Vanderbilt Law Review

Volume 9
Issue 1 *Issue 1 - December 1955*

Article 2

12-1955

# Public Employees and the Right to Engage in Political Activity

Dalmas H. Nelson

# PUBLIC EMPLOYEES AND THE RIGHT TO ENGAGE IN POLITICAL ACTIVITY

DALMAS H. NELSON*

## I. Freedom of Expression of Public Employees

Although the right to freedom of expression has become more narrowly circumscribed for everyone in recent years, the abridgments of this right that the courts have held may constitutionally be imposed on public employees are exceptionally extensive. This has been justified basically in terms of the doctrines that public employment is a privilege which the government may extend or withdraw at will and upon such terms as it chooses, and that denial of public employment does not constitute punishment. The upshot is that in this area the government may act with almost complete arbitrariness, even when basic rights such as freedom of expression are involved.

A considerable amount of administrative and legislative discretion in matters of public personnel management seems clearly to be essential to modern government. Crucial issues arise, however, when in the exercise of their discretion administrative authorities or legislatures invade the constitutional rights of public employees.

### 1. *Constitutional Restrictions*

Early restrictions on public employees' constitutional rights largely involved police and fire departments or employees in "police power" activities where discipline of a quasi-military sort is an important consideration.[1] Upon this ground the courts have sustained sanctions imposed on firemen for violating departmental rules against "publicly criticizing the official action of a superior officer"[2] and imposed on firemen and policemen for violating restrictions on the joining of labor unions.[3] With regard to public employees in general, there is some conflict among the judicial decisions on the power of the government to forbid its employees to form unions. But in most instances the courts have "agreed that the determination of the right of association

*Instructor in Political Science, University of Nebraska. The author is indebted to Professor Robert G. McCloskey of Harvard University for valuable criticisms and suggestions in the preparation of this paper. Sole responsibility for what is said in it rests with the author.

1. Sherman, *Loyalty and the Civil Servant*, 20 Rocky Mt. L. Rev. 381, 387 (1948).

2. State *ex rel.* Curtis v. Steinkellner, 247 Wis. 1, 10, 18 N.W.2d 355 (1945).

3. Hutchinson v. Magee, 278 Pa. 119, 122 Atl. 234 (1923); McNatt v. Lawther, 223 S.W. 503 (Tex. Civ. App. 1920); Carter v. Thompson, 164 Va. 312, 180 S.E. 410 (1935).

in the government service is inherently a policy-making function which will rarely be subject to judicial limitations."[4]

The largest category of restrictions on freedom of expression by government employees that the courts have upheld concerns the right to engage in political activity. In *Ex parte Curtis*[5] the Supreme Court sustained the congressional prohibition of all but a specified top-level category of federal officers and employees from "requesting, giving to, or receiving from, any other officer or employé of the government, any money or property or other thing of value for political purposes. . . ." In *United States v. Wurzbach*[6] the Court upheld the application of this prohibition to members of Congress and to candidates for Congress. A vast extension of this type of prohibition, to political activities generally, was sustained in *United Public Workers of America (CIO) v. Mitchell*,[7] discussed below.

It has been held that the constitutional privilege against self-incrimination does not apply to testimony by a federal employee which will cost him his job. It applies only, said the court, where testimony requested will subject the employee "to either criminal prosecution or imposition of a penalty under a federal law"; and the loss of a position is not "a forfeiture of a right."[8]

Under the comprehensive federal loyalty program, the holding of a government position has been made contingent upon loyalty as adjudged on the basis of the employee's associates and political views as well as his actions. This raises serious problems concerning such constitutional rights as freedom of speech, press, association and assembly, the right to engage in political activity, and the right to petition for redress. The President's loyalty program was held constitutional in *Washington v. Clark*.[9]

Section 9A of the Hatch Act[10] provides that it is illegal for a federal employee to belong to an organization advocating overthrow of the

4. GODINE, THE LABOR PROBLEM IN THE PUBLIC SERVICE 64 (1951). For instance, prohibitions against the joining of unions by city employees were upheld in City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947), and CIO v. City of Dallas, 198 S.W.2d 143 (Tex. Civ. App. 1946).

5. 106 U.S. 371, 374 (1882).

6. 280 U.S. 396 (1930).

7. 330 U.S. 75 (1947).

8. Pfitzinger v. United States Civil Serv. Comm'n, 96 F. Supp. 1, 2, 3 (D.N.J.), *aff'd*, 192 F.2d 934 (3d Cir. 1951). In a number of recent state cases the courts have upheld removals of public employees for refusing to testify in loyalty or other investigations on the basis of the constitutional privilege against self-incrimination. See Board of Educ. v. Eisenberg, 129 Cal. App. 2d 732, 277 P.2d 943 (1954); Faxon v. School Comm'n, 120 N.E.2d 772 (Mass. 1954); Lerner v. Casey, 138 N.Y.S.2d 777 (Sup. Ct. 1955); Daniman v. Board of Educ., 306 N.Y. 532, 119 N.E.2d 373 (1954), *rehearing denied*, 307 N.Y. 806, 121 N.E.2d 629 (1954), *appeal dismissed*, 348 U.S. 933 (1955).

9. 84 F. Supp. 964, 967 (D.D.C. 1949), *aff'd*, 182 F.2d 375 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 923 (1951).

10. 53 STAT. 1148 (1939), 5 U.S.C.A. § 118j (Cum. Supp. 1950).

government, and by executive order the Attorney General is authorized to provide administrative officials with listings of subversive organizations.[11] These listings are to be considered by such officials in deciding individual employee cases. A lower federal court has held that Section 9A of the Hatch Act and the executive order authorizing these designations by the Attorney General are constitutional.[12] The decision of the lower court was reversed by the Supreme Court, but the reversal turned on the procedure involved in the making of the lists rather than on the constitutional power to make such lists. Under the recent *Adler*[13] decision, a state may disqualify for employment in its schools any teacher who advocates forceful overthrow of the government. And the fact of advocacy may be presumed if the teacher is a member of any organization administratively determined, upon notice and hearing, to be an organization advocating forceful overthrow of the government, and if the teacher knows the organization advocates such overthrow. If the teacher holds membership in an organization under these circumstances, the burden may constitutionally be placed on him to prove his non-adherence to the organization's principles.[14]

Many loyalty oaths have been prescribed in federal, state and local governments in recent years. Most of the requirements have concerned affirmation of present non-belief in particular political doctrines and present non-membership in certain kinds of organizations. This type of oath, imposed as a condition for a government job, benefit, or legal right to carry on certain activities, has generally been held constitutional.[15] Under the decision in *Gerende v. Board of Supervisors*[16] a candidate for public office may be required, in order to gain a place on the ballot, to take an oath disclaiming any attempt forcefully to overthrow the government, and disclaiming membership in an organization which advocates such overthrow. The *Gerende* case applied to present affiliation, but in the *Garner* case[17] the Supreme Court sustained an oath requiring city employees to reveal past connections with "subversive groups." This constitutionally retroactive result arose from the fact that the oath applied only to the period following the enactment of a city charter provision which prohibited (with regard to city employees) the items later incorporated in the

11. 65 STAT. 615 (1951), 5 U.S.C.A. § 631 (Supp. 1954).
12. Joint Anti-Fascist Refugee Comm'n v. Clark, 177 F.2d 79, 84 (D.C. Cir. 1949), *rev'd on other grounds,* 341 U.S. 123 (1951).
13. Adler v. Board of Educ., 342 U.S. 485 (1952).
14. *Id.* at 492, 496.
15. See Annot., 18 A.L.R.2d 268, 274, 275 (1951). The leading case here is American Communications Ass'n, CIO v. Douds, 339 U.S. 382, *rehearing denied,* 339 U.S. 990 (1950). See, *e.g.,* Steiner v. Darby, 88 Cal. App. 2d 481, 199 P.2d 429 (1948), *cert. dismissed,* 338 U.S. 327 (1949).
16. 341 U.S. 56, 57, *rehearing denied,* 341 U.S. 923 (1951).
17. Garner v. Board of Pub. Works, 341 U.S. 716, *rehearing denied,* 342 U.S. 843 (1951).

oath. The Court in the *Garner* case also sustained a requirement that each employee file an affidavit with information concerning any past membership in the Communist Party or "Communist Political Association."[18]

Clearly, a finding by the government that an employee is disloyal, or lacks sufficient loyalty, is an extraordinarily severe blow to that person's reputation and to all his subsequent employment opportunities, public or private. It has been held, however, that the courts do not have jurisdiction to review dismissals made upon such findings, since by long tradition the courts "will not review managerial acts, not clearly arbitrary, of executive officials performed within the scope of their authority, and will not substitute their judgment . . . for that of the officials."[19] And under the holding of *Bailey v. Richardson*[20] a government employee may be fired on a charge of disloyalty without right of knowing or questioning the accusers, and without any explanation of the reasons.

### 2. *Limitations on Restrictions*

The foregoing is the main outline of what appear to be the restrictions that may constitutionally be imposed on the freedom of expression of public employees. But there are some limitations which the Constitution imposes in this field. One limitation arises from the fact that when government acting as an employer infringes upon the constitutional rights of individuals, there must be a reasonable relationship between the restrictions imposed and a constitutional legislative objective.[21] In general the courts have imposed this test upon governmental action as an employer,[22] but it is certainly not a sharp limitation.

A Missouri test oath requiring candidates for the public office, as well as voters, ministers and attorneys, to swear that they had never been rebels against the United States, or aided rebellion, or expressly sympathized with rebellion, was struck down by the Supreme Court as an ex post facto law and a bill of attainder.[23] The Court held that "disqualification from office may be punishment." The Court at this same time also held unconstitutional on the same grounds a similar

18. *Id.* at 720.
19. Friedman v. Schwellenbach, 159 F.2d 22, 25 (D.C. Cir. 1946), *cert. denied,* 330 U.S. 838, *rehearing denied,* 331 U.S. 865 (1947).
20. 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court,* 341 U.S. 918 (1951).
21. See the opinion of Justice Reed for the majority in the *Mitchell* case: "Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations on congressional power. . . ." 330 U.S. 75, 100 (1947).
22. See Note, 45 ILL. L. REV. 274 (1950).
23. Cummings v. State, 71 U.S. (4 Wall.) 277 (1867).

federal test oath upon federal attorneys.[24] Said Justice Field for the Court's majority: "[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."[25] In *United States v. Lovett*[26] the Supreme Court invalidated, as a bill of attainder, the attempt of Congress to bar permanently specified individuals from government service because of their political opinions. Permanent exclusion from the public service is punishment, said the Court, "of a most severe type." Further, in the recent *Garner* case[27] the Court indicated that the constitutional prohibitions against ex post facto laws limit the power of the government as employer. It is clear, therefore, that the government may not as an employer impose ex post facto laws or bills of attainder. In the light of these cases it might be considered that legislation barring individuals or definite classes from public employment because of political opinion or affiliation is unconstitutional.[28] However, a distinction has been drawn by the courts between a bar to employment that is imposed as a punishment for past conduct and one that is the effect of "reasonable qualifications" prescribed for employment.[29] In this manner measures have been upheld which, as we have seen, disqualify persons for government employment on the basis of their political beliefs or associations. At any rate, the constitutional limitations imposed by the bill of attainder and ex post facto clauses evidently have, under the recent cases, only a very restricted application in this field of government activity.

In *Atkin v. Kansas*,[30] involving a state law which regulated the working hours of public employees and employees of public contractors, the Supreme Court described in sweepingly broad terms the power of the state acting as an employer. The *Atkin* case was made the basis for the holding of *Heim v. McCall*[31] that a state may, despite the fourteenth amendment, completely bar aliens from employment on public works. These cases seem to indicate that a state may act as employer without any regard to the fourteenth amendment. A number of state courts have specifically so held.[32] Moreover, in *Snowden v. Hughes* the Supreme Court held that "an unlawful denial by state action of a right to state political office is not a denial of a right of

24. *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867).
25. *Id.* at 377.
26. 328 U.S. 303 (1946).
27. Garner v. Board of Pub. Works, 341 U.S. 716 (1951).
28. See Note, 60 HARV. L. REV. 779, 783 (1947).
29. See note 27 *supra*.
30. 191 U.S. 207 (1903).
31. 239 U.S. 175 (1915).
32. Goodrich v. Mitchell, 68 Kan. 765, 75 Pac. 1034 (1904); State v. Caldwell, 170 La. 851, 129 So. 368 (1930), *appeal dismissed*, 282 U.S. 801 (1930); Nashville v. Martin, 156 Tenn. 443, 3 S.W.2d 164, 166 (1928); Scopes v. State, 154 Tenn. 105, 112, 289 S.W. 363, 364 (1927).

property or of liberty secured by the due process clause."[33] And in *Bailey v. Richardson*[34] and *Washington v. Clark*[35] it was held that due process requirements do not limit government as an employer. However, in the *Adler* case the state statute, as we have seen, imposed a presumption of disqualification on a teacher who belonged to a listed subversive organization. The Supreme Court assumed that under due process requirements the presumption could not constitutionally be made more than a rebuttable one, nor could it apply to those who did not know the subversive purposes of the organizations to which they were affiliated.[36] The Court similarly assumed the due process clause to require a knowledge of the subversive doctrines of the organization in the *Gerende*[37] and *Garner*[38] cases, involving loyalty oaths. And in *Wieman v. Updegraff*[39] the Supreme Court held unconstitutional as a denial of due process an Oklahoma test oath which disqualified persons from public employment on the basis of organizational membership without regard to their knowledge of the nature of the organization. There are, moreover, several decisions by state courts to the effect that the equal protection clause of the fourteenth amendment prevents states from arbitrarily or discriminatorily excluding persons from public employment.[40]

In sum, there are certain constitutional limitations on the powers of the federal and state governments in dealing with their employees. But these are very broad limitations, and in most instances they are vaguely defined. The courts have actually given Congress and the state legislatures an almost completely free hand in this area.

---

33. 321 U.S. 1, 7 (1944), *rehearing denied*, 321 U.S. 804 (1944).

34. 182. F.2d 46 (D.C. Cir. 1950).

35. 84 F. Supp. 964, 967 (D.D.C. 1949).

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

37. Gerende v. Board of Supervisors, 341 U.S. 56, 57 (1951).

38. Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

39. 344 U.S. 183 (1952). On the authority of the *Wieman* case some state courts have recently held that the Constitution prohibits arbitrary exclusion of persons from government jobs. Nathanson v. Adams, 207 Misc. 572, 138 N.Y.S.2d 598, 601 (Sup. Ct. 1955); Haynes v. Brennan, 135 N.Y.S.2d 900, 902, 903 (Sup. Ct. 1954).

40. Terry v. Civil Serv. Comm'n, 108 Cal. App. 2d 861, 240 P.2d 691 (1952); Hamilton v. Brennan, 203 Misc. 536, 119 N.Y.S.2d 83 (Sup. Ct. 1953); Gianatasio v. Kaplan, 142 Misc. 611, 255 N.Y. Supp. 102, 105, 106 (Sup. Ct.), *aff'd*, 257 N.Y. 531, 178 N.E. 782 (1931), *appeal dismissed*, 284 U.S. 595 (1932); Ekern v. McGovern, 154 Wis. 157, 142 N.W. 595, 618, 619 (1913). In the *Gianatasio* case the court evidently considered the privileges and immunities clause as well as the equal protection clause to limit the state as employer. For judicial dictums that there are certain broad limits on the discrimination that can be imposed in public employment, see Thorp v. Board of Trustees of Schools for Industrial Educ., 6 N.J. 498, 79 A.2d 462, 469, *rev'd*, 342 U.S. 803 (1951) (cause then moot); People v. Crane, 214 N.Y. 154, 108 N.E. 427, 431 (1915), *aff'd*, 239 U.S. 195 (1915).

In a case involving the suspension of a fireman for public criticism of his chief, the Supreme Court of Florida affirmed the decision of the lower court ordering the fireman's reinstatement. Although the court did not mention the

## II. Right of Public Employees to Engage in Political Activity

### 1. *The Hatch Act Cases*

One of the most significant abridgments of the constitutional rights of public employees that the courts have sustained concerns the right to engage in political activity. The leading case is *United Public Workers (CIO) v. Mitchell*,[41] which sustained the Hatch Act of 1939. The act prohibits all officers and employees of the federal government, with the exception of a few top-level officers, from taking "any active part in political management or in political campaigns."[42] In a companion case, *Oklahoma v. United States Civil Service Commission*,[43] the Supreme Court upheld the Hatch Act of 1940, which applies this prohibition to state and local officers and employees mainly employed in activities partly or entirely supported by federal funds.[44] The sanctions in the case of federal employees include removal from office. To enforce the statute on the state and local level the Civil Service Commission is authorized in effect to compel removal of the alleged offender through the power of the federal government to withhold a designated amount of federal funds.

The scope of the Hatch Acts in terms of the number of persons involved and the kinds of activities proscribed is truly enormous.[45]

---

Fourteenth Amendment, it held: "We approach danger when we allow an employee to be disciplined for criticizing or voicing a want of regard for his superior's abilities. . . . An employee may express himself freely so long as he does not impair the administration of the service in which he is engaged." St. Petersburg v. Pfeiffer, 52 So. 2d 796 (Fla. 1951). And see also Kane v. Walsh, 295 N.Y. 189, 66 N.E.2d 53, 56 (1946).

41. 330 U.S. 75 (1947).

42. 53 Stat. 1148 (1939), 5 U.S.C.A. § 118i(a) (Cum. Supp. 1950).

43. 330 U.S. 127 (1947).

44. 54 Stat. 767 (1940), 5 U.S.C.A. § 118k (Cum. Supp. 1950).

45. The acts incorporated the proscriptions previously set out by the Civil Service Commission with regard to federal civil servants. These types of activity "in general" are:

> "1. Participation, except as a spectator, in political conventions. 2. Active participation, including speaking, in party primary meetings or caucuses. 3. Organizing, conducting, or addressing a public political meeting or participating in a political parade. 4. Holding the office of political committeeman. 5. Organizing, holding office in, or addressing a political club or committee thereof. 6. Soliciting, receiving, or otherwise handling political funds. 7. Distributing campaign literature. 8. Publishing or contributing to a partisan newspaper or publishing any letter or article for or against a party candidate or faction. 9. Any activity at the polls except voting. 10. Initiating or circulating nominating petitions. 11. Running for public office. 12. '[E]mployees are forbidden to become prominently identified with any political movement, party, or faction, or with the success or failure of any candidate. . . .'" Esman, *The Hatch Act—A Reappraisal*, 60 Yale L. J. 986, 990 (1951).

What is left for the public employee? He may: "1. Vote. 2. Contribute to campaign funds [but he is restricted here with regard to place and regarding fellow employes]. . . . 3. Join political organizations. 4. Attend political meetings. 5. Participate actively in civic associations or civic betterment groups. 6. Sign petitions. 7. Wear badges (but not at work). 8. Speak or write publicly on political subjects so long as they are not

Although Justice Reed, for the majority,[46] seemed at one point in the *Mitchell* opinion to acknowledge that public employees' constitutional rights to free expression existed, and that the court must "balance" these "against the supposed evil of political partisanship," he in fact went on to hold the act valid in terms which denied that these constitutional rights applied in any way to the case at hand. In holding the act constitutional the Court cited *Ex parte Curtis* and *United States v. Wurzbach* as precedents, and attempted to buttress its decision further by the separate arguments of administrative efficiency and the purification of the political process. Partisan political activity by employees may adversely affect employee morale, it may make difficult the "orderly management of administrative personnel," it creates the danger that promotions may become based upon political activity rather than merit, and it may produce partiality in administrative services to and regulation of the public as a result of political considerations. On the political-process side, Congress may have legitimately desired, in placing this restriction, to avoid a one-party system, to ensure that political parties serve the public interest to a greater degree than they could if public employees were "over-active politically," and to prevent political leaders from using government employees to create and develop political machines.[47]

But Justice Reed implied that all these considerations do not really matter because the congressional judgment is conclusive. The prohibition on political activities may not be necessary but this "does not mean that it is not desirable or permissible" under the Constitution. Congress and the Executive are responsible for the "discipline and efficiency of the public service." "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." The courts will not interfere unless the restriction imposed "passes beyond the general existing conception of governmental

connected with political campaigns [but see below, p. 183]" Esman, *supra* at 990-91. These allowable activities perhaps appear to leave the employee a great deal. But, as Morton R. Godine points out, "their substance is in fact negligible for the reason that they prevent civil service participation in political activity during election periods or the public expression of staff opinion upon issues which have become sufficiently vital as to be made the subject of partisan controversy." GODINE, *op. cit. supra* note 4, at 183. It is clear that the acts are sweeping in their coverage. Yet they leave some very serious questions only vaguely answered (see p. 37 *infra.*), but the Court upheld them anyway.

46. It was a five-to-two decision. Justices Jackson and Murphy took no part. Justice Frankfurter wrote a concurring opinion. Justice Black (with Justice Rutledge agreeing) dissented, maintaining that the Hatch Act was too broad in its restrictions to be justifiable under the first amendment and that it also probably violated the right of citizens under article I and the seventeenth amendment to vote in federal elections and "to have their votes counted." Justice Douglas dissented in part, holding that although the act could perhaps validly apply to employees in the "administrative" category, it could not do so with regard to "industrial" workers. 330 U.S. at 95.

47. 330 U.S. at 95-101.

power." And "that conception develops from practice, history, and changing educational, social and economic conditions." In this connection Justice Reed mentioned that there are a number of "court decisions upon similar problems," a long-standing practice by the Civil Service Commission of requiring civil servants to be politically neutral, and a "large body of informed public opinion."[48] Under Justice Reed's reasoning any constitutional rights of anyone could be freely abridged by Congress so long as the abridgment had some "reasonable" relationship to a legitimate legislative purpose. Presumably the Court meant to confine this result to public employees. It is clear that, although the only direct reference to the privilege doctrine is in a footnote,[49] this view of public employment was assumed by the Court, so that the public employee was regarded as being in a special category.

In the *Oklahoma* case the Court applied the privilege doctrine in another form to uphold the Hatch Act of 1940.[50] The Court in effect evaded the issue as to the constitutional right of state and local employees to engage in political activity by referring to the *Mitchell* decision.

The upshot of the *Mitchell* decision and the general line of related cases is that the government may act arbitrarily in hiring and firing, and that entrance into the public service means entrance into a second-class status, so far as constitutional rights are concerned. It seems fair to say that much of the willingness on the part of the courts to sanction this development arises from the fact that public administration theorists and civil service reformers have sometimes been so concerned with efficient and impartial administration and with the reduction of political corruption that they have failed to give adequate attention to the problem of protecting the constitutional rights of those who work for the government. There appears in many instances to have been a tendency to assume either that there are no constitutional problems involved, or that if there have been any they were clearly and soundly resolved by the *Mitchell* decision.[51] In view of the extensive and constantly increasing restrictions that are being imposed on public employees under the "cold war" atmosphere of the current scene, and in view of the large influence that the *Mitchell* case

48. 330 U.S. at 95-103.

49. Justice Reed quoted Justice (then Judge) Holmes's classical statement of the privilege doctrine in McAuliffe v. Mayor, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892). 330 U.S. at 99 n.34. See p. 40 *infra*.

50. The Court said that "while the United States . . . has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed." 330 U.S. at 143. Justices Black and Rutledge dissented, and Justices Murphy and Jackson did not participate.

51. See, for examples of these views: L. WHITE, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION 334-37 (4th ed. 1955); WILMERDING, GOVERNMENT BY MERIT 231 (1935); Epstein, *Political Sterilization of Civil Servants: The United States and Great Britain*, 10 PUB. ADMIN. REV. 281, 283 (1950); Heady, *The Hatch Act Decisions*, 41 AM. POL. SCI. REV. 687, 697 (1947).

and the reasoning and doctrines that underlie it have had on this whole development, it seems crucially important to raise the question whether the *Mitchell* decision is really sound from the standpoint of constitutional law and political and administrative theory.[52]

*2. The Cases and General Constitutional Doctrine*

The *Mitchell* case should, in the first place, be evaluated in terms of the general constitutional law regarding freedom of expression. Secondly, tests should be applied to the particular rationales that the Court supplied for its holding. The Court's decision was preceded by several state court holdings sustaining prohibitions of political activities by public employees. Significantly, these state cases exhibit a large amount of consistency in the criteria applied to test the prohibitions and in the reasoning pursued by the courts. Moreover, with one minor exception, all of the rationales employed by the state courts appear in the *Mitchell* opinion.

In deciding the *Mitchell* case the Court strikingly departed in two basic respects from the general path of constitutional law concerning freedom of expression: namely, in the matter of presumption of constitutionality and in the matter of vagueness. It is well-established judicial doctrine that where the unconstitutionality of a statute is alleged the courts will presume the statute to be constitutional if there is a "rational" connection between the statute and a purpose that lies within the legislature's delegated powers. However, the freedoms guaranteed by the first amendment occupy a "preferred position." The Court has held that in such cases only the existence of extraordinary and grave exigencies can justify the restrictive measures.[53] But even though these fundamental rights were involved in the *Mitchell* case, the Court adopted the "rational basis" test, abandoning its judgment to the legislature. This action of the Court seems all the more remarkable in view of the nature of the right involved in the case. There are certain rights of national citizenship that do not depend on the first or fourteenth amendment but are implied by the republican character of our government. Among these are the right to petition Congress for redress "or for anything else connected with the powers or the duties of the national government"[54] and the right to assemble and to discuss national laws and to supply information to other citizens with regard to such laws.[55] Similarly, the 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

52. The most penetrating criticism of the case that has appeared is Wormuth, *The Hatch Act Cases*, 1 WESTERN POL. Q. 165-73 (1948).

53. Thomas v. Collins, 323 U.S. 516, 530 (1945); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Thornhill v. Alabama, 310 U.S. 88, 104 (1940).

54. United States v. Cruikshank, 92 U.S. 542, 552 (1875).

55. Hague v. CIO, 307 U.S. 496, 512 (1939). And see Wormuth, *supra* note 52, at 165.

speech, association and assembly.[56] It does not appear, therefore, that the summary dismissal of questions of constitutional right by the Court in the *Mitchell* opinion was justifiable. Moreover, the Court refused to weigh the potential suppression of constitutionally protected conduct that is involved in the broad sweep of the statute. It had been judicial doctrine that it is not enough to save such a statute that the particular conduct in the case at bar could constitutionally be prohibited.[57] But it was enough for the majority of the Court in the *Mitchell* case. Under the vague language of the statute and the opinion[58] some very large questions as to what the public employee can do and say without risking valid sanctions under the statute are left unclear.[59]

*3. The Court's Reasons for Upholding Constitutionality*

The justifications offered by the Court in its opinion sustaining the Hatch Act of 1939 are a composite of the following elements: (1) precedents, (2) the privilege doctrine, (3) the needs of public administration, (4) the needs of the political process, and (5) legislative discretion in the light of what the Court called the "general existing conception of governmental power." These also embrace the rationales that the state courts have supplied in upholding Hatch-type measures on the state and local level.

*a. Precedents*

The Court in the *Mitchell* case relied, as we have seen, on *Ex parte Curtis* and *United States v. Wurzbach,* and the lower courts have similarly relied on the *Curtis* decision. But actually the statutes involved in the *Curtis* and *Wurzbach* cases were of a very different nature from the broadly restrictive legislation involved in the *Mitchell* case and in the bulk of the state cases. The former were "narrowly drawn" to meet a specific evil, namely the right of federal employees

56. See Santiago v. People, 154 F.2d 811, 813 (1st Cir. 1946); Lockheed Aircraft Corp. v. Superior Court, 153 P.2d 966, 975, 976 (Cal. App. 1944), *aff'd,* 28 Cal. 2d 481, 171 P.2d 21 (1946); Rosenfelder v. Huttoe, 156 Fla. 682, 24 So. 2d 108, 110 (1945).

57. See Thornhill v. Alabama, 310 U.S. 88, 97 (1940), and Note, *Political Sterilization of Government Employees,* 47 COLUM. L. REV. 295, 298 (1947). See also, on the problem of vagueness in statutes infringing on freedom of expression, Winters v. New York, 333 U.S. 507 (1948).

58. Said Justice Reed: "It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success." 330 U.S. at 100.

59. "After more than a decade, the question whether the Hatch Act may constitutionally prevent a federal employee from speaking in a political campaign is still in doubt. If thousands of federal employees have refrained from making speeches they want to make, because they cannot afford to risk their jobs, their freedom of speech is effectively curtailed. . . ." Davis, *Standing, Ripeness and Civil Liberties: A Critique of Adler v. Board of Education,* 38 A.B.A.J. 924, 926 (1952).

to get political contributions of money from other federal employees, inasmuch as such channels in fact provided the means of extortion. Justice Reed in the *Mitchell* case thought that the Hatch Act and the *Curtis* statute were analagous, since the latter was aimed at monetary contributions and the Hatch Act was aimed at "political contributions of energy." But a crucial distinction exists. In the *Curtis* case (and the *Wurzbach* case) every other avenue of political contributions of money was left open, and the Court in the *Curtis* case indicated that it was this fact which saved the statute from unconstitutionality.[60] The Hatch Acts, on the other hand, close every avenue of political action. *Ex parte Curtis* is, therefore, instead of a valid precedent for the *Mitchell* holding, actually "authority against the Hatch Acts,"[61] and it was so interpreted by the Supreme Court of Appeals of Virginia in *Louthan v. Commonwealth.*[62]

*b. The Privilege Doctrine*

As we have seen, a statute prohibiting political activity by public employees takes from those who work for the government constitutional rights which are retained by private citizens. When a court is faced with the problem of deciding the constitutionality of a Hatch-type statute, and it wants to hold the act valid, it is logically compelled to find some way to justify this discrimination. For this purpose the courts have usually resorted to the doctrine that working for the government is a privilege and not a right, and that therefore the public employee is a special case. This privilege doctrine thoroughly pervades the case law on public employment. The Supreme Court relied on it in the *Mitchell* case. In the great majority of cases on the state level upholding Hatch-type measures the courts have

60. See 106 U.S. at 373, 374.

61. Wormuth, *supra* note 52, at 172.

62. 79 Va. 196, 204, 52 Am. Rep. 626, 631 (1884). Here the court held unconstitutional a state statute forbidding certain state officers to be politically active. The court relied on *Ex parte Curtis* in finding the statute to be a denial of the constitutional rights of citizens. This appears to be the only case in which a prohibition of political activity by public employees has been invalidated. However, in *Rosenfelder v. Huttoe* the Supreme Court of Florida held invalid the dismissal of a police officer where the dismissal had been based in part on an alleged violation of a city charter provision against "taking part in a political campaign." The court did not find the provision unconstitutional but merely held that the action of the officer did not violate the charter. It justified its decision however by stating: "Neither is it competent for administrative officers, by rule or otherwise, to unduly restrict one's activity in a political campaign. Commerce in political opinion is essential to democratic government. . . .

"The City Charter does not attempt to define what constitutes taking part in a political campaign. . . . Some practices the Legislature may unquestionably forbid, but when it does it must provide a yard stick to measure them by. . . . Freedom of suffrage and political expression are as essential as freedom of the press." 156 Fla. 682, 24 So. 2d 108, 109, 110 (1945).

relied on it.[63] It has similarly provided a rationale in cases sustaining various other kinds of restrictions on the freedom of expression of public employees.[64] And it has been relied on in many cases involving government employees but not their freedom of expression.[65] The

63. Ricks v. Department of State Civil Serv., 200 La. 341, 8 So. 2d 49, 58, 59 (1942); McAuliffe v. Mayor, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892); State *ex inf.* McKittrick *ex rel.* Ham v. Kirby, 349 Mo. 988, 163 S.W.2d 990, 996 (1942); People *ex rel.* Clifford v. Scannel, 74 App. Div. 406, 414, 77 N.Y. Supp. 704, 710 (1st Dep't 1902), *aff'd* per curiam, 173 N.Y. 606, 66 N.E. 1114 (1903); Stowe v. Ryan, 135 Ore. 371, 296 Pac. 857, 862 (1931); Commonwealth v. Hasskarl, 21 Pa. Dist. 119 (1912); Duffy v. Cooke, 239 Pa. 427, 86 Atl. 1076, 1077 (1913) (quoting *Commonwealth v. Hasskarl, supra*); McCrory v. Philadelphia, 345 Pa. 154, 27 A.2d 55 (1942) (following *Duffy v. Cooke, supra*).

In a case involving a statute similar to the one in *Ex parte Curtis* the court also relied on the privilege doctrine. People v. Murray, 307 Ill. 349, 138 N.E. 649, 650 (1923).

64. Adler v. Board of Educ., 342 U.S. 485, 492 (1952); Bailey v. Richardson, 182 F.2d 46, 60, 61 (D.C. Cir. 1950), *aff'd per curiam equally divided*, 341 U.S. 918 (1951); Joint Anti-Fascist Refugee Comm'n v. Clark, 177 F.2d 79, 84 (D.C. Cir. 1949), *rev'd on other grounds*, 341 U.S. 123 (1951); Pfitzinger v. United States Civil Serv. Comm'n, 96 F. Supp. 1, 2, 3 (D.N.J.), *aff'd per curiam*, 192 F.2d 934 (3rd Cir. 1951); Washington v. Clark, 84 F. Supp. 964 (D.D.C. 1949), *aff'd*, 182 F.2d 375 (D.C. Cir. 1950), *aff'd per curiam by equally divided court*, 341 U.S. 923 (1951); Board of Educ. v. Eisenberg, 129 Cal. App. 2d 732, 277 P.2d 943 (1954); Hirschman v. Los Angeles County, 231 P.2d 140 (Cal. App. 1951), *aff'd*, 39 Cal.2d 698, 249 P.2d 287 (1952); Steiner v. Darby, 88 Cal. App. 2d 481, 199 P.2d 429 (1948), *cert. dismissed*, 338 U.S. 237 (1949); Perez v. Board of Police Comm'rs, 78 Cal. App. 2d 638, 178 P.2d 537 (1947); Goldsmith v. Board of Educ., 66 Cal. App. 157, 225 Pac. 783 (1924); Faxon v. School Comm'n, 120 N.E.2d 772 (Mass. 1954); Detroit v. Division 26 of Amalgamated Ass'n of Street Employees of America, 332 Mich. 237, 51 N.W.2d 228, *appeal dismissed*, 344 U.S. 805, *rehearing denied*, 344 U.S. 882 (1952); King v. Priest, 357 Mo. 68, 206 S.W.2d 547 (1947), *appeal dismissed per curiam*, 333 U.S. 852 (1948); City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947); Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462, 469, *rev'd on appeal*, 342 U.S. 803 (1951) (cause had become moot); Daniman v. Board of Educ., 306 N.Y. 532, 119 N.E.2d 373, *rehearing denied*, 307 N.Y. 806, 121 N.E.2d 629 (1954), *appeal dismissed*, 348 U.S. 933 (1955); Lerner v. Casey, 138 N.Y.S.2d 777 (Sup. Ct. 1955); Scopes v. State, 154 Tenn. 105, 289 S.W. 363, 364 (1927); CIO v. City of Dallas, 198 S.W.2d 143 (Tex. Civ. App. 1946); Seattle High School Chapter No. 200 of the American Federation of Teachers v. Sharples, 159 Wash. 424, 293 Pac. 944 (1930), 72 A.L.R. 1215 (1931).

65. Atkin v. Kansas, 191 U.S. 207, 223 (1903); Boone v. State, 170 Ala. 57, 54 So. 109, 111, 1912C Ann. Cas. 1065 (1911); State *ex rel.* Attorney Gen. v. Irby, 190 Ark. 786, 81 S.W.2d 419, 421, *cert. denied*, 296 U.S. 616 (1935); Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745, 750 (1932); Christal v. Police Comm'n, 33 Cal. App. 2d 564, 92 P.2d 416, 419 (1939); People *ex rel.* Gullett v. McCullough, 254 Ill. 9, 20, 98 N.E. 156 (1912); Mosley v. Board of Comm'rs, 200 Ind. 515, 165 N.E. 241 (1929); State *ex rel.* Jones v. Sargent, 145 Iowa 298, 124 N.W. 339, 342, 27 L.R.A. (N.S.) 719 (1910); Goodrich v. Mitchell, 68 Kan. 765, 75 Pac. 1034, 1036 (1904); Lewis v. Omaha, 153 Neb. 11, 43 N.W.2d 419, 422 (1950); Coleman v. School Dist., 87 N.H. 465, 183 Atl. 586 (1936); People v. Crane, 214 N.Y. 154, 108 N.E. 427, 430, *aff'd*, 239 U.S. 195 (1915); Gianatasio v. Kaplan, 142 Misc. 611, 255 N.Y. Supp. 102, 105 (Sup. Ct.), *aff'd*, 257 N.Y. 531, 178 N.E. 782 (1931), *appeal dismissed*, 284 U.S. 595 (1932); Commonwealth *ex rel.* School Dist. v. Tice, 282 Pa. 595, 128 Atl. 506 (1925); Hockman v. Tucker County Court, 75 S.E.2d 82, 85 (W. Va. App. 1953). In contrast to these cases is the holding that there is a constitutional right to work for the state in Terry v. Civil Serv. Comm'n, 108 Cal. App. 2d 861, 240 P.2d 691 (1952). And cf. Opinion of the Justices, 126 N.E.2d 100 (Mass. 1955), where the court refers to "the constitutional right of certain persons to engage in the occupation of teaching. . . ."

The courts have many times held to the effect that public office is not a "property right." See, *e.g.*, Taylor v. Beckham, 178 U.S. 548 (1900), and

statement of the theory by Justice (then Judge) Holmes has been very extensively quoted by the courts, in whole or part:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control.[66]

The doctrine may at first glance seem obvious, simple, and sound. But this apparent nature of the doctrine disappears upon closer analysis.

In the first place, the privilege doctrine overlooks the fact that government is a trustee of the public interest, and the general public has a stake in the exercise of their freedom of expression by government employees. Further, "To uphold a contract of employment by the state without considering the constitutional prohibitions involved is like upholding a peonage contract without discussing the Thirteenth Amendment."[67]

There is, moreover, considerable judicial doctrine in cases outside the field of public employment which either expressly repudiates the privilege doctrine as such, or repudiates it in particular applications. Thus in *Frost v. Railroad Commission* the Supreme Court held that a state may not "require the relinquishment of constitutional rights" as a condition for the receipt of a benefit or privilege.[68] And in *Terral v. Burke Construction Co.* the Court held that it is unconstitutional for a state to attempt to condition the grant of the "privilege of a foreign corporation's doing business in the state" upon the

---

Hillel v. Borough, 106 N.J.L. 481, 150 Atl. 385 (1930). There are a few cases to the contrary, however. See Rosenfelder v. Huttoe, 156 Fla. 682, 24 So. 2d 108, 110 (1945), and State *ex rel.* Ryan v. Norby, 118 Mont. 283, 165 P.2d 302 (1946). According to the court in the *Norby* case, "while . . . most courts have held that a public office is not property, there is a growing tendency on the part of courts to recognize a property interest therein at least for certain purposes."

66. McAuliffe v. Mayor, 155 Mass. 216, 220, 29 N.E. 517 (1892).

67. Wormuth, *supra* note 52, at 172.

68. 271 U.S. 583, 593, 594 (1926). In *Danskin v. San Diego Unified School Dist.* the Supreme Court of California held: "A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property." 28 Cal. 2d 536, 171 P.2d 885, 891 (1946). See also Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946), and the dissents of Justices Brandeis and Holmes in United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407 (1921).

In two recent state cases involving attempted exclusion of persons with subversive affiliations from public housing projects, the courts explicitly criticized and rejected the privilege doctrine in holding the exclusionary measures unconstitutional. Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 122 N.E.2d 522 (1954), and Lawson v. Housing Authority, 70 N.W.2d 605 (Wis. 1955).

corporation's "waiver of the exercise of its constitutional right to resort to the federal courts. . . ."[69] In the field of public employment, the Supreme Court of New Jersey has held that the legislature cannot impose unconstitutional conditions on the holding of a government job,[70] and the Supreme Court of Florida invalidated a statute requiring entrants into the civil service to waive their judicial remedies concerning disputes with the civil service board, and providing that board decisions on dismissals from the service should not be judicially reviewable.[71] Moreover, certain doubts about the privilege doctrine as applied to public employment appear in the recent opinion of the Supreme Court in *Wieman v. Updegraff*.[72] In sum, the constitutional law with regard to the privilege doctrine is deplorably muddled and contradictory.

It is not surprising that the constitutional law is chaotic in this regard if one considers the privilege theory from an additional standpoint, namely, the inner logic of the doctrine itself. It is in fact impossible to grasp what logic it really rests upon. It is of course incontrovertible that no particular individual has an absolute right to a government job. But it does not follow from this that the government may deny employment to everyone. Yet even if this latter proposition is granted—and it seems to be implicit in the privilege doctrine—it does not follow from it that the government may discriminate against the constitutional rights of government employees. Exclusion of everyone would not be discrimination.[73] The conclusion seems inescapable that the privilege doctrine is really incapable of solving anything, and it certainly confuses everything. If it is logically applied, it means that the public employee has no constitutional rights whatever. But, as we have seen, the courts have made it clear that he does have some. It cannot help to clarify matters to say that because no one has a right to public employment the public employee may be denied some constitutional rights but not others. The privilege doctrine seems simply to spare the courts of the task of giving an intelligible reason for sustaining a denial of a constitutional right. Ours is a democratic society based on a theory of limited, constitutional government. It may well be doubted whether the doctrine that government may condition the receipt of its benefits on a waiver of

69. 257 U.S. 529, 532 (1922). And see Western Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1 (1910).

70. Morgan v. Civil Serv. Comm'n, 131 N.J.L. 410, 36 A.2d 898, 900 (1944). And see Opinion of the Justices, 126 N.E.2d 100 (Mass. 1955).

71. Becker v. Merrill, 155 Fla. 379, 20 So. 2d 912, 914 (1944). And see the discussion above of the judicial decisions regarding the constitutional limitations on the power of the government to restrict the freedom of expression of its employees.

72. 344 U.S. 183 (1952). See also the dissent of Justice Frankfurter in Garner v. Board of Pub. Works, 341 U.S. at 724-29.

73. See Powell, *The Right to Work for the State,* 16 COLUM. L. REV. 99, 108 (1916).

constitutional rights, and in that way be enabled to act arbitrarily, is one which a society like ours can afford to hold.[74]

*c. Administrative Justifications*

In the *Mitchell* case and in about half of the decisions in the state courts sustaining Hatch-type statutes, the prohibitions on political activity were justified in terms of the need for administrative efficiency, impartiality, and faithfulness on the part of public employees.[75] It is said that it would be highly inconsistent to expect or require "a political party on coming into power to retain . . . employees who have actively and notoriously worked for its opponents."[76] Partisan activity by public employees gives rise to promotions and other types of rewards on the basis of political labors rather than merit, and this in turn disrupts employee morale.[77] Moreover, public servants are compensated for the restrictions on their political activity by the fact that they "can very properly make their opinions heard through the mouths of their political superiors, whom it is their right and duty to advise."[78] The danger of control of an agency by outside politicians in the place of the agency head and the possibility of loss of public confidence in the bureaucracy are other major reasons given in support of the principle of the Hatch Acts.[79]

---

74. See McCloskey, *The McCarran Act and the Doctrine of Arbitrary Power*, in PUBLIC POLICY 228, 246-48 (Friedrich and Galbraith 1953), and Note, *Judicial Acquiescence in the Forfeiture of Constitutional Rights Through Expansion of the Conditioned Privilege Doctrine*, 28 IND. L.J. 520 (1953).

75. See School City v. Sigler, 219 Ind. 9, 36 N.E.2d 760, 762 (1941); State *ex inf.* McKittrick *ex rel.* Ham v. Kirby, 349 Mo. 988, 163 S.W.2d 990 (1942); State *ex rel.* Baldwin v. Strain, 152 Neb. 763, 42 N.W.2d 796, 799 (1950); Stowe v. Ryan, 135 Ore. 371, 296 Pac. 857, 862 (1931); Lennox v. Clark, 87 Pa. D. & C. 289, 307, 308 (C.P. 1952), *aff'd in part, modified in part, and rev'd in part*, 372 Pa. 355, 93 A.2d 834 (1953); Commonwealth v. Hasskarl, 21 Pa. Dist. 119 (1912); Brownell v. Russell, 76 Vt. 326, 330, 57 Atl. 103 (1904). In Sarlls v. State *ex rel.* Trimble, 201 Ind. 88, 166 N.E. 270, 276 (1929), the court sustained a Hatch-type statute without any explanation, giving only a citation to People v. Murray, *infra*. And *cf. Ex parte* Darnell, 76 So. 2d 770, 781 (Ala. 1954).

The Court in *Ex parte Curtis*, dealing with a statute that placed certain restrictions on political contributions and solicitations of money, also relied on administrative efficiency as a justification. 106 U.S. 371 (1882). So also did the court with regard to a similar statute in People v. Murray, 307 Ill. 349, 138 N.E. 649 (1923).

76. MERIAM, PUBLIC PERSONNEL PROBLEMS 288 (1938).

77. WILMERDING, *op. cit. supra* note 51, at 234. Thus in a few cases the courts have justified Hatch-type statutes in terms of benefit to the employee. This involves an attempted extension of *Ex parte Curtis*. It is reasoned that suppression of his political activity removes from the employee the hazards of disqualification for or removal from office because of his political activity or lack of activity. See the opinion of the lower court in United Federal Workers, CIO v. Mitchell, 56 F. Supp. 621 (D.D.C. 1944); Duffy v. Cook, 239 Pa. 427, 86 Atl. 1076, 1077 (1913), followed in McCrory v. City, 345 Pa. 154, 27 A.2d 55 (1942); and State *ex rel.* Green v. City, 33 N.E.2d 35, 38 (Ohio App. 1940).

78. WILMERDING, *op. cit. supra* note 51, at 237.

79. *Id.* at 231-37; Esman, *supra* note 45, at 994-95.

What considerations should be weighed against these? The evils against which the Hatch Acts are directed are largely hypothetical.[80] And the Acts cut both ways in their impact on the nature of the public service. It may well be questioned whether entrance into public service of individuals of high caliber can be maintained on an adequate scale if such entrance puts them into a sub-citizenship status so far as their constitutional rights are concerned. Moreover, the Acts

> in part, at least, . . . attempt to eliminate issues of broad citizen concern from the range of legitimate employee interests. The result of such policies is to concentrate the attention of the bureaucracy upon a narrowly exclusive preoccupation with the material conditions of employment and virtually to assure the indifferent performance of public functions as well as to balk the emergence of a vital and creative citizenship among the ever-expanding ranks of government employees.[81]

This observation is particularly serious in the light of the fact that the bureaucracy is inescapably involved, on several organizational levels, in policy making. It "is not just an instrument to carry out a will formed by the elected Congress and President. It is itself a medium for registering the diverse wills that make up the people's will and for transmuting them into responsible proposals for public policy."[82] Given the tremendously influential position of the bureaucracy in our government, and the magnitude of the role of government in our modern life, the argument seems persuasive that "it is of critical importance that the bureaucracy be both representative and democratic in composition and ethos."[83] By imposing barriers

80. The empirical knowledge about the effects of political activity by public employees is evidently in a state of great uncertainty. Here is surely an area which deserves more inquiry by researchers.

In defense of the Hatch prohibitions it has been said, for instance, that they rest "on the view of American political behavior that was taken by Congressmen who may be assumed to have been politicians of considerable experience. It may be presumed that they know something about the evils against which they were legislating." Epstein, *supra* note 51, at 283. The government made arguments to similar effect in the *Mitchell* case, and the lower court in the *Mitchell* case apparently had something like this in mind when it referred to the "considered judgment of the Congress and of the President." 56 F. Supp. 621, 627. But there is considerable evidence that this represents an erroneous assessment of the amount of careful consideration Congress gave to the Hatch laws. See Mosher, *Government Employees Under the Hatch Act*, 22 N.Y.U.L.Q. REV. 233 (1947).

81. GODINE, THE LABOR PROBLEM IN THE PUBLIC SERVICE 192 (1951). Mr. Godine believes consequently that the restrictions on political activity should be considerably liberalized. Like several other observers however he favors this not as something to which employees are constitutionally entitled, but as something which the sovereign state should allow its employees as a matter of policy. See *id.* at 41-42, 173-92.

82. Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV., 808, 810 (1952).

83. *Id.* at 813. Professor Long maintains that "it is the balance of social forces in the bureaucracy that enables it both to perform an important part in the process of representation and to serve as a needed addition to a functioning division of power in government." *Id.* at 817.

between the public servant and vital public issues the Hatch Acts militate against the development of the breadth of understanding, outlook, and interests that members of the bureaucracy should have in light of their strategic importance. Further, "authoritarian administration" alongside democratic, constitutional government is an incongruity,[84] since in the former the constitutional rights of public employees are to a great extent unrecognized. Such a situation is not likely to help maintain a bureaucracy that holds and practices a democratic ethos.[85] Clearly, the doctrine of political sterilization of public servants needs to be rethought in administrative as well as legal terms.

*d. Political Justifications*

Interrelated to the propositions in support of the Hatch Acts in terms of the needs of public administration are the arguments for them in terms of the need to safeguard the political process. Such propositions were relied on by the Supreme Court in the *Mitchell* case and by several state courts in upholding Hatch-type measures,[86] and they are held by many students of public administration. The major arguments in this regard on behalf of the prohibitions on political activity by public employees include the following: (1) they are essential in order to combat the evils of political machines; (2) public employees need the protection such prohibitions afford against being coerced into making political contributions of time or money; and (3) in the absence of such prohibitions the party in control of the administration might compel employees to aid the party so that it becomes extremely difficult to defeat in an election, or a one-party system might develop in this connection, or their may be built up a bureaucratic "power bloc."[87] In *Green v. Cleveland*[88] the Court advanced the novel argument that the restriction actually was of great benefit to the employee because it would make him "freer to express and to vote his real convictions" since he "is protected from pressure and dictation from his superior officers. . . ."[89]

Here again the evils aimed at by the restrictive legislation are largely

84. See GODINE, *op. cit. supra* note 81, at 9.

85. "For a bureaucracy . . . is the core of modern government and in large part conditions the nature of political institutions and political morality. . . . An authoritarian bureaucracy is not only an unfit instrument to achieve broad democratic objectives but also it may jeopardize the very survival of representative institutions." *Id.* at 10.

86. State *ex inf.* McKittrick *ex rel.* Ham v. Kirby, 349 Mo. 988, 163 S.W.2d 990, 996 (1942); State *ex rel.* Baldwin v. Strain, 152 Neb. 763, 42 N.W.2d 796, 799 (1950); State *ex rel.* Green v. Cleveland, 33 N.E.2d 35, 38 (Ohio App. 1940).

87. See Epstein, *supra* note 51, at 281; Esman, *supra* note 45, at 994-95.

88. 33 N.E.2d 35, 38 (Ohio App. 1940).

89. *Id.* at 38. According to H. Eliot Kaplan, most of the government employees were "privately" glad to see the Hatch prohibitions enacted, as ridding them of coercion and political exploitation. *Political Neutrality of the Civil Service*, 1 PUB. PERSONNEL REV. 10, 17 (1940).

hypothetical. But the constitutional rights severed from the individuals involved are real and they are "essential both to the status of free citizen and to the functioning of democracy."[90] One of the basic rationales behind the presumption of constitutionality granted by the courts to a statute is that persons whose rights are affected can make their appeal to the voters. The striking feature of the Hatch Acts is that they not only remove the constitutional rights of several million citizens, but they also cut off "opportunity to take effective action to regain these rights." And such circumstances as these have "in the past been considered to be peculiarly appropriate for judicial intervention."[91] Further, freedom of expression has as one of its fundamental purposes the right of listeners to hear what is being expressed. The government cannot by definition be thought of merely as a private employer, since it is the trustee of the public interest, and this third party, the general public, has a constitutional interest in the political activity of government employees. Against such "purifications" of the political process as may result from the Hatch Acts there must be weighed the fact that the acts at the same time deprive the political parties and society in general of the active participation of several million citizens in public affairs.[92] It is indeed ironical if, in order to preserve the democratic process, we must cut off from participation the very persons who, as government employees, "are entrusted with the task of making democratic government work."[93]

In addition to imposing direct and immediate restrictions on the democratic process, the Hatch Acts and the rationales behind them contain some grave implications. As Justice Black pointed out in his dissenting opinion in the *Mitchell* case,[94] if government employees can be deprived of their constitutional rights because they might "exercise, or be susceptible to, a corrupting influence on politics or government," then it is equally supportable—in fact it is logically necessary—to prohibit farmers, businessmen, laborers, and so on from engaging in political activity since they clearly have a large and direct interest in governmental subsidies, regulations, and policies.

> A democracy is always open to the abuse of its instruments or the extraction of special privileges by interest groups which gain ascendancy among the conflicting social and economic forces operative within the community. The political neutralization of a specific group based upon

90. Wormuth, *supra* note 52, at 173.
91. *Id.* at 168.
92. William Seal Carpenter suggests, *e.g.*, that public employees should be able to obtain leaves of absence to run for political positions, since their experience in the public service would enable them to contribute to "improving the work of legislation and administration." THE UNFINISHED BUSINESS OF CIVIL SERVICE REFORM 76 (1952).
93. Heady, *supra* note 51, at 699.
94. 330 U.S. at 109. And see Wormuth, *supra* note 52, at 169.

> the possibility of such undesirable consequences would seem to constitute a repudiation of institutional arrangements which have become an integral part of the apparatus of a modern democratic state.[95]

Thus the difficulties and dangers involved in the justificatory principles of the Hatch Acts become particularly manifest when the logical application of the same principles to other groups besides government employees is envisaged. In *Crandall v. Nevada* the Supreme Court held invalid a state tax on the right of national citizens to travel to national offices, even though it was a nominal tax. The Court said that "if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars."[96] The *Mitchell* decision and the Acts it upheld seem to confirm the observation of the Court in *Crandall v. Nevada,* in view of their enormously restrictive implications. For

> democracy rests on the assumption that purity in government is to be achieved not by restriction but by extension of participation. . . . The direction and the ultimate tendency of the Hatch Acts are profoundly at variance with the political principles upon which our government rests.[97]

If there are some evils sufficiently serious and extensive as to justify some types of restrictions on political activity of government employees—and the courts should themselves inquire whether this is so and not simply defer to the legislature—then it is also desirable and appropriate for the courts to inquire as to the availability of alternative means of accomplishing the ends sought. In the *Mitchell* case the Court said that "to declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system."[98] But surely the situation cannot validly be reduced to such all-or-nothing alternatives. The same argument would support abandonment of judicial review in every field where constitutional rights are involved. Justice Douglas, dissenting in the *Mitchell* case, suggested a distinction between administrative officers and industrial employees as a basis for deciding where restrictions on political activity should and could

---

95. GODINE, *op. cit. supra* note 81, at 186-87.

96. 73 U.S. (6 Wall.) 35, 46 (1868). And see Frost v. Railroad Comm'n, 271 U.S. 583, 594 (1926): "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 inconceivable that the guarantees embedded in the Constitution . . . may thus be manipulated out of existence."

97. Wormuth, *supra* note 52, at 169.

98. 330 U.S. at 95.

constitutionally be placed.[99] But this seems too broad. The political rights of all kinds of employees are important, not only to the employees themselves but to society, and the tests applied to determine whether restrictions are justified ought to be just as rigorous in the case of those in any one category as of those in any other. The different nature of employee tasks should be taken into account. But the fact that a person is in a particular category does not justify the assumption that restricting his right to political activity raises no constitutional questions of the same order as in the case of those in any other category.

It ought to be possible without the broadly restrictive provisions of the Hatch Acts to prevent government employees from engaging in political activities during official working hours and to prevent them from exhibiting either the appearance or the substance of partisanship in the course of their official duties—in those positions where this really matters. Further, the Hatch Acts should not be necessary for the realization of another valuable objective, the fidelity of employees to and their cooperation with their political superiors regardless of personal feelings or political philosophy. Here there could well be increased reliance on the development of the ethical standards of the public service.[100] As the late Harold J. Laski observed in his remarks on the British Civil Service, "loyalty and detachment . . . are qualities quite distinct from political convictions and party preferences."[101] Congress, the President, and the administrative agencies have an obligation to endeavor to develop rules under the merit system which safeguard the system without denying basic rights of public employees. Professor Laski's recommendation concerning the British Civil Service seems instructive in this regard:

> It is enough if an official in the Executive, or the Clerical class, give an undertaking, whether he becomes a Parliamentary candidate or takes an active interest in his party, not to discuss in public the affairs of the Department to which he belongs, nor to reveal information which he obtains by virtue of his position in the Service. . . .[102]

It is certainly desirable to protect employees from being compelled to make political contributions of time or money, whether such contributions are to aid the administration in power to win an

99. Morton R. Godine, for instance, suggests on the other hand the possibility of distinguishing in this regard between rank and file and supervisory personnel in practically all categories of public employment. *Op cit. supra* note 81, at 190. And *cf.* LASKI, REFLECTIONS ON THE CONSTITUTION 191-92 (1951). According to Wallace S. Sayre, some particular categories perhaps require special restrictions, but "all of them are small groups and their special problems cannot easily be made the basis of restrictions upon all public employees." *Political Neutrality,* in PUBLIC MANAGEMENT IN THE NEW DEMOCRACY (Marx ed. 1940).

100. See Sayre, *supra* note 99, at 214-15.

101. *Id.* at 190-91.

102. *Id.* at 192.

election or for any other purpose. But, as Justice Black suggested in his dissent in the *Mitchell* case, if coercion is the danger, the thing to do is to punish those who impose the coercion, instead of depriving millions of their political rights because they might be coerced.[103] It should also be possible to protect security of tenure and promotion by merit without severing political rights in the sweeping fashion of the Hatch Acts. There has in the past been a tendency to assume too readily that the merit system and partisan activity by employees are antithetical. According to Morton R. Godine,

> it would be a palpable oversimplification of history and indeed a reversal of a causal sequence of events to contend that the political activity of civil servants was a principal factor in the emergence of the spoils system. It is neither reasonably certain nor logical to conclude that the exercise of political rights by civil servants in a *professionalized* bureaucracy would inevitably lead to its corruption by spoilsmen.[104]

It is significant that in Britain, where the doctrine of political neutrality on the part of the civil servant had its origins, the long term trend has been selectively to relax the prohibitions on political activity to a very considerable extent. Britian has nothing comparable to the broad prohibitions of the Hatch Acts. The restrictions that are imposed upon public employees in this regard vary, "depending upon the nature of their work and their relations to the public."[105] It certainly cannot be denied that Britain's "concern for the values of effective administration and political liberty is as serious and vital as our own."[106]

*e. Judicial Deference to Legislative Discretion*

We have seen that, although the Court in the *Mitchell* case relied for support of its decision upon propositions concerning public administration and the political process, it held that these were not really

---

103. 330 U.S. at 113. Some commentators deny the feasibility of this. See Epstein, *supra* note 51, at 283. "It would be no small matter to distinguish between political activity that was voluntary and that which was coerced." Cf. Esman, *supra* note 45, at 991.

104. GODINE, *op. cit. supra* note 81, at 187.

105. SPERO, GOVERNMENT AS EMPLOYER 55 (1948).

106. Epstein, *supra* note 51, at 282. Mr. Epstein believes that the British have been able to liberalize their system of restrictions because they have not had to worry about the use of public employees in political machines. The United States is not so mature, he says, as to be free from this worry and therefore it must be cautious in lifting any of these restrictions. That is, "in the United States it would be necessary . . . to learn whether any given portion of the government service was removed from the sphere of possible activities of political machines." *Id.* at 290. This argument is indicative of the uncertainty of empirical knowledge about the effects of political activity by public employees on the political process. If in the last analysis the justification of the Hatch Acts is to lie in their prevention of the possible exploitation of government employees by political machines, the acts seem an extremely high price to pay to meet an evil of uncertain existence and dubious seriousness.

essential considerations because the legislative decision binds the courts on this issue. There is no limitation on Congress herein, said the Court, except insofar as the restriction exceeds "the general existing conception of governmental power." The Court found this "existing conception" in part in the traditional practice of the Civil Service Commission prohibiting political activity by civil servants. To that extent consequently the Court rested the denial of basic constitutional rights on the factual existence of certain executive practices. This clearly collides with *Wilkes v. Wood*,[107] according to which traditional executive practices do not change the law. Said Lord Chief Justice Pratt in the *Wilkes* case:

> It is my opinion the office precedents . . . are no justification of a practice in itself illegal, and contrary to the fundamental principles of the Constitution; though its having been the constant practice of the office, might fairly be pleaded in mitigation of damages.

Whatever its views about the elements that compose the "existing conception of governmental power," the Supreme Court was not justified in introducing this vague doctrine as the only outer limit to the power of Congress to take away the constitutional rights of those who work for the government. That the courts should sustain loyalty oaths through which the government in effect deprives men of their livelihoods because of their thoughts, and removals from office upon a brand of disloyalty without any procedural protection whatever, is not a surprising development in the wake of the *Mitchell* decision.

## III. Conclusion

In sum, the Court had to abandon the established path of the constitutional law to find that the Hatch Acts do not raise problems of constitutional rights. The privilege theory relied upon as a justification for the departure is insupportable. Not only were the two cases relied upon by the Court as precedents inappropriate, but the major precedent, *Ex parte Curtis*, actually is in contradiction to the *Mitchell* case. Although the acts were designed to achieve safeguards concerning government administration and our political process, there is considerable uncertainty as to the existence of the particular evils aimed at. Such benefits as may be derived from the acts are not persuasive when weighed against the loss of constitutional rights, the restrictions on the democratic process, and the adverse effects on the public service itself. Moreover, there is abundant reason to believe that all of the really significant problems the Hatch Acts were designed to meet may be adequately coped with by means far

107. Lofft 1, 98 Eng. Rep. 489, 19 State Trials 1154, 1167 (C.P. 1763).

less drastic than those acts. Congress, state legislatures and administrative authorities ought to observe extreme caution in imposing restrictions on the constitutional rights of any government employees.[108] The courts ought likewise to be extremely scrupulous in considering the constitutionality of such legislation. In short, the *Mitchell* decision ought to be overruled and the courts ought to uphold only those restrictive statutes or rules which they find narrowly drawn to meet a specific and sufficiently grave evil that is not remote in its possibilities.

108. See Heady, *supra* note 51, at 699. He suggests as a "guide for re-examination" of the Hatch Acts "that public employees should be shorn of political privileges [as he regards them] only when correspondingly substantial benefits accrue to the civil service system."