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Article 9

Recent Decision: State's Right of Inquiry

hold the dignity of man and avoid his being discarded as a human being simply because he is helpless and no longer productive.[111]

Recent Decision: State's Right of Inquiry

The scales of justice not only balance right and wrong, but frequently are used to decide which of two competing rights may be exercised. The petitioning schoolteachers in *Shelton v. Tucker*[1] challenged a state's right of inquiry on the ground that it abridged their individual right to freedom of association. The State of Arkansas had passed a statute that compelled every teacher, as a condition of employment in state-supported schools, to file an annual affidavit listing *every* organization to which he has belonged or regularly contributed within the preceding five years. The United States Supreme Court held that the statute, as applied to teachers without job security safeguards, violated their rights under the fourteenth amendment to the Constitution by extending the state's right of inquiry into areas not reasonably related to occupational competence and fitness.

Realizing the sensitive area in which a teacher works, the state has a vital and necessary right of inquiry into the fitness and competency of the teachers it employs.[2] A "rule of reason"[3] will be applied to determine whether the state, in the exercise of legitimate inquiry, employs means which are consistent with the teacher's constitutional rights. In other words, when the state exercises its police power over liberty of the mind, it must do so in a reasonable manner.

It is reasonable for the state to protect the "integrity and competency"[4] of public employees by restricting them from doing acts, which, if done by private individuals, could not be restrained by legislative action.[5] Any direct inquiry based upon the standards of competency and fitness set up for public employment will be held reasonable.[6] All the state must establish is that the questions asked would be directly determinative of whether the required standards of competency and fitness have been met.[7] Whenever the state asks questions "wholly unrelated"[8] to the standards, it will be an unconstitutional infringement on personal liberties.[9] These liberties are guaranteed by the due process clause of the

111 *Hearing Before N.Y. Joint Leg. Committee on Problems of the Aging,* at 24 (March 10, 1960) (statement of Justice Brenner). For a recent article pointing out the current anxiety over this problem in New York see DeCain, *Commitment Procedures and the Non-Mentally Ill,* 33 N.Y.S. BAR J. 151 (1961).

1 364 U.S. 479 (1960).

2 Beilan v. Board of Educ., 357 U.S. 399, 405 (1958); Adler v. Board of Educ., 342 U.S. 485, 493 (1952).

3 Dennis v. United States, 341 U.S. 494, 568-69 (1951) (concurring opinion).

4 *Ex parte* Curtis, 106 U.S. 371, 373 (1882).

5 See Garner v. Board of Pub. Works, 341 U.S. 716 (1951); *cf.* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). Taking an active part in political campaigns is not a right guaranteed to government employees. "[F]undamental human rights are not absolutes. . . . [The] Court must balance the extent of the guarantees of freedom . . . to protect a democratic society against the supposed evil of political partisanship. . . ." *Id.* at 95-96. See Comment, 65 YALE L. J. 1159 (1956).

6 Beilan v. Board of Educ., 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 468 (1958); Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

7 *Ibid.*

8 Slochower v. Board of Educ., 350 U.S. 551, 558 (1956).

9 An inquiry for the purpose of rooting out subversives in the school system drawn without regard to the presence or absence of guilt was deemed an unreasonable use of the state authority in Sweezy v. New Hampshire, 354 U.S. 234 (1957). Whenever the dismissal is based upon inferences drawn from a valid assertion of a constitutional right, rather than from proven facts, such dismissal will be termed an unreasonable use of delegated power.

fourteenth amendment. Even if the state meets the procedural requirements of due process, the inquiry may still be unreasonable, if the substantive protections of due process have in fact been breached.

In the instant case, the question is whether demanding disclosure of *all* the organizations to which a teacher belongs has a direct bearing on whether the standards of competency and fitness have been met. Judicial concepts of what is "reasonable" are subject to variance, and the facts here involved precipitated a dissent which argued that the statute was reasonable and that the information disclosed was directly relevant. Where the teacher spends his time, and the nature of his contacts and associations are, in the opinion of the dissent, pertinent to ascertaining his professional fitness. But, as the majority indicated, this view does not give due weight to the practical fact that such an inquiry is in fact a "fishing expedition,"[10] resulting in an unwarranted inhibition of free association which the Court has allied to free speech – a right which lies at the foundation of our society.[11] Many, if not all, of the relationships inquired into by this expedition could have no possible bearing upon occupational competence or fitness, but could freeze scholarship "in an atmosphere of suspicion and distrust."[12] The power to inquire must be so reasonably exercised as not to unduly infringe upon the protected freedom of association.[13]

In the case of *NAACP v. Alabama,*[14] the Court, considering the purpose and climate in which the NAACP was carrying on its activities, held that a statute requiring membership lists was repugnant to the Constitution. The Court felt that the stated motive, the regulation of intrastate commerce, was a mere subterfuge, the real purpose being to obtain membership lists, which, if published, would subject these persons to harassment and embarrassment, in breach of their right to free association.

In *Bates v. City of Little Rock,*[15] the state failed to show, other than by a mere assertion of proper motive, a public interest to be protected. The Court, using the same criteria as in *NAACP v. Alabama,* placed the individual right above the state's power. Yet, when the state has asserted and proved a proper motive, as in the case where a state statute required disclosure of membership lists of the Ku Klux Klan, the statute will be held constitutional as being related to the public interest.[16] In the present case,

Konigsberg v. State Bar of Calif., 353 U.S. 252 (1957). If the answers to the questions asked a teacher will give no relevant information as to his fitness, then the inquiry must be considered unreasonable. Slochower v. Board of Educ., 350 U.S. 551 (1956).

[10] Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951).

[11] Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

[12] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[13] See cases cited note 11 *supra.*

[14] 357 U.S. 449 (1958). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462. "Whether there was 'justification' . . . turns solely on the substantiality of Alabama's interest in obtaining the membership lists. . . . [The Court was] unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing [upon intrastate business]. . . ." *Id.* at 464.

[15] 361 U.S. 516 (1960).

[16] New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928). The decision was based on the particular character of the Klan's activity which involved acts of unlawful intimidation and violence. The Court assumed that the legislature, when it passed the statute, was aware of this, and the Court itself took judicial notice of these facts.

the Court divided on the question of whether the statute itself violated the traditional notions of free association or whether an actual abuse of the statute would have to be perpetrated. The dissent adhered to the latter view. The majority, although holding the statute violative of the fourteenth amendment because of its unlimited and indiscriminate scope, may well have considered the climate in which the statute was passed. Was this "fishing expedition" really searching for occupational competence, or is the state attempting to learn if the teacher belongs to the NAACP or any other "unpopular" organization?

The scrutiny to which the Court has put the present statute raises the question of whether the Court viewed it as a possible collateral attack upon its decisions on civil rights. The statute as it stood was a potentially powerful weapon of subtle noncompliance with the spirit of the *Brown v. Board of Educ.*[17] decision. To understand this it is necessary to consider the job security under which teachers are employed in Arkansas. In Arkansas the teacher serves at the absolute will of those to whom the information must be entrusted.[18] Thus, a teacher may be dismissed without assigned cause. The Court, impliedly at least, considered it entirely possible that the information disclosed pursuant to the statute would be used to cause the teacher to be dismissed.[19]

The Court leaves open the question of whether the statute would be constitutional if the teachers were protected by tenure, civil service, or some other means of job security.[20] Assuming this was the procedure, the state would then have to show cause for a teacher's dismissal. The disclosure of a cause required under the procedural aspects of the due process clause of the fourteenth amendment would permit the judiciary to discover any subtle erosion of the teacher's substantive rights. This judicial power would allow discovery of any dismissal based upon an improper motive. Under such a safeguard, it may not have been necessary for the Court to take notice of the proximate and probable improper motive before there was an actual abuse. But, without these job security safeguards, the Court was properly constrained to take notice now, or any unjust dismissal under the Arkansas school system would be beyond the Court's protection.

[17] Brown v. Board of Educ., 347 U.S. 483 (1954).
[18] Shelton v. Tucker, 364 U.S. 479, 486 (1960).
[19] *Ibid.*
[20] *Id.* at 482.