Michigan Law Review

Volume 49 | Issue 8

1951

CONSTITUTIONAL LAW-CIVIL RIGHTS-DISCHARGE OF TEACHERS FOR SUBVERSIVE ACTIVITY

William H. Bates
University of Michigan Law School

CONSTITUTIONAL LAW—CIVIL RIGHTS—DISCHARGE OF TEACHERS FOR SUBVERSIVE ACTIVITY—An action was brought seeking a declaratory judgment as to the constitutionality of New York's Feinberg law. The statute provided that the Board of Regents of the University of the State of New York should list organizations found to be subversive. Membership in such organizations was made prima facie disqualification for the position of public school teacher.[1] At the time of suit the Board of Regents had made no listing of subversive groups nor had any teacher been discharged under the provisions of this enactment. The supreme court of New York, special term, held the law unconstitutional;[2] the appellate division reversed.[3] *Held,* affirmed. The statute is not a denial of due process and does not constitute a bill of attainder, because the legislature

[1] 16 N.Y. Consol. Laws (McKinney 1946, 1950 Supp.) §3022; see also 16 N.Y. Consol. Laws (McKinney 1946) §3021; 9 N.Y. Consol. Laws (McKinney 1946) §12-a.

[2] Thompson v. Wallin, 196 Misc. 686, 93 N.Y.S. (2d) 274 (1949).

[3] See Lederman v. Board of Education of City of New York, 276 App. Div. 527, 96 N.Y.S. (2d) 466 (1950); L'Hommedieu v. Board of Regents of University of State of New York, 276 App. Div. 494, 95 N.Y.S. (2d) 443 (1950).

has authority to prescribe conditions of employment and removal of public school teachers. *Thompson v. Wallin,* 301 N.Y. 476, 95 N.E. (2d) 806 (1950).

In holding that there is no denial of due process of law under the Feinberg law the court chiefly relies on the premise that there is no taking of property, since a public employee has no right to retain his position.[4] Public employ is considered a privilege which is not protected by the procedural guaranties of due process applicable to a private right.[5] It is held that the legislature as the public employer can attach any reasonable condition which will advance the public interest.[6] However, it might be objected that the exercise of a privilege should never be subject to conditions which would be unconstitutional if the power to withhold the privilege did not exist.[7] Yet, the argument of unconstitutional conditions may be avoided and the law upheld, if there is deemed to be a valid exercise of a separate governmental power, such as the power of a state to regulate its public school system.[8] Nor would objections to a purported denial of freedom of speech appear applicable. Cases involving freedom of speech generally are decided by applying the clear and present danger test. This test has had a varied history,[9] but when it is applied today, a legislative determination that a condition presents a clear and present danger carries considerable weight when a statute is being scrutinized by a court; and in the present version of the clear and present danger test the danger need not be shown to threaten the existence of the government but only that it threaten something which is the proper subject of regulation by the government.[10] Since

[4] Superior Engraving Company v. NLRB, (7th Cir. 1950) 183 F. (2d) 783; Bruck v. State ex rel. Money, (Ind. 1950) 91 N.E. (2d) 349; Common School District No. 27 of Gasconade County v. Brinkmann, (Mo. 1950) 233 S.W. (2d) 768; Ladd v. Commonwealth, (Ky. 1950) 233 S.W. (2d) 517; People v. Deatherage, 401 Ill. 25, 81 N.E. (2d) 581 (1948); Heinlein v. Anaheim Union High School District, (Cal. App. 1950) 214 P. (2d) 536.

[5] Washington v. McGrath, (D.C. Cir. 1950) 182 F. (2d) 375; Bailey v. Richardson, (D.C. Cir. 1950) 182 F. (2d) 46; McAuliffe v. The Mayor and Aldermen of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). See, generally, 11 UNIV. PITT. L. REV. 336 (1950).

[6] United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556 (1947); Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 67 S.Ct. 544 (1947).

[7] Frost v. Railroad Commission, 271 U.S. 583, 46 S.Ct. 605 (1926); Western Union Telegraph Co. v. Kansas, 216 U.S. 1, 30 S.Ct. 190 (1910). See, also ROTTSCHAEFER, CONSTITUTIONAL LAW 555-557 (1939); Hale, "Unconstitutional Conditions and Constitutional Rights," 35 COL. L. REV. 321 (1935).

[8] See American Communications Association v. Douds, 339 U.S. 382, 70 S.Ct. 674 (1950).

[9] See Antieau, "The Rule of Clear and Present Danger: Scope of Its Applicability," 48 MICH. L. REV. 811 (1950).

[10] American Communications Association v. Douds, supra note 8; Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 69 S.Ct. 684 (1949); Whitney v. California, 274 U.S. 357, 47 S.Ct. 641 (1927). Because of the effect of the clear and present danger test and the superior level afforded the freedoms enumerated in the First Amendment, it has been suggested that statutes involving abridgment of these freedoms should be presumed invalid. See United States v. Carolene Products Co., 304 U.S. 144 at 152, footnote 4, 58 S.Ct. 778 (1938); and Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315 (1945). But the concept of presumed invalidity cannot be said to be the prevailing view. See Frankfurter, J., concurring in Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448 (1949). For a good discussion of the

the legislature has determined that members of certain groups present such a danger,[11] and because the state has complete control over its school system, the Feinberg law can be upheld[12] by applying the present day version of the clear and present danger test.[13] Other arguments against the statute also appear invalid. Thus, this statute does not improperly delegate legislative power to an administrative agency, for the standard governing what is a subversive group is stated to be a group adhering to the doctrine of overthrow of the government by force, violence, or other unlawful means,[14] and this standard has been judicially sanctioned as having a sufficiently clear meaning.[15] Although conviction based on guilt by association has been held to violate due process,[16] the Feinberg law does not authorize any prosecution for crime, nor does it invoke penal measures.[17] The presumption created by the statute seems to have the requisite rational basis[18] since the same acts which may cause a group to be listed as subversive constitute crimes in New York when performed by an individual.[19] A more serious objection is that the Feinberg law itself makes no provision for judicial review. However specific reference is made to the relevant section of the state civil service law which provides for the accepted procedure used in other cases of discharge of public employees.[20] Probably more important, the appellate division has indicated that the findings of the Board of Regents are subject to review, and that the presumption created by the statute is easily rebutted.[21] Until such time as it shall appear that the procedural interpretation indicated is

presumptions used by the lower courts in New York with regard to the Feinberg law, see 45 ILL. L. REV. 274 (1950).

[11] See 16 N.Y. Consol. Laws (McKinney 1946, 1950 Supp.) §3022, Declaration of Policy.

[12] American Communications Association v. Douds, supra note 8. Although it might be possible to obtain the desired discharges without the use of the Feinberg law [see 9 N.Y. Consol. Laws (McKinney 1946) §12-a, and 39 N.Y. Consol. Laws (McKinney 1946) §160, §161], still the effectiveness of wisdom of a statute is a legislative question, not judicial; see People v. Lloyd, 304 Ill. 23, 136 N.E. 505 (1922). Moreover, courts have exercised self-restraint in judicial review of state action as public employer. See Keim v. United States, 177 U.S. 290, 20 S.Ct. 574 (1900); Rogers v. Common Council of Buffalo, 123 N.Y. 173, 25 N.E. 274 (1890); 45 ILL. L. REV. 274 at 280 (1950).

[13] Usually, however, it is held that conditions for public employ need only meet the test of reasonableness. United Public Workers v. Mitchell, supra note 6.

[14] 16 N.Y. Consol. Laws (McKinney 1946, 1950 Supp.) §3022.

[15] Whitney v. California, supra note 10; Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925); Dunne v. United States, (8th Cir. 1943) 138 F. (2d) 137, cert. den. 320 U.S. 790, 64 S.Ct. 205 (1943), rehear. den. 320 U.S. 814, 64 S.Ct. 426 (1944).

[16] Bridges v. Wixon, 326 U.S. 135, 65 S.Ct. 1443 (1945).

[17] There is no attempt in the Feinberg law to make membership in a subversive organization a crime, nor are those who are members of such organizations prevented from exercising their right of free speech elsewhere than in the public schools.

[18] Manley v. State of Georgia, 279 U.S. 1, 49 S.Ct. 215 (1929); McFarland v. American Sugar Refining Company, 241 U.S. 79, 36 S.Ct. 498 (1916); People v. Mancuso, 255 N.Y. 463, 175 N.E. 177 (1931).

[19] Gitlow v. New York, supra note 15.

[20] See 9 N.Y. Consol. Laws (McKinney 1946) §12-a.

[21] Lederman v. Board of Education of City of New York, supra note 2; L'Hommedieu v. Board of Regents of University of State of New York, supra note 2.

not the one intended, the superior courts of New York are correct in declaring that the statute does not deny due process of law.[22] The contention that the Feinberg law constitutes a bill of attainder likewise appears invalid, for there is no condemnation or punishment by legislative action without judicial determination.[23] In addition, although it is not absolutely necessary for a bill of attainder that those at whom the statute is directed be specifically named, they must be clearly capable of determination;[24] and the Feinberg law has no such clarity of identification.[25] Moreover, although permanent exclusion from public service is sufficient punishment to constitute a bill of attainder,[26] many other recent cases indicate that statutes conditioning the exercise of privileges upon clarification of loyalty are not bills of attainder.[27]

William H. Bates

[22] A change in rules of evidence is not a denial of due process; People v. Turner, 117 N.Y. 227, 22 N.E. 1022 (1889). That the construction state courts place upon a state statute, and the manner of the statute's administration influence the statute's constitutionality, see Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894 (1949); Kovacs v. Cooper, supra note 10.

[23] Cummings v. Missouri, 4 Wall. (71 U.S.) 277 (1866).

[24] Cummings v. Missouri, supra note 23; Ex Parte Garland, 4 Wall. (71 U.S.) 333 (1866).

[25] The only mention in the Feinberg law of any group is made in the preamble and there not specifically; see 16 N.Y. Consol. Laws (McKinney 1946, 1950 Supp.) §3022, Declaration of Policy. A statute is construed without reference to the preamble unless there is an ambiguity. Hammond v. Frankfeld, (Md. 1950) 71 A. (2d) 482. Even if reference were made to the preamble of the Feinberg law, there still would not seem to be any imposition of penalty without a hearing.

[26] United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073 (1946); Norris v. Doniphan, 61 Ky. (4 Metc.) 385 (1863).

[27] American Communications Association v. Douds, supra note 10; Shub v. Simpson, (Md. 1950) 76 A (2d) 332; Smith v. Director of Civil Service, 324 Mass. 455, 87 N.E. (2d) 196 (1949). Cf. Imbrie v. Marsh, 3 N.J. 578, 71 A (2d) 352 (1950); Communist Party v. Peek, 20 Cal. (2d) 536, 127 P. (2d) 889 (1942).