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THE MERGING CONCEPTS OF LIBERTY
AND EQUALITY

RICHARD B. WILSON*

Liberty and equality have frequently been considered antithetic. Liberty has been viewed as protecting the unfettered expression of individuality in all its forms, equality as a set of limitations on human action. R. H. Tawney observes that: “Equality implies the deliberate acceptance of social restraints on individual expansion. If liberty means, therefore, that every individual shall be free to indulge without limit his appetite (for wealth and power), it is clearly incompatible not only with economic and social, but with civil and political, equality.”

The pervasive influence of this dichotomy on the development of American political thought is underscored by William Graham Sumner’s observation that “we cannot go outside this alternative: liberty, inequality, survival of the fittest; non-liberty, equality, survival of the unfittest.”

Heightened by philosophies of individualism and competitive economics on the one hand and by periodic waves of egalitarian and leveling tendencies on the other, the conflict between liberty and equality has been a continually recurrent theme in American ideological history. Adverting to the dominant role of equality in the Declaration of Independence and to the disproportionate weight given individualism in the Constitution, Parrington notes that the “unlikeness (of these two documents) is unmistakable; the one a classical statement of French humanitarian democracy, the other an organic law designed to safeguard the minority under republican rule.”

Finally, the diversity of liberty and equality has been confirmed by the clash between security and opportunity. “When opportunity became bounded in the last generation,” writes Myrdahl, “the inherent conflict between liberty and equality flared up.”

Side by side with this idea of competition and contrast between liberty and equality there has developed the notion that they are similar or identical. Each was viewed by the framers of the Declaration of Independence as containing an irreducible and inalienable

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1Tawney, Equality (1931) 238.
2Sumner, The Challenge of Facts and Other Essays (Keller ed. 1914) 25.
3III Parrington, Main Currents in American Thought (1930) 411.
4Myrdahl, An American Dilemma (1944) 9.
core. Moreover, it is now clear that the phrases embodying these concepts in the Fourteenth Amendment—the Due Process and Equal Protection Clauses—were both originally intended by their abolitionist formulators to project certain natural and inalienable rights. Indeed, one abolitionist architect of the Amendment, Rep. John A. Bingham, used the phrases “due process of law” and “equal protection of the laws” interchangeably. Eighty years of judicial construction has failed to erase completely this common substantive content. In certain respects men have been said to have an absolute right to equality before the law and certain classifying traits have been rendered constitutionally suspect. Speaking for a unanimous court in *Hernandez v. Texas*, Chief Justice Warren remarked that “it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State....”

Neither the similarities nor the distinctions between liberty and equality have been developed systematically. Each has on occasion functioned as an alternate for the other, and no superior doctrine has been developed for determining the types of situations to which each is applicable. In the postwar period, particularly, federal decisions reveal an accelerating tendency to construe constitutional liberties in terms of equal protection formulae. The conflict between convergent and divergent theories about the relationship of liberty and equality has contributed signally to our current confusion over the nature of individual freedom and the proper relationship between man and the state.

Liberty and equality have been shaped and refined constitutionally by a philosophy of minimum government. Within this context they have tended to diverge. It is highly probable that their future constitutional development will be reshaped by expanding government controls over ever-widening areas of individual activity. Within this context they will probably coalesce, providing a unified doctrine as our dominant ideal and constitutional demand. Moreover, the disappearance of geographical, economic, and social frontiers has intensified collision and conflict among individuals and between so-

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*ten Broek, The Anti-Slavery Origins of the Fourteenth Amendment (1951) 198-200.*

*Congressional Globe, 39th Cong., 1st Sess. 1088.*

*Hernandez v. Texas, 347 U.S. 475, 477 (1954).*

*Infra, at 16 through 38.*
cial groups. Consequently, invasion of individual liberty by private action is becoming an equal, if not greater threat, to the fabric of freedom than invasion by government action. To control these private invasions and to maximize liberty, government must be as concerned with equality of regulation and similarity of treatment as it is with the preservation of certain negative freedoms. The result promises a further merging of the doctrines of liberty and equality.

Existing confusion over the proper relationship of the two concepts, when coupled with their emerging and potentially increasing convergence, provides compelling argument for a re-exploration of the constitutional status of liberty and equality. What do recent federal decisions tell us about the roles played by liberty and equality in the numerous constitutional sections which embody them? To what extent and in what manner has there been an intermingling of the two concepts and of their attendant interpretive doctrines? What are the consequences of this intermingling for the future of self-government?

I. Equal Protection

The demand for equal protection of the laws has been assigned, in the language of the Court, to numerous constitutional sections. The Due Process Clauses of the Fifth and Fourteenth Amendments, the Privileges and Immunities Clause of the Fourteenth Amendment, the Commerce Clause, and the First Amendment—all have been said to require some measure of equal treatment for those similarly situated.

While the concept of equality developed in some of these areas

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9 Infra, at 16.
10 See Antieau, Equal Protection Outside the Clause (1952) 40 Calif. L. Rev. 362-377.
14 Welton v. Missouri, 91 U. S. 275 (1875); Minnesota v. Barber, 136 U. S. 313 (1890); Morgan v. Virginia, 328 U. S. 373 (1946); Dean Milk Comp. v. City of Madison, 340 U. S. 349 (1915).
will be explored more adequately below, it is to the Equal Protection Clause of the Fourteenth Amendment that we must turn initially for a clear view of the contemporary constitutional doctrine of equality.

Ideally and abstractly, equality requires that excessive differences in wealth and power be prohibited, that all persons have equal access to the mainstreams of opportunity, and that all enjoy identical substantive rights. Achievement of this ideal would require the fulfillment of at least three conditions, none of which we have seen fit to meet completely. (1) Since men differ in energy, ability, and resources, positive public action is necessary to provide the material requirements for near or exact similarity of condition. Social security programs, agricultural and business subsidies, government credit facilities, publicly-owned enterprises—while highly selective, frequently inadequate, and usually motivated by pressure-group interest rather than by an egalitarian ideal—all point toward a constitutional demand for similarity of status and equality of opportunity. (2) Regulatory action is necessary to create and maintain equality of condition and opportunity against those inequities produced by the clash of private interests. Police power protections against monopolies, adulterated or unhealthful products, unscrupulous and incompetent professional practitioners, unfair labor practices, unfair competition, etc.—all represent a partial fulfillment of this demand. Other private discriminations, as those perpetrated on the basis of race, color, or creed, have only recently and partially been prohibited under the Equal Protection Clause of the Fourteenth Amendment, a clause intended by its formulators to abolish completely private discrimination and to guarantee fully the equal enjoyment of all substantive rights. The emergence of an embryonic doctrine of "substantive" equality may presage a significant expansion of equality in the enjoyment of basic rights. (3) Since government action defines and regulates in large part the relationship between citizens, government must itself refrain from creating and maintaining inequalities. It is to this third condition that the Equal Protection Clause has been primarily directed. Here, two doctrines have predominated: the requirement of reasonable classification and the prohibition on discriminatory motive. A more detailed statement of these doctrines and of the concept of substantive equal protection should bring into sharper focus the present boundaries of the Equal Protection Clause.

\textsuperscript{16}ten Broek, \textit{supra}, note 5 at 221-222.
A. Reasonable Classification

Since the Fourteenth Amendment "does not require things which are different in fact or opinion to be treated in law as though they were the same," some measure of discrimination is constitutionally tolerable. Discrimination is tolerable if it rests upon a reasonable classification. When legislatures define a limited class of persons and apply to the members of that class a unique or special treatment, the courts have usually demanded that all persons within the class be treated in the same manner, and that the classification itself be reasonably related to the accomplishment of some valid public purpose. While the first of these requirements has presented relatively few problems, the second raises two definitional questions: what is a reasonable relationship, and what is a valid public purpose? No complete nor satisfactory answers have been given to either of these queries.

Setting aside temporarily the "purpose" issue, an ideally reasonable classification would mean that all persons included in the class slated for special treatment and only those persons, possess the characteristics which the legislature has undertaken to promote, to regulate, or to eliminate. If government decides to remove all potential saboteurs from the vicinity of defense installations, for example, the demand for reasonable classification requires that no potential saboteurs be omitted from the exclusion order and that no persons lacking the characteristic of potential sabotage be included in the order. In short, the classification should ideally be neither under-inclusive nor over-inclusive with respect to the purpose to be accomplished.

Two general types of difficulty have marked judicial attempts to review the reasonableness of classifications. The first of these has been a failure to identify accurately the purpose for which a given classification is established. Unless the purpose be identified, it is impossible to determine whether the classification established and the treatment accorded to persons within it are reasonably calculated to effect legislative and administrative intent.

20 See infra at 189-192.
21 For more exhaustive analysis of the logical alternatives available to classifiers, see Tussman and ten Broek, The Equal Protection of the Laws (1949) 37 Calif. L. Rev. 344-356.
Two recent opinions, *Avery v. Georgia* and *Day-Brite Lighting, Inc. v. Missouri*, offer conspicuous examples of this difficulty. In the *Avery* case, Georgia's method of selecting juries by printing the names of eligible Negroes on yellow tickets and those of whites on white tickets was struck down as a "prima facie case of discrimination." While constituting only 14 per cent of the eligible jurors in Fulton County, Georgia, Negroes accounted for over 5 per cent of those on the jury list during the preceding year. Since "proportional representation of races on a jury is not a constitutional requisite," it might reasonably be concluded that the Georgia selection system was designed to create juries "generally representative of the community." If this was the State's purpose—and there is no clear showing of any other—then the classification would appear to be a reasonable one.

A Missouri statute requiring employers to give their employees four hours off on election day without loss of pay was tested in the *Day-Brite* case. "The classification of voters so as to free employees from the domination of employers," said the Court, "is an attempt to deal with an evil to which the one group has been exposed. The need for that classification is a matter of legislative judgment... and does not amount to a denial of equal protection under the laws." If it can be assumed the statute was aimed at preventing employers from interfering with the political attitudes of their workers, then the classification seems reasonably well related to its purpose. If, however, the Act was intended primarily to encourage larger turnouts of voters, then the classification is under-inclusive since it imposes a financial burden on one group, employers, and not on another, self-employed persons and employees. Once again, the validity of a classification is seen to depend on a prior identification of purpose.

Discovery of legislative purpose is a logically necessary prerequisite to the testing of classifications. Unfortunately, judicial recognition of this task has frequently been marred by slipshod performance. Where problems of equality are involved, identification of purpose remains a major area for judicial improvement.

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2245 U. S. 559 (1953).
25345 U. S. 559, 562 (1953).
28342 U. S. 421, 425 (1952) (italics mine).
A second difficulty which has plagued the Court is its attempts to evaluate the reasonableness of classifications has been that of over or under-inclusive coverage. Once legislative purpose has been ascertained, it must next be determined whether all persons similarly situated with respect to that purpose, and only such persons, have been accorded the treatment specified by statute. The Japanese evacuation cases represent classic examples of over-inclusive classification. To prevent sabotage of our war industries, the federal government in 1942 removed all Japanese-Americans from the west coast. Little insight is required to recognize that most of the Japanese-Americans thus singled out for special treatment did not possess the trait—potentiality for sabotage—which the law was designed to control. Hence, the classification was over-inclusive.

Under-inclusive classification offers even greater difficulties. In cases involving tax laws, public utilities and regulations of business the Court has usually been willing to uphold classifications even though they did not include all those similarly situated with respect to the purpose of the law. Administrative difficulty in reaching simultaneously all who require special attention has been the usual justification for this tolerance. Granting such difficulties, it would seem reasonable to require some compelling reason or reasons for overriding the demands of sound classification. The consequences of failure to justify adequately an under-inclusive classification emerge with striking clarity in the recent case of Salsburg v. Maryland.

In issue there was a Maryland law permitting admission of evidence secured by illegal search and seizure for prosecution of certain gambling misdemeanors in Anne Arundel County, but prohibiting the admission of such evidence in like prosecutions in all but two other counties, and, even in Anne Arundel County, prohibiting its admission in prosecutions for many other misdemeanors. Observing that "the Equal Protection Clause relates to equality between persons as such, rather than between areas," the Court concluded that the

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30See also Yick Wo v. Hopkins, 118 U. S. 356 (1886).
36346 U. S. 545, 551 (1954).
classification was reasonable, even though it might be "illogical" and "unscientific." The ruling principle here, it was argued, is the same as that which upheld a Missouri law requiring that in the city of St. Louis and four counties appeals be made to the St. Louis Court of Appeals, whereas appeals made elsewhere in that State must be directed to the Supreme Court of Missouri.\(^3\)

The purpose of the Maryland law was quite clearly improved efficiency in the apprehension of gamblers. Since some gamblers were subject to its provisions and others were not, the classification is under-inclusive. The Court attempts to justify this by equating Missouri's classification—invoking a minor matter of judicial administration—with one which deprives certain state residents of a fundamental right. This represents a curious departure from past judicial demands that classifications involving human and civil rights require a stronger justification than do all others.\(^3\) No compelling reasons were presented for restricting the use of illegally seized evidence to the Courts of three counties. The alleged recent increase of gambling activity in Anne Arundel County offers no basis for the contention that gamblers were more difficult to detect and capture there than elsewhere in the State.

**B. Legislative and Administrative Purpose**

Identification of legislative purpose and measurement of the relationship between classification and purpose do not exhaust the judicial tasks posed by the Equal Protection Clause. Still to be considered is the validity of legislative and/or administrative purpose. Is the classification motivated by a "discriminatory" intent? Is the purpose, regardless of its motivation, one which is "absolutely" or "substensively" prohibited?

1. **Discriminatory Purpose**

Clearly enunciated in *Yick Wo v. Hopkins*,\(^4\) *Truax v. Raich*\(^1\) and *Takahashi v. Fish and Game Commission*,\(^1\) and confirmed by dicta in *Korematsu v. United States*\(^4\) and *Kotch v. Board of River Pilot*
Commissioners is the notion that classificatory schemes may not be motivated purely by "antagonism," "hostility" or "prejudice." If the imposition of special burdens on a limited class of persons is occasioned primarily by legislative or administrative enmity toward that class, then the classification must fall as a denial of equal protection. Judicial vigilance in this area has been directed exclusively to the interdiction of racial and religious prejudice; hostility toward economic, political, and social groups, although frequently a motivating factor in legislative action, has never been exposed and struck down on equal protection grounds.

The racial segregation cases, from Plessy v. Ferguson to Brown v. Board of Education, present a curious exception to this line of development. While the "separate but equal" doctrine compromised many aspects of equality, its most glaring deficiency resided in a failure to recognize that segregation is, in most instances, discriminatorily motivated. Indeed, prohibition on the intermingling of races for educational purposes is the most stringent and uncompromising demand of anti-Negro prejudice in the United States. Consistent application of the "discriminatory purpose" doctrine would have invalidated most segregative practices.

It is surprising that the doctrine of discriminatory purpose has enjoyed even a limited application. Individual legislators and administrators are seldom, if ever, motivated by a single purpose; legislative bodies never are. Moreover, the distinction between an intent to regulate what is reasonably apprehended to be an evil and an intent unreasonably to discriminate against specified groups is an exceedingly

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4 "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection." Hirabayashi v. United States, 320 U. S. 81 (1943).
4163 U. S. 537 (1896).
4See also Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938).
4Judicial reluctance to expose and overturn discriminatively motivated segregation schemes is most dramatically illustrated in Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938); and McLauren v. Oklahoma State Regents, 339 U. S. 637 (1950), where the educational segregation practices of two states were struck down, although the separate but equal doctrine was explicitly upheld. Since the facilities afforded the two races in both these situations were, for all practical purposes, equal, the Court could reasonably eliminate the practices in question only by finding a discriminatory intent or by relinquishing "separate but equal." It is interesting to note that a unanimous court chose the latter course in Brown v. Board of Education, 347 U. S. 483 (1954).
difficult one to draw. What is prejudice? Can it be distinguished from the more tolerable varieties of opposition and disagreement? Although these questions appear to be nearly unanswerable, it is nevertheless true that a complete and systematic application of the egalitarian principle requires recognition and regulation of authoritarian, elitist attitude patterns. Such patterns have been correlated, although to an as yet unmeasured extent, with the growth of unequal and discriminatory action on both the private and public levels. Neither courts nor legislatures can continue to ignore the critical role of emotional attitudes in the formulation of public policy. The discriminatory purpose doctrine, though indecisively and inconsistently applied, represents an emergent effort to cope with the consequences of intergroup hostility. We shall return to it and to the possibilities for its refinement and expansion in the concluding section of this article.

2. Forbidden Purpose

Although a given classification may not be motivated by a discriminatory intent, its purpose may be invalidated on other grounds. The restrictive covenant cases suggest that the Equal Protection Clause may be used to guarantee certain substantive rights—rights which have previously been protected by the Due Process Clause of the Fourteenth Amendment. Under Due Process, some rights to liberty and property have been viewed as absolute and inviolable. Attempts to infringe them, even when accompanied by the usual procedural safeguards, have thus been invalidated. Similarly, *Shelley v. Kraemer* stands for the proposition that the right of minority races to own and enjoy property wherever they wish will be protected positively under the Equal Protection Clause. Attempts to segregate the living accommodations of different races, although representing a classification which is reasonably related to what the Court has apparently accepted as a non-discriminatory purpose, have consequently been overturned.

Thus far, only the ownership of property has been included among those substantive rights protected by the Equal Protection Clause. Prior to the long-awaited opinion in *Brown v. Board of Education*, however, the educational segregation cases were linked by a rhetorical

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52*Shelley v. Kraemer, 334 U. S. 1 (1948).*
53*347 U. S. 483 (1954).*
thread which promised a further expansion of the substantive equality doctrine. Initially stated in Missouri ex rel. Gaines v. Canada and explicitly reiterated in the Sweatt and McLauren opinions was the proposition that the right to equality is a “personal one.” “It was as an individual that (petitioner) was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white races.” Are “personal rights” and “individual rights” equivalent to “absolute” or “substantive” rights? With the exception of the restrictive covenant cases, the Equal Protection Clause has heretofore been concerned primarily with the relationship which ought to obtain between individuals; it has imported a collective and relative view of individual conditions. The enjoyment of a “personal right,” however, does not depend upon the circumstances and condition of others. It, like freedom of press or assembly, may not be denied merely because others have suffered a similar deprivation. In this sense it may reasonably be viewed as an “absolute” or “substantive” right.

Since the “substantive” thread linking together certain of the earlier segregation cases appears to have been severed by Brown v. Board of Education, the concept of substantive equality remains as an embryonic facet of equal protection doctrine. It has in no way been diminished, however, as a potential common denominator for liberty and equality.

C. Requirements of Equality

Reasonable classification, purity of motive, and to a minor extent guarantees for the protection of basic rights—these represent the minimum demands of the Equal Protection Clause in its present state of development. Essentially the Clause has played a negative role, functioning as a legislative standard and as an obstacle to the creation of inequalities by government action. Inequities resulting from individual differences and from the clash of private interests, have, with minor exceptions, been largely beyond its reach. Moreover, the clause has been little used as a positive device for promoting similarity of condition, equality of opportunity, and the full enjoyment of

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305 U. S. 337 (1938).
305 U. S. 337, 351 (1938).
Supra, note 51.
substantive rights. In turning next to current doctrinal elaborations of liberty, we are met with implications which if fully realized would alter this emphasis and would establish liberty and equality as synonymous guarantors of minimum conditions for individual well-being.

II. Liberty

The development of American political and constitutional thought has cast the idea of liberty into two molds, one negative, the other positive. Negatively, liberty consists in a system of constitutional limitations on majority rule. The Bill of Rights constitutes our most explicit and definitive statement of this concept. Government may not act if in so doing it denies the free expression of opinion or belief, intrudes unreasonably upon privacy, employs improper procedures in trying and convicting criminals, restricts unjustly freedom of locomotion, invades without compensation the ownership and enjoyment of property, creates a system of peonage or slavery, etc. Moreover, the rights protected by these limitations have frequently been held to derive from natural as well as from constitutional authority.58 "It must be conceded," wrote Justice Miller in 1874, "that there are rights in every free government beyond control of the State."59 For example, "... the right of acquiring and possessing property and having it protected, is one of the natural, inherent, and inalienable rights of man."60 The concept of Due Process of Law was defined for Justice Cardozo by "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."61

Defined positively, liberty consists in those rights which promote full citizen participation in government and in the decision-making process—the right to vote, to hold office, and the right of the majority to rule. When fully implemented, these rights in turn provide the channels for expanding and guaranteeing the conditions necessary for full enjoyment of still other rights—the right to choose one's livelihood and to enjoy a decent standard of living, the right to full opportunity for individual development, the right to marry, raise a family, to move freely about, etc. While many of these rights may not be guaranteed in the narrow constitutional sense, all of them are and have ever been insistent and fundamental demands of a free people. That we have

59Citizen's Saving and Loan Association v. Topeka, 20 Wall. 655, 662 (U. S. 1874).
60Van Horn's Lessee v. Dorrance, 2 Dall. 304, 310 (U. S. 1795).
recognized them in some sense as rights is attested to by the ever-
expanding volume of state and federal legislation designed to pro-
mote the morals, health, safety and well-being of all the people.

In its positive aspect liberty has much in common with equality.
Both are oriented toward the positive promotion of those conditions
necessary for full and equal enjoyment of the fruits of social organi-
sation; both are directed toward the elimination of those conditions
which, while tolerating the continued existence of abstract rights for
all, nevertheless frustrate effectively the active enjoyment of them.
Thus, both equality and positive liberty are concerned with oppor-
tunity, with a just distribution of the wealth and power of society,
and with the road-blocks to individual self-fulfillment so frequently
resulting from the clash of private interest groups. Both require
ideally that when large groups of people become the object of either
public or private action, those who are similarly situated shall be
similarly treated, and that the purpose of such action shall be legiti-
mate—shall aid in the realization of human strivings rather than in
their frustration.

A study of those post-war decisions involving individual rights re-
veals a slow, indecisive, yet clearly discernable shift away from the
idea of negative liberty and toward that of positive liberty. The Court
is demonstrating an increasing tendency to construe liberty in terms
of the doctrines formerly associated with equality generally and with
the Equal Protection Clause specifically. Stated more accurately, the
interpretation of liberty in equal protection terms contributes signif-
icantly to the removal of those conditions blocking the full and equal
enjoyment of positive liberty and provides the tools and the frame-
work for any expansion of those liberties which society may wish to
make. It is in this sense that we may speak of the merging concepts of
liberty and equality. The extent of this merger requires a detailed
analysis of some recent civil liberties cases.

For purposes of convenience post-war civil liberties decisions may
be organized and treated under three headings: 1) cases in which
rights are distinguished from privileges; 2) First Amendment cases;
3) Labor cases.

A. Right v. Privilege

"It has been held repeatedly and consistently," announced Judge
Prettyman in Bailey v. Richardson "that Government employ is not
'property' and that it is not a contract. We are unable to perceive how
it could be 'liberty.' Certainly it is not 'life.' . . . the due process clause
does not apply to the holding of Government office.”62 Substitute for the phrase “government employ” such activities as teaching school, running for public office, or engaging in political campaigning, and the result will be a concise summary of the Court’s position in what we shall term the “constitutional privilege” cases. In these cases certain activities of private individuals were claimed to be, or to involve the exercise of, unabridgeable rights. Among these activities were: 1) political campaigning;63 2) teaching school;64 3) federal employment;65 4) state employment;66 5) running for public office;67 6) utilizing federal collective bargaining machinery;68 7) operating a private charitable organization.69

In each instance the Court denied to the activity in question the status of a right and either asserted or implied that each was a privilege, the exercise of which might legitimately be conditioned upon the meeting of reasonable requirements laid down by public authority.70 “It is . . . clear,” announced Justice Minton in the Adler case, “that they have no right to work for the State in the school system on their own terms. . . . They may work for the school system on the reasonable terms laid down by the proper authorities of New York.”71 Justice Frankfurter, concurring in Garner v. Board of Public Works, was emphatic that “The Constitution does not guarantee public employment. City, State and Nation may assure themselves of fidelity to the very presumption of our scheme of government on the part of those who seek to serve it.”72 Finally, this statement from United Public Workers v. Mitchell: “If, in their judgment (President and Congress),
efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no Constitutional objection."  

Failing to establish their activities as rights, petitioners turned to more generally recognized liberties which they asserted were in whole or in part, directly or indirectly, involved in the regulated activities. Among these were claimed to be the right to freedom of expression, as protected by the First and Fourteenth Amendments, the right to Due Process of Law under the Fifth and Fourteenth Amendments, the Sixth Amendment rights to counsel and to jury trial, and the right to be free from bills of attainder and ex post facto laws. These claims were also given short shrift. Due process, jury trial, and prohibitions of ex post facto laws and bills of attainder were designed to afford proper safeguards to those faced with possible criminal punishment by the State. Denial of the various privileges involved in these cases because of a failure to meet the conditions laid down for their exercise was not, said the Court, punishment. "Mere dismissal from government service," for example, "is not punishment." In some of these decisions, however, it was held that adequate procedural safeguards had been observed or it was assumed that they would be. With respect to freedom of expression it was determined either that a minor but justifiable invasion of the right had occurred, or that there was, in fact, no infringement.

Hence, the exercise of some rights, as well as what are here called privileges, may be conditioned upon the fulfillment of reasonable requirements. But what are reasonable requirements? Involvement in "subversive" activity or knowing membership in "subversive" organizations is clearly recognized in all these opinions as a reasonable basis for public action. It was made equally clear, however, that not every condition which government decides to impose will meet the reasonableness test. To place conditions upon the exercise of a privilege is

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48 supra, notes 63, 64, 65, 66, 67, 68, 69.  
6 Bailey v. Richardson.  
9 Adler v. Board of Education; Garner v. Board of Public Works.  
10 Communications Ass'n v. Douds.  
11 Adler v. Board of Education; Bailey v. Richardson; Anti-Fascist Refugee Committee v. McGrath.
to establish a classification. Classifications so established, averred the Court, must bear a reasonable relationship to some legitimate public purpose. In short, the demand for equal treatment under the laws is the doctrinal upshot of these cases.

In upholding the Hatch Act limitations upon one class of persons—federal employees and certain state employees—and upon no others, the "decisive principle" was noted to be "the power of Congress, within reasonable limits, to regulate, so far as it might deem necessary, the Political conduct of its employees." The Court found that a denial to public employees of "an active role in political management or political campaigns" was such a reasonable regulation. "Many classifications of government employees have been accustomed to work in politics—national, state, or local—as a matter of principle, or to assure their tenure. Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system."

While the Hatch Act was conceded to have a legitimate purpose, the Court hastened to add that classifications stemming from a discriminatory purpose would be invalid. "None would deny . . . that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work'."

Finally, the contention was entertained, but rejected, that the classification was over-inclusive—that Congress had gone further than necessary in prohibiting political activity to persons in non-policy, industrial jobs. Distinction between policy and non-policy positions and between administrative and industrial jobs were held to be "differences in detail—which are for Congress rather than for the Courts" to decide.

The Hatch Act decisions, then, were rested squarely on equal protection grounds. The purpose of the classification was identified, found to be non-discriminatory, and accepted as valid. The classification itself was discovered to be reasonably related to its purpose and to be neither under nor over-inclusive.

It is similarly clear that the President's Loyalty Review Program was sustained on equal protection grounds. After rejecting the claims that the Loyalty Order denied to government employees their

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6Id. at 100.
6Id. at 100.
6Id. at 101-102.
rights under the First, Fifth and Sixth Amendments, the Circuit Court concluded that the Executive is restricted in the selection and dismissal of federal employees only by the requirements of reasonable classification and non-discriminatory purpose. He may discriminate for "political reasons." Neither he nor Congress, however, could require "that no Republican, Jew or Negro be appointed to public office." Such a classification would "have no discernible bearing upon qualification for office," and "would be purely arbitrary and capricious in the most obnoxious meaning of those words." Dismissal of government workers suspected of disloyalty to the United States was held to constitute reasonable discrimination, since the President is constitutionally charged with the responsibility for the "ability, integrity, and loyalty of the personnel of the Executive Branch."  

Conditions upon state employment or the holding of state offices similar to those imposed on federal employees under the President's Loyalty Program were faced by the Supreme Court in four post-war cases. In three of these a nearly identical loyalty oath was involved. Employees (or candidates for office, in the Maryland case) were required to swear that they did not advocate, nor did they belong to organizations which advocated, a forceful overthrow of government. Again rejecting First and Fifth Amendment claims, the Court's decision was couched in equal protection terms. Loyalty oaths were deemed to constitute reasonable conditions upon public employment and hence dismissal for failure to sign is legitimate. But Justice Frankfurter, concurring in the Garner case, carefully spelled out the usual equal protection requirements for employment classification. "... it does not follow that because the Constitution does not guarantee a right to public employment, a city or a State may resort to any scheme for keeping people out of such employment.... unreasonable discrimination, if avowed in formal law, would not survive constitutional challenge. Surely, a government could not exclude from public employment members of a minority group merely because they are odious to the majority."  

While the imposition of a loyalty oath was viewed as a reasonable condition upon public employment, dismissal for membership in a subversive organization was seen in a different light. In the Garner and  

87 Id. at 62-63.  
88 Id. at 57.  
90 341 U. S. 716, 725 (1951).
Gerende cases the Court assumed that only those who *knowingly* belonged to such organizations would be severed from their jobs. Dismissal "of those who during their affiliation with a proscribed organization were innocent of its purpose" or "those who severed their relation with any such organization when its character became apparent," was strongly implied to constitute an over-inclusive, and hence an unreasonable classification.92

This implication was made explicit in *Wieman v. Updegraff* where Oklahoma's loyalty oath for state employees was overturned on grounds that "association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."93 In short, an equal protection determinant—over-inclusive classification—is here read into the Due Process Clause.

We turn finally to the non-Communist-oath provision of the Taft-Hartley Act as construed in *Communication Association v. Douds.*95 It was granted at the outset that the oath "exerted pressure upon labor unions to deny positions of leadership to certain persons who are identified by particular beliefs and political affiliations,"96 and that the First Amendment rights of union members and their officers are, to a certain degree, thereby contravened. Classification based upon beliefs and political affiliations was upheld as bearing a "reasonable relation to the evil which the statute was designed to reach"—the prevention of political strikes designed to interrupt the free flow of commerce. Affiliational classification was justified by specific reference to a number of equal protection decisions which upheld classifications based upon alienage, ancestry, and business activity.99 "If accidents

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91 Id. at 723.
92 Indeed, Justice Frankfurter, concurring in the Garner opinion, stated explicitly that the oath could not be assumed to contain a *scienter* provision and that it therefore represented an unreasonable classification. *Id.* at 727-728.
93 *344* U. S. 189, 191 (1952).
95 *339* U. S. 382 (1950).
96 *Id.* at 390.
97 *Id.* at 390-391.
of birth and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference."

But, may classifications built on beliefs and political affiliations be allowed to invade First Amendment rights? They may, the Court assures us, if such rights are only partially and indirectly involved in the regulated activity and if the class singled out for special treatment (Communists) poses a substantial threat to the public interest. The purpose of the law is not to suppress speech and opinion, but to prevent politically-motivated strikes. If the purpose is valid and non-discriminatory and the classification is reasonably related to it, the regulation must stand.

That these cases pivot on equal protection considerations, although the Clause itself is never invoked, seems clear enough. Equally evident are the same inadequacies implicit in the Court's other attempts to apply equal protection formulae. In the Hatch Act cases, for example, an over-inclusive classification receives the Court's seal of approval. If the purpose of the Act is to "avoid a tendency toward a one party system," then only federal employees who are in a position to influence or coerce their co-workers require special regulation. Were the limitation on political activity restricted to those in policy-forming and higher administrative positions, the classification would probably be a reasonable one. Inclusion of laborers, charwomen, and minor technical assistants, however, extends the classification to persons having little or no relationship to its purpose.

Judicial insistence in the State Loyalty Oath cases that "knowing" membership in subversive organizations must be distinguished from "innocent" membership is a defensible and accurate application of classification doctrine. Unfortunately, the Court failed to exercise equal vigilance in Adler v. Board of Education where it found acceptable New York's requirement that knowing membership in a subversive organization shall constitute prima facie evidence for disqualification from the public school system. It is reasonable to presume, averred Justice Minton, that knowing membership in an organization implies acceptance of the organization's purpose. Such a presumption is, of course, a flagrant example of over-inclusive classification. Where ideological and political association is involved,

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102 Supra, note 85.
103 U. S. 75, 100 (1947).
individuals are seldom, if ever, impelled by a single common motive. A plurality of frequently conflicting purposes is a commonplace in American political organizations. To assert that all members of organizations infiltrated by Communists have a "subversive" purpose is to uncritically lump the innocent with the guilty. Many members of such organizations have frequently retained membership for purposes of expelling Communist influence and reorienting the group. A vigorous and systematic application of the concept of reasonable classification would effectively frustrate the trend toward "guilt by association." 05

The decision in the Douds case is an excellent example of underinclusive classification. If the purpose of the Taft-Hartley Act's Non-Communist Oath is the prevention of politically-inspired strikes, then a regulation requiring all labor leaders to forswear them would constitute a means reasonably related to the end. It can hardly be assumed, however, that only Communist leaders will call strikes for political reasons.

The repeated application of equal protection doctrine in these cases, halting and indecisive though it may have been, casts considerable doubt on the contention that partisan political activity, government employment, public office holding, etc. are conditioned privileges rather than rights. Although regulation of them does not infringe the traditional negative liberties of free speech and assembly, private property and contract rights, or due process, the Court strongly implies that such regulation must meet the demands of equality. These activities, then, are positive rights requiring the equal protection of the laws.

B. First Amendment Cases.

Down to the end of World War I the First Amendment was a relatively insignificant factor in American constitutional development. The thirty years between 1919 and 1949, in contrast, witnessed a veritable flood of decisions dealing with freedom of expression. In the period 1943-49 alone, forty-one such cases were decided. 106 The dominant canon of construction throughout most of these thirty years is generally

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105 The decision in Anti-Fascist Refugee Committee v. McGrath represents yet another failure to strike down an obviously over-inclusive classification. Although the procedures used by the Attorney General in drawing up his list of subversive organizations were mildly rebuked, the Court failed to overturn his classification as arbitrary and devoid of ascertainable defining characteristics.

106 For a thorough survey of First Amendment cases from 1919 to the present, see Mendelson, Clear and Present Danger from Schenk to Dennis (1952) 52 Col. L. Rev. 313.
believed to have been Justice Holmes' renowned "clear and present danger" rule. However, little support can be found for this view. In the decade 1919-1930 only one majority opinion, *Schenk v. United States*, and six dissents were rested on clear and present danger grounds. In the following decade the doctrine appears in only one majority opinion and one dissent. While numerous opinions have pivoted on clear and present danger since 1940, a greater and steadily increasing number have been grounded on two competing doctrines: "reasonable basis" and "prior restraint." Even in the restricted area to which it previously applied, and even as a "pervasive atmospheric pressure" on free speech decisions, clear and present danger in the post-war period has all but disappeared. The paramount doctrinal thread tying together First Amendment cases since 1947 has been the concept of equal treatment under the law. Both the "reasonable basis" and "prior restraint" tests are, at bottom, guarantees of reasonable classification and legitimate purpose. Although the idea of equality does not emerge from these cases with the uniform clarity seen in the "constitutional privilege" cases, a discernible trend is nonetheless evident.

For purposes of analysis, post-war First Amendment decisions may be divided into three groups: (1) license cases, (2) nuisance cases, (3) cases pertaining to freedom of the public forum. Labor cases touching on free speech problems will be treated in a separate section.

1. License Cases

Local ordinances or practices for licensing the use of public facilities were tested in four recent decisions. In all of them, local licensing authorities had refused to religious organizations permits to hold meetings on public property; in all, the licensing provisions as

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249 U. S. 47 (1919).


253 See, for example, Minersville School District v. Gobitis, 310 U. S. 586 (1940); Cox v. New Hampshire, 312 U. S. 589 (1941).

254 *Infra*, note 119.

255 *Supra*, note 106 at 313.

applied were held to constitute a prior restraint on the free exercise of speech and religion. In the absence of "narrowly drawn, reasonable and definite standards for the officials to follow," stated Chief Justice Vinson in *Niemotko v. Maryland*, "the license-issuing 'practice' becomes "completely arbitrary and discriminatory.""

Prior restraint is thus condemned, not on chronological grounds, as it erroneously was in *Near v. Minnesota*, but because the classifications established by licensing authorities—the determination of who may and who may not speak—are likely to be *arbitrary* and *discriminatory*; such classifications are not presumed to bear any reasonable relationship to a valid, non-discriminatory purpose. Prohibition on prior restraint here becomes a demand for equality under the law.

That the purpose of these licensing schemes, as demonstrated by their administration, was discriminatorily motivated is evident from Chief Justice Vinson's remark that permits were denied in the *Niemotko* case "because of the City Council's dislike for or disagreement with the (Jehovah's) Witnesses or their views.""

Prejudiced and hostile motives, he asserted, are a denial of the "right to equal protection of the laws" which "in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.""

Insofar as the licensing schemes in the *Kunz, Fowler* and *Poulos* cases were held to constitute a prior restraint, all of them turned on equal protection considerations. Justice Douglas, speaking for the Court in *Fowler v. Rhode Island*, held as determinative the fact that "a religious service of Jehovah's Witnesses (was) treated differently than a religious service of other sects.... This (is) a discrimination which we (hold) to be barred by the First and Fourteenth Amendments.""

Justice Frankfurter's contribution to the casting of First Amendment rights in an equal protection mold should not go unnoticed. Concurring in the *Fowler* and *Niemotko* cases, he stoutly maintained that the licensing ordinances there involved should be tested by the Equal Protection Clause rather than by the Due Process Clause of the Fourteenth Amendment."

After an exhaustive survey of prior decisions in-

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116 *Loc. cit.*
Involving limitations on First Amendment rights, he concluded that review of each attempted regulation requires a balancing of the right to freedom of expression against such considerations as "the interest deemed to require the regulation of speech," the type of regulation used, "the mode of speech to be regulated" and the "place where the regulated speaking is to take place." Regulation, in short, must meet the demands of reasonable classification.

2. Nuisance Cases

To what extent may the manner or mode of speech be regulated? May sound-amplification devices and mobile advertising displays be entirely prohibited? May they be allowed to operate over widespread public objection that they invade the right to privacy? In three out of four post-war nuisance cases the Court answered the latter two questions affirmatively. In *Saia v. New York* the discriminatory application of Lockport, New York's loudspeaker licensing ordinance was overturned. Finding that a lack of standards for the exercise of administrative discretion in the issuing of licenses again constituted a prior restraint on speech, the opinion proceeded to emphasize the unreasonable discrimination implicit in such administrative behavior. "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. Must a candidate for governor or the Congress ... prove to the satisfaction of (an) official that his noise will not be annoying to people?" Thus, although a "narrowly drawn" regulation may be acceptable, the Lockport ordinance amounts to an unreasonable classification.

In the *Kovacs* case the discriminatory application of loudspeaker licenses against religious minorities was unavailable as a hook on which to hang an equal protection interpretation of First Amendment rights. Trenton, New Jersey's ordinance, in effect, prohibited absolutely the use of sound amplification trucks on the streets. This drastic treatment of an entire class of communication devices, never-

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221  U. S. 558, 561-562 (1948).
222  Although the ordinance purported to prohibit only sound trucks emitting "loud and raucous" noises, the latter phrase was apparently interpreted by application to cover all sound trucks operating at an ordinary number of decibels. 336 U. S. 77, 79 (1948).
theless, was justified as a needed protection of "privacy," "tranquility" and the smooth flow of "traffic." The First Amendment "is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance." In upholding New York City's prohibition on "rented advertising vehicles" the Court sustained a similar outright interdiction of a communication media. Two issues were presented here: Does a prohibition on the use of mobile advertising violate First Amendment rights? In limiting the prohibition to rented signs has the Equal Protection Clause been breached? The Court employed an equality formula in answering both questions. Free speech has not been improperly invaded since regulation of advertising vehicles is "reasonably related" to the "safety of the public in the use of the streets." The Equal Protection Clause has similarly suffered no violation, "since local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem" as do advertisements on rented vehicles. In a concurring opinion Justice Jackson insisted that both problems should be attacked through the Equal Protection Clause. "Invalidation of a statute or an ordinance on due process grounds," he asserted, "leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.... Courts can take no better measure to assure that laws will be just than to require that laws be equal in application." Although each of these regulations of the mode of speech was tested in classification terms, little attention was given to the classificatory purpose or motive. Sound trucks and mobile signs are effective communication devices for persons and groups unable to afford the costlier varieties of advertising. To what extent were these regulations intended to enhance the position of well-established media such as

115Id. at 87.
116Id. at 88-89.
118Id. at 109.
119Id. at 110.
120Id. at 112-113.
121See also Public Utilities Comm'n v. Pollack, 343 U. S. 451 (1952) in which the Court upheld a finding of the District of Columbia Public Utilities Commission that Washington, D. C. bus lines be allowed to operate radio loudspeakers in their vehicles. The Commission, it was concluded, did not act "arbitrarily" or "capriciously."
radio, newspapers, and television? The Court made no attempt to look behind these ordinances for discriminatory intent. Similarly ignored was the under-inclusive classification implicit in some of these ordinances. If their purpose was the safeguarding of peace, quiet, tranquility, and traffic safety, then many nuisances—as billboards, neon signs, store-front loudspeakers, or sound trucks, in the case of the New York ordinance—might reasonably be included in the sweep of regulation.

3. Freedom of the Forum

Perhaps the most controversial of the post-war civil rights decisions have been those aimed at maintaining freedom of the public forum. *(Terminiello v. Chicago, Feiner v. New York, Beauharnais v. Illinois, and Dennis v. United States).* Implicit in the speech regulated in each of these cases, asserted the controlling authority, was a degree of intransigent radicalism fundamentally opposed to free public discussion and aimed at the destruction of all opposing points of view. In two of these instances *(Beauharnais and Terminiello)*, the alleged radicalism was cast in the mold of race-hate propaganda; in one *(Dennis)*, it appeared as an authoritarian political creed—Communism; in the fourth, both were involved.

In prohibiting certain types of speech for the purpose of protecting equal access for all to the public forum, the Court undertook a superficial analysis of the nature and consequences of radical and authoritarian attitude patterns. Justice Jackson, dissenting in the *Terminiello* case, characterized both the speaker and the hostile mob gathered outside the hall as “local manifestation(s) of a worldwide and standing conflict between two organized groups of revolutionary fanatics....” Continued tolerance of their strong-arm tactics, he implied, will destroy faith in the democratic process and will force the citizenry to choose between Communism and Fascism. Similarly, Justice Frankfurter, speaking for the Court in the Illinois case, equated Beauharnais’ anti-Negro utterances with group libel. Group libel, like defamation of individuals, is “no essential part of any exposition of ideas” and, referring to the recent history of race-riot in Illinois, frequently leads to civil disturbance. Finally, former Chief Justice Vinson, in the *Dennis* case, distinguished Communist doctrine from ordinary, constitutionally-protected discussion on the grounds that it constituted “advocacy” by a “highly organized conspiracy with rigidly
disciplined members subject to call when leaders... felt that the time had come for action..." Thus, it poses a threat to democratic government and institutions.

It was asserted in all of these opinions that a certain class of radical utterances, including race-hate propaganda and Fascist and Communist doctrines, incorporate a trait—fanatical intent to destroy the public forum—which the state may legitimately suppress. It was further asserted that the state has selected a means and thereby established a classification reasonably related to its purpose. Persons whose speech incites a hostile mob to violence, in the Terminiello and Feiner cases; persons whose speech portrays depravity, criminality, or contempt for a racial or religious group, in the Beauharnais case; leaders of the Communist party, in Dennis v. United States—all are said to represent classifications whose members possess the forbidden trait. Justice Frankfurter's observation in Beauharnais, then, succinctly capsulizes the Court's equal-protection rationale in these cases: "It would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power"—provided, that is, the classification is reasonable and the purpose is valid.

Even granting that equal-protection formulae are best suited for testing the situations involved in each of these situations, little comfort can be derived from the manner in which such formulae are applied. First, in no case was the regulatory purpose identified with sufficient accuracy: that is, the forbidden trait was not clearly defined. What is group-hate propaganda? Can it be distinguished from the threats and accusations which have traditionally marked inter-group relations in the United States? What is a Fascist doctrine, as distinguished from reaction in general; a Communist doctrine, as distinguished from collectivism? Second, to what extent were these regulations themselves motivated by pure hostility or antagonism toward the interdicted groups? Was a forbidden, discriminatory motive involved in any of them? Third, both under and over-inclusive classifications are upheld in these opinions. In the Terminiello and Feiner cases, the speaker, his cohorts, and the hostile audience all were similarly situated with respect to the purpose of the law, in that it is assumed all wished to destroy by force the exercise of free speech. Suppression

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123 U. S. 494, 511 (1951).
125 For a more extensive treatment of the constitutional problems posed by ethnocentric utterances see Wilson, Beauharnais v. Illinois: Bulwark or Breach? (1952) 14 Current Economic Comment 59.
of the speaker and not the others is clearly an under-inclusive classification. In the *Beauharnais* case it is assumed that all who verbally castigate racial and religious minorities are ethnocentrically oriented; that is, that they are motivated by psychotic or neurotic prejudice. This would appear to be an exaggeration and thus to constitute an over-conclusive classification. Similarly, the contention in *Dennis v. United States* that all leaders of the party—because they hold positions of leadership—are devoted to a revolutionary purpose, would appear to be an over-inclusive classification.

C. Labor Cases.

Is labor picketing exclusively or primarily a publicity and informational device, or does it merely include the speech aspect as one among many characteristics? The first view—accepted by the Court in the early forties—leads to a characterization of picketing activity as a negative right (freedom of speech), properly to be protected by "substantive" or "absolute" doctrines. The second view—presently accepted by the Court—justifies the imposition of reasonable limitations on the "permissible contest open to industrial combatants." Under the aegis of this latter view liberty and equality have merged within the area of labor picketing.

Two factors presently determine the nature and scope of permissible restrictions on picketing: (1) the purpose of the restriction; (2) the relationship between the regulation and its purpose. Picketing restrictions are said to have a legitimate purpose if they seek to enjoin conduct the continuance of which would frustrate the furtherance of valid State policies as expressed either in legislative enactment or judicial pronouncement. A public policy is valid if it falls within the scope of police power; that is, if it is reasonable. Regulations are said to be related to their purpose if there is any basis in fact for a legislative or judicial finding that the conduct sought to be enjoined does interfere with the achievement of existent state policies. Such

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208 *Thornhill v. Alabama, 310 U. S. 88 (1940); Bakery and Pastry Drivers v. Wohl, 315 U. S. 769 (1942); American Federation of Labor v. Swing, 312 U. S. 321 (1941); Cafeteria Employees Union v. Angelos, 320 U. S. 293 (1943).*


210 *Giboney v. Empire Storage and Ice Comp., 336 U. S. 490 (1949).*

211 *Teamsters Union v. Hanke, 339 U. S. 470 (1950).*
a finding, of course, requires an economic and social evaluation of competing forces and tendencies in the industrial sphere.\textsuperscript{140}

No longer to be equated with speech and, consequently, not to be protected under the “clear and present danger” rule, labor picketing has now become primarily a classification problem. Moreover, the judicial tendency to avoid a close examination of legislative intent where economic interests are involved has been confirmed and extended.\textsuperscript{141} Unfortunately, the ghost of \textit{Thornhill v. Alabama} hovers near enough to remind us that picketing—if not to be equated with speech—nevertheless involves a large element of speech activity, and that the purpose and intent of picketing restrictions may well merit more careful judicial scrutiny.

\textbf{III. Conclusion}

What are the demands of equality as revealed by recent federal decisions? (1) That those similarly situated be similarly treated; (2) that classifications be reasonably related to their purpose; (3) that legislative and administrative action not be motivated by hostility or prejudice; (4) that legislative and administrative purpose be legitimate. What are the demands of liberty? For the positive liberties, or “conditioned privileges,” as well as for the traditional negative freedoms, they are rapidly becoming the identical requirements for reasonable classification, non-discriminatory motive, and validity of purpose. What are the consequences of this progressive identification of liberty with equality? Although not yet clearly discernible, a number of trends are beginning to emerge.

The application of equalitarian principles is no less indecisive, inconsistent, and defective in the area of liberty than it has been within the orbit of the Equal Protection Clause. Moreover, the judicial tendency to tolerate under and over-inclusive classifications and discriminatively motivated regulations has been strengthened by a burgeoning of the judicial restraint doctrine. Impelled by Justice Frankfurter’s well-known solicitude for legislative experiment, and goaded by Justice Jackson’s fear of anarchy and civil disorder, the Court has developed a noticeable reticence to enforce vigorously the equal protection concept. Equality demands that when suppressing inflammatory language local police officers demonstrate a preponderance of evidence rather than a mere suspicion that breach of the peace is imminent. Equality places a positive obligation on legis-

\textsuperscript{140} Id. at 477-478.
\textsuperscript{141} Supra, at 189-191.
latures to show that when organizations are labeled "subversive," all members of the organization share its purpose: equality requires that all members of a proscribed class of public employees have the taint which has been condemned. Ultimately, equality embodies a demand for judicial judgments about legislative and administrative wisdom. Equal protection of the laws is a guarantee of positive rights; it is not an open invitation to judicial abdication.

The alarm with which social scientists and philosophers have viewed recent civil liberties decisions may be due as much to faulty and hesitant application of equal protection doctrine as to judicial rejection of such absolute formulae for the protection of individual rights as clear and present danger. Certainly the grosser inadequacies of these decisions—as guilt by association and effective suppression of certain political beliefs—would be condemned by a more resolute use of equal protection tests.

The long-range consequences of merging liberty with equality are impossible to predict. There are implicit in this development, however, a number of potentialities which if actualized would occasion significant changes in the American pattern of self-government. First, the equal protection prohibition on prejudicially motivated classifications can provide an effective device for obstructing legislative attempts to perpetuate and extend an unequal distribution of the wealth and power of society. Similarly, equal access for all groups to the mainstreams of opportunity can be better assured. Second, the implicit notion that equality under law is a guarantee of certain positive rights can provide a viable channel for public control over private invasions of liberty. Illinois' regulation of race-hate propaganda in an effort to reduce intergroup hostility is only one of the more dramatic illustrations of this possibility. Third, the stress placed by the doctrine of equality on similarity of condition opens the way for positive government action to equalize the status of individuals and thereby to enhance the equal enjoyment of positive rights. The equalitarian doctrine of liberty imposes no such absolute obstacles as sanctity of contract or property on the advancement of community well-being. The extent to which society is impelled to utilize the tools provided by the combined doctrines of liberty and equality is, of course, unpredictable. Formal notions of judicial construction, such as equal protection of the laws, or due process of law, seldom if ever operate as the motivating well-springs for social change.

We might, however, conclude with R. H. Tawney that "when liberty is construed realistically, as implying not merely a minimum of
civil and political rights, but securities that the economically weak will not be at the mercy of the economically strong, and that the control of those aspects of economic life by which all are affected will be amenable, in the last resort, to the will of all, a large measure of equality, so far from being inimical to liberty, is essential to it.”142

142 Supra, note 1 at 244.
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