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The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy

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THE CONSTITUTIONAL RIGHTS OF PUBLIC EMPLOYEES: A COMMENT ON THE INAPPROPRIATE USES OF AN OLD ANALOGY

William W. Van Alstyne*

I.

"The petitioner," Holmes declared, "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Three quarters of a century later, however, the Supreme Court made a different observation:

To the extent that the [opinion below] may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.2

The "numerous prior decisions" to which the Court referred, and others to which it might also have referred in rejecting the constitutional orphanage of public employees, all appeared during the three decades of Supreme Court service by Mr. Justice Douglas. No one has done more than he to secure the equal protection of public employees under the Bill of Rights. Never impressed by the suggestion that the state is somehow not so much the state when it is also an employer, he has steadfastly denied that those whose livelihood is linked with government must accept their labor as a mere privilege which the state may ration without constitutional review. Rather, many of Justice Douglas' rugged contributions to the constitutional rights of public employees reflect a single, essential proposition: The state is always the state and therefore always constrained by the Constitution irrespective of the capacity in which it acts.

What government is forbidden to do directly it may not do by indirection; what is not justified when sanctioned by fine or jail is no more justified when sanctioned instead by a threat to the source

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of one's livelihood. As the first amendment will protect an employee from the threat of jail for writing letters in support of a given candidate or for serving as a poll watcher, so should it also protect him from the loss of his nonsupervisory public job. If a citizen cannot be subjected to a fine without a fair hearing, neither may he be threatened with an equally important loss such as discharge from his public employment without a hearing. The immunities of the Bill of Rights and the fourteenth amendment are straightforward and unqualified, and no reason has ever existed to give them a cramped construction. The fourteenth amendment provides unequivocally that "No State shall deprive any person of life, liberty, or property without due process of law"; it leaves no quarter for a different, more grudging view that "this amendment shall not apply when the state acts in a proprietary, rather than in a governmental capacity." The first amendment is firm and universal in its mandate that "Congress shall make no law . . . abridging the freedom of speech"; it yields no insinuation that "this amendment does not apply to congressionally authorized standards for federal employment."

In the private sector, an employer may, of course, be unpolicied by the Bill of Rights and—for lack of the requisite state action—an employee correspondingly circumscribed in his freedom according to the terms of the contract permitted, though not required, by the State. Even here, however, the State cannot insinuate itself into the transaction and trammel the employee's freedoms for purposes of its own which are forbidden by the Constitution. And

5 See the observation of Chief Justice Stone in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 477 (1939): "As [the federal] government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action . . . . " See also the remarks by Mr. Justice Douglas in Thorpe v. Housing Authority, 386 U.S. 670, 674, 678 (1967) (concurring opinion): "It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment."
the fact that a private employer may enforce a given condition without constitutional restraint yields nothing about employment prerogatives in the public sector, since it is the lazy analogy between the two sectors which is condemned by the express constitutional distinction between private and governmental action. Exactly because it is the state (if only the state) which is foreclosed from negotiating terms permitted to private employers, nothing inductive of governmental power can ever be received by false analogical reasoning from what is permitted in the private sector. That a private school does not want and cannot be compelled by force of the fourteenth amendment alone to permit its teaching staff to ventilate evolutionary theory obviously says nothing about permissible public school standards. That a zealous private landlord may restrict his choice of janitors and tenants to politically like-minded persons merely underscores the difference, not the similarity, in constitutional models. So far as government may insinuate its authority and largesse, it remains uniformly constrained.

In half a nutshell, it is this gradual and overdue return to fundamentals which characterizes much of Mr. Justice Douglas's

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8 See Epperson v. Arkansas, 393 U.S. 97 (1968). Cf. Scopes v. State, 154 Tenn. 105, 109-12, 289 S.W. 363, 364-65 (1927). ("In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of . . . the Fourteenth Amendment to the Constitution of the United States.")


10 Pickering v. Board of Educ., 391 U.S. 563 (1968); Sherbert v. Verner, 374 U.S. 398, 404 (1963): "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

11 A look into the other half of the nutshell would spy some reservations. For instance, Mr. Justice Douglas tacitly concurred in the opinion for the Court in Gardner v. Broderick, 392 U.S. 273, 277-78 (1968), in which Mr. Justice Fortas acknowledged some interests the government holds qua employer—interests sufficient to uphold some demands which it might not make of persons with whom it lacked an employment relationship: "It is argued that although a lawyer could not constitutionally be confronted with Hobson's choice between self-incrimination and forfeiting his means of livelihood, the same principle should not protect a policeman. Unlike the lawyer, he is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other 'client' or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer. Unlike the lawyer who is directly responsible to his client, the policeman is either responsible to the State or to no one.

"We agree that these factors differentiate the situations."

Similarly, Douglas tacitly concurred in Mr. Justice Marshall's qualification of his remark in Pickering v. Board of Educ., 391 U.S. 563, 568 (1968), that the first amendment equally protects public school teachers: "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."

That the employment relationship may sustain some regulations which would be unconstitutional in the absence of such a relationship, moreover, is developed in Part III, infra.
significant contributions to the rights of public employees. Reference to the virtuoso collection of cases appearing in two articles by Hans Linde, commemorating the Justice's twenty-fifth year on the Supreme Court, will attest to the strength of his position. The last five years have largely added confirming opinions plus increasing support from the rest of the Court on important holdings in public employment cases. The professional literature so thoroughly abounds with additional writing equally effective in demolishing earlier excuses for state misconduct (e.g., employment as a "privilege," the state is exempt when acting as a "proprietor," the individual "agreed" to the terms or "waived" his rights) that the point is now plain: the state is the state, bound by uniform constitutional constraints regardless of the capacity in which it purports to act.


II.

The emphatic rejection of the analogical model (that what is constitutionally permitted in the private sector is therefore permitted to government when it acts in a "private" way, e.g., as entrepreneur, proprietor, or employer), however, merely clears the air of canards. By itself, it yields very few positive answers as to what the state is forbidden to do, even granting that the state is always the state. Rather, it returns the constitutional inquiry to dead center. Thus, while the mere fact that a private employer's freedom to hire his nephews in preference to others is not enough to show that a public employer may do the same thing, neither is it enough to show that the public employer may not do the same thing. Similarly, the fact that the Constitution does not forbid a private employer from terminating an employee without a hearing does not in itself yield any inference that a public employer must provide a hearing to its employees. Rejection of the analogical model merely denies any constitutional correspondence between the private and public sectors; it yields no negative inference that whatever is permitted to private employers is thereby forbidden to the public employer. Rather, problems in the public sector are returned to the vagaries of substantive due process and equal protection clauses, more at sea than before for loss of an old, inept, but once-felt useful analogy.

Without some analogical model enabling courts to move from a more settled area of constitutional interpretation toward coherence in a less settled area where the problems appear to be "similar," moreover, we may seem to suffer from an uneasiness or apparent lack of consistency (or failure of neutral principles, if you will) in the decisional process. The failure of the one analogical model consequently leads one to yearn to find another. There is, after all, a feeling that public employment cases are "harder" than or "different" from conventional state regulation cases, needing something to be supplied as a reliable model for guidelines. For instance, what shall be said of a case where the public employee is subject to mandatory discharge in the event he is convicted of an act of civil disturbance? Or another, conditioning employment of state employed accountants on abstinence from smoking (so hazardous to one's health)? Or a third, requiring an oath to support and defend the Constitution as a prerequisite to eligibility to work for a municipal sanitation department? Self-evident answers may not readily occur unless . . . well, unless one can say that these cases are really the "same" as (or analogous in all significant respects to) others where we think that we already know the answer. Or, even though
we do not positively know the answer under the analogical model, at least we think we know how to determine what it most probably would be and can borrow a corresponding confidence in settling the matter at hand.

It is precisely here that Professor Linde believes that an analogy can be found—an analogy, moreover, which surprisingly again makes use of government and the private sector, albeit in a wholly different way. As I understand his thesis (presumably synthesized from Mr. Justice Douglas' opinions), it is essentially this: The constitutionality \textit{vel non} of a condition restricting public employment (or any other important governmental connection, \textit{e.g.}, welfare, housing, or education) \textit{is the same as} the constitutionality \textit{vel non} of the same restraint imposed by government on equivalent employment in the private sector. If a given governmentally imposed regulation of equivalent jobs in the private sector will survive all constitutional objections of the private employees whom it regulates, it will also survive such objections when it appears merely as a condition of public employment instead. If it would not survive constitutional objection when proposed as a government regulation in the private sector, however, neither is it valid as a condition in the public sector. In short, the allegedly proper question to raise, in testing a requirement or condition of public employment for constitutionality, is this:

\begin{quote}
The question is whether the guarantees of liberty remain the same when the welfare state provides public benefits and services as they are when government seeks to regulate private conduct by law.\textsuperscript{15}
\end{quote}

The analogical model does not, as noted above, merely purport to trade one problem for another of equal perplexity. Rather, if it works (and that is what we mean to examine hereafter), it allowably will yield a clearer perception of the problem, cut away obfuscations, and provide a context where an answer is more readily forthcoming. This is, of course, a claim—but the proof of the claim may allegedly be seen in any one of the several excellent illustrations Professor Linde provides. One of these is taken from \textit{Hamilton v. Regents of University of California},\textsuperscript{16} in which the Court originally upheld the exclusion of students otherwise eligible for admission to the University of California who refused on grounds of religious scruple to enroll in the compulsory ROTC program. At the time \textit{Hamilton} was decided, the Court disregarded its then recent decisions on the subject of unconstitutional conditions.\textsuperscript{17}

\textsuperscript{15} Linde, \textit{supra} note 12, 40 \textit{Wash. L. Rev.} at 26.
\textsuperscript{16} 293 U.S. 245 (1934).
\textsuperscript{17} See, \textit{e.g.}, Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94
Instead, it emphasized that attendance at the university was voluntary rather than compulsory, it characterized matriculation as a "privilege" rather than as a right, and it concluded that the condition of attendance was valid against a religious freedom claim since, while students had a right to be free of state-coerced activity contrary to abiding religious convictions, they had no right to a state-subsidized education.\(^{18}\) Subsequently, in *Board of Education v. Barnette*,\(^{19}\) *Hamilton* was distinguished on the basis that in *Barnette* the children reserving religious objections to a compulsory flag salute were subject to treatment as delinquents if they were not attending school where, of course, they had to participate in the flag salute as a condition of remaining. The net effect of the flag-salute requirement was not merely to confront the students with the hard enough choice of respecting their religious commitment and forfeiting free education, or of taking the education while yielding their convictions. Rather, they had either to attend school and salute the flag or risk being prosecuted as delinquents (and have their parents criminally prosecuted for contributing to the delinquency of a minor). Thus, *Hamilton* was distinguished and not overruled.\(^{20}\)

Under Professor Linde's view, however, the problem in *Hamilton* should be examined this way:

> As far as the First Amendment is concerned, California's power must be tested by whether it could require military training of students at *all* colleges, private as well as public.\(^{21}\)

And, in *Barnette*, the correct approach is this:

> When West Virginia undertook to compel the flag salute at public schools, it must be prepared to defend its constitutional power to require the same at private schools, though it might not in fact do so. When the constitutional question is thus posed, some apparently difficult answers become almost self-evident. New York or Pennsylvania have broad authority over the curriculum that will satisfy the standards of a compulsory school attendance law, but would anyone argue that these standards could have included a requirement of the "Regents' Prayer" or daily Bible readings for all schools, private as well as public, without falling afoul of the establishment clause?\(^{22}\)

\(^{18}\) More recently, however, the Court has "explained" *Hamilton* as having held merely that the religious free exercise claim lacked merit. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 n.2 (1969).

\(^{19}\) *319 U.S. 624* (1943).

\(^{20}\) Id. at 631-32. Additionally, as subsequently emphasized in *Tinker*, the Court implied that congressional authority to raise armies by requiring compulsory officer training might override an objection based solely on the free exercise clause. *Id.*


\(^{22}\) Id. at 26-27.
This way of looking at the case does indeed make the case appear more resolvable by placing it in a more manageable context. We are freed at the very outset from being misled into a wrong result by conceding any significance to the adventitious manner in which the governmental power is being exercised, i.e., we will not make the mistake of thinking that the government is any less the government (and any less bound by the first amendment) when it operates as an employer or proprietor rather than as a legislator, the better to see its "true" position.

Another illustration, also Professor Linde's, may convince the few remaining doubters of the practical value of this analogical model. A much vexed question still with us concerns the extent to which a state may restrict the use of publicly held property from popular assembly. In *Hague v. CIO*, the Court broadly implied that a few kinds of public property, e.g., parks, street corners, or other places customarily used as forums or locations for pamphleteering, could not be withdrawn from such use. Impliedly, however, governmentally owned property having no similar tradition of public-forum use could be completely precluded from such uses as long as the ban was total and therefore neutral in the sense that no one is favored at all, and therefore no one is more favored than anyone else. Mr. Justice Black's view, on the other hand (happily not the prevailing view), is that government ownership is sufficient per se to sustain a total ban on the use of any governmentally owned property as a place for activity unconnected with its described use, whether or not that activity is disruptive, and that a constitutional question arises only where the restriction is incomplete (in which case the equal protection clause may come into play).
Using Professor Linde's analogical model, however, we come to a conclusion quite opposed to Mr. Justice Black's and much more generous than the Court's position in *Hague*. Under this view it appears that the majority in *Hague* as well as Mr. Justice Black were too beguiled by the irrelevancy of "government-as-owner," and that a correct perception of the issue would make clear that a broader field of first amendment protection exists:

The proper constitutional test of reasons for restricting his speech (or an ensuing parade) there [i.e., on the grounds of the veterans' hospital] is whether the same reasons would or would not sustain, over first amendment objections, the same government restriction of speeches or parades at private hospitals. . . . Should the principle not be the same for all government real estate, for parks and beaches, for public housing projects and college campuses, though the limits derived from their distinctive characteristics, functions, and necessary conditions of use might differ?26

Thus, restrictions on places to speak must be justifiable in terms of their necessity to protect other legitimate uses associated with those places, and nothing whatever turns upon the source of ownership or customary use. If a decent concern for patient care would warrant a state law forbidding noisy speeches within the curtilage of a private hospital, it would sustain the same law as applied to the curtilage of a public hospital. Public ownership in the latter case is neither a necessary nor sufficient basis for the statute. Similarly, a statute forbidding peaceful assembly on privately owned lots is no stronger when limited, instead, to a ban on peaceful assembly on publicly owned lots whether or not such lots were traditional forums.

It should be recognized, of course, that Professor Linde has fashioned a model with much more in mind than a limited equal protection claim in respect of statutory differentiations between the public and private sector. The more limited claim would merely observe that where the evil alleged to rationalize the need for a statute can readily be seen to be no more nor less an evil in the private sector than in the public sector itself, a regulation forbidding a given activity only in the public sector seems arbitrary—underinclusive without reason.27 For instance, if abstention from knowing and active membership in the Communist Party is required of

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26 Linde, supra note 12, 40 Wash. L. Rev. at 42-43. See also id. at 37: "Are the constitutional limits less stringent when government denies the right to speak on public property than on private?"; the implication clearly being that they are not.

a state hospital physician based on some notion that the nature of his work carries intolerable risks for dangerous action, it must equally require the same abstention from membership by a private physician employed in similar tasks in a private hospital. Thus, the public physician may be able to claim that in being subjected to a restriction on his political association not imposed on all others similarly situated in terms of the menace to be avoided, he has been subjected to an invidious classification and denied equal protection. Again, loyalty oaths for public, and not for private, school teachers may be vulnerable to this sort of claim. The fact that the Hatch Act forbids civil service supervisory personnel to solicit contributions from their subordinates while it does not equally affect supervisory personnel in private business may seem arbitrary if, indeed, the legitimate purpose of the Act is merely to reduce opportunities for unfair or intimidating political pressure; the evil and likelihood of such pressure are equally present in both cases.

There are, in short, myriad situations in which the fact that a given restriction applies by law only to persons in the public sector, but not in the private sector, may be constitutionally significant in determining whether public employees have been denied equal protection. While sometimes helpful (perhaps to a greater extent than thus far appreciated by the courts), however, this is both a different and a significantly lesser point than Professor Linde has made. It is a lesser point, of course, because the equal protection claim will frequently fail for lack of merit even when appropriately acknowledged. Conventionally, legislation is allowed to proceed by degrees, experimentally resolving a felt problem by steps; it is not a hard and fast rule that government must legislate against all of a problem in order to legislate against any part of it. Frequent, too, the public component of a given employment subject to regulation constitutes a very large majority of the whole area of that employment, so that the underinclusiveness of the law is marginal; the regulation in the public sector appears substantially to respond to the problem which called it up. (E.g., a regulation applicable only to public secondary school teachers reaches most secondary school teachers, although a federal statute affecting only state university professors may reach barely more than half of all university professors.) The omission of private-sector counterparts of

regulated public employees may also be rationalized against an equal protection claim in terms of some other characteristic associated with the fact of public employment and not equally present in the private sector, e.g., the administrative ease or other lower cost of securing compliance, and the lack of equivalent economic constraints on government. Thus, the apparent underinclusive character of a regulation limited only to public employees may sometimes survive an equal protection objection on the basis that the classification is, in point of fact, reasonably connected with a legitimate distinction.

None of this is to say that the courts ought not take a harder look at regulations limited only to public employees for equal protection shortcomings. Surely they should do so. And in doing so, they might well remember that the state is the state, to avoid missing the equal protection claim once again by rationalizing the classification by exempting the government from constitutionally imposed limitations when the government acts as employer, owner, etc. Linde's thesis is an important one, then, even in the setting of an equal protection claim alone, as it serves to strip away the claim that there is something so uniformly or absolutely distinct about public employment per se that such classification is always and necessarily a reasonable one. A revisionist view, profiting from Linde's observations, might more nearly hold that such a basis of classification is presumptively unreasonable, shifting to the state the burden affirmatively to justify placing greater restrictions on public employees than on their private-sector counterparts.29 But the basic thesis is both stronger than and different from this one.

29 Such a presumption already obtains in a variety of areas. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964). See also Karst & Horowitz, Reitman v. Mulkey: The Telophase of Substantive Equal Protection, 1967 Sup. Ct. REV. 39. Convenience of administration may not, moreover, be sufficient to overcome the presumption of unconstitutionality of certain disfavored classifications. Carrington v. Rash, 380 U.S. 89 (1965); Harper v. Virginia, 383 U.S. 663 (1963). Where a regulation reaches only employees in the public sector (or only a portion of such employees) without reaching their more numerous private counterparts, greater judicial activism and rigor in the application of the equal protection clause may be warranted than where the regulation binds a larger political class more substantially represented in the legislative process. The point was especially well made by Mr. Justice Jackson, concurring in Railway Express Agency, Inc., v. New York, 336 U.S. 106, (1949): "The framers of the constitution knew, and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."
It posits that no degree of added reasonableness attaches to a regulation from the role of government as employer, and it frames a new standard of substantive due process rather than a standard of equal protection. Whatever would deny substantive due process as a governmental restriction on private employment denies substantive due process as a condition or regulation of equivalent public employment. Applying this test to our hypothetical cases tends, moreover, to make some regulations more probably unconstitutional than we might otherwise have thought. It appears doubtful, for instance, that a state law requiring the dismissal of any private employee convicted of any civil disturbance would be upheld, and even more doubtful that protection of the public from the felt hazards of cigarette smoking would sustain a general statute requiring the dismissal of private employees who smoke. Is the case any different though the rule in question immediately applies only to public employees? The implied answer is: "No."

The analogical model may also seem to breathe new life into the eighth amendment's proscription of cruel and unusual punishment in this connection. Policing the public health by mandating dismissal of private employees who choose to blacken their lungs surely strikes one as an eccentric way of exercising the police power, and no less eccentric even if the regulation is rationalized as a way of conserving manpower resources. It seems no less so, if the analogy fits, when imposed as a condition on public employment.80

III.

There are, however, serious problems which need to be overcome before the analogical model Professor Linde proposes can be generalized and safely applied. Without some degree of clarification,

80 The point is a limited one and not intended to carry beyond the observation that where a regulation of employment threatens dismissal as a punishment for conduct thought to be merely bad and undesirable in general, but not relevant to one's job competence in any distinguishing respect, its distinctly punitive function should be acknowledged and the appropriateness of discharge should be reviewable under the eighth amendment as well as under the equal protection clause and possibly under the attainder clauses of article I, sections 9 and 10. In a few cases, courts have set aside conditions on public jobs where they were ulterior to the function of the employment. See discussion and references in Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 505-07, 421 P.2d 409, 414-15, 55 Cal. Rptr. 401, 406-07 (1966). In a larger sense, this approach is best seen through the equal protection clause; even where the regulation may be said to serve legitimate state interests, where it is imposed only on public employees and the purpose of the regulation does not coincide with a classification based on that employment relation, the regulation is arbitrarily underinclusive.
tion and qualification, the argument may claim too much in sug-

1969]

PUBLIC EMPLOYEES 763

gesting that all conditions on public employment are constitutionally

indistinguishable from identical regulations of equivalent private

employment—that government derives no interests as employer

which it lacks as regulator.

The first qualification is merely one of explicit clarification.
The comparison to be made in each case is not between the par-
ticular condition of public employment and a hypothetical reg-
ulation of private employment in general, but between the condition
of public employment and the same regulation of equivalent jobs
in the private sector. If the case at hand involves a first amendment
claim that the government cannot discharge a ranking physicist
in the Atomic Energy Commission in spite of his knowing member-
ship in the Communist Party, the comparision must fairly be made
only with a statute restricting private employment in truly “equiv-
alent” posts, i.e., those involving access to classified information,
responsibilities closely connected with risks to national security,
and authority possessed of considerable discretion. It would un-
fairly beg the question to compare the case at hand with one
arising under a restriction against the private employment of Com-
munists in utterly nonsensitive and nondiscretionary jobs, or simply
jobs in general; they are clearly not “equivalent,” and their prob-
able immunity from political regulation provides no constructive
analogy.

The equivalency of the comparable private sector employment
must first be established then, and this may not always be an easy
task. In some instances, it is difficult to locate a private-sector
equivalent of the public employment under review (as is nearly
but not exactly true with an AEC physicist). In nearly every
instance, moreover, there is a great amount of guesswork in de-
fining equivalency. Presumably, jobs are “equivalent” when they
are functionally the same in terms of the discoverable valid purposes
of the regulation in question—but courts (and counsel) must
frequently guess at or simply invent a statement of purposes validly
served by a given statute. Thus, we generously assumed that the
purpose of the regulation applied to our AEC physicist was narrowly
to safeguard national security rather than, say, simply to conserve
job opportunities, discourage Communist Party affiliation, or some-
thing else. The problem of inferring legislative purpose is no greater
here than elsewhere in the exercise of constitutional review, however,
and the use of the analogical model can thus scarcely be faulted on
this account alone.

Even assuming that we can unerringly hypothesize “equiv-
alent" public and private jobs with sufficient ease to make the model serviceable, we must also hypothesize the "same rule" as a regulation of those private jobs. But as we shall try to hypothesize the same rule, we shall also become aware of the fact that the private and public situations are distinguishable in still another important respect and that the distinction, once recognized, makes the private case far less easy to resolve than we had imagined. Yet, it was due to our faith that the private case is easier to resolve that we thought it useful to develop it analogically so that we might borrow the result and apply it to the actual case at hand. If the private case turns out not to be any easier to resolve, it becomes correspondingly more doubtful whether the effort to make the analogy was worthwhile after all.

For instance, let us suppose that we want to determine the constitutionality of a rule which authorizes but which does not require a public school board to dismiss any teacher who sports sideburns more than 1-1/2 inches below his ears or a hair style extending more than 1/2 inch down his collar. The equivalent job in the private sector is almost surely a teacher's job in a private school covering the same grade levels and, perhaps, involving the same cultural cross section of students. Would the "same" rule simply be a state statute which authorizes but which does not require a private school board to dismiss any teacher who sports sideburns more than 1-1/2 inches below his ears, etc.? The comparison becomes difficult to follow, for ordinarily a private school board's authority so to restrict the conditions of employment of its teachers would not require the existence of such a statute to begin with. The private school might have reserved the right to terminate a teacher for such cause without any such state statute, by contract. Further, such a statute does not necessarily forbid the private school to contract not to terminate its teachers for such cause. In short, the contract and the contractual will of the parties initially describe the private school relationship, and the hypothesized state statute contributes very little.

Would the analogy be clearer, however, if the public regulation

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provides that any public school teacher sporting the forbidden hair style shall be dismissed (rather than that he may be dismissed)? Shall we resolve the constitutionality of this rule by asking whether it would be constitutional for the state to require the dismissal of any similarly offending teacher in a private school, whether or not the school proprietors as well as the private teachers object to the statute? Seemingly, this is the "same" rule, as far as the legitimacy of the state's interest is concerned. If that interest reflects a settled feeling that certain male hair styles set a "bad example" for the young, detract from a desirable educational atmosphere, induce a certain moral laxity or bohemian waywardness among students, and that these concerns override the marginal claim of the individual teacher's interests in personality, the situation is in these respects unchanged in the context of the private school.

The cases are distinctly not the same in another critical respect, however, as Professor Linde acknowledged in an important footnote. Rather, the regulation as extended to the private sector trammels other important personal interests in addition to those of the employee, namely, interests (or prerogatives) of the private employer. Not only is the teacher forbidden to work without such a restriction, but the school proprietors are similarly restrained in their freedom to utilize their facilities in a manner which they regard as most appropriate. There is, in short, a "property right" interest of the private school which adds to the "civil liberties" claim of the private teacher, much as there was in Truax v. Raich, Myer v. Nebraska, and Pierce v. Society of Sisters. The number and kinds of private prerogatives arranged against the regulation are doubled; it is the difference between a state law allowing an employer not to hire whom he pleases, on the one hand, and a law compelling him to dispense with the services of another, regardless of how he and the employee both feel, on the other hand. Where the state itself is the employer, of course, it cannot, by definition, have "private" interests different or apart from the policy the state has adopted for itself as employer. But such a situation is manifestly not applicable to the private sector.

To return for a moment to our earlier case, we were considering the statute which authorizes but does not require the firing of a public school teacher in terms of whether a statute permitting but not requiring the discharge of a private school teacher would be

82 Linde, supra note 12, 40 WASH. L. REV. at 43, n.304.
83 239 U.S. 33 (1915).
84 262 U.S. 390 (1923).
85 268 U.S. 510 (1925).
valid. If the statute as applied to a private school is interpreted to permit such discharge even when the school has willingly contracted not to discharge the teacher on such grounds, it becomes clear that we have overextended the analogy once again. The private school proprietors may not want such a restriction; they may indeed feel that they can better compete for talented teachers by providing them with an enforceable assurance that they will not be fired for causes not immediately related to their job competence. The state statute not only restricts the private school teacher in this view, but it restricts the contractual and proprietary prerogatives of the private school board as well. Again, the interests arranged against the state statute are multiplied in a manner not subject to duplication when the only rule in question relates only to public rather than to private school boards.

Nor is it entirely fair merely to say that the teacher's civil liberties claims have been conjoined with the proprietors' "mere property" claim, with both arranged against the policy of the state. Rather, the proprietors may hold a distinct educational philosophy which they wish to reflect in the kind of teachers they provide for their students. They, like the teachers, may believe that a more permissive and tolerant academic atmosphere is conducive to superior education. There is little reason to denigrate the proprietors' interest as "merely" property, or otherwise to ignore it in the constitutional balance.

More importantly, however, it is only by ignoring this possible conjunction of employer-employee interests in the private sector that a great number of public employment regulations appear more clearly unconstitutional than otherwise, because facile use of the analogical model borrows from "same" cases where, in fact, the constitutional objections to the regulation as extended into the private sector are compounded. Professor Linde makes essentially the same observation in a footnote caveat where he wrote:

To avoid misunderstanding: The present point is that, against an objection under the first, fourth, or fourteenth amendments, the validity of a governmental restraint in a publicly-owned place depends on whether government could, under the same conditions, and over the same objection, validly impose the same restraint in a similar privately-owned place. It leaves aside claims against land-use controls based on the private owner's property rights under the due process and just compensation clauses. 36

86 Linde, supra note 12, 40 Wash. L. Rev. at 43, n.304. The distinction was acknowledged even as long ago as Mr. Justice Holmes' otherwise regrettable opinion in Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113 (1895), aff'd, 167 U.S. 43 (1897), where he acknowledged that the presence of "proprietary rights" (i.e., private
If one is obliged to disentangle the private property owner's own claims, or the private employer's own prerogatives, from those of the private employee in the analogical model, however, one may wonder whether the model does not lose most of its alleged value in clarifying the constitutionality vel non of a rule applicable only to public employees. The test which emerges is this: A condition imposed on public employment is not valid unless it would be valid if imposed as a regulation of private employees in equivalent jobs as against constitutional claims of such private employees alone (without consideration of whatever claims the private employer might also have and without knowing how the private employer feels about the situation). Thus qualified, the model achieves the necessary precision, but the task of separating employee from employer interests and setting aside the latter makes it terribly hard to use.

Even with these qualifications, the model may still be far from perfect. In posing and testing various regulations in the public sector, we are almost inevitably drawn to illustrations where the employee's "constitutional right" to substantive due process is easily verbalized in terms of one or more of the guarantees in the Bill of Rights, especially the first amendment's explicit protection of free speech. This habit of mind tends to reduce the field of human interests where recognizable constitutional claims can arise and correspondingly turns us away from seeing defects in the analogical model which would surely be noted if less familiar comparisons were made. We think almost reflexively or exclusively in terms of explicitly protected Bill of Rights interests, e.g., speech, religion, assembly, and press. More accurately, however, the concept of a broader substantive due process still lives, and under certain circumstances, almost any imaginable human interest may be protected from inhibitory legislation. One's interest in moving from ownership) would affect the constitutionality of a state law restricting places where speeches might be heard.

Note that Professor Linde's qualifying quotation, see note 36 and accompanying text, supra, puzzlingly restricts the use of his test to objections raised "under the first, fourth, or fourteenth amendments." In context, it appears that he means to limit the utility of the test to explicitly named rights, e.g., speech and religion in the first amendment made applicable to the states via the due process clause of the fourteenth amendment, although it is somewhat a mystery why other explicit rights (e.g., self-incrimination in the fifth amendment) are not mentioned and, of course, fourth amendment substantive rights, e.g., privacy as inferred by Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 479 (1965), are not "explicit" named in the fourth amendment at all.

place to place, for instance, has recently been subsumed as an interest sheltered by the (substantive) due process clause of the fifth amendment under some circumstances. One's interest in sexual intercourse within the marriage relation is subsumed in the (substantive) due process of the fourteenth amendment under some circumstances. Indeed, even interests in group association are not explicitly protected even in the first amendment itself. "Freedom of association" has been given separate constitutional status under the (substantive) due process clause of the fourteenth amendment for reasons fulfilling alleged functions of explicit first amendment interests, to be sure; but it receives protection as an independent interest and sometimes without particular reference to the political focus of speech and assembly. Mr. Justice Black to the contrary notwithstanding, "Lochner v. New York" is not dead in the sense that only "explicitly" named interests (i.e., those set out somewhere in the substantive portions of the Bill of Rights) find shelter in substantive due process. Even one's homely interest in the wear-


42 Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 515 (1969) (dissenting); Ferguson v. Skrupa, 372 U.S. 726 (1963). From his opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), it would appear that Mr. Justice Douglas agrees that the character of interests protected by the fourteenth amendment is determined by reference to the more specific enumeration of protected interests in the Bill of Rights, but he finds a much larger array of such interests implied in the Bill of Rights than does Mr. Justice Black.

43 198 U.S. 45 (1905). Note that without abandoning the principle that substantive due process brings "mere" economic interests within range of constitutional review, "Lochner did not necessarily carry with it an unyielding absolutism in the measure of protection thus provided. Bunting v. Oregon, 243 U.S. 426 (1917); Muller v. Oregon, 208 U.S. 412 (1908).

44 See, e.g., United States v. Robel, 389 U.S. 258, 263 n.11 (1967): "We recognized in Greene v. McElroy, 360 U.S. at 442, that 'the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment.'"

It does not necessarily follow from the mere fact that an interest is classified as one of substantive due process that the "Lochner standards in reviewing the "reasonableness" of a state's interference with that interest are applicable. Arguably, this aspect of "Lochner retains vitality only when the interest seeking protection can be verbalized as a "preferred" one within the Bill of Rights itself. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965). However, this restricted role of the "Lochner standards in reviewing the reasonableness of state legislation does not explain the strict
ing of long hair may be constitutionally protected in the acid sense that a state law forbidding such a thing anywhere or anytime may, under some circumstances, at least, be so outrageous as to be invalid as applied—a petty denial of substantive due process.

Of course, opinions will not be phrased in terms of a "constitutional right to wear long hair," for that demeans a court and degrades the document. Rather, it will be described, perhaps, as an aspect of "personal integrity," or a right to be left alone, or even forced into the first amendment itself, just as, in Griswold, interests in sexual intercourse are given greater dignity as a "right of marital privacy," and built up from penumbras of fourth amendments, and just as interests in maximizing profits were once elevated as "freedom of contract" or "rights of property." Correspondingly, of course, even the explicitly protected rights are protected only under some, not all, circumstances.

All of this, however much it may seem otherwise, does ultimately bear on the utility of the analogical model. For there are a great number of never-questioned conditions on public employment which might well raise substantial questions if recast as equivalent regulations of the private sector; and yet their possible dubiousness as state regulations in the private sector raises little serious question when the state is the employer precisely because the state, as employer, may involve some interests it lacks as general regulator. For instance, suppose the promulgation of a bureaucratic rule requiring all attorneys in the United States Department of Justice to provide résumés of their work every twelve minutes on a daily basis, the rule being applicable to all attorneys in every division, indiscriminately and ultimately enforceable through an authority to discharge attorneys unwilling to comply. Granted the arguable unwisdom of the rule, should it also be conceded that it is constitutionally challengeable unless an identical requirement imposed by the federal government on the private-sector counterparts of judicial scrutiny employed in the recent equal protection cases. See generally Karst, Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula," 16 U.C.L.A. L. Rev. 716 (1969). In these cases, the interests involved are classified as "basic" or "fundamental" or "critical"—but it seems clear that this classification is not limited to interests considered to be protected by the Bill of Rights itself. See, e.g., King v. Smith, 392 U.S. 309 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). It should also be observed that the Court may be indirectly returning to Lochner by its very expansive reading of the Bill of Rights so that nearly everything can be said, in one way or another, to be a "preferred" right.

46 The hypothetical is, alas, not entirely fanciful. See N.Y. Times, Mar. 6, 1969, § 1, at 25, cols. 1-5.
these attorneys would clearly be valid? Is it possible that we might well conclude that "pennuras of privacy," self-employment prerogatives, and even shades of first amendment protection (in anonymity) might insulate private practitioners from such officious time-and-motion census taking without, however, sufficing to overthrow the scheme as restricted to government attorneys? Is it possible, in short, that government may be vouchsafed certain interests qua employer which it lacks qua regulator, and that we cannot therefore safely analogize the two roles for all purposes?

For instance, suppose we test an unexceptional regulation which provides that a public school teacher reporting to work more than half an hour late on more than six occasions during an academic term without excuse for cause due to circumstances beyond his control shall be dismissed. Does the constitutionality of such a rule depend upon whether the state could similarly require the dismissal of any private school teacher identically late to work in his private school on more than six occasions? Suppose the rule is that public school teachers may have but one half-hour for lunch. Is it invalid unless a law forbidding private school teachers to contract for more than half an hour at lunch break is also constitutional? No important public policy can honestly be said to be accomplished by such a statute, and reasonable persons may be of different opinions as to the desirable length of a lunchtime. The regulation as a rigid constraint on private teachers (quite apart from the interference with the private employers' interests) seems quite arbitrary, displacing their wishes and serving no particular public purpose. The needs of the schools and of the teachers alike are surely better met by allowing greater flexibility to exist. At the same time, a half-hour for lunch may not be too short to nourish a teacher; the public school authority may find some advantage in it; there is, after all, need for a line to be drawn somewhere for ease of administration; the teacher cannot show in what respect the rule seriously disadvantages him; and we are less likely to quarrel with it as a rule within the discretion of state authorities to adopt as a standard rule merely for the public schools. More importantly, the state as employer or school proprietor does have some choices which it cannot avoid making qua employer or qua proprietor which it distinctly can and should avoid as regulator of the private sector. To say that it cannot make any choice unless it could also impose that choice on the private sector seems absurd.

The two roles of government are not entirely fungible, and the analogical model simply fails. To imply that with a dozen reasonably similar arithmetic books from which to choose, for instance, the state may not choose any one for required and uniform use in public schools unless it could insist that all private school teachers must use that one, too, implies too much. There are needs of economy of purchase, ease of administration and standardization which may sustain the choice in the public sector, not sufficient in themselves to oust the prerogatives of others to use different, albeit equally competent books in private schools. Indeed, it may well be that the protected pluralism of the private sector is all that makes the uniformity of the public sector tolerable.

A parting observation may be made about the use of the analogical model in association with one of Mr. Justice Douglas' views of state action. In some fairly celebrated places, Mr. Justice Douglas has implied that what is done in the private sector with the mere permission or license of the state (and not merely by its command or order) is done as though required by the state itself.\(^{48}\) By such reasoning, the merely licensed act of a private party is reviewable against fourteenth amendment standards of due process (substantive and procedural) and equal protection. Coupling this view with the analogical model produces a dizzying circle of constitutional analysis that becomes impossibly difficult to penetrate, however, and it tends to yield results quite opposed to what the model was practically meant to do. For, working backwards, it appears to imply that whatever a state can constitutionally permit to exist in the private sector, it may also adopt as a requirement in the public sector without the standard becoming any less constitutional. If, then, a licensed drug store is constitutionally free to hire only druggists who are Democrats, the state may itself likewise hire only democratic druggists. If a licensed private school could forbid its teachers to wear beards, then so may the state forbid its teachers to wear beards.\(^{49}\) In short, the development of a

\(^{48}\) See, e.g., Bell v. Maryland, 378 U.S. 226, 242, 255-60 (1964) (concurring opinion); Lombard v. Louisiana, 373 U.S. 267, 274, 276-83 (1963) (concurring opinion); Garner v. Louisiana, 368 U.S. 157, 176, 182-85 (1961) (concurring opinion); Black v. Cutter Laboratories, 351 U.S. 292, 300 (1956) (dissenting opinion). In fact, however, Justice Douglas' views on the application of the fourteenth amendment to the private sector is much more complicated and sensitive than this, taking into account such additional considerations as the character of the interests involved, the kind and degree of governmental enforcement, and the scope of impact of decisions made in the private sector.

\(^{49}\) But see Mr. Justice Douglas' vigorous dissent to the Court's denial of certiorari in Ferrell v. Dallas Independent School Dist., 393 U.S. 856 (1968), in which he makes a telling argument respecting the relevance of the equal protection clause to a public school restriction on student hair length. Indeed, it should certainly be acknowledged
theory originally designed to spread the coverage of the Bill of Rights into influential parts of the private sector may, woodenly applied, have the opposite effect of contracting coverage in the public sector. Faced with the choice of either stratifying the prerogatives of private employers exactly to conform with constitutional norms in the public sector, or removing constitutional norms from the public sector to correspond with pluralistic practices extant in the private sector, a court is surely as likely to opt for the second alternative as for the first. The case remains to be made, however, that these are the only alternatives. We may need to bear in mind that analogies are only analogies and, by definition, not the "same."

IV.

The inflexible use of particular analogies, including the one we have examined, has not in fact characterized Mr. Justice Douglas’ contributions to the Court. Rather, his opinions fully reflect the impression one gets simply from watching him within the Supreme Court itself. Incredibly restless on the bench, he conveys a sense of impatience to reach central issues and an almost physical brusqueness with procedural needlepoint. His manner implies that counsel had best be right about the critical core of his case—that appeals to judicial modesty, parades of horribles, administrative ease and convenience, etc., are unworthy trade-offs for essential principles of constitutional liberty.

Correspondingly, the Douglas opinions more than occasionally are brusque and restless, too. They give fits to readers and offer fair game to critics because they are seen as untidy and almost careless in their flow. They sometimes range far beyond the necessities of the case, leaving broad pronouncements unelaborated (e.g., “Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change . . .”), upsetting entire schools of constitutional theory and distressing confidence in continuity. Yet, without raking through thirty years of his work to make the point again, I think it very clear that he has helped immeasurably to end the constitutional orphanage of public employees and that we have gained, not lost, in loyalty and efficiency at the same time. There is, moreover, an obvious explanation of his great and steadfast contributions: Mr. Justice Douglas has a very rugged Constitution.

that this brief article has concerned itself more with Professor Linde’s analogical model than with an attempt to capture even a significant part of Mr. Justice Douglas’ calculus of constitutional review.

50 See note 11 supra.