Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State

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VI. PUBLIC GRANTS, BENEFITS, AND SERVICES

Although the needs of the national economy and national security have vastly expanded the public sector, it is the direct underwriting of individual living standards and social services that characterizes the welfare state. Inevitably, conflicts between the views and objectives of the welfare state's political management and the views of some claimants to welfare state benefits have put in issue the constitutional limitations on the power to deny, withdraw, or condition such benefits. And inevitably, the cry of "constitutional rights" in public programs has been countered with the cry of "privilege." The arguments were already familiar when Mr. Justice Douglas joined the Court. But the growth of the welfare state since 1939 and the political pressures to exclude the unworthy from its earthly paradise have given the issue greater modern importance.

The doctrinal lines had been drawn in cases involving such classics of socialism as the post office, highways, and land-grant colleges. Among post-World War I cases sustaining the 1917 Espionage Act, when the first amendment received its first judicial debate through the dissents of Holmes and Brandeis, the Supreme Court in United States v. Burleson had affirmed the power of the Postmaster General to deny second-class mailing privileges to a Milwaukee paper because of its anti-war and socialist articles and editorials. To objections based on freedom of the press, the Court answered that the extremely low second-class rate was "a frank extension of special favors to publishers" by Congress, that it was open to appellant to "mend its ways, to publish a paper conforming to the law" rather than to carry on "this futile litigation, undertaken upon the theory that a government competent to wage war against its foreign enemies was powerless against its insidious foes at home," and that any injury to the paper was "the result of its own

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The first installment of this article included five parts: I. The Turn to the Public Sector; II. The Role of the Judge; III. Private Property and the Public Domain; IV. States' Rights in the Public Sector; V. The right to Work. 39 Wash. L. Rev. 4 (1964).

choice." Mr. Justice Brandeis protested that the government's postal power, like all others, was subject to the Bill of Rights and that the Court should not needlessly adopt a statutory construction raising grave constitutional questions. Mr. Justice Holmes, forsaking his earlier dicta about the power to condition privileges, agreed: "The United States may give up the post office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." To the dissenters, the Constitution placed on the government, not on the citizen, the burden of abandoning one objective for another, of acting within prescribed limits or not at all.

The "privilege" doctrine that let the United States Post Office deny cheap postal service as a means of press censorship would not let California claim that its ownership of highways was a basis for regulating motor carriers. The majority that had earlier told the Milwaukee Leader to mend its editorial ways if it wanted to use the government's mails now stated that, since the truck regulation would be unconstitutional if attempted directly, it would be a "palpable incongruity... to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." Holmes and Brandeis again

165 255 U.S. at 410, 416.
166 Id at 429-30. Besides citing the first, fifth, sixth and eighth amendments, Brandeis thought that arbitrary denial to one of a privilege that could be withdrawn from all would deny equal protection of the law, brought into the fifth amendment "due process" clause from the fourteenth amendment. He would not read the statute defining "unmailable" matter, which the Postmaster General might exclude completely, to give him discretion to refuse the second-class rate to a newspaper deemed mailable at higher rates.
167 Id. at 437.
168 Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593 (1926). "It is not necessary to challenge the proposition that... the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But... one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights," continued Mr. Justice Sutherland. Later he limited his Frost Trucking opinion to the exaction of conditions unrelated to protection of the highways. Stephenson v. Binford, 287 U.S. 251 (1932). Many early cases involved the power of states to make otherwise unenforceable demands of foreign corporations as a condition of admitting them to intrastate business, so that the issue became familiar in legal literature, see e.g., Merrill, Unconstitutional Conditions, 77 U. Pa. L. Rev. 879 (1920), Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935), Note, 73 Harv. L. Rev. 1595 (1960), French, Unconstitutional Conditions: An Analysis, 50 Geo. L.J. 234 (1961); but the extreme statement in Frost Trucking is interesting here because California's defense rested on the claim of state power over its public sector. More recently attention to "unconstitutional conditions" has focused on restrictions attached to public services and facilities that are claimed to violate specific guarantees of the Bill of Rights. An excellent study of much of the material in this section is Willcox, Invasions of the First Amendment Through Conditioned Public Spending, 41 Cornell L. Q. 12 (1955).
dissented, this time on the side of government.\textsuperscript{169} But in 1934 not one member of the Court doubted California’s power to condition admission to its state university upon compulsory participation in the R.O.T.C. without thereby invading fourteenth amendment rights of pacifist students:

California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and military education.\textsuperscript{170}

Four years later, Missouri found that a state’s power to place conditions on admittance to its university did not extend to excluding a Negro student who could claim the fourteenth amendment’s “equal protection” rather than its “liberty” of religious scruple.\textsuperscript{171} Whatever greater discretion the Constitution might leave the states in dispensing public benefits than in making laws, after 1938 it did not include explicit disqualification by race. Racial discrimination, however, is only the easiest illustration of a constitutional limit on governmental discretion in distributing public benefits and services. Disqualification from benefits may collide with other claims of constitutional rights beyond the equality of Americans of different racial or national origins. As in the case of public employment,\textsuperscript{172} these constitutional claims include the substantive freedoms of the first amendment and the guarantees of fair procedures, and they are no less controversial when asserted by claimants to government largesse than to government jobs.

And, as in the case of public employment, so in the growing dependence on the public sector created by the pervasive extension of public services and benefits, Mr. Justice Douglas has seen that liberty in the welfare state requires recognition of these constitutional claims.

In 1946 the Court had occasion to reexamine the issue of postal censorship when the Postmaster General denied second-class mailing privileges to Esquire magazine on the ground that some of its pictures and stories, while not obscene, were not devoted to the dissemination of public information, literature, science or the arts. Writing the

\textsuperscript{169} Mr. Justice McReynolds dissented separately. 271 U.S. at 602.
\textsuperscript{170} Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 262 (1934).
\textsuperscript{171} Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). The received learning about states’ rights in the use of public tax funds, Cummings v. Richmond County Bd. of Educ., 175 U.S. 528 (1899), Gong Lum v. Rice, 275 U.S. 78 (1927), appealed only to McReynolds and Butler, 305 U.S. at 353 (dissenting).
\textsuperscript{172} See Part V, 39 WASH. L. REV. 4, 31-46 (1964).
opinion in *Hannegan v. Esquire, Inc.* Mr. Justice Douglas began with the frank premise that the second-class privilege was a form of subsidy, worth $500,000 a year to Esquire. Nevertheless, he found that Congress did not, in describing the categories to be so favored, mean to assign the post office the function of judging the content of publications. This action would be economically equivalent to censorship. Since the Postmaster General was held to have misapplied the statutory standard to Esquire magazine, no constitutional issue was decided. But the opinion raised an explicit warning against reliance on government discretion to withhold a subsidy at will. Fraudulent or obscene material might be excluded from the mails, "but grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *United States v. Burleson.*"

It is the dissents from the *Burleson* doctrine of government discretion to withhold "special favors" that have survived as citations in modern opinions. In 1954 Mr. Justice Douglas, ruling as Circuit Justice on a motion for interim relief from official interception of mail under obscenity laws, cited the dissents when he suggested that Post Office power to intercept mail "touches basic freedoms" and might amount to an unconstitutional prior restraint or infliction of punishment. When the Supreme Court sustained criminal convictions for depositing obscene matter in the mails, Mr. Justice Harlan could assert in a dissent that "the hoary dogma... that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated." And when the issue of post office authority to exclude obscene materials upon its own administrative findings reached the Court, Douglas, with the Chief Justice, joined Mr. Justice Brennan's opinion denying such a statutory mandate to the Postmaster General; as in *Hannegan,* they saw in the suggestion that Congress might authorize administrative censorship by anything other than the stated findings referred to one of the statutory standards for second-class mail, 39 U.S.C. § 226 (1958).

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174 327 U.S. at 156. Mr. Justice Frankfurter, concurring, feared that the majority's dicta threatened "the freedom of society from constitutional compulsion to subsidize enterprise" and considered "the basis on which the Government may grant or withhold subsidies through low postal rates" a very different question from postal censorship. *Id.* at 160.


less than a "fully judicial" procedure the gravest constitutional doubts. Thus far, the expression of such doubts, and statutory constructions to meet them, have sufficed to avoid deciding either the substantive or the procedural constitutionality of postal discrimination against mail potentially within first amendment protection, just as these techniques have served in the employment area. But whatever may be the fate of the Congressional practice to deny postal service to disfavored mail, it will not escape constitutional scrutiny merely because a government service rather than government regulation of a commercial service is involved. The government may carry mail at a financial loss beyond the limits of what it may impose on a commercial carrier, but nothing can be kept out of the United States mails that Congress could not equally keep out of transmission, at least within reach of the federal commerce clause, by American Express or Western Union.

Constitutional issues could not be avoided when disqualification from social security benefits—the very heart of the welfare state—came before the Court in Flemming v. Nestor. Congress had left no room for statutory interpretation. Payments were to be withdrawn from any person who was deported from the United States because of illegal entry, conviction of a crime, or subversive activity. Nestor, a Bulgarian, had lived and worked in the United States continuously from 1913 until 1956. He was deported under the Internal Security Act of 1950 because he had been a member of the Communist party from 1933 to 1939, a period when this was neither unlawful nor an express ground for deportation. Thereupon the government told Mrs. Nestor, who remained in the United States, that her husband would receive no further social security payments, and Nestor appealed the constitutionality of

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177 Manual Enterprises v. Day, 370 U.S. 478, 498-500, 519 (1962). Of the seven justices participating, two voted to reverse the determinations of nonmailability on the merits; they thought that the issue of post office authority had been insufficiently raised and briefed for decision. Mr. Justice Black concurred in reversal without opinion. Mr. Justice Clark, dissenting, was saved from any constitutional doubts by agreeing that they were not brought to the Court.


182 42 U.S.C. § 402(n) (1959); see 363 U.S. 603 n.1; id. at 618 n.10; id. at 620 n.13.
this determination. In a five-to-four decision, the Supreme Court sustained the Congressional withdrawal of social security from the disfavored deportees against all attacks.

The constitutional objections were indignantly argued by the dissenters. Mr. Justice Black, a Senator when social security was enacted, would hold the program a contributory insurance plan giving rise to claims that could not be repudiated without compensation any more than a matured insurance policy. Quoting the then chairman of the Senate Finance Committee, he recalled that social security was presented, not as charity, relief, or a dole for retired workers, but as an earned right; to hold that the government "is merely giving them something for nothing and can stop doing so when it pleases... reveals a complete misunderstanding of the purpose Congress and the country had in passing that law." Mr. Justice Douglas agreed. "Social Security payments are not gratuities," he wrote, citing the use of a trust fund and the relationship of benefits to the amount of tax previously collected from the beneficiary. To him, the 1954 amendment was "a classic example of a bill of attainder... a legislative act which inflicts punishment without a judicial trial." He quoted Irving Brant: "Today's bill of attainder is broader than the classic form.... There is mental in place of physical torture, and confiscation of tomorrow's bread and butter instead of yesterday's land and gold." But the Court had in the past recognized disqualification from professions and from employment as "pains and penalties" equivalent to attainder.

Cutting off a person's livelihood by denying him accrued social benefits—part of his property interests—is no less a punishment. Here, as in the other cases cited, the penalty exacted has one of the classic purposes of punishment—"to reprimand the wrongdoer, to deter others."... Social Security benefits have rightly come to be regarded as basic financial protection against the hazards of old age and disability.... Could Congress on deporting an alien for having been a Communist confiscate his home, appropriate his savings accounts, and thus send him out of the country penniless?... The difference, as I see it, between that case and

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183 363 U.S. at 623. The insurance theory of social security, here relied on to claim a constitutional right to accrued benefits, has led others to claim a constitutional right to exemption from the program. The Old Order Amish of Pennsylvania, who have religious scruples against insurance, have refused to pay social security taxes, leading to some controversial episodes of enforced collection by the Internal Revenue Service in 1961. See Liberty, March–April, 1964, p. 7.

184 Id. at 631.

185 Id. at 629, citing Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) and Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867).

this is one merely of degree. Social Security benefits, made up in part of
this alien's own earnings, are taken from him because he once was a
Communist.\textsuperscript{187}

Together with the Chief Justice, Douglas also joined Justice Bren-
nan's dissenting argument that the 1954 disqualification, as applied to
one who left the Communist Party in 1939 and paid social security
taxes until 1955, was an \textit{ex post facto} law.\textsuperscript{188}

The majority of five offered its refutation of these charges in a dis-
play of Mr. Justice Harlan's technical facility worthy of a better cause.
Though the social security system is one of "social insurance" reflect-
ing a legislative judgment that productive workers have a just claim
on the economy in their later years, he wrote, still the employee's non-
contractual stake in the system is neither analogous to an annuity nor
an "accrued property right." Congress from the beginning reserved
in the law itself the power to alter, amend, or repeal any provision in
it. The disqualification of beneficiaries deported for illegal entry, crime,
or Communism (though not of all deportees) did not necessarily show
the kind of punitive design needed to invoke the constitutional prohibi-
tion against attainder and \textit{ex post facto} laws. Congress might have
thought that payments to individuals permanently residing abroad
would not serve the increase in consumer purchasing power that might
be one purpose of the social security program. For constitutional pur-
poses, "it is, of course, irrelevant whether this reasoning in fact under-
lay the legislative decision, as it is irrelevant that the section does not
extend to all to whom the postulated rationale might in logic apply."\textsuperscript{190}

In vain, Mr. Justice Brennan pointed out that the 1954 amendment
hinged the loss of social security not on the fact but on the grounds
of deportation, and that it was enacted in a national atmosphere no less
emotional and vindictive than that of the Reconstruction laws voided
in \textit{Cummings v. Missouri}\textsuperscript{190} and \textit{Ex parte Garland}.\textsuperscript{191} If a fictitious pur-
pose might have made a broader provision constitutional, the majority
would not hold the actual blow struck by Congress against a narrower
class to have none but punitive reason.\textsuperscript{192}

Nestor's plight was the more dramatic because Congress ended, first
his life in the United States, and then his retirement income in a strange

\textsuperscript{187} 363 U.S. at 630-32.
\textsuperscript{188} Id. at 634.
\textsuperscript{190} 71 U.S. (4 Wall.) 277 (1867).
\textsuperscript{191} 71 U.S. (4 Wall.) 333 (1867).
\textsuperscript{192} 363 U.S. at 609-21, 637-40.
and distant country, for acts which had been long past and completed. But the crucial constitutional problem of such congressional policies, in legislating for federal benefits and services, lies beyond the injustices of retroactivity. Suppose that a program required no contribution from beneficiaries, that Congress explicitly reserved the power to change the rules of eligibility, and that these were changed only with respect to future conditions within the potential claimant’s control. Disqualification for any cause would not, then, fit the ban on bills of attainder and *ex post facto* laws, yet would it be beyond all constitutional limitations? Significantly, even the majority in *Nestor* denied this, though it found no “accrued property rights” in social security. “This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint,” wrote Mr. Justice Harlan. “The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause.”

At the heart of the decision lies an inescapable judgment, couched in terms of “classification,” for or against the constitutional merits, not the timing, of depriving Communists of social security. Harlan himself would not evade this judgment with his speculations about a deportee’s failure to aid domestic consumption: “Nor, apart from this, 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.”

Thus the promised constitutional restraints were at once pushed to the outermost limits of “rationality” by invoking a special power of the purse. Yet what in the Bill of Rights would forbid legislation, for example, for the forfeiture of future commercial annuity policies or private pension rights upon deportation for Communism or crime, that does not equally apply to legislation for the forfeiture of G.I. Insurance, or social security, or of any publicly-financed benefit? Before the *Nestor* decision, Professor Harry Jones had told an international colloquium on the Rule of Law that “the reasonable expectations of a social service beneficiary are as meaningful for the rule of law as the interests of an owner of investment securities or real property.” The actuarial value of Nestor’s future

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social security benefits, at the time of cancellation, was $6000; it was not farfetched for Mr. Justice Douglas to compare their forfeiture to the expropriation of a savings account. But among the dissenters, Mr. Justice Black alone reached beyond the retroactive effects on Nestor to meet the majority's broader constitutional judgment on first amendment grounds.

Despite the majority's "see-no-evil" readiness, when facing a head-on collision with Congress, to find rationality in depriving political deportees of social security, Nestor did not leave in doubt the principle that constitutional rights limit the power of the purse as well as the power to regulate. The Court has firmly declared that principle both before and after Nestor, when mere states rather than Congress transgressed those constitutional limits. And both procedural and substantive constitutional guarantees have been applied to protect claims to government benefits. When California made property tax exemptions for war veterans and for churches conditional on filing an oath disclaiming advocacy of violent overthrow of the United States or California, the Court, in Speiser v. Randall, conceded that the state could construe the denial of exemptions narrowly to reach only taxpayers whose advocacy went beyond the bounds of the first amendment. Nevertheless, California's disclaimer requirement fell because it placed on the taxpayer the burden of proof that he was not in the class denied exemption. "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights," wrote Mr. Justice Brennan, "and the validity of the restraint may turn on the safeguards which they afford." In most cases, it is fair to place on the taxpayer

ican reaches retirement age with a whole bundle of interests and expectations: as home-owner, as small investor, and as social security "beneficiary." Of these, his social security retirement benefits are probably his most important resource. Should this, the most significant of his rights, be entitled to a quality of protection inferior to that afforded his other interests? It becomes the task of the rule of law to surround this new 'right' to retirement benefits with protections against arbitrary government action, with substantive and procedural safeguards that are as effective in context as the safeguards enjoyed by traditional rights of property in the best tradition of the older law." Jones, The Rule of Law and the Welfare State, 58 COLUM. L. REV. 143, 154-55 (1958).


197 Id. at 519, referring to Yates v. United States, 354 U.S. 298 (1957); First Unitarian Church v. Los Angeles, 357 U.S. 545 (1958). The Court held that, even though the exemptions might not have been granted at all, once they were available they could not be denied on the basis of the taxpayer's political expressions, citing Esquire and the Burleson dissents, notes 166, 173, supra, and Grosjean v. American Press Co., 297 U.S. 233 (1936), which had invalidated Huey Long's tax on the advertising receipts of 233 (1936), which had invalidated Huey Long's tax on the advertising receipts of Louisiana's major anti-Long newspapers.

198 357 U.S. at 526.
the burden to qualify for an exemption. But here exemption hinged on whether certain speech could or could not constitutionally be curtailed; if the taxpayer faced the task of convincing the authorities that his speech was privileged, the pressure toward caution would tend to inhibit lawful as well as unlawful expression. California's tax-exemption procedure infringed first amendment liberty even if its substantive standard did not. Only Mr. Justice Clark, dissenting, spoke of "the State's bounty" and "[refusal] of the taxing sovereign's grace in order to avoid subsidizing" revolutionary advocacy.\footnote{Id. at 543.}

Procedure was no issue when South Carolina applied a rule denying unemployment compensation to claimants voluntarily unavailable for work so as to disqualify a Seventh Day Adventist who would not work on Saturday. In \textit{Sherbert v. Verner},\footnote{374 U.S. 398 (1963).} the Court held this denial of compensation to abridge the claimant's freedom of religion. "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," the majority stated, once again through Mr. Justice Brennan. Nor could the rule be saved "on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege."\footnote{Id. at 404-05, citing Fleming v. Nestor, 363 U.S. 603 (1960), Speiser v. Randall, 357 U.S. 513 (1958), Wieman v. Updegraff, 344 U.S. 183 (1952), American Communications Ass'n v. Douds, 339 U.S. 382 (1950), and Hannegan v. Esquire, Inc., 327 U.S. 146 (1946). Though the withdrawal of Nestor's social security benefits had been sustained, the Court now distinguished it as a "quite different case" justified only by "compelling federal interests," 374 U.S. 409 n.9; compelling, of course, to a different majority from that in \textit{Sherbert}.} The inclusion of "expression" with religion seems natural enough, since both liberties are guaranteed by the same first amendment; yet this apparently artless dictum swept under the protection of that amendment claims to equality in the welfare state that are far more controversial than those of religious minorities. It extends the benefits of the democratic welfare state to those who abuse it, suspect its motives, and preach the need of its radical transformation. Legislators have been short-tempered with such claims of freedom, if not to bite, at least to bark at the hand that feeds one. As in the case of public employment, where we have seen the range of disqualification go from active espionage, through Communist party membership, mem-
bership in blacklisted "subversive" organizations, unrepentant past membership, refusal to take disclaimer oaths, and fifth amendment claims against investigation, down to failure affirmatively to prove one's loyalty, so also in distributing the bounties of modern social services the legislative reflex of the 1950's was to impose political tests of eligibility. And even more than in the hunt for subversive school teachers and subway conductors, that reflex would find it superfluous to seek justification in national security for the politically self-evident purposes of striking a symbolic blow against Communism and of refusing to support Communists with taxpayers' money.202 Thus legislators at all levels of government imposed political tests on college admissions, scholarships, public housing, unemployment compensation, even on drivers' licenses.203 Speiser v. Randall,204 however, made it clear that in withholding social benefits, no matter how "gratuitous," government has, if anything, less discretion to disqualify than in employment.205 And to drive home the point that political as well as religious disqualifications from benefits were forbidden by the first amendment, the Court in Sherbert added a note to the sentence quoted above in order to cite approvingly a series of lower court decisions holding such tests unconstitutional.206

The Sherbert opinion goes far to fortify the position of constitutional rights against government claims of discretion to withhold "privileges." An otherwise qualified beneficiary may not be put to a choice between abandoning either his public benefits or his constitutionally protected beliefs. A generation earlier, students at the University of California had similarly been put to a choice between forfeiting the benefits of a public education or abandoning their religious scruples against bearing arms in the R.O.T.C. Where did the 1963 Sherbert decision leave Hamilton v. Regents?207 As late as 1959, the Supreme Court had dis-


203 See, e.g., Willcox, supra note 168, at n.143-46.


205 The Court distinguished its decisions sustaining non-communist oaths for public or union offices as recognizing "some interest clearly within the sphere of governmental concern .... Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety." Id. at 527.

206 374 U.S. at 404 n.6. In addition to decisions of the supreme courts of California, Maryland, Illinois, and Wisconsin, the Court's footnote endorsed Steinberg v. United States, 143 Ct. Cl. 1, 163 F. Supp. 590 (1958), in which the Court of Claims had held unconstitutional an act of Congress (a section of the "Hiss Act," 68 Stat. 1142, 5 U.S.C. § 2282 (1954)) to cut off the annuity of any retired federal employee who, on grounds of self-incrimination, declined to testify with respect to his former government service. 207 Hamilton v. Regents of Univ. of Cal., 293 U.S. 243 (1934); see text accompanying note 170 supra.
missed per curiam, with the single citation of *Hamilton*, an appeal by conscientious objectors seeking to relitigate the issue of their right to continue their studies at the University of Maryland without participating in military training. The Maryland Court of Appeals had refused to consider *Hamilton* undermined by later Supreme Court opinions until expressly overruled, apparently with good reason. Only Justices Black and Douglas had dissented from the dismissal of the appeal. In 1963, despite the holding that a state could not disregard religious scruples in delimiting eligibility for social benefits, neither Mr. Justice Brennan's majority opinion nor the other three opinions in *Sherbert* mentioned *Hamilton*. But in another opinion on the same day, Mr. Justice Brennan indicated his own doubts of its status. Whatever that status may be with respect to military obligations imposed upon religious pacifists, *Hamilton* presumably would not permit a state university to exclude Seventh-Day Adventists who refused to attend Saturday classes.

Yet the fact that religious rather than secular first amendment rights were claimed in *Sherbert* raised additional issues. For if denial of unemployment benefits to a claimant who refused Saturday work by reason of her religion prohibited her free exercise thereof under the first amendment, might not the grant of benefits despite such a refusal support religion in violation of that amendment's establishment clause? Mr. Justice Stewart argued that to exempt from the "availability for work" requirement persons unwilling to work on a given day for religious reasons would run afoul of the establishment clause as interpreted in the Court's decisions on religion in the schools; since he disagreed

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210 Abington School Dist. v. Schempp, 374 U.S. 203, 250 (1963). Concurring in this decision against religious exercises in public schools, Brennan explained *Hamilton* as resting on "a very narrow principle," a strong and legitimate state interest in training a citizen militia justifying the imposition of military training as a condition upon voluntary attendance at a state university. "Hamilton has not been overruled," although cases on which it relied have been, he wrote. "But if Hamilton retains any vitality with respect to higher education, we [have] recognized its inapplicability to cognate questions in the public primary and secondary schools ...." Id. at 250-51.
with those decisions, he concurred in Sherbert.\textsuperscript{212} Justices Harlan and White, dissenting, believed that the state might not have violated its obligation of neutrality toward religion, had it chosen to recognize an exemption for religiously-motivated refusal of Saturday work, but that the state was not constitutionally compelled to single out Seventh-Day Adventists for financial benefits denied to others who might be unavailable for Saturday work for non-religious reasons.\textsuperscript{213} To these three justices, Sherbert seemed necessarily to overrule the Court’s 1961 holding that Sunday closing laws need not exempt Orthodox Jews who, for religious reasons, refrained from work also on Saturdays.\textsuperscript{214}

The dilemma, whether government must give special recognition to the claims of religion (to respect its “free exercise”) or whether it may not do so (to avoid its “establishment”), is implicit in the first amendment. It is hardly surprising that the Court has not arrived at a single formula to resolve every conflict that invokes these competing principles. Inevitably, the growth of the public sector has given enhanced significance and urgency to the competing claims and, outstandingly in the case of public support for church-related private education, has made them a major national issue. The emergence of education as the chief arena for church-state controversies in the United States, as it has long been in Western Europe, has been foreshadowed in the development of the Supreme Court’s modern case law under the first sentence of the Bill of Rights, a development that coincided with Mr. Justice Douglas’s years on the Court.

Religion in the Welfare State. The curtain was rising on a dramatic chapter in the Court’s struggles with the first amendment as Mr. Justice Douglas came on stage. On the day he took his seat, having first sworn to discharge his duties agreeably to the Constitution and laws, “so help me God,” the Court sustained without opinion the constitutionality of a Massachusetts compulsory flag-salute law over the religious objec-

\textsuperscript{212} 374 U.S. at 414-17 (1963).
\textsuperscript{213} Id. at 422-33.
\textsuperscript{214} Braunfeld v. Brown, 366 U.S. 599 (1961). There was no majority opinion on Braunfeld’s claim under the free-exercise clause, Justices Frankfurter and Harlan writing a concurrent opinion, Mr. Justice Douglas dissenting, and Mr. Justice Stewart joining the dissent of Mr. Justice Brennan, the subsequent author of Sherbert. The justices participating in the majority in both Braunfeld and Sherbert were Black, Clark, and the Chief Justice. In his dissent in the Sunday closing cases, Douglas quoted Seattle’s Rev. Allan C. Parker, Jr., to support his conclusion that the choice of the Christian majority’s Sunday as a compulsory day of rest was an unconstitutional establishment as well as a burden on the “free exercise” of minority religions who worship on another day. McGowan v. Maryland, 366 U.S. 420, 378-81 (1961).
tions of Seventh-Day Adventists, citing *Hamilton v. Regents.* Within a year, a contrary decision by lower federal courts compelled full-dress review. In an opinion by Mr. Justice Frankfurter, the Supreme Court held that Pennsylvania could require daily flag salutes from public school children as means toward "promotion of national cohesion" and "to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious," without having to exempt Jehovah's Witnesses. Only Mr. Justice Stone dissented. Three years later, he was joined by five brethren in overruling that decision in *Board of Education v. Barnette.* But Mr. Justice Jackson's new majority opinion in *Barnette* did not claim any special religious exemption for the protesting minority. Under the first amendment government may not compel anyone to an affirmation of a belief or an attitude of mind by symbolic ritual any more than by words. If it was remarkable that the unconstitutionality of compulsory patriotic exercises should be announced in the middle of a great war, recollection of what the war was against weighed heavily in the decision. "We live by symbols," Mr. Justice Frankfurter had written in 1940. "It mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader." "Compulsory unification of opinion achieves only the unanimity of the graveyard," wrote Mr. Justice Jackson in 1943. "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." Of the new majority, two were recent appointees, but Justices Black, Douglas, and Murphy had reversed their position since 1940 and felt impelled to elucidate beyond merely concurring in the Jackson opinion. Mr. Justice Douglas joined in Black's explanation that, on reflection, their strong views against imposing due process review on state regulatory policy were inappropriate to a first amendment case. But unlike the majority's broad first amendment premises of general freedom from compulsory

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ideological utterance, with possible overtones even from the establishment clause, their concurring opinion stressed the religious liberty of the dissenting Jehovah’s Witnesses. Mr. Justice Frankfurter, in a dissent restating his earlier views, forecast the difficult implications of the Court’s assumption of judicial responsibility for such future issues as Bible reading in public schools and free textbooks or transportation for parochial school students.

The Court has evaded the difficulties Frankfurter sought to avoid. In 1947, in *Everson v. Board of Education*, it sustained the constitutionality of state-paid bus transportation of students to non-profit private schools which, in practice, meant parochial schools. Mr. Justice Douglas joined Mr. Justice Black’s opinion to make a bare majority of five. The following year, in *McCollum v. Board of Education*, eight Justices agreed that the Constitution forbade religious instruction by private denominational teachers in the public schools for students whose parents requested this “released time” while other children stayed at their regular studies. Douglas again joined Black’s majority opinion. But in 1952, it was Mr. Justice Douglas, writing for the majority in *Zorach v. Clauson*, who led the retreat from the Court’s effort to separate church and public school. In perhaps his least happy constitutional opinion, he distinguished New York’s program under the establishment clause—“This ‘released time’ program involves neither religious instruction in public school classrooms nor the expenditure of public funds”—and the free exercise clause—“no one is forced to go to the religious classroom... A student need not take religious instruction.” A footnote disposed of the crucial point on which analysis of the protesting students’ claims under both clauses must turn—the practical differences between “released time” and “dismissed time”—by a grudging reading of the facts: “Nor is there any indication that the public schools enforce attendance at religious schools by punishing absentees from the released time programs for truancy.” If any child could leave the school, to go home or to play the pinball machine at the corner drugstore, released time would be constitutional; the

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220 Id. at 643.
221 Id. at 659-61. Justices Roberts and Reed, also dissenting, stood by the *Gobitis* opinion. Id. at 642.
223 333 U.S. 203 (1948). There were two concurring opinions; Mr. Justice Reed dissented.
225 Id. at 308.
226 Id. at 311 n.6.
Zorach record did not show otherwise. It seems unlikely that this is what New York and the sponsors of released time had in mind. But it was clear which premises of the opinion were in the footnotes and which in the text: "We are a religious people whose institutions presuppose a Supreme Being," wrote Douglas. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."

That same year, Mr. Justice Douglas had been prepared to reach the issue of Bible reading in public schools, but the Court had denied that taxpayers had standing to prosecute an appeal to the Supreme Court though a state court had decided against them on the merits. It bought the Court a ten-year delay. But in the school prayer and Bible reading cases of 1962 and 1963, the Court reached the constitutional decision that devotional exercises could not be incorporated in the instructional program of public schools. Mr. Justice Douglas wrote concurring opinions in both cases. In both he found the forbidden establishment in the fact that public funds were spent to support a religious exercise. He chose to meet head-on the implications of this premise in the politically most visible analogy, the religious invocations customary in government itself.

[The] teacher who leads in prayer is on the public payroll; and the time she takes seems minuscule as compared with the salaries appropriated by state legislatures and Congress for chaplains to conduct prayers in the legislative halls. Only a bare fraction of the teacher's time is given to reciting this short 22-word prayer, about the same amount of time that our Crier spends announcing the opening of our sessions and offering a prayer for this Court. Yet for me the principle is the same...for in each of the instances given the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution.

\[227\] [Ibid. The New York courts had refused a trial on the factual issues; Mr. Justice Douglas accepted this "adequate state ground." \textit{Id.} at 311 n.7.]

\[228\] \textit{Id.} at 314. The opinion evoked dissents by Justices Black, Frankfurter, and Jackson, the last exceeding even his characteristic intemperateness: "The distinction attempted between [\textit{McCollum}] and this is trivial, almost to the point of cynicism.... Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law," \textit{id.} at 325. Between the two "released time" decisions, Justices Clark and Minton had replaced Murphy and Rutledge of the \textit{McCollum} majority, Burton and Chief Justice Vinson made the swing with Douglas.


Repudiating his vote as the fifth member of the *Everson* majority that sustained free bus tickets for parochial school students, since its theory would equally support publicly paid school lunches, books, or tuition, Douglas retrospectively endorsed the Rutledge dissent. Money, not coercion, established churches in the welfare state; he italicized it the next year: "The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools." Furthermore, he spelled out his view that no public facilities or funds may "in any way" add to the strength that churches derive directly from their members, even if the public support is allocated to church activities separable from religious exercises as such.

Another article in the *Washington Law Review* has surveyed Mr. Justice Douglas' position on religion from *Jones v. Opelika* to *Schempp*, and the same ground will not be covered here. The present study reviews not so much the specific limits of constitutional rights but, rather, their position in the public sector. The question is whether the guarantees of liberty remain the same when the welfare state provides public benefits and services as they are when government seeks to regulate private conduct by law. To pose in this manner the problem of the "establishment" and "free exercise" of religion can help separate what should be irrelevant from that which is difficult in the constitutional decision. Immaterial to Hamilton's complaint was the fact that it was a state university in which California made R.O.T.C. compulsory. As far as the first amendment is concerned, California's power must be tested by whether it could require military training of students at all colleges, private as well as public. When West Virginia undertook to compel the flag salute at public schools, it must be prepared to defend its constitutional power to require the same at private schools, 

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232 Id. at 443; Mr. Justice Douglas had already indicated in 1961 that he was prepared to reconsider *Everson* in voting to note probable jurisdiction when the Court dismissed an appeal from a Connecticut parochial school transportation case, Snyder v. Town of Newtown, 365 U.S. 299 (1961).


234 316 U.S. 584 (1942).

though it might not in fact do so. When the constitutional question is thus posed, some apparently difficult answers become almost self-evident. New York or Pennsylvania have broad authority over the curriculum that will satisfy the standards of a compulsory school attendance law, but would anyone argue that these standards could have included a requirement of the "Regents' Prayer" or daily Bible readings for all schools, private as well as public, without falling afoul of the establishment clause?

However, by focusing on a sharply distinct issue of financial "establishment" beyond any question of compulsion on dissenters—whether explicit, as in the Sunday closing or the flag salute cases, or through social pressure, as claimed in the released time and school prayer cases—Douglas moved the frontier of judicial debate toward confrontation with the real dilemma of religion in the welfare state; for it has become the essence of the welfare state to pursue social goals with money rather than with laws. It is not surprising that much of the public outcry following the prayer decision was directed at the implications drawn in the Douglas concurrence. Of course it is a fair criticism that to focus on the pay of public school teachers who lead prayers appears to seize upon a trivial rather than a real constitutional interest. No doubt scheduled prayers in public schools led by unpaid, outside volunteers are equally an "establishment." And the mere broad statement of a doctrine against financial support of religion "in any way" scarcely conceals an economist's nightmare of unresolved problems of application and of protection for the "free exercise" of religion. If a community may not pay the bus fares of parochial school students, must a municipal transit system plan of free rides for children exclude or include

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283 A Comment, Private Tutoring, Compulsory Education and the Illinois Supreme Court, 18 U. Ctr. L. Rev. 105 (1950) reviewed some of the other constitutional difficulties courts have seen in delimiting state control over education, citing, inter alia, State v. Coulter, 69 Wash. 361, 124 Pac. 910 (1912). Apart from the deprivation of a private economic stake in education, a factor in the mid-nineteen-twenties due-process jurisprudence of Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Farrington v. Tokushige, 273 U.S. 284 (1927), any constitutional liberty of parents and of children that might be claimed against a state-prescribed course of study in private education [e.g., evolution in Biology, sex education in Health—cf. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943) (Frankfurter dissenting)] could equally be claimed to excuse public school children from the same courses in public schools. Of course private schools may voluntarily pursue religious studies and exercises that the public schools may not; the stated test for the public sector is not what the private sector is free to do but what government could constitutionally require it to do.


such students? Surely the mere form of ownership of public transit facilities should make no more constitutional difference here than in the employment or "captive audience" cases. If the source of capital and operating funds were alone decisive, would the establishment clause be violated when a state university-based educational television station broadcasts a religious program, but not when the Federal Communications Commission requires a private station to set aside time for religious broadcasts in its program schedule? And what about opportunities for the free exercise of their religion for those isolated within the public sector—not only in the military forces and veterans’ hospitals, but in state institutions, county hospitals, Indian schools? Could N.A.S.A. ground stations broadcast Sunday sermons to astronauts on their way to the moon?

Despite obvious difficulties, Mr. Justice Douglas has, nevertheless, chosen in his concurring opinions to emphasize the issue of finance as the central question of the constitutional position of religion in an expanding public sector. "Establishment" can be avoided only by keeping churches, their ceremonies, their proselytizing and educational programs, and their financing in the private sector. This emphasis is realistic although it discloses as many dilemmas as it resolves. But its implication is also plain. In a society that separates church and state, religion must depend on the maintenance of a strong and prospering private sector within which individuals, in order to exercise the freedom

239 See Everson v. Board of Educ., 330 U.S., 1, 17 (1947). The construction of such problems happily occupies constitutional law scholars in commenting on first amendment cases and in writing examination questions; e.g., if the community cannot build a gymnasium for use by students attending parochial schools, must it deny them free admission for group swimming lessons at a municipal pool? Can a parochial school teacher assign her class outside reading in books to be obtained from the public library? Perhaps her students may go for examinations by a public health nurse or dentist but the latter not visit the parochial school. Yet current experiments toward designing "shared time" schemes make such speculations far from academic.


241 Concern about religious establishment through financing and through public education is not a recent discovery but was expressed quite specifically by the draftsmen of state constitutions in the nineteenth century, under which state courts have long imposed even more stringent separation of church and state than the United States Supreme Court. See, e.g., Wash. Const. art. 1, § 11, amended in 1904 and 1958 specifically to permit the employment of chaplains for inmates of state institutions; art. 9, § 4; Visser v. Nooksack Valley School Dist., 33 Wn.2d 699, 207 P.2d 198 (1949) (no school bus travel to parochial schools), State v. Showalter, 159 Wash. 519, 293 Pac. 1000 (1930) (no Bible study in public schools), State v. Frazier, 102 Wash. 369, 173 Pac. 35 (1918) (no public school credits for private Bible study); cf. Dickman v. School Dist. 62C, 232 Or. 238, 366 P.2d 533 (1961) (no public text-books for parochial schools). On a recent phenomenon raising issues of religious minorities in institutions, see Comment, Black Muslims in Prison: Of Muslim Rites and Constitutional Rights, 62 Colum. L. Rev. 1488 (1962); Brown, The Developing Criteria for Judicial Review of Complaints of Religious Discrimination Against Black Muslim Prisoners, 32 Geo. Wash. L. Rev. 1124 (1964).
guaranteed them by the first amendment, are able to direct resources into channels closed to the state.

And private resources must be available for direction not only into channels closed by constitutional interdiction, but also those closed by political choice. The establishment clause makes the corollary of a flourishing and decentralized private sector most compelling for the position of religion, but it is hardly less realistic for the position of the other first amendment freedoms. For, unlike the case of religion, government is free to support scientific study, creative publication, and the dissemination of critical opinion or artistic expression. But how much, except for the existence of private resources, can the first amendment do to assure a hearing to ideas which government deems unworthy of support by the public sector? President de Gaulle decrees that the Voice of France may be heard over the state's broadcast network but not the voices of the opposition. For the unorthodox writer or artist in Eastern Europe, censorship may no longer mean peril to his personal security, but, instead, only a lack of commissions from state orchestras, film producers, public construction projects, or rejection slips from state publishing houses faced with "paper shortages"—and from the standpoint of the administrators, their selections may not be censorship at all but the prudent and responsible use of limited public resources. In such a market painters will turn out socialist realism for the public museums and hang their abstract expressionist experiments in each others' homes. We need not point so far afield. U.S. Government grants can be expected to sustain study of electronic miniaturization but not electronic music, of modern Chinese economics but not medieval Chinese poetry; and the American use of political tests for both teachers and scholars has already been discussed in this article. A McCarthy committee can stir righteous indignation by disclosing that the United States Information Service buys for overseas libraries books which have been written by authors who could not have passed a government security check. To qualify for the national schoolbook market, almost completely in the public sector, a text must pasteurize and homogenize the facts of American history, society, and language in deference to the regional, religious, racial, and nationality sensitivities of countless school board members, taxpayers, and self-appointed vigilantes of the public funds. A court may order that taxes be collected and spent on

public schools to assure the equal protection of state laws; but could it find, under the first amendment or the fourteenth, that a book has been excluded for constitutionally impermissible reasons from a public library, whether of a county school or of the U.S.I.S., and substitute judicial criteria of selection for those found invalid?

In securing the affirmative exercise of first amendment freedoms, we thus encounter limits on constitutional rights in the public sector, legal limits in the case of religion, and practical limits in the areas of secular opinion or creative expression. As concerns the distribution of grants, benefits, or services by reasonably objectifiable criteria—social security, welfare, access to public housing, hospitals, and schools—the developing judicial doctrines can meet the interrelated constitutional claims that correspond to those discussed in the preceding section on the right to work. The first amendment claim not to be disqualified for unorthodoxy of opinion falling short of validly forbidden conduct, the claim to fair procedures in determining disqualification, and the claim that eligibility for the benefits of the welfare state—increasingly essential to whole generations before they qualify to enter the labor market, while they are in it, and after they leave it—not be denied by standards and procedures that could not constitutionally be applied in government regulation of the private sector. In *Sherbert v. Verner* the first of these claims, against disqualification for unorthodoxy, seems to have been written into constitutional law. As to the second claim, when a person's interest in the public sector has once been held entitled to the guarantees of the equal protection clause or the first amendment in the face of the state's defense of "discretion" and "mere privilege," can that same interest long be denied the constitutional guarantees of fair procedures? Such guarantees for a stake in public acts often labeled "gratuities," in grants, benefits, and services as well as in employment, licenses, and contracts, are a main frontier of today's constitutional law. Once the fourteenth amendment's substantive standard of equality had compelled a state to extend the service of a university education to a qualified student, its procedural standard of due process would apply to withdrawal of that service by expulsion. In two recent studies, Charles Reich has pointed out...
that virtually everyone's stake in the modern public sector is economically, and should be legally recognized as, akin to the forms of "property" which the eighteenth century thought essential to individual liberty; and that government methods of control may invade constitutional liberties as ruthlessly in administering the welfare state as in enforcing the penal controls over private conduct which were the historic premise of American constitutional guarantees.\textsuperscript{248} Might not the third claim, against arbitrary disqualification, lead to the development of a constitutional requirement of relevance similar to that expressed by Mr. Justice Douglas for the right to work in \textit{Beilan} and \textit{Barsky}\textsuperscript{249}

But even judicial demarcation of all these claims could secure that constitutional frontier only against disqualification from social benefits granted in terms of general categories. How could courts assure affirmative rights to effective self-expression of the kind whose very individuality makes it the special ward of the first amendment and simultaneously places it beyond any objectifiable criteria of eligibility for public support?


\textsuperscript{249} Reich, \textit{The New Property}, 73 Yale L.J. 753 (1964), \textit{Midnight Welfare Searches and the Social Security Act}, 72 Yale L.J. 1347 (1963). \textit{Beilan v. Board of Pub. Educ.}, 357 U.S. 399 (1958); \textit{Barsky v. Board of Regents}, 347 U.S. 442 (1954). See 39 Wash. L. Rev. 4, 38-40 (1964). In Speiser v. Randall, 357 U.S. 513, 527-28 (1958), the Court held that disclaimers of disloyalty had greater relevance to a genuine governmental interest in the employment cases than in withholding a benefit such as tax exemption; see note 205 supra. In an opinion as circuit justice, Mr. Justice Douglas has suggested that "A doctor might well go to prison for a misdeed in connection with his practice and yet not automatically lose his right to practice medicine. Deprivation of a professional license should require a hearing, since broader issues than those in the criminal case are involved, \textit{e.g.}, whether the misdeed is of a character to make it unsafe and improvident for the State to entrust a medical license to that person," citing Reich, supra, note 248. Rehman v. State of California, 85 Sup. Ct. 8 (1964).
A generation after Burleson and Hamilton, the public sector daily offers concrete illustrations for such abstract speculations. As this article is written, the U. S. Naval Academy reaffirms compulsory church attendance for its midshipmen. The local press reports the battle in a nearby school district over the removal and subsequent reinstatement of The Catcher in the Rye in the school library. The U. S. State Department worries about the selection of paintings for an exhibit representative of American art. The University of Oregon has pioneered in the adoption of a new student discipline code that approximates the procedural safeguards of Oregon’s Administrative Procedure Act, only to find it at once jeopardized by external demands for University sanctions against off-campus offenses; yet if the state may constitutionally withhold educational (or other social) benefits as a form of punishment for unrelated misconduct, what in the Constitution would keep a state from equally disqualifying the offender from private education? If a rubber check artist is a bad risk for a B.S. degree from State, he is a bad risk for a B.S. from a private college; the fourteenth amendment may not prevent state-imposed disqualification from the private degree, but if it does, the constitutional limitation should equally govern the state college. Again, the proper constitutional test for State is not what a private college might be free to do, but what government might constitutionally prescribe for it; and again, for the student’s claim to share in the welfare state courts can develop workable criteria of relevance. But the University of Oregon has recently suspended publication of a literary magazine after protests against its publication of some offensive poetry. The state could not have censored or suspended a private periodical, but what constitutional doctrine or what judicial remedy could assure a poem an affirmative right to publication in a state college magazine—or this article in the Washington Law Review? Such questions will become increasingly relevant as literature and the arts win the kind of support from the public sector already familiar in Europe and elsewhere outside the United States, for theatres, art galleries, orchestras, perhaps even the broadcast media, as well as through the existing public libraries and educational institutions,

252 To what extent states may prescribe standards for private education, cf. Comment, supra note 226.
their university presses and educational TV channels. Perhaps answers can be sought in the diffusion of management within the public sector and the deliberate insulation of its cultural activities from the main arenas of politics. But experience shows such insulation to be fragile at best, and it is in any case not constitutionally required. The political managers responsible for the public sector, whether on a school board, in a legislature, or in the Kremlin, will continue to feel obliged to judge books bought or published with public funds, statues and murals commissioned for public buildings, the men who staff the universities or cultural centers.

In the end, the first amendment's freedoms of religious and secular diversity and dissent find their economic guarantees in a diversified and diffused private sector, where courts can protect constitutional liberty by stopping rather than by compelling government action, applying the great negatives of the Bill of Rights in their 18th century context of negative government rather than having to translate them into positive commands to the 20th century positive state. This translation is not impossible: "The Bill of Rights does not say... what government must give, but rather what it may not take away," Mr. Justice Douglas wrote in *Barsky v. Board of Regents,* concerning government withdrawal of the right to work, whether in public or private employment.

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253 Eric Larrabee recently reported:

"The most conspicuous of all dissimilarities between the positions accorded culture on two sides of the Atlantic is the European custom of governmental subsidy... It takes various forms, from grants to individual writers (as in Italy) or aid to artists and musicians (as in France) to the partial underwriting of the expenses of publishing (as in Austria and Greece) and direct subsidies covering the major costs of theaters and operas (as in West Germany in particular but nearly every other nation as well). West Germany spent $67 million in 1960 to meet two thirds of the budgetary needs of 128 theaters and operas... At the same time, in Great Britain the Arts Council makes grants to Covent Garden, Sadler's Wells, the Old Vic, and so on; while in France the Ministry of Culture subsidizes the Opéra, the Opéra Comique, the Comédie Française, the Théâtre Nationale Populaire, the Théâtre de France, and dozens of other regional and private theaters. The result is a fantastically lessened burden to the ticket buyer." But he went on to point out: "What distinguishes America on this point is the reluctance to be committed as to what is, and is not, art. Our separation of church and state, which implies a certain reverence, is matched by a separation of culture and state which implies a certain respect... The trouble with Europe's generosity to art, judged by American standards, is that it subsumes a frozen definition of what art, or indeed culture, is... Who is to decide? Often the choice is made by bureaucrats, as in Italy, where the writers to receive grants are picked by officials in the equivalent of the American copyright office, and, so it is said, novelists such as Silone and Moravia have never been among those selected. The Establishment giveth, the Establishment taketh away." Larrabee, Transcripts of a Transatlantic Dialogue, Daedalus, Winter 1964, 468-70. A California court has recently held government subsidy of a film of a religious parade to be forbidden by the establishment clause. County of Los Angeles v. Hollinger, 221 Cal. App.2d 154, 34 Cal. Rptr. 387 (1963); see also Ezer, Book Review, 11 U.C.L.A.L. REV. 174 (1963).

But the answer he gave to the Marxist thesis that the ownership of production determines all cultural and intellectual life was the mixed economy of the Human Welfare State.

"By communist standards [a] state that encourages free enterprise or pluralism in economic organization, or free speech or religion, or any of the earmarks of an independent people must be destroyed," he said in 1949. "We place our faith in a society that preserves greatest possible freedom for the individual yet secures the masses in their basic needs."255

VII. LIBERTY IN PUBLIC PLACES

The issues of constitutional rights in employment, and in government benefits and services, are equally present when government owns or finances real property. Land—streets, buildings, parks—is among the simplest and oldest forms of the public sector. When a school board makes rules for the schoolhouse, is it landowner or government? The premise is as decisive here as for its relationship to its teachers and students.256 And as before, we begin with an assumption that public property may be managed at government discretion like private property, and we end with a rule that public funds, public regulation, or the performance of public functions may bring even "private" property under constitutional restraints.

Once again, the conventional premise had become classic through being announced by Judge Holmes in Massachusetts. William F. Davis challenged as unconstitutional an ordinance prohibiting "in or upon any of the public grounds, any public address... [without] a permit from the mayor," under which he was convicted for making a speech in Boston Common. "The argument to that effect involves the same kind of fallacy that was dealt with in McAuliffe v. New Bedford,"257 wrote Holmes. "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."258 The United States Supreme Court affirmed in Davis v. Massachusetts,259 largely in reliance on Holmes's opinion. The state's power "to absolutely exclude all right to use,

256 See 39 WASH. L. REV. 4, 39 (1964) and note 247 supra.
257 155 Mass. 216, 29 N.E. 517 (1892).
259 167 U.S. 43, 48 (1897). For the subsequent views of Mr. Justice Holmes and others on "unconstitutional conditions," compare notes 167, 168 supra.
necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.”

But the Court to which Mr. Justice Douglas was appointed forty years later was not concerned whether the citizen on the public grounds was there by a property right or by special invitation. In 1938 it had unanimously decided that an ordinance requiring written permission from the city manager to distribute literature was void on its face. Douglas took his seat in April 1939, too late to participate in Hague v. C.I.O. which had been argued in February. The decision cast doubt on the continued validity of Davis v. Massachusetts when it rejected the contention of Jersey City officials, as stated by Mr. Justice Roberts, that “the city’s ownership of streets and parks is as absolute as one’s ownership of his home, with consequent power altogether to exclude citizens from the use thereof,” a power they had used to drive C.I.O. spokesmen from public streets, parks and buildings. During the next five years, the Court opened the streets to the exercise of first amendment freedoms over a variety of local restraints. These freedoms were seen as confronting the community’s powers to maintain public order rather than its interests as the owner of public “property,” and only narrowly defined police controls, without official discretion over the purpose or content of the privileged activity, were sustained.

When the city of Dallas invoked Davis to claim an absolute power over its streets, the Court replied, “[T]his same argument, made in reliance

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260 Id. at 48.
262 307 U.S. 496 (1939).
263 Id. at 514. There were three separate majority positions, divided on the applicability of the privileges and immunities clause of the fourteenth amendment, but there seemed to be agreement on Mr. Justice Roberts’s statement: “We have no occasion to determine whether, on the facts disclosed, the Davis case was rightly decided, but we cannot agree that it rules the instant case.” Id. at 515. Only Mr. Justice Butler, dissenting, argued for sustaining Jersey City’s ordinance on the principle of Davis, id. at 533. In Saia v. New York, 334 U.S. 558, 561, n.2 (1948), Mr. Justice Douglas cited Hague as stating the majority’s view of Davis.
upon the same decision, has been directly rejected by this Court” in *Hague v. C.I.O.*

The issues continued to be posed in terms opposing regulation for public order against freedom from discretionary or prior restraints on speech, rather than in terms of management of public real estate, when the pendulum swung the other way after 1949. Yet when the controversy moved from the street into the parks, *Davis* proved not to have been finally laid to rest. In *Fowler v. Rhode Island*, Mr. Justice Douglas wrote for the Court: “[M]uch of the oral argument and most of the briefs have been devoted on the one hand to a defense of the *Davis* case and on the other hand to an attack on it. . . . We are invited by appellant to overrule it; we are asked by respondent to reaffirm it.” But he continued, “We put to one side the problems presented by the *Davis* case and its offspring.” Pawtucket, Rhode Island’s ordinance could be invalidated for discrimination against Jehovah’s Witnesses as compared to other religious denominations. In the following month, the Court held that even a wrongful denial of a permit to use a public park, under a nondiscriminatory requirement similar to that sustained in *Cox v. New Hampshire*, afforded no constitutional immunity from prosecution. Mr. Justice Douglas, with Mr. Justice Black, argued in dissent that the holding sanctioned a previous restraint. But even the majority opinion rested the validity of the permit requirement on the limited objectives of “peace, order and tranquility” and “comfort

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266 Jamison v. Texas, 318 U.S. 413, 415-16 (1943).
268 345 U.S. 67 (1953).
269 Id. at 68-69.
270 This admission by counsel for Rhode Island brought the case within Niemotko v. Maryland, 340 U.S. 268 (1951).
272 Id. at 426.
and convenience" in the use of the grounds, unrelated to any judgment concerning the speaker or his speech; *Davis* was not mentioned.\(^{273}\)

Public order is a legitimate concern of government on private as well as on public land. Are the constitutional limits less stringent when government denies the right to speak on public property than on private? The community as landowner has an additional, managerial role in allocating public property fairly to competing users, consistent with its intended function and its physical and economic preservation. Apart from discrimination among users, controlled by the equal protection clause, such practical needs of public order and functional management, rather than any absolute rights of ownership, delimit the authority of government to withdraw its property from uses protected by the first amendment. The community may not ban all public speech and religious pursuits from its streets and parks; does the first amendment also open public buildings to all comers willing to comply with reasonable rules of time, space, and conditions of use?

In 1946 the California Supreme Court, while retaining the traditional premise that "the state is under no duty to make school buildings available for public meetings," found the denial of first amendment freedoms rather than equal protection to be the vice in a statute that denied "subversive elements" the use of school buildings as "civic centers."\(^{274}\)

"Since the state cannot compel 'subversive elements' directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building," wrote Justice Traynor.

The convictions and affiliations of one who requests the use of a school building as a forum is of no more concern to the school administrators than to a superintendent of parks or streets if the forum is the green or the market place. . . . The state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable.\(^{275}\)

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\(^{273}\) *Id.* at 405-07.


The Supreme Court of the United States has avoided occasions for endorsing this logical extension of its decisions. When the New York courts sustained the discretion of its boards of education to grant the use of a schoolhouse to a group or to deny it on the ground that it might lead to controversy and "dissatisfaction and criticism" in local opinion, the Court granted certiorari but after two arguments voted 5-4 (Mr. Justice Douglas among the dissenters) to dismiss the writ as improvidently granted.\(^{276}\) And the Court denied certiorari when the California Supreme Court, after reaffirming its constitutional doctrine, sustained a revised requirement limited to an advance statement disavowing illegal use of the school building.\(^{277}\)

The community may not deny freedom of speech in public places. But what are public places, and what is the community? Two cases reaching the Court midway in its course between the trailbreaking opinions of the early 1940's and the second thoughts of the 1950's showed that the answer does not depend on title to property.\(^{278}\) In each, a Jehovah's Witness had been convicted under state law for refusing to leave property on notification by the owner. The property in each, however, was a "company town," owned, building, streets, and all, in one case by the Gulf Shipbuilding Corporation, in the other by the federal government. Though the rules had been made by the owners, not the states, the convictions were reversed. It might have been easy to hold that the federal government, at least, could no more than any state, make rules driving religious or other proselytizers from its streets. But the Court first held that even private ownership would not sustain such ground rules for land whose use in fact met all other characteristics of a community, a "typical American town;" the federally-owned village was treated as only another kind of company town.\(^{279}\) The Court rejected Alabama's contention, as stated by Mr.

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\(^{276}\) Ellis v. Dixon, 349 U.S. 458 (1955). The New York judge had written: "The Board is presumed to have knowledge of local conditions, and to know the sentiment of the taxpayers and voters in the district. Assuming that a proposed use is in itself legitimate, a Board of Education may still find that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request, the granting of which would result in dissatisfaction and criticism. . . . The objects and purposes of petitioner's organization [The "Yonkers Committee for Peace"] . . . and the proposed subject of the forum discussions, impress this court as being of an essentially controversial nature." Ellis v. Dixon, 118 N.Y.S.2d 815, 817 (1953).


\(^{279}\) While holding in Tucker that "the . . . difference . . . that here instead of private
Justice Black, that "the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests... Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." Was it the fact that Alabama had "permitted" a corporation to operate a town, or that it had lent its criminal enforcement to the private landowner's exclusion of itinerant preachers, which constituted the "state action" required to invoke the fourteenth amendment? Mr. Justice Black's opinion clearly implied the former. The question was soon to become crucial in defining the public sector in which that amendment would establish constitutional rights.

Two New York decisions a year apart exemplified the problem. In 1948 the New York Court of Appeals unanimously held that the Metropolitan Life Insurance Company, unlike Gulf Shipbuilding's Chickasaw, could make and enforce regulations barring Jehovah's Witnesses from the hallways of its 129-acre, 171-building, 35,000 resident apartment project in the Bronx. That court, however, split four to three in sustaining the same company's right to exclude negro tenants from another vast apartment project, built as part of a New York City redevelopment plan with the aid of tax exemptions and the power of eminent domain. In each case Mr. Justice Douglas announced that he would have granted certiorari.

corporation, the Federal Government owns and operates the village... does not affect the result," Mr. Justice Black's opinion suggested that national security reasons might perhaps justify isolating the inhabitants of a federal defense installation from free access by outsiders. Id. at 520. Presumably such a justification of controlled access would not be weighed differently whether the community real estate were owned by the federal government, by a defense or Atomic Energy Commission contractor, or by individual homeowners incorporated as a conventional town.


284 Dorsey v. Stuyvesant Town Corp., 339 U.S. 981 (1949). Compare Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433 (1948), distinguishing Marsh v. Alabama on the ground that the proposed distribution of religious literature "was not on streets, sidewalks or other public or quasi-public places, but inside of, and into, the several floors and inner hallways of multiple dwellings." 79 N.E.2d at 436.

Meanwhile, *Shelley v. Kraemer*\(^{285}\) showed that state court enforcement alone would unconstitutionally involve government in even clearly "private" landowners’ restrictive housing arrangements when exclusion by race rather than free speech was the issue.\(^{286}\) And after the school desegregation decision in 1954 had held racial segregation itself to be inherently discriminatory, that holding was at once extended to public parks, beaches, golf courses, court rooms, and other publicly-owned community facilities.\(^{287}\) Once the powers of ownership had been thought to give government discretion like that of the private homeowner to exclude the unwanted visitor from its grounds;\(^{288}\) now it was seen that the more government owned, the more it was responsible for respecting constitutional rights. Even claims of public order and fear of violence, sometimes sufficient to override freedom of speech, would not be balanced against the Negro’s right to equal access to public places.\(^{289}\) The open issue became what degree of governmental property interest, financial support, or regulation would suffice to bring the segregated territory into the public sector. Thus the fourteenth amendment compelled desegregation of restaurants leasing their premises from a state-owned parking building\(^{290}\) and from a municipal airport.\(^{291}\)

Mr. Justice Douglas agreed when the Court found government ownership to entail compliance with constitutional guarantees. But for him, ownership was only one criterion of what is "public." When the Court first reversed "sit-in" convictions in Louisiana on the ground that the orderly and peaceful presence of Negroes at lunch counters was no evidence of "disturbing the peace,"\(^{292}\) Douglas, unpersuaded by this limited holding developed his own constitutional view while concurring: "If these cases had arisen in the Pacific Northwest—the area I know best—I could agree with the opinion of the Court. . . . [but in] the environment of a segregated community I can understand how the mere

\(^{285}\) 334 U.S. 1 (1948).


\(^{288}\) See text accompanying notes 258, 259 *supra*.


presence of a Negro at a white lunch counter might inflame some people,” he wrote. But though restaurants “are private enterprises, they are public facilities in which the States may not enforce a policy of racial segregation. . . . Restaurants, though a species of private property, are in the public domain.” He found the reason in a restaurant’s function, for which it is licensed and regulated by the state. “Access by the public is the very reason for its existence,” another Douglas concurrence argued in 1962.

Business, such as this restaurant, is still private property. Yet there is hardly any private enterprise that does not feel the pinch of some public regulation—from price control, to health and fire inspection, to zoning, to safety measures, to minimum wages and working conditions, and to unemployment insurance. When the doors of a business are open to the public, they must be open to all regardless of race if apartheid is not to become engrained in our public places.

He would also hold states to assuring Negro travelers access to public accommodations, not only as a right entitled to equal protection, but as an incident of national citizenship.

Mr. Justice Douglas would recognize that in the modern economy, favorable government decisions—such as liquor licenses, property zoning, government guarantees of construction loans, leases or franchises in airports, national forests, or public buildings, contracts to serve government installations—often represent more important wealth to entrepreneurs than their own investment in land, brick, or fixtures, just as he would recognize the property value of Nestor’s social security expectancy. What is “public” and what is “private” property depends on function more than on title. Yet whatever lesser involvement by government may suffice to invoke the guarantees of the Constitution, a fortiori they must be observed by government itself as “owner” in managing public property. To protect the liberty of Negroes in public places, the Court has left the theory of Davis v. Massachusetts far be-

hind, as it left behind the theory of McAuliffe v. New Bedford.\footnote{298} and Heim v. McCall.\footnote{299} Far from giving government greater discretion, public ownership carries into the management of property the constitutional restraints that bind government generally. In the use of public places, as in employment and in social benefits, the principle appears most evident when it strikes at racial discrimination. But though the equal protection clause may be the most obvious of constitutional limitations, it has no unique status that would make it the only such restraint.

Against the federal government, freedom from racial discrimination itself must be subsumed under the more general "liberty" which, by the fifth amendment, may not be denied without due process of law.\footnote{300}

Liberty also includes observance of other constitutional restraints, as the welfare state brings more and more important categories of real estate—public housing, hospitals, schools and colleges, parks, military and civilian installations, and the federal lands—into the public sector.

Doubtless Mr. Justice Douglas would not apply his dictum that "[T]he power of Congress over public lands...is 'without limitations' " to meet a claim based on one of the specific guarantees of the Bill of Rights.\footnote{301} For it is on public property that much of modern life is lived. Could a state, as landlord of college dormitories, deny a student’s freedom from search and seizure, or make him waive it as a condition of admission?\footnote{302} Can public schools systematically open and search students' lockers for pilfered property, if police could not do the same in a private school? Where does the hospitalized veteran have freedom of speech, unless he can mount his soapbox somewhere on the grounds of the veterans' hospital to harangue his fellows on the iniquity of the Veterans Administration? The proper constitutional test of reasons for restricting his speech (or an ensuing parade) there is whether the same reasons would or would not sustain, over first amendment

\footnotesize{\bibitem{298} Mass. 216, 29 N.E. 517 (1892). See 39 WASH. L. REV. 31-32 (1964).}
\footnotesize{\bibitem{299} U.S. 33 (1915).}
\footnotesize{\bibitem{300} FPC v. Idaho Power Co., 344 U.S. 17, 21 (1952); see 39 WASH. L. REV. 4, 18 (1964). Permission for the Idaho Power Co. to build transmission lines across public land could be conditioned on carrying Bonneville power over those lines. Could similar permission for Western Union be conditioned on not carrying "indecent" or "subversive" transmissions disfavored by Congress? Compare Douglas's view of the postal power, Hannegan v. Esquire, 327 U.S. 146 (1946), note 174 supra.
\bibitem{301} Cf., with respect to the residents of the state’s jails, Lanza v. New York, 370 U.S. 139 (1962). Mr. Justice Douglas believes the fourth amendment protects against unreasonable searches and seizures for other governmental objectives than criminal prosecutions; see his dissents in Frank v. Maryland, 359 U.S. 360, 374 (1959) (health inspection of home), Abel v. United States, 217, 241 (1960) (deportation); thus its standards would govern searches that led only to eviction from a public housing unit or a college dormitory.
objections, the same government restriction of speeches or parades at private hospitals. We have seen that it was the right, not only to equal protection, but to free speech itself that opened the public streets to such dissemination of ideas and opinions. The limits of this right derive solely from the needs of traffic and public peace and order, irrespective of discrimination or arbitrary discretion, whether the agitators are union organizers, Jehovah’s Witnesses, or Negro freedom marchers.\footnote{Hague v. CIO, 307 U.S. 496 (1939); Edwards v. South Carolina, 372 U.S. 229, 235 (1963), recognizing a peaceful protest rally at the site of state government as “an exercise of these basic constitutional rights [of speech, assembly, and petition] in their most pristine and classic form” and distinguishing Feiner v. New York, 340 U.S. 315 (1951), on the absence of threatened violence; Henry v. City of Rock Hill, 375 U.S. 6 (1963); Fields v. South Carolina, 375 U.S. 44 (1963).}

Why should the principle not be the same for all government real estate, for parks and beaches, for public housing projects and college campuses, though the limits derived from their distinctive characteristics, functions, and necessary conditions of use might differ?\footnote{To avoid misunderstanding: The present point is that, against an objection under the first, fourth, or fourteenth amendments, the validity of a governmental restraint in a publicly-owned place depends on whether government could, under the same conditions, and over the same objection, validly impose the same restraint in a similar privately-owned place. It leaves aside claims against land-use controls based on the private owner’s property rights under the due process and just compensation clauses; government does have greater discretion in the public sector than in the private to the extent that it may not unconstitutionally impose economic loss on the private owner. Compare note 180 supra, and 39 WASH. L. REV. 4, 11-13 (1964). A noisy political campaign song might constitutionally be silenced on the sidewalk in front of a hospital—or if it moves to a private lot across the street. Even a civil rights parade might be fined for trampling flower beds in a public park—or in a private park. If the United States Forest Service can exclude billboards from national forest roads even when Foster & Kleiser substitutes appeals to attend church for the usual advertisements of gasoline or toilet tissue, it must be because the first amendment would not preclude billboard control on privately-owned roadsides. Conversely, a government cannot refuse the use of a publicly-owned hall if (apart from any issue of the owner’s property rights) its closing of an identical privately-owned hall to the same use under the same circumstances would violate freedom of speech or assembly; thus, valid reasons must be of a kind (safety, reasonable hours, adequate staffing) that permit government regulation of private theatres, school rooms, or other places of public assembly. In this view, the California Supreme Court was right and the New York court wrong about a school board’s duty, under the first amendment and quite apart from discriminatory administration, not to refuse the public use of a school auditorium except for reasons that would equally support government restraints on the use of a private school auditorium. See notes 274-77 supra. This is a different issue from whether the private landowner may impose additional restrictions forbidden to government, or whether the law may permit and aid him to do so, discussed supra at notes 278-95; but in a logical extension of Mr. Justice Douglas’s realism about what is “public” and what is “private,” the constitutional rules for both issues would merge. Cf. his opinions in Garner v. Louisiana, 368 U.S. 157 (1961); Lombard v. Louisiana, 373 U.S. 267 (1963); and Black v. Cutter Lab., 351 U.S. 292 (1956).} Mr. Justice Holmes himself would probably find only the same, and no greater, reason why the most stringent protection of free speech would not protect a man in falsely shouting fire in a publicly-owned as in a private theatre. If the auditorium rented for Terminiello’s Chicago...
appearance had belonged to the city rather than a private landowner, could he have been evicted, even though he could not be convicted, by the standards which Mr. Justice Douglas found inconsistent with the first amendment? Not long ago the University of Oregon was the object of much unsought publicity when it let the Communist spokesman Gus Hall speak to students on the campus. Could the University exclude him from the campus unless its reasons would equally justify the state from prohibiting his appearance on any college campus?

Establishment Revisited. There remains, in examining such a principle for public places, the question to what extent it is limited by the first amendment's proscription against an establishment of religion. That question, which has proved so difficult with respect to public education and other social benefits and services of the welfare state, has not so far caused comparable difficulties with respect to the use of public real estate.

From Lovell and Cantwell to Kunz, Niemotko, Fowler, and Poulos, Jehovah's Witnesses and an occasional other street preacher have successfully insisted on a right to proselytize in the public streets and parks which, if no greater, at least has not been held to be less than that of various secular prophets. When Saia v. New York permitted one such missionary to use a sound truck to broadcast his message into a public park, Mr. Justice Jackson once raised in dissent the establishment issue that had just been decided in McCollum v. Board of Education, the first released-time case: "Only a few weeks ago we held that the Constitution prohibits a state or municipality from using tax-supported property 'to aid religious groups to spread their faith.'... Today we say it compels them to let it be used for that pur-

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305 Terminiello v. Chicago, 337 U.S. 1 (1949) ("breach of the peace" defined to include speech stirring public anger, dispute, unrest, or a disturbance.)

306 Hall was invited by students; the question is not one of university sponsorship but only of access to the university's grounds and structures. Advance attacks caused increasing interest until Hall's appearance, originally scheduled for a moderately-sized room, filled the football stadium, where it took its course in peace and good order. Eugene Register-Guard, Feb. 13, 1962, p. 1. Other campuses of the Oregon state system of higher education split on permitting Hall to appear. Recently the University of Washington and the University of California have acted to modernize their rules concerning speakers on campus. See generally Van Alstyne, Political Speakers at State Universities: Some Constitutional Considerations, 111 U. Pa. L. Rev. 328 (1963); Pollitt, Campus Censorship: Barring Speakers From State Educational Institutions, 42 N.C. L. Rev. 179 (1963).

307 See text accompanying notes 200-241 supra.

308 See text accompanying notes 261-73 supra and KURLAND, RELIGION AND THE LAW ch. 6 (1962).

309 334 U.S. 558 (1948).

310 333 U.S. 203 (1948).
pose. In the one case the public property was appropriated to school uses; today it is public property appropriated and equipped for recrea-
tional purposes." But his attack was directed at the Court's protec-
tion of loudspeakers in general, not at letting religion share with secular speech the platform of the public grounds. And since the licensing ordinance on its face placed uncontrolled discretion in the chief of police, Mr. Justice Douglas, for the majority, held it void as a previous restraint on any kind of expression protected by the first amendment. Would the question of "establishment" remain quiescent though the public property involved were buildings, or though it were given to a more frequent and regular religious use than a sporadic street parade or prayer meeting in a park? Would the government that obeys the first amendment when it permits a Communist to speak in its public auditorium, violate the first amendment if it lent the same auditorium to an evangelist's rally—or if it refused to lend it? Is the Eugene school board wrong to rent its school buildings to congregations for regular Sunday services pending construction of their own churches?

In McCollum, Mr. Justice Black had indeed found the use of public school buildings for religious purposes to fall under the ban against financial "establishment" which the free bus rides in Everson v. Board of Education had so closely escaped, and Mr. Justice Douglas in Zorach v. Clauson, had duly noted the absence of such use in sustaining an otherwise comparable released time program. But in both opinions the context suggests that it was the reality of the public school as a community institution that gave substance to the references concerning the community's investment in bricks and chairs. The public school uniquely represents the community to children. To permit the use of the school house for adult assemblies, without regard to their religious or secular subject matter, is not the same as, for instance, to make it the site of a regularly scheduled Sunday school.

311 334 U.S. at 569.
312 330 U.S. 1 (1947).
313 Black had coupled "the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council;" the vice was that "not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery." McCollum v. Board of Educ., 333 U.S. 203, 209, 212 (1948). Douglas recited it as a single distinction in Zorach: "In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction." 343 U.S. at 315 (1952). Black, dissenting, saw no difference between the systems "except for the use of the school buildings," and invoked the last quoted passage from his McCollum opinion to show that this was not the important factor. 343 U.S. at 316.
Public ownership cannot alone decide the issue between "establishment" and "free exercise" of religion, when tested against the hypothesis that the community may own all the relevant real estate. The establishment clause would seem to mean, at least, that government may not build a church. Yet, may government in fact refuse to furnish a building for church services where it has a monopoly of all buildings or where people are precluded from leaving them, as in military camps or in state institutions? Freedom of religion does not give churches immunity from the zoning of private land uses, but zoning that left no room for a church anywhere in the community would surely raise a different question. The first amendment should leave the state, as landowner, as much but no greater power to exclude churches than as government. Thus, the federally-owned village which, according to Tucker v. Texas could not deny Jehovah's Witnesses the use of its streets to preach at the doors of its government-owned houses, presumably could not deny the use of some suitable government-owned building for the indoor worship of a more conventional denomination. "The question is not what government must give, but rather what it may not take away."

While the use of public buildings for religious purposes may involve interests of real substance, however, as a stimulant of civic controversy over "establishment" it cannot match the placing of religious symbols on public grounds. The year's hottest public debate in Eugene, Oregon, arose from some private volunteers' construction of a large cross in a hillside public park visible for miles; a more widely recurring form of this issue was compromised by a decision to move the next Christmas

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314 Mr. Justice Reed, the sole dissenter in McCollum, argued that even less than a monopoly of land made use of public buildings for religious instruction reasonable and cited the precedent of chapels at the service academies: "Metropolitan centers like New York usually would have available quarters convenient to the schools. Unless smaller cities and rural communities use the school building at times that do not interfere with recitations, they may be compelled to give up religious education. . . . When actual church services have always been permitted on government property, the mere use of the school buildings by a non-sectarian group for religious education ought not to be condemned as an establishment of religion." 333 U.S. at 252, 255.

315 The Court dismissed such a claim for want of substantial federal question, Corporation of the Presiding Bishop v. Porterville, 338 U.S. 805 (1949).

316 In Berman v. Parker, 348 U.S. 26 (1954), Mr. Justice Douglas had treated regulation and taking for public use or for resale as equivalent tools of government. See 39 Wash. L. Rev. 4, 11-13 (1964). He voted to grant certiorari when New York sold to Fordham University, a Catholic institution, land which the city had condemned for the Lincoln Square urban renewal project, perhaps in order to examine whether a financial subsidy was involved. Harris v. City of New York, 357 U.S. 907 (1958).


display from the courthouse square to adjoining private land. In such matters, can government turn to first amendment doctrine to find a rule for liberty in public places?

When Mr. Justice Douglas reconsidered the question of “establishment” in the Regents' Prayer case, his concurring opinion returned to stressing the use of public funds and property. *McCollum* was not decisive, he wrote, since it involved religious exposition and indoctrination as well as the use of public school facilities; but he would not find such proselytizing in *Engel*. New York had overstepped the constitutional bounds specifically by financing a religious exercise. Among the widespread examples of such public financing, Douglas cited community Christmas trees decorated with Biblical mottos. But the Justice's opinions in *Engel* and later in *Schempp* still leave inexplicit whether he would hold the use of publicly-owned real property alone to constitute forbidden support for religion. The references are to operating public “facilities” and “institutions” rather than to property as such; the hypothetical community Christmas tree is described as “purchased with the taxpayers’ money.” There is no retreat from the earlier decision that the first amendment also secures religious speech and assembly on public grounds. But how much besides public property will make an establishment?

There is reason to require something other than the mere use of government-owned land or structures, for the historic or economic accidents of public or private title may not close the physical environment to the free exercise of religion. Cost is not the distinction. The use of a public hall, a park, a national forest campground, has an economic cost and value as surely as the services of the chaplain or teacher leading a prayer. The fraction of the teacher's time so spent seems minuscule, wrote Mr. Justice Douglas in *Engel*, yet “the principle is the same, [for] the person praying is a public official on the public payroll, performing a religious exercise in a government institution.” And in *Schempp* he again found that “public funds, though small in amount, are being used to promote a religious exercise. . . . Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended; as this case illustrates, it is the use to which public funds are put that is controlling.”

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320 Id. at 441-42, 374 U.S. at 229.
321 370 U.S. at 441
322 374 U.S. at 229-30.
If the use to which public funds are put is to “perform” or to “promote” a religious exercise, the use of funds suffices to constitute an establishment. Yet it will not matter that private groups donate the religious display for a public park. Government financing is a sufficient, but not an indispensable, criterion of establishment. The “something more” than the use of public grounds need not cost additional public funds, it may be the appearance of government sponsorship, just as the school prayers in Engel would not be saved if the school brought in unpaid volunteers instead of paid teachers to lead the daily classroom exercise. Whether government property becomes the scene of an establishment of religion or of its free exercise, absent other government financing, must thus depend on such variable as time, place, and duration. On the one hand, few would argue that a state could erect even donated crucifixes in its courthouses; on the other, we have seen that religious meetings cannot be excluded from otherwise suitable public parks. In the range between there is much room both for prescribed governmental neutrality and proscribed governmental endorsement. In a city park or on a state college campus, a speaker or a passing procession should not, a week-long display perhaps might, and a permanent religious symbol surely will carry the implication of government sponsorship. But no such implication may appear if a congregation decorates a rented public hall for even a prolonged holiday celebration, or another constructs a simple chapel on a forest campsite leased for a religious retreat. Publicly-owned or not, these will be plainly understood to be private places for the duration of such use.

Two factors other than ownership of a place emerge to determine what is public and what is private, for purposes of liberty in the public sector. One is the function of the place. The other is who makes the challenged choice. Ownership, if private, is relevant to the owner’s additional constitutional guarantees of property rather than liberty; if public, it is evidence of governmental support and involvement. But ownership is not conclusive.

A private landowner may be performing such essential community functions that the law, to remain constitutional, must hold him to constitutional standards. Even beyond the case of a company town, Mr. Justice Douglas would not let government abdicate to private owners its responsibility for liberty in public places. On the other hand, government cannot impose demands forbidden by the Bill of Rights on places whose function is private, even if it owns them. The gov-
ernment's tenant in the public housing project, at the forest ranger station, in the university's married students' apartment, remains as secure against unreasonable searches and seizures, as free to place a crucifix on his wall or to remove it, as free to close his door to a Negro or to a Jehovah's Witness, as his neighbor on private land. The choices are his. "The problem with which we deal has no relation to opening or closing the door of one's home," Douglas wrote in the restaurant sit-in cases. "The home is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public."

VIII. "BALKANIZING" THE PUBLIC SECTOR

Most issues of constitutional rights in the public sector have arisen from claims of political and religious freedom, equal treatment, and procedural fairness under the fourteenth amendment and the Bill of Rights. But these are not the only constitutional limitations on government's freedom of action. Already the Articles of Confederation had pledged the states to accord one another's inhabitants freedom of travel, trade and commerce, and "all privileges and immunities of free citizens in the several States." One of the essential purposes and achievements of the Constitution, designed by a convention seeking to remedy the demonstrated defects of the Articles, was to impose further restraints on the self-serving parochialism of states in the interest of a national financial and commercial market, both for domestic and for foreign trade. Do these restraints govern the states as growing social services and other governmental programs bring more and more economic activity into the public sector?

The conflict between state economic protectionism and the constitutional vision of a common, national economic fate was intensified by the shrinking economy of the Great Depression. By the end of the 1930's, the states' efforts to help local business at the expense of their neighbors had become a subject for wide public and academic con-

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324 ART. CONFED., art. IV. The lengthy first section of this article was compressed into the first clause of U.S. Const., art. IV, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."
325 U.S. Const., art. I, §§ 8, 10; Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827). Section 10 expressly denies state power over money and over import or export duties, both assigned to Congress in section 8; without any express denial, the grant of power to Congress "to regulate Commerce with foreign Nations, and among the several States" has been held to imply substantial limits on state interference with such commerce.
 Interstate trade barriers were examined by the Temporary National Economic Committee. As Mr. Justice Douglas took his seat on the Supreme Court, a National Conference on Interstate Trade Barriers called by the Council of State Governments was convening in Chicago. Among the protectionist barriers identified in these studies were the restrictive practices of governmental contracting for goods and services. Whatever the special legal position of these practices, to the economist they were relatively minor variants of much broader state incursions into the market mechanisms of the national economy.

Although state protectionism was generally deplored, the proper role of the Supreme Court as the watchdog of economic nationalism was itself in controversy. The justices who in 1937 unshackled federal power over the national economy were generally sympathetic rather than hostile to state programs. Mr. Justice Stone had led the way from a doctrinaire towards an empirical approach in applying the commerce clause to control state regulation and taxation. But the survivors of the old school had misgivings, while Mr. Justice Black, the first Roosevelt appointee, doubted any judicial competence to apply controls under the commerce clause and dissented when Stone's method...
led to invalidating a state tax or law. The learning of a century of decisions conveyed neither uniformity of results nor clarity of reasoning. In this as in other constitutional fields, a new judge might work his way through old choices afresh.

During his early years on the Court, Mr. Justice Douglas shared Black's reluctance to interfere with state economic policies unless they discriminated against, rather than merely burdened, interstate commerce. By its terms, the commerce clause assigned the task of protecting the national economy to Congress, not to the Court, and Congress had been busy using the powers which the Court had newly confirmed to it. When a majority enjoined as a burden on interstate commerce an Arkansas tax on gasoline in the tanks of interstate buses beyond that which would be burned within the state, Justices Douglas and Frankfurter, in their first year, wrote in joint dissent with Mr. Justice Black:

This case again illustrates the wisdom of the Founders in placing interstate commerce under the protection of Congress. . . .

Our disagreement with the opinions just announced does not arise from a belief that federal action is unnecessary to bring about appropriate uniformity in regulations of interstate commerce . . . .

Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States.

Douglas reaffirmed these views in a 1945 dissent when a Stone opinion found Arizona's restrictions on the length of trains not supported by any sufficient local need, and again in a 1946 tax case. But in that

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333 Adams Mfg. Co. v. Storen, supra note 332; Gwin, White & Prince, Inc. v. Henneford, supra note 332; Southern Pac. Co. v. Arizona, 325 U.S. 761, 784 (1945). In Barnwell Bros., Black had caused Stone to remove from his draft opinion a reference to South Carolina's highway regulations as "reasonable" that might be construed to imply a judicial evaluation of the kind to which Stone returned, over Black's dissent, in Southern Pac. Mason, Harlan Fiske Stone: Pillar of the Law 492.


335 Id. at 188-89. The opinion cited the 1939 W. P.A. and Council of State Government studies of interstate trade barriers. Another of the dissenters was to move toward greater judicial intervention under the commerce clause; see Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 YALE L.J. 219 (1957).


year he joined the majority rather than Black's unrepentant concurrence in using the commerce clause to strike down state-enforced segregation on interstate buses.\textsuperscript{338} By 1949, Douglas had moved into the nationalist camp, making a fifth vote for Mr. Justice Jackson's strongest statement of the "common market" philosophy in \textit{H. P. Hood & Sons v. Du Mond}\textsuperscript{339} over the protests of Black, Frankfurter, Rutledge and Murphy. Thereafter, his votes have continued to reflect a commitment to that philosophy toward state regulation in the economy, especially if Congress appears to have declared a national policy.\textsuperscript{340}

Meanwhile, the prevailing commerce clause doctrine has contented itself with reaffirming the concurrent power of local regulation where it does not "discriminate" against interstate commerce, or "disrupt its required uniformity," or "unduly burden" it, while protecting "a legitimate local public interest," aided by references to the "traditional concept of what is compendiously known as the police power" that imply a distinction between the states' concern for their economies and for the "health, life, and safety of their citizens."\textsuperscript{339} With the increasing probability that the objects of state regulation are also reached by federal laws, the decisive debate now often shifts to the issue of fed-

\textsuperscript{338} Morgan v. Virginia, 328 U.S. 373 (1946). Soon thereafter Douglas, in an opinion for the Court under Article I, § 10, cited \textit{Southern Pacific} and \textit{Morgan} for the "well established" doctrine "that the Commerce Clause is a limitation upon the power of the States, even in the absence of action by Congress," Richfield Oil Corp. vs. State Bd., 329 U.S. 69, 75 (1946). For his view of the stricter restraints imposed on state taxes by the export-import clause, see also Joseph v. Carter & Weeks Co., 330 U.S. 422, 434 (1947) (dissent).

\textsuperscript{339} 336 U.S. 525 (1949).


\textsuperscript{341} Huron Cement Co. v. City of Detroit, 362 U.S. 440, 442-43 (1960); Head v. New Mexico Bd. of Examiners, 374 U.S. 424, 428-29 (1963). Mr. Justice Stewart's recent references to "police power" in these recitals of accumulated commerce clause terminology revert to an effort to distinguish valid local "police laws" from invalid "regulations of commerce" that is at least as old as Mayor of New York v. Miln, 36 U.S. (11 Peters) 102 (1837) and the License Cases, 46 U.S. (5 How.) 504 (1847).
eral preemption. The rule that the commerce clause by itself excludes local economic protectionism no longer calls forth extensive theoretical discussion. Thus, state regulation of "local" activities may have valid purposes to be "weighed" against the adverse effect on interstate commerce, but no such analysis and balancing of relative values is undertaken where this adverse effect is itself patently the purpose of the regulation.

Obviously these distinctions continue to pose difficult issues in application. But, however they may apply to concrete cases, is their application the same in the public sector? Or may the state as seller and buyer choose to impose on the national economy burdens of trade barriers and artificial resource allocations that it could not impose through regulation of private sellers and buyers? Can state government invoke an independent proprietary interest that, apart from other valid purposes, immunizes even patent economic protectionism and discrimination against interstate commerce from constitutional attack?

In fact, state and local governments do assume such unrestrained proprietary powers to discriminate against the national economy in favor of the local economy. In 1960 all states but one had official purchasing preference rules giving absolute or percentage preferences to local products, suppliers, or labor. Taken individually, many of these acts of discrimination may not appear as significant burdens on the national interest favoring free commerce among the states. But the total of state and local purchases is too large a sector of the economy, and too likely to grow further, for such an assumption to remain unexamined as a principle of constitutional law. In 1962 state and local operating expenditures for supplies, materials, and services (other than salaries of public employees) was about $14 billion, and capital outlay $16.7 billion. In many specific fields, of course, public purchases constitute a much larger proportion of the relevant market. Public school systems in New York, Los Angeles, or Chicago that may buy books for hundreds of thousands of children each year dwarf any comparable private market; for chalk, blackboards, school desks, and the

343 Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964) (preference for in-state producers in local milk market unanimously invalidated.)
344 The various state policies are compiled in Lueck, State Purchasing Preference Practices, BUREAU OF ECON. AND BUSINESS RESEARCH, U. OF UTAH (1961). Wisconsin alone was reported to be pure. See also Melder, supra note 326.
like, public education is effectively the total market. A state law that would require all business offices to purchase only pencils manufactured in the state would fall at once under the commerce clause; undeniably, a similar order to all schools and public offices equally discriminates against and burdens interstate commerce.

Nevertheless, the constitutional immunity of economic protectionism by the state as buyer has been taken for granted by the critics of state barriers to interstate trade, a judgment based on the same decisions, *Heim v. McCall* and *Crane v. New York*, which were once thought to support unreviewable discretion over government employment. But that reliance is misplaced.

In the decisions in the New York Court of Appeals that were later affirmed in these cases, Judge Cardozo had defended the discretion of the state to consider the welfare of its own citizens in spending public funds to the extent of excluding aliens from employment on public works. But the attack had been under the fourteenth amendment, and even in this respect the opinion had warned that discretion would not extend to discriminatory disqualifications among classes of the state’s citizens. Judge Cardozo, like Mr. Justice Douglas after him, knew that state policies valid under the fourteenth amendment might not survive conflict with the commerce clause. New York’s milk price control law had been held not to take the industry’s liberty or property without due process; thereafter, the state argued that the protection of New York’s milk supply which supported this result also justified it in excluding Vermont milk unless the New York price was paid to the out-of-state producer. “Such a power,” wrote Mr. Justice Cardozo for a unanimous Court in *Baldwin v. Seelig*, “will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported.”

Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the

346 239 U.S. 175 (1915).
347 239 U.S. 195 (1915).
348 See also Atkin v. Kansas, 191 U.S. 207 (1903); McAllister, *Court, Congress and Trade Barriers*, 16 Ind. L.J. 144, 164 (1940); Note, 16 Ind. L.J. 269 (1949); Peck, *State Provincialism and the Proprietary Power*, 20 Neb. L. Rev. 149, 151-52 (1941); Melder *supra* note 326, at 34-36; all predating the inroads on *Heim* made by and after the Hatch Act opinions. See 39 Wash. L. Rev. 4, 31-46.
352 294 U.S. 511 (1935).
353 Id. at 521.
consequences of competition between the states. . . . If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.\textsuperscript{354}

Trade barriers economic in form would not be saved by a claim that the ultimate objective was local health rather than wealth.

Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.\textsuperscript{355}

Cardozo's statement of the free trade doctrine, quoted extensively in \textit{Hood & Sons},\textsuperscript{356} was unanimously reaffirmed in 1964, when the Court struck down a Florida scheme to give Florida dairy farmers a statutory priority over out-of-state producers in supplying milk for distribution in the state.\textsuperscript{357} From the constitutional perspective of the commerce clause that compelled this result, it seems immaterial whether milk distribution was in the public or the private sector. Why should it matter to that perspective if Florida farmers were to persuade the state government to take over milk distribution as a public function?\textsuperscript{358} Nothing in the opinions of the author of \textit{People v. Crane}\textsuperscript{359} and \textit{Baldwin v. Seelig}\textsuperscript{360} suggests that this should change a result under the commerce clause. Yet if it does not, can Florida limit its milk purchases for a public school lunch program or other public institutions to Florida producers?

\textsuperscript{354} Id. at 522.
\textsuperscript{355} Id. at 523.
\textsuperscript{356} 336 U.S. 525, 532 (1941).
\textsuperscript{357} 375 U.S. 361 (1964).
\textsuperscript{358} 375 U.S. 361 (1964).
\textsuperscript{359} With respect to the analogous marketing of liquor through state stores, the 21st amendment deflects what might otherwise be the impact of the commerce clause on public economic activity. \textit{Cf. State Bd. v. Young's Market Co.}, 299 U.S. 59 (1936); \textit{Hostetter v. Idlewild Bon Voyage Liquor Corp.}, 377 U.S. 324 (1964). It was this distinction that proved decisive for the State of Washington, when California sued it for discriminating against out-of-state wines, \textit{California v. Washington}, 358 U.S. 64 (1958).
\textsuperscript{360} 214 N.Y. 154, 108 N.E. 427 (1915).
\textsuperscript{360} 294 U.S. 511 (1935).
In other commerce clause cases, no consistent significance has been given the question whether the state’s pursuit of its local interest occurred in the public or the private sector. When state-authorized bridges were attacked as obstructions to interstate commerce, the Court did not ask whether they were built by private licensees or by the government itself. In sustaining truck width and weight restrictions against similar attack, Mr. Justice Stone in *South Carolina State Highway Department v. Barnwell Brothers* referred to many decisions that rested the validity of traffic regulations in part on the state’s ownership of “its” highways. But he coupled the state’s interest in conserving its investment with its interest in local safety that would be an independent ground of validity irrespective of ownership. And even public economic investment and legal title would not permit a state, under the guise of regulation, to discriminate against interstate commerce. Safety would presumably support regulation of interstate traffic even on the roads of a private turnpike corporation, or on privately-built logging roads. On the other hand, perhaps it is doubtful whether *Barnwell Brothers* itself would apply today to the Interstate and Defense highway system, built to safety and engineering standards of the U.S. Bureau of Public Roads and financed with over 90 percent federal funds, even though construction, ownership, and maintenance remain state functions. In 1945, the case for safety was insufficiently proved for Arizona’s train-length law to survive commerce clause attack. Stone quoted *Barnwell Brothers* to distinguish it: “Unlike the railroads, local highways are built, owned and maintained by the state or it municipal subdivisions. The state is responsible for their safe and economical administration...” But would the same train-length law have been immune from the stated test of weighing the local interest against “the national interest in keeping interstate commerce free from

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361 Pennsylvania v. Wheeling & Belmont Bridge Co. 54 U.S. (13 How.) 518 (1852); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866). In Kansas Southern Ry. Co. v. Kaw Valley Drainage Dist., 233 U.S. 75 (1913), invalidating under the commerce clause a state order to remove a railroad bridge, Mr. Justice Holmes wrote: “The freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ.” Would the controlling commerce clause reasons be less compelling in a suit to restrain the state from removing a state-owned railroad bridge?  
363 *Id.* at 189. Both the “ownership” and “safety” interests of the state in its highways could, of course, be superseded by federal law, though this result will not readily be implied. See Welch v. New Hampshire, 306 U.S. 79 (1939). But the commerce clause alone can be sufficient. Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).  
365 *Id.* at 783, quoting 303 U.S. 177, 187 (1938).
interferences which seriously impede it if a public state agency rather than a private corporation owned the transcontinental roadbed and rails in Arizona? "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power," Mr. Justice Stone had also written in 1936; the commerce clause leaves state-owned functions in no stronger position than state-regulated private ones when Congress has acted under it. In 1959, Mr. Justice Douglas wrote for the Court that the Southern Pacific "national interest" test of the commerce clause alone, without Congressional action, also reaches state-owned highways, when a state pursues safety by restrictions on equipment inconsistent with movement from or into other states. The state's ownership of the roads is evidently too plainly irrelevant to the commerce clause issue to be discussed. "Like any local law that conflicts with federal regulatory measures state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow."

In the many conflicts between state economic protectionism and the nationalism of the commerce clause and article IV, the Supreme Court has come closest to dealing with distinctions of the public and private sectors when states have sought to capitalize on local natural resources. The resource cases, and the role of a "title" theory in sustaining state power, have often received extensive analysis. Early opinions referred to the state's "ownership" of wild animals to support fish and game laws against a variety of constitutional attacks. This historical fiction was never extended to other kinds of environmental resources and was soon replaced by a conventional "police power" analysis of the local interest in conservation. For the third time in this narrative, the story of the search for clarity about the constitutional choice (though making the wrong choice) begins with Mr. Justice Holmes. When New Jersey prohibited riparian owners from exporting water from

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366 Id. at 776.
Staten Island to New York City, the state court sustained the prohibition against constitutional attack by finding a "residuum of public ownership" in the stream beyond the reasonable riparian uses, reinforced by state title to the tidal stream bed. "We will not say that the considerations that we have stated do not warrant the conclusion reached," wrote Holmes for the Supreme Court in *Hudson Water Co. v. McCarter.*[^371^] "But we prefer to put the authority which cannot be denied to the State upon a broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the State may be said to possess." Finding this broader ground in the public interest in conserving and protecting the physical environment within the state's territory, Holmes reached back to bring even the wild game cases under his reformulation.[^372^]

New Jersey could prohibit the export of water from its streams irrespective of whether the water was in private or public ownership. But when other states, blessed with large reserves of natural gas, sought to extend their export controls from conserving the physical resource to favoring the local economy or local consumers, the Court invoked the common market philosophy of the commerce clause, over Holmes's dissent. "[Oklahoma's] conservation is in a sense commercial,—the business welfare of the state, as coal might be, or timber," said the Court in 1911. "If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals...embargo may be retaliated by embargo, and commerce will be halted at state lines."[^373^] Twelve years later a statutory priority to protect gas consumers within West Virginia weighed no heavier in the balance than Oklahoma's economic objectives, though Mr. Justice Holmes still saw "nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages."[^374^] The Court has recognized

[^372^] "On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the State may make laws for the preservation of game, which seems a stronger case. *Geer v. Connecticut,* 161 U.S. 519, 534." *Id.* at 356. Game laws, as in *Geer,* were again explained as "police" regulations independent of title in New York *ex rel. Silz v. Hesterberg,* 211 U.S. 31 (1908).
[^374^] Pennsylvania v. West Virginia, 262 U.S. 553, 602 (1923) (Holmes, J. dissenting): "I am aware that there is some general language in Oklahoma v. Kansas Natural Gas Co....a decision that I thought wrong, implying that Pennsylvania might not keep its coal, or the northwest its timber, etc. But I confess I do not see what is to hinder. Certainly if the owners of the mines or the forests saw fit not to export their products the Constitution would not make them do it. I see nothing in that instrument..."
a legitimate state interest in conservation not only against physical but also against economic waste of natural gas through dissipation in "inferior" uses, though it has confined the state to controls over production rather than over interstate trade;\textsuperscript{375} but Holmes's straight-forward defense of discriminatory resource management has not been accepted.

At times the Court has gone far to sustain state programs openly designed to restrict trade in the state's products in the interests of the state's economy.\textsuperscript{376} Nevertheless, wherever the balance might be struck in applying the commerce clause formulas of national interests and local concerns, there is nothing to suggest that a state can tilt the scales by socializing the intended means of its economic protectionism. Oklahoma had in fact relied elaborately on its ownership of state highways and withdrawal of its grant of eminent domain powers to keep pipe line companies from exporting natural gas; the Court held that these state facilities could not be withheld in discrimination against interstate commerce.\textsuperscript{377} Louisiana legislation declared a local economic resource, shrimp and oysters, to be the property of the state, so as to permit their taking only when first-stage processing was carried on within the state. This "public ownership" approach, even to a fishing resource, failed to persuade the Court; it applied its Oklahoma and West Virginia natural gas precedents to invalidate Louisiana's protectionist efforts under the commerce clause.\textsuperscript{378} Would those gas-producing states have been freer to reserve that resource for their local economies if they held natural gas reserves in public ownership? The Oregon legislature seems to have thought so in 1961, when it enacted a statute directed against the export of logs by requiring timber sold by the state or by any of its political subdivisions to be "primarily processed in the United States unless the State Forestry Department has issued ... a permit for the processing of such timber elsewhere."\textsuperscript{379} Oregon's geographic limitation that would produce a different result if the State gave the owners a motive for their conduct, as by offering a bonus.


\textsuperscript{377} Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 261-62 (1911).

\textsuperscript{378} Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928). Mr. Justice Butler, who had previously thrown together title and "police power" terminology in Lacoste v. Dep't of Conservation, 263 U.S. 545 (1924) to sustain a Louisiana severance tax collected from dealers in wild animal hides, conceded that fish and game might be conserved for consumption within the state, but here Louisiana's shrimp was destined for export after their enforced processing within the state. Mr. Justice Holmes joined the Court rather than Mr. Justice McReynolds's dissent.

\textsuperscript{379} Ore. Rev. Stat §§ 526.805 et. seq. (1963). Hood & Sons referred to timber in repeating, in 1949, the apprehensions expressed in the opinions of 1911 and 1923 (supra
on processing would violate the commerce clause were it imposed on privately owned timber. If it could be used to reserve government-owned timber as a base for local economic advancement, such a constitutional distinction would create an important incentive for states to socialize natural resources, by purchase, eminent domain, or otherwise, solely for protectionist reasons backed by local processing interests. This is what Louisiana did not succeed in doing.

In 1948, the Court turned another long unused siege gun against the barricades. Again the prize was shrimp, which South Carolina sought to reserve to resident fishermen, licensed at twenty-five dollars, by imposing a $2500 license on nonresidents' shrimp boats. The discrimination violated the nonresidents' privileges and immunities under article IV, section 2, wrote Mr. Chief Justice Vinson for the majority in *Toomer v. Witsell.*

The primary purpose of this clause ... was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. ...

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them.

Conservation, urged by the state, could not justify the discriminatory remedy chosen; the argument "overlooks the purpose of that clause, which, as indicated above, is to outlaw classifications based on the fact

notes 373, 374): "We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!" Hood & Sons v. DuMond, 336 U.S. 525, 538-39 (1949). "Primarily processed," in the Oregon statute, is defined as that stage of manufacture next beyond the log form. Compare the possibility of basing a preference for local use of hydroelectric power on state development of state-owned waterpower, e.g., Ore. Const. art. XI-D; cf. Simonton, supra note 369; Smith, Maine's Power Embargo—How It May Be Terminated, 36 Cornell L. Q. 342 (1951).

380 334 U.S. 385 (1948). The clause reads: "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the Several States." Justices Frankfurter and Jackson concurred on the basis of the commerce clause, wishing to rest on the Foster-Fountain distinction between reservation for local consumption and for economic gain in the nation's commerce. See supra, note 378.

381 Id. at 395-96.
of citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.\textsuperscript{388}

What kind of evidence might show a peculiar relevance of non-citizenship, beyond that mere fact itself, so as to furnish valid independent reasons for a closely related degree of disparity of treatment? The Court's formula requires identification of a material difference between residents and nonresidents that is pertinent to the state program involved. No doubt a state may deem a period of residence relevant for admission to political participation in its government. Beyond that, the most obvious sources of distinction are financial—typically, administrative cost differences attributable to non-residency, and the taxes that may be contributed to state programs by residents and not by non-residents. But the Court has made clear that "something more is required than bald assertion to establish a reasonable relation between the higher fees and the higher cost." Thus it found that Alaska could not in fact show that a five to fifty dollar license fee differential imposed against nonresident fishermen "would merely compensate" for more expensive enforcement.\textsuperscript{888}

In any case, once more, public ownership of the asset is not itself a "valid independent reason" for discrimination. In \textit{Toomer v. Witsell} the Chief Justice limited the fish and game exception to the precise facts of \textit{McCready v. Virginia},\textsuperscript{884} quoting Mr. Justice Holmes that "To put the claim of the State upon title is to lean upon a slender reed."\textsuperscript{388}

Are other forms of public activity—government purchasing, management, public services—a stronger reed than title to support a state's discrimination in favor of its residents that otherwise lacks "valid independent reason"? The implications of article IV, section 2, for constitutional rights in the public sector exceed even those of the commerce clause. For it is immaterial to the privileges and immunities clause whether it is interstate commerce, or indeed any economic process, that the state seeks to close to nonresidents. When a state's scheme to rig its market to the disadvantage of outsiders is challenged under the com-

\textsuperscript{388} Id. at 398.
\textsuperscript{384} 94 U.S. 391 (1876).
\textsuperscript{888} 334 U.S. at 401, quoting from Missouri v. Holland, 252 U.S. 416, 434 (1920).
\textsuperscript{885} The opinion also quotes Roscoe Pound to trace the state ownership fiction concerning wild game to a confusion between \textit{imperium} and \textit{dominium}, concluding that the state's power to regulate the exploitation of an important resource can be adequately exercised, "like its other powers, so as not to discriminate without reason against citizens of other States." Mr. Justice Douglas had occasion to explore the difference between \textit{dominium} and \textit{imperium} in \textit{United States v. Texas}, 339 U.S. 707, 712-19 (1950), when the Court held that Texas lost both with respect to the marginal sea when it entered the Union on an "equal footing" with other states.
merce clause, it is the national interest in a free market that is weighed against the local objective, whether the challenger complains from within or without the state. But the nonresident attacking state discrimination under article IV, section 2, need not overbalance the state's policy by demonstrating a greater national interest entrusted to Congress; it is his own privileges and immunities, precisely as a citizen of a different state of the Union, that the Constitution protects in this section. It places on the state the burden of justifying every disparity of treatment by adequate reasons other than the urge to distinguish between residents and outsiders itself—that simple political motive so self-evident as to have been made the specific target of article IV.

The state as buyer of goods or services is presumably no more immune than as seller of socialized shrimp or conservator of other resources. Under article IV, section 2, a nonresident railroad construction contractor has been held to be entitled to equality with residents in Tennessee occupational taxation, in order to assure nonresidents equal opportunity with Tennessee citizens to construct railroads in that state. To protect a builder of highways instead of railroads, the same constitutional policy would have to assure him equal opportunity to compete for a public contract. Of course, public purchase regulations may impose independently valid requirements—labor standards, materials inspection, and probably a price differential to reflect fairly the taxes the state would recapture from resident suppliers. These might meet the constitutional test of article IV even if they were imposed as state laws or regulations on purchasing by similar private businesses in the state, for example by regulated private utilities. But regulation to exclude the foreigner would fail. A few weeks before Mr. Justice Douglas's appointment, Mr. Justice Frankfurter's first opinion for the Court declared unconstitutional a Florida statute requiring special inspection only of cement imported from abroad, at a fee several times the national tariff on cement and said to amount to sixty times the cost of inspection. Since the discrimination was against foreign goods, not against nonresident citizens, the decision rested on the commerce clause rather than article IV. But Florida's policy would be no less discriminatory if it were administered directly in the procurement of cement by state agencies, or required by the state road department of private construction contractors on public projects. A state's policy of absolute or prohibitively great preferences for local suppliers and labor

cannot long expect to base its survival on the fact that it regulates purchases by a public rather than a private entity.

How far will the nonresident's constitutional right to equal privileges and immunities force the state to open the doors to all of it lands, its resources, its social services and institutions? No delimiting line appears self-evidently logical. Would the test of *Toomer v. Witsell* permit Washington to reserve its state parks for its residents? Presumably a tourist from Portland or Boise takes up no more space and leaves no more litter than a tourist from Seattle. Is a state university campus different, under article IV, section 2, from a state park? The University of Oregon, like other state universities, imposes not only higher tuition but also higher academic entrance requirements on non-resident than on resident students. The reason to limit nonresident enrollment by higher admission standards is, of course, to prevent the overcrowding of limited academic facilities; yet a nonresident student can no more than a resident be identified as a "peculiar source of the evil" unless one first assumes the very conclusion that such facilities may be limited to residents—an assumption that, contrary to *Toomer*, would justify discrimination by the mere fact of residence without any other identifiable distinction between the applying students. The argument of scarcity alone has failed to justify reservation of other resources for use by residents. If, on the other hand, a state's interest in the education of those who are likely to be its own future citizens is a sufficient "valid independent reason" to discriminate in the use of limited educational facilities, then a state-imposed priority for resident students applied even to private colleges would withstand attack by nonresidents based on article IV, section 2—whatever other constitutional claims a private college might itself be able to raise under the

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388 The Oregon Supreme Court has applied art. IV, § 2, to invalidate a statutory preference for Oregon residents in access to grazing districts encompassing private and federal range; nothing suggests that state-owned lands could be exempted. *Mendiola v. Graham*, 139 Ore. 592, 10 P.2d 911 (1932).

389 University of Oregon Bulletin, Catalog Issue, 1964-65, pp. 65-66 (difference between high school grade point requirement of 2.25 for residents, 2.75 for non-residents). *Cf.* University of Washington Bulletin (General Catalog Issue) 1964-65, p. 27: "The University recognizes the academic and educational benefits derived from a cosmopolitan student body and accepts highly qualified nonresidents who are able to meet significantly higher scholastic standards. As a state institution, preference must be given to residents of Washington and to sons and daughters of Washington alumni, who are accepted according to resident standards, although they are required to pay the regular nonresident fees."

390 Differences in scholastic records required for admission might, for instance, be justifiable if a state could show that its high schools imposed stricter standards for academic grades than those in other states.

fourteenth amendment. Again, the result does not depend on distinctions between state regulation of the private and state operation of the public sector.

That distinction does remain relevant to the state’s use of its fiscal resources. Presumably a state may demand of nonresidents through tuition, or in other types of higher fees, that cost of its services which its resident population supports through taxes. In the allocation of costs, in the refusal to subsidize, rather than in historical notions of what is “fundamental” or distinctions between commercial and non-commercial interests, a line may be found between permissible and impermissible constraints on outsiders’ access to the state’s public sector. But differences even in fees cannot exceed what may fairly be called compensatory; they must not reflect an effort to disguise exclusion of nonresidents. Only in the selective use of direct subsidy do the states perhaps retain some means immune from constitutional attack to let charity, and economic self-help, begin and end at home.

When the demands of the commerce clause and article IV, section 2, are thus brought to bear on the public economic and social programs of state and local government themselves, the conflict is between competing principles to each of which Mr. Justice Douglas has been strongly committed. He has defended the role of the states as independent organs of experimentation and social services and has sought to protect them against federal fiscal centralization. He is equally committed to the nationalizing role of those two constitutional clauses in overcoming state parochialism directly, even without Congressional action. The conflict is inevitable; separate governments are bound to

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392 See with respect to nonresident tuition, Landwehr v. Regents of Univ. of Colo., 396 P.2d 451 (Colo. 1964); unfortunately the Colorado Supreme Court’s brief and inadequate opinion omits any analysis of plaintiff’s claim under art. IV, § 2.
394 Mullaney v. Anderson, 342 U.S. 415 (1952). The same test seems pertinent for percentage differentials applied to public procurement. States have been accorded exceptional leeway in levying taxes on highway users that might unconstitutionally strike at interstate commerce in other contexts, but are justified as contributions to the cost and upkeep of the public roads. See Barrett, “Substance” vs. “Form” in the Application of the Commerce Clause to State Taxation, 101 U. Pa. L. Rev. 740, 785-89 (1953).
give serious domestic objectives priority over those of a greater community, whether in the international or in a federal system. But solutions once designed to maintain the benefits of a common market in a private economy must find new applications as the sectors of the economy under direct public management become increasingly important. Thus, equal access to the public sectors of member states has been recognized as a significant objective of the European Economic Community. In addition, the problems of access to public hospitals and health and welfare plans, and the transfer of eligibility for other social benefits, are no less important than the businessman's access to a market, if there is to be mobility of the labor force in a common economy while social programs are administered by geographically delimited states.

For more than economic reasons this fact is likely to tip the scales toward the national principles of the Constitution in deciding a conflict with state efforts to use their proprietary and fiscal powers to help their own economies and residents. For most people, the law and economics of social benefits in the modern world will also be the determinants of personal freedom. After two years on the Court, Mr. Justice Douglas heard California argue that it could punish a man for bringing to that golden state an unemployed relative who would add to its heavy social burdens. The Court in Edwards v. California held that the commerce clause prohibited any such "attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its bor-

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308 Eric Stein reports: "A very special problem arises in connection with assuring access for all Community nationals and companies to contracts for the supply of goods and services awarded by governmental departments, municipalities, provinces and other public entities. Since the role of governments in national economies has been steadily on the uptrend, important portions of economic activities would be excluded from Community-wide competition unless free access to, and participation on an equal basis in, the public tender procedures is assured. The Commission has been working on two directives: one will be based on the Rome Treaty provisions concerning the right of establishment and supply of services, and its purpose will be to ensure that specific restrictions discriminating against the nationals and companies of the member states on the ground of nationality are removed. . . . The working group dealing with this problem concluded that a removal of discriminatory legal restrictions would not be enough to achieve the removal of discrimination in practice, and as a result a second directive is in preparation which will list the procedures which may be employed in awarding contracts for public works, fix the conditions under which the members will apply one or the other of these procedures, and provide a consultation procedure in case of complaints. In terms of the economic impact, this might prove to be one of the most important steps in the approximation of laws, since the national public markets have been traditionally more or less closed to outsiders." Stein, *Assimilation of National Laws as a Function of European Integration*, 38 Am. J. Int'l L. 1, 12-13 (1964).

309 314 U.S. 160 (1941).
But Mr. Justice Douglas, concurring, was not prepared to rest unconstitutionality on the ground that California had lost its power over commerce to Congress. "I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines," he wrote. California's exclusion of indigent nonresidents could not in fact survive article IV, section 2. But Douglas would go further and hold freedom of movement among the states to be an incident of national citizenship recognized since Crandall v. Nevada and thereafter protected by the privileges and immunities clause of the fourteenth amendment.

That result necessarily follows unless perchance a State can curtail the right of free movement of those who are poor and destitute. But to allow such an exception to be engrafted on the right of national citizenship would be to contravene every conception of national unity... It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of national citizenship, a serious impairment of the principles of equality.

The move to revive the privileges and immunities clause of the fourteenth amendment did not develop past its high water mark of 1941. But the same choice as between the competing claims of Mr. Edwards's brother-in-law and of California recurs also under the commerce clause and article IV when a state restricts a nonresident's access to its public sector. In the welfare state, freedom of movement for a tour-

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400 Id. at 173, continuing with a quotation from Baldwin v. Seelig, 294 U.S. 511 (1935).
402 73 U.S. (6 Wall.) 35 (1867), invalidating a Nevada tax on every person leaving the state by common carrier. That decision could not rest on art. IV, § 2, since Nevada's tax had applied equally to residents and nonresidents.
403 Edwards v. California, 314 U.S. 160, 181 (1941). Justices Black and Murphy joined this concurring opinion. Mr. Justice Jackson's concurring opinion, his first, also chose this ground: "the migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights... I think California had no right to make the condition of Duncan's purse, with no evidence of violation by him of any law or social policy which caused it, the basis of excluding him or of punishing one who extended him aid." Id. at 182, 185.
404 Similar issues may arise under the equal protection clause; cf. Mr. Justice Douglas's citation of Edwards v. California in dissent when the Court sustained the application to a lawyer with offices in Kansas and Missouri of a Kansas rule that attorneys practicing in another state must associate another Kansas attorney. Martin v. Walton, 368 U.S. 25, 26-28 (1961).
Constitutional Rights—Justice Douglas

IX. The Future of Constitutional Rights in the Public Sector

In the past quarter century, the service and management functions of government have become more important to many Americans than its application of regulatory and prohibitory laws. Individuals rely on government for many of their most vital needs—for education, security against loss of income in old age or unemployment, often also for hospitalization, for housing, for welfare payments, to provide at least minimally for the absolute necessities of life. Others train for and

Eligibility rules for nonresidents may be incorporated in the federal programs, or the presence of substantial federal funds in a state program might be judicially held to remove the constitutional basis for imposing any significant differential charge on nonresidents. Of course, state laws may themselves provide for reciprocal transferability of earned eligibility, e.g. in unemployment compensation.
enter upon careers in which government is the only significant employer. Private entrepreneurs of farm and factory see government as an important, often as their only, customer; others, for instance the timber-based industries and the electric utilities of the Pacific Northwest, as their chief source of supply.

The growth of the public sector has not occurred without a good deal of ideological furor directed to individual controversies against public power, urban renewal, or “socialized medicine.” But today doctrinaire negation of the entire role of public services is rare. We have become used to the thought that the United States is a mixed economy. The growth of the public sector has also had profound consequences for the tasks of modern constitutional adjudication. But like that growth, the response of the law has also been episodic, *ad hoc*, enlivened by ideological rhetoric, but devoid of a consistent theory of constitutional rights in affirmative government actions. On that question, our constitutional law is as mixed as the economy in which it must be applied.

This is only natural. It is our good fortune to have made changes by solving concrete problems pragmatically, by evolution, not revolution; no systematic political or economic theory has been embodied in a single new code and given to the courts to apply. There have been enough strains on maintaining consistency and continuity in modern constitutional law apart from the question of its place in the public sector. During Mr. Justice Douglas’s years on the Supreme Court, the substantive meanings of the various constitutional guarantees have been hotly contested. So has the fundamental issue of the role of the courts in enforcing adherence to these guarantees. Choices between diametrically opposed views have often been made by the narrowest of divisions. Then the accidents of time and politics in changing the Court’s membership have brought sharp reversals of approach both to the Constitution’s substantive values and to the judicial function. A new decision may cast doubt on precedents that reflect an earlier theory but is not directly at stake in the case. Yet the Court’s judicial role obliges it to save explicit overruling for the exceptional case when the change of direction unavoidably means discard of a precedent recognized to be squarely in point. Thus decisions from an era when direct operation was a factor likely to exempt government from otherwise applicable constitutional restraints remain on the books alongside desegregation holdings that find in the slightest government participation the factor triggering application of such restraints. At first, the fact of
public ownership invites simple but natural analogies with private ownership, and tends to insulate public management from the constitutional obligations of government. In the end, public ownership, management, or financial support tends to make government responsible for all social decisions. But the significance—as excluding or as invoking constitutional rights—to be attached to this factor has clearly differed not only with time, but with the high or low value seen by shifting majorities in the several guarantees of the Constitution. With so many variables, it is not surprising that the scores of opinions in cases contesting constitutional claims in the public sector have not focused on this common denominator as a problem for evolving doctrinal consistency.

Yet if our pursuit of that common denominator has discovered no consistency explicit in established doctrine, consistency is implicit to a high degree in the votes and opinions of Mr. Justice Douglas. The reason is plain: When a litigant asserts that government has crossed constitutional bounds, Douglas looks first at the injury done to the citizen and not to the government's choice of weapons. He is concerned with effects, not with forms. In this approach to constitutional issues, he follows his earliest commitment to the American legal realism of the 1920's. As a 30-year-old assistant professor at Yale Law School, he

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"Should not corporate giants be considered as 'states'? Is it not naive to think of them as 'persons'? . . . The constitutional literature is a continuing exhibit of negative liberty. The authors quite properly go much further afield to show that a viable society is one where various types of power co-exist, offsetting one another. . . . The shudder that passed through our Union League clubs and our bar associations when the specter of Socialism appeared on the American scene is mentioned but not in its full vigor. Americans turned their back on that creed and government ground onward—from a communal concept to the concept of arbiter and finally to the welfare state. Douglas's view on the constitutional obligations of government-sponsored groups is illustrated in his opinions in International Ass'n of Machinists v. Street, 367 U.S. 740, 775 (1961) (concurring), and Lathrop v. Donohue, 367 U.S. 820, 877 (1961) (dissenting), that labor unions and bar associations with legally compulsory memberships should not be entitled to use compulsory dues for politically controversial purposes.
told the annual convention of law teachers to bring realism into their classes in corporation law, to analyze the functions of financing, management, and of allocating control and risk of loss, rather than the categories of "corporation," "partnership," and "agency." Those categories made for easy classification of cases, he said; "the importance of the form of the unit is apt to make the regulation of that form the focal point; the ancient stress on details of organization emphasizes form; the increasing importance of certain businesses is likely to bring into consciousness devices which are being used by business in terms of the regulation of the device used." As a consequence the legal analysis of American business enterprise tended toward metaphysics. "The analysis, the rules, the theology emphasized the business unit. It was this. It was not that. It could do this. It could not do that. It was different from this but similar to that...."

A theology not fashioned in concepts which earmarked it as part of a specific economic and social order soon knew no industrial society for its forbears and readily adjusted itself to no economic and social order as its inheritance. The consequence was that the unit instead of being visualized as a device adjustable to a changing order and as a vehicle for the accomplishment of certain specific business functions was apt to be pictured as static. What the functions were was obscured. What vital processes were involved was concealed. The analysis has been so conceptualized that the attention is too frequently focused on the device used rather than on the function which the device is intended to perform.

And he hailed the beginning shift of emphasis "from the vehicle employed to the function performed." Substitute for "business" in these quotations the word "government," and they describe the Douglas methodology in constitutional law as in corporation law. What law is to business enterprise, constitutional law is to government. If in the 1930's law could control its corporate creatures only by looking beyond forms and devices to functions and effects, the same is true of the constitutional law of the modern state. In such an approach, none of the manifold devices of modern government is immune from constitutional restraint. If the effect of a governmental decision is to invade a constitutionally protected interest, it is no answer...
that government has cast itself in the role of landowner or employer, banker, business manager, or educator, rather than that of lawgiver and policeman. The form of the governmental invasion indeed makes a difference; the use of criminal prosecution, for instance, carries its special constitutional procedures. But none escapes simply by the choice of form from scrutiny of function and effect.

Though this may describe the approach of Mr. Justice Douglas, it is not yet the law of the Court. Much challenged governmental action does escape scrutiny, not necessarily because of any substantive significance attached to the government’s method of action, but because of formal barriers to judicial review. One device to effect a policy may be held to be in government’s “unreviewable discretion” while another means to the same end would not be. Challengers may be met at the courthouse door by assertions of sovereign immunity or by denials of their “standing.” Such formal barriers surround especially the power to spend, to subsidize by grant, by loan or by tax exemption, and to buy, sell, or manage property—the economic instruments of the public sector. Obviously they become increasingly critical to the constitutional law of the welfare state.

Since the days of the T.V.A. cases just before Mr. Justice Douglas’s appointment, the Court has often wavered in its use of these techniques of judicial abstention when confronted with a substantial con-
stitutional claim, and they remain high on the agenda of unfinished business in constitutional law. In dealing with such preliminary questions, Douglas has been a vocal critic of procedural doctrines that would deny litigants the benefit of the courts' power to protect constitutional rights. With Mr. Justice Murphy, he dissented from Mr. Justice Rutledge's *Rescue Army* restatement of the policy limiting the exercise of that power to cases of "strict necessity." In 1962 he summarized his stand on that policy in reviewing the Court's "niggardly" decisions on the use of declaratory judgments—a remedy which he has often defended against judicial hedging and narrowing. He wrote that

These cases illustrate the restrictive nature of the judge-made rules which have made the federal courts so inhospitable to litigation to vindicate private rights. At no time has the Court been wholly consistent; nor have I . . . . But my maturing view is that courts do law and justice a disservice when they close their doors to people who, though not in jail nor yet penalized, live under a regime of peril and insecurity. What are courts for, if not for removing clouds on title, as well as adjudicating the rights of those against whom the law is aimed, though not immediately applied?"

And he professed himself to have "great difficulty" with *Frothingham v. Mellon*, the precedent denying federal taxpayer actions that has rationalized unreviewability of federal spending programs for four decades.

This stand also implies a jaundiced view of other barriers erected in the past against litigating the government's choice in the public sector. In 1940, Douglas still had joined in an all-but-unanimous decision denying potential government contractors the right to challenge government wage determinations on the broad ground that, "like private individuals and business, the Government enjoys the unrestricted


417 262 U.S. 447 (1923).
power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.\textsuperscript{418} A decade later he protested against according unreviewable finality to an agency’s administrative determinations in a contract dispute between itself and a private contractor. “Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat,” begins his dissent. “Where discretion is absolute, man has always suffered. . . . It is more destructive of freedom than any of man’s other inventions.” Contract theory indeed could make the private business consent in advance to such determinations or forego its government contract. “But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. . . . A citizen who has an appeal to a body independent of the controversy has protection against passion, obstinacy, irrational conduct, and incompetency of an official.”\textsuperscript{419} For Mr. Justice Douglas, more than contract theory is relevant when one of the two contracting parties is also a government. He is equally skeptical when government seeks to defend against private claims in tort, property, or other interests by asserting a special governmental privilege or immunity.\textsuperscript{420}

Thus in his approach to the preliminary questions of the judicial function, as to the merits of constitutional issues, Mr. Justice Douglas would keep the focus on the substance of the litigant’s complaint rather than on the formal status of the government’s activity.\textsuperscript{421} That focus concentrates attention on the impact of the activity in society, on results rather than formulas, on consistency of doctrine with respect to categorical constitutional values rather than to categories of govern-


\textsuperscript{419} United States v. Wunderlich, 342 U.S. 98, 101-02 (1951).


\textsuperscript{421} His indifference extends to the hats government may wear as complainant, not only as respondent, see Georgia v. Pennsylvania R.R. Co., 324 U.S. 459 (1945) (permitting state to bring anti-trust suit irrespective of distinction between state’s “proprietary” and “parens patriae” roles).
mental action. In doing so, it also points the way toward a consistent theory of constitutional rights in the public sector.

Such issues of constitutional rights occur at the intersection of two dimensions—the wide range of diverse public activities in the welfare state and the Constitution's various substantive and procedural limits on the exercise of governmental power. If a litigant is able to reach the merits in court, as Mr. Justice Douglas favors, his claim against the administration of one of the government's programs may arise under any of those constitutional guarantees. Often it may involve several together. But when these guarantees are examined individually, few appear directly to concern a difference between the private and the public sector; between government regulation and government operation. The outstanding one is the guarantee of the fifth and fourteenth amendments against deprivation of private property without just compensation or due process of law.

Government cannot take private property and turn it into public property without just compensation. It cannot impose on private owners the obligation to sacrifice their capital to a losing operation, though it can itself conduct the same operation at a fiscal loss. Drawing the line between non-compensable regulation and compensable confiscation has its own difficulties of theory and application. What matters here is that the constitutional limits on government regulation differ from those on government operation when a litigant asserts the specific constitutional rights of a private owner. But compensation aside, Mr. Justice Douglas recognizes regulation and operation as interchangeable instruments of public policy. The legislative choice is "merely the means to the end," he wrote in Berman v. Parker. "The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of

422 See 39 WASH. L. REV. 4, 8 (1964).
423 E.g., denial of first amendment freedoms and procedural due process in personnel discharges, see 39 WASH. L. REV. 4, 42 (1964), or in disqualification from social benefits, see text accompanying note 244 supra.
424 The contract clause, art. I, § 10, cl. 1, and the several specific limits on taxation have had little recent importance.
promoting the public purposes of community redevelopment projects. . . . The rights of these property owners are satisfied when they receive that just compensation which the fifth amendment exacts as the price of the taking. 2427

The legislative choice among alternative instruments may result from many variables: The presence or absence of existing private operations, the novelty or magnitude of the task, the degree of economic feasibility or risk, the importance of politically independent or of politically responsible management, the urgency of achieving the desired objective and the political acceptability of the proposed means. 428 Yet why should the choice of means affect other constitutional guarantees besides those provided for private economic rights as such? Nothing in those other limitations with which the Constitution surrounds government action speaks of another variable: of an option, by choosing public operation, to circumvent these constitutional guarantees as they would be applied to public regulation of the same operation in private hands. On the contrary, such an option would invite government to negate constitutional limitations by socialization whenever it seemed sufficiently essential to circumvent them, whether these be the limitations of the commerce clause on a state's economic self-interest or the first amendment freedoms of employees in important industries. 430 That would be to make the form of the unit, the device used, the focal point; it would subvert the flexibility to "pick and choose the best device for

428 Among the many historic illustrations, such as the decisions to provide public education, to subsidize construction of private railroads but to build public highways, and to maintain regulated private communication utilities, the choice between pursuing agreed ends by means in the private or in the public sector has itself often been the bitterly contested issue, e.g., in rural electrification and the generation and distribution of hydro-electric power, in industrial accident and retirement medical insurance, or in sharing the public space program with private communication satellites.
430 Through the device of taking over possession and operation of industrial plants in labor disputes, government has been able to cut off statutory rights, see United States v. United Mine Workers of America, 330 U.S. 258 (1947), though Justices Black and Douglas, concurring, insisted it must be a true government operation for its own account: a symbolic seizure would be "the equivalent of the Government's seeking an injunction for the benefit of the private employers." Id. at 329. If government, by using law to seize rather than to regulate industrial operations, can cut off rights other than those of property, it must be because no constitutional guarantee stands in the way, not because the Constitution forces government to seize rather than to legislate in order to overcome the guarantee. Public employees have no constitutional right to strike against a public operation, e.g., a municipal utility or a county hospital, presumably because employees of the analogous non-governmental operation would have no constitutional right to strike in the face of a law prohibiting it. Compare, with respect to employees' political rights, Mr. Justice Douglas's dissent in United Public Workers v. Mitchell, 330 U.S. 75 (1947) quoted in 39 WASH. L. REV., 4, 33 (1964), and discussion, pp. 39-40. See also Anderson, Labor Relations in the Public Service, 1961 WIS. L. REV. 601.
each task at hand.\textsuperscript{430} That cannot be the construction of constitutional guarantees if function and effect are the test.

Of course a particular claim that the effect of a governmental decision in the management of a public operation infringes constitutional rights may or may not have merit. But to focus on the effects rather than the means of government action removes the false analogy. The relevant measure of the constitutionality of government action is not the analogy of public management and private management. It is the comparison of governmental decisions in a public operation with governmental regulation of the analogous operation in private hands. The relevant question is not whether the complainant—be he an employee, a contractor, a student, an insurance beneficiary—could make his claim against the action of the public managers if they were private. It is whether he could object if that action had been imposed upon comparable private managers by governmental decision. Constitutional rights against government action in the private sector (beyond the economic rights secured to the private owner as such) are the measure of constitutional rights in the public sector when effects rather than devices are seen as the object of constitutional guarantees.\textsuperscript{431}

"Certain rights are protected . . . certain things shall not be done,"


\textsuperscript{431} Like all attempts at simple formulations in constitutional law, this one is of course suspect. But there are several answers to whether it unrealistically restrains government's managerial freedom if applied to various hypothetical situations. First, it says nothing about governmental actions that could have no private analogue subject to government regulation, e.g., the President's choice of his chief cabinet, military, or diplomatic officers, or a state's selection of judges. Second, and most important, the analogy leaves government's discretion to manage as broad as its power to regulate, and that is very broad. Suppose government undertook to impose on non-public institutions state-prescribed criteria of eligibility for academic degrees (see note 236 supra), or priorities for admission, e.g., veterans' preferences, or the same for employment (cf. 50 U.S.C. App. § 459, Sullivan Drydock and Repair Co. v. Fishgold, 328 U.S. 275 (1946); Tilton v. Missouri Pacific R.R. Co., 376 U.S. 169 (1946), or for leases in privately-owned buildings; suppose even that these priorities were applied directly by government agencies, such as the United States Employment Service, a state educational testing and qualifications board, a housing assignment office, or the like. The hypothetical regulatory analogue to public management may seem to be government control so all-pervasive as to be surely unconstitutional; still, constitutional attack would have to demonstrate invasion of an identifiable claimant's interest protected by some specific constitutional guarantee. The present argument is that (once the due process claims of the private owner as such have been segregated) claims under constitutional guarantees that would prevail against such pervasive regulation would equally prevail against invasions by direct government management in the public sector. Third, it has been recognized in this article that constitutional adjudication as we know it cannot assure affirmative first-amendment claims to government support in the public sector; effective rights both to religious and to secular self-expression require the existence of privately accessible and allocable resources in a thriving and diffused private economic sector. See supra, text at notes 252, 253.
Mr. Justice Douglas in *Barsky v. Board of Regents*[^432] expressed the nature of constitutional limitations. "And so the question here is not what government must give, but rather what it may not take away."[^433] In the public sector, refusal to give is the easiest means of taking away. But a sovereign whose name is blessed when it giveth and blessed when it taketh away would claim inheritance from the divine right of kings more than from the Constitution. Government finds itself operating a public sector for various reasons, some with historical roots as old as the Constitution—the military, the public lands, the post office—others the accretion of two centuries of growth in public services. The twenty-five years of Mr. Justice Douglas's Supreme Court service that are the occasion for this survey have seen that growth accelerate sharply in response to new demands in a rapidly changing world. It has passed the point where the historically exceptional position of early government operations might furnish doctrine that today would provide the modern state with a vastly greater exemption from constitutional prohibitions. And the public sector will continue to grow, absolutely whether or not relatively, with the growth of the nation. Public financing, management, services and benefits, rewards and incentives, will remain more important instruments than prohibitions and penalties in government’s tool kit for tackling new problems.

Thus, the coming test of constitutional adjudication is whether it can maintain toward the use of these tools, as toward the traditional methods of government, the basic values of the Constitution—the substantive and procedural rights of individuals against government, and the classic federal antinomy of free personal and economic movement throughout a nation of politically separate states. Whether a particular decision is for or against the claimed right, it must be fashioned from premises that keep the constitutional commands relevant across the whole range of governmental activities in a mixed economy. In the modern state, constitutional decisions grounded in a difference between government operation and government regulation are not likely to enjoy a long life expectancy. Already, in fact, few substantial decisions stand in support of such a difference in constitutional limitations. In the next twenty-five years, the law of constitutional rights in the public sector may well follow Mr. Justice Douglas’s lead toward liberty in the welfare state.

[^433]: Id. at 473.