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# CONSTITUTIONAL LAW AND ECONOMIC LIBERTY

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IN *Weaver v. Jordan*,<sup>1</sup> the Supreme Court of California invalidated an initiative provision of that State prohibiting the operation of any scheme under which television viewers would be called upon to pay directly for the privilege. In an opinion by Justice Burke, joined by five other members of the court, it was held that the provision violated the "free speech" clauses of the United States and California constitutions, in that it prohibited a legitimate method of communication of ideas. Because the court held that the provision abridged free speech, it was unnecessary to reach the question of whether it was an unconstitutional incursion upon the rights of the sponsors of subscription television to engage in an innocuous business venture. Mr. Justice Mosk dissented. He saw no abridgment of free speech, and stated that it is not the function of courts to substitute their judgment as to the wisdom or propriety of economic regulations for the judgment of the people's representatives. The Supreme Court of the United States denied certiorari.<sup>2</sup> Aside from the general proposition that there is no significance in the denial of certiorari, the fact that there was an independent state ground for the decision makes the action of the Court peculiarly insignificant. Further, the failure of the majority to reach the economic freedom issue, coupled with the adverse view of Justice Mosk, makes the decision of the Supreme Court of California no more than a one man reaffirmation of the oft-stated proposition that the propriety of governmental regulation of business is a question for the legislature and not for the courts.

As everyone knows, this was not always so clear, and various aspects of the question have attracted the attention of scholars over a long period of time. The "economic due process" doctrine has been buried, exhumed, and reburied so frequently that its history reads like *Intruder in the Dust*. It has been suggested that it is dead only in Washington, and vampire-like it stalks the halls of the state court houses, sucking the blood of the state

<sup>1</sup> 64 Cal. 2d 235 (1966).

<sup>2</sup> 385 U.S. 844 (1966).

legislatures,<sup>3</sup> and that it should be dispatched with the proverbial stake.<sup>4</sup> On the other hand, it has been suggested that the Supreme Court has frozen the corpse and will thaw it out and use it as soon as it has straightened out all of our "human rights," that is to say that it is only a question of where economic liberty is on the Court's timetable.<sup>5</sup> This suggestion was coupled with the opinion that "human" rights solutions so far have left the people so irritated that perhaps to conserve its "image," the Court should not put economic due process very high on the table, and should let it "requiescat in pace," for the time being. One possibility that all the cadaver traffic appears to have overlooked is the possibility the doctrine of economic due process has been a donor in a heart transplant. With this in mind, I propose to make one more trip to the bone yard and then scout around among a number of living doctrines to look for symptoms of rejection.

#### THE GOVERNMENT AS A DISTRIBUTOR OF GOODS AND SERVICES

It goes without saying that today government is an enormous force in the allocation of resources and in the distribution of wealth. The first and most direct way in which this force is felt is through simple taking and giving. Government taxes some and gives to others. Sometimes this process is employed to reduce to an extent the gulf that otherwise would exist between the living standards of the successful and unsuccessful. It is certainly not limited to this function. Thus the red-nosed medicant on Madison Street in Chicago, as he drains his half-pint, can take pride in the fact that he has made a contribution to the health of the pink-cheeked milk drinker on Madison Avenue in New York.<sup>6</sup> In such a system there is an understandable scramble for the "goodies" that government puts on the table, and an equally understandable exodus when the waiter approaches with the check, witness the tensed posture of the nation's educators as they face Washington and await the shattering of the annual poverty piñata.

<sup>3</sup> Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 Minn. L. Rev. 91 (1950).

<sup>4</sup> "If the goal of a democratic form of government is the effective realization of the popular will, then the legislative body of that government is the part functionally best equipped to give voice to that will. The United States Supreme Court has concluded that states should be free to formulate whatever economic regulatory policies they desire but should be curtailed in any attempt to deprive the individual of his essential liberties. This would seem to be the essence of democracy and its promotion the proper role of the judiciary in a democratic society. The closer state courts co-ordinate their due process concepts with those of the United States Supreme Court, the closer our nation will come to the realization of the democratic ideal." John A. Hoskins and David A. Katz, *Substantive Due Process in the States Revisited*, 18 Ohio St. L.J. 384, 401 (1957).

<sup>5</sup> Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Examination and Reburial*, 1962 Supreme Court Rev. 34.

<sup>6</sup> Assuming, of course, that there are any pink-cheeked milk drinkers on Madison Avenue.

A certain amount of direct government giving is syphoned off by the givers. As Professor Aaron Director is fond of saying, in paraphrase of Adam Smith, "When these young men go to Washington to serve the public interest, they find that as by an unseen hand, they serve their own."<sup>7</sup> Some helping one's self takes the form of bribery and embezzlement, but profit from public service is by no means limited to such aberrant behavior. Our tradition is rich with mutually advantageous dealings between public servants and those who have "connections."

## THE ROLE OF COURTS IN SUPERVISING THE EXPENDITURE OF PUBLIC FUNDS

### 1. *The Federal Courts and the Expenditure of Federal Money*

The power of democratic government to take and to give is an awesome power, for exercised without limitation it would permit a bare majority to wax rich by pauperizing the rest. Yet it is a power with respect to which it is very difficult to verbalize any limitation. At the federal level, the Constitution places no restriction on spending other than to provide that taxation, and by inference the spending of tax monies,<sup>8</sup> must be for the "general welfare."<sup>9</sup> There was a difference of opinion between Madison and Hamilton as to the meaning of this provision. The former believed that the section conferred no powers on the United States that were not provided for in the other parts of the Constitution; the latter thought that the "general welfare" clause was in addition to powers granted elsewhere. The Hamilton view is the one that has been adopted by the Court.<sup>10</sup>

Viewed as an independent grant of power, the "general welfare" language still presents a problem of interpretation as to the scope of judicial review afforded. If the phrase were interpreted as giving the Court the function of reviewing the question of whether each expenditure is made for the "general welfare" in the sense of "good for the country," it would make of the court a sort of council of revision. It would take a considerable amount of gall for a court to claim such a function, and the Supreme Court has been careful not to.

<sup>7</sup> This quotation may not be original with Professor Director, but by local custom I shall attribute it to him. See Brainerd Currie, *The Verdict of Quiescent Years*, 28 U. Chi. L. Rev. 258 (1961).

<sup>8</sup> "The necessary implication from the terms of the grant is that the public funds may be appropriated 'to provide for the general welfare of the United States.' These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money. How shall they be construed to effectuate the intent of the instrument?" *United States v. Butler*, 297 U.S. 1, 65 (1936) (Roberts, J.)

<sup>9</sup> U.S. Const. art. I, § 8.

<sup>10</sup> *United States v. Butler*, *supra* note 8. See Edward S. Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 Harv. L. Rev. 548 (1923).

The alternative view of the language emphasizes the concept of generality. Such an interpretation would preclude review of the wisdom of particular spending programs, but would leave the Court free to protect the taxpayer from private or regional raids on the general treasury. The precise limits on federal government spending imposed by Section 8 of Article 1 have never been much explored. In 1923, in *Massachusetts v. Mellon* and *Frothingham v. Mellon*,<sup>11</sup> it was held that neither a taxpayer nor the State as *parens patriae* has standing to raise the question of the constitutionality of legislation under Section 8 of Article 1 or under the Fifth Amendment. In 1936, in *Alabama Power Co. v. Ickes*,<sup>12</sup> the holding in *Frothingham* was reiterated and expanded to preclude review at the instance of a citizen alleging financial loss attributable to competition from government subsidized operations. For thirty-five years the *Frothingham* doctrine has protected from judicial scrutiny the vast majority of federal government spending programs. This does not mean to say that the literature has been wholly free from judicial expressions on the power to spend. In those few programs in which Congress has levied earmarked taxes to finance spending schemes, the Court has reached the merits in cases brought to contest the tax. In *United States v. Butler*,<sup>13</sup> in 1936, it struck down the Agricultural Adjustment Act of 1933. While there may be nothing left of the *Butler* decision insofar as it holds that the expenditures involved would be an unconstitutional invasion of the reserved powers of the states, even the dissenting justices, Stone, Brandeis, and Cardozo, recognized that Article 1, Section 8, places certain limits on the congressional spending power. "The power to spend is not without constitutional restraints," wrote Mr. Justice Stone. "One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control." In both *Steward Machine Co. v. Davis*,<sup>14</sup> upholding against constitutional attack the unemployment compensation provisions of the Social Security Act, and *Helvering v. Davis*,<sup>15</sup> decided the same day and sustaining the constitutionality of the old-age insurance provisions of the same Act, Mr. Justice Cardozo, writing for the Court, assumed the existence of these same limitations, finding after extended discussion that the Act dealt with national problems, and that it was persuasive rather than coercive.

In *Steward Machine Co. v. Davis*, the Act was also attacked as wanting equality in that its provisions applied only to employers who employed eight

<sup>11</sup> 262 U.S. 447 (1923).

<sup>12</sup> 302 U.S. 464 (1938).

<sup>13</sup> 297 U.S. 1 (1936).

<sup>14</sup> 301 U.S. 548 (1937).

<sup>15</sup> 301 U.S. 619 (1937).

or more persons. In rejecting this argument, Mr. Justice Cardozo pointed out that the Equal Protection Clause is not applicable to the United States; he noted, however, that the distinctions drawn in the Act would not be unconstitutional if measured by the standard applied to state legislation under the Equal Protection Clause, adding that *a fortiori* they met the less exacting requirements of the Constitution governing reasonableness of classification in federal legislation.

In the cases in which a particular class of persons is excluded from benefits under a general spending program, the Court has considered on the merits the constitutionality of the exclusion. In *Flemming v. Nestor*,<sup>18</sup> for example, it considered the question of whether Congress could deprive of benefits under the Social Security Act an alien deported from the country for illegal entry, commission of a crime, subversion, or engaging in any of several other specified types of undesirable behavior. Taking the position that recipients of benefits under the social security system take no vested rights in their continuance, a five-man majority of the Court referred to the argument on equality as "constitutionally irrelevant," citing, among other authorities, *Steward Machine Co. v. Davis*. The page reference indicates that Mr. Justice Harlan, who wrote the opinion for the majority, had reference to Mr. Justice Cardozo's observations on the applicability of the Equal Protection Clause and the consequently more limited scope of review afforded in the examination of classifications embodied in acts of Congress. As Mr. Justice Cardozo had done in *Steward Machine Co.*, Mr. Justice Harlan went on to observe that in any event the classification was not arbitrary. "Nor, apart from this," he wrote, "can it be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute. We need go no further to find support for our conclusion that this provision of the Act cannot be condemned as so lacking in rational justification as to offend due process."

Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Douglas, dissented on the ground that the statute in question was a punitive provision and violated the Ex Post Facto Clause, a ground of objection that has no relevancy to the question of the scope of review of allegedly irrational classifications in government spending. Mr. Justice Douglas delivered, in addition, a separate dissent to express his opinion that the Act violated the Fifth Amendment because the rights to benefits under the original Act had vested, and cutting them off constituted a "taking" of property under the Due Process Clause. He did not reach the question of rational classification. Mr. Justice Black, however, while of the opinion that the Act was (1) an

<sup>18</sup> 363 U.S. 603 (1960).

ex post facto law, (2) a bill of attainder, and (3) a "taking" under the Fifth Amendment, took Mr. Justice Harlan to task for suggesting that absent such a violation of the Constitution there is any power in the Court to invalidate an act of Congress on the ground that it is "irrational."

The *Steward Machine Co.* and *Helvering* cases, and the *Flemming* case, are not likely to be very important as limitations upon the spending power. The Congress has financed almost all of its spending programs from general funds, thus bringing into play the doctrine of *Frothingham v. Mellon* and leaving a very narrow range of application for *Steward Machine Co.* and *Helvering*. As to *Flemming*, the standing in such cases is to request inclusion of the omitted recipient in the general plan of spending, rather than to challenge the spending program or to examine the rationality of the general class.

These cases have a certain relevance, however, to the general question of the scope of judicial review. In *Steward Machine Co.* and *Helvering*, the Court indicated that the Fifth Amendment requires less by way of equal treatment than the Fourteenth, by virtue of the inclusion of the Equal Protection Clause in the latter but not the former. In *Flemming*, five members of the Court reiterated this view, and two did not dissent from it. Since the doctrine of *Frothingham v. Mellon* is currently before the Court for reexamination,<sup>17</sup> they take on added interest, for were the Court to change its mind about taxpayer standing, the scope of review would become vastly more important. With this in mind, it is useful to examine the application of the Due Process Clause and the Equal Protection Clause in cases in which the constitutionality of state spending has been called into question.

## 2. *The Federal Courts and the Expenditure of State Money*

### a. Public Purpose under the Due Process Clause

It has often been stated that public funds, that is to say funds raised by taxation, cannot be spent for other than a public purpose. This doctrine has been traced to *Loan Association v. Topeka*,<sup>18</sup> in which the Supreme Court affirmed a judgment for the city in an action brought on the city's bonds issued under statutory authority, when it appeared that the proceeds of the bonds had been donated to a manufacturer to induce it to locate its plant in the vicinity. It was stated by Mr. Justice Holmes in his dissent in *Madisonville Traction Co. v. St. Bernard Mining Co.*<sup>19</sup> that *Loan Association v. Topeka* was not and could not have been rested on the Fourteenth Amendment. In *Fallbrook*

<sup>17</sup> *Flast v. Gardner*, probable jurisdiction noted 389 U.S. 895 (1967).

<sup>18</sup> 87 U.S. (20 Wall.) 655 (1874).

<sup>19</sup> 196 U.S. 239, 260 (1904).

*Irrigation District v. Bradley*,<sup>20</sup> however, it had been stated to so rest by analogy to a "taking" of property. This view of the matter was reiterated in *Jones v. Portland*<sup>21</sup> and *Green v. Frazier*.<sup>22</sup> More recently, in *Griswold v. Connecticut*,<sup>23</sup> Mr. Justice Goldberg hinted that, like privacy of the bedroom, the right not to be taxed for other than a public purpose is one of those "other" rights placed under the Court's protection by the Ninth Amendment.<sup>24</sup>

Whatever the origin of the constitutional protection against private incursions into the state treasury, and whatever the statements that have been made by the Supreme Court, it has not proved to be much of a shield. The Court has examined a reasonably large number of spending schemes over the years, but it has almost always come to the conclusion that "public purpose" exists. One reason why the doctrine has a very limited application goes back to the suggestion made earlier in this paper that government spending is so spread around the community by the process of oiling squeaky wheels that it is virtually impossible to say how the relative benefit rests. If everyone had to benefit from every program, the functions of government would be very limited indeed. Once one departs from this principle, however, the calculus of benefit is next to impossible. The net effect of the doctrine seems to be that an occasional preference is struck down when the transfer from public to private purse is direct. In a recent case in Illinois, for example, it was held that a taxpayer could maintain a class action on behalf of himself and all other taxpayers of a taxing district to inquire into whether the Fourteenth Amendment was offended by an alleged "give-away lease" entered into by the governing board of the district and a private industry, despite the holding by the state courts that a taxpayer had no standing to complain of the lease.<sup>25</sup>

#### b. The Equal Protection Clause and State Expenditures

It is well to start the discussion of equal protection and government spending with the observation that any general equality in the spending of public funds is both impossible, and were it possible it would be undesirable. It is impossible because the generality afforded in the "public purpose" doctrine permits the community to seek through government action many ob-

<sup>20</sup> 164 U.S. 112, 156 (1896).

<sup>21</sup> 245 U.S. 217 (1918).

<sup>22</sup> 253 U.S. 233 (1920).

<sup>23</sup> 381 U.S. 479 (1965).

<sup>24</sup> *Id.*, at 486. This interpretation of the Ninth Amendment is derived in all likelihood from similar interpretations of the reserved rights clauses in state constitutions. See, e.g., *State of Iowa v. County of Wapello*, 13 Iowa 388, 412 (1862).

<sup>25</sup> *Booth v. General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967).

jectives with respect to the achievement of which individual benefit cannot be measured even approximately. It is impossible because some objects of expenditure are physical and must be located somewhere. Wherever they are located, they are more convenient to some than they are to others. Thus a highway must be laid out along *some* route, and wherever it is located, some people's property will have a more ready access to town than others. It is also impossible because the spending programs that are in operation at any one time are so numerous and so varied that ordinarily one cannot say what is the relative benefit to any one individual. Further, if one were to talk about equality of benefit from government, he would have to talk about net benefit after subtracting his contribution through taxation. This brings one to the obvious conclusion that government spending is quite often for the express purpose of taking from one and giving to others. Indeed, if all net benefit after contribution were equal, the only justification for spending would be the dubious assumption that the legislators know best how the people should spend their incomes.

What role, then, can the Equal Protection Clause play in judicial supervision of legislative choices as to what shall be done through taxation and spending? In this connection it is to be noted that occasionally questions of reasonable classification are also disposed of under the "public purpose" doctrine of the Due Process Clause. If the class is so individual as to make the expenditure a mere steal from the public treasury, it would violate both the federal and state due process concepts.<sup>26</sup> Where it has passed this test, what standing has a person excluded from the benefits to complain because a similar benefit was not conferred upon him?

The case of *Cumming v. Board of Education*,<sup>27</sup> in 1899, poses the problem. In 1876, Richmond County, Georgia, established a white high school. In the same year it appropriated some funds to subsidize to some small extent a private white high school in a remote part of the county. Two years later the county was offered the gift of a lot and a building if it would use the property to establish a high school for girls. It moved its high school into the building and restricted the enrollment to girls, renaming it after the donor. Boys were left to attend local private schools. In 1880, there being no high school for Negroes, the county created one. Seventeen years later, the board of education was faced with a sharp growth in the population of Negro grammar school children, and a shortage of class rooms. At that time there were only sixty children enrolled in the Negro high school, and the building could be used to accommodate several times that number of children in the lower grades. A survey of high school facilities in the county showed that there were three schools in Augusta to which Negro high school pupils could

<sup>26</sup> See text to notes 18-25, *supra*.

<sup>27</sup> 175 U.S. 528 (1899).

go without paying a higher tuition than was being charged at the public school. Accordingly the board closed the Negro high school and converted it into additional grammar school facilities. Suit was brought to force the board to close the white high school for girls unless it continued to operate the Negro high school.

The *Cumming* case is anachronistic, of course, insofar as it is related to racial separation in the public schools. In posing the problem of equality of treatment in public spending, however, it deals with the same sort of financial squirming that many a public unit is up against today. The board was induced to convert its only high school into a school for girls by the offer of private support. It could do this because the local private school for boys charged no more tuition than they were charging at the public high school. This left a gap in the system because there was no Negro high school, so this gap was filled. In time, the system began to pop out at another seam when the number of Negro grammar school children grew beyond the facilities. At that point they found that Negroes, like white boys, could be accommodated in the county's private schools. Weighing sixty high school students against the larger number of younger children, they made the obvious decision.

In an opinion by Mr. Justice Harlan, the Supreme Court affirmed a decision in favor of the county. "We may add," he wrote, "that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of the Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of the rights secured by the supreme law of the land. We have here no such case to be determined . . . ."

He indicated that if some direct proceeding were brought to compel the board to operate a Negro high school out of funds in its possession or available to it, and "if it appeared that the Board's refusal to maintain such a school was in fact an abuse of discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court."

The expansion of the doctrine laid down in the *Cumming* case in the *Canada*,<sup>28</sup> *Sipuel*,<sup>29</sup> *Sweatt*,<sup>30</sup> *McLaurin*,<sup>31</sup> and *Brown*<sup>32</sup> cases is familiar, and today, of course, it is firmly established that the state may not engage

<sup>28</sup> *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938).

<sup>29</sup> *Sipuel v. Oklahoma*, 332 U.S. 631 (1948).

<sup>30</sup> *Sweatt v. Painter*, 339 U.S. 639 (1950).

<sup>31</sup> *McLaurin v. Oklahoma Board of Regents*, 339 U.S. 637 (1950).

<sup>32</sup> 347 U.S. 483 (1954).

in material discrimination based upon race in providing educational or other services.<sup>33</sup> So far, however, the racial classification has been involved in all the cases in which relief has been given. In this connection it is worthy of note that in all the cases dealing with racial discrimination, not one of them, with the exception of *McLaurin* can be framed to relate to any other classification. In *McLaurin* the plaintiff had been admitted to the graduate school at a state university, but was forced to attend in as segregated way as the circumstances permitted. He was assigned a seat apart from the rest of the class. He was required to eat separately, though permitted to go through the cafeteria line for his food. In short, he was treated like a leper. While this quarantine of the plaintiff was held to be offensive on the ground that it was an unconstitutional racial classification, the language of the Court could apply just as well had the basis for his separation from the rest of the students been pure personal animus, for the basis of the harm lay in the fact that the separate treatment set him apart from the rest of the students and made it less likely that he could pursue his studies with profit. Of course had he *been* a leper, perhaps the separation would have been examined on a different footing.

### c. Result Orientation and Equal Protection

With *Brown v. Board of Education* and the cases that extended the doctrine, Negroes became entitled to equal treatment under law in the use of public facilities. It soon became apparent, however, that the absence of racially based legal classifications does not in any way assure an individual that he will benefit from each public dollar expended, nor that the net benefit to each citizen will be the same. Though it was suggested in the *Brown* case that legal discrimination, being a brand of inferiority, itself worked disadvantages on the Negro, by and large the Negro's fight has been for an improvement in the level of services afforded him rather than a change in the classification system that relegates him to inferior services. This fact made it almost inevitable that improvements in his legal status in many instances should make less difference in his daily life than perhaps he had been led to believe. Thus in the political rights area, if he couldn't vote, he might be led to believe that if only he could, he would receive the favors and the preferences that he saw whites receive from exercising their franchise. But democracy does not always pay a dividend to a voter whose candidate is defeated at the polls, and after all the Negro is a minority voter in most communities. In the area of school segregation, if he lives in a neighborhood that is all Negro, he may win his court battle for interdiction of legally sponsored separation on racial grounds, only to find that he is still surrounded by black

<sup>33</sup> See, e.g., *Evans v. Newton*, 382 U.S. 296 (1966) (public park).

faces in *his* school, and the school is no better. Indeed, since it was assumed as far back as the *Cumming* case in 1899, that racially separate schools must receive equal financial support, he may find himself in worse condition than he was before, for as to nonsegregated facilities there has been no *Cumming* case.

Inevitably, this state of affairs has led the leaders of the groups seeking to better the lot of Negroes into a number of new lines of attack, perhaps in spots inconsistent, but all directed toward achieving practical equality in white and Negro education. The first is the *de facto* approach to racial discrimination. If the law interdicts segregated education because it is bad, the state has a duty to operate a school system in which school rooms show both black and white faces. If the neighborhood in which a school is located is all black, then the lines should be redrawn so that it will not be, or if this is impossible, black children should be transported out to other schools or *vice versa*. This argument can be made at two levels. At the permissive level, it amounts to a concession that the Equal Protection Clause permits racial classifications so long as they are reasonable, a doctrine, it will be recognized, that was adhered to from *Plessy v. Ferguson*<sup>34</sup> to *Brown*. Though the legality of bussing plans has not been ruled upon directly by the Supreme Court, the lower court cases generally have upheld them.<sup>35</sup>

While there has been a considerable shift in opinion toward efforts to achieve some sort of racial balance in public schools, bussing still gets up the hackles of the residents of many communities, and like so many other aspects of public spending programs, it is often easier to get some sort of agreement in principle than it is to get consensus on any particular plan. As a result, while the Negro may profit generally from posing the *de facto* segregation problems as a legislative one, certainly many particular groups are doomed to disappointment. It is understandable, therefore, that their leadership should make the argument that active measures to achieve desegregation in schools are obligatory under the Fourteenth Amendment. To date, the courts have declined to hold that the mere fact that a particular school is all Negro or all white indicates discrimination, and have required a showing that the pattern of pupil attendance is in some way caused by discriminatory treatment, that is to say that the community has classified the students by their race rather than by their locality. Of course when it can be shown that the boundaries were drawn for the purpose of creating or preserving racial segregation such a showing has been made.<sup>36</sup>

It should be noted at this point that the problem of equal educational

<sup>34</sup> 163 U.S. 537 (1896).

<sup>35</sup> See, e.g., *Offermann v. Nitkowski*, 248 F. Supp. 129 (W.D.N.Y. 1965).

<sup>36</sup> See *Taylor v. Bd. of Education of New Rochelle*, 191 F. Supp. 181 (S.D.N.Y. 1961).

opportunity in the public schools is vastly more complex than the same problem as it was posed in connection with graduate and professional, and college institutions. These latter institutions are selective in the first place. In most instances there are not very many such institutions. This makes the relief fairly simple. The institution concerned can be ordered to admit the plaintiff, or enjoined from discriminating in its admission policy. Once the color bar is down perhaps it is more difficult to police discrimination because no longer can it be assumed that every denial of admission of a Negro is poisoned by racial animus. Even so, the pupils are admitted on some criteria that make comparison of Negro and white admissions possible. If it were found, for instance, that whites are regularly admitted to the state university when they present a 350 average Scholastic Aptitude score and a C average from high school, but Negroes are admitted only if they score 550 and present a B record, it can be inferred that the university is applying different standards on the basis of race. The problem is not always this simple, to be sure. There may be a perfectly good reason to assume that performance in one high school at a C level augers success in college, while B work in another does not. As long as the high school is illegally segregated, the court can say, as the Fifth Circuit did say in *Meredith v. Fair*,<sup>37</sup> that it sits ill in the teeth of the admitting authority to state that the schools that they have for many years contended were "separate but equal" were so unequal that the state university would not take their product. This was clever forensically but the problem remains, as any admissions officer knows.

At the grammar and high school levels there is the added problem of geography. Though it may sometimes be proved that a particular school district has been racially gerrymandered, certainly it is common for a neighborhood to start as all white and gradually become all black. It is difficult to say in such a case that the attendance district was designed to make it all black. Even when new facilities are built in this area, there are usually perfectly good reasons for expanding the existing plant, for with the change in the neighborhood, there is typically a sharp increase in the population. Further, where there is a sharp increase in the population and new facilities are not built, or temporary facilities are moved in, or shifts maintained, it may well be that the particular area is in the path of the slum clearance bulldozer, and limited financial resources make it quite sensible to resort to such temporary expedients. Thus typically it is very difficult to say that there are not reasons other than race that make any particular school board decision rational.

The fact remains, however, that the product of the "inner city" schools is less well educated than the product of schools in the outlying neighborhoods that have a pupil population that typically is largely white. To those who

<sup>37</sup> 305 F.2d 341 (5th Cir. 1962).

seek solutions for this problem it becomes tempting to say that this phenomenon is attributable to discrimination in the allocation of resources, and those who are litigation-minded have been busy scouring the reports for support for the argument that the courts should undertake to rectify the money discrimination. Attempts to tie this alleged discrimination to race having proved unsuccessful, recently there has been a tendency to tie it to poverty, or to geography. The former is a difficult point to make. As has been suggested already, various groups benefit at various levels from the very large number of spending programs, and contribute at various levels to the cost. It can be said without cavil, however, that when benefit is adjusted to reflect contribution, the scales tip to some extent in favor of the poor. Thus while it may be true in poor neighborhoods in some communities the per pupil expenditure on education may be less than it is in the wealthier neighborhoods, the expenditures for welfare are negligible in the latter and heavy in the former. Net figures suggest that nationally, persons earning \$7,500 and over in 1946-1947 paid roughly 36.3 per cent of their income in taxes, federal, state and local, while receiving 12.9 per cent of that amount in benefits from government spending, while persons earning from \$5,000 to \$7,500 paid 24.2 per cent and received 14.6 per cent. Figures in the other income brackets bear out the relationship.<sup>38</sup> This is only to say that the total impact of government spending is, as of course it should be, to aid at the expense of those who are better off than those who cannot afford certain necessities of life. While it is arguable at the political level that some other, perhaps higher, level of income redistribution would be more desirable, obviously the poor would not profit if net benefit were equalized on a one man—one dollar basis.

Can it be said that a special case should be made of education and that as with the vote<sup>39</sup> every citizen has a right to his aliquot share of the expenditures for this particular commodity? Could Chief Justice Warren write with that satisfaction that must have come to Mr. Justice Cardozo when he wrote "The timorous may stay at home," that "Trees are not educated," citing his opinion in *Reynolds v. Sims*<sup>40</sup>? Such a decision would present a number of problems. While there were those who found difficulties in deriving the one man—one vote requirement from the Constitution,<sup>41</sup> it must be conceded that it was a standard that had the advantage of simplicity and relatively easy enforcement. In the case of education, one dollar's worth is a slippery standard. If the community should assure each school that the same amount would

<sup>38</sup> State of Illinois, Report of the Commission on Revenue 343 (1963).

<sup>39</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>40</sup> *Id.*

<sup>41</sup> See Jo Desha Lucas, Legislative Apportionment and Representative Government: The Meaning of *Baker v. Carr*, 61 Mich. L. Rev. 711 (1963); Phil C. Neal, *Baker v. Carr*: Politics in Search of Law, 1962 Supreme Court Rev. 252.

be spent per child in the "inner city" and the outlying schools, and it turned out that the books in the former lasted three generations of students, while they lasted six in the latter, after the third class in the "inner city" school, the pupils would be without books, or the share of the new appropriation made to the outlying school could be used to increase the general library, thereby introducing a growing inequality of facilities. In the same fashion, if the cost of sandblasting graffiti from the walls were a considerable item in the budget of one school, another school with a less "lively" student body might devote this amount to the support of more conventional art programs.

Despite these difficulties, there might be cases in which the Court should hold that a particular geographical area was calculatedly starved in the allocation of the community's funds for education or other services. Certainly if the city school board should decide that there would be no schools whatever in the ghetto, without permitting children residing there to attend other schools in the city, the courts would intervene. If, like Richmond County, in 1897, the school board should decide that one group of students within its care should be provided with education through high school, while another would be served only through the seventh grade, without making any satisfactory arrangement for providing high school education for qualified students in that group, the Court would intervene, and this despite the absence of a specifically prohibited basis for classification such as race. In short, any completely unjustified legal rule excluding a portion of the tax-paying public from participation in the benefits made available through operation of public expenditures might fall afoul of the Fourteenth Amendment. At the level of practical application, however, there has never been any constitutional requirement that the spending authority make up for individual differences. Thus if a community has an insufficient number of high school pupils to justify more than one high school, and for reasons sufficient to itself determines that such school shall be located at any particular place within the jurisdiction, it has never been held that the Fourteenth Amendment would require that it subsidize the transportation of every student who finds it inconvenient to attend. It has been enough that the student has a right to attend, whether or not as a practical matter he finds himself able to do so. Indeed, even in the racial classification area, a truly open enrollment plan has been held sufficient to meet the standards set by the courts and the federal establishment.<sup>42</sup>

It may be conceded, therefore, that within fairly narrow limits, judicial review has a role to play in supervising geographical or other classifications of

<sup>42</sup> See Office of Education, Dep't of Health, Education & Welfare, General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary School, (April 1965). See also *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965).

the population for purposes of allocating tax expenditures. It is to be noted, however, that examination of matters of equality of treatment by government normally are viewed as operating wholly within the jurisdiction of the governmental unit imposing the taxes that pay for the services. A taxpayer in one city cannot complain that he is being treated unequally if he receives less in the way of services than a resident of another unit, for though he gets less, presumably he is not called upon to pay for more. Accordingly he has suffered no unequal treatment. This doctrine was sometimes thought to rest upon an uncontrolled discretion on the part of the state to divide itself up and permit localities to manage their own affairs. In *Hunter v. Pittsburgh* in 1907<sup>43</sup>, a unanimous court refused to interfere with the annexation of a suburban community to the City of Pittsburgh at the instance of taxpayers of the annexed community who claimed that they had already expended large sums of money for local services that were not enjoyed by Pittsburgh, and if annexed would be called upon to help pay for the same services in other parts of the city, having already paid for their own. Mr. Justice Moody observed, "Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."<sup>44</sup>

Obviously, however, the power to subdivide and to delegate powers is not completely unlimited for most classifications *could* be framed as geographical. When the state has hidden behind geographical classifications to accomplish a forbidden end, the Courts have not hesitated to go behind the form of legislation to examine its intended and inevitable consequences. This matter is discussed at some length by Mr. Justice Frankfurter in the majority opinion in *Gomillion v. Lightfoot*.<sup>45</sup> There the state legislature had redefined the boundaries of a city so as to exclude almost all Negroes. Mr. Justice Frankfurter pointed out that in a number of cases the Court had struck down efforts to violate the contracts clause<sup>46</sup> by redefining municipal boundaries and abolishing units<sup>47</sup> and held that the state could no more violate the Fifteenth

<sup>43</sup> 207 U.S. 161 (1907). See Jo Desha Lucas, Dragon in the Thicket: a Perusal of *Gomillion v. Lightfoot*, 1961 Supreme Court Rev. 194, 239-243.

<sup>44</sup> 207 U.S. 161, 178 (1907).

<sup>45</sup> 364 U.S. 339 (1960).

<sup>46</sup> U.S. Const. art. I, § 10.

<sup>47</sup> See, e.g., *Mt. Pleasant v. Beckwith*, 100 U.S. 514 (1879). Other cases are collected in Lucas, *supra* note 43.

Amendment by geographical maneuvering than it could the contracts clause. In distinguishing *Hunter*, he noted that the only discrimination alleged in that case was that some people would pay more taxes than before or that as a collateral effect of the change in boundaries some property might be reduced in value, observing that the Constitution affords the citizen no guarantee that this will not happen. In a separate opinion, Mr. Justice Whittaker stated that he was hard put to it to see how the Fifteenth Amendment was violated, and thought that the decision should be grounded on the Equal Protection Clause. The violation of that provision he found in the "arbitrary fencing out" of Negroes from city services. Quite obviously, the doctrine of *Colegrove v. Green*<sup>48</sup> was much in the minds of all the members of the Court when the *Gomillion* case was decided.<sup>49</sup> Mr. Justice Frankfurter noted that the *Hunter* case involved rights under the Due Process Clause and Contract Clause and the decision should be limited to the clauses involved. This leaves open the question of whether geographical classification could ever violate the Equal Protection Clause. This matter was foreclosed in the later case of *Baker v. Carr*,<sup>50</sup> where it was held that geographical inequality in the weight given to the vote of resident citizens was a denial of Equal Protection. *Baker*, like *Brown v. Board of Education* before it, was followed by the establishment of an absolute right of equality in respect to the right that underlay the classification, that is to say a one man—one vote rule among qualified voters in the political jurisdiction to the governance of which the voting is directed.<sup>51</sup> It must be recognized, however, that there is no requirement of one man—one vote throughout the state. Thus there is no suggestion that the residents of unincorporated portions of counties have a right to vote for members of the representative bodies that govern the affairs of incorporated cities and towns within the the county. So, presumably, with benefits and burdens of government.

In cases in which there is no underlying right to precisely equal treatment, the Supreme Court has held early, often, and late, that mere discrepancies in treatment between geographical areas does not constitute a denial of

<sup>48</sup> 328 U.S. 549 (1946).

<sup>49</sup> Mr. Justice Frankfurter placed the case on the Fifteenth Amendment and therefore avoided any implication as to the effect of the decision on *Colegrove*. Mr. Justice Whittaker was careful to note that his reading of the Constitution as prohibiting the fencing out of Negroes did not touch the *Colegrove* doctrine. Mr. Justice Douglas noted his continued disagreement with the *Colegrove* decision.

<sup>50</sup> 369 U.S. 186 (1962).

<sup>51</sup> See *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Romand v. Sincock*, 377 U.S. 695 (1964); *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964). Cf. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

equal protection. The state is free to treat different areas differently, with an eye to their differences in situation, and with an eye to their desires. If this were not true all local government would have to be abolished and the states run totally from the state capital. The cases dealing with this question for the most part have been brought either by a taxpayer who has been included in a taxing district from which he claims he derives no benefit, or by a citizen of a geographical jurisdiction of the state who is treated differently from citizens in the state at large because the legislature has seen fit to enact a different rule for the locality in question, or has left the matter to local decision and a different rule has been adopted for local operation. Thus in *Missouri v. Lewis*<sup>52</sup>, in 1879, the appellant challenged the constitutionality under the Equal Protection Clause of a provision of the Constitution of Missouri creating a special court of appeals in St. Louis that was to hear appeals from the circuit courts in the City and County of St. Louis and in three other counties, with appeal from there to the Supreme Court of Missouri restricted to enumerated types of cases, while preserving that right of an appeal to the supreme court in cases arising in all the other counties of the state. Speaking for a unanimous Court, Mr. Justice Bradley wrote that the Equal Protection Clause does not require equal treatment of geographical areas as such. He preserved the question later adjudicated in *Gomillion*. "It is not impossible that a distinct territorial jurisdiction and establishment might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class would happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it." The principle of the *Lewis* case was reiterated in 1954 in *Salsburg v. Maryland*.<sup>53</sup> There the legislature in effect adopted the then "federal rule" on use of illegally obtained evidence in most places and most cases, but provided, *inter alia*, that the "common law rule" would apply in gaming cases in Anne Arundel County. The local option cases began with the gradual drying up of the country prior to national prohibition. In *Rippey v. Texas*,<sup>54</sup> in a short opinion by Mr. Justice Holmes, writing for a unanimous court, the Supreme Court held that conviction of appellant for selling liquor contrary to the vote of his precinct did not violate the Fourteenth Amendment. There seem to be no cases in which the argument is made that the fact that one locality provides a service that another does not violates the Equal Protection Clause except such cases as attack the taxes on the ground that the plaintiff, without benefit, is being included in the taxing (and spending unit) for the mere purpose of milking him for the benefit of

<sup>52</sup> 101 U.S. 22 (1879).

<sup>53</sup> 346 U.S. 545 (1954).

<sup>54</sup> 193 U.S. 504 (1904).

others. Such are the cases in which annexations are challenged by the owners of the land annexed.

In *Kelley v. Pittsburgh*, in 1881,<sup>55</sup> the owner of unplatted farm land annexed to the City of Pittsburgh, challenged the annexation as a violation of the Fourteenth Amendment. In sustaining the annexation, Mr. Justice Miller observed, "It is urged however, with much force, that land of this character, which its owner has not laid off into town lots, but insists on using for agricultural purposes, and through which no streets are run or used, cannot be, even by the legislature, subjected to the taxes of a city,—the water tax, the gas tax, the street tax, and others of similar character. The reason for this is said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use or might use them if they choose, while he reaps no such benefit . . . [citing state cases to this effect] . . . It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for construing the Constitution of the United States." The Court went on to hold that the taxes involved were taxes laid for a public purpose under *Loan Association v. Topeka*<sup>56</sup> and the arrangement of municipal boundaries in respect to their levy and collection was "clearly" a matter of detail within the discretion, and therefore the power, of the law-making body within whose jurisdiction the parties live. In 1958, in a similar case, the Supreme Court dismissed the appeal per curiam without opinion.<sup>57</sup>

More recent cases dealing with state and local expenditures are not inconsistent with these holdings. In *Griffin v. Illinois*,<sup>58</sup> Mr. Justice Black was careful to hold that the state of Illinois need not in all cases provide free transcripts, but might permit the indigent defendant to reconstruct the evidence through a bystander's bill or otherwise. The case goes no further than to say that the state may not provide an appeal and then make no provisions under which an indigent defendant can avail himself of it.<sup>59</sup> Even more to the point, in *Griffin v. County School Board of Prince Edward County*,<sup>60</sup> the Court did state that the phrase "deliberate speed" can no longer justify denying Prince Edward County school children their constitutional rights to an education similar to that afforded by the public schools in the other parts of Virginia. And it did instruct the district court to frame an order, "which will guarantee that these petitioners will get the kind of education that is

<sup>55</sup> 104 U.S. 78 (1881). See also *Forsyth v. Hammond*, 166 U.S. 506 (1897).

<sup>56</sup> See text accompanying note 18, *supra*.

<sup>57</sup> *Texas ex rel Pan American Production Co. v. Texas City*, 355 U.S. 603 (1958).

<sup>58</sup> 351 U.S. 12 (1956). See also *Smith v. Bennett*, 365 U.S. 708 (1961); *Lane v. Brown*, 372 U.S. 477 (1963).

<sup>59</sup> 351 U.S. 12, 20 (1956).

<sup>60</sup> 377 U.S. 218 (1964).

given in the State's public schools." This language must be read in context, however. The county had shut down its public schools in favor of a private educational system that was operated on pupil grants from the State and from the county. Earlier in the opinion, Mr. Justice Black reiterated the doctrine of *Salsburg v. Maryland* and stated that a state has a wide discretion in "deciding whether laws shall operate state-wide or shall operate only in certain counties, the legislature 'having in mind the needs and desires in each.'" He found that in the case before him there was only one reason, and that to permit the county to continue in its pattern of segregated education.

Despite the fact that the cases to date have continued to announce the rule that geographical inequalities are not such a violation of the Equal Protection Clause, and that there is nothing unconstitutional in permitting local determination of the level of spending for the services it wants, there has been a recent flurry of discussion about the probability that eventually the Court will hold that educational opportunity, like the vote, is a commodity that must be distributed equally state-wide, at least to the point of requiring dollar equality in educational expenditures. Some have progressed beyond this point to suggest that where there are personal or class inequalities that prevent some children from achieving the same results per dollar of public funds expended on them, the Constitution requires that differentials be maintained in their favor, so that the *product* of education will be equal. Thus a suit has been brought in Detroit attacking the educational tax support program of the State of Michigan on the ground that the state aid allocation formula does not allow for the higher cost of education in the urban community due to the need for special efforts in the "inner city" schools. In short, it seeks to prohibit equality per pupil and require a distribution based upon some need formula.

### 3. *State Courts and the Spending of State Money*

#### a. The "Public Purpose" Doctrine in the States

Most of the state constitutions contain some provision to the effect that private property may not be taken or damaged for public use without just compensation. In addition, many include provisions to the effect that the "aid and credit" of the state and of its municipalities may not be loaned to private parties. The first provision is no different, of course, from the last clause of the Fifth Amendment of the Constitution of the United States. Most also include the "due process" language of the Fifth Amendment, or some equivalent. The Fifth being read through the Fourteenth, at first blush it might seem that these "local fifth amendments" became anachronistic with the adoption of the Fourteenth, but their importance is not to be underestimated. The rule that the Supreme Court will not review a decision by a state supreme court when the decision rests upon an independent state ground results in the

finality of most state court decisions invalidating government action as a violation of due process.<sup>61</sup>

The development of the doctrine of "public purpose" in taxation seems to have begun with the middle nineteenth century public appropriations in aid of the railroads. In *Loan Association v. Topeka*,<sup>62</sup> Mr. Justice Miller noted that there were a number of state supreme courts that held that the railroad appropriations were outside the power of government, though conceding that a majority of courts had sustained them. He stated, however, that in all these cases, the courts that had sustained appropriations for purchase of railroad stock had done so on the ground that it was "public," and that none had suggested that the legislative power to tax was totally unlimited.

Recourse to the cases cited by Mr. Justice Miller suggests that the problem had arisen most often not with state taxation but with state statutes that permitted municipal corporations to levy taxes to pay bonds sold for the purpose of subscribing issues of railroad stock. In one of these cases, *State of Iowa v. County of Wapello*,<sup>63</sup> a case in which the Supreme Court of Iowa reversed other cases to the contrary and held that the county could not be empowered by the legislature to raise money by taxation to pay for a railroad subscription, the court predicates its opinion partially upon the fact that the benefit, if there is benefit, is too general. Not only this county benefits, but the whole state, observed the court, and that being the case, if it is to be called a "public purpose" by the legislature then the legislature could levy taxes itself and pay for the work out of the treasury of the state. The case is in a sense, then, put on the ground that there is no "municipal" or "local" benefit that would justify the legislature in empowering the local officials to saddle dissenters with the burden.

Nevertheless, these early state cases did suggest that even absent specific constitutional prohibitions, a financial exaction for private purposes, though clothed in the trappings of law and called a tax, was not a tax but simply a decree depriving the taxpayer of his property, and as such unconstitutional. In *Hanson v. Vernon*,<sup>64</sup> in Iowa in 1869, Chief Judge Dillon placed the unconstitutionality squarely on the due process clause.

There seems to be little doubt that this course of the law was influenced heavily by the disappointing results and mountain of debt that was left in the wake of municipal subscription of railroad stock. This fact is alluded to by Mr. Justice Miller in the *Topeka* case, and was certainly a factor in the reversal of position by the Iowa Supreme Court. In *Hanson v. Vernon*, Judge Dillon confessed the difficulties in determining what is a public purpose, and

<sup>61</sup> *Weaver v. Jordan* is an example. *Supra* note 1.

<sup>62</sup> 87 U.S. (20 Wall.) 655 (1874).

<sup>63</sup> 13 Iowa 388 (1862).

<sup>64</sup> 27 Iowa 28 (1869).

further, like Judge Lowe in the *County of Wapello* case, he confessed that he was not prepared to say that the legislature could not constitutionally decide that the building of a railroad was not such a purpose and take the cost of the work out of general taxation. The doctrine, as it developed, was, then, in response to abuses that the court felt were inherent in turning loose an unlimited power in the hands of local officials. Dillon pointed out that some states had been prompted by the railroad debts to amend their constitutions to require that any such delegation of power be accompanied by safeguards fixed by the legislature.

Without attempting to tie this view of the matter to the words of the constitution, there is a certain sense in a sliding scale of judicial review as one goes down in the governmental hierarchy. The Congress is so numerous, and the base of representation so broad, that it is less likely that it will act with the specific and private motives that might motivate the council in a small community. As a consequence, under the doctrine that recognizes the existence of judicial review, but limits the scope of review by creating a presumption of legislative good faith, it is not surprising that the courts should scrutinize the operation of a law the effect or substance of which has not been determined by the legislature itself but left to the discretion of smaller units with a more fishy eye than it would fix on general legislation. The railroad subsidy cases involved a delegation of authority to do the very act that was done. There is a level below this, of course, for delegations of authority are often much less specific. Further, the municipality may in turn delegate the filling in of detail to its administrative officials. Any detailed examination of cases dealing with judicial supervision of the exercise of these delegated powers, or subdelegated powers, is beyond the scope of this paper. To round out the general picture of control of expenditures, however, it may be stated that courts frequently read into statutory delegations, and into delegations to administrative officers, a "silent term of reasonable exercise," and interfere in cases in which they would abstain had the very act that was done been specifically authorized in the statute.<sup>65</sup>

#### b. Reasonable Classification and Equal Protection

What has been said of the state due process clauses can also be said of state constitutional provisions that deal with equal protection principles. Some state constitutions contain an equal protection clause as such. Some contain provisions against special and class legislation that have been held to require a similar brand of equality.<sup>66</sup> In some states, as has been noted, the state courts have interpreted constitutional provisions similar to the retained rights

<sup>65</sup> See E. Blythe Stason and Paul G. Kauper, *Municipal Corporations* 123, n.4 (1959), where the "reasonableness" rule is discussed at some length.

<sup>66</sup> See, e.g., Ill. Const. art 4, § 22 (1870).

language of the Ninth Amendment to the Constitution of the United States to permit the court to review classifications.<sup>67</sup> Some have based review on the state due process clause.<sup>68</sup> In one way or another state courts have often been more willing to review legislation as to its equality of effect than has the Supreme Court in recent years. Even in the state courts, however, very little limitation has been placed upon legislatures when the inequality alleged has been an inequality of benefit from public spending.

## THE ROLE OF THE COURTS IN SUPERVISING THE COLLECTION OF REVENUE

### 1. *The Federal Courts and Federal Taxation*

The public purpose doctrine has already been discussed in connection with the limitations imposed by the Constitution on federal spending. Nothing more need be said of it here, for normally the "purpose" of a tax is the expenditure to be made from its proceeds. This is not always true, however, for taxes may be imposed at a level that will have the effect of prohibiting the activity, thus raising no revenue at all, or it may be designed to deter the purchase of certain commodities by making them expensive. The characterization of a tax as a prohibition or regulation would lead, of course, to the question of whether the body imposing the tax also has the power to regulate or prohibit. At the federal level so long as the tax relates only to matters regulatable under the Commerce Clause, no constitutional question arises. If the tax applies to activities outside the power of Congress to regulate commerce, it has been supposed that Congress, having no power to regulate could not do so indirectly by levying a tax, and there have been occasional cases in which levies of taxes have been struck down as wholly lacking in revenue character.<sup>69</sup> On the other hand taxes that appear largely regulatory have frequently been upheld, the Court declining to look behind the tax for other motives.<sup>70</sup> Quite recently it has been held that taxes coupled with registration requirements cannot be employed to require that the taxpayer give evidence of his violation of the law.<sup>71</sup> Mr. Chief Justice Warren dissented, indicating that the decision put in jeopardy the whole developed system of regulation through taxation.<sup>72</sup>

Congress was empowered to lay and collect "taxes, duties, imposts, and

<sup>67</sup> See, e.g., Ill. Const. art 2, § 1 (1870).

<sup>68</sup> See, e.g., *Hanson v. Vernon*, 27 Iowa 28 (1869).

<sup>69</sup> See, e.g., *United States v. Constantine*, 296 U.S. 287 (1935) (special excise of \$1,000 for conducting malt liquor business without conforming to state law).

<sup>70</sup> *Sonzinsky v. United States*, 300 U.S. 506 (1937) (\$200 annual tax on dealers in firearms).

<sup>71</sup> *Marchetti v. United States*, 36 U.S.L.W. 4143 (1968); *Grosso v. United States*, 36 U.S.L.W. 4150 (1968).

<sup>72</sup> 36 U.S.L.W. 4154 (1968).

excises." Three limitations were imposed upon this general power. Duties, imposts and excises must be "uniform throughout the United States."<sup>73</sup> There may be no tax or duty upon "Articles exported from any State."<sup>74</sup> Capitation and other direct taxes must be laid "in proportion to the Census of Enumeration hereinbefore directed to be taken."<sup>75</sup>

It is notable that all these limitations deal with regional discrimination. So far as the people are called upon to support the federal government by direct taxation, the slave states were protected from contributing more than their share under the "one-three fifths-no Indian" formula of the Census Clause.<sup>76</sup> The "uniformity" required of imposts, duties, and excises was, presumably, geographical, rather than "uniformity" in the sense of reasonable classification as to subject or object and equality of rate within the class, and so it has been held,<sup>77</sup> the matter of tax uniformity in the latter sense being one of those matters that the founding fathers were willing to leave to the good judgment and good will of Congress. It is to be noted that the interpretation of the Fifth Amendment as including an equal protection principle was late in coming,<sup>78</sup> and the early federal tax equality cases were argued under Article I, section 8, rather than under the Fifth Amendment.<sup>79</sup> The relationship between the argument under Article I and the principle of equal protection was recognized by the court, however. In *Fernandez v. Wiener*,<sup>80</sup> for example, Mr. Justice Stone observed that the interpretation of Article I to require tax uniformity would impose upon the Congress a more rigid standard than that imposed upon the state legislatures under the Equal Protection Clause.<sup>81</sup>

## 2. *The Federal Courts and State Taxation*

### a. *The Due Process Clause*

As in the case of the Fifth Amendment, the Due Process Clause of the Fourteenth has already been discussed in connection with the limitation that taxation cannot be employed for private ends.<sup>82</sup> Aside from the limited use

<sup>73</sup> U.S. Const., art. I, § 8.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> U.S. Const., art. I, § 1.

<sup>77</sup> The latter requirement often appears in state constitutions. The state constitutional equality and uniformity clauses are gathered and discussed in Wade J. Newhouse, Jr., *Constitutional Uniformity and Equality in State Taxation* (1959).

<sup>78</sup> Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>79</sup> See *Fernandez v. Wiener*, 326 U.S. 340 (1945).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*, at 361.

<sup>82</sup> See text accompanying notes 61-65, *supra*.

to which it has been put in this context, it has had very little application to taxation of purely local subjects and objects. It has been employed from time to time to strike down taxes that impose burdens on transactions that cross state lines. An example of this use lies in the now much attenuated, if not altogether abandoned, effort of the Court to prevent multiple burdens on interstate transactions by attributing a situs to each transaction and holding that attempts to impose a tax upon it by a state other than the one in which it was situate violated the Due Process Clause as an excess of jurisdiction.<sup>83</sup> As *Pennoyer v. Neff*<sup>84</sup> has given way to *International Shoe*,<sup>85</sup> the focus of the Court has shifted from attempts to determine a single tax situs to the question of whether the connections between the state imposing the tax and the transaction taxed are sufficient to justify as a matter of fairness the exaction imposed. There are still occasional cases that strike down attempts to reach outside assets, but the trend has been away from federal intervention.<sup>86</sup>

#### b. The Privileges and Immunities and Equal Protections Clauses

The Privileges and Immunities Clause of the Fourteenth Amendment has played no role in curbing state taxation. Since it was held in *The Slaughterhouse Cases*<sup>87</sup> that it created no new rights of national citizenship, it has no application to the state's power to tax. The Privileges and Immunities Clause of Article IV, however, has been employed to require that individual outsiders be treated on equal footing with locals.<sup>88</sup> The matter is not of very great importance, since foreign corporations that have been given an unrestricted license to do business within a state have been covered under the Equal Protection Clause.<sup>89</sup> Between these two provisions, the Court has reviewed tax legislation calculated to discriminate against outsiders in favor of the local business man.

There are some few cases in the literature striking down state taxes on the basis of irrational classification without reference to outsider discrimination. Thus in *Quaker City Cab Co. v. Pennsylvania*,<sup>90</sup> the Court struck down

<sup>83</sup> See *Frick v. Pennsylvania*, 268 U.S. 473 (1925).

<sup>84</sup> 95 U.S. 714 (1877).

<sup>85</sup> *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

<sup>86</sup> See, e.g., *Curry v. McCanless*, 307 U.S. 357 (1939).

<sup>87</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>88</sup> See, e.g., *Toomer v. Witsell*, 334 U.S. 385 (1948); *Mullaney v. Anderson*, 342 U.S. 415 (1952).

<sup>89</sup> *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938). Cf. *Lincoln Nat'l Life Ins. Co. v. Read*, 325 U.S. 673 (1945). See John B. Sholley, *Equal Protection in Tax Legislation*, 24 Va. L. Rev. 229 and 338 (1938); John B. Sholley, *Corporate Taxpayers and the Equal Protection Clause*, 31 Ill. L. Rev. 463, 567 (1936-1937).

<sup>90</sup> 277 U.S. 389 (1928).

a tax on incorporated cab companies when unaccompanied by a similar exaction upon unincorporated units, and in *Steward Dry Goods Co. v. Lewis*<sup>91</sup> it struck down a gross receipts tax imposed at a graduated rate. Perhaps the most restrictive of these decisions was *Louisville Gas & Electric Co. v. Coleman*,<sup>92</sup> in 1928. There it was held in an opinion written by Mr. Justice Sutherland that a tax statute levying a tax on the recordation of mortgages maturing within five years was invalid in that it imposed no similar tax on the recording of longer term mortgages.

These decisions have never been overruled, and indeed the *Coleman* case was cited as late as 1959 by Mr. Justice Whittaker in his opinion in *Allied Stores of Ohio, Inc. v. Bowers*,<sup>93</sup> but they seem out of keeping with more recent decisions.<sup>94</sup> The most that can be said is that the Court has not repudiated its power to examine tax classifications for possible violation of equal protection. The standard of equality imposed, however, is very un-exacting indeed unless the classification is in favor of the insider. In the *Bowers* case, Justices Brennan and Harlan went so far as to suggest that there could not be a denial of equal protection when the discrimination was against locals in favor of outsiders. The clause in question was not designed to protect the wolves from the sheep.

### c. The Commerce Clause

This is not the place to do more than refer to the very large and complex body of case law dealing with the effect of taxation on interstate commerce. The problem must be mentioned, however, because in the general history of federal regulation of state taxation the decisions under the Commerce Clause, the Equal Protection Clause, and the Due Process Clause are highly inter-related. Thus a tax placed upon some incident, a multi-state transaction, can often be looked upon as a discrimination denying equal protection, as in *Wheeling Steel Corp. v. Glander*,<sup>95</sup> as a denial of due process as an effort to reach outside assets, as in *Union Refrigerator Transit Co. v. Kentucky*,<sup>96</sup> or as a burden on interstate commerce, as in *Fargo v. Hart*.<sup>97</sup>

In general, the cases under the Commerce Clause have followed those under the other clauses toward a more liberal view of the power of the state to reach assets with which they have some reasonably plain connection, and to classify subjects and objects for differences in treatment, leaving the

<sup>91</sup> 294 U.S. 550 (1935).

<sup>92</sup> 277 U.S. 32 (1928).

<sup>93</sup> 358 U.S. 522 (1959).

<sup>94</sup> Cf. *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937).

<sup>95</sup> 337 U.S. 562 (1949).

<sup>96</sup> 199 U.S. 194 (1905).

<sup>97</sup> 193 U.S. 490 (1904).

function of the federal courts one of screening out discriminations against outsiders.<sup>98</sup>

### 3. *State Courts and State Taxation*

Unlike the federal constitution, most state constitutions require in terms some form of tax equality and uniformity. In the property tax area, some require complete uniformity by valuation.<sup>99</sup> Others permit stated classifications only.<sup>100</sup> Still others permit classification of property without specific limitation.<sup>101</sup> In the nonproperty tax areas, virtually all constitutions require reasonable classification and equality within the class.<sup>102</sup>

The interpretation of these provisions has varied widely, but it is certainly fair to say that state courts often strike down excises as not uniform within the class when they would have been upheld by the Supreme Court of the United States as not violating the Equal Protection clause. In Illinois, for example, it was held that a tax on the occupation of selling tangible property at retail was invalid in that it exempted sellers of agricultural produce grown by the seller and sellers of gasoline on which the gasoline tax had been collected.<sup>103</sup> On the strength of this holding it is a widely held opinion that it would violate the constitutional provision to exempt sellers of food. The Illinois Supreme Court has liberalized its view in recent years,<sup>104</sup> and certainly most state courts would not take the equality requirement to such lengths.<sup>105</sup>

## THE CONSTITUTION AND BUSINESS REGULATION

Much that has been said about the judicial trends in the spending and taxing areas can be said of the Court's role in reviewing business regulation. For a relatively long period the Supreme Court sought to free the market from arbitrary regulations imposed by silly legislation.<sup>106</sup> This was done sometimes by recourse to the Due Process Clause.<sup>107</sup> Sometimes it was done under the Equal Protection Clause.<sup>108</sup> Indeed, since no regulation operates

<sup>98</sup> See, e.g., *American Oil Co. v. Neill*, 380 U.S. 451 (1965).

<sup>99</sup> See Newhouse, *supra*, note 77.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Winter v. Barrett*, 352 Ill. 441, 186 N.E. 113 (1933).

<sup>104</sup> See, e.g., *G. S. Lyon & Sons Lumber Co. v. Department of Revenue*, 23 Ill. 2d 180, 177 N.E. 2d 316 (1961).

<sup>105</sup> See Jerome R. Hellerstein, *The Scope of the Taxable Sale Under Sales and Use Tax Acts: Sales as Distinguished from Services*, 11 Tax Law Rev. 261 (1956).

<sup>106</sup> McCloskey, *supra*, note 5.

<sup>107</sup> *Id.*

<sup>108</sup> See, e.g., *Morey v. Doud*, 354 U.S. 457 (1957).

equally upon *all* business and *all* users of property, the question as to whether a particular requirement is constitutional often fits more comfortably under the latter than the former. It has been noted earlier that recent cases state that the Court will no longer consider the rationality or wisdom of federal or state legislation, and will restrict itself to the question of whether the regulation impinges upon some personal right under the less general provisions of the Constitution.<sup>109</sup> There is recent indication that "substantive due process" concepts are not a thing of the past so long as the right asserted is not merely economic. In *Griswold v. Connecticut*,<sup>110</sup> the Court struck down a state statute forbidding the use of contraceptive devices. There were five opinions. Mr. Justice Douglas, joined by the Chief Justice and Mr. Justice Clark, found a violation of the Due Process Clause. This was accomplished by interpreting the word "liberty" to include one's bedroom behavior. Mr. Justice White also believed that the Due Process Clause protects "liberties" in the bedroom, but looked upon such protection in such "sensitive areas of liberty" as a requirement that any regulation of them must bear a heavy burden of justification and must be drawn as narrowly as possible, so as to cause no more intrusion than necessary for the accomplishment of the legitimate objective of the statute. He found in the Connecticut statute neither justification nor a design that was calculated to serve any legitimate end. Mr. Justice Harlan took a broader view of the Due Process Clause. He read that clause to incorporate historical concepts of ordered liberty. Justices Black and Stewart dissented, finding in the Connecticut statute, silly as it was, no infraction of the Constitution. They would read the Fourteenth Amendment to incorporate the Bill of Rights and nothing more. Both the Douglas and Black opinions took particular care to make the point that the return to substance is not to be read as a return to review of the propriety of economic regulations.

In another line of cases, however, there is some suggestion that the impact of *de facto* thinking that is creeping into the legal battles over taxation and public spending has seeped over into the area of private economic activity. This line of cases begins with *Terry v. Adams*,<sup>111</sup> holding that the denial to Negroes of the privilege of participating in the election held by the Texas Jaybird Association, an organization created for the purpose of selecting candidates to run in the state Democratic primary, was a violation of the Fifteenth Amendment. The case was the culmination of a series of cases that had involved progressively more private methods of selection. In the *Terry* case the Court was faced with a totally undirected and unregulated selection of people who later filed individually in the primary election. But the *result* was the same as if the state had run the election. In a galaxy of

<sup>109</sup> McCloskey, *supra*, note 5.

<sup>110</sup> 381 U.S. 479 (1965).

<sup>111</sup> 345 U.S. 461 (1953).

opinions the Court was able to find sufficient action and inaction on the part of the state to satisfy itself that the election was state connected and that Negroes must be allowed to vote in this pre-primary primary.

The next in line are the sit-in cases. As a result of demonstrations throughout the country designed to desegregate public accommodations, there came to the Court a series of cases appealing convictions of persons who refused to leave the premises of private businessmen after being instructed to do so. The first set of these cases arose in the South, and the majority of the Court was able to find some connection between the action of the proprietor and some local ordinance. In *Lombard v. Louisiana*,<sup>112</sup> there was no such ordinance, but the Court, through Chief Justice Warren, rested its opinion on the fact that some of the city officials had made statements about their intention to prevent desegregation of the public facilities. In each of these cases, Mr. Justice Douglas took the position that places that serve the public are "affected by the public interest" and are therefore, by analogy to innkeepers at common law, under an obligation to offer their services without unconstitutional discrimination. No other member of the Court joined in these opinions.

The second set of sit-in cases were decided after statutes had been adopted prohibiting racial discrimination in public accommodations and the court was able to decide them on the ground that the subsequent statute must be applied retroactively to invalidate a previous conviction so long as the case was still pending on appeal.<sup>113</sup> In these cases, as well, Mr. Justice Douglas repeated this view. Again, he stood alone. Mr. Justice Goldberg, who agreed with four-fifths of the Douglas opinion, took occasion to disassociate himself from the "innkeeper" doctrine.

In *Reitman v. Mulkey*,<sup>114</sup> in 1967, the Court had before it the validity of a provision of the California constitution providing that the legislature could abridge the right of a property owner to sell or rent, or refuse to sell or rent his property to whomever he should choose. This provision, adopted by the voters in a state-wide election as Proposition 14 had the effect of nullifying statutes then in force that proscribed discrimination on racial grounds in the sale and rental of housing. The California Supreme Court had read the provision as intended to give state sanction to private discrimination. In an opinion by Mr. Justice White, the Court affirmed the California court. He was careful to state that the California court had not read the Supreme Court's decisions to mean that the state was obliged to pass such a law or that any repealer of anti-discrimination laws would be invalid. He was also

<sup>112</sup> 373 U.S. 267 (1963).

<sup>113</sup> See, e.g., *Bell v. Maryland*, 378 U.S. 226 (1963).

<sup>114</sup> 387 U.S. 369 (1967).

careful to state that *Lombard v. Louisiana* rested on the statements of public officials, repudiating by inference, Mr. Justice Douglas's concurring decision in that case. In a separate opinion, the latter repeated his view that persons engaged in business "affected by the public interest" were subject to the requirements of the Fourteenth Amendment, and added persons providing urban housing to the list.

### SUMMARY AND CONCLUSIONS

To date there seems to be very little support for the prediction that courts at the federal or state level are about to resume the function of appraising the rational quality of legislative impositions upon private economic activity, or to protect the free market, except as they may exercise a certain supervision over the efforts of smaller governmental units to create local advantages.

The question that is a pressing one today is whether this abstention from interference with legislative decisions stems from an abiding faith in the democratic process, or from a shift in judicial concern for protecting the individual's opportunity to seek his level in a competitive world to a concern for achieving economic leveling in fact. The Court has permitted a free legislative hand perhaps because it saw in increased regulation, taxing, and spending its vision of the "Great Society." It has become apparent, however, that for some the "Great Society" has not appeared. As a consequence, the Court is increasingly exhorted to interfere directly in the economic process to see that groups of "disadvantaged" are able to obtain the commodities that their television sets have taught them are their birthright. For a number of historical reasons the Court's move toward an order that "all shall equal be" has begun with the Negro, and with prohibition of the overt and public forms of discrimination. These can be approached with relatively simple and straightforward methods. As it has become obvious that prohibition of discrimination is not a very rapid cure for the situation in which Negroes find themselves, and just as obvious that there are "disadvantaged" who are not Negroes, the egalitarians are wooing the Court toward a declaration that the Equal Protection Clause decrees equality in fact, and efforts on the part of the state to adjust group inequalities are compellable by court order. Their appraisal of the Court is like Falstaff's view of Mistress Ford in *Die lustigen Weiber von Windsor*:

"Ein Weibchen, fängt es einmal Feuer,  
bleibt nicht so leicht auf halbem Wege stehn."

We can only cross our fingers and remember that Mistress Ford managed to preserve her honor.

