

# Invasions of the First Amendment Through Conditioned Public Spending

Alanson W. Willcox

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Alanson W. Willcox, *Invasions of the First Amendment Through Conditioned Public Spending*, 41 Cornell L. Rev. 12 (1955)  
Available at: <http://scholarship.law.cornell.edu/clr/vol41/iss1/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# INVASIONS OF THE FIRST AMENDMENT THROUGH CONDITIONED PUBLIC SPENDING

Alanson W. Willcox\*

“Congress may withhold all sorts of facilities for a better life,” wrote Mr. Justice Frankfurter in the *Doubs* case, “but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities.”<sup>1</sup> The Supreme Court has given us recent and forceful reminder that neither Congress nor a state legislature may provide facilities in an obviously arbitrary way,<sup>2</sup> but it has yet to condemn with comparable clarity their conditioning on the surrender of unrelated freedoms.

With the growth of public spending for all sorts of purposes, the potentialities of control through the power of the purse have grown apace. The most controversial issues at the moment have to do with pressures toward conformity of opinion and association; most conspicuously, pressures exerted through limitations on government or government-financed employment, which is often described as a “privilege”<sup>3</sup> and treated as though it were a bounty; but increasingly, also, pressures through conditioning of other public expenditures and public services. Though the courts have finally recognized that the equal protection clause applies to public benefits and public employment as fully as to other acts of the state, they are less quick to demand constitutional justification when benefits are so conditioned that, to receive them, one must surrender some part of one’s basic freedoms.

The difference in the judicial stature of these two limitations is the more striking in that they deal with what is fundamentally a common problem and have been thought to pose the same logical dilemma. It is

---

\* See Contributors’ Section, Masthead, p. 105, for biographical data.

<sup>1</sup> *American Communications Ass’n v. Douds*, 339 U.S. 382, 417 (1950), opinion concurring in part and dissenting in part.

<sup>2</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955); *Bolling v. Sharpe*, 347 U.S. 497 (1954), 349 U.S. 294 (1955), holding enforced racial segregation in the public schools to be unconstitutional.

<sup>3</sup> See, for example, Exec. Order No. 10450, “Security Requirements for Government Employment,” 3 C.F.R. 72 (Supp. 1953). The recitals of the Order refer to “all persons privileged to be employed” by the government, and to “all persons seeking the privilege of employment or privileged to be employed” by it. Curiously, however, § 14 of the same Order directs the Civil Service Commission to study, *inter alia*, possible tendencies in the security programs “to deny to individual employees . . . rights under the Constitution.”

See also, Dotson, “The Emerging Doctrine of Privilege in Public Employment,” 15 *Pub. Admin. Rev.* 77 (1955). The author, though believing that the doctrine that public employment is a privilege is established by the cases, characterizes the doctrine as “un-sound, unwise, and unnecessary.”

often said that a government, which is free to grant or to withhold its largesse, must of necessity be free to grant it to some and withhold it from others, or to attach such conditions to the grant as it may choose. The same is said of public employment. As the whole includes the part, must it not follow that the power to withhold altogether includes the power to withhold in part? If a grant or a job may be denied without cause, may it not be denied for any cause, including a bad one?

An analogy is frequently drawn to a private philanthropist or private employer, whose freedom to withhold his bounty or his offer of employment altogether ordinarily carries with it freedom to make an offer to whomever, and on whatever conditions, his fancy may dictate. So it is said that the state, which need not assume the role of almoner or employer at all, must enjoy the same freedom to assume the role in part and reject it in part—the same freedom, that is, to discriminate or to impose conditions.

This reasoning collides squarely with Justice Frankfurter's dictum, as much with the one half of it as with the other. The logic of the whole and the part is equally good, or equally bad, whether the partial withholding of benefits or jobs is effected by a description of people or by a description of conduct.<sup>4</sup> We now know, however, that despite this reasoning the first half of the dictum is true. Is the second half also true? If, as Justice Frankfurter says, it is unconstitutional to demand the surrender of unrelated freedoms as the price of receiving a public benefit, several existing limitations on public bounty may well be invalid; and since the same principle is presumably applicable to licenses and other "privileges" that do not involve the spending of public funds, the courts may have it within their power to halt a number of the more unnecessary incursions upon the Bill of Rights.<sup>5</sup>

---

<sup>4</sup> The two problems, indeed, overlap and at times become indistinguishable. Most limitations can be expressed, at the choice of the legislative draftsman, either by words of inclusion or exclusion or by words of condition. Racial discrimination, however expressed, raises only the issue of inequality, since people can do nothing to change the color of their skins. But other kinds of discrimination may be designed to influence conduct or may have that effect (*Grosjean v. American Press Co.*, 297 U.S. 233 (1936)), while grants conditioned on future conduct may work discrimination, as where the required conduct is easy for some but difficult or impossible for others. Cf. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 327 (1866).

<sup>5</sup> There have been reported in the Washington, D.C., press, for example, the imposition of a loyalty test for the licensing of insurance salesmen, denial of transfer of a liquor license because an applicant had invoked the privilege against self-incrimination in regard to alleged Communist Party activities, and refusal on similar grounds of a license to deal in second-hand pianos. *Washington Post and Times-Herald*, April 28, November 12, November 13, 1954. At the time of writing, administrative review of the piano dealer case was pending.

How far this doctrine is from universal acceptance by the courts, however, is suggested by the continued currency<sup>6</sup> of Justice Holmes' epigram in *McAuliffe v. New Bedford*<sup>7</sup> that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman";<sup>8</sup> the plain implication being that no constitutional issue is presented by conditions attached to public employment. His qualification, that the city was free to impose "any reasonable condition" on holding office, has been obscured by the neat simplicity of his epigram; the more so, perhaps, in that he did not trouble to discuss the reasonableness of the condition in the case that was before him.<sup>9</sup>

Nor is there much evidence that the principle that invalidates unrelated conditions is understood by the legislative and administrative arms of government, either federal or state. Loyalty tests<sup>10</sup> are imposed on public and publicly financed employment and on public benefits, not only in situations to which they are clearly pertinent, but also in other cases, seemingly rather at random and without much thought whether they serve any purpose related to the work that is to be done or the relief that is to be afforded. Automatic dismissal from employment for "pleading the Fifth Amendment" has become a commonplace, and has lapped over into employments to which the plea seems to have little relevancy.

<sup>6</sup> A few recent cases will suffice to show the continuing popularity of this remark: *Board of Education v. Wilkinson*, 125 Cal. App.2d 100, 270 P.2d 82 (1954); *Faxon v. School Committee*, 331 Mass. 531, 120 N.E.2d 772 (1954); *Thorp v. Board of Trustees*, 6 N.J. 498, 79 A.2d 462 (1951); *Daniman v. Board of Education*, 306 N.Y. 532, 119 N.E.2d 373, 307 N.Y. 806, 121 N.E.2d 629 (1954) probable jurisdiction noted, *Slochow v. Board of Higher Education*, 348 U.S. 935 (1955); *Appeal of Albert*, 372 Pa. 13, 92 A.2d 663 (1952). Cases citing *McAuliffe v. New Bedford*, without quotation, are more numerous by far.

<sup>7</sup> 155 Mass. 216, 29 N.E. 517 (1892).

<sup>8</sup> *Id.* at 220, 29 N.E. at 517. Douglas and Black, dissenting in *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1954), referred to this epigram as a dictum having "pernicious implications."

<sup>9</sup> Justice Holmes confined himself to stating that nothing in the Constitution or statute forbade the city to make abstention from political activity a condition of employment, or a part of the good conduct required of a policeman. His summary disposition of the case stands in marked contrast to the ten pages devoted in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), to the justification of the similar restrictions in the Hatch Act. See pages 37-38 *infra*.

<sup>10</sup> The federal employee program is now couched in terms of "security." The meaning of "security" in this context is obscure. It includes, but is not limited to, loyalty. Considerations of suitability for employment, such as honesty and sobriety, may also be included, as may past missteps which might make the employee a target for blackmail. It is not clear why such factors as these should, with respect to the great mass of employees whose work has nothing whatsoever to do with the safety of the nation against foreign powers, be blanketed under the heading of "security" and made the occasion for summary procedures. Cf. *Edgerton, C. J.*, dissenting in *Cole v. Young*, 24 U.S.L. Week 2056 (D.C. Cir. July 28, 1955), petition for cert. filed, October 3, 1955.

There can be no gainsaying today that freedom of speech and freedom of assembly are in fact curtailed by imposing tests of loyalty or security, or that surrender of these freedoms, as well as of the privilege against self-incrimination, is at times being exacted without much regard for the necessity of the exaction. In the belief that employment and benefits are "privileges" that may be circumscribed at will, dislike of "subversives" (and even of suspected "subversives") is given free rein to withhold the "facilities for a better life" without need for any other justification than a belief that government ought not to aid people who harbor or are suspected of harboring views which the government deems inimical to it.

This Article will undertake to show that there is ample judicial authority for the view that conditions exacting the surrender of unrelated constitutional freedoms are invalid. First, it will review briefly two analogous lines of decision: the cases dealing with the equal protection clause in relation to public benefits and public employment; and the line of decisions generally known by the phrase "unconstitutional conditions." It will then consider the manner in which the Supreme Court has dealt with those cases which have directly involved conditioned public benefits or conditioned public employment. Finally, it will examine several of the situations in which such conditions are most commonly applied at the present time and will attempt to sort out those instances in which the conditions are so far unrelated to the purpose of the benefits or the employment that the courts might reasonably hold them invalid.

### I. THE EQUAL PROTECTION CLAUSE

It is now axiomatic that the equal protection clause is as fully applicable to public benefits and public employment as to other actions of a state. But it was not always so. The clause had been a part of the Constitution for seventy years before the Supreme Court wholly repudiated<sup>11</sup> the notion that a state's power to withhold from all carried with it, to some undefined extent, a special license to withhold from one group while granting to another.

Soon after the fourteenth amendment was adopted, there was a spate of litigation in state courts challenging the practice of racial segregation in the public schools, then prevalent even in the North. The practice was sustained against constitutional attack, primarily on the now familiar ground that separate but equal facilities complied with the mandate of the equal protection clause. But there was more than a suggestion that the clause was inapplicable to a public gratuity. The New York Court of Appeals voiced this view most explicitly, saying that:

---

<sup>11</sup> *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

... the privilege of receiving an education at the expense of the State, being created and conferred solely by the laws of the State, and always subject to its discretionary regulation might be granted or refused to any individual or class at the pleasure of the State.<sup>12</sup>

The reliance placed on these school cases in *Plessy v. Ferguson*,<sup>13</sup> which first established in the Supreme Court the doctrine of "separate but equal," may be thought to have placed the ultimate imprimatur on them as interpretations rather than as rejections of the equal protection clause in relation to public education; there can be no doubt that this had become the well-nigh universal view many years before the "separate but equal" doctrine was repudiated with respect to public schools.<sup>14</sup> But if *Plessy v. Ferguson* seemed to have settled the matter, it was almost immediately thrown into doubt again by the extraordinary decision in *Cumming v. County Board of Education*.<sup>15</sup>

In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until it resumed operation of a high school for Negro children.<sup>16</sup> Here was not even the semblance of "separate but equal" facilities; here was schooling provided to one group of children and wholly denied to the other. Yet the Supreme Court unanimously sustained the action of the county board, in an opinion by Mr. Justice Harlan who, three years earlier, had protested so vigorously against enforced

<sup>12</sup> *People v. Gallagher*, 93 N.Y. 438, 447 (1883). Emphasis on the wide discretion of the state is also found in *Cory v. Carter*, 48 Ind. 327 (1874), and *State v. McCann*, 21 Ohio St. 198 (1871), and it is difficult to determine whether such rights to equal schooling as the courts conceded rested on the fourteenth amendment or on state constitutional provisions relating to schools. In *Ward v. Flood*, 48 Cal. 36 (1874), on the other hand, the court explicitly affirmed the applicability of the equal protection clause, and declared: "The education of youth is emphatically their protection." *Id.* at 51.

<sup>13</sup> 163 U.S. 537 (1896). This case dealt with segregation in railroad cars enforced by state law, and did not in itself involve any question of the applicability of the equal protection clause to public benefits.

<sup>14</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court pointed out that public education is today a wholly different thing from what it was when the fourteenth amendment was adopted. The acceptance of the equal protection clause, even before the *Gaines* decision, *supra* note 11, as a limitation upon the provision of public education cannot be dissociated from the growing recognition of the right to education as a basic legal right. Spread of compulsory attendance laws has contributed to this growing recognition, but otherwise seems to have had little influence on equal protection decisions.

<sup>15</sup> 175 U.S. 528 (1899).

<sup>16</sup> This statement of the *Cumming* case is taken substantially verbatim from *Brown v. Board of Education*, 347 U.S. 483, 491, note 8 (1954). The decision of the board of education in the *Cumming* case to discontinue the Negro high school had been prompted by the belief that it would better serve the interests of the Negroes in the area to devote such funds as were available for Negro education to primary schools. The report does not indicate, however, the basis on which funds had been allocated as between Negro and white schools.

separation of the races in railroad cars, even though the treatment accorded them was assumed to be equal.

The Court quoted at length from the opinion of the Supreme Court of Georgia, which had said *inter alia*:

We think we have shown that it was in the discretion of the Board to establish high schools. It being in their discretion, they could, without a violation of the law or of any constitution, devote a portion of the taxes collected for school purposes to the support of this high school for white girls and to assist a county denominational high school for boys.<sup>17</sup>

After pointing out that there was not shown "any desire or purpose on the part of the Board to discriminate," Justice Harlan continued:

Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined. . . .<sup>18</sup>

To appreciate the inferior status thus assigned to public education, in respect of the equal protection of the laws, it is only necessary to contrast this holding with the Court's statement in *Plessy v. Ferguson* that the object of the fourteenth amendment "was undoubtedly to enforce the absolute equality of the two races before the law,"<sup>19</sup> and with Justice Harlan's statement in dissent:

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.<sup>20</sup>

The view that "privileges" are not subject to the equal protection clause reached its highwater mark in *Heim v. McCall*<sup>21</sup> and *Crane v. New York*.<sup>22</sup> A New York statute, under pain of criminal sanction, forbade the employment of aliens in the construction of public works by the state or a municipality or by a public contractor and required that preference be given to citizens of New York State. Objection under the equal protection clause was disposed of summarily, on the ground that:

---

<sup>17</sup> 175 U.S. 528, 542 (1899).

<sup>18</sup> *Id.* at 545.

<sup>19</sup> 163 U.S. 537, 544 (1896).

<sup>20</sup> *Id.* at 554.

<sup>21</sup> 239 U.S. 175 (1915).

<sup>22</sup> 239 U.S. 195 (1915).

. . . it belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. . . . No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.<sup>23</sup>

Finally, in *Gong Lum v. Rice*,<sup>24</sup> the Court sustained the assignment of a child of Chinese descent to a school for Negroes, relying on *Cumming v. Board of Education* and reiterating its language. While this case adds nothing new, it at least suggests that the reasoning of the *Cumming* case retained its vitality as late as 1927.

Up to this point, then, there was eminent authority for the view that the equal protection clause was wholly inapplicable to public employment, and that it had only a limited application to public education—an application to strike down, not inequality as such, but only “a clear and unmistakable” discrimination (such, perhaps, as one shown to be inspired by vindictiveness against the Negro race?). The state must have the same “control of its affairs” as a private employer has in deciding whom it will permit to work for it;<sup>25</sup> and in providing public education it confers a “privilege” which rests largely, at least, in its discretion.

Though these views have been wholly abandoned today, it is worth pausing to examine briefly the reasoning underlying them because the same reasoning, in substance, is still being used to argue for an unlimited power in the state to attach conditions to public benefits or public employment.

The analogy between the public and the private employer is obviously a false one. As Professor Thomas Reed Powell pointed out in a critique of *Heim v. McCall* and *Crane v. New York*:

A significant difference between the individual employer and the state at once suggests itself. The federal constitution does not require individuals to accord equal treatment to all. It does not forbid individuals to discriminate against individuals. It does, however, expressly declare that

---

<sup>23</sup> *Id.* at 191. The language was quoted from *Atkin v. Kansas*, 191 U.S. 207 (1903), which, however, dealt with the due process rather than the equal protection clause. That the issues under the two clauses are materially different, see page 20 *infra*.

<sup>24</sup> 275 U.S. 78 (1927).

<sup>25</sup> In *Heim v. McCall*, 239 U.S. at 188, the Court, quoted the remark from a concurring opinion below, that “the statute is nothing more, in effect, than a resolve by an employer as to the character of his employés.” *People v. Crane*, 214 N.Y. 154, 175, 108 N.E. 427, 434 (1915). The same concurring opinion below states:

Other employers, individual or corporate, possess the undoubted and absolute right to withhold employment from whomever they see fit. The Constitution could hardly have been intended to deprive the states of equality with private employers in this respect. . . .

*Ibid.*



no state shall deny to any person within its jurisdiction the equal protection of the laws. Thus state action is prohibited by the federal constitution where individual action is not prohibited.<sup>26</sup>

The equal protection clause makes no exception of a state acting either as employer or as almoner. The tendency to reason as though there were such an exception seems plainly unwarranted.

Professor Powell then takes up the argument of the whole and the part:

The state, like the individual, may decline to be an employer at all. It is therefore urged that since the state may refuse employment to any given class by undertaking no work which calls for such employment it may refuse employment to that class by discriminating against it in favor of another class—that since the class has no right to claim work if all are denied work, it has no right to claim the opportunity to work under any different circumstances.

Although the opinion in *Heim v. McCall* does not specifically set forth this doctrine, this is undoubtedly the theory underlying the proposition that the right of the state to contract in respect to public work as it shall see fit is the same as the right of the individual employer so to do. The power of discriminatory exclusion is assumed to follow from the power of excluding all.<sup>27</sup>

He then proceeds to expose the logical fallacy in this argument. Referring to the power of a state to exclude a foreign corporation from local business, and to Mr. Justice Holmes' use of the "whole and part" argument in connection with it,<sup>28</sup> Professor Powell presents a syllogism and shows that the conclusion sought to be drawn does not follow logically from the premises. He adds:

Logically a thing which may be absolutely excluded is not the same as a thing which may be subjected to burdens of a different kind, even though such burdens would be regarded by all as less onerous than the burden of absolute exclusion.<sup>29</sup>

Except in the abstractions of geometry, the part ordinarily differs from the whole in kind as well as quantity, and receives correspondingly different treatment in human affairs including the law.<sup>30</sup> If the part does,

---

<sup>26</sup> Powell, "The Right to Work for the State," 16 Colum. L. Rev. 99, 105 (1916). The author concedes that the same result might perhaps have been reached by application of the equal protection clause that was in fact reached by its rejection. He does not consider the preference given to citizens of the state over other citizens of the United States.

<sup>27</sup> *Id.* at 106-07.

<sup>28</sup> See page 29 *infra*.

<sup>29</sup> 16 Colum. L. Rev. at 111.

<sup>30</sup> The law commonly does not treat automobile parts in the same way that it treats automobiles. Most of the wholes that we deal with in our daily lives, like automobiles or houses, books or ideas, are made up of parts that are quite unlike one another and quite unlike the wholes. Even fungible goods, the parts of which resemble one another closely, may be treated differently in accordance with the quantity—as, for example, in the unit price they command.

where the whole does not, run afoul of a constitutional prohibition, then the part must be adjudged invalid even though the whole would be sustained.

The fallacy of the whole and the part probably owes some of its popularity to the real, if verbal, difficulty of applying the due process clause to public gratuities or, indeed, to other things which a government may withhold altogether.<sup>31</sup> Due process, unlike equal protection, can come into play only if that for which protection is sought can be described as either "liberty" or "property." This verbal necessity presents its own difficulties, including the temptation to reason in a circle: whether a thing is "property" may depend on whether it is accorded constitutional protection.<sup>32</sup> Be that as it may, however, these subtleties and the cases that grapple with them have no relevance to the categorical injunction against denying to any person the equal protection of the laws; or, indeed, to several other categorical injunctions found in the Constitution.

We need return but briefly to the history of the equal protection clause as applied to public benefits. The turning point in that history, of course, was *Missouri ex rel. Gaines v. Canada*.<sup>33</sup> The state supreme court had acknowledged the applicability of the equal protection clause to public education, and Chief Justice Hughes did not pause (beyond attaching the word "compare" to his citation of *Cumming v. Board of Education*) to consider the limited scope which the earlier education cases had given to that clause. "It is manifest," he said, "that this discrimination, if not relieved by the provisions we shall presently discuss [for the education of Negroes at institutions outside the state], would constitute a denial

---

<sup>31</sup> See Davis, "The Requirement of Opportunity to be Heard in the Administrative Process," 51 Yale L.J. 1093, 1122-25 (1942); Note, "Judicial Acquiescence in the Forfeiture of Constitutional Rights through Expansion of the Conditioned Privilege Doctrine," 28 Ind. L.J. 520 (1953).

<sup>32</sup> Whenever the Court has accorded protection under the due process clause, it has usually contented itself with the assertion that what it is protecting is in some sense a right, and not a mere privilege—and by according constitutional protection, it has made the characterization seem warranted. See, for example, *Lynch v. United States*, 292 U.S. 571 (1934); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Bolling v. Sharpe*, 347 U.S. 497 (1954); Douglas, J., concurring in *Peters v. Hobby*, 349 U.S. 331, 352 (1955). That this circular reasoning can be pursued in a counter-clockwise as readily as in a clockwise direction is illustrated by the long list of pension cases, a few of which were distinguished in *Lynch v. United States*, supra, on the ground that the pensions are mere gratuities. See also *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Bailey v. Richardson*, 182 F.2d 46, 57-58 (D.C. Cir. 1950), aff'd, 341 U.S. 918 (1951).

<sup>33</sup> 305 U.S. 337 (1938). In the preceding year the Court had applied the equal protection clause to unemployment compensation benefits. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937). While these benefits were technically gratuities, however, the constitutional attack was directed primarily at the taxes levied by the statute.

of equal protection."<sup>34</sup> Only Justices McReynolds and Butler dissented, in reliance on the broad discretion which the *Cumming* and *Gong Lum* cases had left to the state.

Through the later education cases,<sup>35</sup> down to and including *Brown v. Board of Education*, the applicability of the equal protection clause in all its vigor has never been doubted; in the *Brown* case the Court stated categorically:

Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>36</sup>

The clause has also been applied to public employment,<sup>37</sup> to unemployment compensation benefits,<sup>38</sup> to public housing,<sup>39</sup> to public recreation facilities,<sup>40</sup> and to public assistance.<sup>41</sup> It is probably a safe generalization today that the clause is applicable to any program of benefits which the state makes available to the public in general or to a defined segment of the public,<sup>42</sup> and that the admitted power to withhold such benefits

<sup>34</sup> *Id.* at 345.

<sup>35</sup> *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). The *Sipuel* case required the state to provide legal education to a Negro "as soon as it does for applicants of any other group." The *Sweatt* and *McLaurin* cases held that separate treatment of Negroes in institutions of higher learning was unconstitutional if it was not equal, in fact as well as in form, to that accorded whites.

<sup>36</sup> 347 U.S. 483, 493 (1954).

<sup>37</sup> *Alston v. School Board*, 112 F.2d 992 (4th Cir.), cert. denied, 311 U.S. 693 (1940). See *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952); *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947).

<sup>38</sup> *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937).

<sup>39</sup> *Banks v. Housing Authority*, 120 Cal. App.2d 1, 260 P.2d 668 (1953), cert. denied, 347 U.S. 974 (1954).

<sup>40</sup> *Beal v. Holcombe*, 193 F.2d 384 (5th Cir. 1952), cert. denied, 347 U.S. 974 (1954); *Dawson v. Baltimore City*, 220 F.2d 386 (4th Cir. 1955). See *Rice v. Arnold*, 340 U.S. 848 (1950).

<sup>41</sup> The only case holding a public assistance statute invalid under the equal protection clause is the unreported decision in *Arizona v. Ewing* (D.C. D.C. 1953), aff'd on other grounds, sub. nom. *Arizona v. Hobby*, 221 F.2d 498 (D.C. Cir. 1954). See also, *Commonwealth ex rel. Meredith v. Frost*, 295 Ky. 137, 172 S.W.2d 905 (1943); *Dimke v. Finke*, 209 Minn. 29, 295 N.W. 75 (1940); *Senior Citizens League v. Dep't of Social Security*, 38 Wash.2d 142, 228 P.2d 478 (1951).

<sup>42</sup> Intriguing questions remain, nevertheless. As the scope of a benefaction narrows, the ultimate being a private relief act, at what point (if any) does it cease to constitute "protection of the laws" and become a gift pure and simple? If wide discretion to select beneficiaries is entrusted to administrative officers, as in grants for research or in the hand-picking of fellows for advanced study, does the absence of claim to benefit as a matter of statutory right negate the application of the equal protection clause? Or does it merely augment the difficulty of proving discrimination, and the difficulty of persuading a court to assume jurisdiction?

Except for public education, the concept of public benefits as constituting matters of legal

altogether is no longer deemed relevant in appraising a charge of discrimination among the beneficiaries.

## II. THE UNCONSTITUTIONAL CONDITION CASES

In framing the second half of the dictum with which this Article opens, Justice Frankfurter probably had in mind the long line of cases dealing with unconstitutional conditions.<sup>43</sup> These cases have involved, in the main, conditions attached by a state to permission granted to foreign corporations to do local business within the state, but they have dealt also with the conditioning of other privileges—notably, the privilege of using public streets, highways, or parks. Writers who have essayed to draw general conclusions from these decisions have not found the task easy, and we may content ourselves here with a cursory survey.

Throughout the earlier cases the dominant but by no means universal theme was that, because a state had the power to exclude a foreign corporation unconditionally from doing local business, it must of necessity have the power to impose any condition it might see fit. From a multitude of cases,<sup>44</sup> we may take *Doyle v. Continental Ins. Co.*<sup>45</sup> as illustrative of the conflicting points of view. Sustaining the action of Wisconsin, pursuant to its statute, in ousting a foreign corporation for removing a case to the federal court, Justice Hunt said for the majority:

The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there.<sup>46</sup>

Dissenting, Justice Bradley said:

The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man

---

right is in the main a development of the last few decades. See A. Delafield Smith, "Public Assistance as a Social Obligation," 63 Harv. L. Rev. 266 (1949). Writing in 1916, Professor Powell seems to have assumed that public gratuities (from which he would perhaps have excluded public education) fell outside the scope of the equal protection clause. Powell, *supra* note 26, at 114.

<sup>43</sup> See Merrill, "Unconstitutional Conditions," 77 U. Pa. L. Rev. 879 (1929); Hale, "Unconstitutional Conditions and Constitutional Rights," 35 Colum. L. Rev. 321 (1935); Note, "Judicial Acquiescence in the Forfeiture of Constitutional Rights through Expansion of the Conditioned Privilege Doctrine," 28 Ind. L.J. 520 (1953).

<sup>44</sup> Professor Hale, *supra* note 43, discusses many of these cases.

<sup>45</sup> 94 U.S. 535 (1877).

<sup>46</sup> *Id.* at 542.

as my tenant, therefore I may make it a condition or his tenancy that he shall take the life of my enemy, or rob my neighbor of his property.<sup>47</sup>

The vice in an unconstitutional condition, in other words, is its tendency to bring about a forbidden result, interference with the federal judicial power in this case. Much the same thought is expressed in *Terral v. Burke Construction Co.*,<sup>48</sup> which in 1922 finally overruled the *Doyle* case and established its dissenting opinion as law. The invalidity of the condition, said Chief Justice Taft,

. . . rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law.<sup>49</sup>

One of the early cases in this series requires more particular mention, because it involved freedom of speech. In *Davis v. Massachusetts*,<sup>50</sup> the appellant had been convicted of making a speech on the Boston Common, in violation of a city ordinance forbidding, *inter alia*, the making of any public address upon public grounds without a permit from the mayor. The conviction had been affirmed by the Supreme Judicial Court of Massachusetts in an opinion by Justice Holmes,<sup>51</sup> in which he said:

The argument [that the ordinance was unconstitutional] involves the same kind of fallacy that was dealt with in *McAuliffe v. New Bedford*, 155 Mass. 216. It assumes that the ordinance is directed against free speech generally . . . whereas in fact it is directed toward the modes in which Boston Common may be used.<sup>52</sup>

<sup>47</sup> *Id.* at 543-44. Presumably Justice Bradley used the analogy of a private landlord merely to show that, even in the hands of a private party, the right to impose conditions is not unlimited. Just as the Constitution does not forbid a private party to discriminate in ways that the state is forbidden to do (see pages 18-19 *supra*), so a private party may impose many conditions which are not permitted to the state.

<sup>48</sup> 257 U.S. 529 (1922).

<sup>49</sup> *Id.* at 532-33.

<sup>50</sup> 167 U.S. 43 (1897). This case arose long before the freedoms secured by the first amendment were found to constitute "liberty" within the meaning of the fourteenth. Perhaps because it thought no constitutional rights were in issue, the Court did not pause to consider whether, if there had been, they would have been rights under the Federal Constitution and would thus have raised a federal question.

<sup>51</sup> *Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1895). The ordinance forbade, in addition to speaking, the discharge of cannon and several other activities to the banning of which no exception would be taken. Justice Holmes concluded:

But we have no reason to believe, and do not believe, that this ordinance was passed for any other than its ostensible purpose, namely, as a proper regulation of the use of public grounds.

*Id.* at 512, 39 N.E. at 113.

<sup>52</sup> *Id.* at 511, 39 N.E. at 113.

He continued, in language quoted by the United States Supreme Court in affirming the judgment:

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. When no proprietary right interferes, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes.<sup>53</sup>

A contention that the unlimited discretion of the mayor to grant or withhold a permit violated the due process clause by authorizing arbitrary action was also disposed of by reference to the power of control over public property. That argument, said the Supreme Court,

. . . in truth, whilst admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.<sup>54</sup>

The reasoning of both courts, it will be observed, is substantially the reasoning of the majority in *Doyle v. Continental Ins. Co.*, and sharply at odds with that of the dissenting opinion in the *Doyle* case which has since been declared to be the law.

Even before the reversal of the *Doyle* case in 1922, other inroads had been made on the view that a power to exclude carries with it an unlimited power to impose conditions.<sup>55</sup> For present purposes, however, we

---

<sup>53</sup> *Id.* at 511, 39 N.E. at 113; 167 U.S. at 47. The analogy thus drawn by Justice Holmes between public and private action is, it is submitted, as inconclusive in support of conditions as it is in support of discriminations. See pages 18-19 *supra*. Most constitutional limitations apply to public but not to voluntary private action. Yet in Opinion of the Justices, 126 N.E.2d 100 (Mass. 1955), advising that a statute would be invalid which required the dismissal of private as well as public teachers for pleading the privilege against self-incrimination with respect to communism, the court distinguished the *Faxon* case (note 6 *supra*, pages 54-55 *infra*) on the ground that there

. . . the public as represented by the school committee had the rights of an employer in the selection and retention of employees suitable to the enterprise in hand.

Opinion of the Justices, *supra* at 103. This is all very well of conditions that really bear upon suitability, but it should not be used as a catchall to justify the sort of capricious classifications or conditions that a private employer is constitutionally free to impose.

<sup>54</sup> 167 U.S. at 48.

<sup>55</sup> Thus, the Court had denied the power of a state, as the price for permission to do local business, to exact payments measured by the corporations' entire capital stock, and so to burden their interstate activities and those wholly in other states; or to impose on a corporation already doing a local business a discriminatory tax, found to violate the equal protection clause. *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910); *Pullman Co. v. Kansas*, 216 U.S. 56 (1910); *Southern Railway Co. v. Greene*, 216 U.S. 400 (1910). For reference to Justice Holmes' dissenting opinion in the *Western Union* case, see page 29 *infra*.

may move on to *Frost Trucking Co. v. Railroad Commission of California*,<sup>56</sup> which illustrates the danger of veering from one extreme to the other. Holding invalid a California statute which he construed as requiring a private contract carrier, as a condition of permission to use the highways, to assume the burdens of a common carrier, Justice Sutherland said for the majority of the Court:

It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.<sup>57</sup>

Justice Sutherland was able to cite many earlier expressions to like effect; yet to place beyond the pale all bargaining away of "constitutional rights,"<sup>58</sup> as this language seems to do, is a manifest absurdity. Such a rule would invalidate, among other things, all contracts to work for the state, for those require sacrifice of the constitutional right of idleness; or to sell it property, at least if the market value (and hence "just compensation") should increase before delivery.

An escape from this absurdity was found in *Stephenson v. Binford*,<sup>59</sup> which like the *Frost* case involved the regulation of private contract carriers as a condition of their right to use the highways. Unlike the *Frost* case, however, *Stephenson v. Binford* involved no attempt to convert private carriers into common carriers, but only such regulation as was reasonably calculated to protect and promote the proper use of the facilities afforded by the state. For this reason Justice Sutherland, again writing for the Court, sustained, as a condition of the permission to use the roads, regulation of rates which he assumed the state could not have imposed by direct fiat. He distinguished the *Frost* case on the ground that the statute there in issue "was in no real sense a regulation of the use of the public highways. . . . Protection or conservation of the highways was not involved."<sup>60</sup>

Reviewing the cases up to this point, Professor Hale concluded that a state may not, by attaching a condition to a privilege, bring about undue interference with the workings of our federal system; and also, that it

---

<sup>56</sup> 271 U.S. 583 (1926).

<sup>57</sup> *Id.* at 593-94.

<sup>58</sup> The concept of "constitutional rights" in the abstract is amorphous. Presumably, Justice Sutherland meant to refer to those rights that are generally accorded constitutional protection against direct invasion by the state.

<sup>59</sup> 287 U.S. 251 (1932).

<sup>60</sup> *Id.* at 275. The Court was able to cite the Supreme Court of California in support of its characterization of the statute involved in the *Frost* case.

may not in this fashion require the surrender of constitutional rights unless the surrender "serves a purpose germane to that for which the power can normally be exerted without conditions."<sup>61</sup> The latter limitation, it will be noted, is essentially the same as that voiced by Justice Frankfurter in the *Doubs* case, that Congress may not "exact surrender of freedoms unrelated to the purpose of the facilities." It is similar, also, to the limitation imposed by the equal protection clause, which requires that the reasonableness of an exclusion be tested in relation to the purpose of the legislation of which it forms a part.<sup>62</sup>

Later cases dealing with foreign corporations need not detain us, beyond noting that the Court continues to recognize that the power to impose conditions is not unlimited.<sup>63</sup> We need not be concerned if the limitation has sometimes been stated too broadly, after the fashion of the *Frost* case; nor, on the other hand, if there are still areas of the law in which the power to exclude apparently continues to override all or nearly all other considerations.<sup>64</sup> The unconstitutional condition cases, if they had done nothing more, would at least have undermined the reasoning which many a court still applies to issues of civil liberty.<sup>65</sup>

But in actuality, there has been a sequel to those cases which gives affirmative and powerful support to the view that a conditioned privilege may be invalid for conflict with the first amendment, as applied to the states by the fourteenth. In a long line of decisions in the last twenty years, the Supreme Court has dealt with various forms of regulation of

---

<sup>61</sup> Hale, *supra* note 43, at 357.

<sup>62</sup> *Smith v. Cahoon*, 283 U.S. 553 (1931); *Railway Express Agency v. New York*, 336 U.S. 106 (1949). Cf. *Toomer v. Witsell*, 334 U.S. 385 (1948), applying a like test to the privileges and immunities clause (U.S. Const. art. IV, § 2).

<sup>63</sup> *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629 (1936); *Power Co. v. Saunders*, 274 U.S. 490 (1927); *Hanover Ins. Co. v. Harding*, 272 U.S. 494 (1926). But cf. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 437-38 (1946); *Lincoln Life Ins. Co. v. Read*, 325 U.S. 673 (1945); *Fox River Co. v. Railroad Commission*, 274 U.S. 651 (1927).

<sup>64</sup> Perhaps the most conspicuous example is in the power of Congress to control immigration and deportation. See *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

<sup>65</sup> See, for example, *Adler v. Board of Education*, 342 U.S. 485 (1952) (see pages 41-42 *infra*), and the cases cited note 6 *supra*. In most of these cases the courts, in addition to quoting or paraphrasing Holmes' dictum in *McAuliffe v. New Bedford*, have advanced substantive arguments in support of the conditions involved. In some of them it is difficult to know how much weight has been attached to the argument that a conditioned privilege raises no constitutional issue.

For discussion of conditioned privileges not limited to public employment and public benefits, see Note, "Judicial Acquiescence in the Forfeiture of Constitutional Rights through Expansion of the Conditioned Privilege Doctrine," 28 *Ind. L.J.* 520, 525-34 (1953).



the use of public parks and streets,<sup>66</sup> and has struck down many of them as infringing too far upon the right of free expression. Not once has the Court reverted to the formula of *Davis v. Massachusetts*, which would dispose of these difficult and delicate problems by a syllogism. In 1943 the Court said, in *Jamison v. Texas*:<sup>67</sup>

The city contends that its power over its streets is not limited to the making of reasonable regulations for the control of traffic and the maintenance of order, but that it has the power absolutely to prohibit the use of the streets for the communication of ideas. It relies primarily on *Davis v. Massachusetts*, 167 U.S. 43. This same argument, made in reliance upon the same decision, has been directly rejected by this Court. *Hague v. C.I.O.*, 307 U.S. 496, 514-516. Of course, states may provide for control of travel on their streets in order to insure the safety and convenience of the traveling public. *Cox v. New Hampshire*, 312 U.S. 569, 574. They may punish conduct on the streets which is in violation of a valid law. *Chaplinsky v. New Hampshire*, 315 U.S. 568. But one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.<sup>68</sup>

The *Davis* case has not been overruled,<sup>69</sup> but its too simple approach to an exceedingly difficult problem has long since been abandoned. These recent cases, indeed, raise a question whether Professor Hale's formulation of the unconstitutional condition doctrine is still adequate, for many of the regulations of streets and parks which have been held invalid were

<sup>66</sup> Among the principal cases are *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Feiner v. New York*, 340 U.S. 315 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Saia v. New York*, 334 U.S. 558 (1948); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Jamison v. Texas*, 318 U.S. 413 (1943); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Schneider v. State*, 308 U.S. 147 (1939); *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).

<sup>67</sup> 318 U.S. 413 (1943).

<sup>68</sup> *Id.* at 415-16.

<sup>69</sup> In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the state rested its case largely on *Davis v. Massachusetts*, while appellant asked that it be overruled. Justice Douglas, speaking for the Court, found it unnecessary either to reaffirm or to repudiate that case. A few years earlier, however, on behalf of a majority of the Court, he had indicated that the *Davis* case has at least been drained of its authority. *Saia v. New York*, 334 U.S. 558 (1948). See also the quotation in the text from the opinion of the unanimous Court in *Jamison v. Texas*, 318 U.S. 413 (1943). Except for Justice Butler's dissent in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), and Justice Jackson's in *Saia v. New York*, *supra* at 566—each speaking for himself alone—it is difficult to find, frequently though the *Davis* case has been cited, that the Court or any of its members has in recent years placed any reliance on it whatsoever.

See also summary of brief filed in *Hague v. Committee for Industrial Organization*, 101 F.2d 774 (3rd Cir.), modified and *aff'd*, 307 U.S. 496 (1939), by Committee on the Bill of Rights of the American Bar Association, 25 A.B.A.J. 7, 73-74 (1939).

in some degree relevant to the maintenance of order and to the quiet and comfort of other users of the public property. *Hannegan v. Esquire, Inc.*<sup>70</sup> points in the same direction. In that case the Court intimated its grave doubt as to the constitutionality of a provision of the postal laws if the provision were construed to authorize withholding the low-rate second class mail privilege because of the quality of a magazine's content, even though it would be difficult to pronounce such censorship "irrelevant" to the exercise of the Congressional power to control a medium of communication.<sup>71</sup>

Relevance alone is evidently not enough to sustain a condition attached to a privilege, if the condition strikes at first amendment freedoms. However the tests may be framed,<sup>72</sup> it is plain that significant impairment of

<sup>70</sup> 327 U.S. 146 (1946). The Government did not claim that the magazine was obscene or otherwise non-mailable, and the only question was one of postal rate. In the course of its opinion the Court said:

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 whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 421-423, 430-432, 437-438. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the Fourth condition would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.

*Id.* at 156. Justice Brandeis' dissent in *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407 (1921), with which Justice Holmes agreed "in substance," contains this statement:

Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitutional.

*Id.* at 430-31.

Justice Holmes added:

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. . . .

*Id.* at 437.

<sup>71</sup> The constitutional issues arising out of postal censorship are many and varied. See Deutsch, "Freedom of the Press and of the Mails," 36 Mich. L. Rev. 703 (1938). As the Court intimated in the *Esquire* case, the doctrine of unconstitutional conditions should dispel any notion that conditions attached to the "privilege" of using the mails, or of enjoying second-class rates, are automatically valid. Cf. *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 313-16 (1913). But the rule of relevancy, which is an essential element if the doctrine of unconstitutional conditions is not to get out of hand (see pages 24-26 *supra*), seems hardly a satisfactory criterion by which to distinguish those postal restrictions that are held to be permissible (such as the exclusion of fraudulent matter, *Donaldson v. Read Magazine*, 333 U.S. 178 (1948)) from those that would today almost certainly be condemned.

<sup>72</sup> Even where the "clear and present danger" test may be inapplicable (see pages 46-47 *infra*) plainly more is required than "reasonableness" in the usual due process sense. See *Schneider v. State*, 308 U.S. 147, 161 (1939). Many of the regulations condemned in the street and park cases cited in note 66 *supra*, would presumably have been held reasonable if the rights invaded had been other than first amendment rights.

those freedoms can be justified only to avoid an evil of substantial gravity. Even a related condition will be struck down if the impairment of free expression is found to outweigh the legitimate concerns which prompted the condition.

When he took his seat on the United States Supreme Court in 1902, Justice Holmes still adhered to the views about conditioned privileges which he had expressed in *McAuliffe v. New Bedford* and *Commonwealth v. Davis*. Writing for the Court in *Pullman Co. v. Adams*,<sup>73</sup> he disposed summarily of a contention that a tax on local business was so heavy as to burden the interstate operations of the Pullman Company, saying:

The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce.<sup>74</sup>

And when in 1910 the majority of the Court swung to the opposite position in *Western Union Co. v. Kansas*,<sup>75</sup> he dissented in characteristic fashion:

Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way. I hardly can suppose that the provision is made any worse by giving a bad reason for it or by calling it by a bad name.<sup>76</sup>

But when he was outvoted in that and its companion cases he accepted the result. Eight years later we find him saying for a unanimous Court in *Western Union Tel. Co. v. Foster*,<sup>77</sup> which struck down an interference with interstate commerce:

It is suggested that the State gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, . . . and a constitutional power cannot be used by way of condition to attain an unconstitutional result.<sup>78</sup>

From this and subsequent opinions<sup>79</sup> it appears that in his later years

---

<sup>73</sup> 189 U.S. 420 (1903).

<sup>74</sup> *Id.* at 422.

<sup>75</sup> 216 U.S. 1 (1910).

<sup>76</sup> *Id.* at 53. It is this dissenting opinion which Professor Powell uses to demonstrate the logical fallacy in the Court's reasoning in *Heim v. McCall*. See page 19 *supra*.

<sup>77</sup> 247 U.S. 105 (1918).

<sup>78</sup> *Id.* at 114.

<sup>79</sup> In *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 434-35 (1926), he said:

Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong.

Justice Holmes came to accept views differing in a significant degree from the rigidity of his reasoning in the *McAuliffe* and *Davis* cases. Remembering his deep attachment to the rights secured by the first amendment, it is interesting and perhaps not wholly useless to speculate whether, had the issues arisen before he finally left the bench, he would have given the political freedoms of federal employees<sup>80</sup> the same short shrift that he gave to those of policeman McAuliffe, or would have sustained the silencing of Jehovah's Witnesses<sup>81</sup> as cavalierly as he did the silencing of Dr. Davis.

### III. CONDITIONING OF PUBLIC BENEFITS AND PUBLIC EMPLOYMENT

We may now turn to those cases in which the Supreme Court has been called upon to consider the constitutionality of conditions attached to the expenditure of public funds. We shall find that, though not often clearly avowed, the principles which emerge from the unconstitutional condition cases have usually been applied in the sense, at least, that the claim of unconstitutionality resulting from the conditions has usually been tested on its merits, and has not been rejected out of hand simply because the expenditure might validly have been withdrawn altogether.

Our review begins, however, with two cases, *Massachusetts v. Mellon*<sup>82</sup> and *Florida v. Mellon*,<sup>83</sup> in which this is conspicuously not true.

The State of Massachusetts and an individual taxpayer sought injunctions against carrying out the Maternity Act of 1921, which provided for federal grants to the states for maternal and child health and welfare

---

. . . Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, . . . or to tax it upon property that by established principles the State has no power to tax, . . . or to interfere with interstate commerce. . . .

See also, *Burnes Nat'l Bank v. Duncan*, 265 U.S. 17 (1924); *St. Louis Compress Co. v. Arkansas*, 260 U.S. 346 (1922); *Union Pac. R.R. v. Pub. Serv. Comm'n*, 248 U.S. 67 (1918). And see the dissents in *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407 (1921), note 70 supra.

<sup>80</sup> See *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

<sup>81</sup> Many of the cases cited in note 66 supra, involved this contentious sect.

In its brief in the Hague case the committee of the American Bar Association said, . . . it is hard to believe that Mr. Justice Holmes, if still on the Bench, would approve the use of his statement in *Commonwealth v. Davis* to justify the conduct of the Jersey City officials.

25 A.B.A.J. at 75 (supra note 69).

Since this brief was written, successive decisions of the Supreme Court have substantially deprived the *Davis* case of authority. See note 69 supra. Since Justice Holmes himself had likened that case to *McAuliffe v. New Bedford*, it is surprising how persistently the "phantom policeman" continues to rear his head.

<sup>82</sup> 262 U.S. 447 (1923).

<sup>83</sup> 273 U.S. 12 (1927).

services, conditioned<sup>84</sup> on state acceptance and on matching appropriations by the state legislature, the submission of state plans of operation for approval by a federal board, the vesting of state administration in the state health agency (if it contained a child-welfare or child-hygiene division), and the provision of safeguards of the rights of parents.

The point actually decided in the case was that neither the state nor the taxpayer had standing to challenge the constitutionality of the federal statute. There was thus removed from the case the basic question, then still unsettled, of the scope of the Congressional power of expenditure under the general welfare clause. But in the course of denying the standing of the state to sue, Justice Sutherland made it quite clear that he thought the conditions of the grant raised no constitutional issue. He cited contentions that the statute was intended to induce the states "to yield a portion of their sovereign rights," that it was "a usurpation of power not granted to Congress" and "an attempted exercise of the power of local self-government reserved to the States by the Tenth Amendment." To these contentions he replied:

Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject.<sup>85</sup>

And at a later point in the opinion he adds:

Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.<sup>86</sup>

This language is in marked contrast to that which the same Justice used a few years later to strike down conditions—apparently all conditions—"which require the relinquishment of constitutional rights."<sup>87</sup> Had he applied the test of relevance which he finally developed in *Stephenson v. Binford*,<sup>88</sup> however, the conditions would have passed muster, at least if we assume the broad scope that has since been given to the general wel-

---

<sup>84</sup> For the conditions of the grant, which are not fully set forth in the opinion, see 42 Stat. 224 (1921). A small part of the grant was not conditioned on state matching.

This statute was the prototype for many later federal grants-in-aid for the operation of health and welfare programs. Conditions have become more numerous and elaborate, the sums involved much larger, but the general areas of federal concern have usually not differed greatly from those in the Maternity Act. Grants in some other fields—e.g., for the construction of highways—may rest on a different constitutional base.

<sup>85</sup> 262 U.S. 447, 480 (1923).

<sup>86</sup> *Id.* at 482.

<sup>87</sup> *Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593-94 (1926).

<sup>88</sup> 287 U.S. 251 (1932).

fare clause;<sup>89</sup> the same considerations would have disposed of the contention that the conditions interfered unduly with the workings of the federal system.<sup>90</sup> For, once it is recognized that national and state governments have overlapping authority to spend money for the health and welfare of their common citizenry, the Constitution must be taken to invite—certainly not to forbid—reasonable measures of cooperation between the two sovereignties.

The State of Florida was equally unsuccessful in attempting to enjoin enforcement of the inheritance tax provision of the Revenue Act of 1926 which granted a credit, up to 80 per cent of the federal tax, for payments made under state inheritance or estate tax laws.<sup>91</sup> This provision was challenged as an effort to coerce the states to enact inheritance taxes, the absence of which was—especially to the more opulent—one of Florida's many charms. As in the Massachusetts case, Florida's suit was rejected on jurisdictional grounds, but again with strong intimation from Justice Sutherland that no serious constitutional question would have been presented if the merits had been reached.

The next case raised issues of a very different sort. *Hamilton v. Regents*<sup>92</sup> rejected an effort by a conscientious objector to obtain an education at the University of California without taking the prescribed course in military tactics. Here was a case in which it would have been very easy to give a short answer: the State of California is under no federal obligation to provide an education, and when it sees fit to do so, a student who avails himself of the privilege may not complain of the curriculum. At one point in his opinion, indeed, Justice Butler seems to suggest this

---

<sup>89</sup> Social Security Cases: *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-87 (1937); *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937); *United States v. Butler*, 297 U.S. 1, 65-66 (1936).

<sup>90</sup> In a later and more difficult case, Justice Sutherland was to dissent on just this point. See page 35 *infra*.

<sup>91</sup> While tax credits differ in some respects from grants from the federal treasury, the effects, and particularly the inducement to state lawmakers, is much the same. Here, while the individual taxpayer received the credit, it was the state treasury that received the profit. As in the case of grants, the inducement lies in hope of gain rather than fear of loss. That the inducement was effective to produce many changes in state laws, and two in state constitutions, see Perkins, "State Action under the Federal Estate Tax Credit Clause," 13 N.C.L. Rev. 271 (1935).

Perkins indicates that the tax-credit device originated as a compromise between those who wished to continue the federal estate tax and those who wished to repeal it and leave the field of estate taxation to the states. In this view, the condition might well have been held germane—if the Court had seen fit to apply that test—to the purpose of the federal tax. Compare *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), discussed at pages 34-35 *infra*.

<sup>92</sup> 293 U.S. 245 (1934).

argument.<sup>93</sup> But he did not decide the case on that ground. Instead, he undertook to show, first, that the states have a proper interest in training their citizens for service in the national army or the state militia (that is, that the condition was relevant to a legitimate concern of the state); and second, that there is no constitutional right, even of conscientious objectors, to refuse to bear arms. In a concurring opinion Justice Cardozo further developed the latter point.

The only decision of the Supreme Court holding an expenditure invalid on the ground of an unconstitutional condition is *United States v. Butler*,<sup>94</sup> which struck down the Agricultural Adjustment Act of 1933 because it sought, through the use of federal funds, to "purchase compliance" in a matter—the regulation of agricultural production—which did not fall within the delegated powers of the federal government, and was therefore reserved to the states by the tenth amendment. True, there is an obscure suggestion that the contracts required of farmers raised a more serious constitutional objection than would a mere conditioning of benefits on the conduct of the recipients, but the reasoning of Justice Roberts' opinion as a whole, and his reliance on *Frost Trucking Co. v. Railroad Commission*<sup>95</sup> in particular, seem to warrant the classification of this as an unconstitutional condition case.

Justice Roberts found in the conditioned benefits<sup>96</sup> a plan to subvert our federal system and to project the national government into areas from which the Constitution had intended to debar it. The weak link in his argument, of course, was the lack of any provision in the Constitution forbidding the federal government to regulate agriculture. A prohibition may exist, to be sure, though not expressed.<sup>97</sup> But as Justice Stone's dis-

---

<sup>93</sup> *Id.* at 262. The Court declined to dismiss the appeal for want of a substantial federal question, as it had done with a similar appeal in *Coale v. Pearson*, 290 U.S. 597 (1933), perhaps because in that case the state court had cast doubt upon the bona fides of the conscientious objector. See *Pearson v. Coale*, 165 Md. 224, 167 Atl. 54 (1933).

The Court has sustained the banning or limitation of fraternities in public institutions, as constituting reasonable "disciplinary regulations" despite the limitation on freedom of association. *Webb v. State University of New York*, 125 F. Supp. 910 (N.D. N.Y.), appeal dismissed, 348 U.S. 867 (1954); *Hughes v. Caddo Parish School Board*, 57 F. Supp. 508 (W.D. La.), *aff'd*, 323 U.S. 685 (1944); *Waugh v. Mississippi University*, 237 U.S. 589 (1915).

<sup>94</sup> 297 U.S. 1 (1936).

<sup>95</sup> 271 U.S. 583 (1926), cited and discussed 297 U.S. at 71-72.

<sup>96</sup> It is not wholly clear whether the taxes levied to support the benefits, which presented the issue actually before the Court, shared in his condemnation because they were part and parcel of the regulatory scheme, or merely because they were earmarked for what he deemed an unconstitutional purpose.

<sup>97</sup> It is doubtless reasonable, for example, to imply from the Constitution a prohibition, not expressed, of state interference with the federal judicial power.

sent powerfully argues, there is no basis for implying a prohibition if the power to spend for the general welfare (which was broadly interpreted by the whole Court) embraces the welfare of farmers, and if expenditure for that purpose was therefore within the delegated powers of Congress. Finding the purpose to be authorized, Justice Stone then shows that the conditions attached to the payments not only were germane, but were essential to the effectuation of that purpose.<sup>98</sup>

If consistency with the federal system was perhaps an artificial issue in *United States v. Butler*, it was not so in a case that arose in the following year. Title IX of the Social Security Act imposed a federal tax on the payroll of employers, but provided a 90 per cent credit for contributions paid<sup>99</sup> under state unemployment compensation laws. The statute had been drawn in the image of the federal estate tax seemingly sustained in *Florida v. Mellon*, but the image was blurred by the addition to the credit provision of a series of conditions defining what were deemed the essentials of the state laws.

This tax was sustained in *Steward Machine Co. v. Davis*.<sup>100</sup> The Court was acutely aware, as it had apparently not been in *Florida v. Mellon*, of the extent and variety of the pressures which, through the tax-credit mechanism, Congress could exert on state legislatures. The treatment it accorded that mechanism is in striking contrast to the broad sweep of the opinions on other issues in the *Social Security Cases*.<sup>101</sup> Pointing to the federal expenditures, huge by the standards of that day, which had been made for the relief of unemployment in the great depression, to the need to relieve the federal treasury by stimulating the states to make orderly provision to share in such costs in the future, and to the reluctance of

---

<sup>98</sup> In countering the argument that farmers were coerced by the proffered benefits, Justice Stone said: "Threat of loss, not hope of gain, is the essence of economic coercion." 297 U.S. at 81. While coercion or duress has sometimes entered into discussion of unconstitutional conditions, the doctrine plainly extends, in appropriate cases, to the persuasive effect of hope of gain. That Justice Stone fully recognized this, appears from other portions of his opinion. See *id.* at 83-86.

<sup>99</sup> Under so-called "experience rating," taxpayers now get federal tax credit for amounts they are excused from paying to the states as well as for amounts they pay, and the persuasive effect of the federal tax therefore operates on taxpayers as well as on state legislatures. The "experience rating" provisions, though contained in the federal statute from the beginning, were not in operation at the time of the decision, and were not considered by the Court.

<sup>100</sup> 301 U.S. 548 (1937).

<sup>101</sup> *Steward Machine Co. v. Davis*, *supra* note 100; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937). It is interesting, but on reflection not surprising, that the Court had considerably less difficulty in sustaining the wholly federal system of old-age insurance than it had in sustaining the federal-state system of unemployment compensation.



states to act unaided for fear of interstate competition, Justice Cardozo said:

In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. . . . It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. The *Child Labor Tax Case*, 259 U.S. 20, and *Hill v. Wallace*, 259 U.S. 44, were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. *United States v. Constantine*, 296 U.S. 287. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power.<sup>102</sup>

Here the rationale of unconstitutional conditions is used both to sustain the tax credit which was before the Court and to warn against misuse of the precedent in matters not properly of federal concern. Justices McReynolds and Butler thought the entire statute disruptive of the federal system,<sup>103</sup> while Justices Sutherland and Vandevanter<sup>104</sup> accepted the general scheme but thought that certain of the conditions attached to the credit impinged, even in the absence of coercion, too far upon the "governmental administrative powers" of the states.

The two flag-salute decisions<sup>105</sup> must be passed by in a review of conditioned privilege cases, because compulsory attendance laws robbed the children who resisted the salute of any effective option, unless, per-

---

<sup>102</sup> 301 U.S. 590-91.

<sup>103</sup> *Id.* at 598-609, 616-18.

<sup>104</sup> *Id.* at 609-16. The provision these Justices chiefly objected to was the deposit of state funds in the federal treasury, required as a condition of the tax credit.

<sup>105</sup> *Board of Education v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). In the earlier case, and apparently in the later also, the requirement of a salute could be escaped by sending the children to a private school. Despite this avenue of escape, however, the Court treated the cases as involving direct compulsion rather than allegedly unconstitutional conditions, except, possibly, in its differentiation of the flag-salute requirement from the requirement of military training in a university:

It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton v. Regents*, 293 U.S. 245. In the present case attendance is not optional. That case is also to be distinguished from the present one because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens.

319 U.S. at 632. And see Justice Frankfurter's discussion of the *Hamilton* case in his dissenting opinion. *Id.* at 656-57.

chance, their parents were able to afford the luxury of private schooling.

*United States v. Lovett*,<sup>106</sup> which strictly speaking does not belong in this review, must be mentioned for its bearing on the question, which recurs in other cases, of the relation between the appropriating power of the legislature and the judicial power of the courts. A specific Congressional prohibition against the use of appropriated funds to pay salaries to three named individuals was challenged by them in suits for their salaries. The prohibition was interpreted by a majority of the Court as imposing a permanent bar to the federal employment of these men, and on this ground was held void as a bill of attainder. But for this ban on employment, however, as distinguished from a bar merely to the payment of salary, the opinion seems to indicate that the case would not have presented a justiciable question, but "merely a political issue over which Congress has final say."<sup>107</sup>

Can the courts ever order the payment of money from the national treasury which Congress has in terms forbidden to be paid?<sup>108</sup> A universally negative answer, it is submitted, ought not to be accepted without due thought. In the *Lovett* case, if the rider forbidding payment to three men was void, why were not existing appropriations available as though the rider had never been enacted?<sup>109</sup> As in other problems of severability, the question is of the legal effect of a legislative enactment which, for constitutional reasons, cannot be carried out in accordance with its terms. There is nothing unique about the power of appropriation; it is no more completely reserved to the legislature than the power to enact laws of other kinds.<sup>110</sup>

<sup>106</sup> 328 U.S. 303 (1946).

<sup>107</sup> *Id.* at 313.

<sup>108</sup> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9.

Concurring in *Hannegan v. Esquire Inc.*, Justice Frankfurter said:

It seems to me important strictly to confine discussion in this case because its radiations touch, on the one hand, the very basis of a free society, that of the right of expression beyond the conventions of the day, and, on the other hand, the freedom of society from constitutional compulsion to subsidize enterprise, whether in the world of matter or of mind.

<sup>327</sup> U.S. at 160.

<sup>109</sup> In the actual case, presumably no appropriation was available to pay the judgments of the Court of Claims, because Congress has not been willing to make appropriations generally available in advance for the payment of judgments against the United States. If any of the three men had continued to work for the government beyond the period for which his salary claim was merged in the judgment, no reason is apparent that, once the law was settled, his salary should not have been paid by administrative officers in ordinary course, from appropriations available generally for the payment of salaries.

<sup>110</sup> See Judge Madden, concurring, in *Lovett v. United States*, 66 F.2d 142, 152 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946). In *Okahoma v. Civil Service Commission*, 330 U.S. 127 (1947), the Court clearly indicated that, if a provision for a deduction from a grant had

If a court finds that the legislature would not have enacted the appropriation without the limitation<sup>111</sup> it may be unable to grant relief to a plaintiff who would not be benefited by invalidation of the statute in its entirety. But even where affirmative relief cannot be afforded the courts are not necessarily powerless. When a Negro is excluded from an institution designed by the legislature for whites, a court may order his admission—in which case it is ordering that appropriated funds be used for a purpose not authorized by the legislature—or it may give the institution an option to admit him or to discontinue its operation for whites—in which case it is leaving, ordinarily to administrative officers, the decision whether the appropriation should be declared wholly inoperative or should be stripped of its limitation and continued in effect. In either case the court is enforcing the equality which the Constitution commands by directing, or cloaking others with authority to direct, that the legislative will expressed in an appropriation act be frustrated in part.

The Hatch Act of 1940 forbade nearly all employees of the federal government to “take any active part in political management or in political campaigns.” The prohibited activities were those which had previously been prohibited by civil service rules to classified employees, and the penalty for violation was mandatory dismissal and ineligibility for reappointment to the same position. This provision, challenged as violating the first, fifth, ninth, and tenth amendments, was sustained in *United Public Workers v. Mitchell*,<sup>112</sup> though three of the seven Justices who participated would have held it partly or wholly invalid.

The majority traced a long history of regulation of political activity by federal employees, and pointed to the widespread belief that such activity may impair the efficiency of the public service through political influence both on the advancement of employees and on the disposition of the public business, and may in fact constitute a material threat to

---

been held unconstitutional, the state would have been entitled to receive the grant in full. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), the Court reversed an injunction against paying salaries to people to whom the legislature had directed they not be paid. See *Washington Nat'l Ins. Co. v. Board of Review*, 1 N.J. 545, 64 A.2d 443 (1949).

<sup>111</sup> The context in which an exception appears may be important in determining the legislative intent, and so in determining whether the statute can survive invalidation of the exception. Where an exception has been engrafted by later amendment, as in the *Lovett* case, invalidity of the amendment is often held to leave the pre-existing statute in force. See *Reitz v. Mealey*, 314 U.S. 33 (1941); *Davis v. Wallace*, 257 U.S. 478 (1922); *Myers v. Anderson*, 238 U.S. 368 (1915). In construing appropriation acts it is commonly necessary to consider, not only other appropriation acts, but also the relationship to underlying legislation; but once the legislative intent has been determined, it must be unimportant whether the limitation under attack appears in the appropriation act itself or in other legislation.

<sup>112</sup> 330 U.S. 75 (1947).

democratic government through its possible tendency to create a one-party system.<sup>113</sup> Though Justice Holmes' epigram from the *McAuliffe* case was quoted in a footnote, even the majority made it quite clear that affirmative justification was needed for such measure of interference with constitutional rights:

We have said that Congress may regulate the political conduct of government employees "within reasonable limits," even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. . . . Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.<sup>114</sup>

Another provision of the Hatch Act imposed a similar prohibition of political activity on state and local employees principally employed in functions financed in whole or in part by federal loans or grants. The sanction, if the employee was not removed promptly upon a determination by the Civil Service Commission that a violation had occurred, consisted in a mandatory withholding from the state of an amount equal to two years' salary of the offending employee. Such a threatened withholding was challenged in *Oklahoma v. Civil Service Commission*,<sup>115</sup> and the Court found that authorization in the statute of judicial review gave it jurisdiction to determine the validity of the statute. After referring to its decision in the *United Public Workers* case decided the same day, the Court disposed briefly of the merits:

---

<sup>113</sup> *Id.* at 96-100.

<sup>114</sup> *Id.* at 102-03. It is difficult to suppose, in the face of this and similar language, that the Court intended to sweep away all constitutional protection of the political rights of public employees. One cannot read the majority opinion without believing that the Court would have struck down limitations—a prohibition of voting, for example, or of non-partisan discussion of public affairs—which it could not find reasonably related to the integrity or the efficiency of the public service.

Speaking of this case the Court said in *American Communications Ass'n v. Douds*, 339 U.S. 382, 405 (1950):

The decision was not put upon the ground that government employment is a privilege to be conferred or withheld at will. For it was recognized that Congress may not "enact a regulation providing that no Republican, Jew, or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." 330 U.S. at 100. But the rational connection between the prohibitions of the statute and its objects, the limited scope of the abridgement of First Amendment rights, and the large public interest in the efficiency of government service, which Congress had found necessitated the statute, led us to the conclusion that the statute may stand consistently with the First Amendment.

<sup>115</sup> 330 U.S. 127 (1947).

We do not see any violation of the state's sovereignty in the hearing or order. Oklahoma adopted the "simple expedient" of not yielding to what she urges is federal coercion. Compare *Massachusetts v. Mellon*, 262 U.S. 447, 482. The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.<sup>116</sup>

The issues of personal freedom (assuming them to have been open at suit of the state) being disposed of by the *Mitchell* case, the remaining issue of states' rights did not differ materially from that apparently settled many years before in *Massachusetts v. Mellon*. It is surprising, nevertheless, that the Court dealt so summarily with a federal-state relationship not wholly unlike that which it had handled so circumspectly in *Steward Machine Co. v. Davis*.

In *American Communications Ass'n v. Douds*<sup>117</sup> the National Labor Relations Board argued that the non-communist affidavit requirement of the Taft-Hartley Act raised no problem under the first amendment "because its sole sanction is the withdrawal from noncomplying unions of the 'privilege' of using its facilities." In rejecting this abrupt disposition of the case, Chief Justice Vinson pointed out that the statute imposed restrictions on noncomplying unions that would not have existed if the statute had never been enacted; there may be an inference from his language that, but for this detriment, he would have accepted the Board's simple rationale.<sup>118</sup> If such an inference is to be drawn, it had, so far as one can judge, the concurrence of only three other members of the Court.<sup>119</sup> The other four who participated in this case or in *Osman v. Douds* apparently viewed the conditioning of a privilege as imposing in itself a sufficient burden on liberties secured by the first amendment to demand that the validity of the condition be judged on its merits.

---

<sup>116</sup> *Id.* at 143-44. Justices Black and Rutledge dissented without opinion. Presumably, they thought that the United States could not constitutionally exert pressure on the states, through the grant mechanism, to deprive state and local employees of freedoms of which these Justices believed the United States could not validly deprive its own employees.

<sup>117</sup> 339 U.S. 382 (1950). The opinions in this case were too many and too sharply in conflict to permit any confident statement of the Court's position on many of the points involved. On the validity of one part of the oath, the Court divided three to three. In *Osman v. Douds*, 339 U.S. 846 (1950), of the three Justices who had not participated in the earlier decision, two split on this issue and one continued to abstain, leaving the vote divided four to four.

<sup>118</sup> *Id.* at 389-90.

<sup>119</sup> Justices Reed and Burton and, in *Osman v. Douds*, Justice Minton. While Justice Frankfurter expressed concurrence in most of the Chief Justice's opinion, his views on this point are epitomized by the sentence quoted at the beginning of this paper. See 339 U.S. at 417-18. Justice Jackson, who also concurred in part, apparently did not accept the Chief Justice's rationale on this point. See *id.* at 433-36. Justices Black and Douglas, dissenting, clearly did not accept it. Justice Clark took no part in either case.

On the substantive issues the Justices differed widely and sharply. We shall have occasion to refer at a later point to some of the views expressed, but here it will suffice to note that all of the Justices recognized the substantial impairment of first amendment freedoms, and sustained or rejected the challenged provision, or sustained it in part, according to whether they thought the impairment of freedom warranted or unwarranted, or warranted in part, by the harms to interstate commerce that might fairly be anticipated from communist control of labor unions.

The Taft-Hartley cases have been followed by a series of decisions<sup>120</sup> dealing with loyalty oaths and other loyalty procedures as conditions of public employment. *Garner v. Board of Public Works*,<sup>121</sup> dealt with a complex legislative situation which perhaps makes the decision less important as a precedent. The Los Angeles city charter was amended in 1941 to exclude from city employment any one who, at any time after 1936, advocated or taught violent overthrow of national or state government, or was a member of or affiliated with an organization advocating or teaching such overthrow. In 1948 an ordinance was adopted requiring employees to take an oath, covering a period beginning in 1943, declaring in effect, that they had not violated this provision of the charter; they were also required to state by affidavit whether they had ever been members of the Communist Party. Employees dismissed for refusal to sign the affidavit or, in most of the cases, to take the oath sued for reinstatement.

It is noteworthy that none of the five opinions in the case so much as suggests that, because public employment is a "privilege," the state and the city could attach to it whatever conditions they might see fit. *McAuliffe v. New Bedford* is not cited nor is its reasoning relied on by any member of the Court. The majority sustained the dismissals, finding the substantive stipulations to be reasonable qualifications for public employment,<sup>122</sup> the objection to retroactivity of the oath to be untenable in

---

<sup>120</sup> The next case dealing with an oath, *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951), involved a requirement of an affidavit as a condition of the placing of a candidate's name on the ballot. Accepting an interpretation that the candidate need swear only that he was not engaged in an attempt to overthrow the government by force or violence, and was not knowingly a member of an organization engaged in such an attempt, the Court unanimously sustained the requirement in a short per curiam opinion.

<sup>121</sup> 341 U.S. 716 (1951).

<sup>122</sup> The majority asserted that the non-communist affidavit required of employees dealt with "matters that may prove relevant to their fitness and suitability for the public service," and that the oath constituted "a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States," and was "reasonably designed to protect the integrity and competency of the service." 341 U.S. at 720-21. Though the justifications are treated briefly, and in some respects not too convincingly, there is no suggestion that justification is unnecessary.

view of the preexisting charter provision, and the oath with respect to organizations to be inapplicable to unwitting or innocent membership or affiliation. Dissents took issue, severally, on all these points, and also raised the objection of bill of attainder.

*Adler v. Board of Education*<sup>123</sup> sustained a New York statute prohibiting the public employment of any person advocating or teaching the overthrow of government by force, violence, "or any unlawful means," or of any member of an organization teaching or advocating such a doctrine, as that statute had been implemented by the so-called Feinberg Law. The later law imposed on the board of regents the duty of enforcing the earlier one with respect to the public school system of the state and provided for a listing of organizations found, after hearing, to be "subversive," membership in which should constitute "prima facie evidence of disqualification" for employment in the school system. Procedures for enforcement by the board of regents were still in the formative stage, but it was planned to require an annual report on each employee with a view to discovering possible violations. Substantial procedural protections were afforded by statute both to individuals and to organizations.<sup>124</sup> The state court had construed the "prima facie evidence" provision as applicable only to a member of an organization who knew its purposes, and also as raising no presumption of individual disloyalty which survived the introduction of substantial countervailing evidence.

In sustaining these statutes Justice Minton said for the Court:

It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communications Assn. v. Douds*, 339 U.S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers v. Mitchell*, 330 U.S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.<sup>125</sup>

Here, without quoting or citing *McAuliffe v. New Bedford*, is virtually a paraphrase of Justice Holmes' famous epigram. It is small wonder that

---

<sup>123</sup> 342 U.S. 485 (1952).

<sup>124</sup> Upon judicial review of a dismissal, for example, "the hearing shall consist of the taking of testimony in open court with opportunity for cross-examination." The burden of sustaining the dismissal "by a fair preponderance of the credible evidence" rests on the public authorities. These provisions contrast sharply with federal practice. See *Peters v. Hobby*, 349 U.S. 331 (1955). But that the protections are by no means complete, see the dissenting opinions in the *Adler* case.

<sup>125</sup> 342 U.S. 485, 492 (1952). This advice to "go elsewhere" in search of one's freedoms comes strangely from a Court that has so often disapproved the same advice when it has been given by local police to Jehovah's Witnesses.

this language has been taken as a modern and authoritative buttress of the doctrine of that case<sup>126</sup> though courts tempted so to use it might prudently observe the caveat later in the same year:

To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue.<sup>127</sup>

Justice Minton did discuss briefly in the *Adler* case the substantive justification of the restrictions imposed, reiterating some of what was said in the *Garner* case. It might be argued that his language quoted above is improperly taken out of context, were it not for the remarks with which he concluded this part of the opinion. He said that a person dismissed for membership in a listed organization

. . . is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.<sup>128</sup>

Justice Holmes' reasoning is tempered a little, but only a little. Justice Frankfurter, dissenting because he thought the case not ripe for constitutional decision, and Justices Black and Douglas, dissenting on the merits, were the only voices raised in protest.

A few months later, however, those who have maintained that public employment is a "privilege" unencumbered by any constitutional protection received a rude jolt from the decision in *Wieman v. Updegraff*.<sup>129</sup> An Oklahoma statute required state employees to swear that they were not members of any organization listed by the Federal Attorney General as a "communist front or subversive organization," and the Oklahoma court had so applied the statute, the Supreme Court found, as to require that innocent as well as knowing membership should be forsworn. Pointing out that the earlier loyalty cases had involved condemnation of membership only in the presence of *scienter*, Justice Clark said for the unanimous Court:

We hold that the distinction observed between the case at bar and *Garner*, *Adler* and *Gerende* is decisive. Indiscriminate classification of innocent with

<sup>126</sup> *Daniman v. Board of Education*, 306 N.Y. 532, 119 N.E.2d 373 (1954) (see *supra* note 6); *Appeal of Albert*, 372 Pa. 13, 92 A.2d 663 (1952). The Albert case was decided prior to *Wieman v. Updegraff*, *infra* note 127.

<sup>127</sup> *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

<sup>128</sup> 342 U.S. 485, 493 (1952).

<sup>129</sup> 344 U.S. 183 (1952).



knowing activity must fall as an assertion of arbitrary power. The oath offends due process.<sup>130</sup>

He sidestepped the argument that a job is not "liberty" or "property" within the meaning of the due process clause:

We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.<sup>131</sup>

He found it unnecessary to consider other objections to the oath, some of which concurring opinions held to be well taken.

Justice Clark's opinion seems to turn upon the unfairness of taking away a job on so arbitrary a ground as unwitting association. So read, the decision is a landmark in the difficult area of applying the concept of due process to public employment and, indeed, to other "privileges" which we do not ordinarily think of as constituting either "liberty" or "property." For present purposes, however, we are more concerned with an alternative rationale that seems to underlie Justice Frankfurter's concurring opinion,<sup>132</sup> in which he was joined by Justice Douglas.

Whenever a state imposes a choice between maintaining a public job or receiving a public benefit, on the one hand, and exercising one's constitutional freedoms, on the other, the state burdens each course to the extent that abandonment of the other is unpalatable. The deterrent to exercise of first amendment freedoms when a job is at stake is a real one, Justice Minton to the contrary notwithstanding, and it is a considerably greater deterrent if one must take the hazard, in joining any organization for the most laudable of reasons, that it may some day be found to have been dominated by "subversive" interests. And so, in the delicate weighing of personal freedom against public self-protection the difference between knowing and unknowing membership may well be decisive. And in another way, too, the difference is important. For whereas membership in an organization with knowledge that it is dedicated to the violent overthrow of the government is obviously relevant to fitness to serve that government, membership without such knowledge is relevant only in the limited sense that knowledge may be difficult to prove, and that it may therefore be thought "safer" to dismiss all members lest some guilty ones escape detection.

---

<sup>130</sup> *Id.* at 191.

<sup>131</sup> *Id.* at 192.

<sup>132</sup> *Id.* at 194-95. This same rationale was suggested in his opinion, dissenting in part, in *Garner v. Board of Public Works*, 341 U.S. 716, 726 (1951), where he, unlike the majority, found no requirement of scienter: "Not only does the oath make an irrational demand. It is bound to operate as a real deterrent to people contemplating even innocent associations." *Id.* at 727-28.

This review<sup>133</sup> suggests that in recent years, with only occasional lapses (of which the *Adler* case is the most recent and most grievous), the Supreme Court has applied with reasonable consistency, though usually without explicit formulation, the view that power to withhold public benefits or public employment altogether does not carry with it unlimited power to impose conditions that have the effect of restraining the exercise of constitutional freedoms. The normal desire to enjoy these "privileges," like the desire to use public streets and parks, cannot be made an instrument of suppression unless in the context of the statute in question the suppression is adjudged to serve a legitimate public interest of such gravity as to warrant it. Infringement of constitutional rights is nonetheless infringement because accomplished through the conditioning of a privilege.

#### IV. CURRENT ISSUES

The first amendment forbids Congress, and the fourteenth amendment forbids the states, to make any law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . ." These prohibitions apply not only to laws imposing penalties, but to

. . . any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.<sup>134</sup>

---

<sup>133</sup> There have, of course, been many other cases, during the period under review, which have a tangential bearing upon these questions. Two of them deserve mention:

In *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), the Court, in the course of holding that prospective bidders for government contracts could not challenge a determination by the Secretary of Labor fixing one of the terms of such contracts, said:

Like private individuals and businesses, the Government enjoys the unrestricted 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.

*Id.* at 127. Citing, *inter alia*, *Atkin v. Kansas*, *supra* note 23, and *Heim v. McCall*, *supra* note 21. The constitutional rights of would-be contractors are no doubt few, but surely the government would not be permitted—least of all by Justice Black, who wrote the *Lukens* opinion—to discriminate against all Negroes or Catholics seeking contracts, any more than it would be permitted to discriminate against all Negroes or all Catholics seeking employment. Cf. *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947) (*dictum*).

In *re Summers*, 325 U.S. 561 (1945), sustained the action of the Illinois Supreme Court in refusing to admit to the bar a conscientious objector, who, it found, could not honestly subscribe to the oath to support the Illinois constitution. Though the relevance of his pacifism to a legitimate concern of the state court was tenuous, to say the least, the case was treated by the majority as merely an extreme application of the doctrine of *Hamilton v. Regents* (pages 32-33 *supra*) and other cases, that there is no right, protected by the Federal Constitution, to refuse to bear arms. The four dissenting Justices, in likening the case to exclusion of Protestants, Catholics, or Jews, came close to denying this premise; at any rate, they felt there was too much impingement on religious freedom, with too slight a warrant, to be allowed to stand.

<sup>134</sup> *Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936), quoting from 2 *Cooley, Constitutional Limitations* 886 (8th ed. 1927).

If taking money away from people under the taxing power may violate the first and fourteenth amendments when it tends to stifle their freedom of expression,<sup>135</sup> it seems plain that refusing to give them money, when the refusal is so conditioned as to tend in the same direction, may be open to the same constitutional challenge. If a tax of \$7 a week<sup>136</sup> may be unduly restrictive of freedom of speech, periodic payments of the magnitude of unemployment compensation or even public assistance are not, because of their smallness, incapable of exerting such pressures as to call these amendments into play. Threat of loss of a job is to most people a powerful inducement, the more so if issues of loyalty are involved, for—

There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy.<sup>137</sup>

Common sense and every-day experience demonstrate beyond question that jeopardy to one's means of livelihood, or to his rights under some social security law can be an effective means of persuasion.

Granting, then, that the pressures behind loyalty tests are great enough to influence people's conduct, there can be no doubt that these tests do have the effect of "abridging" first amendment freedoms, and that any constitutional judgment of them must take this fact into account. Tests and oaths take a great variety of forms, but whatever the form, association with suspect organizations and suspect people, and the expression of heterodox opinions are the routine raw ingredients of their enforcement.<sup>138</sup> In the present context of communism versus loyalty, this

<sup>135</sup> *Grosjean v. American Press, Co.*, supra note 134; *Jones v. Opelika*, 319 U.S. 103 (1943), vacating judgments in 316 U.S. 584 (1942); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

<sup>136</sup> *Murdock v. Pennsylvania*, supra note 135. The taxes and fees involved in the group of cases decided sub nom. *Jones v. Opelika*, supra note 135, ranged from \$5.50 a year to as much as \$25 a month.

<sup>137</sup> *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952). It has been estimated (on the basis of an "elaboration of conjectures") that upwards of 12,000,000 persons, or about one-fifth of the labor force, are exposed to loyalty or security tests of one sort or another, most of them by or at the instance of federal or state government. Brown, "Loyalty-Security Measures and Employment Opportunities," 11 *Bull. Atomic Scientists* 113 (1955).

<sup>138</sup> *Bontecou*, *The Federal Loyalty-Security Program*, 136-45 (1953). Even the simplest form of oath—e.g., that one is not a member of the Communist Party—is apt, if its truthfulness is called in question, to open up a wide range of enquiry into opinions and associations.

Justice Douglas thus described the effects of loyalty tests for teachers:

What was the significance of the reference of the art teacher to socialism? Why was the history teacher so openly hostile to Franco Spain? Who heard overtones of revolution in the English teacher's discussion of the *Grapes of Wrath*? What was behind the praise of Soviet progress in metallurgy in the chemistry class? Was it not "subversive" for the teacher to cast doubt on the wisdom of the venture in Korea?

What happens under this law is typical of what happens in a police state. Teachers

is inevitably so; little though many an isolated episode may rationally count in the judgment, patterns of behavior and of opinion often have a real probative force—and a pattern can be built up only from its pieces.<sup>139</sup> The excesses that occur too often in applying loyalty criteria are more commonly the result of indiscriminating judgment than of use of data wholly irrelevant to the issue.<sup>140</sup>

In the growing volume of litigation around matters of loyalty, in short, the courts are confronted by mechanisms—the need for which ranges from the wholly obvious to the wholly obscure—that have a powerful and unavoidable tendency to limit first amendment freedoms. Unlike regulation of parks and streets, moreover, which limit free expression in one place or through one channel of communication, loyalty procedures limit at all times and in all places the freedoms of those exposed to them.

It was suggested in the Taft-Hartley oath case that the “clear and present danger” rule is not fully applicable to restraints which are purely incidental to proper governmental activity in some other sphere.<sup>141</sup> Perhaps this is merely another way of saying that in such cases the impairment of first amendment rights must be weighed not merely against any harm that unhampered speech may cause, but also against the other objectives to which the governmental activity is addressed.<sup>142</sup> But however the thought may be put, it plainly rests on the premise that the restraint of freedom is in fact genuinely an incident—one is tempted to say, an unavoidable incident—of the regulation of other matters. If that premise fails, there is no reason to measure the restraint by any standard other than the standard applicable to an independent statute, aimed at nothing but suppression.

Here we come back to the teaching of the unconstitutional condition cases, and to Justice Frankfurter’s dictum about “freedoms unrelated

---

are under constant surveillance; their papers are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment.

*Adler v. Board of Education*, 342 U.S. 485, 510 (1952) (dissent).

<sup>139</sup> Even a single association may be seriously damaging, such as active participation in an organization known to be pursuing illegal ends, or marriage to an admitted member of the Communist Party. Change of opinion with change of the Communist Party line is another item that carries considerable weight.

<sup>140</sup> Obviously the salt of common sense is too often lacking in loyalty proceedings.

The bludgeon has been used where the scalpel is needed, with resulting unnecessary damage both to individuals and to our institutions.

Bontecou, *supra* note 138, at 145.

<sup>141</sup> *American Communications Ass’n v. Douds*, 339 U.S. 382, 393-97 (1950). See also, *Dennis v. United States*, 341 U.S. 494, 507-08 (1951).

<sup>142</sup> *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Schneider v. State*, 308 U.S. 147 (1939).

to the purpose of the facilities." If a legislature attaches to a public benefit a gratuitous addendum, which in no rational way advances the purpose of the scheme of benefits but does restrain first amendment freedoms, it is submitted that the restraint can draw no constitutional strength whatsoever from its attachment to the benefit, but must be measured as though it were a wholly separate enactment.

This consideration would seem to dispose of loyalty oaths attached to unemployment compensation and of the banning of members of "listed" organizations from public housing.<sup>143</sup> If there is a rational connection between these conditions and the purpose of the benefits provided it seems to have eluded the courts thus far. This fact in itself should condemn the conditions, since they clearly infringe on constitutional free-

---

<sup>143</sup> A loyalty test for unemployment compensation was sustained in *Dworken v. Cal- lopy*, 91 N.E.2d 564 (C. P. Ohio 1950) (not officially reported). Cf. *State v. Hamilton*, 92 Ohio App. 285, 110 N.E.2d 37 (1951).

Congress purported by the "Gwinn amendment" to forbid occupancy, by any member of an organization designated by the Attorney General as "subversive," of any housing unit constructed under the United States Housing Act of 1937. 66 Stat. 403 (1952), 67 Stat. 307 (1953), 42 U.S.C. § 1411c (Supp. 1954). Local regulations undertaking to carry out this injunction have not, in the main, been well received by the appellate courts, though litigation is still pending in several states. In *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955), application for writ of cert. filed in the Sup. Ct. of the U.S., Aug. 27, 1955, reported in *U.S. Law Week*, Sept. 13, 1955, the court concluded that both the Gwinn amendment and its local progeny are void as imposing unconstitutional conditions in violation of the first and fourteenth amendments. In *Rudder v. United States*, 24 U.S.L. Week 2044 (D.C. Cir. July 21, 1955); *Housing Authority v. Cordova*, 279 P.2d 215 (Super. Ct. Los Angeles 1955); and *Chicago Housing Authority v. Blackman*, 4 Ill.2d 319, 122 N.E.2d 522 (1954), similar results were reached on more limited grounds. Contrary holdings are *Peters v. New York City Housing Authority*, 283 App. Div. 801, 128 N.Y.S.2d 712 (2d Dep't), reversed on non-constitutional grounds, 307 N.Y. 519, 121 N.E.2d 529 (1954), petition for cert. filed, Aug. 27, 1955; and *Weixel v. New York City Housing Authority*, 143 N.Y.S.2d 589 (Sup. Ct. Queens County 1955). See Note, "Constitutionality of Denying Federal Housing to Members of Subversive Organizations," 53 *Colum. L.R.* 1166 (1953).

A statute prohibiting the use of public school buildings by "subversive" groups, though such use was permitted for civic purposes generally, was held invalid as an unconstitutional condition in *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946).

If it should ultimately be held that membership in the Communist Party, knowing its purposes, may constitutionally be made a crime (see 18 U.S.C. § 2385 (1952) (Smith Act); cf. *Frankfeld v. United States*, 198 F.2d 679 (4th Cir. 1952), cert. denied, 344 U.S. 922 (1953)), lesser sanctions visited on party members with such knowledge could presumably not be attacked as unconstitutional conditions. On similar grounds a Pennsylvania statute denying public assistance to persons actively engaged in seeking by unconstitutional means to change the form of government (*Pa. Stat. Ann.*, tit. 62, § 2509 (Supp. 1954)) is probably not open to such an objection. It will hardly be suggested, however, that membership in an organization could be made a crime merely because an administrative officer has found it to be "subversive."

doms. But on other scores, also, there is not much to be said for such conditions. As the Superior Court of Los Angeles pointed out, it is not

. . . apparent that the laudable purpose of combating the efforts of subversives is advanced by compelling them to live in slums or substandard housing accommodations.<sup>144</sup>

Perhaps the chief motive for the imposition of such conditions is a feeling that the government ought not to be required to help those who would overthrow it.<sup>145</sup> But while ingratitude to a generous government may be a sin, the fact remains that the first amendment protects ingrates as well as the grateful and, as the Jehovah's Witness cases abundantly testify, the cantankerous as well as the meek.

A similar problem is posed by imposition of loyalty tests for admission of students to public educational institutions.<sup>146</sup> Such tests differ in two ways from the requirement of military training sustained in *Hamilton v. Regents*:<sup>147</sup> the freedoms affected are constitutional freedoms; the purpose to be served by the tests is less apparent, or at least less important.

<sup>144</sup> *Housing Authority v. Cordova*, 279 P.2d 215, 218 (Super. Ct. Los Angeles 1955).

<sup>145</sup> A private philanthropist, of course, if he entertained such feelings would be free to indulge them, but it does not follow that the state is free to do so. Even a private philanthropist, moreover, might hesitate to assume that all members of "listed" organizations are bad people, or that all who rebel against loyalty tests are necessarily subversive.

<sup>146</sup> A Texas statute requiring an oath or affirmation of loyalty (Tex. Rev. Civ. Stat., art. 2908(b) (1948)) appears vulnerable on other grounds as well as those suggested in the text. The part of the oath abjuring organizational membership does not expressly require scienter, and unless such a requirement is implied appears to fall under the ban of *Wieman v. Updegraff* (see pages 42-43 supra). Another part of the statute, requiring that the student swear or affirm "that I believe in and approve the Constitution of the United States and the principles of government therein contained," would plainly be invalid under the second flag-salute decision (see pages 50-51 infra) if attendance were compulsory, and on a voluntary basis would seem to be an unconstitutional condition.

A Louisiana statute (La. Rev. Stat., §§ 42:54-58 (1950)) requires expulsion from any public school, as well as from a public college or university, of a student who knowingly advocates or advises violent overthrow of government. Whatever the case with respect to older students, a child expelled from a school and threatened with punishment for truancy should clearly be able to invoke constitutional protection except in the unlikely event that his utterances constituted a "clear and present danger."

A loyalty oath required for membership in the Reserve Officers Training Corps raised serious problems in institutions where military training is compulsory. The oath has recently been changed to one merely to support the Constitution, and has apparently not been so applied as to exclude students from the universities. See "Civil Liberties," American Civil Liberties Union, May, 1955. Loyalty tests are applied to some fellowships for advanced study and to grants for research work, even in non-sensitive fields, but in view of the wide discretion in the making of such awards, the availability of constitutional protection is obscure. See note 42 supra. In some situations, however, a justiciable issue might be presented, as, for example, where a grant has once been made and is subsequently withdrawn for reasons of loyalty or security.

<sup>147</sup> 293 U.S. 245 (1934).

Whether such loyalty tests are motivated by reluctance to benefit "subversives," or by fear that they will "contaminate" their fellow-students, it is a sorry confession if our school system must turn from its doors those misguided youths who so obviously need its intellectual challenge. Surely, danger to the institution is trivial, and "the purpose of the facilities" argues not for exclusion but for admission of these students in the hope of their redemption.

For public employment in general, which by constitutional mandate in some cases and by tradition in others requires an oath to support the Constitution, there can be no question of the relevance of loyalty as such.<sup>148</sup> Particular tests and particular applications of them, however, may occasionally run afoul of the first amendment, just as they may run afoul of the due process clause in either its procedural or its substantive aspects, or of the equal protection clause, or of the prohibitions against *ex post facto* laws and bills of attainder. Thus, we have it on the highest authority that in the absence of *scienter* membership in a "listed" organization cannot validly be made a ground of dismissal,<sup>149</sup> and this conclusion may rest in part on the first amendment. Some other grounds of administrative dismissal, if they could be extracted from their cloak of secrecy and attacked in a case where they were the only grounds (a conjunction of unlikely hypotheses), would probably meet with similar judicial rebuff.

Though we can hardly expect the courts to reject loyalty tests as irrelevant to even non-sensitive public employment,<sup>150</sup> their relevance to

---

<sup>148</sup> For similar reasons, there can be little question of the relevancy of a requirement of loyalty for membership in the bar, as would be imposed for practice before the federal courts and executive departments by S. 2326, 84th Cong. 1st Sess. (1955) (Eastland). Cf. *In re Summers*, 325 U.S. 561 (1945), *supra* note 133. By making the required affidavit of non-membership in certain organizations cover three years past, however, Senator Eastland's bill raises other constitutional issues. A further provision, barring from federal practice any person who has asserted before a federal tribunal the privilege against self-incrimination with respect to Communist affiliations (and has not subsequently "purged" himself by giving the desired testimony), would raise in some of its applications questions quite similar to those presented by *Slochower v. Board of Higher Education*, now pending before the United States Supreme Court (see pages 53-55 *infra* and *supra* note 6). See Panel Discussion, "When Lawyers Plead the Fifth Amendment," 27 N.Y.S. Bar Bull. 247 (1955).

<sup>149</sup> *Wieman v. Updegraff*, 344 U.S. 183 (1952).

<sup>150</sup> It is interesting to note that one Justice thought the Hatch Act's limitations on political freedoms were valid as applied to administrative employees of the federal government, but invalid as applied to industrial employees. *United Public Workers v. Mitchell*, 330 U.S. 75, 120-26 (1947). But a court could hardly hold loyalty irrelevant to even non-sensitive public employment unless it were prepared to hold the traditional oath to support the Constitution also invalid. This is not to say, however, that a court should not distinguish between sensitive and non-sensitive positions in determining the validity of par-

non-sensitive private employment or occupations financed by the government stands in a quite different posture.<sup>151</sup> Unless in particular situations some reason for such tests can be shown other than the mere fact that the government is footing the bill, it is submitted that the tests, if imposed by government, are unconstitutional conditions in violation of the first amendment.

One question that goes to the heart of many loyalty procedures has not yet been finally answered. In the Taft-Hartley cases three Justices voted against the validity of that part of the oath that abjured belief in violent overthrow of the government, on the very broad ground that unexpressed opinions and beliefs are wholly immune from governmental probing or scrutiny.<sup>152</sup> One other Justice joined in the condemnation of this part of the oath, but on somewhat different grounds,<sup>153</sup> and the four-to-four division has never been resolved. In the second flag-salute case<sup>154</sup> Justice

---

ticular loyalty tests or procedures. Constitutional protection of employment in work secret for reasons of national security will certainly be minimal, if not non-existent. Quite likely *Wieman v. Updegraff* would not be applied to such employment.

<sup>151</sup> Admittedly, the distinction between government employment and government financed activity becomes at some points rather artificial. Dr. Peters served, for from four to ten days a year, as a consultant to the Public Health Service on non-confidential assignments. See *Peters v. Hobby*, 349 U.S. 331, 333 (1955). The fact that he was technically an "employee" and took the constitutional oath did not render his loyalty appreciably more important to the work he was doing than it would have been if he had done the same work as an independent contractor.

Relevancy is of course a relative matter. At the one extreme we find, first, those officers whose loyalty the Constitution itself makes relevant by requiring them to take the oath of office; and second, all those officers and employees (whether of government or of private industry) whose duties give them opportunity, if they were so disposed, to do real harm to the security of the nation. At the other extreme are, let us say, manual workers in a factory making ordinary articles of commerce under a contract with the government. The circumstances of particular employments vary, by almost imperceptible gradations, from the one extreme to the other, and it is suggested here that where no interests of national security are involved the boundary of technical public "employment" and of the generally concomitant requirement of the constitutional oath is the most satisfactory line of demarcation. Perhaps the analogy of private employment is helpful, some measure of loyalty to the employer being a common requirement. At any rate, *Garner v. Board of Public Works*, 341 U.S. 716 (1951), would seem to foreclose attack upon the relevancy of loyalty to any public employment.

<sup>152</sup> *American Communications Ass'n v. Douds*, 339 U.S. 382, 442, 445-46 (1950); *Osman v. Douds*, 339 U.S. 846 (1950) (see note 117 supra).

<sup>153</sup> 339 U.S. at 419-21.

<sup>154</sup> *Board of Education v. Barnette*, 319 U.S. 624 (1943). Justice Jackson's broad position on this question is the more striking in that on other first amendment issues he was not in the vanguard of the liberals.

In the *Barnette* case concurring opinions of Justices needed to make up a majority, expressing agreement or substantial agreement with Justice Jackson (whose opinion is labeled as that of the Court), nevertheless confined their supplementary remarks—as Justice Stone had confined his dissent in *Minersville School District v. Gobitis*, 310 U.S. 586, 601 (1940)



Jackson had persuaded a majority of the Court by his moving and eloquent appeal for the total and untrammelled freedom of the human mind—the absolute freedom to think and believe as one will, without let or hindrance by government. But in the Taft-Hartley cases only two other Justices joined him on this lofty plane, and with his death this reading of the first amendment has lost its most effective champion. Yet the issue is not foreclosed, and three of the present Justices have not had occasion to speak to it.<sup>155</sup>

Many loyalty procedures, at least when they reach the enforcement stage, do probe into opinions and beliefs that till then have remained locked in the recesses of the mind. To some extent, it is probably inevitable that this should be so.<sup>156</sup> As Chief Justice Vinson pointed out in the *Doufs* case, one could hardly take constitutional exception to asking a candidate for the Secret Service force assigned to guard the President whether he believed in assassination. Yet somewhere between this question and the broad enquiries into social, economic, and political beliefs that characterize many a loyalty investigation, it is still possible that the Supreme Court may erect what would be a fitting memorial to Justice Jackson.

A purposeful attack on both freedom of association and freedom of expression is the recently announced threat, quickly modified, of the Georgia Board of Education to revoke “for life” the license of any public school teacher who remains a member of the National Association for the Advancement of Colored People, or who “supports, encourages, condones or agrees to teach a mixed grade.”<sup>157</sup> If these conditions of con-

---

—to the narrower ground that the required salute violated the religious freedom of the particular child whose religious tenets forbade it. But these Justices could not have expressed even substantial agreement with Justice Jackson, who had in effect declared the requirement invalid for all children, if they had meant to limit their holding to the narrower ground.

<sup>155</sup> A similar issue has been presented, but not decided by the Supreme Court, upon the demand by a Congressional committee that a witness reveal his opinions and beliefs. See *Quinn v. United States*, 349 U.S. 155, 170 (1955); *Emspak v. United States*, 349 U.S. 190, 202 (1955). Justice Harlan’s dissent in the latter case did not discuss the first amendment issues, and should probably not be assumed to indicate disagreement with Justice Jackson’s views described in the text. See 349 U.S. at 218.

<sup>156</sup> Many, perhaps most, revelations of opinion and belief in loyalty proceedings are voluntary, insofar as any steps in these proceedings can be called voluntary; a suspect is given the opportunity, either in writing or at an interview or hearing, to rebut or explain away information furnished by others, and in the process chooses to expose the workings of his mind. Needless to say, revelations made under such circumstances as these raise no constitutional question in themselves, though a prosecution for perjury based on such a statement might possibly do so. Cf. *United States v. Lattimore*, 215 F.2d 847, 868-69 (D.C. Cir. 1954) (opinion concurring in part).

<sup>157</sup> N.Y. Times, August 2, 1955, p. 13, col. 3. Later action is reported as leaving the

tinued certification are relevant to any purpose of the Georgia school system, the purpose can only be defiance of the Supreme Court of the United States, a purpose that is not apt to commend itself to the courts.<sup>158</sup>

In most of its usual applications, the privilege against self-incrimination seems a far cry from the rights of free association and free expression. Now that ideologies have become incriminating, however, and exposure to public opprobrium has come into common use for the suppression of unpopular ideas, the right, in appropriate cases, to maintain silence before the inquisitor has become the surest haven for the unorthodox and the heretic. While the first amendment still holds out its promise of intellectual freedom, it is too often the fifth that can alone give some measure of substance to that noble promise.

No one would doubt the propriety of dismissing an employee for refusing to give his employer, whether public or private, information bearing on his fitness for the job, and the employer is plainly entitled to very broad leeway in deciding what information is pertinent. Refusal to testify before a grand jury investigating alleged illegal activity in a public agency, whether it be corruption or "subversive" activity in violation of law, is almost equally clearly so related to the employment as to justify a dismissal if the employer thinks that course proper. If the investigation is being made by a legislative committee of the same sovereign which is the employer the question is more debatable. In view of the important and complex relations between the administrative and legislative arms of government, however, a decision by the administrative arm to require its personnel to cooperate with the legislature, on pain of dismissal, may be difficult to challenge on constitutional grounds.<sup>159</sup> At any rate, these problems in state and municipal government would ordinarily raise no federal question.<sup>160</sup>

---

matter to local school authorities, but whether there has been a change of substance is not clear. *N.Y. Times*, August 16, 1955, p. 25, col. 2.

<sup>158</sup> As in so many of these situations, however, it is one thing to prophesy the holding of a court, and quite another to speculate on the practical efficacy of judicial relief. Opportunities to discriminate against a teacher reinstated under court order would be many and varied, and it will require some courage in a Georgia teacher to stand on his constitutional rights.

<sup>159</sup> Legislation includes appropriation, and a measure of overseeing of administration normally accompanies the process of appropriation; it would be unrealistic to urge that the administrative arm does not have a legitimate interest in maintaining, even at some sacrifice to its employees, the good will of the legislative arm.

In sustaining such a dismissal in *Board of Education v. Eisenberg*, 129 Cal. App.2d 732, 277 P.2d 943 (1954), the court was untroubled by these subtleties, but three Justices of the state supreme court dissented from that court's refusal to hear the case. *Id.* at 950.

<sup>160</sup> *Adamson v. California*, 332 U.S. 46 (1947).

A different issue is presented by a case now pending before the Supreme Court.<sup>161</sup> Pursuant to a provision of the New York City charter, a teacher in Brooklyn College was dismissed for invoking the privilege against self-incrimination when asked about past Communist Party membership by a Congressional sub-committee. Here, a right under the Federal Constitution is in issue, and the dismissal would seem to be an unconstitutional condition unless some reasonable relationship can be found between the refusal to testify and the teacher's employment.<sup>162</sup>

The New York Court of Appeals disposed of the constitutional issue summarily, on the authority of *McAuliffe v. New Bedford* and *Adler v. Board of Education*, but it did disclaim the argument that an inference of guilt could be drawn from the refusal to testify. Another possible argument in support of the statute is that the state may require of its teachers the highest standards of "good citizenship," and that claim of privilege before a committee of Congress is incompatible with such standards. If we view the privilege as a part of our charter of basic liberties,<sup>163</sup> neither of these arguments does justice to it, for in that view it must be available to the highly placed and the innocent as well as to the lowly and the guilty.

There is another answer, at least to the former argument. If Brooklyn College deemed the unanswered questions pertinent to the teacher's employment, why not call him before an administrative superior or an academic tribunal, and put the same questions to him?<sup>164</sup> If he again refused to answer, dismissal would be constitutionally unexceptionable.

---

<sup>161</sup> *Slochower v. Board of Higher Education*, probable jurisdiction noted, 348 U.S. 935 (1955); decided below sub nom. *Daniman v. Board of Education*, 306 N.Y. 532, 119 N.E.2d 373 (1954). The federal questions presented in the court below are stated on amendment of the remittitur, 307 N.Y. 806, 121 N.E.2d 629 (1954). Though the argument of irrelevance suggested in the text was not mentioned in terms, it may perhaps be embraced by the general claim that there had been a denial of due process of law because the dismissal "deprives him of tenure . . . to which he was entitled."

<sup>162</sup> Protection of a federal constitutional right against interference by a state is among the oldest and most typical applications of the doctrine of unconstitutional conditions. See, e.g., *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922), page 23 supra. If state pressure to relinquish the fifth amendment privilege were deemed (like state pressure against resorting to the federal courts) to constitute an undue interference with the working of the federal system, the condition would be void even if relevant to otherwise legitimate state purposes. But if the condition is found to be irrelevant, then under the doctrine of unconstitutional conditions not even Congress could impose it; and it would seem to follow that a state could not do so.

<sup>163</sup> See *Quinn v. United States*, 349 U.S. 155, 161-62 (1955); Griswold, *The 5th Amendment Today*, 7-10 (1955).

<sup>164</sup> The procedure had been followed in *Davis v. University of Kansas City*, 129 F. Supp. 716 (W.D. Mo. 1955), and apparently the only issue presented to the court was one of contractual academic tenure.

But it is not a foregone conclusion that, absent the glare of publicity and present those procedural safeguards with which most academic institutions surround such proceedings, he would again have refused.<sup>165</sup> Who can say that in that event the full story would not have come out, and his fitness to teach have been judged on the merits?

With the availability of these procedures in mind, it would seem that the courts ought not to strain to find some tenuous relationship between the claim of privilege and fitness for employment. Three judges of the Court of Appeals, though accepting the majority's view on constitutionality, dissented on the ground that the legislature had not intended to require dismissal when the questioning was by a body having no responsibility for operation of the city's educational system. The interpretation by the majority, they said, resulted in

. . . a statutory monstrosity, whereby an upstate town board or a legislative committee from another State could bring about the firing of a New York City employee because the latter refused to answer the questions of the interlopers, about his official conduct.<sup>166</sup>

These remarks might have been addressed to the constitutionality of the statute as well as to its interpretation.

A more disturbing argument in support of the validity of such dismissals is one accepted by the Supreme Judicial Court of Massachusetts.<sup>167</sup> A teacher must be above suspicion, said that court in effect, and his invocation of the privilege against self-incrimination automatically makes him so far suspect in the public mind that he is no longer suitable for employment as a teacher. This argument has substance if we are willing to hear it, for there can be no doubt, as the currency of the phrase "Fifth Amendment Communist" suggests, that many people have come to equate claim of privilege with guilt. But, like the argument that racial inequality must be tolerated because people will do unpleasant things if it is not,<sup>168</sup> this argument can have little appeal to a court bent on

---

<sup>165</sup> It is not suggested that either publicity or lack of procedural safeguards bears on the propriety of claiming the privilege, but merely that either of them may bear on the likelihood that it will in fact be claimed.

<sup>166</sup> *Daniman v. Board of Education*, 306 N.Y. 532, 548, 119 N.E.2d 373, 383 (1954).

<sup>167</sup> *Faxon v. School Committee*, 331 Mass. 531, 120 N.E.2d 772 (1954). Action in this case was taken by the school committee without statutory mandate. The court subsequently advised that a statute requiring such action by all public schools would be valid, though admitting that the question would remain doubtful until the disposition of the *Slochower* case. *Opinion of the Justices*, 127 N.E.2d 663 (Mass. 1955).

<sup>168</sup> Public opinion and public attitudes are not in all cases to be wholly disregarded in the enforcement of the Bill of Rights and similar constitutional guarantees, as witness the delay and gradualism in the present school integration cases. Such factors may be allowed to temper, but not to frustrate, the enforcement of our basic rights.

Public mistrust of an official against whom charges have been made may in some cases war-

giving substance to the Bill of Rights. Most of its great guarantees are designed as safeguards against the passions and prejudices of the moment, and to use passion and prejudice to justify violation of our basic freedoms is to reduce the Bill of Rights to a very low estate.

In protecting basic freedoms against indirect encroachment by the conditioning of public benefits and public employment the courts are dealing with essentially the same logical problem with which they struggled so long in fixing the rights of foreign corporations and, more lately, the rights of users of highways and streets and parks. From the unconstitutional condition cases there seems to emerge the rule that surrender of freedom may not be exacted unless it is related to the purpose of the benefit or the employment. Though most encroachments on freedom today are made in the name of loyalty or security, this rule of relevance holds no danger to the nation. By hypothesis, an unrelated condition serves no purpose of the program to which it is attached, and if by any chance it were nevertheless found calculated to avert the "clear and present danger" of some grave evil it still could stand, for in that unlikely event it could meet the test that would be applied to an independent enactment.

The more difficult and delicate task arises only when some measure of relevancy has been found to exist. When that is the case, "clear and present danger" may no longer be the yardstick. But if we are to judge by the cases dealing with streets and parks,<sup>169</sup> it still remains to weigh the impairment of freedom against the governmental interest offered in justification, and to strike down the limitation if the balance tips in favor of freedom. If the challenged provisions bear in some evident way on the safety of the nation, courts must obviously give great weight to the legislative judgment of the necessity of the resulting impairment of freedom. But even here the legislative judgment is not conclusive; as dissenting Justices of the Supreme Court have not tired of pointing out, even those restraints which really contribute to the national security are not exempted from the Bill of Rights.

But however one may incline on these issues which have divided the

---

rant his suspension while the facts are being investigated, but the position of the Massachusetts court that public suspicion destroys his usefulness, and thus renders him automatically unfit for further employment, is difficult to reconcile with our concepts of fair play. At least when the suspicion results from the assertion of a constitutional right, the validity of automatic dismissal on this ground seems highly dubious.

<sup>169</sup> See notes 66 and 72 *supra*. The avoidance of litter on the streets, for example, is a legitimate and laudable objective of government, and is plainly relevant to the privilege of using the streets; yet it does not justify prohibiting the distribution of handbills. *Jamison v. Texas*, 318 U.S. 413 (1943); *Schneider v. State*, 308 U.S. 147 (1939).

Court so sharply, all must agree that no special deference is due a measure merely because justification of it is offered in the name of security. So much has been done in that name of late that it is incumbent on the courts to examine critically, whenever it is advanced, the claim that security is really at stake. It is incumbent on them, too, to recognize more forthrightly than most of them have yet done how effectively the conditioning of "privileges" can erode the Bill of Rights, and to realize that the Constitution forbids abridgement of first amendment freedoms in this way as much as in any other. By doing these two things, the courts can at least limit the permissible battleground in the current war on unorthodoxy and restore some part of the esteem in which the first amendment has traditionally been held.