William & Mary Law Review

Volume 14 (1972-1973)
Issue 3

Article 11

March 1973

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Political Patronage and Unconstitutional Conditions: A Last Hurrah for the Party Faithful?, 14 Wm. & Mary L. Rev. 720 (1973), https://scholarship.law.wm.edu/wmlr/vol14/iss3/11

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POLITICAL PATRONAGE AND UNCONSTITUTIONAL CONDITIONS: A LAST HURRAH FOR THE PARTY FAITHFUL?

It is manifest that rapidly increasing portions of government budgets are devoted to providing services—welfare, social security, health care, and public housing—which encompass an almost limitless range of benefits generally classified as government largess. As a function of the increase in number and scope of these programs, there has been a concomitant increase in the number of employees required to staff administrative bureaucracies.[1] With nearly one out of every seven working Americans on public payrolls, the government's pervasive role as an employer, especially at the state level, is undergoing fresh examination. This process of re-evaluation portends new problems for the institution of political patronage, a system which has weathered several generations of reform movements.

Although patronage floats like an iceberg on the political sea, nine-tenths generally unseen,[2] one highly visible aspect of the system is the traditional mass firing of patronage workers that inevitably takes place as one party succeeds another in the statehouse, governor's mansion, or mayor's office. Critical questions arise when a succeeding administration dismisses or refuses to hire lower level personnel, who are not considered participants in the formulation or supervision of administration policies, and who, unprotected by any civil service system,[3] hold their positions solely through the favor of the dominant political party. If the impassioned arguments which surround the system of patronage are

1. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964) [hereinafter cited as Reich].

2. Once thought of as consisting only of jobs, patronage includes the vast range of favors awarded by constantly expanding governments whose increased government spending—much of it discretionary—has brought increased opportunities to political supporters. Nonofficeholders receive construction contracts, defense contracts, banking and insurance funds, and specialized treatment by the discretionary agencies of government whose power continues to grow.

M. TOLCHIN & S. TOLCHIN, TO THE VICTOR 5-6 (1971). [hereinafter cited as TO THE VICTOR.]

3. Jean J. Couturier, executive director of the National Civil Service League, testified before the U.S. Senate Subcommittee on Intergovernmental Relations in 1969 that 663,000 of the 1,434,000 full-time municipal employees were in non-civil service positions. *Id.* at 72.

eschewed,[4] attention can be focused on the constitutional issues involved in the operation of patronage systems.

The Present Division of Authority

The several tribunals which have considered the patronage question have demonstrated a disparity of opinion. Typical of the early cases supporting the right to dismiss an employee for political reasons is *Bailey v. Richardson*,[5] which reasoned that since the government is not obligated to employ an individual in the first instance, it is not constrained thereafter from dismissing him for any or no reason. More recently, in *Alomar v. Dwyer*,[6] the Court of Appeals for the Second Circuit held that if an employee is not covered by New York's Civil Service Law, his employment is terminable at will; relying heavily on *Bailey*, the court reasoned that, under such circumstances, no constitutionally protected right is abridged. The court emphasized the longstanding acceptance of the spoils system in concluding that protection against dismissal for political reasons must come from the legislature.[7]

However, the recent decision of the Court of Appeals for the Seventh Circuit in *Illinois State Employees Union v. Lewis*[8] may have signaled the demise of the political patronage system. When a new Illinois secretary of state commenced wholesale dismissals of employees retained by his predecessor,[9] several members of the Employees Union sought

4. One of the usual justifications put forth by supporters of the system is that political parties, as we know them, would simply disappear if no longer held together by the carrot and stick rewards of patronage. A sufficient rebuttal might emphasize that our political system was not founded for the purpose of facilitating the organization of political parties, and that, if necessary, they should give way in order to preserve the rights of individuals.

5. 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951).

6. 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972); *accord*, Norton v. Blaylock, 409 F.2d 772 (8th Cir. 1969).

7. *Accord*, American Fed'n of State, County, & Municipal Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

8. No. 4743 (7th Cir., Sept. 18, 1972).

9. In Illinois, the secretary of state has "more power than anyone else," according to Rep. John B. Anderson of Rockford, Ill. Without having to "gimmick" the civil service as the governor does, [he] runs the largest secretary of state office in the nation, reportedly controlling over 2,800 patronage jobs in the offices under his jurisdiction: motor vehicle registration, corporation charters, index division (which administers election laws), the registration of securities, and the state libraries.

To the Victor, *supra* note 2, at 106-07.

relief, alleging that the dismissals were based solely upon political affiliation.[10] The state's successful motion for summary judgment was reversed, and despite allegations that the firings were based on a need for administrative efficiency, the court held that the motive for the firings presented a question of fact requiring a full trial.[11]

Essential to the court's conclusion was its holding that an individual has a constitutionally protected right to participate in the political process.[12] In determining the circumstances under which such a right may be abridged, the court invoked a series of Supreme Court decisions, beginning with *United Public Workers v. Mitchell*[13] and culminating with the recently decided *Perry v. Sinderman*.[14] It was concluded that, regardless of the discretionary nature of the government's prerogative to hire or fire, it could not use its position to infringe constitutionally protected rights.[15] The court acknowledged that the interests of the state might justify some curtailment of individual rights, but it placed a heavy burden of justification upon the government—a burden the state was unable to carry in *Lewis*.

It appears, therefore, that the Supreme Court may be called upon to resolve the patronage question and to eliminate the existing division of authority among the circuits. Resolution of the issues will necessitate a re-examination of the constitutional precepts articulated in previous decisions.

Constitutional Protection for Political Activity

It has long been recognized that freedom of political association is protected by the first amendment. In *Sweezy v. New Hampshire*,[16] for example, the Supreme Court declared "freedom of speech or press [and] freedom of political association" [17] to be among the fundamental rights protected by the Constitution.[18] In *N.A.A.C.P. v. Alabama*[19] and

10. No. 4743 at 2.
11. *Id.* at 4-5.
12. *Id.* at 5-6.
13. 330 U.S. 75 (1947).
14. 92 S. Ct. 2694 (1972).
15. No. 4743 at 15.
16. 354 U.S. 234 (1957).
17. *Id.* at 245.
18. *See* MECHEM, PUBLIC OFFICES AND OFFICERS § 98 (1890): "[U]nder our republican form of government, the legislature can not make the holding of any particular public opinion a test of the right to hold office."
19. 357 U.S. 449 (1958).

United States v. Robel,[20] the Court affirmed the *Sweezy* rationale and concluded further that freedom of association is an inseparable aspect of the "liberty" assured by the due process clause of the fourteenth amendment, as well as a specific guarantee of the first amendment.[21]

A finding that the Constitution protects political associations, however, is merely a point of departure. The controlling question, once such rights have been identified, is clear: What kinds of state action are limited by an individual's right to political association? More specifically, may a state accomplish through indirect means what it is constitutionally forbidden to do directly?

THE STATE AS EMPLOYER: RIGHT VERSUS PRIVILEGE

When a constitutionally protected right is interjected into an employment situation, the broad questions which have been suggested become less abstract and more manageable. In an employment context, it becomes manifest that the provisions of the Constitution are susceptible to circumvention or dilution by various means.

It has been argued that a state has no obligation to act as a public employer in any capacity; consequently, when it elects to do so, it ought to have the same rights vis-à-vis its employees that are enjoyed by private employers. Since benefits can be withheld entirely, the state may also attach conditions to receipt of its largess, as it deems advisable. Proponents of this viewpoint contend, therefore, that the surrender of political freedom may be required as a qualification for state employment. Justice Holmes' famous statement that one "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" [22] has been cited frequently in support of this proposition. Acknowledging that political activity normally is a protected freedom, Holmes nevertheless sanctioned abridgement of that right by the state *qua* employer, although direct prohibition would have run afoul of constitutional limitations.

20. 389 U.S. 258 (1967).

21. 357 U.S. at 460. The incorporation of first amendment rights into the fourteenth amendment is usually dated from Gitlow v. New York, 268 U.S. 652 (1925).

"[T]he right to engage in political activity is an inherent right of citizenship, a fundamental requisite to the democratic process, and it involves even more than freedom of speech, association and assembly." Nelson, *Public Employees and the Right to Engage in Political Activity*, 9 VAND. L. REV. 27, 36 (1955).

22. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892).

Holmes' statement became a talisman of constitutional adjudication for the next 75 years[23] and served as a foundation for the rationale that became known as the "right versus privilege" doctrine. Under this label, the argument assumed a syllogistic form—if the government is doing something it is not required to do, it is granting a "privilege"; since, by definition, the grantee has no "right" of continuation of a "privilege," he has no grounds for complaint if the "privilege" is withheld for any reason.

During the 1950's the Court invoked similar reasoning in upholding the Hatch Act's interference with the first, ninth, and tenth amendments;[24] in sustaining prohibitions on state employment of those who advocated, or were members of groups which advocated, overthrow of the government by force or violence;[25] in acknowledging the right of a city to dismiss employees who refused to answer questions concerning their activity in the Communist Party;[26] and in upholding the suspension of a physician's license following his conviction for failure to produce papers concerning an organization which was under investigation by the House Committee on Un-American Activities.[27]

The difficulty with the "right versus privilege" doctrine and similar reasoning is the manner in which it has been applied. The Holmesian philosophy upon which it is based has been employed without serious consideration of its basic premise—that the individual remains free to choose between employment with the government and the exercise of his constitutional rights.[28] While it is true that an individual is not actually forced, through the application of legal sanctions, to take the former alternative, still, as a practical matter, the exercise of his rights, especially the right of political association, will foreclose a substantial

23. "Shepardizing *McAuliffe* yielded more than 70 cases, 77 percent of which resolved the decision against the constitutional claim being asserted." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1441 (1968) [hereinafter cited as Van Alstyne].

24. United Public Workers v. Mitchell, 330 U.S. 75 (1947).

25. Adler v. Board of Educ., 342 U.S. 485 (1952).

26. Lerner v. Casey, 357 U.S. 468 (1958).

27. Barsky v. Board of Regents, 347 U.S. 442 (1954), *aff'g* 305 N.Y. 89, 111 N.E.2d 222 (1953).

28. Although the doctrine normally is challenged on the ground that the government may not accomplish indirectly what it is constitutionally forbidden to do directly (*see* notes 32-36 *infra* & accompanying text), it seems that the most obvious line of attack would be through application of the equal protection clause. The exercise of constitutional rights is not a logical basis for discriminating among citizens in the dispensing of government benefits.

and growing portion of the employment market. The doctrine is under increasing challenge,[29] and, while it has not yet been completely overruled, it has been considerably vitiated by recent holdings.[30]

Development of the Unconstitutional Conditions Doctrine

In criticizing the right versus privilege doctrine, one commentator has written: ". . . the power to impose conditions is not a lesser part of the power to withhold, but instead is a distinct exercise of power which must find its own justification." [31] While the right versus privilege doctrine was being developed in the area of government benefits, the courts were grappling with the same fundamental considerations in the area of interstate commerce. In *Frost & Frost Trucking Co. v. Railroad Commission of California*,[32] the Supreme Court recognized the distinction between the power to impose conditions and the power to withhold benefits, when it formulated the doctrine of "unconstitutional conditions" to deal with state regulation of commerce. Justice Sutherland enunciated the doctrine's purpose in *Frost:* "The naked question which we have to determine . . . is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so." [33] This question was answered in the negative:

> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is conceivable

29. It has been argued, for example, that government spending, even discretionary spending, should relate directly to the general welfare, and that conditioning of benefits on the basis of political affiliation does not contribute to the general welfare. Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

30. Graham v. Richardson, 403 U.S. 365 (1971); *see* notes 37-47 *infra* & accompanying text.

31. Note, *supra* note 29, at 1609.

32. 271 U.S. 583 (1926).

33. *Id.* at 592-93.

> that guarantees embedded in the constitution of the United States may thus be manipulated out of existence.[34]

Essential to an understanding of the doctrine is the realization that it makes no attempt to confer upon the citizen a general right to the benefits granted by the government. Clearly, as Justice Sutherland said in *Frost,* the doctrine sets aside the question of right versus privilege and merely holds that when the government does decide to provide a service generally, it must refrain from using its powers to coerce a citizen into relinquishing an entirely unrelated right over which the state may exert no direct control.[35]

It is thus apparent that the courts have followed different paths in dealing with closely related subjects—conditions upon the exercise of individual rights, and conditions upon the right to participate in commerce. Since the questions are so clearly analogous, the extension of the doctrine of "unconstitutional conditions," from commerce to government benefits generally, was inevitable.

EXTENSION OF THE DOCTRINE

Commenting on the "unconstitutional conditions" doctrine, one observer has said: "[W]hatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly. As a consequence . . . [t]he net effect is to enable an individual to challenge certain conditions imposed upon his public employment without disturbing the presupposition that he has no 'right' to that employment." [36]

The Supreme Court has applied this rationale in several cases involving government attempts to deny certain benefits to Communists, to enforce loyalty oath requirements, and to dismiss arbitrarily certain non-tenured teachers and professors. In a series of cases arising under

34. *Id.* at 593-94.

35. *See* United States v. Chicago M., St. P. & Pac. R.R., 282 U.S. 311, 328-29 (1931). It should be noted that the Holmes aphorism was not entirely inconsistent with this viewpoint, the difference arising chiefly with respect to what controls or restrictions were considered justifiable—a question of degree. Holmes concluded his analysis in *McAuliffe* with the statement: "This condition seems to us reasonable. . . ." In light of the then inchoate status of what are now well-defined constitutional rights, it is dangerous to attach much weight to his original conclusion as an expression of the position which his court would have taken under present circumstances.

36. Van Alstyn, *supra* note 23, at 1445-46.

the Independent Offices Appropriation Act of 1953,[37] several state courts invalidated implementing statutes which forbade the rental of federally financed public housing to members of subversive organizations. In so doing, these courts rejected the assertion that indirect restrictions on political association are less violative of the Constitution than direct means to the same end.[38]

The courts applied the same unequivocal standard in cases which conditioned employment upon an affirmation of non-membership in subversive groups. In striking down such a statute in *Wieman v. Updegraff*,[39] the Supreme Court stated: "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion is patently arbitrary or discriminatory."[40] A similar statute providing that public employees who refused to answer questions concerning their jobs would be dismissed without charge, notice, or hearing was invalidated in *Slochower v. Board of Higher Education*.[41] Similarly, in *Keyishian v. Board of Regents*,[42] the Court, in overruling an earlier decision,[43] declared: "[C]onstitutional doctrine which has emerged since that decision has rejected its major premise. That premise was that public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. . . ."[44]

Analogous reasoning was employed in cases not involving direct government employment. Thus, the "unconstitutional conditions" doctrine was applied in cases such as *Speiser v. Randall*,[45] where a tax exemption for veterans was conditioned upon the filing of a loyalty oath

37. "[N]o housing unit constructed under the United States Housing Act of 1937, as amended, shall be occupied by a person who is a member of an organization designated as subversive by the Attorney General: *Provided further*, That the foregoing prohibition shall be enforced by the local housing authority. . . ." Act of July 5, 1952, ch. 578, § 101, 66 Stat. 403. This section was not repeated in subsequent appropriations acts.

38. Lawson v. Housing Authority, 270 Wis. 269, 70 N.W.2d 605 (1955), *cert. denied*, 350 U.S. 882 (1957). *See* Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 122 N.E.2d 522 (1954); Peters v. New York Housing Authority, 307 N.Y. 519, 121 N.E.2d 529 (1954).

39. 344 U.S. 183 (1952).

40. *Id.* at 192.

41. 350 U.S. 551 (1956).

42. 385 U.S. 589 (1967).

43. Adler v. Board of Educ., 342 U.S. 485 (1952).

44. 385 U.S. at 605.

45. 357 U.S. 513 (1958).

with the local tax assessor, and *Sherbert v. Verner*,[46] where South Carolina denied unemployment benefits to a Seventh Day Adventist who refused to accept employment that required Saturday labor. *Shelton v. Tucker*,[47] moreover, invalidated an ordinance requiring every teacher to file a yearly statement revealing all organizations to which he belonged. Although the Court did not explicitly apply the "unconstitutional conditions" doctrine, its opinion refers to the chilling effect of the law upon a teacher's rights and implies that an unconstitutional effect is prohibited.

It may be concluded that whatever the basis of any one decision—due process, equal protection, or simply that the government may not use indirect means to accomplish a forbidden result—the courts uniformly have rejected the proposition that the concept of an abstract "right" to government benefits is controlling.

UNCONSTITUTIONAL CONDITIONS AND PATRONAGE

The application of the "unconstitutional conditions" doctrine to patronage employment practices yields the inescapable conclusion that certain employees are protected, and the state may not exercise its power as an employer to "purchase"[48] rights secured to those employees by the Constitution.[49] However, if the burden of justifying its employment practices is placed upon the state, this result might appear to foreclose employment decisions necessary to administrative efficiency. It arguably engrafts quasi-civil service status on employees the state has chosen not to include in its own system. One means of resolving this problem, however, is suggested by *Freeman v. Gould Special School District*.[50] There, the Court of Appeals for the Eighth Circuit articulated its view of discretionary dismissal: "In Arkansas the board's right not to rehire a teacher in the school district appears to be absolute, except that the decision must not rest on grounds that are violative of

46. 374 U.S. 398 (1963).

47. 364 U.S. 479 (1960).

48. Reich, *supra* note 1, at 764, 779.

49. It should be noted that the Supreme Court has not yet seen fit to extend the doctrine of "unconstitutional conditions" to political patronage. In fact, it recently denied certiorari in Alomar v. Dwyer, 404 U.S. 1020 (1972). In addition, as noted in Judge Campbell's concurring opinion in *Employees Union*, No. 4743 at 23, any mention of *Alomar* and *Shapp* conspicuously is absent from the opinion in Perry v. Sniderman, 40 U.S.L.W. 5088 (1972).

50. 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969).

constitutional or legal rights."[51] Applying this logic to patronage cases, a state may exercise its discretionary power of removal, and may refuse to hire or rehire for any or no reason, as long as that reason does not constitute an impermissible abridgement of protected rights.[52]

This approach has been hailed as a workable formula to accommodate conflicting interests:

> First, it preserves the appearance of judicial objectivity. A court need not "weigh" or "balance"; it need simply apply the literal mandate of a given constitutional provision flatly to forbid government from conditioning its largess on any waiver of such a provision regardless of the circumstances. A court may thus avoid any unseemly appearance of acting as a superlegislature. Second, the doctrine greatly expedites decision making and provides clear guidelines in cases which might otherwise be especially difficult to resolve.[53]

Although the test arguably lacks a satisfactory degree of flexibility in situations where the government has a compelling interest in limiting or qualifying individual freedom because of the nature of the job,[54] this problem is not likely to arise within the narrow confines of well-defined patronage cases, especially in light of the willingness of many courts to allow "justifiable" restrictions of individual rights.[55]

A related problem is that of defining the protected class. The most common proposal is that persons in policy making positions be excluded.[56] Such a distinction proves simple at either end of the employment spectrum, but would be almost impossible to accomplish where

51. *Id.* at 1158.

52. No attempt has been made in this Comment to discuss issues of procedural due process. Without recognition of some minimum standard of conduct applied to the government in its role as employer, the concept of due process is meaningless. Obviously, a hearing in which an employee finds he has been released because of his political affiliation is fruitless unless he has some substantive right to enforce. If the *Freeman* rule is combined with the "unconstitutional conditions" doctrine, however, the situation is significantly different. Procedural due process becomes necessary to protect the substantive right. *See* Van Alstyne, *supra* note 23, at 1453; Comment, *Constitutional Rights of Public Employees: Progress Toward Protection*, 49 N.C.L. Rev. 302 (1971).

53. Van Alstyne, *supra* note 23, at 1447.

54. *Id.* at 1449.

55. *See, e.g.*, No. 4743 at 15.

56. Although the [constitutional protection] argument may be persuasive when the employee is not involved in policy making, it is not compelling when an individual's position involves both the formulation and execution of policy. Such a person is hired, in a very real sense, *because* of his

the groups shade together. As *Employees Union* concluded,[57] perhaps the only sensible approach is to await a case-by-case adjudication of the doctrine's limits.

More problematic are the practical limitations on the effectiveness of the proposal. Protection against dismissal for political reasons may prove illusory, since the employee must prove the political motive, and the proposal apparently allows a state to maintain that its decision was arbitrary without putting forth specific reasons for its actions. On the other hand, to the extent that the state is required to provide specific reasons for discharging particular employees, its efforts to achieve administrative efficiency may be thwarted, and the entire purpose of the proposal defeated. Thus, problems of determining the amount of evidence necessary to shift the burden of proof to the state, and determining what procedural safeguards should be extended to the employee, must be resolved before the effectiveness of the protection afforded the employee can be established.

CONCLUSION

The Supreme Court, in widely variant situations, consistently has disregarded the question whether a citizen has a vested right to government benefits[58] and has utilized the "unconstitutional conditions" doctrine to invalidate government attempts to use those benefits in obtaining leverage to compel the surrender of constitutional rights. Since it has long been acknowledged that the right of political association is constitutionally protected as a functional part of free speech, all that is required to proscribe politically motivated dismissals is the application of the Court's formula to that right. Indeed, it is difficult to understand why the same protection that is routinely extended to members of subversive organizations has not been extended uniformly to Republicans and Democrats as well.

> viewpoints. His job is to translate his beliefs into governmental action. If dismissals such as those . . . were constitutionally prohibited, the government could not refuse to hire an individual for . . . a position of policy formulation and administration because his views were diametrically opposed to that of the executive, and it would be virtually impossible to effectuate a change in governmental policy.

Note, *The First Amendment and Public Employees—An Emerging Constitutional Right to be a Policeman?* 37 GEO. WASH. L. REV. 409, 422 (1968).

57. No. 4743 at 25.

58. The question may be controlling, however, if the employee is asserting a violation of procedural due process. *See* Board of Regents v. Roth, 92 S. Ct. 2701 (1972).

Apparently, the courts have perceived a tacit distinction between those situations, perhaps based upon the long-standing public acceptance of the spoils system.[59] Yet, since no actual distinction is discernible from the opinions, and unless a justifiable basis for treating politically motivated dismissals as a separate class of cases is forthcoming, the constitutional mandate seems to compel the abrogation of this aspect of political patronage.

59. *See, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).