1942) (regulating commercial speech by sustaining legislation in apparent context in which theater sought to exclude critic from performance), *aff'd*, 292 N.Y 520, 54 N.E.2d 206, *cert. dened*, 323 U.S. 710 (1944). Another case in which New York judges approved regulation of press coverage was United Press Ass'n v. Valente, 120 N.Y.S.2d 174, 180 (App. Div. 1st Dep't 1953) (upholding exclusion of press from criminal trial because newspapers and members of public had no implied remedy under statute), *aff'd*, 308 N.Y 71, 123 N.E.2d 777 (1954). But courts would not permit regulation of political speech under the guise of commercial speech. *Cf.* People v Skottedal, 104 N.Y.S.2d 583 (Suffolk County Ct. 1951).
146. See infra note 293 and accompanying text.
148. *Id.* at 396, 90 N.E.2d at 317
Judges in the 1940s and 1950s were thus no more prepared than their predecessors to protect the right of minorities to freedom of expression. Similarly, New York judges were unwilling to create judicially enforceable equality rights that would provide racial, religious, and ethnic underclasses with immunity from discrimination. Although the judges remained sympathetic to the goal of equality and would usually enforce legislation designed to effectuate that goal, they proved unwilling to grant individual plaintiffs specific rights of equality with others.

In one 1937 case, for example, a resident brought suit to keep a black purchaser out of his residential subdivision by enforcing a covenant attached to the land that prohibited ownership by African-Americans. Deciding against the black purchaser, the court granted enforcement of the covenant because "the issues in the case [did] not warrant the discussion of abstract social theories," but only "whether a contractual duty, knowingly and voluntarily assumed, [could] be enforced." The result was the same in two virtually identical cases brought during the next decade when, paradoxically, the use of restrictive covenants to exclude both racial and religious groups from new residential subdivisions was, in fact, on the rise. Although the more extensive of the two opinions recognized that "[d]istinctions based on color and ancestry [were] utterly inconsistent with ... [the] traditions and ideals" for which Americans had just been "waging war," both judges, as late as one year before the Supreme Court decided Shelley v Kraemer, relied on precedents holding that enforcement of racially restrictive covenants involved only private and not state action and therefore was not subject to the prohibitions of the Fourteenth Amendment. As one judge observed, he was "constrained to

150. Id. at 943.
151. Id.
152. See John P Dean, Only Caucasian: A Study of Race Covenants, 23 J. LAND & PUB. UTIL. ECON. 428, 429-31 (1947) (providing data that attests to rapid spread of race covenants during 1940s).
follow precedent" despite his own "sentiments," especially because bills to overturn the precedents had been introduced in the legislature but not yet enacted. The court did "not feel that it should judicially legislate by reading into the statutes something which the Legislature itself ha[d] failed to adopt." A 4-3 majority of the Court of Appeals took essentially the same view in the leading case of Dorsey v Stuyvesant Town Corp., which was decided one year after Shelley. Despite the fact that Stuyvesant Town had assembled its land through use of the eminent domain power and had received tax exemptions on its buildings for twenty-five years, the court held it to be a purely private entity left free to discriminate under the state action requirement of the Fourteenth Amendment. The majority expressed its concern that "[t]ax exemption and power of eminent domain [were] freely given to many organizations which necessarily limit[ed] their benefits to a restricted group" and worried that a "grave and delicate problem would be posed if we were to characterize the rental policy of respondents as governmental action." The court also noted that legislation to prohibit the discrimination occurring in the case had been introduced in the legislature, but had been defeated. That fact, indeed, had led the trial judge in the case to declare that, although "from a sociological point of view, a policy of exclusion and discrimination on account of race, color, creed or religion [was] undesirable," the ultimate "wisdom of the policy" was "a matter for the Legislature," and courts could "not usurp the function of the Legislature" by adding provisions that "the Legislature [had] refused to enact."

In his dissent, Court of Appeals Judge Stanley Fuld noted that the tenants of Stuyvesant Town gained "tremendous advantages in modern housing at rentals far below those charged in purely private develop-

156. Kemp, 69 N.Y.S.2d at 683.
157. Id. at 685.
158. Id. Kemp was reversed only when the U.S. Supreme Court reached the opposite result. See Shelley v Kraemer, 334 U.S. 1 (1948); Kemp v. Rubin, 298 N.Y 590, 81 N.E.2d 325 (1948).
159. 299 N.Y 512, 87 N.E.2d 541 (1949).
161. Id. at 535, 87 N.E.2d at 551.
162. See id. at 531, 87 N.E.2d at 549.
ments. Because "Negroes as well as white people" had "contributed" through higher taxation to make such low rents possible, were, he added, entitled to "share in the benefits." Failure to give them their share amounted to a "[d]istinction between citizens solely because of their ancestry," which was by its "very nature odious to a free people whose institutions are founded upon the doctrine of equality."

In two other important cases in the 1940s, challenges to possibly discriminatory rulings of public bodies were equally unsuccessful. In *Goldstein v. Mills*, the plaintiff challenged the New York City Tax Commission's grant of tax exemption to Columbia University. The suit rested on a statutory provision that prohibited discrimination by nonsectarian schools and colleges in the admission of students. The plaintiff Goldstein's specific charge was that the New York City Tax Commission had failed to find Columbia innocent of discrimination. Everyone knew, of course, that Columbia like most other colleges and universities did discriminate, especially against Jews, but occasionally against other groups such as Italian Catholics as well. Nicholas Murray Butler, who was still president of Columbia at the time of *Goldstein*, had earlier imposed quotas that had the effect of reducing Jews from forty to twenty percent of the student body. Moreover, at the time Goldstein filed his suit, a committee of the American Dental Association was accusing Columbia's Dental School of admitting too many Jewish students, and the Columbia administration had decided to merge the Dental School, which had no

164. Dorsey, 299 N.Y. at 545, 87 N.E.2d at 557 (Fuld, J., dissenting).
165. Id. at 536, 87 N.E.2d at 551 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (Murphy, J., concurring)).
166. 57 N.Y.S.2d 810 (Sup. Ct. N.Y County 1945).
168. Paradoxically, discrimination on ethnic and religious grounds had increased between the mid-1930s and the late 1940s. See American Jewish Yearbook: Volume 50 (5709) 1948-1949, at 768 (Harry Schneiderman & Morris Fine eds., 1949); Commission on Law and Social Action of the American Jewish Congress, "Dr. Howard E. Wilson's Report to the New York State Board of Regents on the Admissions Practices of the Nine New York State Medical Schools," 18 (July 1953) (manuscript in Blaustein Library, American Jewish Committee, New York, N.Y.).
170. See A.D.A. Head Assails Report by Horner, N.Y Times, Feb. 9, 1945, at 32.
quota, into the Medical School, which did have one. Dental School alumni were publicly complaining that the purpose of the merger was "to establish a quota system for dental students restricting Jewish students," and the American Jewish Committee had launched a nationwide campaign against quotas that discriminated against Jewish and Catholic applicants. Meanwhile, a group of educators had asked President Roosevelt to appoint a committee to work toward the elimination of "quotas and other forms of racial and religious discriminations in the nation's colleges," which one member of the group had condemned as a "'Nazi practice.'" Nonetheless, the Goldstein case was dismissed on various procedural grounds, among them that the plaintiff had failed to allege that Columbia had a discriminatory admissions policy.

Another case, Marburg v Cole, which perhaps involved anti-Semitism in the form of hostility toward Jewish refugees fleeing from Hitler, reached the Court of Appeals in 1941. The court, however, declined to overturn the refusal of the Commissioner of Education to endorse an Austrian medical license and thereby permit medical practice in New York by its holder, who had been Director of the Neurological Institute at the University of Vienna from 1919 until he fled the Nazis in 1938. Upon his arrival in New York, he had been appointed Clinical Professor of Neurology at Columbia and Research Neuropathologist at Montefiore Hospital. Dr. Marburg, as Judge Desmond noted in his dissent, was "unquestionably the most prominent of recent emigres" and allowing him to practice would not "let [ ] down any bars or mak[e] possible any great inrush of emigre physicians." Still the Commissioner of Education would not permit him to practice, and the court sustained the Commissioner's refusal.

People v Bell followed Marburg. Four African-American males were arrested at a suburban railroad station for loitering and later convicted.

172. Columbia Merger Is Linked to Fund, supra note 171.
175. 286 N.Y. 202, 36 N.E.2d 113 (1941).
176. On the existence of such hostility, see POLENBERG, supra note 112, at 41-42, which calls the hostility anti-Semitic; see also NEVINS, supra note 14, at 199-200.
in a municipal court on evidence that, after they had been in the station for thirty-five minutes, they falsely told the police that they had just arrived. Defense counsel argued "that the defendants were denied equal protection" in that they "were selected for prosecution for reason of the color of their skin" and that the case had "racial discrimination overtones," but the county judge hearing the initial appeal found the defense lawyers to be "consumed with indignation over this fancied issue" and also found "nothing in the record" to support "these serious and startling charges." 179 Although the defendants had plainly violated the loitering ordinance, which defined the offense as mere presence without a satisfactory explanation, the county judge reversed their conviction by construing the ordinance as not applying to "those who are guilty of mere lassitude or indolence, those overcome by a normal weariness, or indeed those of our citizens who consider themselves students of human nature and who use station waiting rooms as their laboratory." 180

The Court of Appeals agreed that the ordinance did not apply to people present in a station in order to meet or to speed the departure of others, to obtain information concerning trains, to purchase tickets, to check or call for baggage or parcels, to buy tobacco, newspapers, magazines or other articles from concessionaires, to use the toilets for purposes for which they were intended, or to be present on other errands whose legitimacy can be decided as the case arises. 181 On the contrary, the ordinance had been passed to prevent persons from infesting subway, elevated or other railway stations who have no occasion to be there. The danger to the public is well understood which arises from the congregation of nondescript characters at such locations, particularly at night, where degenerates, or even "boisterous, noisy cut-ups," as they are called in the opinion of the County Court, may easily become anything from a public nuisance to a serious menace. 182

180. Id. at 119.
182. Id. at 113, 115 N.E.2d at 822.
On the basis of this bright line distinction, the court found the ordinance "not so vague or indefinite as to render [it] void," and further held that there was no evidence that the defendants had violated it.\footnote{Id. at 113-14, 115 N.E.2d at 822.}

The \textit{Bell} case strikes me as one in which judges, themselves guilty of egregious racial stereotyping in the reference, for example, to those "guilty of mere lassitude or idleness," were unwilling either to condemn such racism or to allow it to serve as a basis for formal government action. Thus, they invalidated particular acts of police racism while at the same time protesting that they were doing no such thing. By such behavior, the judges were able to achieve justice in the \textit{Bell} case itself and perhaps even to send an inarticulate message to police forces to alter their practices. Nonetheless, it must be noted that the New York courts explicitly refused to recognize the existence of racism and likewise refused to create an individual constitutional right to seek judicial relief if one were cast into a subordinate status or otherwise victimized as a result of racial discrimination.

In sum, the early response of the New York courts to lawsuits brought to outlaw racism and analogous ethnic and religious discrimination was not especially uplifting. Although something had happened in the years immediately surrounding World War II to induce victims of discrimination to demand judicial relief against the various mechanisms of subordination used by elites to preserve their hegemony, New York's judges turned a deaf ear to their complaints. Obviously those judges were aware of the history of subordination that African Americans, Catholics, and Jews had suffered and the continuing efforts of some to keep them subordinate. In cases in which the legislature had created a specific remedy against discrimination, the courts would dutifully give it effect,\footnote{See Railway Mail Ass'n v. Corsi, 293 N.Y 315, 56 N.E.2d 721 (1944) (holding that legislation prohibiting discrimination by labor unions on grounds of race, color, or creed unvalidated provision in association's constitution limiting membership to whites and American Indians), aff'd, 326 U.S. 88 (1945); American Jewish Congress v. Carter, 190 N.Y.S.2d 218 (Sup. Ct. N.Y County 1959) (upholding priority of New York's anti-discrimination legislation over Saudi Arabian anti-Semitism inhirings by Arabian-American Oil Company), aff'd, 9 N.Y.2d 223, 173 N.E.2d 788 (1961).} and they would also do \textit{ad hoc} justice in random cases like \textit{Bell}. But throughout the 1940s and into the 1950s the New York courts consistently refused to elaborate any legally enforceable right to equality to which individuals could turn in a search for judicial relief if they found themselves victims of discrimination or subordination in the world of prejudice that still surrounded them.
B. Providing Space for Minority Institutions

Although the New York courts refused to respond to inequality by creating a legalistic right to equality that subordinated groups or individuals could use to obtain judicial relief, they were frequently prepared to adopt an alternative approach that achieved at least religious equality without proclaiming it. In the context of religion, the approach was to confer special rights and a special status not merely on Judaism and Catholicism, but on all religion—a status that in large part rendered all religion immune from state power and thereby gave minority religions space within which to flourish.

This move toward granting a special status to religion began quite hesitantly and confusedly, however. In one of the earliest cases, People ex rel. Fish v Sandstrom, the New York Court of Appeals confronted "a young girl thirteen years of age associated with, the religious order known as Jehovah's Witnesses" who persisted in coming to school every morning but, once there, refused to take part in "a simple ceremony of saluting the flag with the other scholars." For her refusal, her parents were convicted of violating the provision of the State Education Law requiring them to send her to school.

Before the Court of Appeals, the parents argued that requiring their daughter to salute the flag violated the free exercise clause of the state constitution. Judge Irving Lehman agreed. Although he found "it difficult to understand how any reasonable and well-disposed person can object to such a salute on religious or other grounds," the fact was that "this little child has been taught to believe otherwise." Judge Lehman then continued:

The legitimate purpose of the salute to the flag is to inculcate love of country and reverence for the things which the flag represents; it may be an aid in teaching good citizenship — but surely not where a little child

185. For two cases indicative of the special status granted even to very small religious organizations, see O'Neill v Hubbard, 40 N.Y.S.2d 202 (Sup. Ct. Kings County 1943) (striking down as unconstitutional recent legislation that had permitted only clergymen affiliated with religion listed in last federal census to perform marriages); In re Saunders (Hubbard), 37 N.Y.S.2d 341 (Sup. Ct. N.Y. County 1942) (same).
186. 279 N.Y. 523, 18 N.E.2d 840 (1939).
188. Id. at 534, 18 N.E.2d at 845.
189. Id. at 536, 18 N.E.2d at 845.
is compelled in fear and trembling to join in an act which her conscience tells her is wrong. She does not refuse to show love and respect for the flag. She asks only that she not be compelled to incur the wrath of her God by disobedience to His commands. The flag salute would lose no dignity or worth if she were permitted to refrain from joining in it. On the contrary, that would be an impressive lesson for her and the other children that the flag salute stands for absolute freedom of conscience.

The salute of the flag is a gesture of love and respect — fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of a secular authority which clashes with the dictates of conscience. The flag "cherished by all our hearts" should not be soiled by the tears of a little child. The Constitution does not permit, and the legislature never intended, that the flag should be so soiled and dishonored.190

The majority of the court agreed that "saluting a flag, even an American flag, [was] of little vital force to the nation unless behind it there is a love and reverence for the things it represents,"191 and hence it wondered whether there might not be "a better way for accomplishing the purposes of this law than immediate resort to disciplinary measures."192 Writing for the majority, Chief Judge Crane expressed a hope that, if "our fine educational system" placed its "emphasis more upon instruction than mere blind obedience," the child would develop "a reverence for our flag and she will be glad that it is still here to salute."193 Crane thereupon proceeded to reverse the conviction of the parents on the ground that they had not failed to send their daughter to school, as the lower court had found. But on behalf of the majority, he refused to declare that the legislature lacked constitutional power to enact a mandatory flag salute statute if it chose to do so.

This same hesitancy about creating constitutional rights also appeared in cases dealing with religious tax exemptions. Thus, some early cases continued to adhere to the traditional principle that religious "[e]xemptions from taxation [were] to be strictly construed" and granted only if "such clearly appears to have been the intention of the Legislature."194 As a result,

190. Id. at 538-39, 18 N.E.2d at 846-47
191. Id. at 532, 18 N.E.2d at 844.
192. Id. at 533, 18 N.E.2d at 844.
193. Id. at 532-33, 18 N.E.2d at 844.
194. People ex rel. Unity Congregational Soc'y v Mills, 71 N.Y.S.2d 873, 875 (Sup.
entities having both social and religious purposes were denied exemption along with properties used for both religious and other ends.

Nonetheless, without making any explicit declaration, judges began to display some awareness that denials of tax exempt status might reflect religious bias and to act accordingly. Thus, one judge granted an exemption to a Christian summer camp for boys, while someone else in the late 1940s published a decision from 1920 that had accorded exemption to a Christian conference center. Likewise an interfaith group consisting of Protestants, Catholics, and Jews associated with Hunter College, which was organized to "foster religious idealism in the students and to serve the educational, spiritual, charitable and social needs of the students, without discrimination," was able to obtain an exemption when it purchased the Sarah Delano Roosevelt House from President Roosevelt and devoted it to the quoted purpose.

But substantial change in the willingness of judges to grant tax exemptions to minority religious institutions came only in the case of *Williams Institutional Colored Methodist Episcopal Church v City of New York*. In *Williams*, the city maintained its right to tax on the ground that the church property was owned by an out-of-state corporation — namely, the parent church — and that only in-state entities could receive exemption. Suspecting, I believe, that adoption of such a rule would penalize a number

---


of African-American ecclesiastical groups, the appellate division rejected the city's argument and instead enunciated a general principle that to "exempt" all church "property from taxation [was] 'scarcely less the duty than the privilege of the enlightened legislator.'"201 In reliance upon the Williams rationale, another case then ruled that property held in New York for the purpose of carrying on overseas missionary work was also exempt. In the judge's view, Williams and other cases revealed "the modern trend of thought," which prohibited taxing authorities from reading "into the statute exempting a non-profit 'charitable corporation' their version of who are to be the objects of its bounty or where its bounty is to be dispensed."202 Charity, according to this judge, was "not provincial," and it knew "no boundaries or classes."203 Coming as close as any to explicitly recognizing the existence of discrimination and the danger of subordination, this last case demanded respect for all claims of religious tax exemption.

Comparable developments occurred in the law of zoning. On the one hand, there remained an occasional case in which a court upheld a decision by zoning authorities that was contrary to the interests of religious institutions.204 On the other hand, the facts of a number of cases suggested that denials of zoning requests by religious institutions had occurred in the face of discrimination; in such cases, although discrimination was neither proved nor judicially found, the courts had no difficulty declaring actions by zoning authorities invalid. In one lower court case, for example, a judge found a municipal ordinance "arbitrary and discriminatory in that it exclude[d] churches and places of public worship although permitting uses including village and municipal buildings, railroad stations, public schools and club houses which entail[ed] in an equal or greater degree" the same results that might flow from "the erection of a church."205 Likewise, an ordinance that "precluded" a church-related college "from erecting any school building in the entire village , while boardinghouses, multifamily houses, hospitals and hotels may be erected," although "schools and churches may


203. Id. at 740.


CHANGING MEANING OF EQUALITY

not," was declared unconstitutional by the Court of Appeals.\(^{206}\) As another judge observed in a suit arising out of the proposed construction of a school attached to the New Hyde Park Jewish Center, "[n]o difference can be perceived in relation to the health, safety, morals and general welfare of the community by permitting public schools and not parochial schools.\(^{207}\)

The cases culminated in two important 1956 decisions by the Court of Appeals — \textit{Community Synagogue v Bates}\(^{208}\) and \textit{Diocese of Rochester v Planning Board}.\(^{209}\) The significance of the cases, as well as their interconnection, is emphasized by the fact that the New York State Catholic Welfare Committee appeared as \textit{amicus curiae} in support of the synagogue in the first case, while the American Jewish Congress appeared as \textit{amicus} in support of the diocese in the second. Both cases involved analogous attempts by established suburban communities to which Catholics and Jews had migrated in large numbers since World War II to prevent the religious newcomers from building facilities of worship within their borders and thereby to slow the newcomers' influx. In \textit{Bates}, the community sought to prevent a Reform congregation from purchasing and renovating a twenty-four acre estate that had been used since 1941 as a home for French sailors, as a merchant marine rehabilitation center, and as a U.S. Navy Officer's Club.\(^{210}\) In \textit{Diocese of Rochester}, the town wished to prevent construction of a Roman Catholic church and school on "the only suitable property found to be centrally-located and available" in a portion of town where the population had "been rapidly increasing" to some 23,000 people, of whom about 6,000 were Catholic.\(^{211}\)

Anti-Catholicism and anti-Semitism lurked just below the surface in both cases. The first case occurred in a county where Jews had been


\(^{209}.\) 1 N.Y.2d 508, 136 N.E.2d 827 (1956).


kidnapped by Klansmen, where "restricted" communities with few Jewish families existed into the 1950s, and where synagogues had been burned by arsonists or defaced by swastikas. Thus, it takes little imagination to find anti-Semitism in a chain of events that began when neighbors sued on alleged restrictive covenants to prevent the Community Synagogue from buying one piece of land, continued when the Village Board then adopted a zoning ordinance restricting religious uses after the Synagogue had decided to buy an existing estate, and ended when, after the repeal of the restrictive ordinance, village authorities still refused to issue a certificate of occupancy for the synagogue. At least one resident of the village, Averill Harriman, in the midst of his successful campaign for governor, found these actions "hasty and shocking unjust, intolerable and un-American" and, although he never explicitly said so, probably prejudiced as well.

In a similar vein, the Diocese of Rochester sensed danger in the upstate town of Brighton that zoning restrictions might be used "to permit a new church of denomination A and to forbid a new church of denomination B, or to allow denomination A to build a church in a desirable residential location while denomination B was relegated to the wrong side of the tracks." In its amicus brief, the American Jewish Congress similarly took note of the danger that a "person or class of persons" might be "singled out as a special subject for hostile and discriminatory legislation."

Needless to say, the Court of Appeals annulled the actions of both municipal bodies. According to the court, a zoning ordinance could "not wholly exclude a church or synagogue from any residential district," nor could it "exclude private or parochial schools from any residential area

212. See supra note 39 and accompanying text.
215. See id. at 134-35.
where public schools are permitted.\footnote{220} The court, in particular, rejected the argument of the Brighton Planning Board that new churches should not be built in areas that were "almost completely built up," but rather should be constructed only "in areas where future residential development could accommodate itself to a church," a rule with which all previously built churches had complied.\footnote{221} Although the court did not say so, it must have recognized how such a proposal would disadvantage Catholic and Jewish institutions, which in the mid-1950s were in the process of following their people to the suburbs, while having much less impact on Protestant entities, most of which were already well-established.

Just as it had in \textit{People v Bell}, however, the Court of Appeals refused to pay heed explicitly to the reality of discrimination aimed at keeping African-Americans, Catholics, and Jews in positions of subordination and refused to decide the cases before it by granting subordinated individuals or groups a right to equality. Instead, the court established a broad principle of religious autonomy that "terminated the interference of public authorities with free and unhandicapped exercise of religion"\footnote{222} by making it impossible for "a municipal ordinance to be so construed that it would appear in any manner to interfere with the 'free exercise and enjoyment of religious profession and worship.'"\footnote{223}

The New York Court of Appeals reiterated this principle periodically in a long line of tax exemption and zoning cases in the years that followed. In \textit{People ex rel. Watchtower Bible and Tract Society, Inc. v Haring},\footnote{224} which involved an issue of tax exemption for real property owned by another frequent victim of discrimination — the Jehovah’s Witnesses, the local assessors came as close as any litigant in the period ever did to proclaiming their discriminatory biases openly. They attempted to defend their denial of an exemption on the ground that "the somewhat rudimentary training of those Witnesses and the unorthodox character of their religious beliefs and practices remove[d] them from the beneficent aim and coverage of" the state’s tax exemption legislation.\footnote{225} Although it would have been

\footnotesize
\begin{itemize}
\item \footnote{220}{\textit{Id.}}
\item \footnote{221}{\textit{Id.}}
\item \footnote{222}{\textit{Community Synagogue v. Bates}, 1 N.Y.2d 445, 458, 136 N.E.2d 488, 496 (1956).}
\item \footnote{223}{\textit{Id.}}
\item \footnote{224}{8 N.Y.2d 350, 170 N.E.2d 677 (1960).}
\item \footnote{225}{\textit{People ex rel. Watchtower Bible & Tract Soc’y, Inc. v. Haring}, 8 N.Y.2d 350, 359, 170 N.E.2d 677, 681 (1960).}
\end{itemize}
easy for the Court of Appeals to respond to this argument with a powerful declaration of the unconstitutionality of subordinating the religiously unorthodox, no one on the court took that approach. Instead, the unanimous opinion authored by the chief judge reached the right result of exempting the Witnesses by intoning a paean to all religion. The court declared:

The policy of the law has been, in this State from an early day, to encourage, foster and protect corporate institutions of religious character, because the religious, moral and intellectual culture afforded by them were deemed, as they are in fact, beneficial to the public, necessary to the advancement of civilization, and the promotion of the welfare of society 226

Nine years later the court again reiterated that "[f]irmly embedded in the law of this State is the doctrine that real property owned by a religious corporation and used exclusively for religious purposes is exempt from taxation,"227 and in affirming the judgment of the Court of Appeals, the United States Supreme Court agreed that "[f]ew concepts [were] more deeply embedded in the fabric of our national life."228

The judiciary's approach of according special status to all religion229 rather than merely preventing the subordination of unpopular religions had significant effects on doctrine. For example, it altered the meaning of statutory language which required that property be "used exclusively" for religious purposes in order to gain exemption.230 Although earlier cases had relied on this language to deny exemptions for property used in part for nonreligious purposes, cases by the end of the 1960s were holding that the

226. Id. at 357, 170 N.E.2d at 680.
language required only "that the primary use of the realty must be in
furtherance of the permitted corporate purposes." 231 The old rule not
exempting parsonages from taxation was also reversed. 232 Finally, courts
required less evidence that land owned by a religious entity was actually
being held for a religious use. 233

Still suggestions continued to arise that unpopular sects were victimized
by discrimination in cases involving zoning as well as tax exemption.
Congregation Beth El of Rochester explicitly claimed discrimination, 234 and
the fact that a YM & YWHA was denied a permit to hold music and dance
classes in a building previously used for other, unidentified club purposes
by the Veterans of Foreign Wars suggests that discrimination may have
occurred in that case as well. 235 Similarly, the occurrence of four reported
cases involving denials of zoning and tax exemptions for Hassidic Jews
during the single year of 1979 from the New York City suburban town of

231. Greater New York Corp. of Seventh-Day Adventists v. Town of Dover, 288
N.Y.S.2d 334, 336 (App. Div. 2d Dept'1968); accord, Mary Immaculate Sch. of Eagle Park
v. Wilson, 424 N.Y.S.2d 251 (App. Div 2d Dept'1980); Mount Tremper Lutheran Camp,
Inc. v. Board of Assessors of Shandaken, 417 N.Y.S.2d 796, 798 (App. Div. 3d Dept'1979);
Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm'n of New York, 404
N.Y.S.2d 93, 96 n.5 (App. Div. 1st Dept'1978); Shrine of Our Lady of Martyrs of
aff'd, 33 N.Y.2d 713, 304 N.E.2d 563 (1973); Gospel Volunteers, Inc. v. Village of
N.E.2d 139 (1971); Rabbi Solomon Kluger Sch., Inc. v. Town of Liberty, 351 N.Y.S.2d 563,
566 (Sup. Ct. Sullivan County 1974); America Press, Inc. v. Lewisohn, 345 N.Y.S.2d 396

232. See Congregation Kollel Horabonnim, Inc. v. Williams, 48 N.Y.2d 301, 398 N.E.2d
515 (1979); Congregation Beth Mayer, Inc. v. Board of Assessors of Ramapo, 417 N.Y.S.2d

233. See Congregation K'hal Torath Chaum, Inc. v. Town of Ramapo, 421 N.Y.S.2d 923

234. See Congregation Beth El of Rochester v. Crowley, 217 N.Y.S.2d 937, 940 (Sup.

235. See YM & YWHA of Mid-Westchester, Inc. v. Town of Eastchester, 201 N.Y.S.2d
622 (Sup. Ct. Westchester County 1960); see also Westbury Hebrew Congregation, Inc. v
Downer, 302 N.Y.S.2d 923 (Sup. Ct. Nassau County 1969) (rejecting as unreasonable
ordinance that conditioned grant of permit to add classes to parochial school on congregations
purchase of additional 34½ acres of land); Five Towns YM & YWHA, Inc. v. Plaut, 178
N.Y.S.2d 190 (Sup. Ct. Nassau County 1958) (allowing YM & YWHA under zoning
ordinance provision for clubs such as golf and yachting clubs), aff'd, 181 N.Y.S.2d 182 (App.
Div. 2d Dept'1958).
Ramapo,\textsuperscript{236} which a decade earlier had routinely granted a special permit for the construction of a Masonic Temple,\textsuperscript{237} is suggestive of anti-Semitism.

The judiciary nonetheless continued to respond to the likelihood of discrimination not by creating a judicially enforceable right to religious equality, but with ringing endorsements of the specially exalted constitutional stature of religion. Thus, in \textit{Westchester Reform Temple v Brown},\textsuperscript{238} in which the Village of Scarsdale imposed restrictions that added $100,000 of expense to a planned expansion of the temple, the Court of Appeals, in striking the restrictions down, observed that "churches occupy a different status from mere commercial enterprises"\textsuperscript{239} and that they "enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers."\textsuperscript{240} A few years later in an analogous case, \textit{Jewish Reconstructionist Synagogue of North Shore, Inc. v Incorporated Village of Roslyn Harbor},\textsuperscript{241} the court again repeated its rule that "the pre-eminent status of religious institutions under the First Amendment provision for free exercise of religion"\textsuperscript{242} required that "where an irreconcilable conflict exist[ed] between the right to erect a religious structure and the [police power], the latter must yield to the former."\textsuperscript{243}

Lower courts, of course, took their cue from the Court of Appeals. Judge Christ held, for example, that a village could not deny a building permit to a proposed Jewish Center because it would "tend to depreciate the value of property in the neighborhood and would be detrimental to the

\begin{itemize}
\item \textsuperscript{236} \textit{See} Weiss v. Willow Tree Civic Ass'n, 467 F Supp. 803 (S.D.N.Y 1979) (denying relief to the Hassidim, even while conceding that community groups were lobbying to keep a Hassidic housing development out of Ramapo); \textit{see also} the cases cited in notes 232-33 above.
\item \textsuperscript{238} 22 N.Y.2d 488, 239 N.E.2d 891 (1968).
\item \textsuperscript{240} Id. at 496, 239 N.E.2d at 896.
\item \textsuperscript{241} 38 N.Y.2d 283, 342 N.E.2d 534 (1975). A subsequent report of the case at 40 N.Y.2d 158, 352 N.E.2d 115 (1976), struck down an effort on the part of the village to impose the legal costs of the case on the synagogue.
\item \textsuperscript{243} Id.
\end{itemize}
neighborhood and the residents thereof. Another trial judge agreed that because "of the worthy purposes and moral value, of" churches "mere pecuniary loss to a few persons should not bar their erection and use."245 The appellate division took the view that even "potential traffic hazards do not justify the exclusion of a proposed religious use."246

At the close of the 1970s in New York, religious institutions thus enjoyed "a constitutionally protected status which severely limit[ed] application of normal zoning standards"247 and "a legally superior religious privilege" that trumped any mere "annoyance or financial inconvenience" that they posed to a community.248 In order to protect "the constitutional right to the free exercise of religion" from any "chilling application of zoning laws,"249 religion was given "to some extent an immunity from significant zoning regulation" and accorded an "all but conclusive presumption that considerations of public health, safety and welfare are always outweighed by the policy favoring religious structures."250 The decided cases were solidly in accord with these immunities and presumptions.251


The effect which the zoning and tax exemption cases had on eliminating anti-Semitic and anti-Catholic prejudice and thereby facilitating the upward mobility of both groups is, however, unclear. Those who watched the developing case law carefully — namely, municipalities and the lawyers who represented Catholics and Jews involved in litigation against them — must surely have understood that houses of worship and parochial schools could be neither excluded from town nor denied tax exempt status. But the right to maintain religious buildings did not guarantee the elimination of other sorts of prejudice that had traditionally supported the subordination of the two religious groups. At best, the right and the religious structures erected pursuant to it facilitated the migration of white ethnics from urban ghettos into suburban communities, where, as they interacted with their neighbors, the old barriers against them came down. Perhaps, the religious zoning and tax cases also constituted symbolic statements that all sorts of religious and ethnic discrimination had gone out of style.

Education constituted an even more important vehicle than zoning and tax exemption law in facilitating the upward mobility of children of the immigrant classes and thereby providing the space within which the descendants of immigrants could move toward assimilation into the nation's mainstream. Many Catholic and Orthodox Jewish children were educated in parochial schools, and those who were not often participated in release-time programs that permitted them to leave public school during class time so that they could receive religious instruction. State aid to parochial schools, together with governmental authorization of the release-time programs\(^{252}\) — programs uniformly favored by Catholics and supported by some though not all Jews\(^ {253} \) — made an enormous contribution to the upward

---

\(^{252}\) See Zorach v Clauson, 343 U.S. 306 (1952).

\(^{253}\) See COHEN, supra note 173, at 440-41, 447
mobility of both these children and their parents. These forms of aid to 
religion, like the judicial decisions facilitating the construction of synagogues 
and Catholic churches in suburban communities, enabled white ethnics to 
pursue secular advancement without abandoning all of their traditional 
religious values.

The New York legislature regularly voted considerable sums of money in aid of religious education. After World War II, it granted financial support, and the courts upheld the grants, for such purposes as student transportation, provision of textbooks in secular courses, reimbursement of parochial schools for state-mandated testing and recordkeeping, remedial teaching for handicapped or disadvantaged parochial school students. The legislature and courts also granted and upheld aid to religiously affiliated colleges that taught religion as long as it was taught "as an academic discipline [that focused on] the sources and development of the Judeo-Christian tradition and the religious heritage of the world" and "no denominational tenet or doctrine [was] taught in the manner of dogmatism or indoctrination." The New York legislature was prepared to go even

---


further in providing support for religious education when it adopted programs to help parochial schools maintain and repair their physical facilities and to grant tuition reimbursement and tax relief to parents who sent their children to parochial schools, but the Supreme Court ruled that these programs were unconstitutional.\textsuperscript{260}

The state's legal system also displayed symbolic support for religion in general\textsuperscript{261} and for Catholics and Jews in particular. A powerful symbol of the equality of immigrant with WASP religion arose out of the judicially approved construction on public land at Kennedy International Airport of three chapels — one Catholic, one Jewish, and one Protestant.\textsuperscript{262} Judges made other concessions to religious symbolism by approving the addition of the words "under God" to the Pledge of Allegiance\textsuperscript{263} and the religious matching of adopted children with adoptive parents.\textsuperscript{264} Special concessions to Roman Catholic piety included judicial approval of the placement of nativity scenes on public property,\textsuperscript{265} as well as the upholding of the constitutionality of Sunday closing laws well into the 1970s.\textsuperscript{266} The New

\begin{footnotes}
\footnote{261. See Toomey v Farley, 2 N.Y.2d 71, 83, 138 N.E.2d 221, 227-28 (1956) (stating that "all churches in America" are "opposed to communism").}
\footnote{262. See Brashich v. Port Auth., 484 F Supp. 697 (S.D.N.Y 1979), aff'd, 791 F.2d 224 (2d Cir. 1980).}
\footnote{265. See Baer v Kolmorgen, 181 N.Y.S.2d 230 (Sup. Ct. Westchester County 1958); cf. Impellizerri v Jamesville Federated Church, 428 N.Y.S.2d 550 (Sup. Ct. Onondaga County 1979) (not nuisance to play Christian hymns on church carillon).}

...
York Court of Appeals would also have upheld prayer in the public schools. Finally, in deference to traditional common law and constitutional doctrine, judges continued to look to ecclesiastical law in resolving disputes between rival factions when a schism or analogous property dispute arose within a church.

C. Assimilation as Quod Pro Quo for Equality

The central conclusion of the two preceding sections, at this stage, bears repetition. Section A illustrates that New York judges were unwilling during the 1940s and 1950s to recognize the existence of a judicially enforceable right to equality. Nonetheless, as Section B indicates, those same judges decided cases in ways that facilitated efforts by Catholics and Jews, the two main groups in New York seeking equality, to push their way into the societal mainstream. The judges thereby advanced the goal of equality even while denying the right. On what terms, however, did the judges imagine that egalitarian interaction would occur? It is this question that the present section must address.

As we shall see, the support that the courts provided religious liberty did not license religious or other minorities to celebrate or invigorate their cultural differences. American ideology in the post-World War II era did not envision a multicultural society in which former immigrant groups would

---


perpetuate their distinctiveness. Rather, as a leading cultural historian has found, public discussion of intergroup relations, reflecting the nationalism and unity concerns of the war years, was dominated by an outlook that was tolerant, but at the same time strongly assimilationist. Immigrants and their children were invited to abandon their ethnicity and move upward into society's mainstream, but only when they accepted the mainstream's values, melted into the mainstream on its terms, and became in the process "true Americans." They, in turn, eagerly accepted the invitation; as the American Jewish Committee declared, what we now call multiculturalism was "antagonistic to the basic tenets of the American Creed." The "preservation of all that we cherish," the Committee continued, "all that is summed up in the word Americanism, depend[ed] upon the achievement of national unity." A leading Catholic theorist agreed that America was "an Anglo-Saxon country," and he accordingly urged all immigrants "unyieldingly to stand for" at least two things: "A common language, and a universal American Public School for our children." Even if "conformity to American life means our racial self-effacement," he urged immigrants not to "begrudge our gift." In short, Protestants, Catholics, and Jews all agreed, in the language of a popular song, which inquired into what America meant to its listeners, that the proper answer was "All races, all religions, that's America to me," at least when the goal of minority races and religions was "to fit unobtrusively into the American scene."

State education law, while subsidizing religion in the many ways noted above, strongly endorsed this assimilationist and integrationist vision. It required that every child receive an education meeting minimum state standards — standards designed to convey skills essential for participation in the marketplace, but even more to inculcate the value system of a tolerant, but nevertheless deeply American America. Most significantly, the courts

269. See Steele, supra note 107

270. Brief Submitted on Behalf of the American Jewish Committee as Friend of the Court at 3, Kemp v. Rubin, 75 N.Y.S.2d 768 (App. Div 2d Dep't 1947) (manuscript in Library of American Jewish Committee, New York, N.Y.); see also Cohen, supra note 173, at 333-44.


272. Id. at 266.


274. Memorandum to Dr. Stern 7 (May 1941) (in folder entitled Program and Policy, 1940-42, Morris Waldman Papers, Box 34, YIVO Institute for Jewish Research, N.Y., N.Y.)

275. As one educated during the late 1940s and 1950s in a series of New York public
did not allow any child to be exempted on grounds of religious belief from state-mandated requirements.

Thus, in *Shapiro v. Donn*, in which a group of Jewish families sent their children to a parochial school that did not give "systematic instruction [in English] in the ten common branches and other courses of study required by the Education Law," the court held that the families had violated the law. The court declared that it was "more important that all children within the realm of our democratic society shall receive a basic secular education in the English language than that religious convictions" be honored. "[S]ecular law" had to "take precedence over the religious law, where the interests of a democratic society clearly require[d] compliance with the secular law," as they did in the case of "secular education" which had "become a fundamental part of our system of society." As the court explained, secular education was "designed to give equality of opportunity to all children in a society dedicated to the democratic ideal." The court added that "[w]ithout equality of opportunity in education there would be "no equality among the children of our democratic society," and some children would be prejudiced in their ability "in later life to take their rightful place in civil society."

Not only did the courts require that all children receive a basic secular education that would prepare them for the marketplace; they also upheld curricular requirements that exposed students to established cultural canons, even when those canons reflected the discriminatory past of Anglo-American culture. The key case that approved what amounted to cultural indoctrination was *Rosenberg v Board of Education*.

In *Rosenberg*, the plaintiff challenged the Board of Education's adoption of Dickens's *Oliver Twist* and Shakespeare's *The Merchant of Venice* as

---

278. Id. at 837
279. Id.
280. Id. at 835.
281. Id. at 834.
282. Id.
283. Id. at 835.
approved reading in New York City's high schools. The plaintiff urges that these two works were "objectionable because they tend[ed] to engender hatred of the Jew as a person and as a race." Even the Board of Education had recognized this tendency and accordingly had "expressly required teachers to explain to pupils that the characters described therein [were] not typical of any nation or race, including persons of the Jewish faith," and thus were "not to be regarded as reflecting discredit on any race or national group." One wonders, however, at the effect of this explanation; like a cautionary instruction to a jury to ignore evidence it ought never to have heard, the teacher's explanation might have emphasized the religious stereotyping in which Dickens and Shakespeare were engaging and thereby further insulted and degraded Jews, especially the Jewish students who had to listen to it. By being stereotyped, and then by having the stereotype analyzed and discussed in their presence, Jews were subjected to what was, at the very least, an unpleasant experience to which Christians were not subjected, and thereby treated less favorably than and, in a sense, subordinated to Christians. It is, indeed, quite difficult to "see how," especially after a teacher's admonition, "a Jew [could] read The Merchant of Venice without pain and indignation."

Rosenberg could thus have been seen as a simple equal rights case, in which a victim of discrimination sought to enjoin the state from selecting and inculcating in the public mind symbols that he found degrading and insulting. But the court did not so understand the case. In language as insulting as that of Dickens and Shakespeare, the court held that the "public interest in a free and democratic society [did] not warrant or encourage the suppression of any book at the whim of any unduly sensitive person or group of persons, merely because a character described in such book as belonging to a particular race or religion is portrayed in a derogatory or offensive manner." Removal from schools of these books," moreover, would "contribute nothing toward the diminution of anti-religious feeling;" according to the court, "[p]ublic education and instruction in the home [would] remove religious and racial

286. Id.
287. Id. at 345-46.
289. Rosenberg, 92 N.Y.S.2d at 346.
290. Id.
intolerance more effectively than censorship and suppression of works of art.\textsuperscript{291}

Three important lessons can be teased out of the \textit{Rosenberg} opinion. First, the case unearthed an important issue — essentially today's issue of hate speech — that had been framed in the struggle between Jews striving to attain equality in the face of symbolic degradation and a WASP elite intent on maintaining at least its cultural hegemony through the schools. Second, this issue was one for which an equal rights jurisprudence provided no answer. Thus, in the \textit{Rosenberg} case, either Jewish interests had to be subordinated to the preservation of the established cultural tradition of which \textit{Oliver Twist} and \textit{The Merchant of Venice} were a part, or the cultural tradition had to be truncated and subordinated at the behest of Jews. There was no way for the court to honor equally the established tradition, aspects of which insulted and degraded Jews, and the entirely accurate Jewish perception that the tradition was insulting and degrading. Third, insofar as the result in the case accurately reflected how higher courts would have acted,\textsuperscript{292} the outcome made clear what we have already observed: the maintenance of cultural hegemony trumped the goal of uplifting the urban immigrant underclasses. The best that groups like Jews, Catholics, and African-Americans could expect from the law was the removal of specific coercive barriers to their participation in the political and economic life of the society. Equality meant that they would be invited to abandon their ethnicity and move upward into society's mainstream. But they would have to accept the mainstream's existing values and cultural norms, even if those values and norms degraded and prejudiced them, for the law, as explicated in cases such as \textit{Rosenberg}, lacked any capacity to change culture and thereby end all racial, ethnic, and religious subordination. Only private

\textsuperscript{291}Id.

\textsuperscript{292}Three decades later in \textit{Board of Educ. v. Pico}, 457 U.S. 853 (1982), a school district would explicitly "emphasize the inculcative function of secondary education, and argue that they must be allowed unfettered discretion to 'transmit community values.'" \textit{Id.} at 869 (emphasis in original). Even in 1982, Justice Brennan's plurality opinion did not reject that argument in a \textit{Rosenberg} context, in which a school board merely sought "to establish curriculum in such a way as to transmit community values" and to promote "respect for authority and traditional values be they social, moral, or political." \textit{Id.} at 864. But, while \textit{Pico} left school officials free to establish a hegemonic curriculum, it denied them the power to "remove books [from a school library] for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved." \textit{Id.} at 879-80 (Blackmun, J., concurring) (emphasis added); \textit{accord}, Presidents Council, Dist. 25 v. Community Sch. Bd. No. 25, 457 F.2d 289 (2d Cir.), \textit{cert. denied}, 409 U.S. 998 (1972).
efforts and education and, ultimately, the emergence of a new cultural tradition that did not rest on racial, ethnic, and religious hierarchies could eliminate prejudice and result in equality.  

Judges continued to promote upward mobility of religious minorities into the societal mainstream, conditioned on their surrender of sectarian religious and cultural beliefs, in a line of cases requiring compulsory vaccinations as a prerequisite to entering public schools. As one judge declared, in rejecting a mother’s claim of religious conscience and ordering her child seized and vaccinated, the mother’s refusal to vaccinate had made

293. In other cases, state judges were more willing than the judge in Rosenberg to provide legal protection against hate speech. Consider, for example, People v Kunz, 300 N.Y 273, 90 N.E.2d 455 (1949), rev’d, 340 U.S. 290 (1951), in which the defendant had engaged in "scurrilous attacks on Catholics and Jews," preaching that the "Catholic Church makes merchandise out of souls" and is "a religion of the devil" and that Jews were "Christ-killers" who "should have been burnt in the incinerators." It was, he added, "a shame they all weren’t." Kunz v New York, 340 U.S. 290, 296 (1951) (Jackson, J., dissenting). Noting that religion involved "very tender emotion[s]," a New York City magistrate convicted Kunz on these facts under an ordinance making it "unlawful for anyone ‘to ridicule or denounce any form of religious belief,’" and a 4-3 majority of the New York Court of Appeals upheld the conviction. Kunz, 300 N.Y at 278, 90 N.E.2d at 458. Likewise, in upholding censorship of a "sacriligious" movie in Joseph Burstyn, Inc. v. Wilson, 303 N.Y 242, 250, 101 N.E.2d 665, 667 (1951), rev’d, 343 U.S. 495 (1952), the New York Court of Appeals observed that "[i]nsult, mockery, contempt and ridicule [could be] a deadly form of persecution — often far more so than more direct forms of action," and thus, it was "within the legitimate sphere of State action," id. at 260, 101 N.E.2d at 673, to make it unlawful "to hurl insults at the deepest and sincerest religious beliefs of others." Id. In People v. Kieran, 26 N.Y.S.2d 291 (Nassau County Ct. 1940), however, an appellate court reversed the conviction of a group of Jehovah’s Witnesses who had made remarks "annoying all sorts of religious people" and stated that "here in this country, which, just now, seems to be the last stronghold of freedom," it was essential to "fight to preserve that freedom" by requiring authorities to be "tolerant even of intolerance," especially in areas such as "[c]onflict in religious belief — [the] race question and the new political ideologies, Communism, Fascism, [and] Nazism." Id. at 308. For later cases in which judges took stands protecting speakers hostile to religion in general or to particular religious beliefs, see Panarella v. Birenbaum, 32 N.Y.2d 108, 296 N.E.2d 238 (1973) (refusing to order president of public college to enforce regulations prohibiting derogatory tacks on religion in student publications), and Rockwell v Morris, 211 N.Y.S.2d 25 (App. Div 1st Dep't) (reversing denial of permit to leader of American Nazi Party to speak in Union Square), aff'd, 10 N.Y.2d 721, 176 N.E.2d 836, cert. denied, 368 U.S. 913 (1961). For cases in which courts upheld property rights against Jehovah’s Witnesses who were seeking to proselytize their religious beliefs, see Watchtower Bible & Tract Soc’y, Inc. v Metropolitan Life Ins. Co., 297 N.Y 339, 79 N.E.2d 435, cert. denied, 335 U.S. 886 (1948); People v Brown, 27 N.Y.S.2d 241 (Suffolk County Ct.), aff’d sub. nom. People v Bohnke, 287 N.Y 154, 38 N.E.2d 478 (1941), cert. denied, 316 U.S. 669 (1942); People v Dale, 47 N.Y.S.2d 702 (Utica City Ct. 1944).
the child a ward of the court, "to be helped, protected, and accorded the opportunities that an enlightened community affords — provide the child with the necessary guidance and education to fit him to adjust in society and carry forward the progress for an adequate life." In analogous cases, in which parents refused to allow their children to undergo needed medical treatment, courts routinely ordered provision of the treatment. In the one reported case in which a trial judge refused to compel surgery, a minority of the Court of Appeals wanted to reverse the judgment below because "[e]very child [had] a right, so far as possible, to lead a normal life" and religious scruples could not be permitted to stand in the way of that right and thereby "ruin his life and any chance for a normal, happy existence." The majority, recognizing that there were "important considerations both ways" and that it could "not be certain of being right under these circumstances," affirmed only because it thought it wisest to defer to the trial judge, who was closest to the facts. In general, though, bureaucratic regularity triumphed over religious scruples, as in Stark v. Wyman, in which a court refused to grant extra money to a welfare recipient to enable her to buy more expensive Kosher food.

The constitutional ideology of the 1940s and 1950s reflected in the cases we have been analyzing — an ideology that might be labelled integrationist
equality — remained dominant as late as the 1963 Court of Appeals decision in People v. Stover.\textsuperscript{301} The Stover case arose in 1956, when the Stovers, as a "peaceful protest" against the high taxes imposed by the city, hung a "clothesline, filled with old cloths and rags," in their front yard "in a pleasant and built-up residential district" of suburban Rye.\textsuperscript{302} As taxes were increased, so were the number of clotheslines, until by 1961 there were six, "from which there hung tattered clothing, old uniforms, underwear, rags and scarecrows."\textsuperscript{303} The city then adopted an ordinance that prohibited clotheslines in front yards unless it issued a special permit because of "a practical difficulty or unnecessary hardship in drying clothes elsewhere on the premises."\textsuperscript{304} After the city refused to grant the Stovers a special permit and they refused to remove the clotheslines, they were convicted of violating the ordinance and their conviction came before the New York Court of Appeals.

The lone dissent of Judge John Van Voorhis captured one view of American constitutionalism. Van Voorhis's starting premise was that:

Protection of minority rights is as essential to democracy as majority vote. In our age of conformity it [ought] not [be]
the instinct of our law to compel uniformity The right to be
different has its place in this country The United States has drawn
strength from differences among its people in taste, experience,
temperament, ideas, and ambitions as well as from differences in
race, national or religious background.\textsuperscript{305}

Wishing to protect the rights of minorities and the even more fundamental,
related right to be different, Van Voorhis refused to condone "unlimited
power in government to compel conformity" — a "power to rule"
which "open[ed] the door to the invasion by majority rule of a great deal
of territory that belongs to the individual human being."\textsuperscript{306} Arguing that
the Stovers were a minority who had been bested by "other residents in the
area" in a "dispute evidently political in nature," Van Voorhis would
have overturned their conviction for their "unusual idea" and their unusual

\begin{itemize}
  \item\textsuperscript{301} 12 N.Y.2d 462, 191 N.E.2d 272 (1963).
  \item\textsuperscript{303} \textit{Id.}
  \item\textsuperscript{304} \textit{Id.} at 465, 191 N.E.2d at 273 (quoting city ordinance).
  \item\textsuperscript{305} \textit{Id.} at 472, 191 N.E.2d at 278 (Van Voorhis, J., dissenting).
  \item\textsuperscript{306} \textit{Id.} at 472-73, 191 N.E.2d at 278.
\end{itemize}
"form of protest."  

All of the other judges on the court, in contrast, believed that protection of the Stovers' "bizarre" conduct was inconsistent with values central to their understanding of American democracy. The vision of the majority, unlike the vision of Van Voorhis, was not a multicultural vision that celebrated differences in racial, national, or religious background. The majority's goal, instead, was to induce underclasses to internalize the "sensibilities of the average person" and ultimately become fully equal participants in "an attractive, efficiently functioning, prosperous community."

While the majority appreciated the value of free speech that furthered "the dissemination of ideas or opinion" resulting in prosperity or some other enhancement of community, it found nothing inappropriate with legislation "designed to proscribe conduct which offends the sensibilities and tends to depress property values." The majority saw no "message," but only "offensiveness" in the Stovers' "protest" and therefore refused to accord it protection under the free speech clauses of the state and federal constitutions.

In its approval of efforts to nurture a common sensibility and to discourage conduct by minorities that might prove offensive to majorities, the court's opinion in Stover powerfully encapsulated the great egalitarian event of the prior two decades, when Catholics and Jews shed their immigrant identities, assumed the sensibility of their former WASP oppressors, and in the process, became full and equal participants in political and economic life, at least in New York. The Stover opinion thus was deeply grounded in a constitutionalism that tolerated upward mobility by underclasses into the mainstream elite as long as the underclasses assumed the elite's values of civility and toleration. But, as neatly as the constitutionalism of Stover fit with past realities known to judges in 1963, it was utterly inconsistent with a new world that was about to emerge with explosive force.

In the end, then, judges in New York responded somewhat strangely to cases seeking to stop discrimination against Catholics and Jews. They never took a simple approach of articulating a general constitutional or

307 Id. at 471, 191 N.E.2d at 277
308 Id. at 470, 191 N.E.2d at 277
309 Id. at 467-68, 191 N.E.2d at 275-76
310 Id. at 470, 191 N.E.2d at 277
311 Id.
common-law right on which groups or individuals could rely for protection against religious and ethnic discrimination or subordination. Instead, they issued a strong proclamation that all religious groups enjoyed rights to religious freedom that trumped ordinary police power regulations, and they approved a wide variety of state aid to religion that gave Jews and especially Catholics important tangible and symbolic support. In the

312. But they did not trump the state’s interest in setting integrationist educational policies.

313. After the cases involving discrimination on grounds of religion discussed in the text above, and the cases involving race and gender discrimination, to which we shall turn later, the largest category of reported discrimination cases dealt with age. In these cases, the courts again refused to create any legally enforceable, formal principle of equality. As a result, the courts countenanced much discrimination. For example, judges routinely rejected claims of the illegality and unconstitutionality of mandatory retirement ages or maximum ages for commencement of employment in particular jobs. See Palmer v. Riccione, 576 F.2d 459 (2d Cir. 1978), cert. denied, 440 U.S. 945 (1979); Johnson v. Lefkowitz, 566 F.2d 866 (2d Cir. 1977), cert. denied, 440 U.S. 945 (1979); New York City Dep’t of Personnel v. State Div. of Human Rights, 44 N.Y.2d 904, 379 N.E.2d 165 (1978); Figueroa v. Bronstein, 38 N.Y.2d 533, 344 N.E.2d 402, appeal dismissed, 429 U.S. 806 (1976); State Div. of Human Rights ex rel. Kozlowski v. State, 406 N.Y.S.2d 401 (App. Div. 4th Dept’¹ 1978), appeal dismissed, 46 N.Y.2d 939, 388 N.E.2d 373 (1979); Nurenberg v. Ward, 381 N.Y.S.2d 412 (App. Div. 2d Dep’t 1976); Foran v. Cawley, 354 N.Y.S.2d 757 (Sup. Ct. N.Y. County 1973). But cf. Weiss v. Walsh, 324 F Supp. 75, 78-79 (S.D.N.Y. 1971) (allowing plaintiff to amend complaint to allege that selective enforcement of age criteria is unlawful); New York City Dep’t of Personnel v. State Div. of Human Rights, 392 N.Y.S.2d 641 (App. Div 1st Dep’t 1977) (holding that age limit unlawful when discriminatorily applied). Some discriminations aided the elderly, however, as was the case when the Court of Appeals sustained the constitutionality of legislation imposing a special penalty on juvenile delinquents found to have inflicted serious criminal violence on a person 62 years of age or older. See In re Quinton A., 49 N.Y.2d 328, 332, 402 N.E.2d 126, 128-29 (1980). Other cases in which the elderly received beneficial judicial treatment arose when a court invalidated an exclusion of grandparents from a Social Security program providing aid to dependent children, see Taylor v. Dumphson, 362 N.Y.S.2d 888 (Sup. Ct. Queens County 1974), rev’d on other grounds, 37 N.Y.2d 765, 337 N.E.2d 600 (1975), and when another court upheld a complaint against a municipality for failing to build adequate senior-citizen housing, see Long Island Region NAACP v. Town of N. Hempstead, 424 N.Y.S.2d 319 (Sup. Ct. Nassau County 1979), aff’d, 427 N.Y.S.2d 861 (App. Div 2d Dep’t 1980).

Courts countenanced even more significant discrimination against the young. Thus, particular day-care centers and nursery schools were denied the right to open, see Murmher v. Board of Appeals of Auburn, 415 N.Y.S.2d 562 (Sup. Ct. Cayuga County 1979); Rockefeller v. Pynchon, 244 N.Y.S.2d 978 (Sup. Ct. Nassau County 1963); cf. Bernstein v. Board of Appeals of Matinecock, 302 N.Y.S.2d 141, 145 (Sup. Ct. Nassau County 1969) (upholding imposition of conditions on grant of special permit), and limitations on the use or construction of summer camp facilities in particular municipalities were upheld, see Town of Huntington v. Park Shore Country Day Camp of Dix Hills, Inc., 47 N.Y.2d 61, 390 N.E.2d 282 (1979);
CHANGING MEANING OF EQUALITY


A related line of cases dealt with institutions created for people, often children, suffering from mental or emotional disabilities or from drug addiction. Some cases, of course, upheld efforts at excluding the disabled or the addicted from the social mainstream, see People v. Renaissance Project, Inc., 36 N.Y.2d 65, 324 N.E.2d 355 (1975); Brandt v. Zoning Bd. of Appeals of New Castle, 393 N.Y.S.2d 264 (Sup. Ct. Westchester County 1977), aff'd, 402 N.Y.S.2d 974 (App. Div. 2d Dep't 1978); cf. Maldin v. Ambro, 36 N.Y.2d 481, 487-88, 330 N.E.2d 403, 407-08 (1975) (upholding zoning for retirement communities in which only people over age of 55 could live), cert. denied, 423 U.S. 993 (1975); Campbell v. Barraud, 394 N.Y.S.2d 909, 910-11 (App. Div. 2d Dep't 1977) (same); Community Bd. 3 v. State, 420 N.Y.S.2d 607, 608-09 (Sup. Ct. Queens County 1979) (upholding temporarily exclusion of home for mentally retarded until proponents of home had completed procedural steps mandated by statute), and those that did not followed the same approaches as did the cases
dealing with discrimination against children. Thus, the Court of Appeals found that an "institution for the care of emotionally disturbed delinquent, dependent or neglected boys" fit within the definition of school as that word was used in one municipality's ordinance, see Wiltwyck Sch. for Boys, Inc. v. Hill, 11 N.Y.2d 182, 190-91, 182 N.E.2d 268, 271 (1962), while a trial judge held that a "community residence" for eight mentally retarded young women under the supervision of two house parents was a family for purposes of another zoning code. See Incorporated Village of Freeport v Association for the Help of Retarded Children, 406 N.Y.S.2d 221 (Sup. Ct. Nassau County), aff'd, 400 N.Y.S.2d 724 (App. Div. 2d Dept' 1977); accord, Little Neck Community Ass'n v. Working Org. for Retarded Children, 383 N.Y.S.2d 364 (App. Div. 2d Dept' ), appeal denied, 40 N.Y.2d 803, 356 N.E.2d 482 (1976). In another case, the Court of Appeals held that a school for the mentally retarded constituted a mere continuation of a prior nonconforming use by a convalescent home for children suffering from cardiac disorders. See Rogers v. Association for the Help of Retarded Children, Inc., 308 N.Y. 126, 123 N.E.2d 806 (1954). An alternative approach was to focus on state preemption of municipal power and to hold that local zoning authorities could not prevent the state or a private agency carrying out state policy from locating a facility within municipal boundaries, see Little Neck Community Ass'n, 383 N.Y.S.2d at 367-68; Board of Coop. Educ. Servs. v. Gaynor, 306 N.Y.S.2d 216 (App. Div. 2d Dept 1969), appeal denied, 26 N.Y.2d 612, 258 N.E.2d 729 (1970); Conners v. New York State Ass'n of Retarded Children, Inc., 370 N.Y.S.2d 474 (Sup. Ct. Rensselaer County 1975); see also Zubli v. Community Mainstreaming Assocs., Inc., 423 N.Y.S.2d 982, 995 (Sup. Ct. Nassau County 1979), aff'd, 425 N.Y.S.2d 263 (App. Div. 2d Dept' ), modified, 50 N.Y.2d 1024, 410 N.E.2d 746 (1980), while yet another approach was to strike down a municipal ordinance that barred the mentally ill from registering at hotels in town as an abridgement of the right to travel, see Stoner v. Miller, 377 F Supp. 177 (E.D.N.Y 1974). Only one case analyzed the mentally and emotionally disabled as a weak and insular minority for which the Equal Protection Clause provided legally enforceable protection. See New York State Ass'n for Retarded Children, Inc. v. Carey, 466 F Supp. 479, 486 (E.D.N.Y 1978), aff'd, 612 F.2d 644 (2d Cir. 1979). The one other case in which a jurisprudence of equal rights emerged at all was a federal suit invalidating New York City's practices in assigning students with emotional problems to schools, on the ground that those practices promoted racial segregation and, accordingly, constituted a denial of equal educational opportunity under Title VI of the Civil Rights Act. See Lora v. Board of Educ. of New York, 456 F Supp. 1211 (E.D.N.Y 1978). But even in this case, the finding of segregation was eventually reversed and the judicial remedy for the violation of equal rights therefore vacated. See Lora v Board of Educ., 623 F.2d. 248 (2d Cir. 1980). In the absence of proof of racial discrimination, there was no constitutional right to assignment to any particular public school, even in cases in which a claim was made that a student was emotionally disturbed. See Johnpoll v. Elias, 513 F Supp. 430 (E.D.N.Y 1980).

Similar patterns emerged in cases concerning nursing and convalescent homes and other health-care facilities. For example, in one case a judge held that a nursing home constituted a continuation of a pre-existing nonconforming use of property as a boarding house, see Ganum v. Village of New York Mills, 347 N.Y.S.2d 372 (Sup. Ct. Oneida County 1973); see also Belle Harbor Realty Corp. v. Kerr, 35 N.Y.2d 507, 323 N.E.2d 697 (1974) (dictum) (city can deny building permit for nursing home on ground of inadequacy of public services only "in
process, however, the courts and perhaps society at large failed to respond to a dire necessity” and as “an emergency measure”), and in another case concerning half-way houses, the Court of Appeals ruled that a county’s decision about the location and operation of such a facility preempted municipal law so that it could "not be overruled by application of a local zoning ordinance." People v. St. Agatha Home for Children, 47 N.Y.2d 46, 49, 389 N.E.2d 1098, 1099, cert. denied, 444 U.S. 869 (1979); accord, Hepper v Town of Hillsdale, 311 N.Y.S.2d 739 (Sup. Ct. Columbia County 1970). Contra Cappadoro Land Dev. Corp. v. Amelkin, 432 N.Y.S.2d 513 (App. Div. 2d Dep’t 1980); see Ibero-American Action League, Inc. v. Palma, 366 N.Y.S.2d 747 (App. Div. 4th Dep’t 1975); cf. Tarolli v Howe, 355 N.Y.S.2d 689 (App. Div. 4th Dep’t 1974), aff’d, 37 N.Y.2d 865, 340 N.E.2d 725 (1975); Hepner v Zoning Bd. of Appeals of Mount Vernon, 152 N.Y.S.2d 984 (Sup. Ct. Westchester County 1956); Kanasy v. Nugent, 135 N.Y.S.2d 128 (Sup. Ct. Rockland County 1954), aff’d, 145 N.Y.S.2d 638 (App. Div. 2d Dep’t 1955). Other cases produced rather mixed results. On the one hand, several cases upheld the exclusion of nonresidents from public facilities financed by local tax dollars, see, e.g., People v. Dahlman, 383 N.Y.S.2d 946 (App. Term. 9th & 10th Dist. 1976) (per curiam); Schreiber v. City of Rye, 278 N.Y.S.2d 527 (Sup. Ct. Westchester County 1967), cf. Jeter v. Ellenville Cent. Sch. Dist., 366 N.Y.S.2d 783 (Sup. Ct. Ulster County) (local school must admit nonresident student and receive tuition payment from entity charged with providing for student’s education), modified, 377 N.Y.S.2d 685 (App. Div. 3d Dep’t 1975), aff’d, 41 N.Y.2d 283, 360 N.E.2d 1086 (1977); one case upheld the exclusion of a campsite for temporary residence of the transient public, see Friedland v. Diamond, 324 N.Y.S.2d 578 (Sup. Ct. Sullivan County 1971), and another lower court opinion directed the police to take action against the "noxious activities," and by implication the people committing them, that "cumulatively and collectively [were] contributing factors to the madness and unhealthy situation which [was] rapidly enveloping the entire Greenwich Village area." Perazzo v. Lindsay, 286 N.Y.S.2d 309, 310-11 (Sup. Ct. N.Y County 1967). This opinion, however, was reversed. See Perazzo v. Lindsay, 290 N.Y.S.2d 971 (App. Div. 1st Dep’t), aff’d, 23 N.Y.2d 764, 244 N.E.2d 471 (1968) (mem.). Similarly, the appellate division struck down an attempt to exclude a labor camp in a municipality with a zoning ordinance that did not explicitly exclude labor camps from industrial zones. See White v. Hartnett, 104 N.Y.S.2d 669 (App. Div. 4th Dep’t 1951).

Even when judges acted to protect underclasses from municipal discrimination, they justified their intervention on clearly articulated equal protection grounds only in trivial cases that never got out of the lower courts, such as one case upholding the standing of low-income people residing in a town to sue the town’s zoning authorities for failing to provide sufficient land for their housing needs, see Suffolk Hous. Servs. v. Town of Brookhaven, 397 N.Y.S.2d 302 (Sup. Ct. Suffolk County 1977), modified, 405 N.Y.S.2d 302 (App. Div. 2d Dep’t 1978) (mem.), and another upholding an equal protection discrimination suit by people excluded from public housing because of past criminal activity by children who were not residing with them, see Tyson v. New York City Hous. Auth., 369 F Supp. 513 (S.D.N.Y 1974). But cf. Spady v. Mount Vernon Hous. Auth., 341 N.Y.S.2d 552, 554 (App. Div 2d Dep’t 1973) (upholding denial of public housing to individual who had engaged in criminal activity under different name), aff’d, 34 N.Y.2d 573, 310 N.E.2d 542, cert. denied, 419 U.S. 983 (1974). As we have seen, especially in cases that potentially have precedential value, New York judges justified their intervention on behalf of subordinated classes by strained statutory construction, by recourse to the principle of the superiority of state over municipal power, and, occasionally, by recognizing the existence of specific individual constitutional rights.
to the demand for legal equality for the old immigrant groups.

Meanwhile, white ethimcs had attained practical economic and social equality. Leading universities were one of the first places in which customary WASP preserves were breached. By the early 1960s, "no faculty at any leading university [could] afford to be anti-Semitic in its hiring policies," and "major universities" had begun "drawing on a truly national pool of talent" in faculty hiring.\textsuperscript{314} Similar developments were occurring within the student body, as "Jewish quotas" were first "relaxed" and then eliminated. As a result, the Jewish proportion of Ivy League students had risen about 50% by the early 1960s, even before the quotas had been fully eliminated.\textsuperscript{315}

Consider also statistics on business leadership. According to one study, business leaders in the early twentieth century were 90% Protestant, 7% Catholic, and 3% Jewish,\textsuperscript{316} while in the 1950s they remained at 86.5% Protestant, 8.9% Catholic, and only 4.6% Jewish.\textsuperscript{317} But this homogeneity began to break down in the 1960s. A 1979 study showed that, of executives just below the level of president and board chairman, only 68.4% were Protestant, with Catholics rising to 21.5% and Jews rising to 5.6%.\textsuperscript{318} Because the executives studied in 1979 had an average age of 53,\textsuperscript{319} it is apparent that by 1966, when those business leaders averaged 40 years of age and, thus, had already begun their ascent, many non-Protestants were moving into middle management. Change continued apace over the next seven years, as demonstrated by a 1986 study that examined the same category of executives as the 1979 study.\textsuperscript{320} This 1986 study showed that Protestant representation had declined to 58.3%, while Catholic and Jewish representation had risen to 27.1% and 7.4% respectively.\textsuperscript{321} The 1986 study also showed that 13% of executives under 40 in

\begin{itemize}
\item 314. BALTZELL, supra note 169, at 336-37, 339.
\item 315. See id. at 341.
\item 318 See KORN/FERRY INTERNATIONAL'S EXECUTIVE PROFILE: A SURVEY OF CORPORATE LEADERS IN THE EIGHTIES 45 (1986).
\item 319. See id. at 23.
\item 320. See id. at 45.
\item 321. See id.
\end{itemize}
that year were Jewish, indicating that Jews began to enter corporate management in even larger numbers in the 1970s. 322

Impressionistic evidence confirms this statistical data. In a 1979 article, the New York Times reported that "in a cultural, educational and social explosion, Catholics have brushed aside the old barriers and made striking gains to reach positions of power once demed to their forebears." 323 This article noted that "[m]any [Catholic business] executives would say that they have found little, if any anti-Catholic prejudices to trip them up." 324 Similarly, a 1980 New York Times article noted that "proportionately more Jews than in the past ha[d] been taking jobs [as managers] in corporations," 325 while a 1983 article "showed that Jews are not underepresented [sic] on the nation’s largest public corporations" and took note of many highly successful Jewish executives and entrepreneurs. 326 Another article, published in 1986, concluded that banks had "begun to open key jobs to Jews, Italians and others" 327 and that "what ha[d] been happening in banking ha[d] been also occurring elsewhere," with "[m]embers of ethnic groups who had once been excluded in some heavy industries beginning to move into top jobs." 328 The article also "predict[ed] that the ethnic and religious diversity at the top levels will continue to increase as the system becomes more competitive, and as more and more people from ethnic groups fill the pipelines at management’s lower level." 329

We will never fully work out the complex relationship between the legal doctrines that are the topic of this Article and the socio-economic developments just sketched. We will never know whether legal change

322. See id., see also Robert A. Bennett, No Longer a WASP Preserve, N.Y. Times, June 29, 1986, at C28.
324. Id. at A12.
327. Bennett, supra note 322, at C1.
328. Id. at C28.
promoted or responded to socio-economic change, or whether the two types of change merely occurred simultaneously as part of some larger historical configuration. For present purposes, however, two central facts must be remembered. The first is the judiciary’s decision to respond to ethnic demands for equality by protecting religious rights, applying statutes in helpful fashions, and otherwise deciding cases when they could to assist the ethnic cause. Judges persistently refused, however, to elaborate a formal, legally enforceable right to equality. The second fact to remember is that, even without the help of a legal right, New York’s Catholics and Jews somehow attained their goals of assimilation and equality.

IV Brown v Board of Education and the Emergence of Multicultural Equality

A. The Brown Case and the Origins of Rights Jurisprudence

The year 1938 was the first key year in the story that this Article is relating. In this year of New York's Constitutional Convention, ideologies came together in new ways. Republicans, as we have seen, articulated their fears about how urban underclasses might act lawlessly to gain socio-economic preeminence, while Democrats for the first time expressed their fears of Nazi-like police repression and their hopes that the descendents of the immigrants they represented might some day attain equality. The origins of the drive for white ethnic equality, which ultimately reached full fruition in the 1970s and 1980s, can to a significant extent be traced back to the year 1938.

Also in 1938, Senator Robert F. Wagner spoke at the New York Constitutional Convention, and Justice Harlan Fiske Stone penned the now famous footnote four in United States v Carolene Products Co.,330 a case in which one-half of the Justices in the majority were from New York. There was a striking difference, however, between the ideology proclaimed in Carolene Products and the fashion in which New York judges deployed that ideology over the course of the next two decades. Justice Stone’s footnote proposed "searching judicial inquiry" and "exacting judicial scrutiny" to protect rights that specific provisions of the Constitution embraced and to overcome "prejudice against discrete and insular minorities" unable to protect themselves in the ordinary operations of the

330. 304 U.S. 144 (1938).
The footnote seemed to envision an activist judiciary engaged in legal enforcement of formal constitutional rights, especially the right to equality. As we have seen, however, this was not the role that New York judges would play during the 1940s and 1950s. Indeed, the New York judiciary behaved during those decades as if footnote four had never been written.

New York judges began to change their approach and become more rights conscious only in the aftermath of *Brown v Board of Education.* Ultimately, *Brown* would have a profound impact not only on the subject of race relations law, but on issues far beyond race by introducing into New York's law the concept of a judicially enforceable right to which subordinated individuals could turn to obtain equality. *Brown's* progeny would constitute the first cases in which New York courts proclaimed a right to equality as the appropriate means to attain the goal of equality.

*Brown* marked such a striking departure from earlier New York law dealing with issues of discrimination because racial inequality differed significantly from the other forms of inequality with which New York had been familiar. Three factors made racial inequality different. First, the level of government that committed discriminatory acts was different: in the Southern cases that led to *Brown,* state legislatures had discriminated by statute, whereas municipal bodies were the main discriminatory actors in the New York cases that we have studied. Second, victims of discrimination in New York had access to political power from the highest to the lowest levels of government, whereas Southern blacks at the time of *Brown* were totally excluded from politics.

These two differences led to the third. Because Southern blacks had to overcome state legislation to achieve equality and had to do so without deploying any political influence, they had nowhere to seek relief except the courts. The courts, in turn, had only two choices: either they could recognize a judicially enforceable right to equality, or they could allow perpetuation of the formal legal subordination of African-Americans. Catholics, Jews, and other victims of discrimination in New York, in contrast, had broader options. They could publicize their victimization.

---

333. See, e.g., Commission on Law and Social Action of the American Jewish Congress, *A Survey of the Experience of Winners of New York State Medical and Dental Scholarships for 1951 in Seeking Admission to New York Professional Schools* (unpublished manuscript, on file
and lobby for relief, and their publicity and lobbying mattered because
they had the votes and, hence, the power in electoral contests to back up
their other activities. For Catholics and Jews in mid-twentieth-century
New York, lawsuits were only a small aspect of their overall economic,
political, and social campaign for equality. They could view "[s]ledge-
hammer techniques," such as the imposition of "sanctions authorized by
law," as "a last resort" and could hope that "conciliation [would] follow"
any judicial or legislative victory so that they would be welcomed into
the oppressors' society and could take full advantage of their victories.
Thus, for the religious and ethnic minorities of mid-twentieth-century New
York, legal victories were a mechanism for providing individuals with
economic and social opportunity. For Southern blacks in the 1940s and
1950s, on the other hand, legal rights were all that could be obtained.
Thus, rights jurisprudence took hold somewhat slowly even in race
discrimination cases in New York. Not until four years after Brown did
a New York judge explicitly find the existence of racial discrimination and
grant a remedy in response. Moreover, a whole decade passed after Brown
before state judges entered into the business of remedying racial discrimi-
nation with any frequency and thereby began to provide serious enforce-
ment for a formal right of equality.
The initial finding of discrimination and grant of a remedy occurred
in an unusual case, in which parents were brought to court for neglecting
their children by refusing to send them to their assigned public junior high
schools. The parents justified their refusal on the ground that the schools
in question, "all of whose pupils [were] either Negro or Puerto Rican,"
offered "educationally inferior opportunities as compared to the opportum-
ities offered in schools whose pupil population [was] largely white."
The court agreed and held that, as a result of patterns of teacher assignment, "inferior educational opportunities" existed in schools with a predominantly minority student body and thereby deprived students of "the constitutional guarantee of equal protection of the laws."

The court continued:

[D]etermination, resourcefulness and leadership can bring the situation in the New York City school system into line with the constitutional guarantee. Until then, the Board of Education has no moral or legal right to ask that this Court shall punish parents, or deprive them of custody of their children, for refusal to accept an unconstitutional condition. These parents have the constitutionally guaranteed right to elect no education for their children rather than to subject them to discriminatorily inferior education.

For the next six years, however, state courts did not follow up. Three years later, in Taylor v Board of Education, a federal district court did find upon a detailed examination of the facts "that the Board of Education of New Rochelle, prior to 1949, [had] intentionally created a racially segregated school, and that the conduct of the Board of Education even since 1949 ha[d] been motivated by the purposeful desire of maintaining the racially segregated school." The court therefore directed the Board to develop and present a plan for desegregation. During the rest of the 1960s and into the 1970s, analogous federal court decisions arrived at the same result.

But it was not until the mid 1960s that the State Education Department and local boards of education began to redraw school zone boundaries and reassign students to improve racial balance in schools. Once this occurred,
both state and federal courts routinely upheld the administrative action,\textsuperscript{344} and a federal court held that the Legislature's attempt to limit the authority of nonelected administrators to order racial balance was unconstitutional.\textsuperscript{345}

In a clear statement of the right to racial equality, the three-judge court that invalidated the New York legislation observed that the statute "recognize[d] and accede[d] to local racial hostility" in a way that would "make it more difficult for racial minorities to achieve goals that are in their interest. The statute thus operate[d] to disadvantage a minority, a racial minority," and thereby constituted a "political" decision for which there could "be no sufficient justification."\textsuperscript{346}

Once New York judges fully accepted equal protection in the mid-1960s as a judicially enforceable right, they adhered to it faithfully and vigorously. For example, the equal protection principle came to govern the New York judiciary's response to affirmative action efforts to recruit minority students to the state's colleges and universities. Thus, in one case, a trial judge rejected a request by city authorities to revoke Syracuse University's tax exemption because the University was teaching a series of "race relations courses" that were "not open on an equal basis," but were available only to a "closed group" composed primarily of local residents of minority background, many of whom "were undoubtedly unqualified for admission to the university's undergraduate schools."\textsuperscript{347} The judge found these facts to be a "virtue, not [a] defect" and concluded that the city's arguments were "irrelevant" to the University's tax exempt status because the challenged program "fill[ed] a need in the adult's life or career."\textsuperscript{348}


\textsuperscript{346} Id. at 720.

\textsuperscript{347} In re Syracuse Univ., 300 N.Y.S.2d 129, 135-36 (Sup. Ct. Onondaga County 1969).

\textsuperscript{348} Id. at 136.
In *Alevy v Downstate Medical Center*, a more important case decided two years before the Supreme Court confronted essentially the same issue in *Regents of University of California v Bakke*, the New York Court of Appeals also upheld affirmative action as a remedy for past discrimination. The court's unanimous opinion observed that the Fourteenth Amendment had "been interpreted as permitting, if in fact not requiring, the correction of historical invidious discriminations" and that "would cut against the very grain of the amendment, were the equal protection clause used to strike down measures designed to achieve real equality for persons whom it was intended to aid." At the same time, however, the court expressed doubt about merely "granting preferential treatment to some racial groups," which in its judgment "encourag[e] polarization of the races, perpetuat[e] thinking in racial terms and require[d] extremely difficult racial determinations." Eminent federal judges in New York also struck down affirmative action programs extending beyond remediation, and the federal courts made it otherwise clear that "a private organization of blacks" could not use "a public facility to carry out its discriminatory practices" in connection with improving education for minority students.

Still, New York judges remained overwhelmingly committed to judicial protection of equal rights. Thus they were prepared to hear and potentially remedy constitutional claims of racial discrimination on the part of child adoption agencies, claims alleging discriminatory denials of membership in volunteer fire departments and in clubs operating on

352. *Id.* at 335, 348 N.E.2d at 545.
353. *Id.*
municipal property, and claims that government did not equally fund municipal services in minority communities. There was also a case that invalidated an airline antihijacking system that relied on a profile of individual characteristics, including ethnicity. Far more numerous were suits granting enforcement of civil rights legislation, especially fair housing laws designed to provide relief against discriminatory housing and zoning policies and equal employment laws prohibiting racial discrimination.


359. This was not true for claims that equal funding produced inferior facilities as a result of community conditions. See Beal v Lindsay, 468 F.2d 287 (2d Cir. 1972).


It seems fair to conclude that on the subject of race relations, federal and state judges in New York not only faithfully enforced, but after the mid-1960s even welcomed the U.S. Supreme Court's mandate in *Brown*, as well as various specific legislative initiatives designed to remedy discrimination. The judges were even prepared to extend their rights-centered equal protection jurisprudence beyond the race relations area. They extended it to one case, for example, in which a white attorney "of Italian ancestry and a Catholic" sued Cravath, Swaine & Moore for employment discrimination and unlawful termination of employment.\(^{363}\)

*Brown v Board of Education* and its progeny thus introduced into New York law a new paradigm of a judicially enforceable right to equality. Over time, courts extended the paradigm to provide a remedy for forms of nonracial discrimination, until in the 1970s, as we shall see, the new paradigm became dominant. As it did, the concept of equality was transformed from an amorphous, but nonetheless real and attainable, goal to a firm and hearty right that provided a model for all constitutionalism.

The meaning of equality also changed in another important respect. Whereas early egalitarians had pursued the goal of enabling the urban, immigrant underclass to adopt elite, WASP cultural norms and thereby assimilate and integrate into the mainstream of society, newer rights egalitarians ceased to show respect for traditional norms and instead demanded that subordinated groups receive the right to develop their own culture and to live by their own lights on a level playing field with others. Although *Brown* itself did not contemplate this shift to multiculturalism, but merely sought to integrate African-Americans into the mainstream in the same way that Catholics and Jews were being assimilated, the shift was implicit in *Brown*. The Court in *Brown* demanded that African-American equality be achieved with "all deliberate speed,"\(^{364}\) not as a long-term goal over an extended period of time. For this reason, the Court gave blacks

\(^{363}\) Lucido v. Cravath, Swaine & Moore, 425 F Supp. 123, 125 (S.D.N.Y. 1977). But see Birnbaum v. Trussell, 347 F.2d 86, 87 (2d Cir. 1965) (holding that "conclusory" allegation that plaintiff "was dismissed from his position because of his race [and] would not have been dismissed from his position if he were a Negro instead of being white" was insufficient to state claim for relief).

a legal right to equality in the short term. The difficulty was that full assimilation could be achieved only over an extended period, at least if assimilation was understood, as it had been by Catholic and Jewish immigrants and their descendants at mid-century, as the abandonment of minority cultural values and the assumption of the values of the majority. No group can undergo such a transformation overnight or probably over a period of less than several decades. Thus, if blacks were to gain equality quickly, they could do so only by gaining equal recognition for what they already were rather than by striving successfully over time to become something else.

None of this was apparent, however, when the U.S. Supreme Court issued the Brown opinions. Multiculturalism was a gradual development that did not fully bloom until the end of the 1960s. And other factors, in addition to teasing out the implications of Brown, contributed to multiculturalism's emergence. Thus, a more fulsome understanding of multiculturalism requires a detailed examination of its emergence.

B. Anger and Protest as New Forms of Equality

The majority opinion in People v Stover, it will be recalled, had exemplified the classic mid-twentieth-century social ideal of rational and civil discourse on the part of all groups in society in pursuit of the common good. Because the Stovers had breached this ideal with their offensive protest, they had been held subject to criminal liability. The offensiveness of their clothesline was tame, however, compared to what would become commonplace in the new world that burst forth in the mid-1960s.

Consider, for example, the objects that Stephen Radich displayed in 1966 in his Madison Avenue art gallery, some of which were visible at least partly from the street. The objects were obviously intended to shock. Among them was "a seven-foot 'cross with a bishop's mitre on the head-piece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard," the

365. See Speranza, supra note 271, at 31-33, 257-59, 262-67
367. See supra notes 302-11 and accompanying text.
purpose of which was "to express protest against the American involvement in Vietnam." 370

After Radich was convicted of casting contempt on the American flag and his conviction was affirmed, both by the New York Court of Appeals and by an equally divided U.S. Supreme Court, 371 his case came before a federal district court on habeas corpus. 372 In overturning Radich's conviction, the federal court ruled that his display "did not rape the flag of its universal symbolism," but "simply transferred the symbol from traditional surroundings to the realm of protest and dissent." 373 In language strikingly different from that used in the many previous cases that had sanctioned repression of dissent, the district court declared that the First Amendment afforded citizens "the right, even, to deprecate those symbols which others hold dear." 374 It was the "birthright [of] Americans" that "the free dissemination of ideas, the thoughts of all free-thinking men, even the smallest dissenting voice, might be heard without fear of prosecution." 375 Moreover, this "freedom to differ [was] not limited to things that do not matter much," but included "things that touch[ed] the heart of the existing order [and] ideas [that were] defiant, contemptuous or unacceptable to most Americans." 376

So much for offensive clotheslines. Within five years of Stover, the character of political discourse on the part of those demanding social change had been transformed, largely as a result of the civil rights and antiwar protest movements of the mid- and late-1960s.

By the mid-1960s, the civil rights movement was decades old, Brown v Board of Education had been the law for ten years, and African-Americans had experienced little, if any, improvement in their lives. In a widely publicized 1966 speech, Stokely Carmichael, a young militant who

370. Id. at 168-69.
372. See Radich, 385 F Supp. at 167
373. Id. at 178.
374. Id. at 183.
375. Id.
376. Id. at 183-84.
had just assumed the leadership of the Student Nonviolent Coordinating Committee, made this point with the declaration that: "We been saying 'freedom' for six years and we ain't got nothing." In his view, the time had come to demand "black power". Malcolm X had made the same point a few years earlier in a debate at Cornell University, at which he announced that he could no longer believe in "the American dream" of assimilationist equality. He explained:

[D]ark mankind wants freedom, justice, and equality. It is not a case of wanting integration or separation, it is a case of wanting freedom, justice, and equality. Because we don't have any hope or confidence or faith in the American white man's ability to bring about a change in the injustices that exist, instead of asking or seeking to integrate into the American society, we want to face the facts of the problem the way they are, and separate ourselves.

We feel, that if integration all these years hasn't solved the problem yet, then we want to try something new, something different and something that is in accord with the conditions as they actually exist.

As another radical added, his "fight" was "not to be a white man in a black skin." Blacks did not want "the right to be like" whites, but "freedom for us to be black, or brown, and you to be white and yet live together in a free and equal society." Ultimately, that meant freedom "to inject some black blood, some black intelligence into the pallid mainstream of American life."

Like blacks, the young antiwar protesters of the 1960s felt that to be "American [was] to have been betrayed [and] enraged." Privileged
children of the upper and middle class, they had first grown politically aware in the opening years of the 1960s — years of "rising hope." When, in the middle of the decade, they faced "the denial of hope and terror at the prospect of annihilation," the antiwar protestors did not respond as their parents had by seeking to perfect the American system; instead, they concluded that "America [was] a crime" burdened with not "simply bad policy but a wrongheaded social system, even a civilization." Their protests had "no "political" meaning in the old sense of changing the country purposively." They were "not [in] the mood to generate ideas about a reconstruction of politics." Their "only affirmative position was negation," as they strove to "shatter ordinary patterns of expectation" for the purpose "of stopping the war by stopping America in its tracks."

As a result of cases arising out of radical 1960s protest, it became "firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive." In addition to cases involving disrespect for the flag, other antiwar protest cases in which First Amendment rights were judicially protected involved a teacher who wore a black arm band, a group of eighty-six students who held an antiwar meeting in an apartment, and various individuals who gave antiwar speeches or distributed antiwar literature on streets, in parks, or in public transportation facilities.
Likewise, courts ordered the State Athletic Commission to give Muhammad Ali a boxing license even though he had been convicted of draft evasion, directed a local school district to allow Pete Seeger to use a high school auditorium for a concert despite his "controversial" views, and denied the New York City Commissioner of Parks the power to condition a permit for a poetry reading upon advance disclosure of the contents of the poetry. Other controversial cases in which courts protected First Amendment rights involved an authorization to black activists to picket Southern state pavilions at the New York World's Fair, an order allowing an anti-abortion group to march in a Memorial Day parade, and directions to reinstate a corrections officer who had been dismissed and a school teacher who had been suspended from their jobs for membership in the Ku Klux Klan and for criticizing the school administration.


respectively. Courts also prohibited draft boards from punitively reclassifying registrants who participated in antiwar protests and sustained a civil rights action brought on behalf of a speaker and a member of the audience at a birth control lecture. Several other cases, decided both for and against students, arose out of campus protests.

While the precedents upholding freedom of speech accumulated in cases in which the protected speech offended many members of the community, the scope of free speech rights also grew in cases involving ordinary political speech and even potentially subversive may suppress publication of official school newspaper containing libelous or disruptive material); Schwartz v. Schuker, 298 F. Supp. 238, 241-42 (E.D.N.Y 1969) (holding that students' First Amendment rights were not violated by dismissal for distribution of "Peace Strike" materials).

400. See Wolff v Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967).


activity. Commercial speech also gained constitutional protection. As a result, the nature of public dialogue changed. In four short years in the mid-1960s, the right to free speech changed from "freedom to speak, write, print or distribute information or opinion" that would engage governing elites in discourse affecting policy to the right to be an individual whose behavior was "non-conforming, whose dress was bizarre, and whose conduct was unconventional." It became legitimate, for example, for protesters to use words such as "murder" and "kill" on placards outside


CHANGING MEANING OF EQUALITY

an abortion clinic, even though the words were "provocative and contro-
versial." In parallel fashion, equal protection changed from a concept that
allowed underclasses who assumed elite values to move upward into the
social and economic mainstream to a doctrine that prohibited "exclusive use"
of public space by "any one group to the exclusion of others," even when an
established group "resented the invasion by [a] new group" that was
"unwashed, unshod, unkempt, and uninhibited." These shifts in free speech doctrine represented a more general judicial
recognition of the decline discussed above in public manners, decency, and
civility — a recognition reflected, for instance, in a decision by the New
York Court of Appeals that held the crime of vagrancy unconstitutional.

As the court observed, the "only persons arrested and prosecuted as
common-law vagrants" were people ". whose main offense usually consist[ed]
in their leaving the environs of skid row and disturbing by their presence the
sensibilities of residents of nicer parts of the community " In another
decision that had a similar effect, the New York Court of Appeals refused
to enjoin a new 1970s policy of releasing most patients confined in state
mental hospitals. Also under challenge during the early 1970s were
grooming standards for public officials and prisoners — standards that were
designed "to present a favorable image" or "to inspir[e] public confidence"
and "a sense of pride and self-discipline." Traditional proprieties were
finally challenged in cases brought by adoptees asking to have their adoption
records unsealed, by transsexuals demanding new birth certificates that

409. Wise, 281 N.Y.S.2d at 543.
411. Id. at 315-16, 229 N.E.2d at 429 (emphasis in original).
with earlier policies designed to keep patients confined in mental hospitals, see In re
Buttonow, 23 N.Y.2d 385, 244 N.E.2d 677 (1968); People ex rel. Anonymous v. LaBurt, 218
413. Romano v Kirwan, 391 F Supp. 643 (W.D.N.Y 1975) (invalidating grooming
Monroe County 1971) (invalidating grooming regulations for detainees awaiting trial). Contra
(W.D.N.Y. 1979); Greenwald v. Frank, 363 N.Y.S.2d 955 (App. Div 2d Dep't 1975). The
constitutionality of regulations designed to promote job safety were never doubted. See
414. See Alma Soc'y, Inc. v. Mellon, 601 F.2d 1225 (2d Cir. 1979); Rhodes v. Laurino,
would reflect their new gender,\textsuperscript{415} and by various plaintiffs seeking to end discrimination against illegitimate children.\textsuperscript{416}

With these changes in law, the vision of America changed from a melting pot, in which all people aspired to live with each other ultimately as one, to a vision of a divided, pluralist culture, in which groups with distinctive and even irreconcilable backgrounds, values, and styles competed for their share of public space and the public good. These changes transformed New York from a place of opportunity, where the lowliest man through hard work and abidance by the values of his community could rise to the top, to an international marketplace, where even foreigners could enter into its public life as full participants in fields as diverse as law,\textsuperscript{417} civil service,\textsuperscript{418} taxi driving,\textsuperscript{419} shellfishing,\textsuperscript{420} and the right to bid for and work on state government contracts.\textsuperscript{421} Cases also granted aliens and recent arrivals from other American states quick access to public housing\textsuperscript{422} and gave resident aliens equal rights to receive public educational funding.\textsuperscript{423}


\textsuperscript{417} See In re Griffiths, 413 U.S. 717 (1973).

\textsuperscript{418} See Sugarman v Dougall, 413 U.S. 634 (1973).


\textsuperscript{423} See Nyquist v Mauclet, 432 U.S. 1 (1977). \textit{Contra} Friedler v University of New York, 333 N.Y.S.2d 928 (Sup. Ct. Erie County 1972); see also Spatt v State of New York,
With these decisions, New York became more readily accessible to widely diverse people from all corners of the globe who had little need to learn its ways before participating in broad aspects of its life.

Judicial approval of enhanced competition, the extension of equal benefits to all, and a more open style of public debate did not, however, mean that judges were ready to sanction subversion either of the polity itself or of enforcement of laws in which the polity had any substantial stake. In *People v. Epton*, for instance, the Court of Appeals, over only one dissent, had no difficulty upholding the defendant’s conviction for violating the same criminal anarchy statute under which Benjamin Gitlow had been convicted some four decades earlier.

Indeed, the cases involved remarkably similar efforts to arouse underclasses to revolution through speech. Like Gitlow, Epton was "a self-acknowledged Marxist and president of the Harlem ‘club’ of the Progressive Labor Movement." In the spring of 1964, he had engaged in "formation of a small cadre of followers, who, presumably, would play leadership roles in the eventual revolution toward which their movement was directed." When an off-duty police lieutenant killed an African-American youth in the summer of 1964, and a "spontaneous build-up of pressures within the Negro ghettos of New York" resulted, Epton immediately "took to the streets of Harlem preaching his gospel of revolution," and the "Harlem headquarters of the Progressive Labor Movement became a beehive of activity with the defendant exhorting those in attendance to organize to combat the police." Undercover plainclothes agents infiltrated the movement, however, and recorded much of what was spoken, including the following:

> They [the cops] declared war on us and we should declare war on them and every time they kill one of us damn it, we’ll kill one of them and we should start thinking that way right now. If we’re going to be free, and we will not be fully free until we smash this state completely and totally. Destroy and set up a new state of our own choosing and of our own liking. And in that process of making this state, we’re going to have to kill a lot of these cops, a lot of these judges. Think about it.

361 F Supp. 1048 (E.D.N.Y. 1973) (upholding state scheme limiting financial aid to residents who attend colleges and universities in New York State).

426. *Id.*, 227 N.E.2d at 832.
427 *Id.* at 501-02, 227 N.E.2d at 832.
428. *Id.* at 501-03, 227 N.E.2d at 831-33.
because no people in this world have ever achieved independence and
freedom through the ballot or having it legislated to them. All people in
this world who are free have got their freedom through struggle and
through revolution. 429

On the basis of his speeches alone — without any evidence that there was
"any direct, causal connection between Epton’s activities and the Harlem
riots of the Summer of 1964" or, indeed, that anyone other than police
investigators was paying attention to what he was doing — Epton was
convicted of the crime of advocating criminal anarchy 430

In an opinion joined by erstwhile civil libertarians such as Stanley Fuld
and Kenneth Keating, the New York Court of Appeals concluded that the
criminal anarchy statute that the U.S. Supreme Court had upheld in Gitlow
v New York431 over the now honored dissents of Justices Holmes and
Brandeis was still constitutional.432 The court recognized that "mere
advocacy of the violent overthrow of the Government" would no longer be
constitutional, but it reinterpreted the statute to require two additional
elements for a criminal conviction: "an intent to accomplish the overthrow"
and "a ‘clear and present danger’ that the advocated overthrow [might] be
attempted."433 Despite the absence of any evidence that anyone had acted in
response to Epton’s speeches or had even paid attention to them, the court
had no difficulty in finding both elements present.

In the end, Epton should be seen as an unprincipled opinion. The Epton
case shows that the clear and present danger standard does not focus, as it
purports, on the existence of a connection between advocacy and conduct;
proof or lack of proof about the events that transpired or might have been
about to transpire at the scene of a speech is irrelevant. What matters is
whether judges feel threatened. When, as in Gitlow,434 Dennis,435 Feiner,436
and Epton,437 they do, judges will authorize the use of raw force to preserve
the existing power structure and repress those who are threatening it.

429.  Id. at 502, 227 N.E.2d at 832 (emphasis added).
430.  Id. at 501, 227 N.E.2d at 831.
431. 268 U.S. 652 (1925).
433.  Id. at 506, 227 N.E.2d at 835.
434.  People v Gitlow, 187 N.Y.S.2d 783 (App. Div 1st Dep’t 1921), aff’d, 234 N.Y
437  People v Epton, 19 N.Y.2d 496, 227 N.E.2d 829 (1967).
The new tolerance during the late 1960s of unconventional, nonconforming, and even shocking speech thus did not reflect any willingness on the part of judges to authorize political action that threatened destabilization of the political system. Accordingly, this new tolerance represented much less change than had at first appeared to be the case. It represented change from a world in which elites could expect their underlings to emulate them to a world in which they could expect insult and offense. The new world was much less pleasant and comfortable than the old, but it was also much more secure. Unlike emulation, insult and offense would not produce upward mobility. Insult and offense could be tolerated precisely because of their irrelevance and because the full coercive power of government would be brought to bear upon an advocate of criminal activity the moment an official felt threatened by such advocacy.

A parallel decline of reverence for traditional symbols and the substitution, in their stead, of a raucous, competitive marketplace also occurred in several religious liberty cases in the late 1960s and early 1970s. For example, the Sunday blue laws requiring the closing of commercial establishments fell under immense pressure as the courts first carved a variety of exceptions into them, then interposed procedural obstacles to their enforcement, and finally declared them unconstitutional. Another line of cases sanctioned the unconventional by upholding the right of members of the Reverend Moon’s Unification Church and of the Society for Krishna Consciousness to solicit and to perform religious ceremonies in public places, and even door-to-door in residential neighborhoods.


440. See People v. L.A. Witherill, Inc., 29 N.Y.2d 446, 278 N.E.2d 905 (1972) (holding that only jury can declare forfeiture of property available for Sunday sale); People v. Star Supermarkets, Inc., 339 N.Y.S.2d 262 (App. Div. 4th Dep’t 1972) (invalidating prosecution by way of grand jury indictment because breach of Sabbath law is violation rather than misdemeanor or felony).


442. See International Soc’y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d
Finally, the allowance of religious garb in courtrooms, if it did not devalue religious symbolism, at the very least reflected judges' understanding that the symbols had lost much of their sacerdotal force.\textsuperscript{443}

Of course, the line between the merely unconventional and shocking, on the one hand, and the threatening and dangerous, on the other, was not always clear. Thus, when African-American prison inmates sought to hold Muslim services in prison under the direction of the soon-to-be famous Malcolm X, who had "'a previous criminal record,'" the Corrections Commissioner denied the request as contrary to the "'interests of safety and security of the institution [and to a] long standing policy [of not] allowing inmates to communicate with or to be ministered to by a person with a criminal background.'"\textsuperscript{4} In the face of this denial, the New York Court of Appeals fractured. Three judges voted to sustain the Commissioner's action, while three voted to honor the prisoners' religious rights, bizarre as they may have seemed. The chief judge, observing in a two-sentence concurrence that the state "must extend to petitioner and his co-religionists all the rights guaranteed" by the correction law and the Constitution, "subject to necessary security and disciplinary measures," cast the deciding vote.\textsuperscript{5} The Black Muslims, whom many whites in the 1960s feared as crossing the line from the unconventional to the threatening, would still be litigating their right to religious freedom for several years to come.\textsuperscript{446} And they would receive that right only when it became clear that, however much they might upset some whites, the Muslims posed no threat to the polity's stability or to elite interests dependent thereon.


\textsuperscript{444} Brown v McGinnis, 10 N.Y.2d 531, 533-34, 180 N.E.2d 791, 792 (1962).

\textsuperscript{445} Id. at 537, 180 N.E.2d at 793 (Desmond, C.J., concurring).

\textsuperscript{446} See Bryant v Wilkins, 258 N.Y.S.2d 455 (Sup. Ct. Wyoming County 1965).
C. Gender Equality: Paradigmatic Constitutional Symbol for the 1970s

We must turn at last to the overarching constitutional issue of the 1970s — the issue of gender equality. By the late 1960s, the efforts of Catholics and Jews to assume the values of the dominant culture and thereby enter the socio-economic mainstream had in large part succeeded. The civil rights movement, with its demand for the elimination of subordination on the basis of race, was at its height. But virtually nothing had been done to address the subordination of the largest underclass in American society — women. This Article cannot even outline the many forms of discrimination that victimized women as late as 1970, but three facts must be noted. First, women were virtually excluded from the professions and other elite occupations. Second, employed women earned only 41% of what men earned. Third, 45% of households with children headed by women had incomes below the poverty line, whereas only 11% of all households with children had such low incomes.

The 1962 case of Shpritzer v Lang, in which a policewoman sought to invalidate a provision of the New York City Administrative Code that barred the promotion of women to the rank of sergeant, represented a small step on behalf of equality for women. While it was, in the still sexist words of the court, "beyond dispute that women [could] not perform all the functions which male Sergeants may be called upon to perform in the Police Department," the trial judge found "it unreasonable to conceive that an organization the size of the New York City Police Department would not have at least some positions of authority in which women could perform at the same level of competence as men." In the first case of its kind, the judge ordered a hearing to determine whether the plaintiff could perform any of the tasks required of sergeants on the understanding that if she could, the city's regulation would be "struck down as arbitrary and capricious."

---

448. See id. at 456.
451. Id.
452. Id.
The Civil Rights Act of 1964, which prohibited all employment discrimination based on sex, represented a more significant step toward ending the subordination of women. Like most equal rights legislation that this Article has examined, the 1964 Act was readily enforced by the courts in relatively straightforward cases like *Sontag v Bronstein*, in which the issue was whether a dumbbell lifting test that every male passed, but that Marilyn Sontag failed, bore any relationship to the duties of audio-visual technician, the job for which Sontag had applied. As the New York Court of Appeals proclaimed with clarity in *Sontag*, "when a hiring standard, although neutral on its face, adversely affects equal employment opportunity for a protected class of persons," including women, the employer had to establish that the test was "a valid predictor of employee job performance, and [did] not create an arbitrary, artificial and unnecessary barrier to employment which operate[d] invidiously to discriminate on the basis of an impermissible classification" like gender. The court accordingly reversed the trial court's judgment dismissing Sontag's suit and remanded the case for a fact-finding about the job-relatedness of the dumbbell test.

*Sontag* and thousands of cases like it merely required the clear and easy application of assimilationist equality principles requiring that women be given the same opportunities as men. But some other cases were not so simple. Consider, for example, three cases that were patently related to women's opportunities for equality of economic opportunity, but could not be resolved merely by assimilating women to men: *Ludtke v Kuhn*.

---

456. *Id.* at 201, 306 N.E.2d at 407
457. *Id.* at 202-03, 306 N.E.2d at 407-08.
In Ludtke, a female reporter sought an injunction to compel the New York Yankees to grant her access to the team’s locker room following games. The trial court made two key findings of fact. First, it found that Ludtke was denied "an equal opportunity to get a story or gather news on the same basis as her male counterparts, thus giving the latter a substantial competitive advantage." Second, the court concluded that the players could protect their privacy by "wear[ing] towels" or by "us[ing] curtains in front of the cubicle to undress and hide from these women." Accordingly, it found that "exclusion of women sports reporters from the locker room at Yankee Stadium [was] not substantially related to privacy protection" but only "to maintaining the locker room as an all-male preserve." The ultimate purpose of this exclusion was to "maintain[] the status of baseball as a family sport and conform[] to traditional notions of decency and propriety." So understood, Ludtke’s attempt to crash the men’s locker room, unlike the plaintiff’s effort in Sontag, but like the efforts of anti-Vietnam War protesters, vagrants, transsexuals, foreigners, and bizarre religious dissenters, stood in contradiction to traditional standards of manners and decency. Thus, in

460. 317 F. Supp. 593 (S.D.N.Y. 1970) & 308 F. Supp. 1233 (S.D.N.Y. 1969). Another case, New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975), which arose out of the policy of the Jaycees not to admit women into membership, also raised issues about denying women opportunities in a fashion that adversely affected their abilities to compete in the economy. The court avoided these issues, however, by finding that the Jaycees were not discriminating against women as an employer and, hence, were free from the restraints of the 1964 Civil Rights Act. Id. at 860. The court also found that the Jaycees were a purely private entity and were free from any constitutional obligations not to discriminate. Id. The finding that the Jaycees were private seems odd in light of the fact that they received nearly one-third of their funding from federal government sources. See id. at 858. It also seems at odds with the Ludtke case, which held that the New York Yankees were not a private entity, and the Seidenberg case, which held McSorley’s not to be private.


463. Id. at 97
464. Id. at 97-98.
465. Id.
466. Id. at 98.
Ludtke, the achievement of equality was at war with the maintenance of established cultural values, and Ludtke could not gain equal economic opportunity by accepting those existing norms. She had to demand that existing values be changed and that the courts grant equal recognition to her competing values.

The issues at stake in Seidenberg were ultimately the same. On the one hand, the continued exclusion of women from McSorley's Bar would "only serve to isolate women from the realities of everyday life, and to perpetuate, as a matter of law, economic exploitation." On the other hand, there was "the occasional preference of men for a haven to which they retreat from the watchful eye of wives or womanhood in general to pass a few hours in their own company." Lurking behind this urge for an all-male preserve was an "ancient chivalristic concept" of "bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity." Again, equal economic opportunity for women required transforming deeply held cultural assumptions.

The issue in Scott was whether Lori Scott, a young women of fifteen, could wear slacks to high school. The court made no finding that the school board's policy of requiring female students to wear traditional women's dress interfered with their opportunity to function as socio-economic equals, although plenty of evidence on which it could have based such a finding existed. But the court was clear about the school board's concerns: the board would not tolerate dress that would "exaggerate, emphasize, or call attention to anatomical details" or "provoke so widespread or constant attention as would interfere with teaching and learning, espouse violence, be obscene, suggest obscenity, or call for an illegal act." At bottom the board was seeking to impose rules of "style or taste" based on ancient chivalristic stereotypes about the behaviors and proper roles of

469. Seidenberg, 308 F Supp. at 1260.
472. See id. at 606-07
473. Id. at 607
474. Id. at 606.
men and women in society. Again, the attainment of equality was at war with traditional cultural values.

Unlike Sontag, in which women, like earlier victims of inequality, merely gained access to opportunities from which they had previously been excluded without the nature of those opportunities being changed in any way, Ludtke, Seidenberg, and Scott sought to do more. The real significance of the three cases lay in their efforts to transform culture by rejecting "mid-Victorian concept[s] which females [had] long since abandoned."475 Unlike Sontag and the religious equality cases of the 1950s, Ludtke, Seidenberg, and Scott did not merely expand women's opportunities to interact with men on men's terms; the three cases also altered the terms of interaction, so that men and women would henceforth interact on the basis of rules set in favor of women rather than of men.

In all three cases, adherence to traditional practices could be justified only on the ground that men were incapable of controlling their aggressive impulses, while women were delicate and impressionable creatures who required protection. Traditionally, of course, women had been protected through exclusion from situations in which they might confront male aggression, such as environments involving provocative dress, locker rooms, bars, and, above all, the world of business and economic competition. Women, as a result, had remained subordinated. Ludtke, Seidenberg, and Scott, in contrast, turned the tables when, in the new world of the 1970s, each was decided in favor of the female plaintiff. The law would no longer be used to subordinate women, but would instead be deployed to grant women rights that they could use to "change men"476 so that men would possess the necessary control of their own impulses. Once men possessed such control, women would no longer require protection and could safely enter former bastions of male privilege where they could compete advantageously with men and thereby end their subordination. It might, of course, take a good deal of time for men to change, but the important point symbolically was that during that time, the law in its apportionment of rights would be on the side of women rather than, as it always had been, on the side of men.

It is necessary to reiterate what has just been said in a more systematic fashion that is consistent with the main themes of this Article. Under the

multicultural vision of equality that Ludike, Seidenberg, and Scott represented, women no longer had to enter the cultural mainstream on men’s terms; these cases made it clear that women could reject traditional male value structures in their drive for equality and strive to develop their own alternative ones. Moreover, by reconceptualizing equality as a right rather than a goal, these cases transformed equality into an entitlement women enjoyed in the present rather than as an end at which they would arrive in the future. Instead of generating hope that women would have the same opportunities and well-being as men at some future date, equality gave women a right in each of the cases to interact on terms immediately favorable to them rather than to men. Equality, in short, was transformed from a process of pareto improvement by which less favored groups gained something over time that the favored group already enjoyed and would continue to enjoy. Instead, equality became a zero-sum game, in which judges fixed the rules under which competing groups interacted in specific contexts, with each group obtaining the right to interact under its preferred rules on some fair number of occasions.

An appreciation of 1970s feminism as an effort to change culture rather than merely to give women access to what men already enjoyed can also help clarify the confusing line of cases dealing with gender issues in insurance, retirement, and other employee benefits cases. Although some women may have obtained tangible financial gains as a result of judicial decisions outlawing gender-based discrimination in the employee benefits context, most cases affected men as a group and women as a group in a fashion that did not improve the well-being of either. The reason, of course was that men and women tended to be married to each other and hence that benefit payments, at least in traditional marriages, were effectively made to the family unit, consisting of both sexes, rather than to men or women alone.

Consider Spirt v Teachers Insurance & Annuity Ass’n,477 which invalidated the use of sex-segregated mortality tables in determining the amount of retirement benefits payable to retirees.478 Because women on the average live longer than men, the consequence of using the tables was that a woman who made the same contribution to a plan as a man received a
lower monthly benefit upon retirement. In striking down this discrimination and requiring that women receive the same monthly benefit as men who made the same contribution, judges did not, however, aid all women at the expense of all men. The reason is that women in traditional marriages, who were dependent on their husbands' pensions, were hurt along with their husbands by the Sprit rule. The women who benefited from the rule were those who had supported themselves all or most of their lives and were dependent on their own retirement annuities for their current support. Perhaps annuity and insurance companies gained the added funds needed to pay these independent women entirely from the pensions and annuities of single men. But if not, then the funds came from the large number of workers and retirees in traditional marriages, with no explanation of why the interests of single women should be preferred to the interests of married women and widows. Whatever the actual distributional impact of Sprit, however, it seems clear that the new-found preference for single women reflected dramatically altered cultural assumptions about the propriety of women's dependence on men.

The same was true of the cases dealing with maternity leave policies and pregnancy benefits, which New York courts decided almost uniformly in favor of women plaintiffs.49 But again, at least insofar as pregnant women were married, the conflict over pregnancy benefits was not between women and men, but between families that would have children and thereby receive benefits, and those that would not but would nonetheless contribute to covering the cost of the benefits. Only pregnant women who were

unmarried or not otherwise financially dependent on men, which except for the uninsured poor was a relatively small group in the 1970s, enjoyed a tangible economic gain financed to a significant extent by men, when the judiciary compelled employers to provide pregnancy benefits. Thus, single women who were economically well-off tended again to benefit at the expense of families, without any judicial policy analysis of why a well-to-do woman who was unmarried, independent, and about to be a mother was a proper subject for state solicitude and support at the expense of married mothers dependent on men for support.

These cases, in short, suggest that one consequence of 1970s feminism, whether by inadvertance or design, was cultural change that exalted independent, single women over married women economically dependent on men. Unlike the egalitarian movements of the 1950s, which sought only to enable subordinated groups to move upward into the elite on the elite's terms, the movements of the 1970s, including the women's movement, sought to alter the cultural terms on which competing groups interrelated. Efforts to change deep cultural values provoked resistance, however, and as a result, it proved far more difficult to achieve equality through cultural change in the 1970s than it had been to achieve equality through assimilation in the 1950s.

The struggle over abortion — a right essential to women if they are to achieve equality — is illustrative. Women initially obtained the right to abortion by statute in New York in 1970, \(^\text{480}\) and thus the right cannot be questioned, as it has been in most of the United States, on the ground that it resulted from the U.S. Supreme Court's alleged usurpation of power in \textit{Roe v. Wade} \(^\text{481}\). Nevertheless, precisely because of the way in which the right to abortion conflicted with traditional moral values, recognition of the right provoked resistance, and New York judges cut back on the substance of the right, even though it had been granted by the legislature. First, the judges upheld a legislative addendum to the 1970 Act that required a doctor to prepare a termination of pregnancy certificate including the name and address of the person obtaining the abortion for every abortion done in New York City. \(^\text{482}\) Second, they upheld requirements for the separate

\(^{480}\) See 1970 N.Y. Laws 127

\(^{481}\) 410 U.S. 113 (1973).

certification of abortion clinics along with the individual certification of every doctor having an office therein.\textsuperscript{483} Third, despite early cases to the contrary,\textsuperscript{484} the U.S. Supreme Court and the New York Court of Appeals both held that only medically indicated abortions could be funded by medicaid reimbursements.\textsuperscript{485}

Taken together, these restrictions tended to limit the availability of abortions, especially to poor women, thereby depriving the right to abortion of much of its substance.\textsuperscript{486} While it would be a mistake to question the real freedom to control their bodies and their life destinies that wealthy women gained from their right to abortion, it seems clear that on the subject of abortion, as on most other subjects of gender equality, the mass of women realized less material improvement in their lives than abortion's proponents might have hoped. Because of the difficulties of obtaining an abortion and the trauma associated with it, granting a formal legal right could not alone create a new social reality.

Indeed, the destruction of traditional norms and their replacement by the law of gender equality even brought tangible benefits on occasion to men. Thus, the U.S. Supreme Court invalidated New York legislation requiring the consent of unwed mothers, but not unwed fathers to the adoption of their children; the Court observed that the facts before it "illustrate[d] the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children."\textsuperscript{487} Similarly, New York's "ancient practice of arresting only men" in civil litigation came to an end "as an unanticipated social dividend" of "the modern insistence on sex

equality, even in cases in which a woman sought to have a man arrested in the context of a marital dispute. Men gained another important bargaining chip against women in a divorce context when it was held that they were entitled to alimony and counsel fees at the expense of their wives in cases in which they were economically dependent. At the other end of the marriage continuum, courts declared that rules making it more difficult for men than for women to obtain marriage licenses were also unconstitutional. Although a number of gender-based discriminations harmful to men were preserved, the fact remains that in the important area of marriage and divorce law, men gained important practical rights from the requirement of gender equality. When one factors in statutory changes in New York’s standards for divorce and for the distribution of marital property that increased the ease with which a husband in a traditional marriage could walk away and leave his former wife in poverty, it may be that in its practical, tangible effects, the gender revolution of the late 1960s and early 1970s favored men at least as much, if not more, than it did women.

493. This is a topic to which I shall turn in a future article.
It would again be a mistake, however, to focus on the immediately tangible consequences of the movement for gender equality rather than on its long-term conceptual goals. An approach to gender equality focusing on equality of rights for women rather than on improving women's material well-being was entirely consistent with the main thrust of constitutional law during the 1970s. Thus, as one judge declared in holding that men should have the same entitlement to alimony as women, it was essential that the law cease its "implicit condescension and maintenance of a protective attitude" which, although it "may help the women immediately affected[,] in the end produces the attitude that women are not equal to men." In this judge's view, women could not be made equal by giving them a series of specific benefits that elevate them as a group to a preordained legal plateau. The gender revolution, he believed, could ultimately succeed only as a "movement to raise the consciousness of women to an appreciation of their potential as functioning individuals."

This judicial observation leads directly to the questions to which this Article's comparison of the mid-century movement for ethnic equality with the subsequent movements for racial and gender equality has been pointing. In conclusion, those questions need to be fleshed out.

V Conclusion: Rights as the Foundation for Social Justice

Before turning to the questions that this Article raises, we need to reiterate briefly the facts that it establishes. One fact that seems clear is that the New York courts over the past two decades have committed themselves to a rights-centered constitutionalism. Beginning with the race relations cases in the late 1950s and culminating in the gender equality cases of the 1970s, faith in constitutional rights generally has led to a fulsome judicial creation of rights, including fundamental ones, such as the right to die and the right to sexual expression, and less important ones,
such as the right to play. And with the judicial creation of rights, societal progress seems increasingly to depend on continued rights expansion. The route to progress has thereby fallen under the guardianship of lawyers and judges.

An obvious question that some might want to ask is when the shift to rights-centered constitutionalism occurred. Three dates suggest themselves. The first is 1938 — the year of United States v Carolene Products Co. and of New York's Constitutional Convention. The second is 1954 — the year of Brown v Board of Education. The third is the mid-1960s — the years of African-American and antiwar protest and of a solid liberal majority on the Warren Court.

Important developments in fact occurred at each of these times. In 1938, a new conception of equality focusing on culture and ethnicity rather than class emerged, and the achievement of such equality became the central goal of liberal constitutionalism. Brown, in turn, marked the first clear proclamation of equality as a legally enforceable, formal constitutional right rather than a mere goal. Finally, the mid-1960s marked the period in which rights-centered rather than goal-oriented jurisprudence permeated the lower courts, and equality became multicultural rather than assimilationist.

A second, normative question also arises: namely, whether the shift from goal-oriented, assimilationist equality to rights-centered, multicultural equality was a positive development. This question cannot be answered definitively. Historical essays need not conclude with definitive normative judgments, and I am sufficiently conflicted about the trend toward rights-centered, multicultural equality that a fully coherent normative judgment authorizing sterilization of severely retarded 16-year-old daughter).

498. See Neeld v American Hockey League, 439 F Supp. 459 (W.D.N.Y 1977) (enjoining league from enforcing rule prohibiting person with sight in only one eye from playing). But cf. Caso v New York State Pub. High Sch. Athletic Ass'n, 434 N.Y.S.2d 60 (App. Div 4th Dep't 1980) (refusing to allow student who had violated athletic association rules prohibiting participation in nonschool sports to participate in school sports). Two judges even upheld a constitutional right to ride a motorcycle without wearing a protective helmet, see People v Carmichael, 279 N.Y.S.2d 272 (Special Sess. Genesee County 1967); People v Smallwood, 277 N.Y.S.2d 429 (Special Sess. Monroe County 1967), although one was reversed by a higher court. See People v Carmichael, 288 N.Y.S.2d 931 (Genesee County Ct. 1968); accord, People v. Newhouse, 287 N.Y.S.2d 713 (Ithaca City Ct. 1968).

499. 304 U.S. 144 (1938).

would be beyond my capacity. But a few tentative observations can be made, and with them, I believe, the most difficult issues will be exposed.

One set of observations results from focusing sharply on the remarkably successful efforts of Catholics and Jews to achieve their goals of equality in the post-World War II decades. Sandwiched between the Holocaust and ethnic cleansing in Bosnia and Rwanda, the upward mobility of white ethnics in mid-twentieth century America possesses a grandeur and singularity that those of us who lived through the movement have never fully appreciated. May it also be that we have not fully appreciated the wisdom of New York judges when they declined to provide Catholics and Jews with judicially enforceable equality rights to overcome their subordination — rights that by the very necessity of their existence would have emphasized and thereby reaffirmed Catholic and Jewish inferiority. At the same time, we also may have failed to understand the moral incoherence of the New York judiciary's approach. Living in a culture that perpetually proclaimed its egalitarianism, New York's mid-century judges themselves joined in the proclamations, but then persistently refused to render them effective in the cases that they decided. The era's vision of equality was also less than complete in that assimilation, in a meaningful sense, was not equality. Although those individuals who were willing and able to shed the cultural identity with which they had been born could assume a WASP identity and join the WASP elite, they had to change, whereas existing members of the elite did not. Nor was change always easy. Jewish children who had to sit through class discussions of The Merchant of Venice, for example, undoubtedly experienced a kind of pain that Christian children did not.

These weaknesses of mid-century, assimilationist equality have been solved by the new rights-centered equality of the 1970s. Rights-centered egalitarians are judicial activists for whom the Warren Court provides a model. Unlike New York judges, who often failed to practice the equality they preached, the Justices who formed the Warren Court's majority appear in retrospect to have displayed even greater moral virtue than we have conventionally credited them with having. In its constitutionalization of rights of equality and autonomy, the Warren Court majority, unlike mid-century New York judges, took responsibility for transforming America's ideology into reality. Warren, Brennan, and their brethren may

not have succeeded, but rarely does one find judges striving so nobly to empower the oppressed.

Today's egalitarian ideology also does not impose on subordinated classes the special burden of shedding their cultural identities in order to climb to the top. In today's utopia, all cultures will receive due respect, and no culture will be the dominant one to which all others must be assimilated. Indeed, in its most advanced forms, multicultural equality rejects the very concept of domination or the very idea of rising to the top. Multicultural rights egalitarians somehow presuppose that every equal group will retain its own values and culture and will relate to others with no one culture or set of values becoming dominant. No one has yet explained, though, how equal groups in a multicultural society would be prevented from striving to make their values dominant or even how culture of any kind could exist without some set of controlling values. Hence, it appears that multicultural equality will lead, if anywhere, to a world in which new values replace traditional values as culturally dominant, not to a world in which all domination is eliminated. Such equality could prove even more inegalitarian than the assimilatist equality of the 1950s.

The reason for being conflicted about the current trend toward rights-centered, multicultural equality is thus apparent: like the mid-century's assimilatist equality, today's multicultural equality is conceptually imperfect and incomplete. Comparison of the two visions of equality does not disclose the superior one, but only displays the weaknesses and limitations of each. Especially in light of the conservative counterreactions it has produced, one therefore wonders how much useful insight our current conception of equality provides with its emphasis on ethnicity and culture, as that conception has evolved since it first replaced the class-oriented conception of equality in the late 1930s.

This question, in turn, only returns us to an even more basic normative question: whether it makes sense to conceive of equality primarily in terms of ethnicity and culture rather than in terms of class conflict and redistribution. This most basic question, however, is irrelevant because in America today, if not in the world at large, politics is driven by ethnic and cultural discrimination rather than by class struggle. In today's world, the poor appear to have accepted their fate. They no longer engage in revolutionary struggle to improve their lot, nor do the rich fear that the poor will dispossess them. At the same time, the world bears constant witness to genocide, ethnic cleansing, and religious
fanaticism, and even in America, intolerance and fear of difference appear to be increasing.

Whether we like it or not, the central task for anyone who today believes in equality is to end discrimination based on ethnicity and culture. Emphasis upon the experience of Catholics and Jews in mid-twentieth-century New York establishes that this task can be accomplished. Emphasis, in contrast, upon the intellectual conceptions needed to accomplish it shows how much work remains to be done.