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Constitutional Law--Feinberg Law--Dismissal of Teachers (Thompson v. Wallin, Lederman v. Board of Education, Matter of L'Hommedieu, 301 N.Y. 476 (1950))

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tically every judicial report of attempted extraterritorial collection of taxes in the United States has come from the state and federal courts of New York. . . ," [30] the *public interest* might well be safeguarded by precluding enforcement of foreign tax measures. Thus, public policy alone should be considered as the preclusionary element against effectuating foreign tax claims.

But complete evasion by some inevitably increases the burden of others. The ultimate solution, it is submitted, should be delegated to the Commission on Uniform State Laws for the purpose of improvising an undiversified code for the enforcement by each state of the revenue laws of foreign states, the result of which may well be reciprocal inter-state legislation.[31] The problem as regards foreign countries should be solved by resort to international conventions.

CONSTITUTIONAL LAW — FEINBERG LAW — DISMISSAL OF TEACHERS.—In three separate actions relief was sought to declare Section 3022 of the Education Law enacted in 1949, commonly known as the Feinberg Law, unconstitutional and to enjoin the Board of Regents of the State of New York from enforcing its provisions. Appellants contend that the Feinberg Law is incompatible with the freedoms guaranteed by the First Amendment to the Federal Constitution and by Section 8 of Article I of the State Constitution, that the Feinberg Law is a bill of attainder and that, as such, it violates Section 10 of Article I of the Federal Constitution, and that the statute is unconstitutionally vague and lacking in procedural due process. *Held,* the Feinberg Law is a valid exercise of the police power of the State, is not an arbitrary or unreasonable restraint on civil liberties, has none of the characteristics of a bill of attainder, is sufficiently clear to satisfy the requirements of procedural due process, and is therefore constitutionally unobjectionable. *Thompson v. Wallin, Lederman v. Board of Education, Matter of L'Hommedieu,* 301 N. Y. 476, 95 N. E. 2d 806 (1950).

The preamble [1] to the Feinberg Law extensively states the need

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[30] *Ibid.*

[31] But conventions consume energy, time and money. The most facile and plausible method whereby every state could collect its tax claims, would be to reduce that claim to a judgment. See note 6 *supra.*

[1] Laws of N. Y. 1949, c. 360, § 1. "The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or vio-

for and the purpose of the law. The directive provisions are embraced in a new section of the Education Law.[2] The law itself is

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lence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influences it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature."

[2] N. Y. EDUCATION LAW § 3022. "Elimination of subversive persons from the public school system

"1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article, or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appro-

free of surplusage. It recognizes and concerns itself with a major state problem and proceeds directly to meet the conditions found to exist. The court in considering the grounds for constitutional attack on the law regarded it as serving to implement the laws [3] previously enacted which prescribed statutory standards governing the conduct not only of teachers but of all persons employed by the state. The law in question now provides a basis for disqualification from employment by the state in the carrying on of one of its basic functions, namely, the education of its children.[4]

In passing upon the constitutionality of an act of the legislature the court may not substitute its judgment for that of the legislature as to the wisdom or expediency of the enactment.[5] The determination of the existence of a danger to society is a practical one, based on experience, and the courts are slow to declare that the legislature is wrong in its conclusion.[6] The New York Legislature having found the facts and directed the law against what it deemed to be an evil actually existing, the court in its review properly held that an inquiry into those facts would be beyond its field and a usurpation of the power of the legislature. Within those limits the court then proceeded to examine the contentions of the appellants.

The freedoms and civil rights guaranteed by the First Amendment to the Federal Constitution [7] and by Section 8 of Article I of the New York State Constitution [8] are not absolutes.[9] The police power of a state is the least restricted of all governmental powers and extends to all great public needs.[10] Thus a state may never

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priate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state."

[3] N. Y. EDUCATION LAW § 3021. (Removal of superintendents, teachers, and employees for treasonable or seditious acts or utterances.) N. Y. CIVIL SERVICE LAW § 12-a. (Any person who commits treasonable acts, publishes, prints, edits, issues or sells any publication advocating overthrow of the government, or who is associated in any way with a group advocating such, shall be ineligible for appointment to or retention in the service of the state.)

[4] N. Y. CONST. Art. XI, § 1. "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated."

[5] American Communications Assn., C.I.O. v. Douds, 339 U. S. 382 (1950); United Public Workers of America (C.I.O.) v. Mitchell, 330 U. S. 75 (1947); Gitlow v. People of New York, 268 U. S. 652 (1925); Mugler v. Kansas, 123 U. S. 623 (1887).

[6] Patsone v. Pennsylvania, 232 U. S. 138 (1914).

[7] U. S. CONST. AMEND. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[8] N. Y. CONST. Art. I, § 8. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. . . ."

[9] United Public Workers of America (C.I.O.) v. Mitchell, 330 U. S. 75 (1947); Gitlow v. People of New York, 268 U. S. 652 (1925).

[10] People of New York v. Nebbia, 262 N. Y. 259, 186 N. E. 694 (1933).

be deprived of its primary and basic right to protect itself against attack[11] since civil liberties themselves imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of abuse of privilege.[12] Abuse of the privileges of freedom is therefore excepted from the protection of the Constitution,[13] and the police power may be directed against dangers to society,[14] the infringement upon civil liberties being weighed against the seriousness of the threat to the public interest.[15] The legislature may not act arbitrarily or unreasonably,[16] and there are limits beyond which it cannot go.[17] The legislation must of necessity be directed at a clear and present danger;[18] in determining the existence of this danger, however, there is no mechanical test which can be applied,[19] the experience of mankind and the lessons of history in relation to existing facts and circumstances being the bases for decision.[20] Once this clear and present danger has been found to exist, the State is not compelled to await the success of the attack, but may then exercise its essential right of self-preservation by taking steps to *prevent* the threatened injury.[21] Thus a state is not inhibited from exerting its police power to prevent its own citizens from obstructing state and national purposes,[22] and statutes aiming to conform law to accepted community standards, even though infringing slightly upon civil liberties, are not to be struck down unless they are clearly unconstitutional,[23] but rather must be liberally construed so as to avoid doubtful constitutional questions[24] to the extent that the statute is essential to the attainment of the end in view.[25] The state having the right to reasonably regulate the conduct of its citizens clearly possesses the right to regulate the conduct of its employees, especially when the interest which the state is seeking to protect is one of such vital importance as the safeguarding of its children from subversive influence.

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[11] Gitlow v. People of New York, 268 U. S. 652 (1925).
[12] Cox v. New Hampshire, 312 U. S. 569 (1941).
[13] People of New York v. Most, 171 N. Y. 423, 64 N. E. 175 (1902).
[14] People of New York v. Nebbia, 262 N. Y. 259, 186 N. E. 694 (1933).
[15] American Communications Assn., C.I.O. v. Douds, 339 U. S. 382 (1950).
[16] United Public Workers of America (C.I.O.) v. Mitchell, 330 U. S. 75 (1947); Gitlow v. People of New York, 268 U. S. 652 (1925).
[17] Mugler v. Kansas, 123 U. S. 623 (1887).
[18] Schenck v. United States, 249 U. S. 47 (1919). See United States v. Dennis, 183 F. 2d 201 (2d Cir. 1950) for recent discussion of the clear and present danger concept.
[19] American Communications Assn., C.I.O. v. Douds, 339 U. S. 382 (1950).
[20] Patsone v. Pennsylvania, 232 U. S. 138 (1914); Hawker v. New York, 170 U. S. 189 (1898).
[21] American Communications Assn., C.I.O. v. Douds, 339 U. S. 382 (1950); Schenck v. United States, 249 U. S. 47 (1919).
[22] Gilbert v. Minnesota, 254 U. S. 325 (1920).
[23] Whitney v. California, 274 U. S. 357 (1927); People of New York v. Nebbia, 262 N. Y. 259, 186 N. E. 694 (1933).
[24] Fox v. Washington, 236 U. S. 273 (1915).
[25] People of New York v. Nebbia, 262 N. Y. 259, 186 N. E. 694 (1933).

It has been held that legislation which has as its purpose the promotion of efficiency and integrity in the discharge of official duties and the maintenance of discipline in public service is constitutionally valid.[26] And in considering Section 9 (a) of the Hatch Act[27] the Supreme Court held that Congress has the right, within reasonable limits, to regulate the political conduct of federal employees, and that when acts of employees menace integrity and competency, legislation is permissible to forestall the danger.[28] In such a case, the court must *balance* the guarantees of freedom against congressional acts designed to protect a democratic society.[29] Employment by the state in the carrying on of its constitutional functions is a matter of privilege, not a matter of right, and is therefore subject to the imposition of reasonable conditions by the state. This is best borne out by the words of Justice Holmes that "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [30]

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial." [31] Therefore, in order to strike down any enactment as a bill of attainder it must be found that it does in fact *impose a penalty without a hearing.* The reference made in the preamble of the Feinberg Law [32] to the Communist Party cannot be deemed to constitute a legislative determination of guilt because it is well settled that the preamble to a statute is not part of it and enacts nothing.[33] Furthermore, the provision of the act authorizing the listing of organizations found to be subversive [34] expressly provides for notice and a full hearing before such determination and listing.[35] No punishment is inflicted upon any organization listed pursuant to the law, such organizations remaining as free to function after as before the determination of the Board of Regents. Inasmuch as examination of the law discloses none of the essential elements of a bill of attainder, neither imposing punishment nor determining guilt by legislative act, it is submitted that the court correctly dismissed this contention.

The use of past conduct as a foundation for determination as to what future conduct will be does not negative the conclusion that an act is aimed to prevent future harm rather than to punish past

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[26] United States v. Wurzbach, 280 U. S. 396 (1930); *Ex parte* Curtis, 106 U. S. 371 (1882).
[27] 53 STAT. 1148 (1939), as amended, 54 STAT. 767, 18 U. S. C. § 61h (1940).
[28] United Public Workers of America (C.I.O.) v. Mitchell, 330 U. S. 75 (1947).
[29] *Ibid.*
[30] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N. E. 517 (1892).
[31] Cummings v. Missouri, 4 Wall. 277, 323 (U. S. 1866).
[32] Laws of N. Y. 1949, c. 360, § 1.
[33] Pumpelly v. Village of Owego, 45 How. Prac. 219 (N. Y. 1863).
[34] N. Y. EDUCATION LAW § 3022.
[35] *Ibid.*

action.[36] Loyalty and patriotism are sometimes as important qualifications for a teacher as knowledge, and it is within the province of the legislative branch to prescribe what evidence of qualification shall be furnished.[37] In *American Communications Assn., C.I.O. v. Douds* the Court stated ". . . they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct." [38] In a leading New York case it was held that "The presumption growing out of a *prima facie* case, however, remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." [39] In the light of these authorities and the fact that there is provision in the law [40] for judicial review of any order of ineligibility for a teaching position, it cannot be said that there is any lack of procedural due process in the directive clauses of the law in question.[41]

The novelty of the Feinberg Law may not be used as a basis of constitutional objection.[42] In view of the legislative determination of facts and circumstances constituting a menace to society, and the nature and language of the provisions of the Feinberg Law, it is submitted that the conclusion reached by the court is in accord with the weight of authority and is a reassertion of the state's right to use the police power to protect itself from internal threat.

CRIMINAL LAW—INSANITY DURING PROCEEDINGS—GROUNDS FOR NEW TRIAL.—A defendant was convicted of murder in the first degree. There was nothing in his demeanor during trial to suggest to the court or to any layman that he was incapable of understanding the proceedings or making a rational defense. When the verdict of guilty was announced the defendant harangued the court claiming to be the "messiah". Upon motion, he was taken to a hospital for observation, and adjudged as presently insane. Defendant was then removed to a state institution for the criminal insane. Five years later, having regained his sanity,[1] he was sentenced to death. The following day, a motion was made for a new trial on the ground

[36] American Communications Assn., C.I.O. v. Douds, 339 U. S. 382 (1950).
[37] Hawker v. New York, 170 U. S. 189 (1898).
[38] American Communications Assn., C.I.O. v. Douds, 339 U. S. 382, 413 (1950).
[39] Potts v. Pardee, 220 N. Y. 431, 433, 116 N. E. 78, 79 (1917).
[40] N. Y. CIVIL SERVICE LAW § 12-a, subd. d.
[41] N. Y. EDUCATION LAW § 3022.
[42] People of New York v. Nebbia, 262 N. Y. 259, 186 N. E. 694 (1933).
[1] People v. Wolfe, 198 Misc. 695 (County Ct. 1950).