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JUSTICE DOUGLAS ON FREEDOM IN THE
WELFARE STATE
CONSTITUTIONAL RIGHTS IN THE PUBLIC SECTOR

HANS LINDE*

I. THE TURN TO THE PUBLIC SECTOR

Twenty-five years, in constitutional law, is a long enough span that at its end a generation is apt to confront the problems created by its solutions to the tasks it inherited at the beginning. In the years before Mr. Justice Douglas took his seat on the Supreme Court in 1939, the attention of the whole nation had been held by an epic of constitutional history—the decision whether American government had the constitutional power to cope with the economic and social crisis of a breakdown in the private economy. In 1937, the Supreme Court had unlocked the federal arsenal. The previous year, in the very course of striking down the first AAA, the Court had given its blessing to a broad, Hamiltonian reading of the spending power,¹ and it had repulsed an attack on the TVA.² It looked as if with the opening page of the 301st volume of its Reports, the Court was turning over a new leaf: the commerce clause was held to support regulation of labor relations in industrial production,³ and an ingenious use of taxes, credits, and payments permitted the nation to place its financial credit rather than that of near-bankrupt and mutually competitive states behind unemployment and retirement benefits through the Social Security Act.⁴ The Federal government was not again to be held to lack the tools for an economic task.

If the vindication of federal powers had been the most dramatic, it had not been the only reevaluation by the Court of the role of government in an economy capable of the Great Depression. Contrary to the dichotomy invoked in the conventional legal arguments, the Justices who had resisted using and ultimately had withdrawn the judicial veto of federal action were also sympathetic toward the states. The due process clause was the chief but not the only battleground. When Thomas Reed Powell spoke to the Washington State Bar in

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¹ *United States v. Butler*, 297 U.S. 1 (1936).

² *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

³ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁴ *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937). This approach is said to have been suggested by Mr. Justice Brandeis; see SCHLESINGER, *THE COMING OF THE NEW DEAL* 302 (1958).

1938 about current constitutional law, his timely illustrations included Mr. Justice Roberts' swing of the Court from finding a denial of due process in New York's minimum wage law in 1936 to sustaining that of Washington in 1937; two very recent decisions had told the federal courts in diversity cases to follow the opinions of state courts on state law, and denied immunity from federal admissions tax to state college football tickets.⁵ State regulatory power had newly survived challenges based on claims of exclusive federal authority and legislation,⁶ and states were holding their own in the struggle for constitutionally taxable objects.⁷ In the course of 1937 the Supreme Court had assured Washington that it could inspect the hulls of federally-licensed motor tugs even though they might operate on navigable waters in interstate commerce; it could make an interstate railroad pay a fee to cover the costs of state inspection, but it could tax a stevedoring company only on the business of furnishing longshoremen, not on loading or unloading ships in interstate or foreign commerce; it could tax the gross income of federal contractors building Grand Coulee Dam and their use of machinery brought from other states to build it.⁸

The new recognition of the country's power to govern itself was accompanied by a quickened concern for individual rights. In 1938, the Court had taken the decisive first step toward securing educational equality for Negroes.⁹ As the states were freed to regulate prices,

⁵ Powell, *A Constitution For an Indefinite and Expanding Future*, 14 WASH. L. REV. 99 (1939), citing *Morehead v. New York*, 298 U.S. 587 (1936); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Allen v. University System*, 304 U.S. 439 (1938). Professor Powell's comments (14 WASH. L. REV. at 107) were perhaps less than fair to the role in the two due process cases of Mr. Justice Roberts, who had written the Court's first statement of the contemporary position in *Nebbia v. New York*, 291 U.S. 502 (1934). See Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313-17 (1955).

⁶ *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Townsend v. Yeomans*, 301 U.S. 441 (1937).

⁷ See, e.g., *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); *Southern Gas Corp. v. Alabama*, 301 U.S. 148 (1937); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604 (1938); but also *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938).

⁸ *Kelly v. Washington*, 302 U.S. 1 (1937); *Great No. Ry. Co. v. Washington*, 300 U.S. 154 (1937); *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U.S. 90 (1937); *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Commissioner Henneford's string ran out in the October, 1938, term; Washington could not tax the gross receipts from the business of marketing Washington fruit throughout the United States and abroad. *Gwin, White & Prince, Inc., v. Henneford*, 305 U.S. 434 (1939).

⁹ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). One would like to say that the Court was never again to sustain any form of racial discrimination, were it not for the endorsement given the war-time treatment of Americans of Japanese ancestry, *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); contrast the judicial courage even in the face of claimed military necessity in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

wages and hours of work, they were also warned that the fourteenth amendment imposed tighter standards, in the name of freedom of speech, assembly, religion, and fair procedures, on their ways of dealing with agitators, troublemakers, and Jehovah's Witnesses¹⁰—such personal rights essential to the political process, or inherently helpless against it, might be “subjected to more exacting judicial scrutiny.”¹¹ The rights of defendants in federal prosecutions were to be jealously guarded,¹² though state criminal procedures need only stay within limits of fundamental principles of justice “implicit in the concept of ordered liberty.”¹³ Washington found one of its criminal sentences reversed under the *ex post facto* clause.¹⁴ In time, these issues of personal liberty were to become the new storm centers; some dividing the Justices, others the country, they would make the Court's work as controversial as had the issues of 1935-38. But to the view of 1939, it was the constitutional ability of government to gain control of the economy that held the center of the stage.

Yet even as regulation, by statutory or delegated rule-making, was winning its final constitutional battles, other forms of governmental action were gaining new significance. By the time the Fair Labor Standards Act and the Agricultural Adjustment Act of 1938 were sustained in terms giving federal commerce power its most sweeping modern definition, and an opinion by the new Mr. Justice Douglas was clearing away one more barrier to state social legislation,¹⁵ the nation was becoming deeply involved in the early stages of World War II; the war power would soon impose all-pervading economic controls.¹⁶ By 1944 the Federal budget absorbed half of the national economy; as many as 18 million men and women were drawn into direct military and civilian government service, and other millions of private employees were wholly engaged in war production. At war's end the tool chosen to meet the anticipated problems of reconversion (as, for instance, in the full employment bill and the G.I. Bill of Rights) was

¹⁰ *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

¹¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n. 4 (1938).

¹² *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Nardone v. United States*, 302 U.S. 379 (1937).

¹³ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹⁴ *Lindsey v. Washington*, 301 U.S. 397 (1937).

¹⁵ *United States v. Darby*, 312 U.S. 100 (1941), overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Olsen v. Nebraska*, 313 U.S. 236 (1941), overruling *Ribnik v. McBride*, 277 U.S. 350 (1928).

¹⁶ See *Yakus v. United States*, 321 U.S. 414 (1944) (price control); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control).

the public purse, not the sovereign command. Congressmen and state legislators have continued to find this an easier, more nearly painless tool. More and more, the political urge to meet perceived social needs has taken the form of programs to render direct aid or services rather than to impose regulations on resisting institutions of the private economy. There has been some legislative tinkering at the periphery of regulatory schemes established years ago; labor relations alone has remained a field of such recurring battles between giant adversaries of the private sector as the Taft-Hartley Law of 1947, the state Right-to-Work campaigns in the 1950's, the Landrum-Griffin Act of 1959. The priorities of the international fever chart have diverted the nation's political energy to new ventures in foreign aid, rearmament, Korea, the great Communist hunt, most recently the space race, which in different ways have further extended government involvement in the economy. But in domestic affairs as such, apart from the biennial, pre-election improvements in social security benefits or an occasional increase in the minimum wage, the dominant concerns of all levels of government have become programs of public services or financial incentives for private action. Even a partial, random list suggests the range from the most traditional to the newest, from direct national management through the proliferating grants-in-aid to mere support of the credit of state, local, or private agencies: Construction of dams and airports, highways, harbors, hospitals, and housing; education from kindergarten to post-doctoral fellowships; welfare, mental health, juvenile delinquency; rivers, forests, parks, and outdoor recreation; air pollution and water pollution; agricultural marketing and soil management; research in how to grow more and rewards for growing less; research toward curing more people and toward killing more people; plans to rehabilitate uneconomic industries and their workers and plans for attracting industry elsewhere. It is one measure of the public sector that in 1962, when the gross national product was \$555 billion, a total of \$175.8 billion was spent by government at all levels.¹⁷

This pervasive expansion of the public sector reflects no radical break with tradition, no coherent new theory of government, but pragmatic political responses to a series of separate and diverse demands for action. Yet as each program pursues its own task, taken together they have inescapably affected also the tasks confronting constitutional law. Problems of once rare or marginal governmental

¹⁷ Fed. Reserve Bull., December 1963, p. 1718; U.S. Bureau of the Census, *Governmental Finances in 1962* (Oct. 1963), p. 3.

activities recur more insistently, and the syllogisms that disposed of them when such activities were peripheral to the main concerns of government break down under the burden of modern realities. When eight million Americans work for public agencies, their constitutional status can no longer be adequately premised on debating whether or not it is a privilege. The legal characteristics of programs that sustain life for 27 millions of old, ill, handicapped, or deserted men, women, and children are not exhaustively defined by the concept of gratuity. The United States Forest Service or the public educational systems of Washington fit awkwardly into the law of vendor and purchaser, landlord and tenant, guardian and ward. When government serves, owns, manages, sells, it yet remains government, the object of constitutional law.

The problems which the growth of the public sector has newly posed for constitutional law involve issues, not of constitutional power, but of constitutional limitations. By 1942 the Supreme Court had reaffirmed the constitutional power to govern in terms so comprehensive that the authority of the federal and state governments to engage in economic and social programs is rarely doubted. But what of the restraints with which the Constitution¹⁸ circumscribes the exercise of public authority? Do they or do they not apply to direct governmental activities as they do to traditional governmental regulation? Are there constitutional rights in the public sector—or is the Prince's pen, in a checkbook, mightier than his sword?

This is the question which the welfare state with increasing insistence brings to the Court. The question is not merely rhetorical, nor, posed thus broadly, will it permit a single, simple answer. We need only plot the two dimensions of the problem to indicate its magnitude and complexity. Along one, the state appears in its functional roles: As owner and manager of land and natural resources, buildings and roads, dams and irrigation pipes, transportation and other utility systems; as buyer and seller of property; as employer; as banker and underwriter of credit; as contractor for goods and services; as distributor of food, housing, water, electricity, education, medical care, and cash. Along the other appear the constitutional limitations on government's use of its power: Due process and equal protection under the fifth and fourteenth amendments, the freedoms guaranteed by the first amendment, the privileges and immunities of article IV, the com-

¹⁸ This article considers only federal limitations, not state constitutional restrictions on state or local action.

merce clause, the express prohibitions of article I, sections 9 and 10, the concept of intergovernmental immunity. Neither list is exhaustive, but the theoretical possibilities are obvious. In fact some of the resulting constitutional questions reached the courts long ago; some have recently come under frequent and extensive consideration; some remain theoretical. We may expect concrete cases presented for decision to increase as their claims on the public sector become important to more and more people. Thus it is worthwhile to trace the development of doctrine with which the courts may meet such claims.

II. THE ROLE OF THE JUDGE

There is special interest in tracing this development in the work of Mr. Justice William O. Douglas. Legal doctrine for immediate use must be sought in the holdings and opinions of past and present majorities, in the authoritative end products of collective decision. But the processes of thought and commitment remain personal. The apologia for the power of appellate courts in the common law tradition has been that the rule of law rests in the constraints which loyalty to the continuum of collective judgment imposes on individual judicial impulses. On the Supreme Court of the United States those Justices have been remembered in whose work commitment to a coherent personal view has taken precedence over the continuity of the collective doctrine. "A judge who is asked to construe or interpret the Constitution often rejects the gloss which his predecessors have put on it," Mr. Justice Douglas in 1948 told an ABA audience in Seattle. "For it is the Constitution which we have sworn to defend, not some predecessor's interpretation of it."¹⁹ In his study of the role of *stare decisis*, he spoke of the antinomies of constitutional judgment:

The problem of the judge is to keep personal predilection from dictating the choice and to be as faithful as possible to the architectural scheme. We can get from those who preceded a sense of the continuity of a society. We can draw from their learning a feel for the durability of a doctrine and a sense of the origins of principles. But we have experience that they never knew. Our vision may be shorter or longer. But it is ours. It is better that we make our own history than be governed by the dead.²⁰

¹⁹ Douglas, *The Dissenting Opinion*, address to the Section on Judicial Administration, American Bar Association, Seattle, Washington, Sept. 9, 1948, 8 *LAWYER'S GUILD REV.*, 6 (1948), reprinted in WESTIN, *THE SUPREME COURT: VIEWS FROM INSIDE* 51 at 54 (1961).

²⁰ Douglas, *Stare Decisis*, lecture to the Association of the Bar of the City of New York, April 22, 1949, 49 *COLUM. LAW REV.* 735, 739 (1949), reprinted in WESTIN, *op. cit. supra* n. 19 at 122, 126.

In a quarter of a century on the Supreme Court, Mr. Justice Douglas has seen the development of the burgeoning public sector and has met its constitutional problems one by one in cases coming to the Court. The manner in which one justice has worked out his stand on these problems, in majority opinion, concurrence, or dissent, not only contributes to our history; it may also offer, better than the mere collection of precedents, one coherent vision to the "oncoming group from a new generation" who must judge "the work of our present and their past."²¹

Moreover, Mr. Justice Douglas' response to this development of our time is to be found largely in the evidence of his work on the Supreme Court. At the age of 39, he did not bring to the Court a long-held and fully articulated philosophy of the role and limits of direct public activities in the economy. To the contrary, as teacher, author, and later on the S.E.C., the young Professor Douglas had been concerned with the law and institutions of the private sector, with bankruptcy and corporations and finance, with the movement toward new realism and reforms that could preserve private decision-making in the American economy under the 20th-century stresses dramatized by the long crisis beginning in 1929. To these concerns, constitutional issues would at first have relevance only as a peripheral barrier to action. Reform did not mean to replace private by public institutions, it meant to make private institutions work, and work with responsible regard for public interests. Its tools were to be found in the law, in legislation, in the regulatory powers of government. But if reform implied an idealistic view of ends to be served by pragmatic experimentation with methods, it also meant equal respect for the choice of the politically responsible agencies whether they pursued the public welfare by regulation or by direct public services, spending, or management. The community could try various roads to reach its social goals. In time, however, this pursuit would come to confront other values with which the Constitution does not invite experimentation.

After ten years on the Supreme Court, Mr. Justice Douglas in one essay brought together his beliefs in the principles with which democracy should meet the challenge of totalitarianism of left or right: Commitment to the goal of human welfare, to the democratic and pragmatic choice of means, and to the primacy of the values of freedom. "The human welfare state is the great political invention of the

²¹ *Id.* at 737, WESTIN at 124.

twentieth century," he said in 1949. But man "can achieve happiness only when he is free. . . ."

If we exploit our political freedom to the fullest, we can show the world the way to preserve incentive and independence for the individual and security for the masses of the people. . . .

The challenge to us is to avoid becoming prisoners of any dogma whether it be free enterprise or government ownership or control. We must preserve flexibility in our thinking, so that we may pick and choose the best device for each task at hand. We must carry that attitude into our social and economic affairs. We must nourish the experimental approach. . . .

We place our faith in a society that preserves the greatest possible freedom for the individual yet secures the masses in their basic needs.²²

III. PRIVATE PROPERTY AND THE PUBLIC DOMAIN

Democratic choice of ends and means, wide scope for pragmatic experiment, preservation of freedom—these criteria imply an approach to judicial review: slow to confine government to the conventional pursuit of traditional goals, quick to protect individual rights and the conditions of the democratic process itself. Two cases illustrate the application of such an approach to the simplest and oldest collision of the public sector with private rights, the taking of property for public use. Government may take with at least the same latitude with which it may regulate. But it must pay for what it takes.

*Berman v. Parker*²³ sustained urban redevelopment in the District of Columbia by the public purchase of land for resale or lease for private development in accordance with a comprehensive land-use plan. Resisting landowners protested that the taking of property which was not itself substandard or otherwise objectionable, and which would eventually be returned to private management, was not taking "for a public use" but rather "without due process of law" under the fifth amendment. Mr. Justice Douglas' opinion for the unanimous Court is likely to remain the classic statement of the community's right to control its physical environment for human needs. The Constitution does not restrict the legislative vision of community welfare to the eradication of tangible evils known to eighteenth century village councils.

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional

²² Douglas, *The Human Welfare State*, Remsen Bird Lecture at Occidental College, Los Angeles, California, 1949, 97 U. PA. L. REV. 597, 600-607 (1949).

²³ 348 U.S. 26 (1954).

application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . . Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.²⁴

They are the words of a Justice who writes of the men and the mountains of Washington and Oregon in his office overlooking the slums below Capitol Hill that are destined for redevelopment.

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.²⁵

“Police power,” if the inherited term must be used, is a description, not a grant of legislative power. It cannot be used by judges as a source of limitation. And the standard of the public interest is as broad when the method chosen is to take property as for other legislation.

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. See *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66; *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 552. . . .

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end Here one of the means chosen is the use of private enterprise for redevelopment of the area. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public

²⁴ *Id.* at 32-3.

²⁵ *Ibid.*

ownership is the sole method of promoting the public purposes of community redevelopment projects.²⁶

Government is not to be driven by a restrictive doctrine of public use into a choice between inaction and state socialism,²⁷ imprisoned in the dogma of either free enterprise or government ownership. The public sector offers a more flexible choice of devices. "The rights of these property owners are satisfied when they receive the just compensation which the Fifth Amendment exacts as the price of the taking,"²⁸ concluded the Court.

The fifth amendment is as capable of expansion to protect those rights as it is to accommodate modern community needs. If *Berman v. Parker* held that traditional property concepts will not let the landowner block progress, *Causby*²⁹ had shown that they also would not let the community evade sharing the cost of progress with the landowner in its path. Progress here took the path of glide of military aircraft over a chicken farm adjacent to an airport. Glare and noise caused panic and death among the chickens and made the land untenable as a farm residence. The Court held that a taking of property had occurred for which the owner must be compensated. Property need not be held to extend *ad coelum* to be constitutionally protected against impairment of its use from above. "Common sense revolts at the idea," wrote Mr. Justice Douglas. "To recognize such private claims to the airspace would . . . transfer into private ownership that to which only the public has a just claim."³⁰ Yet the landowner's domain extends some distance above the earth's surface. Realism, not abstract principles, must draw the line between the private and the public sector, between "incidental damage" and "taking." "The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate."³¹ The airspace is part of the public domain, and the airplane, with its incidental inconveniences, part of the modern environment of life; but when low and frequent flights impair the usefulness and value of specific property, the Court would find a servitude imposed on the land for which the Constitution grants compensation.³²

²⁶ *Ibid.*

²⁷ See Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 *Supreme Court Review* 63, 66.

²⁸ 348 U.S. at 36.

²⁹ *United States v. Causby*, 328 U.S. 256 (1946).

³⁰ *Id.* at 261.

³¹ *Id.* at 262.

³² *Id.* at 266-67.

The government had taken Causby's property by the flight of its planes; the government choosing to build the airport was equally responsible. By the time Mr. Justice Douglas again wrote for the Supreme Court in *Griggs v. Allegheny County*,³³ Congress had added to the airspace in the public domain that airspace needed for take-off or landing. The county, owner of the Greater Pittsburgh Airport, argued that the airlines or the Federal government did the taking. But the Court held that it was the local authority that determined whether, where, and how to build its airport; it could not escape liability for taking the adjacent landowner's property and incurring the obligation to pay for it under the fourteenth amendment. Would the federal government, which had claimed the airspace, which set the design standards for the airport and paid half or more of its cost, and which controlled the flight of airplanes to and from it, also be responsible? "The Federal Government takes nothing,"³⁴ wrote Mr. Justice Douglas, but the context shows, nothing until a local agency decides to build an airport. The issue of federal liability was not before the court.³⁵ In a federal system, the public sector has its special internal complexities; but the burden of their proper adjustment is not to be shifted to the private claimant.

Government must pay for what it takes. But it is not to be charged for what it already owns. The Western heritage that Mr. Justice Douglas brought to the Supreme Court finds its greatest expression in his concern for the public domain, and particularly for its water resources. The development of these resources during the past thirty years has been reflected in a series of decisions involving constitutional issues of federal power, intergovernmental relations, and compensation for private rights. Opportunities came early for Mr. Justice Douglas to develop a judicial philosophy toward these issues.

In 1941, he wrote for the unanimous Court in sustaining the constitutionality of federal construction of the Denison Dam and Reservoir on the Red River in Oklahoma, over the objections of the State of Oklahoma.³⁶ Though the stream being dammed was not navigable, flood control on the nonnavigable tributaries of navigable tributaries of navigable streams was held within the necessary and proper execution of the commerce power. The Constitution permits

³³ 369 U.S. 84 (1962).

³⁴ *Id.* at 89.

³⁵ See Dunham, *loc. cit. supra* n. 27 at 84-7.

³⁶ *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

Congress to view each possible project in its relation to a comprehensive plan for flood control and navigation in an entire watershed—in this case, that of the Mississippi River.³⁷ The nation's power over its river systems was affirmed in unmistakable terms. And when the Tennessee Valley Authority solved the problem of a reservoir-flooded road by the expedient of condemning the private lands served by the road and turning them over to the Great Smoky National Park, Mr. Justice Douglas joined Mr. Justice Black's opinion for the Court in rejecting attack on the "public purpose" of the taking: "When Congress has spoken on this subject 'Its decision is entitled to deference until it is shown to involve an impossibility'"³⁸—the affirmance of legislative power to choose the uses of property that was later spelled out in *Berman v. Parker*.

But there has been no such agreement on the price to be paid for the exercise of this power. When TVA condemned lands of a private power company for a damsite, it took a second argument in the Supreme Court before a 5-4 majority decided that fair compensation need not include the potential value of the land for hydroelectric purposes resulting from the fact that state law had given the company the privilege of eminent domain with which to assemble other lands for its project.³⁹ "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner," wrote Mr. Justice Douglas. The power North Carolina had delegated to the company was not "private property" under the fifth amendment; "an award based on the value of that privilege would be an appropriation of public authority to a wholly private end."⁴⁰ Frustration of an opportunity created by this privilege is not a compensable element of appropriation. Another 5-4 majority, a few years later, held that Oklahoma courts could admit the value of land as a damsite in state eminent domain proceedings brought by the holder of a Federal Power Commission license to construct the dam.⁴¹ Mr. Justice Douglas, for the dissenters, relied on the Federal Power Act's assertion of federal dominion and control

³⁷ *Id.* at 525.

³⁸ U.S. *ex rel.* T.V.A. v. Welch, 327 U.S. 546, 552 (1946), quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 66. See Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949); Dunham, *loc. cit. supra* n. 27.

³⁹ U.S. *ex rel.* T.V.A. v. Powelson, 319 U.S. 266 (1943). Mr. Justice Wiley B. Rutledge replaced Mr. Justice James F. Byrnes after the first argument in 1942.

⁴⁰ *Id.* at 280.

⁴¹ *Grand River Dam Authority v. Grand-Hydro.*, 335 U.S. 359 (1948).

over the water power at stake; "when respondent's claim is recognized, the effect is to make petitioner pay a private claimant for a privilege which only the United States can grant."⁴² The next year he again spoke for four dissenters as the Court, in another twice-argued case, granted compensation when a federal navigation dam on the Mississippi impaired drainage from lands adjoining a nonnavigable tributary; "no vested private right is given to anyone, as against the public interest, in the full utilization and control of the river's bed for navigation or in the flow of the stream within it."⁴³ Concurring in another decision on the same day, he emphasized that payment to landowners losing floodwaters as a result of the Central Valley Project was not required by the Constitution, but only because Congress chose to recognize state water rights under the Reclamation Act.⁴⁴ The issue of Federal payment to private parties for water-power rights in a navigable stream led him to dissent once more when the Court held, 4-3, that a private utility's payments for such water rights under state law should be allowed in computing a Federal Power Act licensee's amortization reserve and net investment in a project, which governs the price of eventual federal assumption of the project.⁴⁵ But when the issue was squarely presented in *United States v. Twin City Power Co.*,⁴⁶ Mr. Justice Douglas found himself again writing for a majority of five to hold that just compensation, for land to be used for a federal hydroelectric project on a navigable river, need not constitutionally include the value of the land for such use resulting from the flow of the stream. The market value of the property found by the trial courts was \$1,257,033.20, as against an estimated \$150,841.85 for its timber and agricultural value alone; if others taking the land by eminent domain would have to pay for its location value, so should the United States, said the dissenters.⁴⁷ But the Court concluded otherwise:

⁴² *Id.* at 376.

⁴³ *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 at 813 (1950). Mr. Justice Rutledge and Mr. Justice Frank Murphy had died between the first and second arguments.

⁴⁴ *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 756 (1950), also argued twice. June 5, 1950, the last day of the 1949 Term, was also the day Mr. Justice Douglas delivered the opinions of the Court in *United States v. Louisiana*, 339 U.S. 699, and *United States v. Texas*, 339 U.S. 707, extending to these states the paramount federal rights over the offshore resources first adjudicated in *United States v. California*, 332 U.S. 19 (1947).

⁴⁵ *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 258 (1954).

⁴⁶ 350 U.S. 222 (1956).

⁴⁷ *Id.* at 237-8. Mr. Justice Burton quoted from *Powelson*: "The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of taking merely because it could destroy the value by appropriate legislation or regulation." *Id.* at 240.

What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys. Cf. *U.S. ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 273 *et seq.* To require the United States to pay for this water-power value would be to create private claims in the public domain.⁴⁸

And when Oklahoma's Grand River Dam Authority returned to claim \$10,000,000 for the loss of water power rights at a site developed by the United States itself, a unanimous Court, speaking through Mr. Justice Douglas, relied on the Denison Dam precedent to extend the denial of compensation to the nonnavigable tributaries of navigable streams.⁴⁹ "When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one."⁵⁰ Most recently, Mr. Justice Douglas reemphasized his view that "a head of water" in a navigable stream "is not a property right subject to private ownership and compensation under the Fifth Amendment," while concurring in a decision allowing compensation for a flowage easement over land above the high-water mark, computed on the basis of the land's value for non-power purposes.⁵¹ He is sympathetic when the claim is for values not resting on private exploitation of the flow of the stream. Where a landowner claimed compensation for the destruction of timber in the course of federal construction of Mississippi River levees, he dissented when the Court read Louisiana law to permit such a taking without notice or opportunity to salvage the timber.⁵²

Readiness to pay when government claims private rights for the public domain, jealous scrutiny of claims to private rights in the public domain. Mr. Justice Douglas, for a majority of the Court, would not hold that the railroad land grants of 1862 conveyed a 20th-century treasure in oil and gas reserves as long as statutory language permitted a different construction, despite Mr. Justice Frankfurter's reminder that "Congress was rather freehanded in its disposition of the public domain ninety years and more ago."⁵³ The clause of the act granting alternate sections of public lands reserved mineral lands; "we cannot read 'mineral lands' in § 3 as inapplicable to the right of

⁴⁸ *Id.* at 228.

⁴⁹ *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960).

⁵⁰ *Id.* at 233.

⁵¹ *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 637 (1961). On the above decisions, see also, 14 *STAN. L. REV.* 800 (1962).

⁵² *General Box Co. v. United States*, 351 U.S. 159, 168 (1956).

way granted by § 2 and still be faithful to the standard which governs the construction of a statute that grants a part of the public domain to private interests," concludes the Douglas opinion.⁵⁴ And he finds that the authority of the Federal Power Commission to license private construction of lines across public lands is sufficient to demand, as a condition, that the excess capacity of the lines be made available to carry public power from federal projects; Congressional power over public lands under article IV of the Constitution is described as "without limitation."⁵⁵

For Mr. Justice Douglas, the public domain holds a special place in the welfare state. In the vast public lands of the West, no pre-existing private rights impose a narrow, dollars-and-cents, economic measure on the community's choice of values. In a time of explosive population pressures on the nation's available space, government is free to find that wilderness will contribute more than logging or grazing to the greatest good for the greatest number in the long run.⁵⁶ And to a generation that spans the conservation philosophy of the two Roosevelts, that saw the development of the Tennessee and Columbia and Missouri-Mississippi river systems, the nation's rivers among all the resources of the public domain particularly invite comprehensive planning for the public welfare beyond the short-range commercial efficiencies of locale, time, and private finance.⁵⁷ "TVA is a great political invention of the century," Mr. Justice Douglas told the legislature of Tennessee in 1951.⁵⁸ He reported on the symbol that TVA has become throughout Asia from India to Syria and Iraq, the area he had traveled during the summers. "The Tennessee Valley Authority has caught the imagination of all the people across this broad belt of Asia. . . . The TVA is a community project whereby the benefits accrue to all the people, not to a few promoters. Some call this socialism. But the people of Asia are not bothered by labels. It is the result that counts. . . . It represents an idea that at this juncture of history can be utilized

⁵³ *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 125 (1957).

⁵⁴ *Id.* at 120.

⁵⁵ *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 21 (1952).

⁵⁶ See DOUGLAS, *MY WILDERNESS*, 167-8, 199-201 (1960).

⁵⁷ Mr. Justice Douglas took the unusual step of indicating his vote to grant certiorari when the Court declined to review the Federal Power Commission's license of a smaller Idaho Power Company project precluding the construction of high Hells Canyon dam on the Snake River, *National Hells Canyon Ass'n, Inc., v. F.P.C.*, 353 U.S. 924 (1957). In the field of compensation law, *DUNHAM, loc. cit. supra* n. 27, 99-104, suggests, critically, that only a special rule for the power potential of flowing water can explain the Supreme Court's recent valuation decisions.

⁵⁸ Douglas, *Tennessee Across the World*, address before the General Assembly of Tennessee, 21 *TENN. L. REV.* 797, 802 (1951).

on behalf of civilization against the threat of totalitarian communism."⁵⁹

IV. STATES RIGHTS IN THE PUBLIC SECTOR

In most contexts, as in its refusal to reexamine the "public purpose" of a compensated expropriation, the Supreme Court has successfully declined to sit in judgment over the affirmative powers of government to pursue new and unconventional goals. By closing the courts' doors to taxpayers and competitors, private attacks on federal programs were stopped at the threshold.⁶⁰ The application of constitutional guarantees to expanding governmental activities, not the legitimacy of those activities themselves, has proliferated the issues of private rights in the public sector.

But in a federal system, the public sector forces some other issues to decision. Federalism is difficult when its divided authority bears upon the conduct of private affairs; its traditional premises of dual sovereignty come under even greater stress to accommodate the coexistence of two public sectors in a single national economy. Who is to determine what shall be private and what public? Can a state withdraw private activity from federal power by making it public, or if the federal supremacy clause⁶¹ precludes this, does it also permit Congress to decree what activity shall remain private beyond state power to socialize? And more practically—how is the cost of public services to be allocated? As the needs and costs of these services increase, the federal division of functions that begins as an issue of political theory ends as one of fiscal resources,⁶² a development reflected in the case law of the Supreme Court.

In the judicial revolution of the years just before Mr. Justice Douglas' appointment, the Supreme Court had also substantially dismantled the elaborate structure of intergovernmental tax immunities that had been built on the classic foundation of *McCulloch v. Maryland*.⁶³ Mr. Chief Justice Marshall had established that when Congress

⁵⁹ *Id.* at 799.

⁶⁰ *Frothingham v. Mellon*, 262 U.S. 447 (1923), *Tennessee Elec. Power Co. v. T.V.A.*, 306 U.S. 118 (1939).

⁶¹ U.S. CONST., art. VI: This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

⁶² "The problem of finance is the fundamental problems of federalism," flatly asserts a recent study in its opening sentence. BIRCH, *FEDERALISM, FINANCE, AND SOCIAL LEGISLATION* xi (1955). For a review of the U.S. experience, see 8-44.

⁶³ 4 Wheat. 316 (1819).

chose to charter and in part finance and manage a national bank as a means of federal financial policy, Maryland could not levy a tax on the notes issued by the bank. The immunity had soon been expanded from the federal operation itself to the personal income derived from investment in federal bonds or from federal employment.⁶⁴ In 1871, *Collector v. Day*⁶⁵ pronounced a theory of reciprocity, drawn from premises of dual sovereignty, to hold the salary of a state judge immune from a federal income tax. Mr. Justice Bradley, in dissent, raised the alarm: "Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad . . . or a bank, . . . reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation?"⁶⁶ His warning was heeded. By 1905, the Court refused immunity from the federal excise tax on liquor sales to South Carolina's state liquor monopoly.⁶⁷ It is a question whether the spectre of socialism or that of shrewd commercial acumen on the part of state governments haunted the majority more. South Carolina's annual profits had been over half a million dollars. "Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax," wrote Mr. Justice Brewer.

More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business If this change should be made in any State, how much would that State contribute to the revenue of the Nation?⁶⁸

To draw the line in the conflict between the federal power to tax and the constitutional immunity of a state's property and functions, he turned to the assumptions of 1787, when "Utopian theories" and "modern notions as to the extent to which the functions of a State may be carried" had no hold.⁶⁹ Finding a familiar line of distinction in the

⁶⁴ *Weston v. Charleston*, 2 Pet. 449 (1829), *Dobbins v. Commissioners of Erie County*, 16 Pet. 435 (1842).

⁶⁵ 11 Wall. 113 (1870).

⁶⁶ *Id.* at 129.

⁶⁷ *South Carolina v. United States*, 199 U.S. 437 (1905).

⁶⁸ *Id.* at 454-55.

⁶⁹ *Id.* at 456.

law governing civil liability of municipalities, the Court held that "the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."⁷⁰ The effect was to claim for the courts the power and duty, at least in granting or denying immunity from federal tax, to enforce a permanent, constitutional distinction between the "strictly" public and the properly private sectors of a state's economy.

If the majority of the modern Court was uncomfortable with such a claim, to Mr. Justice Douglas it would be anathema. Before he had occasion to meet the issue, the Court had pruned back the most luxuriant branches of reciprocal tax immunities. First to go was the extension of secondary, derivative immunities based on tracing the economic burden of a tax back to a state activity. In 1938, the Court refused immunity from federal income tax to salaries paid by the Port of New York Authority.⁷¹ Mr. Justice Stone would not go so far as Mr. Justice Black's concurring opinion that, absent discrimination, personal income should be taxable whatever was the governmental function from which it derived,⁷² only finding the claimed effect on the states here too speculative and uncertain. But the tenor of the Stone opinion, stressing the expansion of government activities into formerly private enterprises and expressly reserving the question whether the Port of New York Authority might itself be taxed, effectively announced the reopening of the whole theory of immunity. Yet on the same day, the Court reaffirmed the constitutional criterion of *South Carolina v. United States* in holding that the University of Georgia's football games were a business rather than an essential educational function of government and for that reason not immune from the federal admissions tax.⁷³ Ten months later, federal salaries were held subject to state income tax;⁷⁴ *Collector v. Day* was overruled along with its most recent progeny, barely two years old.⁷⁵ The Court declined to apply to the federal government any distinction between "governmental" and "proprietary" functions: "As that government derives its authority wholly from powers delegated to it by the Con-

⁷⁰ *Id.* at 461.

⁷¹ *Helvering v. Gerhardt*, 304 U.S. 405 (1938).

⁷² *Id.* at 425-27. See MASON, HARLAN FISKE STONE: PILLAR OF THE LAW, 503-8.

⁷³ *Allen v. Regents*, 304 U.S. 439 (1938).

⁷⁴ *Graves v. New York ex. rel. O'Keefe*, 306 U.S. 466 (1939).

⁷⁵ *New York ex. rel. Rogers v. Graves*, 299 U.S. 401 (1937).

stitution, its every action within its constitutional power is governmental action, and . . . all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation," wrote Mr. Justice Stone.⁷⁶ The main battle over intergovernmental tax immunities was over two weeks before Mr. Justice Douglas took his seat on the bench. It remained to be reaffirmed that Congress could claim or disavow immunity from direct state taxes on the property or transactions of federal instrumentalities.⁷⁷

Yet the new Court was not done with its inheritance from Messrs. Justice Bradley and Brewer, the task of judging which state functions were constitutionally immune from federal taxation and which were not. Why should not "all activities of government constitutionally authorized" by a state also enjoy parity with respect to their tax immunity? Could judges evaluate the state's public activities by criteria inapplicable to federal programs? When New York claimed immunity from a federal tax on soft drinks for the mineral waters of Saratoga Springs, operated as state property by a state commission, two arguments a year apart failed to produce a majority opinion for the Court. Although *South Carolina v. United States*, if followed, concededly would dispose of the case—Mr. Justice Frankfurter saw "no reason for putting soft drinks in a different constitutional category from hard drinks"⁷⁸—the four opinions in *New York v. United States* agreed primarily in their dissatisfaction with raising to constitutional stature a distinction between "governmental" and "proprietary" activities. Yet if state programs were not to be either all taxable or all immune, some distinction was unavoidable. Mr. Justice Frankfurter, fighting off the temptation to flee through the "political question" escape hatch, would limit immunity to uniquely state-owned property and state activities; "only a State can own a Statehouse; only a State can get income by taxing."⁷⁹ He was joined only by Mr. Justice

⁷⁶ 306 U.S. at 477.

⁷⁷ *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939), *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941); *Maricopa County v. Valley Nat'l Bank*, 318 U.S. 357 (1943), and *Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952) (opinions by Mr. Justice Douglas), compare *Howard v. Commissioners*, 344 U.S. 624, 629 (1953) (dissenting opinion.) In *Dameron v. Brodhead*, 345 U.S. 322 (1953), Mr. Justice Douglas dissented when the Court held that a federal statute exempted an air force officer from payment of a state personal property tax, pointing out that Congressional power so to immunize the personal income or property of its employees had been reserved when the constitutional immunity was removed in *Graves v. New York*. *Id.* at 327-29.

⁷⁸ *New York v. United States*, 326 U.S. 572, 575 (1946).

⁷⁹ *Id.* at 582.

Rutledge, who also wrote for himself that state functions must be immune against "discrimination" by taxes not levied on others performing the same functions; "what would happen if the state should take over a monopoly of traditionally private, income-producing business may be left for the future . . ."⁸⁰ Mr. Chief Justice Stone, with three adherents, would not limit state immunity so far. Discrimination alone could not be the test; a non-discriminatory federal tax might seriously interfere with a state's "performance of its functions as a government which the Constitution recognizes as sovereign."⁸¹ The test should not be whether the subject of the tax was traditionally a public or private function, he wrote, but rather whether it was traditionally a subject of the federal taxing power, so that no state could withdraw from that power subjects of taxation traditionally within it.⁸² Whatever the test, the majority agreed that the United States could tax New York's socialized mineral waters.

In dissent, Mr. Justice Douglas wrote one of the strongest statements of his belief in the affirmative role of government—a role that states could perform only if they were protected against the financial drain of federal taxation. *South Carolina v. United States* and its successors should be overruled. The legitimacy of a state's projects, whether traditional or akin to private enterprise conducted for profit, was not a constitutional question. "A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant . . . Here a State is disposing of some of its natural resources. Tomorrow it may issue securities, sell power from its public power project, or manufacture fertilizer. Each is an exercise of its power of sovereignty. Must it pay the federal government for the privilege of exercising that inherent power?"⁸³ The majority sought substitutes for the rejected test of *South Carolina*. But a test of discrimination would not do, if it meant that a general tax on the issuance of securities could be applied to state or local bonds, or an income tax to income from the sale of public resources.

Local government in this free land does not exist for itself. The fact that local government may enter the domain of private enterprise and operate for profit does not put it in the class of private business enter-

⁸⁰ *Id.* at 584-85.

⁸¹ The opinion contains five close variants of this phrasing, *Id.* at 587-89.

⁸² *Ibid.*

⁸³ *Id.* at 572.

prises for tax purposes. Local government exists to provide for the welfare of its people, not for a limited group of stockholders Many state activities are in marginal enterprises where private capital refuses to venture. Add to the cost of these projects a federal tax and the social program may be destroyed before it can be launched.⁸⁴

He addressed himself to the views of the Chief Justice. "To say the present tax will be sustained because it does not impair the State's function of government is to conclude either that the sale by the State of its mineral water is not a function of government or that the present tax is so slight as to be no burden," yet "the power to tax lightly is the power to tax severely."⁸⁵ A rule that left states subject to federal taxes but the federal government immune from tax would tend to centralize all governmental activities. And more than fiscal burdens was involved; taxation could be a powerful instrument of regulation. Reliance on the political guarantees of federalism was no answer. "The notion that the sovereign position of the State must find protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the States and the Nation outside the field of legislative controversy."⁸⁶ Finally, if there was reason to fear loss of federal revenue from South Carolina's liquor monopoly in 1905, when beer and liquor taxes brought in one-fourth of the federal government's income, that fear was unfounded in 1946, with a federal income tax from which state employees would have no immunity. "If the truth were known," concluded Mr. Justice Douglas, "I suspect it would show that the activity of the States in the fields of housing, public power and the like have raised the standards of marginal or submarginal groups. Such conditions affect favorably,

⁸⁴ *Id.* at 593-94.

⁸⁵ *Id.* at 594.

⁸⁶ 326 U.S. at 594. The reply was directed to Stone's earlier use, in *Gerhardt*, of a distinction he drew from Marshall's opinion in *McCulloch v. Maryland*, that there is less danger of abuse from national action, determined and constrained by the political representation of all, than from local action not constrained by such political representation. 304 U.S. at 412, 416. In Mr. Justice Stone's approach to realism about the federal relationship, the significance of the presence or absence of political restraints was a major theme, repeatedly sounded on the second beat by the bass notes of his opinions; cf. *Southern Pacific Co. v. Arizona*, 325 U.S., 761, 767, note 2 (1945), *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 45, note 2 (1940), *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 184, note 2 (1938). The sources and reality of the Constitution's political guarantees of the states have been elaborated by his 1932 law clerk, now Harlan Fiske Stone Professor at Columbia University Law School. Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954), reprinted in *PRINCIPLES, POLITICS, & FUNDAMENTAL LAW* 49 (1961).

not adversely, the tax potential of the federal government."⁸⁷ Mr. Justice Black joined the dissent.⁸⁸ Mr. Justice Jackson, away for the Nuremberg trials after the second argument, apparently had also leaned toward dissent, distinguishing sale of the state's natural resources from sales of liquor.⁸⁹

Though *New York v. United States* rejected the broad view of state immunity urged by Mr. Justice Douglas, the absence of a majority among the diversity of opinions left the development of a constitutional standard unfinished business.⁹⁰ As the fiscal needs at all levels of government increase, so does the importance for each public sector of the taxability or immunity of the other, as well as its own by the other. For local governmental units largely dependent on a property tax base, the immunity of federal military and civilian installations and buildings, and of the public lands particularly in the West, has led to repeated demands for federal consent to taxation, in-lieu payments, revenue sharing, or more radical proposals for the sale or other disposal of much of the national domain.⁹¹ On the other hand, the restrictive impact of federal taxation on state and local governments has resulted, not from the direct taxation of their activities that Douglas feared, but from the states' inability, while competing with each other for private economic investment, also to compete with the heavy demands of Cold-War federal budgets for their slice of the taxable economy. Mr. Justice Douglas was right to question, in a time of a federal income tax from which state-derived private incomes would not be immune, the realism of Stone's repetition of Brewer's bugaboo that the states might withdraw substantial segments of the economy from the taxing power of the nation. But immunity from federal taxation has more realistic economic implications; one may wonder whether Mr. Justice

⁸⁷ *Id.* at 598.

⁸⁸ In his concurrence in *Helvering v. Gerhardt*, 304 U.S. 405, 424-27, Mr. Justice Black had protested against judicial demarcation of "essential governmental functions" and functions that "could be carried on by private enterprise," citing the examples of waterworks, power plants, and transportation systems; he would have decided that case by denying the immunity for publicly derived income which was ended a year later. See *supra* note 72.

⁸⁹ Mason, *op. cit. supra* note 72 at 770, so quotes an opinion circulated by Jackson during the October, 1944 Term.

⁹⁰ In a subsequent challenge to the collection of a Federal tax on admissions to a state park, the Court found it unnecessary to reconsider the doctrine of non-essential state functions, since collection of the tax from private individuals, as in *Gerhardt*, was too "speculative and uncertain" a burden on the governmental activity. Mr. Justice Douglas did not sit in the case. *Wilmette Park Dist. v. Campbell*, 338 U.S. 411 (1949).

⁹¹ See generally, Report of the Commission on Intergovernmental Relations, 107 et seq. (1955), and the report of its Study Committee, *Payments in Lieu of Taxes and Shared Revenues*. Excerpts from this report appear in BARRETT, BRUTON & HONNOLD, CONSTITUTIONAL LAW 541-44 (2d ed 1963).

Brewer himself may not have felt more real concern about the competitive advantage that tax immunity would give public performance of traditional business functions than he did about the threat to the national revenue.⁹² Tax immunity may not only permit states to develop local economic resources, tax immunity may itself be the chief or only local resource. Tax exemption may be created to facilitate the community financing of social services and welfare; competitive pressures will force communities to put this financial asset to the service of the private economy. It has been reported that thirty-seven states permit the use of state or local bonding capacity to underwrite the capital costs of private business developments at the reduced interest rates of tax exempt securities; more than \$400,000,000 of industrial development bonds are said to have been sold in the past four years, some by communities of a few hundred persons.⁹³ The privileged position of state bond interest is statutory, but if state immunity from any major federal tax is grounded in the Constitution, it might similarly force economic activity into the public sector purely for tax reasons unconnected with any independent public purpose, and beyond the reach of federal repeal except by abandoning the tax entirely. (Only in this sense might state tax immunities substantially shape the choice of federal subjects of taxation.) Just before *New York v. United States*, Thomas Reed Powell concluded a review of tax immunities by writing, of tax-exempt interest, that fairness demanded reciprocity between the states and the United States: "It does not follow, however, that such reciprocity must have a constitutional foundation. Senators and representatives chosen from the states ought to be duly mindful of states interests."⁹⁴ There are risks in the rigidity of constitutional tax immunity for the states' public sector, and there are risks in relying on the "statesmanship" of Congressmen. Their sympathy with the public needs of their home communities is more likely to take the form of federal programs and grants-in-aid (with the accompanying centralization) than to enhance the financial resources of the state and local

⁹² *South Carolina v. United States*, 199 U.S. 437 at 455 (1905); cf. the thumbnail sketch of Brewer's dislike of the "paternal theory of government" in FREUND, SUTHERLAND, HOWE & BROWN, *CONSTITUTIONAL LAW*, xlix (2d ed. 1961).

⁹³ *The Wall Street Journal*, November 22, 1963, pp. 1, 13. The interest costs on one new industrial plant are said to have been reduced 45 percent by Shreveport, La., municipal bond financing; "revenue bonds are almost a necessity for this type of capital investment," another entrepreneur is quoted. It should occasion no surprise that "a 3,400-acre piece of farm land outside St. Louis, containing only eight registered voters, incorporated as Champ, Mo., and voted a \$3,250,000 bond issue to finance a plant for R.C. Can Co." *Ibid.*

⁹⁴ Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633; *The Remnant of Intergovernmental Tax Immunities*, *id.* at 757 (1945).

governments from which they sprung, leaving to their successors at home the choice of programs—and the credit for action. To Mr. Justice Douglas, states' rights against dependence on the latter risks justified the former.

Though the issue has been less sharply drawn with respect to the impact of federal regulatory legislation on state activities, here too Mr. Justice Douglas has sought to guard the states' freedom to pursue their public programs. In the light of the supremacy clause, the question of federal regulation has been statutory more often than constitutional, and it has not led the Court to seek criteria of state immunity in the historic, essential, governmental, or other propriety of the activity. In 1936, when the old doctrines of reciprocal tax immunities were still in the process of replacement, the Court had rejected California's effort to use that analogy against the Safety Appliance Act by showing that it operated a state-owned railroad as a non-profit, public function in its sovereign capacity. Unlike the restriction on taxing state instrumentalities, "there is no such limitation upon the plenary power to regulate commerce," wrote Mr. Justice Stone. "The state can no more deny the power if its exercise has been authorized by Congress than can an individual. California, by engaging in interstate commerce by rail, has subjected itself to the commerce power. . . ."⁹⁵ The Court has adhered to that holding.⁹⁶ But after *New York v. United States*, Mr. Justice Douglas had some doubts. When the O.P.A., during World War II, applied maximum price regulations to the sale by Washington of timber from its school lands and to the sale of a used tractor by an Idaho county, he was the only dissenter from the Court's reading of the Emergency Price Control Act to cover states.⁹⁷ He would avoid such a construction because the act contained provisions (including the Administrator's power to license sales) that would be "substantial intrusions on the sovereignty of the States," he wrote, citing his dissent in *New York v. United States*; "they raise for me serious constitutional questions."⁹⁸ He found that the constitutional line had been crossed and dissented when the Court sustained federal confiscation of the personal property left by veterans who die without will or heirs in a veterans' hospital, defeating escheat under

⁹⁵ *United States v. California*, 297 U.S. 175, 185 (1936).

⁹⁶ *See, e.g., California v. United States*, 320 U.S. 577 (1944), *California v. Taylor*, 353 U.S. 553 (1957).

⁹⁷ *Case v. Bowles*, 327 U.S. 92 (1946), *Hulbert v. Twin Falls County, id.* at 103 (1946).

⁹⁸ *Id.* at 105-6.

state law.⁹⁹ And Douglas knows that in the West states' rights mean state water rights and has resisted expansion of federal claims to control.¹⁰⁰

But in the march toward nationalization of the public sector, these have been rear guard actions. Mr. Justice Douglas has been concerned that federal regulation and federal taxation should not be instruments for keeping individual states from moving ahead to meet social needs by local action. That has not proved to be the role of national power; rather, federal direction of the public sector has taken the form of national social programs and, above all, grants-in-aid, to provide federal initiative, federal fiscal strength, and federal standards for activities the states have been politically, economically, or competitively unable to undertake on their own. The federal relationship as such does not give the states the standing to attack such programs, nor is there constitutional substance to such attacks where standing exists.¹⁰¹ Mr. Justice Douglas's concern for the states' affirmative powers has not led him to question the constitutionality of Congressional programs or their immunity from state controls.¹⁰² The fiscal powers of Congress inexorably draw to Washington, D.C., the power to make decisions that shape the public sector. The effect is to restrict state and local authorities' choices of policy in spending even their own resources, for Congress may condition federal contributions on compliance with federal standards. Because federal grants go to many separate agencies at different levels of state and local government, and because costs attributable to the federally-aided programs cannot always be neatly separated from other state and local costs, probably no one can say today how much state and local tax revenue—the lifeblood of local autonomy—is committed to programs the standards for which are set and controlled under federal law.¹⁰³ Yet there must be limits on such conditions if the political values of federalism are to be preserved despite this fiscal centralization.

⁹⁹ *United States v. Oregon*, 366 U.S. 643, 649 (1961).

¹⁰⁰ *See, e.g. Arizona v. California* 373 U.S. 546, 627 (1963) (dissenting opinion), *Federal Power Commission v. Oregon*, 349 U.S. 435, 452 (1955) (dissenting opinion), *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 756 (1950) (separate opinion), *Nebraska v. Wyoming* 325 U.S. 589, 611-16 (1945). *But cf. Oklahoma v. Guy F. Atkinson Co.*, *supra* note 36.

¹⁰¹ *Massachusetts v. Mellon*, 262 U.S. 447 (1923), *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

¹⁰² *Oklahoma v. Guy F. Atkinson Co.*, *supra* note 36, *Public Ut. Comm'n of California v. United States*, 355 U.S. 534 (1958).

¹⁰³ The annual report of the Secretary of the Treasury currently lists 66 separate programs of federal aid payments to states and local units totaling \$8.6 billion. (These do not include another 52 programs dispensing \$2.3 billion in federal payments to

*Oklahoma v. United States Civil Serv. Comm'n*¹⁰⁴ should have been the occasion to explore the issue. The Hatch Act applied its limitations on political activity to state and local officers and employees "whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency."¹⁰⁵ When the chairman of the Democratic State Central Committee was appointed a member of the State Highway Commission, the U.S. Civil Service Commission determined that some of his activities violated the Hatch Act and warranted his removal as a highway commissioner. Oklahoma attacked the constitutionality of the law on the ground that the threat of financial penalties against the state unless it removed a state officer invaded the reserved sovereignty of the state.¹⁰⁶ The case was argued and decided together with the more direct appeal against the Hatch Act brought on behalf of the constitutional rights of federal employees themselves.¹⁰⁷ The issues raised by that appeal were central to the question of political freedom in the public sector; once a majority of four Justices, of seven participating, had sustained the act against the protests of employees, the Court saw little additional difficulty in Oklahoma's objections as a state.¹⁰⁸ "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed," wrote Mr. Justice Reed. "The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly

individuals, mostly in farming, education, health and welfare, and in national guard units throughout the states.) In fiscal 1963, state and local agencies in Washington received \$166 million, in Oregon \$138 million. 1963 Rep. Sec. of Treas., Table 95. Participation in such federal programs generally requires matching funds as well as compliance with federal standards. The state's obligation may range from merely administrative costs to two-thirds or more of the total. A recent compilation in Oregon identified the matching formulas and federal requirements of 54 programs receiving \$71 million in 1961, but the study did not calculate what amount and what proportion of state revenues were committed to these federally conditioned programs. Oregon Department of Finance and Administration, Summary of Federal Grant-in-Aid programs in Oregon (1962). It may help to show at least an order of magnitude that Oregon's total state expenditures in 1961 (including the federal-aid funds) were \$287.6 million. During that year, the federal government disbursed \$7 billion to state and local governments and supplied 13.2 percent of all their general revenues. United States Bureau of the Census, Governmental Finances in 1961, 6, 11, 35 (1962).

¹⁰⁴ 330 U.S. 127 (1947).

¹⁰⁵ *Id.* at 129, quoting 53 Stat. 1147, as amended, 54 Stat. 767.

¹⁰⁶ *Id.* at 142.

¹⁰⁷ *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), reargued after being held over from the October, 1945 Term.

¹⁰⁸ I refer to the constitutional issue; in both cases there were preliminary questions of judicial review.

for the general welfare, is not unusual."¹⁰⁹ Mr. Justice Douglas, who had dissented with respect to the rights of the federal employee, joined the majority opinion; Black and Rutledge merely noted their dissent.

But Mr. Justice Reed's easy generalizations about conditioned federal benefits prove too much. Even the liberal dissenters in 1936 had found the power to spend not beyond constitutional limitations, "it may not be used to coerce action left to state control."¹¹⁰ If Congress chose to forbid any state officer who spends federal grants to take part in a political campaign, could Oklahoma not choose to have an elected highway commission? State officers, from governors and legislators to city councilmen and school board members, increasingly administer programs aided by federal funds; may Congress constitutionally determine which may be elected, which others politically appointed, and which must be in a non-partisan career status?¹¹¹ Surely a line may be perceived between such conditions and conditions that go to the substance of the federally supported project, for instance that it fit a national plan, or be soundly engineered, or meet prescribed standards of hours, wages, or nondiscrimination in employment, or be fairly and

¹⁰⁹ 330 U.S. at 143-44, citing *Massachusetts v. Mellon and Steward Machine Co. v. Davis*, *supra* note 101, and *United States v. Bekins*, 304 U.S. 27 (1938). The opinion mentions that "nothing in this record shows any attempt to suspend Mr. Paris from his duties as a member of the State Highway Commission" and "no penalty was imposed upon the State. . . . Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion," *ibid.*, but the sentences quoted in the text leave little doubt that the United States could enforce the Hatch Act conditions on its grant of federal highway funds.

¹¹⁰ *United States v. Butler*, 297 U.S. 1, at 87 (1936).

¹¹¹ Federal law does in fact impose such requirements, which may substantially control the administrative organization of state government, particularly in social welfare programs. These requirements, and recommendations for confining them to qualitative or performance standards and for providing procedures to determine federal-state conflicts, were the subject of a report to the Governors' Conference in 1962, following a resolution at the 1961 conference deploring "the tendency of federal agencies to dictate the organizational form and structure through which the states carry out federally supported programs." The Council of State Governments, *State Government Organization and Federal Grant-in-Aid Program Requirements* (1962). See also Governmental Affairs Institute, *The Impact of Federal Grants-in-Aid on the Structure and Functions of State and Local Governments* (1955). A study of the "conditions and controls involved in the administration of Federal grants programs," is currently being prepared, pursuant to its statutory mandate, 73 Stat. 703 (1959), 5 U.S.C. 2372(3) (Supp. IV, 1963), by the Advisory Commission on Intergovernmental Relations; see its Fifth Annual Report, p. 26 (January 31, 1964). A constitutional limit on Congressional power to impose political conditions on state government might seem illusory, since many programs now administered by states could presumably be administered by federal employees, federally-appointed state committees, or special agencies locally created according to federal specifications. No doubt the political autonomy of the states still maintains a greater role through the administration of federally-supported programs, even under political requirements like the Hatch Act, than it would if the states lost both the administration of the programs and the accompanying requirements. On the other hand, Congress might well accept judicial limits on political conditions in grants-in-aid rather than switch to direct federal administration.

honestly administered. Whether and where such a line is drawn could determine, as much as any tax immunity, the role of federalism as a safeguard of political democracy in a centripetal public economy. If *New York v. United States* is unfinished business, so is *Oklahoma v. Civil Serv. Comm'n.*

V. THE RIGHT TO WORK

In 1929, when the nation's business was business, there had been three million public employees, about six percent of a civilian labor force of almost 50 million, or ten percent of non-agricultural employment. When Mr. Justice Douglas began his judicial career public employees, after a decade of the depression, numbered four million of 55 million workers, over 13 percent of non-farm employment. By 1960, more than 8½ million men and women worked for local, state, and federal public agencies, 16 percent of all Americans employed outside agriculture.¹¹² The power of government as employer over their lives, as compared with those of citizens generally, has raised crucial issues of constitutional rights in the public sector.

The generation that enacted the Hatch Act, in Mr. Justice Douglas's first year on the Supreme Court,¹¹³ and found it constitutional could still look back to the best of authority that in relation to those who chose to work for it, government was an employer, not a government. Public employment was a privilege it could extend, condition, or withdraw at will. Judge Holmes of Massachusetts had enshrined it in one of his ineradicable epigrams when a policeman protested his removal for political activity: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."¹¹⁴ On such a theory the United States Supreme Court had sustained state and federal power to impose the eight-hour day and other conditions on public employment and government contracts that at the time would have been held an invasion of "liberty of contract" if applied to the private economy.¹¹⁵ In 1915, an Arizona law requiring any employer

¹¹² All data are from Kruger, *Trends in Public Employment*, in PROCEEDINGS OF FOURTEENTH ANNUAL MEETING OF INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, 354-66 (1962). Since World War II the important growth has been in the state and local sector. In 1960, local government employed 4.8 million (55 percent), states 1.6 million (18 percent), and federal agencies 2.4 million (27 percent) civilian workers. Since 1929, public employment has increased 175 percent while population and total labor force have gained 50 percent and 43 percent respectively.

¹¹³ The acts of August 2, 1939, 53 Stat. 1147, and July 19, 1940, 54 Stat. 767, were involved in the Hatch Act decisions. See *United Public Workers v. Mitchell*, 330 U.S. 75, 78 n. 1.

¹¹⁴ *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892).

¹¹⁵ *Ellis v. United States*, 206 U.S. 246 (1907), *Atkin v. Kansas*, 191 U.S. 207 (1903).

of more than five workers to employ "not less than eighty per cent qualified electors or native-born citizens of the United States" had been held to violate the equal protection clause of the fourteenth amendment; Mr. Justice Hughes pointed out that "the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise."¹¹⁶ Yet at the same time, the Court had sustained a New York statute limiting employment on public works to citizens, with preference to residents of New York. If a state could limit employment on public works to eight hours, said Mr. Justice McKenna for a unanimous Court, it could prescribe who might and who might not be permitted to labor on them, "no court has authority to review its action in that respect."¹¹⁷ But by 1947 the Court was no longer willing to follow the doctrine of unrestrained government discretion over the privilege of employment that far. Its potential significance in an era of increasing public activity was apparent. Thus the Hatch Act's proscription of political activity by federal employees was sustained by a bare majority of four, against the constitutional claims of a roller in the United States mint who was a ward executive committeemen of his political party, because on a balancing of the restrictions on his liberty against the values of a politically neutral civil service, Congress was found to have acted "within reasonable limits."¹¹⁸ None would deny, wrote Mr. Justice Reed, that the Bill of Rights limits Congressional power over government employment, for instance disqualification of Republicans, Jews or Negroes, or proscription of participation in religious activities. Holmes's summary treatment of the hapless policeman was relegated to a historical footnote.¹¹⁹ Mr. Justice Black, joined in dissent by Mr. Justice Rutledge, thought the

¹¹⁶ *Truax v. Raich*, 239 U.S. 33, 40 (1915).

¹¹⁷ *Heim v. McCall*, 239 U.S. 175, 191 (1915). *Heim* was argued three days before and the decision rendered four weeks after *Truax*; neither opinion referred to the other. In the companion case, *Crane v. New York*, *id.* at 195 (1915), the New York Appellate Division had held the statute an unconstitutional discrimination against aliens. Judge Cardozo, on the New York Court of Appeals, had overcome his own doubts: "To disqualify aliens is discrimination, indeed, but not arbitrary discrimination; for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. . . . Whatever is a privilege rather than a right, may be made dependent upon citizenship." *People v. Crane*, 214 N.Y. 154, 161, 164; 108 N.E. 427, 429, 430 (1915). The doctrine of *Heim v. McCall* was extra-judicially demolished in Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99 (1916). But its concept of unreviewability of the procurement policies of government, "like private individuals and businesses," was still seductive to Mr. Justice Black, writing for an 8-1 Court in *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, n. 15 (1940).

¹¹⁸ *United Public Workers v. Mitchell*, 330 U.S. 75, 94-102 (1947).

¹¹⁹ *Id.* at 99, n. 34.

prohibition against active participation in political campaigns unconstitutional on its face under the first amendment.¹²⁰

Mr. Justice Douglas, too, dissented; but his separate opinion explored more deeply the dilemma of neutralizing the civil servant in a political democracy. He found the model for a solution in the English distinction between industrial and administrative employees. The staffs in offices that make and supervise government policies, "who have access to the files, who meet the public, who arrange appointments, who prepare the basic data on which policy decisions are made," might require protection both from the temptations of partisanship and the pressures of patronage politics.¹²¹ But a roller in the mint was an industrial worker, like a worker in any other shop, railroad, or factory except for the fact of government operation. The civil service concept, however valuable, could not in a democracy remain coextensive with a growing public sector in the economy:

Can all of those categories of industrial employees constitutionally be insulated from American political life? If at some future time it should come to pass in this country, as it has in England, that a broad policy of state ownership of basic industries is inaugurated, does this decision mean that all of the hundreds of thousands of industrial workers affected could be debarred from the normal political activity which is one of our valued traditions?"¹²²

Blue-collar government workers as much as white-collar clerks pose the risks of being made the willing or unwilling tools of a political machine. But these risks can be met by laws directed against the political misuse of supervisory power over the hiring, dismissal, and direction of personnel, they do not require depriving millions of public employees of their rights of citizenship. "Those rights are too basic and fundamental in our democratic political society to be sacrificed or qualified for anything short of a clear and present danger to the civil service system," concluded Mr. Justice Douglas. "No such showing has been made in the case of these industrial workers which justifies their political sterilization as distinguished from selective measures aimed at the coercive practices on which the spoils system feeds."¹²³

¹²⁰ *Id.* at 105-115. Black drew the first amendment line between forbidding the collection of political contributions from or by government employees, previously sustained, and restricting the employees' own political activities, a distinction that is significant for the constitutional problems of all corrupt practices legislation.

¹²¹ *Id.* at 115-122.

¹²² *Id.* at 123.

¹²³ *Id.* at 126.

In the Hatch Act cases, public employees claimed the constitutional freedom to pursue conventional political activities. The government worker wanted to be a ward committeeman; Oklahoma appointed a party chairman to a state highway commission. The issues of the spoils and merit systems were as indigenous as Andrew Jackson and Chester A. Arthur. But while the Justices were examining those issues, the Cold War was inaugurating a period of national preoccupation with Communism which brought to the Court a stream of cases that cast the civil servant's claims of liberty in an alien light. In the long run, *United Public Workers* and *Oklahoma v. Civil Serv. Comm'n* posed the constitutional problem that will return for new solutions—the problem of the political constituency in a democracy in which a quarter, a third, or more of the labor force works in the public sector.¹²⁴ But before McAuliffe's ghost could be wholly exorcised, the search for doctrinal foundations had to move on to a new terrain, where government workers defended themselves against dismissal for indiscretions with Karl Marx rather than Alexander Hamilton, and subversion rather than corruption was the favorite charge of the "outs" against the "ins." The focus on liberty in the public sector shifted from the employee whose spare time efforts went toward turning the government over to the Republicans, or keeping it safely Democratic, to one who might want to abolish it altogether. Inevitably, the changed focus evoked different analogies, different responses, a different rhetoric.

Both the federal loyalty program and the first of its local counterparts reached the Supreme Court in the October 1950 Term. There were few precedents. In 1946, the Court had turned to the analogy of the Reconstruction period to find that a Congressional act stopping the pay of named federal employees on grounds of alleged subversion constituted a bill of attainder.¹²⁵ But the manner in which the Vinson

¹²⁴ In Oregon, for example, a successful initiative in 1958 amended the state constitution to permit teachers to serve in the legislature, after this had been held to violate the separation of powers. OR. CONST. art. XV, sec. 8 (1963); *Monaghan v. School Dist. No. 1*, 211 Or. 360, 315 P.2d 797 (1957). The Commission on Constitutional Revision which prepared a proposed new constitution for Oregon found the issue of public employees' eligibility for legislative service (and of legislators' eligibility to be teachers) one of its hardest and most controversial problems; it proposed that only such public employment by legislators be excluded "for which compensation is paid directly by the state government," i.e. not by or through local public agencies. REVISED OR. CONST. art IV, sec. 11. A California appellate court has held that a provision for forfeiture of office by any civil servant who becomes a candidate for elective office unconstitutionally deprive public employees of rights of state and federal citizenship, at least insofar as it extended to candidacies that would not interfere with performance of the employee's present duties. *Kinnear v. City and County of San Francisco*, 35 Cal. Rptr. 43 (1963).

¹²⁵ *United States v. Lovett*, 328 U.S. 303 (1946), citing *Cummings v. Missouri*, 4 Wall. 277 (1867) and *Ex parte Garland*, 4 Wall. 333 (1867). The constitutional

Court would respond to the legislative campaign against internal Communism had been determined in the 1949 Term. Justices Murphy and Rutledge had died within two months of each other during the summer of 1949, to be replaced by President Truman's Attorney General, Tom Clark, and ex-Senator Sherman Minton. Injuries from a summer accident kept Mr. Justice Douglas off the bench during most of the year. When the non-Communist affidavit imposed on labor union officials by the Taft-Hartley Act of 1947 came before the Court, Mr. Chief Justice Vinson spoke for four of the six participating justices in holding that the effects on first amendment rights of this political disqualification in the private sector were justified by the threat to interstate commerce from political strikes and other consequences of Communist union leadership.¹²⁶ Mr. Justice Jackson concurred by finding the Communist Party a foreign-directed conspiracy masquerading as a radical political party.¹²⁷ Mr. Justice Black alone dissented. The following year brought to the Court not only the federal loyalty program but also the convictions of the leaders of the Communist Party under the Smith Act. The issue of the constitutional status of political radicalism was irretrievably submerged in the immediate concern with the domestic defense against a hostile foreign power. Because of the "inflammable nature of world conditions" in 1949 (including the then recent Communist coup in Czechoslovakia and the Berlin blockade), Congress was found to have acted constitutionally in 1940 in enacting a statute originally designed to meet the threats of pre-World-War I revolutionaries, as had the executive in prosecuting under it the defendants' 1945 reconversion from the war-time, "national unity" Communist Political Association to the traditional, revolutionary and conspiratorial organization of the Communist Party.¹²⁸

proscription of bills of attainder and ex post facto laws runs against both the United States and the states. U.S. CONST., art. I, sec. 9, 10.

¹²⁶ *American Communications Ass'n v. Douds*, 339 U.S. 382, 399-406 (1950).

¹²⁷ *Id.* at 422-28. Mr. Justice Jackson (in his separate opinion) thought unconstitutional, however, the requirement that union officials disclaim belief in illegal overthrow of the government. *Id.* at 435-44. In *Osman v. Douds*, 339 U.S. 846 (1950), Mr. Justice Douglas could join the previous dissenters with respect to the disclaimer of beliefs, causing the Court to be evenly divided on this issue.

¹²⁸ *Dennis v. United States*, 341 U.S. 494, The Smith Act, 54 Stat. 671, directed against "violent overthrow" of the government and attempts, advocacy, organization, and conspiracy toward that end, follows in its diagnosis of and prescription against revolution the New York Anarchy Act of 1902, enacted after the assassination of President McKinley, which was sustained over the dissent of Justices Holmes and Brandeis in *Gitlow v. New York*, 268 U.S. 652 (1925). In *Dennis* the Chief Justice (as had Judge Learned Hand in the Court of Appeals, 183 F.2d 201 (1950)) cited current "uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned"

In this setting, unlike the Hatch Act cases four years earlier, the rubrics under which issues were shaped and decided were not the government worker's political rights of citizenship but his patriotic "loyalty" as determined from past and present conduct and associations; and his procedural rights in that determination more than his freedom of opinion and association itself became the new constitutional battleground. The federal program of "loyalty" hearings, in which employees were required to rebut absent accusers who were identified neither to them nor always even to their judges, was upheld without opinion by an evenly divided Court, Mr. Justice Clark not participating.¹²⁹ But the Justices found the opportunity to express their views toward the program in six separate opinions in the companion case that threw in doubt the designation of organizations as Communist, without prior hearing, on the "Attorney General's list" to be used by government agencies in their personnel investigations.¹³⁰ At the same 1950 Term, the Court split with five opinions in sustaining a Los Angeles ordinance requiring loyalty oaths and affidavits disclosing or denying present or past Communist affiliations from city employees, in the first of the many cases arising from the efforts of local officials to share in preserving the national security and to protect their communities against revolution by local public servants.¹³¹

For Mr. Justice Douglas, the starting point in denying the validity of the Hatch Act restraints on civil servants had been recognition that the great mass of public employees could not in a democracy be removed from the political constituency and denied the citizen's right of participation. In the loyalty cases, his starting premise was that disqualification for employment was a grievous loss, certainly no less than a deprivation of property, and when inflicted by government for a cause such as "disloyalty" was akin to a punishment demanding the highest procedural safeguards. The employee's stake in his job,

in order to meet a much watered-down version of the danger that Holmes and Brandeis had thought required before political advocacy could be prohibited, 341 U.S. at 510-11. Justices Frankfurter and Jackson concurred individually; Justice Black and Douglas wrote dissents applying first amendment guarantees to the violation of the Smith Act as alleged and proved rather than to the cold war implications of Communism. The Chief Justice's ruling "is in my view not responsive to the issue in the case," wrote Mr. Justice Douglas. "We might as well say that the speech of petitioners is outlawed because Soviet Russia and her Red Army are a threat to world peace;" going on to state that no evidence either of record or within the reach of judicial notice suggested that the Communist Party had gained the strategic strength to endanger the nation by advocating Soviet policies. *Id.* at 587-89.

¹²⁹ *Bailey v. Richardson*, 341 U.S. 918 (1951).

¹³⁰ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

¹³¹ *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716 (1951).

not in his liberty to pursue unorthodox politics, was the first focal point. In an urban and industrial society, the job, the opportunity to earn a living by one's efforts and skills, rather than land or other tangible property, is the fundamental economic base of individual liberty. "The right to work has become the primary plank in the platform of the welfare state," he had said in Los Angeles in 1949.¹³² Dorothy Bailey, he wrote about the federal loyalty program, "was on trial for her reputation, her job, her professional standing Of course, no one has a constitutional right to a government job. But every citizen has a right to a fair trial when his government seeks to deprive him of the privileges of first-class citizenship."¹³³ And the Los Angeles oath and affidavit requirement should be held a bill of attainder under the Civil War precedents:¹³⁴ "Deprivation of a man's means of livelihood by reason of past conduct, not subject to this penalty when committed, is punishment whether he is a professional man, a day laborer who works for private industry, or a government employee."¹³⁵

In subsequent cases, Mr. Justice Douglas maintained this first premise that the government employee's interest in his job rates constitutional protection, but he returned also to a concern with the employee's first amendment rights to pursue unorthodox beliefs and associations without risking his employment—the right to escape McAuliffe's dilemma. "I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights," he wrote in dissent in 1952, when the Court sustained New York's "Feinberg Law" that made membership in listed organizations *prima facie* evidence of disqualification for public school teachers.¹³⁶ "I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression." The prevailing doctrine, of course, saw the position of New York school teachers differently. To Mr. Justice Minton, writing

¹³² *Loc. cit. supra*, n. 22.

¹³³ *Joint Anti-Fascist Refugee Committee v. McGrath*, (dissenting opinion), 341 U.S. at 180, 182-83 (1951). As in *United Public Workers*, Douglas found British precedent to show "the Government need not be paralyzed in handling" the real problem of security, if it would use personnel security procedures for making assignments to and away from sensitive position. *Id.* at 181.

¹³⁴ See *supra* note 125.

¹³⁵ *Garner v. Board of Public Works of Los Angeles*, (dissenting opinion) 341 U.S. at 735 (1951).

¹³⁶ *Adler v. Board of Educ.*, 342 U.S. 485, 508 (1952). A footnote to the quoted sentence cites *United Public Workers* and *Garner*.

for a majority of six, questions like these were never difficult. "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."¹³⁷ The "elsewhere" of this airy dismissal may seem to the teacher, when virtually all schools are public schools, to have no locale but limbo; but the comfortable nineteenth-century premises of total individual mobility in the labor market of a pluralistic society in which government is only one among innumerable competing employers still override the modern realities of public education, of accreditation, of the teacher's investment in preparation for what can only be public employment, and in the accumulated fringe benefits of such employment. On the occasions when the majority did find flaws in some personnel security or loyalty disqualification, Mr. Justice Douglas, with Mr. Justice Black, reiterated in concurrence his continued dissatisfaction with the Court's formulas.¹³⁸ In dissent, he developed a stronger conviction that government could discharge an employee only on grounds truly related to qualifications and performance, not for proscribed beliefs and associations or for asserting a constitutional privilege of silence when asked about these. "The fitness of a subway conductor for his job depends on his health, his promptness, his record for reliability, not on his politics or philosophy of life," he wrote in 1958. "Government rightly can concern itself with the actions of people. But it's

¹³⁷ *Id.* at 492, relying on *American Communications Association, United Public Workers, and Garner*. A majority of five were more concerned with the associational freedom of teachers in 1960, when an Arkansas requirement of disclosure appeared to be directed at favored "civil rights" rather than disfavored "subversive" associations. *Shelton v. Tucker*, 364 U.S. 479 (1960).

¹³⁸ *Wieman v. Updegraff*, 344 U.S. 183 (1952), in which Oklahoma demanded disavowal of innocent as well as knowing association with proscribed organizations; the Court left open "whether an abstract right to public employment exists.... [C]onstitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory." *Id.* at 192. *Peters v. Hobby*, 349 U.S. 331 (1955), reversed a federal loyalty order; Mr. Justice Douglas restated his constitutional objection to the system of "faceless informers," referring to the right to work as a precious liberty within the meaning of the fifth amendment and "more precious than property itself," *id.* at 350-52. See also *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 559 (1956); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288 (1961). The State of Washington has not spared itself the controversies, bitter because so largely symbolic, inherent in the exaction of public employees' non-Communist oaths and disclaimers of subversion; see *Nostrand v. Little*, 53 Wash. 2d 460, 335 P.2d 10 (1959), 362 U.S. 474 (1960), 58 Wash. 2d 111, 361 P.2d 551 (1961); 368 U.S. 436 (1962). Mr. Justice Douglas was prepared to decide the question of the constitutionality of the Washington statute which the Court avoided. 362 U.S. at 476, 368 U.S. at 436.

time we called a halt to government's penalizing people for their beliefs."¹³⁰

As so often, the answers are implicit in the choice of the issue posed. Crucial is the premise that New York's subway system is government, which may be held to its responsibility for the constitutional liberties of its employees as well as for the safe transport of its passengers. If personnel policies in the public sector are seen as issues of government, they will be judged by principles invoked from the law of constitutional rights rather than the law of master and servant. To the traditional view, this change of script casts legislators, administrators, and employees in unfamiliar roles with uncomfortable implications. To the city councilman or the school board member, the question of vocational qualification may seem quite secondary, if not indeed irrelevant. Is it not enough that taxpayers' funds should not be spent to support a Communist, or a person of doubtful loyalty to the very governmental system for which he wants to work, or one who refuses to respond to questions asked of him in a legally authorized inquiry? Beneath all the sophistication about the dangers of subtle indoctrination in the classroom and sabotage in the subways, the answer and its motives will appear at bottom self-evident to men who see themselves as managing a program or agency for their constituents, not as governing them. And in how many constituencies during the 1950's (Oregon was one) would it *not* seem a self-evident obligation of those charged with political responsibility for the public payroll to insist, beyond mere vocational fitness, on such standards of political fitness as loyalty, abstention from questionable associations, and willingness to disclose one's views—even if the necessary oaths, lists, inquiries, and collections of slanders in personnel files regrettably might be distasteful and even intimidatory to the employees.

Yet how much can be made to hinge on the fact that the subway conductor works for a publicly-owned transit system? If it is society's interest in the security of the system that overrides the employee's political rights, society's need for security is equally great in privately-owned transit systems. Once a "security" program imposing disclaimer affidavits, investigations and loyalty disqualifications on the employees of municipal utilities is found constitutional, a law requiring the same of private utility companies cannot easily be found beyond the power

¹³⁰ *Beilan v. Board of Public Education*, 357 U.S. 399, 415-16, with *Lerner v. Casey*, *id.* at 468 (1958). See also *Nelson v. Los Angeles County*, 362 U.S. 1, 9-16 (1960) (dissenting opinions by Black and Brennan, joined by Douglas).

of government. If subversive nurses in public hospitals are a menace to health, so are subversive nurses in private hospitals, and presumably no more constitutionally immune from governmental inquisition and disqualification.

Thus Mr. Justice Douglas would apply constitutional guarantees of liberty to laws impairing a man's livelihood equally whether he pursues it in the public or the private sector. The occasion for his strongest statement of that position, in 1954, was in fact not a case of public employment but of a state's suspension of a physician's license to practice medicine on grounds that appeared to penalize him for his political activities.¹⁴⁰ Douglas dissented from the Court's affirmance of the suspension in terms that studiously swept public, private, and self-employment within a single constitutionally protected interest. Holmes's old dictum that McAuliffe, though free to talk politics, had no right to be a policeman "has pernicious implications," the dissent begins. "By the same reasoning a man has no constitutional right to teach, to work in a filling station, to be a grocery clerk, to mine coal, to tend a furnace, or to be on the assembly line. By that reasoning a man has no constitutional right to work." If the late Olympian's shade might object that he had, after all, been speaking of working for the state, not in a coal mine or factory, that distinction disappears as both government payrolls and government regulation of private work multiply. "The right to work, I had assumed, was the most precious liberty that man possesses," wrote Mr. Justice Douglas.

The dictum of Holmes gives a distortion to the Bill of Rights. It is not an instrument of dispensation but one of deterrents. Certainly a man has no affirmative right to any particular job or skill or occupation. The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. And so the question here is not what government must give, but rather what it may not take away.¹⁴¹

Government may not take away the right to work, whether as a public teacher¹⁴² or as a private physician, on grounds unrelated to competence for the work itself, and relevance of grounds that penalize and

¹⁴⁰ *Barsky v. Board of Regents*, 347 U.S. 442 (1954). Dr. Barsky had been convicted for refusing, as chairman of the Joint Anti-Fascist Refugee Committee, to produce records subpoenaed by the Committee on Un-American Activities. His license was later suspended under a New York statute authorizing such action for conviction of crime, but the hearing included much discussion of the political characteristics of his organization. See *id.* at 460-67 (Black, J., dissenting).

¹⁴¹ *Id.* at 472-73.

¹⁴² Citing *Wieman v. Updegraff*, *supra* note 138.

inhibit political conduct is always suspect. "The fact that a doctor needs a good knowledge of biology is no excuse for suspending his license because he has little or no knowledge of constitutional law," he concluded. "So far as I know, nothing in a man's political beliefs disables him from setting broken bones or removing ruptured appendixes, safely and efficiently."¹⁴³

In another dissent two years later, Mr. Justice Douglas proposed a further extension of constitutional protection for the right to work in the private economy. The California Supreme Court had reversed an arbitration board's finding that an employer's discharge of a Communist employee had not been for "just cause" under a union contract. Certiorari having been granted, the majority dismissed the writ because it found the construction of the contract a question of California law devoid of a federal issue.¹⁴⁴ Mr. Justice Douglas, joined by Warren and Black, saw this disclaimer of a constitutional issue in the enforcement of contracts excluding workers on political grounds as a "dangerous innovation" violating "First Amendment guarantees of citizens who are workers in our industrial plants."¹⁴⁵ Though private employers may be free to hire whom they please, for instance only Democrats, *Shelley v. Kraemer*¹⁴⁶ would make judicial enforcement of a union contract providing for discharge of Republicans very much a constitutional issue. "Government may not disqualify one political group from employment. And if the courts lend their support to any such discriminatory program, *Shelley v. Kraemer, supra*, teaches that the Government has thrown its weight behind an unconstitutional scheme to discriminate against citizens by reason of their political ideology. That cannot be done in America, unless we forsake our Bill of Rights." Does this mean that unions cannot be held to clauses excluding Communists from job security provisions negotiated by an employer? "It has hitherto been assumed that Communists, except and unless they violate laws, are entitled to the same civil rights as other citizens," said the dissent. "Cutter Laboratories is an important pharmaceutical factory. It may need special protection. . . . But there is not a word in the present record indicating that it needs protection against Doris Walker. . . . I do not think we can hold consistently with our Bill of Rights that Communists can be proscribed from making a living on the assumption that wherever they work

¹⁴³ 347 U.S. at 474.

¹⁴⁴ *Black v. Cutter Laboratories*, 351 U.S. 292, 299 (1956).

¹⁴⁵ *Id.* at 302.

¹⁴⁶ 334 U.S. 1 (1948).

the incidence of sabotage rises or that the danger from Communist employees is too great for critical industry to bear."¹⁴⁷

It is the personnel loyalty and security programs, above all, that have forced the development of doctrine for the interrelationship of three constitutional claims: The first amendment right to political eccentricity, and worse, short of validly forbidden conduct,¹⁴⁸ the "due process" claim to fair procedures in adverse determinations by government; and the claim that a man's working role in society, without which political liberty is possible only for the rich, may not be denied by government anywhere across the range of the public and private sectors without meeting the standards of the first amendment and due process claims. For disqualification on loyalty grounds has of course reached beyond government employees to employees of government contractors, on government-supported projects (*e.g.*, research), at high-security locations (*e.g.*, ports), or in other apparently "private" roles within the range of some government regulation. Walter Gellhorn concluded in 1956 that not less than a fifth of all persons employed in the United States, plus members of their families, had undergone political investigation; normal turnover and the passage of time keeps increasing the numbers.¹⁴⁹ Yet in federal cases, where it is free to construe federal law, the Court has found ways to accede to constitutional claims on grounds of decision that avoid or blunt the constitutional issues. When an aeronautical engineer lost his industrial position because the government revoked the security clearance that permitted him access to secret information, eight Justices found that the procedure at the revocation hearing, which did not include full disclosure of the adverse evidence and confrontation and cross-examination of adverse witnesses, had not been authorized by law or executive order.¹⁵⁰ A government argument that petitioner's loss was only a byproduct of necessary government action—the safe-

¹⁴⁷ *Id.* at 303-4. Only Mr. Justice Black, among the dissenters in *Cutter Laboratories*, had participated in *American Communications Ass'n v. Douds*, *supra* note 126, and he had dissented then.

¹⁴⁸ One might include here the privilege of silence about political beliefs and associations, claimed under the fifth amendment's right not to be a witness against oneself.

¹⁴⁹ GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS*, 41 (1956). Gellhorn cited Mr. Chief Justice Warren's count of 8 million federal security clearances, Professor Ralph Brown's report of 12,600,000 positions subject to security tests at any one moment, and the 20 million estimate of Washington's former U.S. Senator Harry Cain, based on his experience on the Subversive Activities Control Board. Compare, for the federal programs alone, the contemporaneous *Report of the Special Committee on the Federal Loyalty-Security Program* of The Association of the Bar of the City of New York, 114-17, 219-21 (1956).

¹⁵⁰ *Greene v. McElroy*, 360 U.S. 474 (1959).

guarding of secrets by security clearances, to which no right could be claimed—gave the Chief Justice occasion for a subordinate clause placing “the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference . . . within the ‘liberty’ and ‘property’ concepts of the fifth amendment.”¹⁵¹ He went on to review the place of confrontation and cross-examination among the “relatively immutable [principles] in our jurisprudence,” concluding that though the Department of Defense had sufficient legal authority to apply an industrial clearance program with procedural safeguards, authority for a program without such “traditional” safeguards would be recognized only in explicit Congressional or Presidential action.¹⁵² But three Justices would concur only in the judgment that the procedures were not authorized, “intimating no view” as to their validity, and Mr. Justice Harlan in particular insisting that constitutional issues had consistently been left undecided in “confrontation” cases.¹⁵³ Mr. Justice Clark, alone in dissent, denied that there was any precedent for holding even private employment protected by the fifth amendment, and he saw in the constitutional overtones of the majority opinion dire prophecies for the government’s procedures with respect also to its own employees.¹⁵⁴

The Court has not yet felt compelled to prove or disprove these prophecies.¹⁵⁵ They may have substance, if the Court takes seriously its citation in *Greene* of Mr. Justice Douglas’s concurrence in *Peters v. Hobby*.¹⁵⁶ But the “liberty” to work asserted by him, and adopted by the Chief Justice for the Court, carries broader implications than that the federal agencies may have to disclose their informers in per-

¹⁵¹ *Id.* at 492. A citation of Mr. Justice Douglas’s concurrence in *Peters v. Hobby*, see *supra* note 138, seems now to give his assertion of this constitutional point the weight of majority approval.

¹⁵² *Id.* at 496, 499, 507.

¹⁵³ *Id.* at 508-9.

¹⁵⁴ *Id.* at 510-12, 524. Clark agreed that the majority had to find a right of the employee invaded before the authority for security clearance procedures could be litigated, but he denied any such right, distinguishing the cases cited by the Chief Justice. To him the case was “clear and simple,” one of denying, not employment, but access to government secrets. “It matters not if as a consequence he is unable to secure a specific job or loses one he presently enjoys. The simple reason for this conclusion is that he has no constitutional right to the secrets.” *Id.* at 514. Mr. Justice Harlan thought Clark had “yielded to the temptations of colorful characterization,” at 510, but Clark retorted modestly that credit belonged to the Solicitor General’s brief, at 511, n. 1.

¹⁵⁵ See per curiam dispositions of *Beard v. Stahr*, 370 U.S. 41 (1962), *Williams v. Zuckert*, 371 U.S. 531 (1963). Mr. Justice Douglas, dissenting in both, repeated his assertion that dismissal or disqualification from employment, under conditions involving the stigma of an adverse judgment, requires procedural safeguards including confrontation and cross-examination, citing *Greene v. McElroy*.

¹⁵⁶ *Supra*, notes 138, 151.

sonnel procedures—implications already partly developed by Mr. Justice Douglas in dissent. Once present and potential employment is recognized as a constitutionally protected liberty, claims that it has been invaded can be raised against any of the forms of government action that, partly under the pressure of the segregation issues, have been shown to be subject to constitutional guarantees. Such claims may be raised against laws licensing and regulating professions.¹⁵⁷ In the private sector, though Mr. Justice Douglas would not let the courts help an employer to carry out a discriminatory plan of employment, he concedes that the Constitution does not directly reach the private employer's practices.¹⁵⁸ But which employers are in the private sector? Is the corporate form of organization and use of capital raised by selling corporate rather than government securities enough, even if the enterprise operates predominantly under government contract (*e.g.* defense and space industries) or close government supervision? If the private business of broadcasting is built entirely on the privilege of using a frequency under license by the Federal Communications Commission, can the Commission constitutionally let broadcasters blacklist performers and other employees by standards and procedures that could not be constitutionally used by the United States Information Agency?¹⁵⁹

Implications drawn from the range of government involvement that has been deemed "state action" against the freedom or equality of persons in other roles than employees may still seem farfetched when extended to the "right to work." In this spectrum, even the implications for direct government personnel procedures are far from

¹⁵⁷ See *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 and *Konigsberg v. State Bar*, *id.* at 252 (1957); *Lathrop v. Donohue*, 367 U.S. 820, 876 (1961), (Douglas, dissenting, argued that a state could not constitutionally make lawyers contribute to an integrated bar that takes positions on issues of public policy); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), enforcement of Virginia "anti-solicitation" laws directed against N.A.A.C.P.'s litigation of desegregation cases held to violate first and fourteenth amendments. In *Martin v. Walton*, 368 U.S. 25 (1961), Douglas dissented, on grounds of "invidious" application, from a *per curiam* affirmation of a Kansas rule restricting a Kansas attorney's right to practice also in Missouri: "When Kansas denies him the right to pursue his livelihood, it destroys his competence for reasons that have no relations to competency." *Id.* at 28.

¹⁵⁸ *Black v. Cutter Laboratories*, *supra* note 144.

¹⁵⁹ *Cf. Public Utilities Comm. v. Pollak*, 343 U.S. 451 (1952). Passengers objected to being made a "captive audience" for music and advertising on Capital Transit Co.'s street cars in the District of Columbia; the Court found in the action of the privately-owned utility coupled with the refusal of the commission to interfere "a sufficiently close relation between the Federal Government and the radio service" to invoke the first and fifth amendments. *Id.* at 462. (Only Mr. Justice Douglas voted for the passengers on the merits of the first amendment claim, *id.* at 467.) Would Capital Transit be on any stronger ground if it refused to hire Negro operators? If it fired an employee for allegedly subversive politics without a hearing? With a hearing?

established. No regulation could exclude a Republican, Jew, or Negro from Federal employment, Mr. Justice Reed had conceded in *United Public Workers*, and other opinions have repeated; is a state more free to discriminate, or does the fourteenth amendment command fair employment practices in public employment without the need of an F.E.P.C.?¹⁶⁰ Can a Negro protest exclusion by race from teaching opportunities in newly integrated schools, from positions on a state or local police force? When it is not yet conventional doctrine that the Constitution requires government to give a fair hearing to an employee discharged on grounds adverse to his personal record, it seems fanciful to speculate whether the Constitution requires enterprises merely paid or regulated by government to do so.¹⁶¹ Yet precisely this point illustrates the shift in the position of the government as employer. To the Court of *Atkin*, *Truax* and *Heim*¹⁶² a half-century ago, there were strict constitutional limits on what government might do to private employers, but government acting as an employer itself was as free as they. It would not have occurred to Holmes, Hughes, and McKenna that government management of public employment would replace government regulation of the conditions of work in private business as the constitutional battleground.

There is no reason why it should have occurred to Mr. Justice Douglas in 1939. But as the conflicts of our time brought the issue to the Court, he concerned himself with the realities behind the formulas of "privilege" and unreviewable discretion. He accepted the significance of the fact that modern Americans live on what they can earn, not on what they own. And he saw that, far from being

¹⁶⁰ 330 U.S. at 100. Well before this, dual salary structures had been held to deny Negro teachers equal protection: "It is true that they are not entitled... to contracts to teach in the public schools of the state; for whether any particular one of them shall be employed to teach is a matter resting in the sound discretion of the school authorities; but they are entitled to have the compensation for position for which they may apply... fixed without unconstitutional discrimination on account of race." *Alston v. School Bd. of City of Norfolk*, 112 F.2d 992, 996 (4th Cir. 1940). Disqualification from state office on religious grounds was held to violate the fourteenth amendment in *Torcaso v. Watkins*, 367 U.S. 488 (1961).

¹⁶¹ There is no dearth of speculation, fanciful or not, to what extent the Constitution requires "private" enterprises not to discriminate in employment. See, e.g., Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Miller, *The Constitutional Law of the "Security State"*, 10 STAN. L. REV. 620, 664-5 (1958); Van Alstyne and Karst, *State Action*, 14 STAN. L. REV. 3, 36-44 (1961). In a 1955 review of BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* (1954), Mr. Justice Douglas called the author's discussion of personnel procedures in government-subsidized or contracting enterprises "the great highlight of the book," 103 U. PA. L. REV. 1108 (1955); he later quoted Berle's description of the impact of security regulations on the "private" employee in his concurrence in *Peters v. Hobby*, *supra*, note 138.

¹⁶² *Supra*, notes 115-117.

immune, the public sector is preeminently the place for constitutional rights. Government owes the citizens it employs more, not less, than a private employer; it owes them adherence to constitutional guarantees and that is the ultimate responsibility government in a democracy owes to all citizens. Thus he has argued that they are entitled, within narrow limits of administrative necessity, to remain part of the democratic constituency, the masters of government as well as its servants.

A man's freedom in the modern economy, as in the agricultural economy of the 18th century, depends on the immunity of his livelihood from official prejudice and reprisals. It offers a vulnerable target, compared to his well-protected freedom from criminal prosecution and punishment, for the power of government to coerce, intimidate, or penalize political deviants and other minorities. To Mr. Justice Douglas, the constitutional guarantees of liberty require protection of the right to work by imposing a constitutional test on governmental restraints: the test of relevance to the task to be accomplished, to competence for the work to be done.¹⁶³ Whatever a private employer may do on his own, and though the relevant reasons for disqualification may vary, the test runs against government whether it governs work in the private or the public sector. In Mr. Justice Douglas's years on the Supreme Court, it has been the constitutional rights of the worker in the public sector that have raised in their sharpest form the issues of liberty in the welfare state.

[To be concluded in a subsequent issue.]

¹⁶³ Where neither a forbidden discrimination or invasion of first amendment rights, nor procedural unfairness, is involved, the author of *Olsen v. Nebraska*, 313 U.S. 236 (1941) and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) would not, of course, revive substantive review of the merits of legislative standards and restraints. *Cf. Ferguson v. Skrupa*, 372 U.S. 726 (1963).