POTENTIALITIES OF EQUAL PROTECTION AS AN IMPLEMENT OF JUDICIAL REVIEW

The basic equality of man has been one of the most persistent and frustrated hopes of a large segment of the civilized world since the beginning of written history. In this country expression of this hope early made its appearance in the Declaration of Independence[1] and was later incorporated into the Constitution by the Fourteenth Amendment.[2] Equality as a concept, of course, can and undoubtedly has meant many different things as the problems and social conditions within our society change. It has been convincingly contended that the original intention of the authors of the equal protection clause of the Fourteenth Amendment was to impose an obligation upon the States to protect the basic rights of the Negro race.[3] Since that time the scope of the clause has broadened and a change in orientation taken place so that today it has come to require that the imposition of burdens or distribution of benefits be done in a reasonable and rational manner.[4]

1. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Declaration of Independence adopted by the Continental Congress in Philadelphia on July 4, 1776.

2. The language of the 14th Amendment to which reference is made here is as follows: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1.

3. "The equal protection clause was, with the foregoing qualification (that the interpretations made are those of the reconstruction decade and not of any particular year), originally understood to mean the following: all men, without regard to race or color, would have the same rights to acquire real and personal property and to enter into business enterprises; criminal and civil law, in procedures or penalties, should make no distinctions whatsoever because of race or color; there should be no segregation of individuals on the basis of race or color as to the right to own or use land; there should be no segregation of individuals on the basis of race or color in the use of utilities, such as transportation or hotels; with reservations, for here there is substantial divergence, there should be no segregation in the schools." Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131, 167-8 (1950); Mr. Justice Miller expressed the opinion in the *Slaughterhouse Cases,* 16 Wall. 36 (U.S. 1873) that the clause was clearly a provision for the benefit of the negro race. See note 40 *infra.* In contrast to this is the background of equal protection clauses in many state constitutions. "The persistent theme of the limitations written into state constitutions after the 1840's was the desire to curb special privilege. The trend began with general or detailed prohibitions on the enactment of special and local legislation." HURST, THE GROWTH OF AMERICAN LAW 241 (1950). The Indiana Constitution provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." IND. CONST. Art. I, § 23.

4. If rationality of the classification is accepted as the essence of equal protection, then the area of equal protection coverage is broadened to cover types of regulatory classification not traditionally covered. See pp. 193, 197, 201 *infra.*

The increased acceptance in contemporary society of the propriety and necessity of economic regulation has lead some legal scholars to suggest the possibility of an increased and broadened application of the equal protection clause as an implement of judicial review in the area of economic regulation.[5] Others have suggested that equal protection review be directly substituted for due process review.[6] Equal protection review is considered appropriate here because it supposedly involves only a consideration of the rationality and fairness of the regulatory classifications and does not constitute a challenge to the basic validity of the regulatory purpose as due process purportedly does.[7]

Should a court wish to subject economic regulation to review by vitalization of the clause, it is important to understand the various and far-reaching theoretically possible applications of equal protection and the manner in which a vitalization might affect the broader problem of judicial review. This can appropriately be approached by an examination and comparison of the possible applications of substantive due process and equal protection to the various statutory means utilized by modern government in an attempt to regulate the conduct or promote the welfare of its citizens. This is neither an attempt to cover all possible types of regulatory statutes, nor an effort to survey the past and recent usage of the clause by the courts.[8]

POSSIBLE APPLICATIONS OF EQUAL PROTECTION

The major types of regulatory devices to be considered here are: (1) complete prohibition; (2) entrance into a permitted activity conditioned on compliance with a norm, which will hereafter be referred to as conditioned entrance; and (3) benefit conditioned on compliance with a norm, hereafter referred to as conditioned benefit. Each of these types

5. See Dkystra, *Legislative Favoritism Before the Courts,* 27 IND. L.J. 38, 55-56 (1951). Tussman and tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949), foresee increased usage of the equal protection clause generally. *Id.* at 342, 381. Strictly speaking, however, they apparently feel that strong review in the economic area is not justified. *Id.* at 372-3. Both of these expressions generally contemplate use of the clause only in the area in which it has been traditionally applied. Compare note 4, *supra.*

6. See Mr. Justice Jackson concurring in Railway Express Agency v. New York, 336 U.S. 106, 112 (1949), 10 U. OF PITT. L. REV. 406; 48 MICH. L. REV. 121. See also Paulsen, *The Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91, 117 (1950).

7. See ROTTSCHAEFER, CONSTITUTIONAL LAW 456-7 (1939).

8. No attempt will be made to examine the field of taxation, a favorite legislative implement of regulation, because of numerous special problems involved therein and the distinctly different treatment accorded taxing statutes by the courts; nor will the problem of criminal sanctions be discussed. See Skinner v. Oklahoma, 316 U.S. 535 (1942).

of regulations involve the problem of classification which, for the purposes of this discussion, can be divided into two general categories,[9] overinclusive and underinclusive. In the former category, the provisions of the statute apply to a larger group of persons or more types of conduct than is reasonable. In the latter category, the provisions apply to a smaller group or fewer types than is reasonable.

All regulatory statutes make at least two classifications, one of the persons regulated, and another of the conduct affected. For example, a statute which permits only agents on a commission basis to sell fire and casualty insurance makes one classification which includes only commission agents within the provisions of the statute and another which includes only the activity of selling fire and casualty insurance.[10] Even a statute which prohibits certain conduct to all persons makes two classifications, although the one covering persons regulated can only be overinclusive.

Reasonableness of classification is established by a comparison of the classification with the purpose of the regulation to determine if the classification bears a substantial relation to the objectives sought to be achieved by the legislature.[11]

Complete Prohibition

The area of complete prohibition is best exemplified by a statute prohibiting some particular activity to all persons. Suppose, for example, that a Legislature passed a statute prohibiting all persons from the manufacture, distribution, and sale of cigarettes,[12] in the belief that the consumption of tobacco is detrimental to the health and welfare of its citi-

9. In addition to overinclusive and underinclusive classifications there is (1) the classification which is perfectly unreasonable, *i.e.*, where the purpose of the statute cannot under any interpretation justify application to all persons within the provisions; (2) the classification which is perfectly reasonable, *i.e.*, where all persons regulated are properly within the provisions and no one has improperly escaped regulation; (3) the classification which is both under and overinclusive concurrently. For a complete discussion of classification and related problems see Tussman and tenBroek, *supra* note 5, at 347.

10. See Dep't of Insurance v. Schoonover, 225 Ind. 187, 72 N.E.2d 747 (1947), in which the court invalidated such a statute. The Indiana constitutional provision against granting special privileges and immunities, see note 3 *supra*, was argued as a basis for invalidation. The court based its action on Article I, Section 1.

11. See Tussman and tenBroek, *supra* note 5, at 346.

12. See Austin v. Tennessee, 179 U.S. 343 (1900), in which the Court upheld such a statute prohibiting the sale of cigarettes against the charge that it infringed upon the power of Congress to regulate interstate commerce. *Compare:* "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. AMEND. XVIII, § 1.

zens and with the purpose of protecting them. If the purpose and belief of the Legislature as to the facts are accepted as correct, then the classification as to persons regulated is perfectly reasonable, but the classification as to the activity prohibited is not. The statute does not affect the manufacture or sale of cigars and other forms of tobacco. Thus, the second classification is underinclusive in that it fails to include within the prohibition cigars, chewing tobacco, and other tobacco products.[13]

An equal protection attack on the underinclusive classification in the above example would probably be made by a manufacturer or seller of cigarettes. The contention would be, following the words of the clause, that the petitioner (in the case of a suit to enjoin enforcement) or defendant (in the case where the seller is being prosecuted for violation) has been denied equal protection of the laws because, considering the purpose of the statute, all articles which properly belong within the regulation are not included. Thus, the petitioner contends it is unfair and discriminatory to prohibit the sale of one article and not another where there is no substantial difference between the two for the purposes of the regulation.

It is obvious that an important problem involved in the challenge is the determination of the purposes or reasons for including the one article and excluding others. The court at this point may employ one of three alternatives: conclusively assume that the Legislature had reasons for setting this classification, thus precluding any arguments the petitioner might have; assume that if any reasons for making the classification are conceivable the Legislature considered them; this could be negated only by the petitioner showing the complete absence of any possible reasons; require, after petitioner's showing of unfairness of the classification to him, the respondent to show what the actual purpose and reasons of the Legislature were. Under either of the last two alternatives, the court may inject its own subjective feelings regarding the reasonableness of the classification into its decisions by determining that whatever reasons advanced by the respondent to sustain the regulation are irrational.

Notwithstanding wide applicability, due process review comes to an abrupt end when an attempt is made to utilize it in the underinclusive situation. If, as in the underinclusive classification example of the prohibition of the sale of cigarettes, the purpose or its validity is unchal-

13. There, of course, may be good reason for distinguishing between cigarettes and other forms of tobacco, but in this instance, when on its face the statute is predicated upon the assumption that the consumption of all forms of tobacco is harmful, the respondent should have the burden of proving affirmatively that the Legislature considered cigarettes a greater evil.

lenged (i.e., petitioner admits tacitly that tobacco, and thus cigarettes, are detrimental to health and *ergo* cigarettes are justifiably prohibited), he has been deprived of no right and has no standing to challenge. The due process argument sometimes used that petitioner has been deprived of his *right* to equal protection is, in a sense, circular and would attempt to place the equal protection clause in the position of a right protected by the due process clause, thus rendering redundant the Fourteenth Amendment as written and as originally intended.[14] Due process logically should not be used to attack an underinclusive classification.

Suppose, however, the Legislature passed a statute prohibiting all forms of gambling but with the purpose of eliminating commercial or professional gambling because of its close connection to organized crime as established by thorough investigation.[15] If the purpose and factual determinations of the Legislature are accepted as correct then the classification is unreasonable as overinclusive since it includes within its prohibition gambling by nonprofessionals such as church groups which are in no sense connected with organized crime.[16]

Equal protection attack on the overinclusive classification in this example would generally[17] be made by a member of some group which does not come within the definition of professional gambling.[18] Such a representative contends that the group's classification within the purview of the statute is unfair and discriminatory considering the purpose and reason for passing the act because none of the substantive evils sought to be eliminated are connected with his organization. The same problems and procedures with regard to the determination of the legislative pur-

14. "We also know that the equal protection clause, the only clause of section one of the Fourteenth Amendment that added new language to the Constitution, was originally regarded as the most basic and sweeping of the three, although they were admittedly overlapping and duplicatory." Tussman and tenBroek, *supra* note 5, at 341.

15. In Fairchild v. Schanke, 113 N.E.2d 159 (1953), the Indiana court invalidated a statute whose stated purpose was ". . . recognizing the close relationship between professional gambling and other crime, to restrain all persons from seeking profit from gambling activities in this state. . . ." because it exempted all ". . . bona fide religious, patriotic, charitable, or fraternal clubs. . . ." *Id.* at 161, 162.

16. The Indiana court in Fairchild v. Schanke, *supra* note 15, implied that it was impossible to distinguish between different forms of gambling by incorporating into their opinion the opinion of the Supreme Court of New Mexico in Harriman Institute v. Carrie Tingley C.C. Hospital, 43 N.M. 1, 6, 84 P.2d 1088, 1091 (1938), where it said ". . . the gambling spirit feeds itself with as much relish upon a charity lottery as upon any other kind. If the average person be consumed with a desire to take a chance and get something for nothing, it matters not to him whether the promoter makes a profit or that the profit goes to charity. . . ."

17. It should be noted that, traditionally due process and not equal protection has been used by the courts to review such overinclusive classifications. But see Tussman and tenBroek, *supra* note 5, at 351-2; pp. 198-9 *infra*.

18. Here the court would be faced with the problem of defining professional gambling if such is possible. Compare note 13 *supra*.

pose and reasons pertain to this situation that applied in the underinclusive situation discussed above.

Turning from the equal protection attack to the due process attack in the overinclusive classification of the gambling statute above one finds many of the same problems prevalent. The group alleging that it is improperly included within the provisions contends essentially that the prohibition deprives it of property without due process of law. Since it is accepted that no activity is completely immune from some type of regulation, the petitioner here is immediately put to the task of alleging and proving that such regulation is unreasonable as to it.

Here the petitioner argues by analogy, pointing out groups which are without the purview of the statute and by maintaining that the petitioner is, with respect to the purpose of the statute, more similar to these groups than to other groups properly regulated. Thus, petitioner contends since he is more like a group properly outside the regulation, then he is being wrongfully regulated and, therefore, is deprived of his property without due process. At once the old problem of legislative purpose arises with the same alternatives available to the court and participating parties as discussed above with regard to equal protection. However, in addition to questioning the rational connection between the legislative purpose and petitioner's inclusion within the regulatory provisions, petitioner may contest the validity of the purpose itself. Under due process review the petitioner may not only be interested in the determination whether, given a purpose, he is properly within its scope but also desire to challenge this regulation in this area regardless of purpose. Consideration of the relation of the purpose to some ultimate public good is necessary.[19] This procedure enables the petitioner to delve one step further back into the legislative process and reasoning than equal protection review.

Conditioned Entrance into an Activity

Entrance into activity conditioned on compliance with a norm is by far the most frequently employed device within the sphere of economic regulation and is possibly best exemplified by the common license statute. Thus, entrance into some particular activity or economic endeavor may be allowed only to those who comply with a specified standard

19. This consideration is usually spoken of by the Supreme Court of the United States in terms of whether the regulation is legitimately within the area reserved to the State's interest in protecting the health and welfare of its citizens, *i.e.*, the "police power". *See, e.g.*, Nebbia v. New York, 291 U.S. 302, 523-5 (1934).

or agree to observe a norm of conduct (usually certain requirements regarding conduct of the activity permitted).[20]

Suppose that the Legislature passed a statute permitting the sale of skim milk on condition that no fat or oil not derived from milk fat be added.[21] This is an example of an activity conditioned on compliance with a norm of conduct. If, however, the statute permitted bar tending only by men,[22] or allowed pool rooms to be operated only by citizens,[23] it would be an example of an activity conditioned on possession of a personal characteristic.[24]

It must be noted that a unique relationship between the concepts of over and underinclusive classification becomes apparent upon close examination and comparison of their connection with either "burdens" or "benefits" within the three major areas of regulation. This relationship stands out most clearly in the area of conditioned entrance; a statute which places a burden on one group confers, in a sense, a benefit on all those outside of the burdened group. The statute which permits only men to tend bar is a benefit statute as to men, and a burden statute as to women. Therefore, this statute, when examined from the burden viewpoint, is overinclusive; i.e., assuming a purpose to protect the health and morals of women, not all women bartenders are properly included since not all women are more susceptible to moral corruption than men. Consequently, the statute may be looked upon as being an overinclusive burden. When, however, the statute is analysed from the benefits viewpoint, the classification is underinclusive; i.e., assuming the same purpose, the privilege of tending bar is not extended to all those reasonably qualified

20. This "standard" may be one of three forms: (1) a "closed" characteristic such as race, sex, or color into or from which it is impossible to enter or leave; (2) a retroactive or "test oath" characteristic such as former membership in some particular organization, which as to those who were members is like a closed characteristic but as to others only forewarns of the disability connected with membership and may have the effect of deterring them from becoming members; (3) an "open" characteristic, such as requirements regarding one's education or passing an exam, which essentially involve the acquisition of some particular attribute which generally is within the attainment of all persons.

21. See Sage Stores Co. v. Kansas *ex rel.* Mitchell, 323 U.S. 32 (1944), where the Court upheld such a statute even though it was admitted that the compound added was more nutritious than plain skim milk. This type of statute is usually couched in terms of a prohibition; *i.e.,* the addition to skim milk of fats or oils not derived from milk fat is prohibited to all those desiring to sell skim milk. Although this is not strictly a license statute it is very similar since entrance into and continued pursuance of a specific activity is conditioned on compliance with a norm of conduct.

22. See Goesaert v. Cleary, 335 U.S. 464 (1948), in which the Court upheld a Michigan statute which permitted only male bartenders, except that women were permitted where the bar was owned by their husband or father.

23. See Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927), where such a statute was upheld.

24. See note 20 *supra.*

to serve in this capacity. Because the benefit is not distributed over a sufficiently broad area, it too is underinclusive.

To examine the equal protection argument, assume the filled milk statute imposes an underinclusive burden; i.e., the enumeration of nonpermitted additions fails to include other elements equally as undesirable considering a general purpose of protecting consumers from fraud and unwholesome products. The petitioner would contend that such a statute is unfair and discriminatory since it regulates one group while overlooking certain activities which render another group equally as susceptible to governmental control.[25] It is obvious that here, as in the underinclusive classification of the complete prohibition type regulation, the problem of determining the legislative purpose and reasons for establishing the classification must be handled by the court. It is equally clear that the same alternative procedures are available to the court and that the change in the type of regulation has caused no new problems.

Here also, as in the complete prohibition type regulation, the due process clause logically cannot be used if the classification is underinclusive. So long as petitioner does not deny the fact that he is properly within the regulatory provisions, the classification cannot be challenged by due process review.

If the filled milk statute is to be considered overinclusive, on grounds perhaps that while some nonmilk fat or oil additions are harmful not all are, the petitioner desiring to use equal protection will logically contend that his additaments are similar to those which are nonharmful. Thus, petitioner argues that, his additions being more like those properly not prohibited, a refusal to allow him to add ingredients is discriminatory and denies him equal protection of the laws. Again, the court is faced with the problem of determining the legislative purpose and reasons for establishing the classification. The basic issue is, as before, the rationality of petitioner's inclusion within the regulatory provisions.

Due process objections to overinclusive classification correspond to the usual due process attack in other areas;[26] i.e., the petitioner contends that his right to add certain ingredients to milk can only be denied by showing some valid purpose. However, a facet of due process review of this type of regulation has been habitually overlooked by the courts, who often neglect to consider the activity regulated. In the situation above

25. The actual existence of such group susceptible to regulation may be made a requirement to the establishment of an unfair classification. In that situation the petitioner would have the burden of alleging and proving such existence. See the discussion of this possible requirement at p. 205 *infra*.

26. For a summary of the usual due process attack see the discussion at p. 194 *supra*.

petitioner contends he has an interest in the nature of a right to add certain ingredients. He assumes that he also has a right to sell milk, but that assumption may not be valid. This discrepancy is emphasized when the activity permitted is conditioned on compliance with some requirement which would cause petitioner to relinquish or curtail the exercise of a constitutional right. For example, petitioner might be allowed to sell milk only if he agrees to relinquish all connections with a religious group. Can petitioner logically challenge this regulation under due process review?[27] He must give up religious freedom only if he wishes to sell milk. Perhaps engaging in the sale of milk is a privilege which may be withheld by governmental action.

To deny a petitioner any standing to challenge this type of regulation under due process by no means precludes his opportunity to contest the provision's validity under equal protection; the establishment of a right to enter the activity regulated is unnecessary, because equal protection review goes only to the rationality of the classification.[28] However, perhaps due to the unfamiliarity of the courts and many legal scholars with the potential applications of equal protection and an innate notion that a remedy for such inequity must be found, due process review has been used frequently to invalidate such regulation. The argument briefly made has been that while petitioner has no unconditional right to sell milk, he does have a right to sell milk modified only by reasonable conditions.[29] Another closely related argument is that what

27. "This bargaining away of my 'constitutional rights' is done under compulsion; but the compulsion can be effective only if, in my own estimation, the surrender of my constitutional right is less harsh than the prohibition to do the other acts to which I have no constitutional right. . . . This doctrine of unconstitutional conditions, as so stated, is difficult to support logically. If I have no ground for complaint at being denied a privilege absolutely, it is difficult to see how I acquire such a ground merely because the state, instead of denying me a privilege outright, offers me an alternative, however harsh." Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 COL. L. REV. 321, 322 (1935); see also Merrill, *Unconstitutional Conditions,* 77 U. OF PA. L. REV. 879 (1929), in which the author expresses the opinion that receipt of a privilege may be conditioned upon the relinquishment of a constitutional right. He would, however, distinguish between those constitutional guarantees set up primarily for the benefit of the individual (due process, equal protection) and those constitutional provisions bound up with the working of our system of federal government. Merrill would not permit the bartering away of the latter constitutional provisions since the operation of the governmental system set up by the Constitution is involved.

28. See Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947), in which the Court upheld a Louisiana statute which, for practical purposes, limited the occupation of pilot for the port of New Orleans to relatives and friends of present pilots. The Court, while declining to invalidate the statute, did accept the applicability of equal protection review. In dissent, four members of the Court expressed their firm conviction that equal protection not only applied but that the statute should have been invalidated as a violation of that clause. The decision was severely criticized in Note, 56 YALE L.J. 1276 (1947), but see Note, 23 IND. L.J. 204 (1948).

29. In Frost v. R.R. Comm'n of California, 271 U.S. 583 (1926), a California

is actually being denied by such a regulation is not the petitioner's right to sell milk (which admittedly may not even be a right) but petitioner's right to freedom of religion.

It is true that the practical effect of this type of regulation may be to force a person who desires to pursue a certain activity to relinquish a constitutional right, but due process review here must always rest on the possibility that a court will accept the proposition that this amounts to depriving a person of a right. Here, as in all other comparisons between due process and equal protection, there exists a difference in coverage since equal protection will only question the rationality of the classification while due process may challenge the basic validity of the purpose. Once the initial 'privilege' gap is bridged, or ignored as is usually the case, due process may be used to penetrate more deeply into the legislature's motives and intent, often substituting in the process the courts' value judgments for that of the legislature. For the practicing lawyer, it is undoubtedly important to know the apparently favored due process mode of attack, but it is also important to understand the strained nature of such a position and a logically more suitable contention.

When entry into a particular activity is conditioned on compliance with some closed standard or personal characteristic such as race, color, or sex, a problem arises which is closely analagous to the example above in which the sale of milk is conditioned upon relinquishing the constitutional right to religious freedom. The only difference is that here the regulated party cannot change his status and, thus, cannot enter the

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statute required every motor carrier for hire to obtain a certificate of convenience and necessity in order to use the state highways. Acceptance of this certificate subjected them to obligations placed on common carriers—obligations to render service, with certain exceptions, to all applicants and to charge only reasonable rates. Mr. Justice Sutherland declared that the state's power to condition the grant of a privilege did not include the power to impose conditions which would require the surrender of a constitutional right. This statement proved too broad even for Justice Sutherland, however, and in Stephenson v. Binford, 287 U.S. 251 (1932), he declared that unconstitutional conditions could be compelled by threat to withhold a privilege provided it is related to the purposes which generally justify withholding such privilege. In the *Stephenson* case a Texas statute forbade private contract carriers to use the state highways unless they charged rates no lower than those charged by common carriers. In sustaining the regulation Justice Sutherland said: "Here the circumstances which justifies what otherwise might be an unconstitutional interference with the freedom of private contract is that the contract calls for a service, the performance of which contemplates the use of facilities belonging to the state; and it would be strange doctrine which, while recognizing the power of the state to regulate the use itself, would deny its power to regulate the contract so far as it contemplates the use." *Id.* at 274. The doctrine of privileges conditioned on the forfeiture of "constitutional rights" has been transplanted to contemporary decisions involving numerous and diversified subjects, in many instances with less judicial restraint even than under the doctrine of the *Stephenson* case. For a survey of these cases and the dangers involved in the present approach, see Note, 28 IND. L.J. 520 (1953).

activity regardless of what actions he may take or what freedoms he may be willing to surrender.

Classifications based on closed characteristics have been one of the most frequently reviewed types of regulation under equal protection. They seem to fall naturally into what has been called "forbidden" or "suspect" classification.[30] It has been asserted that, ". . . human equality is closely associated with the denial that differences in color or creed, birth or status, are significant or relevant to the way in which men should be treated. These factors, the egalitarian asserts, are irrelevant accidents in the fact of our common humanity."[31] As Mr. Justice Jackson has said in speaking of a classification based on the criterion of indigence, "[t]he mere state of being without funds is a neutral fact—constitutionally an irrelevance, like *race, creed,* or *color.*"[32] With regard to the identity of closed classifications and civil rights, Mr. Justice Black has stated, "[i]t should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that the courts must subject them to the most rigid scrutiny."[33] Thus, it will be observed that the closed characteristic used as a basis for classification approaches what is vaguely termed a civil right or liberty, either because of the "liberty" or "right" abridged, such as speech or religion, or because of the nature of the classification itself.[34]

In both under and overinclusive situations involving closed classifications, equal protection review is applicable in the same manner and form as in the other regulation areas discussed. Again, due process is totally inapplicable in the underinclusive burden situation and is inapplicable, though in practice it is much used as a means of attack, in the overinclusive burden situation where the activity is considered a privilege.[35]

30. See Tussman and tenBroek, *supra* note 5, at 353, 356.

31. *Id.* at 353.

32. Edwards v. California, 314 U.S. 160, 185 (1941).

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

34. For a discussion of the problem of and reasons for protecting minorities and the contest involved between the concept of equality of man and the concept of majority rule involved in democratic theory, see HALE, FREEDOM THROUGH LAW 543 *et seq.* (1952); MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE 3 (1951); Lusky, *Minority Rights and the Public Interest,* 52 YALE L.J. 1 (1942).

35. It will be noted that, with regard to the possible due process attacks on statutes which condition entrance into an activity on the relinquishing of some undoubted right, the question arises as to whether the activity to which entrance is sought is a right or privilege. The determination as to what is a right or what is a privilege has no absolute formula and generally will depend upon one's own philosophy of such things as life, society, the role of government in society, and natural rights. It must be admitted in this regard that many activities which would have been termed inalienable rights without hesitation fifty or seventy-five years ago are today considered by a sizeable portion of

Conditioned Benefit

The type of government regulation which may be termed the area of a conditioned benefit involves the granting of some tangible benefit, such as money or govermental jobs, to persons who either agree to comply with a certain norm of specified conduct (which may involve relinquishing a constitutional right or possess some closed characteristic) or conform to a specific standard of achievement (an open characteristic).

The area of conditioned benefit is identical with the area of conditioned entrance into an activity except in one respect: In the former area some benefit such as receipt of public funds is substituted for permission to enter into a certain activity of the latter area. The benefit withheld is always something within the physical control of the government whereas the entrance into an activity is only within the legal control of the government. Thus, the only sanction necessary upon noncompliance with the norm of conduct in the conditioned benefit area is simply withholding the benefit; while in the area of conditioned entrance, it is necessary to provide an affirmative sanction upon noncompliance with the norm because of the possibility of entrance into the activity without governmental permission or license. This difference between the two areas may account for the more universal acceptance of the receipt of a benefit as a pure privilege which may be controlled by the government.

With this one exception the problem and available modes of attack in the conditioned benefit area are the same as in the area of conditioned entrance into an activity.

For example, suppose the Legislature passed a statute prohibiting those who received governmental jobs from entering into any political activity; a governmental employee would not be permitted to make a

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society as only privileges entrance into which may be withheld by the government or any other properly authorized group.

The transition from right to privilege may be described as a spectrum with a pure or absolute right at one end and a pure privilege or benefit at the other. There will be varying gradations in between with different activities possessing differing degrees of the attributes of right and privilege. Note in this regard the difference, with respect to the relative possession of the attributes of right or privilege of such things as the "right" (privilege) to have a government job, such as a policeman, and finally the "right" (privilege) to receive money benefits from the public treasury.

The distinction between "right" and "privilege" may appear nebulous, when it is seen that under equal protection review the premise is that a privilege ought not to be denied a person in an irrational manner just as a right may be conditioned only in a rational manner. The essential difference lies, however, in that, while a privilege may not theoretically under equal protection be denied one person and granted another in an irrational manner, it could possibly be completely denied to all persons. Such would not be true in respect to a right, even a so-called conditional right.

speech supporting any particular candidate for public office. The sanction for violation of such a regulation would be removal from the governmental position.

Under an equal protection attack, the petitioner, who desired a governmental job but was unwilling to surrender his right of free speech in political matters, would contend that he was unequally excluded from the benefit. If the purpose of such a statute is assumed to be to guarantee fair and impartial governmental service, he would contend that there are others engaged in activities which are just as likely to obstruct impartial service as political speeches and that it is unfair to exclude petitioner and not the others. This is an overinclusive benefit classification.[36]

However, under the same statute petitioner may contend that the purview of the benefit provision is too narrow (i.e., that making political speeches is an improper reason for excluding petitioner from the benefit because it is like those activities properly permitted governmental employees). This is, of course, an underinclusive benefit classification.[37]

Again the old problem of determining the legislative purpose arises and necessitates an investigation into the rationality of the reasons for making the classification. As in the other two general areas of regulation, the court is presented with the same alternatives regarding their determination of the purpose and rationality of the classification.

Under a due process attack on the underinclusive benefit classification, the rights-privileges problem again arises to plague the person contesting his exclusion from a particular benefit. Assume a statute which gives compensation to all unemployed persons except those who are or have been members of the Communist party.[38] Those who seek due process review of such a statute begin by neglecting or ignoring the question of whether one has a right to receive governmental funds and concentrate on the norm or standard conditioning receipt of the funds.

However, the question, does anyone have a right to governmental funds, persists. If it is proper to withhold the funds altogether, it is not

36. The overinclusive "benefit" classification corresponds to the underinclusive "burden" classification since in both situations petitioner, while admitting his own position with respect to the statute is proper, contends that the position of other persons similar to petitioner is improper with regards to the statute and that this difference in treatment is a denial of equal protection. For a discussion of this unique relationship, see p. 195 *supra*.

37. The underinclusive "benefit" classification corresponds to the overinclusive "burden" classification since in both situations petitioner contends he is improperly classified with regard to the statute because of his similarity to a person differently but properly classified with regard to the statute.

38. This type of statute was reviewed by an Ohio court in Dworken v. Collopy, 56 Ohio Abs. 513, 91 N.E.2d 564 (1950). The court held the exclusion valid as against challenges that it was a bill of attainder and an infringement of the right of free speech. See Notes, 28 IND. L.J. 492 (1953); 28 IND. L.J. 520, 532 (1953).

improper to withhold them conditionally. Those who desire to use due process in this situation are cognizant of these arguments but insist that the practical effect of such conditions is to deprive persons of their rights such as freedom of speech, thought, conscience, and assembly. Furthermore, they contend that it is the denial of these freedoms or rights that is being attacked through due process review.

Again, it is not contended that such conditioning of benefits upon relinquishing constitutional rights does not have the practical effect of tempting or compelling many of those affected to forego their constitutional freedoms to receive the benefit. The equal protection clause affords full opportunity to review completely the challenged classification without becoming entangled in the rights-privileges controversy.

JUDICIAL REVIEW: LIMITATIONS OF EQUAL PROTECTION

It may seem peculiar that counsel would attempt to secure, or courts utilize, due process review in the areas of conditioned entrance and conditioned benefit when the question of privilege is involved. One possible explanation for this usage is the argument advanced by contemporary advocates of due process review, which essentially is that some means must be found to review and invalidate certain statutory inequities in the privilege category and that due process has been and can, no matter how illogically, be used to achieve this end. Another explanation is the insistence that what is, for practical purposes, being denied is the right which has had to be relinquished to receive the privilege and that, therefore, due process may be used to review directly this denial. Here, as generally, it seems plausible that the basic reason behind this use of due process review is traditional usage and precedent.[39]

39. It is an historical fact that equal protection has been stigmatized as "the last resort of constitutional lawyers." Its application in the review of economic regulation has been consistently denied from its judicial inception in the *Slaughterhouse Cases* to the present day. In sharp contrast to the relative desuetude of equal protection is the history of due process review. After a comparatively hesitant early usage, due process flourished mightily during the period from 1890 to 1937 as the cornerstone of judicial protection of private property and the concept of "natural rights." Due process was the implement of review which the Court used to ride roughshod over a myriad of legislative attempts at regulation in the economic area. It is not at all surprising therefore that counsel and the courts in search of a means to strike at statutory inequities in the conditioned benefit area of regulation fell naturally upon the 'tried and proven' vehicle—due process review.

In the *Slaughterhouse Cases,* 16 Wall. 36 (U.S. 1873), Mr. Justice Miller, for the Court, held the clause was inapplicable, saying: "It [the equal protection clause] is so clearly a provision for that [the Negro] race and that emergency, that a strong case would be necessary for its application to any other." *Id.* at 81. The clause has

However, it was in consideration and contemplation of the effect of traditional usage of due process which lead eventually to its repudiation as an implement of review in the economic area. This took place within the broader shift in the Supreme Court's concept of the proper limits and function of judicial review in a democratic society. Since 1937 the Court has looked with disfavor upon the use of due process to delve into legislative motives.[40] It is for this reason, among others, that various legal scholars have felt that equal protection might prove a likely successor to due process in the economic area.[41] The assumption was made that the Court would be far more willing to accept equal protection as an implement of review because it would not be forced to reverse itself by a return to due process and because it was felt that equal protection would not so easily allow a court to inject its own economic philosophy.

It is true that equal protection review does not question the validity of the statute's purpose nor does it lend itself to as penetrating a review of legislative motives; nevertheless, there are means available to the court by which it may inject its subjective rationale into its resolution. An important step in the determination of the rationality of a classification is ascertainment of the legislative purpose. If, as is true in a majority of instances, this goal is vague, the court must establish a purpose which it feels the legislature contemplated; by manipulating purpose, the court can conclude that a classification is valid or invalid.[42] By broadening the statute's aim the court provides grounds for an underinclusive attack or, by narrowing it, gives rise to an overinclusive contention.

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occasionally been used in the area of economic regulation, but, in comparison with the use of due process in the period since 1873, equal protection usage has been infinitesimal. See, *e.g.*, Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936), in which a statute regulating the selling of milk was invalidated as being violative of equal protection; Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 (1936), which held a statute imposing chain store tax based on gross receipts from sales according to an accumulative graduated scale to conflict with the requirements of equal protection; Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933), which invalidated a chain store license tax under the equal protection clause because it laid a tax on chain store operators graduated according to the number of stores operated under the same general management in the same county.

40. Although, in Nebbia v. New York, 291 U.S. 502 (1934), the Court indicated a trend by finding a state price regulation of milk not violative of due process, it was not until West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), that the trend became firmly established.

41. *Cf.* Tussman and tenBroek, *supra* note 5, at 364.

42. A common mode of upholding the validity of a statute is the judicial assumption of the existence of rational and proper legislative reasons for the classification. See the discussion at p. 192 *supra*. In Goesaert v. Cleary, 335 U.S. 464, 466 (1948) the Court said: "Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. *This Court is certainly not in a position to gainsay such belief by the Michigan legislature.*" (emphasis added)

It must be admitted that one of the most serious problems faced by many state courts is the lack of any legislative records of hearings, reports, or debates which would help the court to determine the factual bases of classification and remedy the absence or ambiguity of the statute's purpose.[43] The publication of such records, perhaps similar to Congressional printed committee hearings and reports, plus habitual inclusion of a section indicating purpose in all regulatory statutes might go far toward relieving this problem. Publication may prove to be objectionable or impossible because of the costs involved in recording and printing committee hearings and floor debates. There could be little valid objection to the inclusion of a purpose section on cost grounds, however, there are other reasons militating against adoption of this proposal unconnected with cost. It may be difficult to establish any clearcut statutory purpose when the act is the product of differing and possibly conflicting interests. Statutes are probably sometimes passed only because their purposes are subject to varying interpretations.

If the legislature is able to express an unambiguous purpose, the court may still find that this is not the "real" purpose and proceed on its own to ferret out the statute's actual goal. The judiciary has, on the other hand, several devices which may be utilized to avoid or make more difficult the invalidation of what might be an improper classification. These devices comprise primarily certain rules used to determine the validity of a classification and certain pleading requirements enforced against the petitioner. Probably the most comprehensive statement of the various rules is that made by Justice Van Devanter writing the majority opinion in *Lindsley v. Natural Carbonic Gas Co.*[44]

> "1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when

43. Mr. Justice Jackson, concurring in Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951), expressed a somewhat different view. Discussing specifically the propriety in going back of the language of a statute to the legislative history, he said: "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. . . . It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation."

44. 220 U.S. 61 (1910).

it is without any reasonable basis, and therefore is purely arbitrary.

"2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

"3. When the classification in such a law is called in question if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

"4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."[45]

In addition to the rules enunciated by Justice Van Devanter, others are frequently used: The Legislature may remedy a little evil at a time, or for some administrative reasons,[46] an enforcement agency may enforce a regulation as to a single group at a time (thus sanctioning underinclusive classification and enforcement).[47] The Legislature may eliminate the main evil, thus discriminating against the one particular class from which the specific evil is mainly to be feared.[48] The Legislature may discriminate between degrees of harm, hitting the most flagrant aspects of an evil without hitting evils of the same class but of lesser magnitude.[49]

The pleading strictures might consist of requiring the petitioner to show the actual existence of persons within the class not regulated or the class receiving a benefit.[50] He could be forced to demonstrate actual

45. *Id.* at 78. For a recent usage of this rule and Justice Sutherland's statement of it, see Pyeatte v. Board of Regents of the University of Oklahoma, 102 F.Supp. 407 (W.D. Okla. 1952).

46. While the administrative justification excuse has generally been used in the underinclusive situation, there is no reason why some of these justifications could not be used in the overinclusive situation, for example, the excuse that the Legislature cannot be expected to draw such a fine line that no one may be improperly regulated. Compare Tussman and tenBroek, *supra* note 5, at 348-9.

47. See, *e.g.*, Semler v. Oregon Board of Dental Examiners, 294 U.S. 608 (1934); Mackey v. Little Rock, 250 U.S. 94 (1919); Broad-Grace v. Bright, 48 F.2d 348 (E.D. Va. 1931), *aff'd*, 284 U.S. 588 (1931).

48. See *e.g.*, New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928); Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1939); Farmers & Merchants Bank v. Federal Reserve Bank of Richmond, 262 U.S. 649 (1922).

49. See Hall v. Geiger Jones, 242 U.S. 539 (1917).

50. In Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 84 (1945), the Court in refusing to invalidate a New York statute compelling lodging houses constructed before 1944 to comply with certain requirements said, "[t]he difficulty is that appellant has not shown that there are in existence lodging houses of that eategory which will escape the law. The argument is based on an anticipation that there may come into existence a like or identical class of lodging houses which will be treated less harshly. But so long as that class is not in existence, no showing of lack of equal protection can possibly

financial injury because of benefits given his competitors or because the regulatory burden has caused petitioner's business to fail.[51] If equal protection is to be taken as a demand for reasonable classification, these requirements may not logically be necessary, although they might be implied from the historical context of the clause. They may be utilized by a court to make less easy the invalidation of legislation or may be ignored making invalidation easier.

It becomes apparent after a study of the various possible uses of due process and equal protection that the only real solution to the problem of extra-stringent judicial review is judicial self-restraint and not resort to a mode of examination which does not include evils associated with a former, now disfavored, implement of review. Equal protection, in addition to its own exclusive area of coverage, may properly be used to challenge enactments traditionally attacked by due process. It is also applicable to benefit statutes in which due process contentions may encounter difficulty because of the judicial determination that a right is not involved.

Equal protection is no nostrum for the problem of stringent judicial review; it can be manipulated with as much facility as was due process during the half century before 1937.

EMINENT DOMAIN: INTERGOVERNMENTAL CONFLICTS

Since the close of the American frontier, the country has had a constant land area while at the same time the need for land by industry and government has continued to grow. Consequently there is a growing contest for available realty, and occasionally public property will be required to meet their expanding needs.[1] It is clear that private property

be made. . . . The point is that lack of equal protection is found in the actual existence of an invidious discrimination, not in the mere possibility that there will be like or similar cases which will be treated more leniently." *But cf.* Needham v. Proffitt, 220 Ind. 265, 269, 41 N.E.2d 606, 608 (1942), where the Indiana Supreme Court allowed an undertaker, who was not permitted under a mortician's licensing statute to advertise in newspapers, to plead, as grounds for invalidation, the discrimination between newspapers and radio advertising. There was no allegation or proof of the existence of any class of undertakers using radio advertising.

51. *See* First National Bank v. Louisiana Tax Commission, 289 U.S. 60, 65 (1932). It will be found, as a practical matter, that the person attacking a statute as discriminatory will have been injured in some manner, albeit indirectly, by the statute.

1. The total federally owned land in continental United States is 455,146,726 acres or 23.89 percent of the total land area. In Nevada the federal government owns 84.71 percent of the land area while in Connecticut, Iowa, Kansas, Maine, and Ohio the