from destruction by Communism, there is vital need to salvage constitutionally guaranteed rights from annihilation by these same efforts. Both courts and legislatures should re-examine the Communist threat and should then determine whether recent laws do themselves present more of a threat to our freedom than does subversion.

JUDICIAL ACQUIESCENCE IN THE FORFEITURE OF CONSTITUTIONAL RIGHTS THROUGH EXPANSION OF THE CONDITIONED PRIVILEGE DOCTRINE

Mr. Justice Douglas, dissenting in *Adler v. Board of Education of the City of New York,* declared: "I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights. I cannot for example find in our constitutional scheme the power of the state to place its employees in the category of second class citizens by denying them freedom of thought and expression."[1] It is both surprising and noteworthy that Mr. Justice Douglas regarded as recent doctrine the prerequisite that one forego the exercise of constitutional rights before becoming eligible for participation in a governmental activity or benefit, for this stipulation has received judicial approval for nearly a century.[2] At first glance, such an exaction by the

. . . Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues. . . ." *Id.* at 261-262.

Yet in Thomas v. Collins, 323 U.S. 516, 530 (1945), Mr. Justice Rutledge warned that ". . . any attempt to restrict those [First Amendment] liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. . . ." See Frank, *The United States Supreme Court: 1951-1952,* 20 U. OF CHI. L. REV. 1, 24-29 (1952).

If state subversion legislation cannot be condemned as "unreasonable" or "without rational basis," then many of these laws will stand. State statutes which impose those severe regulations heretofore discussed may well be declared constitutional though the rights of speech, press, and assembly and the sanctity of the belief must be sacrificed by such a determination. The price of combating Communism and subversion by this method is too great; liberty at so large a sacrifice is not liberty at all.

1. 342 U.S. 485, 508 (1952).

2. *E.g.,* Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); United Public Workers

government appears to be unusual but closer examination of techniques currently utilized in dealing with unpopular minority groups reveals that such requirements are rapidly becoming the *modus operandi.*[3]

Today, communism represents a threat to freedom, and, consequently, communists, left-wingers, and fellow-travelers are undesirable groups. Given the distasteful ideas and causes, the paramount concern becomes the selection of appropriate methods for discovering those who believe and espouse them.

The government has sought to protect itself and its citizens from the evils inherent in communism by making the advocacy of overthrow of the government a crime. The techniques and procedures employed to achieve this goal are as lucid and definite as the motivation itself, for when it is a crime to advocate overthrow of the government, or to be a communist, the individual accused of violating the law receives the full protection of the criminal process. Intent is usually a prerequisite to conviction[4] and proof of violation must be made within the safeguards furnished by evidentiary rules. Since there is a presumption of innocence in criminal cases, the state must prove beyond a reasonable doubt that the accused advocates forceful overthrow or is a communist. Should the accused be convicted, his punishment may be a fine or imprisonment or both. Although the federal government[5] and most states[6] have made the advocacy of violent overthrow of the government a crime, relatively

---

v. Mitchell, 330 U.S. 75 (1947); *Ex parte* Curtis, 106 U.S. 371 (1882); *Ex parte* Garland, 4 Wall. 333 (U.S. 1867); McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892); *Ex parte* Hunter, 2 W.Va. 122 (1867).

3. Throughout history, instances can be found of the subjection of unpopular groups to persecution of various kinds and degrees because they supposedly constitute a threat of some sort to the majority of their contemporaries A cursory glance at the plight of the Christians under Roman rule, the oppression and annihilation of the Jew under Nazism, the infamous inquisition in Spain, and the discriminatory treatment inflicted upon the founders of this nation by the tyrannical policies of George III should suffice to illustrate the universal nature of this persecution. Many so-called threats are illusory and momentary at best; many are substantial and continual. A generation faced with such a menace should determine which of the two types it is before affirmative action is taken; however, the very persons who must make this determination are many times so intimately concerned with the problem that their sense of reason becomes clouded so as to hide from them the real factual danger that the menace presents. See CHAFEE, FREE SPEECH IN THE UNITED STATES c. 2 (1941). Later generations looking at the issues in retrospect often come to the scholarly conclusion that their ancestors were overwhelmed by unfounded fear and reacted, as frightened people do, by taking the most drastic measures to obviate the threat.

4. Indiana has a statute making it a felony to be a member of the Communist Party. On the face of it, no intent or knowledge of the purpose of the party is necessary for conviction. IND. ANN. STAT. § 10-5204 (Burns Supp. 1951).

5. 54 STAT. 670 (1940), 18 U.S.C. § 2385 (Supp. 1952).

6. For a compilation of these statutes as of January 1, 1951, see GELLHORN, THE STATES AND SUBVERSION, App. A (1952).

few individual members of the Communist Party have been prosecuted and convicted under these laws.

The sovereign's fear of possible communist infiltration into positions of responsibility in government where such forces could seriously undermine the efficient operation of the governmental machinery and cause irreparable damage to the nation has led to the institution of the security and loyalty programs. The government's purpose which gave birth to these programs is manifest; however, the techniques utilized to affect the desired result are founded upon indefinite standards and vague procedures for ascertaining the dangerous groups which are to be excluded from governmental employ. To implement the federal government's security and loyalty programs, federal agencies are required to institute an investigation of each applicant and present employee of the agency in an effort to ascertain the status of his loyalty.[7] The limited procedural safeguards which exist in this area arise out of governmental policies adopted under these programs. If, during the investigative process, there should appear indications that the employment of the particular individual is not "clearly consistent with the interests of the national security," the agency head may suspend the individual.[8] Following such an investigation and review as the agency head deems appropriate, the accused's employment shall be terminated if such action is in the "interest of the national security."[9] The order does not indicate that the accused has any right to a hearing, to counsel, to present evidence in his own behalf, to know the specific evidence against him, or to know or confront his accusers.

Loyalty oaths and affidavits afford the most flexible means for dealing with unpopular groups. It is in this area that both the purpose for the restriction and the implementation become obscure and confusing. The interest the government is trying to protect is not always clear, and the techniques employed are many times uncertain and disorderly. No procedural safeguards exist; the state must prove nothing. The individual must determine whether or not he advocates or believes certain ideas, which may be quite vaguely defined and considerably inclusive, and whether or not he belongs, or has belonged, to an organization which endorses or teaches certain philosophies. The theory underlying this technique is that the individuals at whom the oath requirement is aimed will refuse to take it. If this basic premise is correct, an unpopular and possibly dangerous person will be penalized by deprivation of the govern-

7. Exec. Order No. 10450, 18 FED. REG. 2489 (1953).
8. *Id.* at 2491.
9. *Ibid.*

ment benefit which is conditioned upon the taking of the oath. If he is candid and admits that he advocates overthrow of the government by unlawful means, he is not only denied the advantage he seeks, but he may be subject to prosecution under the criminal statutes. Should the individual take the oath he may, thus, avail himself of the proffered service or employment; if, in so doing, he has lied about his beliefs or the groups with which he associates, he may be prosecuted for perjury.

Manifestly, the procedures and sanctions coincident with each method invoked by the sovereign to regulate unwanted groups are dissimilar. The procedural requirements are obviously less demanding with each step away from criminal statutes; seemingly the procedural safeguards become less exacting as the penalty for infraction becomes less stringent. Under certain circumstances, however, the denial of particular governmental services or employment may be as, or more, serious and restrictive a penalty than imprisonment or a fine for the exercise of an activity which may be constitutionally guaranteed.[10]

The most widely used weapon against unpopular groups is a loyalty oath requirement which conditions the grant of a governmental benefit. Perhaps the dominant reason for use of this alternative is the ease with which restrictions may be imposed upon the undesirable person. This very facility, however, makes the choice potentially dangerous, for a lack of substantive and procedural safeguards for the protection of individual liberties uniquely lends itself to a process whereby basic freedoms may be substantially undermined. Moreover, this technique permits wide latitude for determining who is unpopular or dangerous. Therefore, any practice which seeks to place disabilities upon unacceptable segments of society by utilizing a method wherein little protection is afforded individual rights should be closely scrutinized and evaluated in order that fundamental freedoms may not be arbitrarily and summarily denied.

The limitation upon the exercise of First Amendment freedoms resulting from the use of the above method is obvious and this has led to the application of the term "unconstitutional condition" to the loyalty oath or affidavit requirement as a prerequisite to a government privilege.[11] The sovereign need only select some existing or contemplated governmental activity and then deny its advantages to anyone who does

10. See pp. 526-32 *infra*.

11. The term unconstitutional condition may be a misnomer in that it signifies a conclusion of the writer and not of the courts. The greater majority of the conditions which have been imposed upon governmental privileges have been held constitutional when tested in the courts. The phrase "unconstitutional condition," however, will be used in this note to designate any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right.

not believe, speak, or act in conformance with the prevailing beliefs of the majority. Thus, the government may effectively penalize the individuals for whom the proscription is intended; the sanction is either denial of the benefits to be gained from participation in the governmental activity, or deprivation of basic constitutional rights. In the first instance, what may be an economic, social, or personal necessity is withheld because one cannot or will not comply with the conditions attached to its grant. In the second instance, freedoms regarded as essential to societal and individual well-being are summarily removed. That is, in order to avail himself of the benefits proffered by the government, the individual must forego the exercise of constitutionally protected rights. Mr. Justice Douglas' comment in the *Adler* case,[12] however, exemplifies how unknown and misunderstood the applications and limits of this doctrine have been in American law.

Apparently Mr. Justice Douglas considered that the unconstitutional condition in relation to government employees was first conceived in *United Public Workers v. Mitchell* in 1947.[13] The principle, however, was not new in 1892 when then Judge Holmes offered his oft-quoted dictum: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[14] Since the city was not obligated to hire the plaintiff as a policeman, his employment in that capacity was a gratuitous act upon which the city could "impose any reasonable condition."[15] Holmes' rationale became the foundation of judicial decisions upholding conditions levied on government privileges and was instrumental in creating and continuing the use of the words "right," "condition," and "privilege" in decisions concerning government employment and in other areas as well.

Writers have maintained that the unconstitutional condition found its greatest applicability where states denied entry to a foreign corporation except upon the corporation's acceptance of certain conditions.[16] Admission of corporate enterprise into a state was a privilege which could be completely withheld under the authority of *Paul v. Virginia*;[17] therefore, it seemed logical that the greater power of exclusion included the lesser power of condition.[18]

12. See p. 520 *supra*.
13. 330 U.S. 75 (1947).
14. McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).
15. *Ibid.*
16. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COL. L. REV. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. OF PA. L. REV. 879 (1929).
17. 8 Wall. 168 (U.S. 1869).
18. "It is not necessary to challenge the proposition that . . . the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit

Mr. Justice Sutherland presented what appeared to be a sensible, workable solution to the conditioned privilege problem in *Frost v. R.R. Commissioners of California.*[19] Recognizing that the privilege of using the public highways was vital to the petitioner's commercial existence, Mr. Justice Sutherland declared that the state could not impose conditions upon the grant of this privilege which would necessitate the surrender of the petitioner's constitutional rights.[20] If constitutional rights can be bartered away as the price to be paid for the enjoyment of a state granted privilege, then all constitutional guarantees might be destroyed by an indirect process, outwardly voluntary, which is, in reality, compulsory and fraught with coercion.[21] This opinion completely refutes the theory that since a corporation has no *right,* merely a *privilege,* to even enter a state, it cannot complain about conditions exacted from it in return for any other state granted privilege it seeks. Thus, by looking to the effect of the condition, rather than to the activity conditioned, the *Frost* case ended the use of the unconstitutional condition in the corporation area.[22]

The demise of the unconstitutional condition in the corporation field, however, did not result in terminating the use of the same reasoning in other areas. The courts, faced with laws requiring the surrender of constitutional rights in connection with other activities, have borrowed phrases and reasoning from the cases dealing with state control of corpo-

---

to impose." Frost v. R.R. Commissioners of California, 271 U.S. 583, 593-94 (1926). See Western Union Telegraph v. Kansas *ex rel.* Coleman, 216 U.S. 1, 53 (1910) (dissent). See also Security Mutual Life Insurance Co. v. Prewitt, 202 U.S. 246, 252 (1906); Doyle v. Continental Insurance Co., 94 U.S. 535, 543 (1877). *Contra:* Terral v. Burke Construction Co., 257 U.S. 529, 532 (1922).

19. 271 U.S. 583 (1926).

20. *Id.* at 593-94.

21. *Id.* at 593.

22. Perhaps the unconstitutional condition would have been permanently abandoned in all areas, or at least severely contained after the *Frost* case, were it not for the courts' changing interpretation of the commerce clause power. Today, any act of a state legislature which burdens interstate commerce is unconstitutional, and the authority of Paul v. Virginia, 8 Wall. 168 (U.S. 1869), permitting a state to prohibit a corporation from coming into the state is no longer valid. *E.g.,* Dean Milk Company v. Madison, 340 U.S. 349 (1951); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

Since the basic premise upon which the courts upheld the state's power to condition the entry of a corporation into the state was that the state could completely deny such entry, the destruction of the premise effectivly destroys the conclusion. Because the commerce power intervened in this area, the destruction of the unconstitutional condition as to the corporation could be distinguished from other areas where the authority to completely withhold a privilege was, as yet, unquestioned. Unfortunately, the *Frost* decision and the courts' changing interpretation of the commerce clause followed too closely to permit the rationale of Sutherland's opinion to become recognized as pertinent to *all* unconstitutional conditions in whatever form they might be found.

rations and have transplanted them to contemporary decisions involving numerous and diversified subjects.

Perhaps the most frequent use of the principle has heen in cases relating to government employment. It has become a common practice for states to require applicants for jobs to sign an affidavit that they do not now[23] and, in some instances, never did advocate[24] or belong to an organization which advocates forceful overthrow of the government.[25] Admittedly, such speech may be a crime under the various sedition, criminal anarchy, and criminal syndicalism acts;[26] therefore, it may be argued that no one has a constitutional right to engage in it. Further, if an individual can be imprisoned for participating in certain activities, deprivation of a privilege for such participation seemingly should be valid. Those who would defend such a position may even contend that the latter sanction benefits the individual because it is more lenient than the criminal punishment which could be inflicted for the same activity.[27] Even granting that mere advocacy of forceful overthrow of the government is a crime, resort to the conditioned privilege to punish these criminals is repugnant to democratic principles of fairness and justice since the government is thereby permitted to penalize without supporting the burden of proof or adhering to the strict rules of the criminal process, both of which would be required were the person prosecuted under a criminal statute.

Restraints upon constitutional freedoms have not been limited to those exercised for subversive purposes. For example, certain federal employees are prohibited from participating in ordinary political activities.[28] The Supreme Court's opinion concerning the validity of these restrictions was manifested in *United Public Workers v. Mitchell*.[29] The majority declared that regulating political participation of government

23. *E.g.*, ARK. STAT. ANN. § 41-4111(a)(1) (1947); CAL. GOV. CODE ANN. § 1028 (1951); CAL. GOV. CODE ANN. § 18200 (1951); FLA. STAT. ANN. § 876.05 (1951); GA. CODE ANN. § 89.313 (Supp. 1951); KAN. GEN. STAT. § 21-306 (1949); MD. ANN. CODE GEN. LAWS art. 85A, § 11 (1951); MASS. ANN. LAWS c. 264, § 14 (Supp. 1952); N.M. STAT. ANN. § 10-112 (Supp. 1951); N.Y. CIVIL SERVICE LAW § 12a; Ore. Laws 1949, c. 311; WASH. REV. CODE § 9.81.060 (1952).

24. *E.g.*, FLA. STAT. ANN. § 876.05 (1951); Ore. Laws 1949, c. 434, § 14.

25. *E.g.*, ARK. STAT. ANN. § 3-1404 (1947); ARK. STAT. ANN. § 41-4113(c) (1947); CAL. GOV. CODE ANN. § 18200 (1951); FLA. STAT. ANN. § 876.05 (1951); GA. CODE ANN. § 89-313 (Supp. 1951); KAN. GEN. STAT. § 21-306 (1949); N.Y. CIVIL SERVICE LAW § 12a; PA. STAT. ANN. tit. 53, § 351.13 (Supp. 1952); WASH. REV. CODE § 9.81.060 (1952). For a compilation of state statutes aimed at the prevention of supposed subversive activities, as of January 1, 1951, see GELLHORN, *op. cit. supra* note 6.

26. For a discusion of these statutes, see GELLHORN, *op. cit. supra* note 6.

27. It must be remembered that the loss of a job does not preclude criminal punishment as sanctioned by the criminal statutes for the proscribed activity.

28. 54 STAT. 767 (1940), 18 U.S.C. § 61h (1946).

29. 330 U.S. 75 (1947).

employees was valid when the prohibited activity was reasonably deemed by Congress to impair the efficiency of the public service. Mr. Justice Black dissented, however, believing that an employee of the government has the same constitutional right as other citizens to take part in the political processes by which elected representatives are chosen.

The *United Public Workers* rationale is inherent in later decisions dealing with the validity of loyalty oaths. In *Steiner v. Darby,* the California court held that a government employee foregoes any right he may have as a private citizen to advocate the forceful overthrow of the government.[30] Such a proposition might be sustained as a reasonable measure to insure loyal and efficient government employees. The court, however, made more general and inclusive statements which could serve as dangerous precedents for future tribunals, such as the declaration that a person entering the public service impliedly relinquishes "certain natural rights." In conclusion, the court declared that the oath did not require the surrender of any constitutional rights, for government employees can still advocate and believe in overthrow of the government after they leave the public employ.[31] Three years later, the Supreme Court, in upholding a similar oath requirement, ignored the contention that First Amendment rights were violated thereby.[32]

Even though the courts have permitted the imposition of conditions upon public employment which, in effect, restrict basic rights,[33] they have not allowed similar infringements upon religious freedom. In *Morgan*

30. 88 Cal. App.2d 481, 199 P.2d 429 (1948).

31. Certiorari was granted in 337 U.S. 929 (1949) and the case was dismissed as not ripe for adjudication by the Supreme Court in 338 U.S. 327 (1949).

32. Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951). In addition, every employee was required to take an oath stating that within the previous five years he had not been a member of a "subversive" organization. The petitioner contended that the oath requirement violated due process in that it was not limited to membership in organizations which the employee *knew* to be subversive. Mr. Justice Clark for the majority assumed that the oath would not be interpreted as affecting adversely those persons who during their membership in a proscribed association were ignorant of its purpose. *Id.* at 723-24.

This assumption led to confusion the following year in Wieman v. Updegraff, 344 U.S. 183 (1952). In this case the Court held unconstitutional a statute, OKLA. STAT. ANN. tit. 51, §§ 37.1-37.8 (Supp. 1952), which required all state employees to swear that they had not been members of an organization, classed as subversive by the Attorney General, for a period of five years prior to the taking of the oath. Significantly, it was Mr. Justice Clark who wrote for the Court. The majority felt the lack of a requirement of *scienter* in the statute rendered it invalid. The opinion in the *Wieman* case would seem to limit the application of loyalty qualifications upon government employment to activities performed and associations acquired knowingly and wilfully.

33. While there has been this recent outbreak of legislation which conditions government employment, such a practice was utilized as early as 1882 by the federal government in *Ex parte* Curtis, 106 U.S. 371 (1882). Curtis had been imprisoned for receiving money for political purposes from other government employees in contra-

v. Civil Service Commission, the conditioning of the plaintiff's privilege to secure a civil service position, solely upon religious convictions, was held to be unreasonable and, therefore, unconstitutional.[34] The New Jersey court found that a condition of employment requiring a willingness to salute the flag was actually a restraint of religious freedom as applied to Jehovah's Witnesses. Rather than engage in the spurious reasoning that the plaintiff could still worship as he pleased after resigning from his job, the court recognized the compulsory characteristics of a stipulation which forced the individual to choose between his job and his religious beliefs.

In many instances, teachers are government employees, but the problems raised by the imposition of restrictions upon the teaching profession are sufficiently distinct to warrant separate consideration. An effective teacher cannot be an automaton who merely reiterates facts and policies enumerated in approved writings, but must stimulate ideas through unfettered, critical, and rational thought. Free speech and thought are essential to productive teaching. The preservation of these freedoms in academic processes is vital to the survival of a free civilization;[35] hence,

---

vention of a congressional statute. The Court felt that Congress' purpose in promoting efficiency and integrity in official duties was within the legislative scope of authority and the statute was a reasonable means toward that end. Ten years later, Judge Holmes declared that a regulation making it a dismissable offense for members of a police force to solicit money for any political purpose was a reasonable condition, for no one had a right to be a policeman. This opinion admits an individual has a right to express himself on political matters, but the regulation does not prohibit such expression unless the person is a policeman. Since the city is not required to hire anyone as a policeman, this is only a privilege upon which the city may impose any reasonable conditions. McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). Such logic has been used to uphold the dismissal of two San Francisco policemen who refused to answer grand jury inquiries on the ground that their answer might tend to incriminate them. The court offered the now familiar statement that the men had a constitutional right to refuse to answer, but they had no right to be police officers. Christal v. Police Commission of San Francisco 33 Cal. App.2d 564, 92 P.2d 416 (1939). The situation in the *Christal* case may be distinguished from cases involving First Amendment freedoms, for here it is the right against self-incrimination which is involved. The question then is whether the Fifth Amendment prohibition applies to the states through the implementation of the Fourteenth Amendment. According to the authority of Palko v. Connecticut, 302 U.S. 319 (1937); Adamson v. California, 332 U.S. 46 (1947); and Rochin v. California, 342 U.S. 165 (1952), such a relation does not exist *per se.* Under the due process clause of the Fourteenth Amendment, the Court is called upon to determine whether or not the circumstances of a particular case violate fundamental freedoms in such a way as to be shocking to one's conscience. Under this test, it is doubtful that the facts of the *Christal* case would be so heinous to even an extremely sensitive mind as to be shocking. While it seems that this argument could have been maintained in the *Christal* case, it was not advanced, and the decision was rested upon the ground that working for the city was a mere privilege and, therefore, could be conditioned by requiring the surrender of the right against self-incrimination.

34. 131 N.J.L. 410, 36 A.2d 898 (1944). See note 45 *infra.*

35. Mr. Justice Douglas, dissenting in *Adler v. Board of Education of the City*

the application of the unconstitutional condition in this area[36] requires consideration of factors not accorded emphasis in other contexts. Nevertheless, the language of the decisions mirrors the opinions already considered in the corporation and government employment areas.

In 1930, it was decided that there is no right to teach and, therefore, the state can condition the privilege of teaching so as to prevent membership in a teacher's union.[37] But, in *Tolman v. Underhill,* a California district court of appeals refused to uphold a statute which subjected university professors to a loyalty oath as a condition of employment.[38] The court thought it inconceivable that the state constitution would permit a test of political or religious belief, other than a pledge to support the constitution, as a condition to becoming a teacher—such a test would be repugnant to fundamental liberties and freedoms.[39] The Supreme Court, however, in *Adler v. Board of Education of the City of New York,* held constitutional a requirement that no person shall be employed in the public school system who teaches or advocates overthrow of the government.[40] Membership in an organization found to espouse these prohibited philosophies is prima facie evidence of disqualification.[41] Mr. Justice Minton for the majority declared: "His freedom of choice between membership in the organization and employment in the school

---

of New York, pointed out the undesirable aspects brought about by statutes like the one in the instant case: "Teachers are under constant surveillance. . . . A pall is cast over the classrooms. There ean be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry . . . . A problem can no longer be pursued with impunity to its edges . . . . Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin." 342 U.S. 485, 510 (1952).

On the other hand, an argument can be made that, because of the unique opportunity a communist would have as a teacher to disseminate subversive doctrines among school-age children who may be incapable of evaluating the merit of these principles, more rigid control is necessitated in this area than in any other. In addition, emotional adherence to totalitarian ideology is inconsistent with a spirit of inquiry and with objective thought.

36. *E.g.,* ARK. STAT. ANN. § 3-1404 (1947); FLA. STAT. ANN. § 876.05 (1951); GA. CODE ANN. § 89-313 (Supp. 1951); KAN. GEN. STAT. § 21-306 (1949); MD. ANN. CODE GEN. LAWS art. 85A, § 13 (1951); N.J. REV. STAT. § 18:13-9.1 (Cum. Supp. 1949); N.Y. EDUCATION LAW § 3022; TEX. REV. CIV. STAT. ANN. art. 2908a (1948).

37. Seattle High School Chap. No. 200 v. Sharples, 159 Wash. 519, 293 Pac. 994 (1930).

38. 103 Cal. App.2d 348, 229 P.2d 447 (1951), *aff'd on other grounds,* 39 Cal.2d 708, 249 P.2d 280 (1952).

39. Ohio in a similar situation upheld the validity of such an oath after finding there were no infringements upon any constitutionally protected rights. Dworken v. Cleveland Board of Education, 42 O.O. 240, 94 N.E.2d 18 (1950).

40. 342 U.S. 485 (1952).

41. N.Y. EDUCATION LAW § 3022.

system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice."[42]

Not only have conditions affecting constitutional guarantees been imposed upon teachers, they have been levied upon the privilege of attending school. In the past, such restrictions have primarily affected religious beliefs.[43] *West Virginia State Board of Education v. Barnette,* however, seemed to mark an end to the state's power to grant the privilege of attending school upon the performance of a condition which is repugnant to individual religious convictions.[44] While students' religious freedom is apparently protected,[45] a recent Texas statute abridges freedom of speech and thought by requiring students to swear to a non-communist oath as a requisite to attending a state university or college.[46] Louisiana

42. Adler v. Board of Education of the City of New York, 342 U.S. 485, 493 (1952).

43. Early cases upheld the constitutionality of requirements that school children be vaccinated as a condition to their attending school. *E.g.,* Blue v. Beach, 154 Ind. 101, 56 N.E. 89 (1900). In Bissell v. Davison, 65 Conn. 183, 32 Atl. 348 (1894), the court recognized the requirement as being primarily an exercise of the police power. Had the court stopped there, the opinion would have been sound; however, it went on to rationalize that the condition did not compel vaccination, the requirement simply called for vaccination as a condition of the privilege of attending school.

The next significant conditioning of school attendance occurred in connection with Reserve Officer Training Corps programs at state universities. In Pearson v. Coale, 165 Md. 224, 167 Atl. 54 (1933), the Maryland court relied upon United States v. Macintosh, 283 U.S. 605 (1931), which held that any special treatment given conscientious objectors is merely a congressionally granted privilege, not a right. Therefore, by denying an individual his privilege of being a conscientious objector, the person is not deprived of a constitutional right. Since the opportunity to attend school is also merely a privilege, the denial of this opportunity abridges no fundamental liberties. The following year, the Supreme Court was heard on this problem in Hamilton v. University of California, 293 U.S. 245 (1934). The Court held that the State of California, not the federal government, gives the student the privilege of attending the university; consequently, the student desiring to use the facilities the state benevolently offers may be required to do so upon the terms the state imposes.

44. 319 U.S. 624 (1943). The *Barnette* case specifically overruled Minersville School District v. Gobitis, 301 U.S. 586 (1940), which sanctioned such practices. Mr. Justice Frankfurter dissented feeling that the Court could find a "rational basis" in West Virginia's action, and the regulation should be allowed.

One commentator has pointed out that the majority opinion written by Mr. Justice Frankfurter in Beauharnais v. Illinois, 343 U.S. 250 (1952), utilizes the "rational basis" for testing state legislation which is attacked as violative of the First Amendment. Frank, *The United States Supreme Court: 1951-52,* 20 U. of CHI. L. REV. 1, 27 (1952). At page 28 Frank concludes that in the light of the *Beauharnais* case the "rational basis" test has been adopted by a majority of the Court and "perhaps the flag salute will again have a turn at being valid if it comes back again."

45. The rationale of the *Barnette* case was accepted the following year in the area of governmental employ by the New Jersey court in Morgan v. Civil Service Commission, 131 N.J.L. 410, 36 A.2d 898 (1944), which insisted that "the treasured . . . religious liberties yield only to grave public exigencies." *Id.* at 417, 36 A.2d at 902.

46. Part of this oath reads: "I swear . . . that I am not and have not during the past two (2) years been a member of or affiliated with any society . . . which teaches . . . that the government . . . should be overthrown . . . by . . . unlawful

has a similar law, minus the oath stipulation, which results in the same infringements of fundamental rights.[47]

While a layman might be persuaded that the Constitution does not protect his opportunity to attend or teach school, or to hold a government job, it would be an almost insurmountable task to prove to him that his privilege of voting was not constitutionally guaranteed. Yet, the exercise of the elective franchise has been consistently regarded as a mere political privilege.[48] And, with the thesis firmly established that there is no right to vote, it was a small step to the declaration that the establishment of political parties[49] and the privilege of running for a public office[50]

---

means . . . ." TEX. REV. CIV. STAT. art. 2908(b) (Supp. 1950). As yet, there has been no litigation under this statute.

47. ". . . no student in a public educational institution, shall by word of mouth or writing knowingly or wilfully advocate, abet, advise, or teach, the duty, necessity, desirability, or propriety, of overthrowing or destroying the government of the United States . . . by force, violence, or any other unlawful means. . . ." LA. REV. STAT. ANN. §§ 42:54-42:55 (Supp. 1952). Any student found guilty of violating this prohibition shall be expelled from school. *Id.* at § 42:56.

48. As early as 1865 it was felt that the exercise of the elective franchise could be conditioned upon the taking of a test oath prescribed by a state constitution, for it is an absolute, unqualified right of the state to regulate the elective machinery. Anderson v. Baker, 23 Md. 531 (1865). Two years later, it was held that voting is a mere privilege which can be offered or refused, expanded or contracted, either with or without reason. Blair v. Ridgely, 41 Mo. 119 (1867). See STOREY, COMMENTARIES ON THE CONSTITUTION c. IX, § 582 (4th ed. 1873).

In addition to imposing the taking of a loyalty oath upon the privilege of voting, state statutes conditioning this privilege upon the paying of a poll tax, Breedlove v. Suttles, 302 U.S. 277 (1937), and upon the taking of an oath that the deponent is not and has not been a polygamist, Shepherd v. Grimmett, 13 Idaho 403, 31 Pac. 793 (1892), have been upheld.

49. A 1940 decision upheld an Arkansas statute, ARK. STAT. ANN. § 3-1604 (1947), which specifically barred any party from the ballot which advocated the overthrow of the government by force. Field v. Hall, 201 Ark. 77, 143 S.W.2d 567 (1940). It was stated that the act did not prevent the Communist Party or any other group from advocating overthrow of the government, it simply denied them the political privilege of having their name on the ballots. The court believed that there could be no doubt the state could condition the creation, existence, and operation of political parties.

A similar, but distinguishable, situation occurred in Communist Party of America v. Peek, 20 Cal.2d 536, 127 P.2d 889 (1942). The California statute disqualified a party from the ballot: (1) if it used the word "Communist" as a party designation; (2) if it directly or indirectly was affiliated with the Communist Party or a party which advocates the forceful overthrow of the government; or (3) if it could not prove 2,500 voters had declared their intention to affiliate with the party—this proof had to be in the hands of the Secretary of State twenty five days prior to the last primary. CAL. ELEC. CODE §§ 2540.3-2540.5 (1945). The California Constitution guarantees the privilege of voting to all persons who ean qualify under the requirements contained in that document. CAL. CONST. art. XX, § 11. The legislature, then, can only impose reasonable and non-arbitrary conditions upon voting. Judged by these standards, the statute was declared unconstitutional. It is noteworthy that the California court considered the opportunity to vote as one of the highest privileges of a citizen since it is one of the fundamental attributes of a republican form of government.

50. The Supreme Court in a per curiam opinion found no constitutional rights were violated by a Maryland act, MD. ANN. CODE GEN. LAWS art. 85A, § 15 (1951),

stood in no greater stead.[51]

While the most questionable and extensive use of the unconstitutional condition has occurred in the four areas treated, the principle has arisen in other fields and the fact that its use has been less frequent makes it no more defensible. Labor unions, protesting the non-communist affidavit section of the Labor Management Relations Act,[52] have met the same arguments with which teachers and students, voters, government employees, and corporations have long been acquainted.[53]

The legislatures and the courts have seemingly found no limitations, as yet, to the unconstitutional condition's applicability. The granting of a driver's license has been conditioned upon the applicant's waiver of his right against self-incrimination.[54] The privilege of receiving unemployment compensation in Ohio will not be granted to anyone who advocates violent overthrow of the government.[55] The issuance of passports has

---

requiring every candidate for political office to file a loyalty affidavit as a prerequisite to having his name on the ballot. Gerende v. Board of Supervisors of Elections of Baltimore, 341 U.S. 56 (1951). See Shub v. Simpson, 76 A.2d 332 (1950); State *ex rel.* Attorney General v. Woodson, 41 Mo. 228 (1867).

51. A valid argument can be asserted that the Constitution, through the Fifteenth and Nineteenth Amendments, forbids such state action which disqualifies voters on the basis of race, color, previous condition of servitude, or sex. On this point, Mr. Justice Douglas has offered the most rational standard. Regardless of the express wording of the statute, should the act deprive a citizen of his privilege of voting because of arbitrary standards beyond the individual's control, the statute would violate the Constitution. MacDougall v. Green, 335 U.S. 281, 289 (1948).

52. "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees . . . unless there is on file with the Board an affidavit executed . . . by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate . . . that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the . . . Government by . . . unconstitutional methods. 61 STAT. 146 (1947), 29 U.S.C. § 159(h) (Supp. 1952).

53. In National Maritime Union of America v. Herzog, 78 F.Supp. 146 (D.D.C. 1948), the court maintained that the position of an exclusive bargaining agent is a privilege existing only by congressional sanction and, therefore, can be conditioned by Congress. Judge Prettyman dissented, feeling that the requirement of an affidavit forces the union leaders to waive their constitutional rights under the First Amendment, for the non-communist oath section is not merely a condition upon a privilege, it is an infringement of the union leader's freedom of thought.

54. Woods v. State, 15 Ala. App. 251, 73 So. 129 (1916); People v. Finley, 27 Cal. App. 291, 149 Pac. 779 (1915); Ule v. State, 208 Ind. 255, 194 N.E. 140 (1935); State v. Sterrin, 78 N.H. 220, 98 Atl. 482 (1916); People v. Rosenheimer, 209 N.Y. 115, 102 N.E. 530 (1913).

55. Dworken v. Collopy, 56 Ohio Abs. 513, 91 N.E.2d 564 (1950). Pennsylvania also has a statute which denies state assistance to any person who advocates or belongs to any organization advocating the forceful overthrow of the government. Aged persons are included within this prohibition; however, blind persons are excepted. The rationale of this exception is not given. PA. STAT. ANN. tit. 62, § 2509 (Cum. Supp. 1952). On a collateral point, see United States v. Schneider, 45 F. Supp. 848 (E.D.Wis. 1942) and United States v. Hautau, 43 F. Supp. 507 (D.N.J. 1942) which were concerned

been denied apparently because of the applicant's political views or associations.[56] Professional men, too, have felt the sting of the doctrine, for some of the earliest and latest cases have affected them.[57] A recent imposition of an unconstitutional condition denies the privilege of obtaining low-cost government housing to anyone belonging to an organization listed as subversive by the Attorney General.[58] At the present time, then,

with the conditioning of employment with the W.P.A. on not being a communist or a member of a Nazi bund.

56. For an excellent discussion of the constitutional problems raised by such a practice, see Note, 61 YALE L.J. 171 (1952). A district court has held that revocation of a passport without fair notice and hearing violates the due process and equal protection clauses of the Constitution. Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952).

57. One of the earliest cases concerning attorneys was *Ex parte* Hunter, 2 W.Va. 122 (1867), a case which involved the constitutionality of a loyalty oath which required all lawyers to aver that they did not bear arms against the United States during the Civil War. The Supreme Court of West Virginia declared the opportunity to practice law was a special privilege; therefore, the qualifieations and fitness of applicants could be absolutely determined by the state and made to depend upon the meeting of any condition precedent.

In the same year, the United States Supreme Court decided the validity of a test oath, similar to the one in the *Hunter* case, imposed upon priests, among others, by the Missouri Constitution. The Court felt the disability imposed by the constitution was a penalty for the commission of an act which was not a crime when it was committed, and, therefore, violated the constitutional guarantee against ex post facto laws. Cumming v. Missouri, 4 Wall. 277 (U.S. 1867). The same day the Court struck down a like federal statute which conditioned the admission of an attorney to the bar of the Supreme Court upon the taking of a loyalty oath. Mr. Justice Miller in dissenting, however, believed the practice of law is a privilege which the state may grant upon the grantee's acceptance of limitations or conditions prescribed by the grantor. *Ex parte* Garland, 4 Wall. 333 (U.S. 1867). The holding in the *Hunter* case and the dicta in the *Cummings* and *Garland* cases establishing that the retention of a professional position was a mere privilege have been consistently followed for nearly a hundred years. *E.g.,* Dent v. West Virginia, 129 U.S. 114 (1889); Brents v. Stone, 60 F. Supp. 82 (E.D.Ill. 1945); Applieation of Cassidy, 51 N.Y.S.2d 202 (1944). The last Supreme Court decision in this area was handed down in *In re* Summers, 325 U.S. 561 (1945), in which the Court upheld the validity of a requirement that each applicant for admission to the Illinois bar take an oath to support the constitution of the State of Illinois. The petitioner maintained that since the constitution contained a section requiring armed defense of the state, ILL. CONST. Art. XII, the petitioner as a conscientious objector was denied the equal protection of the laws in contravention of the Fourteenth Amendment. The majority, finding no discriminatory purpose in this section, rejected this contention. The Court reasoned that since a resident alien can be barred from naturalization because he is a conscientious objector, United States v. Macintosh, 283 U.S. 605 (1931), refusal of admission to the bar on the same grounds cannot violate the Constitution. One year after this case, Girouard v. United States, 328 U.S 61 (1946), was handed down. This decision held that a resident alien conscientious objector could not be barred from national citizenship if he would agree to perform non-combatant duties in the armed forces. The *Girouard* decision casts doubt upon the authority of the *Summers* case and highlights Mr. Justice Black's dissent in the latter case. Mr. Justice Black did not believe that a man who was qualified in every respect could be barred from practicing law solely because he was a conscientious objector.

58. The Gwinn Amendment to the Independent Offices Appropriations Act of 1952, 66 STAT. 403 (1952), 42 U.S.C. § 1411b (Supp. 1952), provides: ". . . That no housing unit constructed under the United States Housing Act of 1937 . . . shall be occupied by a person who is a member of an organization designated as subversive

it is difficult to find an area of government activity which would not lend itself to utilization of the requirement that one forego a constitutionally guaranteed right as a condition to participation. The applicability of the unconstitutional condition as a circuitous method of destroying rights by conditioning privileges is unlimited when nearly all government activities may be termed privileges so far as public participation is concerned.[59]

With almost unbroken regularity the validity of statutes imposing conditions upon the enjoyment of a governmental privilege has been

---

by the Attorney General: *Provided further,* That the foregoing prohibition shall be enforced by the local housing authority . . . ." To give force to the latter part of this amendment, the Housing Authority of Newark, New Jersey, has required its tenants to sign an affidavit as a condition to their remaining in government housing that neither they nor any person living in the housing with them is a member of one of the subversive organizations listed by the Attorney General. The validity of this regulation is presently being contested in the Superior Court of New Jersey, Chancery Division—Essex County, in the case of *Lawrence v. Housing Authority of the City of Newark.* Plaintiff's contentions, among others, are that the Gwinn Amendment restricts speech and association, violates due process in that it bears no reasonable relation to the public welfare, constitutes a bill of attainder, and is an unconstitutional condition upon a privilege. The defendant insisted that in accordance with the terms of the lease, under which the housing was rented, the agreement could be terminated by either party and without reason upon thirty days notice. It is the Housing Authority's contention that it merely exercised this option and, therefore, the constitutionality of the Gwinn Amendment is in no way involved. On March 24, 1953, the court issued a temporary injunction in the *Lawrence* case to prevent the eviction of the plaintiffs from their housing until a determination could be made whether or not the threatened eviction was occasioned by the plaintiff's failure to sign the affidavit.

Other cases attempting to test the constitutionality of the Gwinn Amendment are Hankerson v. Housing Authority, No. 609741, Superior Court, County of Los Angeles, and *Fitch v. Chicago Housing Authority.* Should these courts refuse to recognize that the implementation of the amendment infringes upon constitutionally guaranteed rights, the plaintiffs in these cases will be forced to choose between the surrender of their right to free thought, speech, and association, and their homes. Thus, they may be added to the long list of persons who have been required to make such impossible choices in many other diverse situations.

Part of the material presented in this footnote was taken from communications to the INDIANA LAW JOURNAL from Mr. Herbert Monte Levy of the American Civil Liberties Union, one of the counsels for the plaintiffs in *Lawrence v. Housing Authority of the City of Newark.*

59. Manifestly, then, the unconstitutional condition may be imposed upon privileges which affect great numbers of American citizens so as to deprive them of fundamental liberties.

The Hatch Act, 54 STAT. 767 (1940), 18 U.S.C. §§ 61-61x (1946), has denied the privilege of participating in political activities to 2,603,288 federal government employees. THE WORLD ALMANAC AND BOOK OF FACTS 91 (1953). Were the loyalty oath requirements for teachers and the conditions imposed upon school attendance, which have been discussed, made uniform, 913,671 public school teachers, *Id.* at 566, and approximately 30,500,000 students would be forced to forego certain of their rights in order to comply with the requirements. *Id.* at 368. Since there are an estimated 62,200,000 automobile drivers in the nation, this large group of persons could be forced to surrender their right against self-incrimination as payment for the privilege of driving a car. *Id.* at 473. If every state had adopted Ohio's unemployment compensation laws,

challenged upon three main grounds: (1) ex post facto; (2) bill of attainder; and (3) due process. With the same consistency that these arguments have been presented, the courts have rejected them.

The ex post facto[60] contention has been unsuccessful since courts have rarely held that the deprivation of the privileges of working for the government, voting, teaching and attending school, or practicing law constitutes the punishment contemplated by the ex post facto interdict.[61]

A bill of attainder has been succinctly defined by Mr. Justice Frankfurter as "the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding and sentence."[62] The courts, in overcoming the contention that statutes which condition the grant of a governmental privilege are bills of attainder,[63] rationalize that these statutes carry no penalty for non-compliance; they simply withhold a privilege which the state is not obligated to grant and the denial of a government privilege is not punishment.[64] But, in *United States v. Lovett*,[65] the Supreme Court, relying upon the authority of *Cummings v. Missouri*,[66] found a legislative act which in effect barred three named individuals from governmental employ to be punishment without judicial process. The *Lovett* case cannot be reconciled with the numerous decisions

---

approximately 3,900,000 citizens would have been affected in 1950. 1951 INFORMATION PLEASE ALMANAC 291. There are approximately 1,040,000 state employees in the United States who would be subject to the loyalty oath requirements for government jobs, THE BOOK OF THE STATES 186 (1952-53), as well as approximately 3,030,000 local government employees. *Id.* at 181.

60. An ex post facto law operates in retrospect to punish as a criminal offense an act which was not a crime when it was committed. See Cummings v. Missouri, 4 Wall. 277 (U.S. 1867); United States *ex rel.* Forino v. Garfinkel, 69 F. Supp. 846, 849 (W.D.Pa. 1947); Hernandez v. State, 43 Ariz. 424, 438, 32 P.2d 18, 24 (1934).

61. It was early decided that the ex post facto clause of the Constitution was restricted in its force to criminal penalties. Calder v. Bull, 3 Dall. 386 (U.S. 1796).

62. United States v. Lovett, 328 U.S. 303, 321-22 (1945) (dissent).

63. At common law the bill of attainder was a special act declaring an individual to be guilty of a crime and to be punished by deprivation of his vested rights without utilization of the judicial process. Consequently, a statute is not a bill of attainder if the offense is not specified and a judgment of guilt is not made. Nor can an act be struck down as a bill of attainder if it inflicts no punishment. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 536 (8th ed. 1927).

64. *E.g.*, Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952); Hamilton v. University of California, 293 U.S. 245 (1934); Dent v. West Virginia, 129 U.S. 114 (1889); National Maritime Union of America v. Herzog, 78 F. Supp. 146 (D.D.C. 1948); Steiner v. Darby, 88 Cal. App.2d 481, 199 P.2d 429 (1948); McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892); Dworken v. Cleveland Board of Education, 42 O.O. 240, 94 N.E.2d 18 (1950); Dworken v. Collopy, 56 Ohio Abs. 513, 91 N.E.2d 564 (1950); State v. Armstrong, 39 Wash.2d 860, 239 P.2d 545 (1952).

65. 328 U.S. 303 (1945).

66. 4 Wall. 277 (U.S. 1867).

which hold that denial of a government job is not punishment.[67] And, in the light of more recent Supreme Court opinions,[68] the authority of the *Lovett* holding seems to be limited to legislation which names specific individuals and expressly declares that those persons are to be barred from holding government jobs. Such statutes are rare, however, so that the bill of attainder objection is not likely to meet with success.

The term "privilege" is extensively used as an escape for courts confronted with the argument that the condition deprives a person of liberty or property in contravention of the Fifth or Fourteenth Amendment. A long line of cases gives authority to the proposition that there is no property right in a government job because a public employee has no right to remain in his position.[69] Further, there is a lack of authority for including within the meaning of liberty any interest an employee may have in his job.

When the statute is attacked as being violative of the First Amendment, the courts look only to the explicit wording of the act. None of these statutes specifically prohibits the exercise of the rights of free speech, assembly, or religion. In the few cases in which a court has

67. See note 64 *supra.*

68. American Communications Ass'n v. Douds, 339 U.S. 382 (1950). In the *Douds* case, the petitioners raised the bill of attainder argument and cited United States v. Lovett, 328 U.S. 303 (1946), as controlling. The Court answered this contention in the following language: "But there is a decisive distinction: in the previous decisions the individuals involved were in fact punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is a substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9(h) is intended to prevent future action rather than to punish past action." *Id.* at 413-14.

Petitioners in Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951), also relied heavily upon the *Lovett* case. At 723, however, the Court said: "Unlike the provisions of the Charter and ordinance under which the petitioners were removed, the statute in the *Lovett* case did not declare general and prospectively operative standards of qualifications and eligibility for public employment. Rather, by its terms it prohibited any further payment of compensation to named individual employees. Under these circumstances viewed against the legislative background, the statute was held to have imposed penalties without judicial trial."

69. *E.g.,* Sanchez v. United States, 216 U.S. 167 (1910); Taylor v. Beckham, 178 U.S. 548 (1900); *Ex parte* Sawyer, 124 U.S. 200 (1888); Wetzel v. McNutt, 4 F. Supp 233 (S.D. Ind. 1933); Edge v. Holcomb, 135 Ga. 765, 70 S.E. 644 (1911); State v. Grant, 14 Wyo. 41, 81 Pac. 795 (1905). *Contra:* Ekern v. McGovern, 154 Wis. 157, 142 N.W. 595 (1913). ". . . [C]an it be possible it was thought the terms 'liberty' and 'property' would not include more than freedom from unjust physical restrictions and things subject to be bought and sold, or stop short of freedom for one to possess anything and to enjoy it as property, if valuable in any sense, which may lawfully administer to his reputable desires and happiness? . . . I think it is dealing with technicalities to restrict 'property' so as to exclude the right to an office . . . acquired, perhaps, by years of effort in preparation for its duties, and by legitimate expenditures of money." *Id.* at 254, 142 N.W. at 624.

recognized that constitutional rights may be involved, defenders of governmental encroachment upon First Amendment freedoms have contended successfully that constitutional rights are not deprived by a conditioned privilege statute because one need only forego the privilege to retain his rights. Superficially, this argument has merit. Realistically, it is subject to strong criticism. Admitting that there may be no recognized right to teach or attend school, to vote, to hold a government position, to practice law, to drive a car, to live in government housing, to receive unemployment compensation, to be issued a passport, or to use the machinery of the Labor Management Relations Act, certain of these privileges have become such an important part of American life that they should not be arbitrarily denied. Further, a person should not be required to choose between exercising constitutional rights and securing an imperative economic, social, or political necessity.

To a foreign correspondent, a passport is essential to the task for which he has spent quantities of time and money training himself to perform.[70] Low-cost government housing and unemployment compensation may be necessary to the survival of an indigent or unemployed worker. Just as use of and access to the postal system has assumed the proportions of a right, so the privileges enumerated above could feasibly be considered in the same light.[71]

When the privilege of attending a university is conditioned upon enrollment in military science courses, the prospective student who is a conscientious objector is confronted with an impossible choice. Should he accept the privilege, he must foresake his religious convictions which prohibit his participation in, or preparation for, war. Should he remain faithful to his religion, he must sacrifice the economic, social, and intellectual values of a higher education. If he is financially unable to attend a university other than a state supported institution, he is effectively denied the opportunity to receive the benefits of an education solely because of his religious beliefs. Under these circumstances, it cannot be defensibly maintained that the condition does not abridge a conscientious objector's freedom of religion, for the very exercise of that freedom forces him to forego an education. Certainly, it was not the intention of the framers of the Constitution to guarantee freedom of religion in the abstract. Deprivation of educational opportunities because of one's religious convictions is just as much a penalty as a prohibition against the belief itself.[72]

70. Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952). See Note, 61 YALE L. J. 171 (1952).

71. See note 73 *infra*.

72. In addition to abridging an individual's right to worship as he believes, such

When an oath or affidavit is required as a condition to obtaining or keeping a government job, the applicant or employee may be forced to surrender his rights to freedom of speech and thought if he wishes to secure or maintain the position. It is no help to say that the individual's fundamental rights have not been abridged because he has only been required to sacrifice the enjoyment of a privilege which could have been completely denied to him. In relation to a person who is applying for a government job as a truck driver, failure to take the oath may have no serious effect on his opportunity to earn a living, for he probably will be able to obtain private employment. The same cannot be said for career government workers. As to these people, failure to secure a government job may mean that their very source of livelihood is denied to them because of their thoughts and speech. The real effect of the condition upon these people is to compel them to choose between their right to think and speak freely and their economic well-being. They cannot exercise their First Amendment freedoms unless they sacrifice a position which might be economically necessary to their existence. In this situation, the condition is as effective a deterrent to thought and speech as direct prohibition would be. Thus considered, it is apparent that one does not voluntarily waive his right—he has been coerced because of the basic importance of the privileges involved to his economic, social, and personal well-being.[73] Even a brief consideration of the many activities

a condition violates the equal protection clause of the Fourteenth Amendment. In effect, the conscientious objector is being denied entry to a university solely because of his religious beliefs. Discrimination of this sort has been proscribed when the denial of the privilege was based entirely upon the individual's color. State *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). Certainly, it is arguable that religious belief is of no lesser importance.

73. Upon the basis that a privilege is, in some circumstances, tantamount to a right, it then may be advanced that its deprivation constitutes a violation of the due process guarantee of life, liberty, and property. The proposition that a privilege can achieve the status of a right through necessity and tradition is not new, for it has been proffered and accepted in regard to the postal service. Originally, the mail service was established voluntarily by the government—a privilege; however, today it is the primary instrumentality for the operation of commercial, social, and personal transactions. "It would be going a long way . . . to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution. . . ." Pike v. Walker, 121 F.2d 37, 39 (D.C.Cir. 1941). See Hannegan v. Esquire, 327 U.S. 146, 156 (1945); Leach v. Carlile, 258 U.S. 138, 141 (1922) (dissent). Mr. Justice Bradley maintained in his dissent to *Ex parte* Curtis, 106 U. S. 371 (1882), that the *right* to hold office is a fundamental right. Also, see Mr. Justice Black's dissent in United Public Workers v. Mitchell, 330 U.S. 75 (1947).

Another privilege which has become a fundamental ingredient of a republican form of government is the opportunity to vote. Free people consider the privilege of voting for whom one chooses to be one of the basic differences between a democratic society and the totalitarian systems of communism and fascism. It is understandable, then, that voting has assumed constitutionally protected heights in the eyes of the citizen. Just as voting has become vitally important to the American citizen, so has the oppor-

which have been foreclosed through surrender of constitutional rights as a prerequisite to entry therein serves to buttress this conclusion.

In the face of the above considerations, it is not clear why the courts have refused to look through the privilege fiction and admit that in many instances these direct limitations upon privileges operate as indirect restrictions upon rights. Progress, however, has been made by the Supreme Court in casting doubt upon the doctrine's validity. The Court in *American Communications Ass'n v. Douds*,[74] after balancing the right of Congress to protect the free flow of commerce from obstruction due to political strikes against the right of the individual to free speech and association, felt the former outweighed the latter. While the result of the weighing process is questionable,[75] the grounds upon which the decision was based are commendable. The privilege fiction was specifically rejected and the decision was rested upon a balancing of two *rights* to determine which demanded greater protection under the circumstances.[76] That certain statutes do infringe upon basic liberties has been recognized in three other recent Supreme Court cases;[77] however, except for the *Douds* opinion, the decisions have not completely discarded the privilege

---

tunity to form a new political party should a group of the electorate be dissatisfied with the present parties. It is obvious that the exercise of the elective franchise is worthless if there is only one party or one person for whom to vote. Such a situation would make a complete mockery out of the claim that our government is a representative one.

74. 339 U.S. 382 (1950).

75. See Meiklejohn, *The First Amendment, and Evils That Congress Has a Right to Prevent*, 26 IND. L. J. 477 (1951).

76. "In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commorce. . . ." American Communications Ass'n v. Douds, 339 U.S. 382, 400 (1950).

77. See Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952); Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951); United Public Workers v. Mitchell, 330 U.S. 75 (1947).

One writer has maintained that ". . . no vitality remains in Holmes' dictum . . . that the state can curtail the activities of its employees because they have no 'right' to their jobs." Fraenkel, *Law and Loyalty*, 37 IOWA L. REV. 153, 163 (1952). This conclusion was drawn primarily from the opinion of the Court in American Communications Ass'n v. Douds, 339 U.S. 382 (1950). This deduction seems to be premature in the light of the *Garner* case, *supra*, which upheld the curtailment of the petitioner's activity with certain associations while he remained an employee of the city. Should teachers in public schools be considered as government employees, the *Adler* case, *supra*, further rebuts the inference that Holmes' dictum has become impotent. Fraenkel mentioned that probable jurisdiction had been noted in the *Adler* case but argument had not been heard when his article was written. Fraenkel, *supra* at 169. In the *Adler* case at 492 the Court said: "It is equally clear that they have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York." The reasonable terms which the Court upheld in this case curtailed New York teachers' associations and activities with certain enumerated organizations. Mr. Fraenkel represented the appellant in the *Adler* case.

conception, and, until they do, lower court deliberations will remain mired in the irrational privilege argument while constitutional rights are conditioned out of existence.[78]

Admittedly, with many of these statutes the federal and state governments are striving to protect a vital interest of the sovereign. When the state requires all school teachers to take a loyalty oath, it is attempting to protect the minds of its school-age children from the real or supposed threat of indoctrination with communist propaganda.[79] A modification of this danger provides the impetus for requiring a loyalty oath from government employees.[80] When the state requires an automobile operator to waive his right against self-incrimination by giving his name and other information to an authorized person after he has been involved in an accident, the government is trying to safeguard its citizens from the dangers incident to the volume of vehicular traffic.[81] In conditioning a student's attendance in school upon his being vaccinated or x-rayed, the sovereign hopes to prevent epidemics of small-pox and tuberculosis.[82] Obviously, the government believes the interest to be protected is sufficiently vital to warrant the action taken. On the other hand, the citizen has an important individual interest at stake—his rights are involved. Since the conflict is clear, it is difficult to understand why many of the forums dodge the issue and decide the controversy upon the fictional privilege basis.[83] Much less confusion, bad law, and poor precedent would result from the adoption of a straight-forward approach.

---

78. The Court's refusal to look beyond the express wording of the statute to its effect is particularly difficult to reconcile with the Civil Rights cases. The so-called "grandfather clause" which prevented an individual from voting unless his grandfather had voted was recognized immediately as an unjust discrimination against Negroes. The section did not explicitedly prohibit Negroes from voting; this result was only the effect of the statute's operation. Nevertheless, the Supreme Court held the clause unconstitutional. "It is true it [1910 amendment to OKLA. CONST. arts. 3] contains no express words of exclusion . . . of any person on account of race, color, or previous condition of servitude . . . but the standard itself inherently brings that result into existence. . . ." Guinn v. United States, 238 U.S. 347, 364 (1915). There is no rational explanation for judicial failure to recognize that the statutes under discussion invade basic freedoms when such is the practical effect of the legislation.

79. Wieman v. Updegraff, 344 U.S. 183 (1952); Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952); Tolman v. Underhill, 103 Cal. App.2d 348, 229 P.2d 447 (1951); Throp v. Board of Trustees of Schools for Industrial Education of Newark, 6 N.J. 498, 79 A.2d 462 (1951); Dworken v. Cleveland Board of Education, 42 O.O. 240, 94 N.E.2d 18 (1950). See note 35 *supra.*

80. See notes 23, 24, and 25 *supra.*

81. See note 54 *supra.*

82. Bissell v. Davison, 65 Conn. 183, 32 Atl. 348 (1894); Blue v. Beach, 154 Ind. 101, 56 N.E. 89 (1900); State v. Armstrong, 39 Wash.2d 860 239 P.2d 545 (1952).

83. *E.g.,* Gerende v. Board of Supervisors of Elections of Baltimore, 341 U.S. 56 (1951); *In re* Summers, 325 U.S. 561 (1945); Hamilton v. University of California, 293 U.S. 245 (1934); *Ex parte* Curtis, 106 U.S. 371 (1882); Field v. Hall, 201 Ark. 77, 143 S.W.2d 567 (1940); Steiner v. Darby, 88 Cal. App.2d 481, 199 P.2d 429 (1948);

Should the Court reject the privilege fiction in these areas, it would not be without justifiable grounds upon which to uphold the constitutionality of some of the questioned regulations. It is generally understood and accepted that the rights of the individual guaranteed by the Constitution are not absolute.[84] The right of the state to enact laws for the preservation of public health, safety, or morals has been recognized as a necessary power of government.[85] If a statute represents proper exercise of the police power, it cannot be invalidated because individual rights are abridged by its operation.[86] In the *Adler* case[87] and in *Throp v. Board of Trustees of School for Industrial Education of Newark*,[88] the courts spoke of the police power and intimated that the action taken might be within that power.[89] In these cases the courts undertook a balancing process between the interests involved. Looking only to the statutory language and the direct effect of the wording, the courts

Dworken v. Collopy, 56 Ohio Abs. 513, 91 N.E.2d 564 (1950); *Ex parte* Hunter, 2 W.Va. 122 (1867).

84. Dennis v. United States, 341 U.S. 494, 503 (1951); Feiner v. New York, 340 U.S. 315, 320 (1951); American Communications Ass'n v. Douds, 339 U.S. 382, 394-95 (1950); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Gitlow v. New York, 268 U.S. 652, 666 (1925); Schaefer v. United States, 251 U.S. 466, 474-75 (1920); Bauer v. Acheson, 106 F. Supp. 445, 451 (D.D.C. 1952).

85. Kovacs v. Cooper, 336 U.S. 77, 85 (1949); Lehon v. Atlanta, 242 U.S. 53, 55 (1916); Lake Shore & M.R.R. v. Smith, 173 U.S. 684, 688 (1899); United States v. Delaware & H. Co., 164 Fed. 215, 233 (C.C.E.D.Pa. 1908); Walton v. City of Atlanta, 89 F. Supp. 309, 312-14 (N.D. Ga. 1949); Suppus v. Bradley, 101 N.Y.S.2d 557,564 (1950); Hagerman v. City of Dayton, 147 Ohio St. 313, 328, 71 N.E.2d 246, 253 (1947); Creditor's Service Corp. v. Cumming, 57 R.I. 291, 300, 190 Atl. 2, 8 (1937); *Ex parte* George, 152 Tex. Cr. 465, 469, 215 S.W.2d 170, 172 (1948); Stickley v. Givens, 176 Va. 548, 557, 11 S.E.2d 631, 636 (1941).

86. It is a power growing out of necessity and must be used only when there is a great and immediate danger to the public welfare which must be met. Further, the regulations imposed and the restrictions sanctioned must bear a reasonable connection to the end sought. See Larabee v. Dolley, 175 Fed. 365 (C.C.D.Kan. 1909); Town of Lake View v. Rose Hill Cemetary, 70 Ill. 191 (1873); City of Louisville v. Kuhn, 284 Ky. 684, 145 S.W.2d 851 (1940); State v. Wagener, 77 Minn. 483, 80 N.W. 633 (1899).

87. Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952).

88. 6 N.J. 498, 79 A.2d 462 (1951). The Supreme Court granted certiorari in this case and in a per curiam opinion vacated the judgment feeling that the question had become moot. 342 U.S. 803 (1951).

89. "His freedom of choice between membership in the organization and employment in the school system might be limited. . . . Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence." Adler v. Board of Education of the City of New York, 342 U.S. 485, 493 (1952).

"Government has the inherent right of self protection against the forces that would accomplish its overthrow by violence. It is of the very nature of the social compact that the individual freedoms at issue here are subject to reasonable restraint in the service of an interest deemed essential to the life of the community." Throp v. Board of Trustees of Schools for Industrial Education of Newark, 6 N.J. 498, 508, 79 A.2d 462, 467 (1951).

weighed the *privilege* of teaching school against the *right* of the community to protect itself and then decided that the latter outweighed the former. The result might have been different had the courts balanced the rights of free speech and thought against the state's action.

Certain situations seem to be well within the authority of the police power. The regulations conditioning the attendance of a student in a public school or university upon vaccination or x-ray examination are reasonable means of protecting the health of all citizens. It is common knowledge that the death toll upon highways necessitates strict control of owners and operators of automobiles if this danger to the general public is to be minimized. The apprehension of drivers involved in accidents so that disciplinary measures might be instituted against them is a plausible means of controlling a dangerous activity. The police power is uniquely suited to such applications. Had the opinions which upheld these restrictions upon fundamental rights relied upon the police power as the source of authority which permitted such action, the decisions would have been made upon sound grounds. Precedents susceptible to undesirable future extension to completely different situations would then have been avoided.

While there is no specific police power in the United States government, the commerce clause of the Constitution has been interpreted to allow federal action of the same type permitted under the state's police power.[90] In addition to the commerce power, Congress has the right and the duty to promote efficiency and to insure integrity and discipline in the public service.[91] If political partisanship among governmental employees could reasonably be thought seriously to obstruct the proper functioning of the governmental machinery to the detriment of the general public, such partisanship should be eliminated. Similarly should a "clear and present danger" be proved to exist in having persons who believe in violent overthrow of the government employed in governmental positions, the vital interest of the sovereign in self-protection[92] should furnish the authority with which to prohibit such persons from holding these positions.

90. *E.g.*, United States v. Walsh, 331 U.S. 432 (1947); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Carolene Products Co., 304 U.S. 144 (1938); Thornton v. United States, 271 U.S. 414 (1926). See ROTTSCHAEFER, CONSTITUTIONAL LAW c. 8 (1939).

91. *E.g.*, United Public Workers v. Mitchell, 330 U.S. 75 (1947); *Ex parte* Curtis, 106 U.S. 371 (1882); Bailey v. Richardson, 182 F.2d 46 (D.C.Cir. 1950), *aff'd mem.*, 341 U.S. 918 (1951).

92. *E.g.*, Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952); Dennis v. United States, 341 U.S. 494 (1951); Prince v. Massachusetts, 321 U.S. 158 (1944); Cox v. New Hampshire, 312 U.S. 569 (1941); Anderson v.

Many of the cases, then, which have utilized the privilege doctrine to uphold the constitutionality of unconstitutional conditions could have been sustained as a valid exercise of the police power or some other accepted sovereign authority. There are other cases, however, which appear to be outside the scope of any of these powers. The courts have so held in *Morgan v. Civil Service Commission,*[93] *Tolman v. Underhill,*[94] and *Communist Party of America v. Peek.*[95] In other cases, too, had the familiar considerations incident to a valid exercise of the police power been applied, the statutes would not have met the requirements demanded by this authority and should have been declared unconstitutional.[96]

When called upon to decide the validity of a condition imposed upon a governmental privilege, the courts have a threefold duty to perform: (1) They should investigate the indirect as well as the direct effect of the statute's operation to discover whether or not it restrains the exercise of any constitutional rights. (2) If such rights are affected, the nature of the sovereign's interest under which the legislation was enacted should be examined. (3) If the relevant state power is a recognized right of the government, the courts should weigh the rights involved to determine which should receive the greater protection under the circumstances. Factually, if First Amendment freedoms are concerned, the state should be required to prove that a "clear and present danger" exists from an evil the state has a right to prevent. A "rational basis" test for legislation regarding First Amendment rights ignores to an alarming degree the factual justification which should support restrictions upon speech and thought.

It must be borne in mind that the conditions which have been imposed with reference to communism and overthrow of the government are but one segment of the general problem of unconstitutional conditions. While the communist threat may pass in time, the precedent of the cases herein discussed will remain to influence future tribunals.[97]

Baker, 23 Md. 531 (1865); Throp v. Board of Trustees of School for Industrial Education of Newark, 6 N.J. 498, 79 A.2d 462 (1951).

93. 131 N.J.L. 410, 36 A.2d 898 (1944).

94. 103 Cal. App.2d 348, 229 P.2d 447 (1951), *aff'd on other grounds,* 39 Cal.2d 708, 249 P.2d 280 (1952).

95. 20 Cal.2d 536, 127 P.2d 889 (1942).

96. *E.g., In re* Summers, 325 U.S. 561 (1945); Hamilton v. University of California, 293 U.S. 245 (1934); Field v. Hall, 201 Ark. 77, 143, S.W.2d 567 (1940).

97. Mr. Justice Black has said: "Public opinion being what it now is, few will protest the conviction of . . . Communist[s]. . . . There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." Dennis v. United States, 341 U.S. 494, 581 (1951)

The language of the decisions will indicate to coming generations of legislators and judges that if a particular activity can be classified as a privilege, it can be conditioned. The statute's indirect effect will continue to be subordinated to its express wording and constitutional rights will be constantly placed in jeopardy. Should the courts continue their present course, any right may be abolished by the circuitous method of conditioning some necessary privilege upon its surrender. This danger becomes more acute with the realization that the courts consider rights to be only those enumerated in the Constitution; everything else, no matter how essential to the individual's economic, social, or personal well-being, is a privilege which can be conditioned. Not until the issue is recognized for what it is—the basic freedoms of the individual balanced against the interests of the state—will the mandates of the Constitution be properly considered in judicial scrutiny of legislative action against real or supposed threats from unpopular minority groups.[98]

AN ANALYSIS OF SUBDIVISION CONTROL LEGISLATION

Preoccupation with the amazingly rapid expansion of suburban areas,[1] usually achieved through the process of large-scale subdividing,[2] may easily obscure perception of the haphazard manner of the typical city's movement to its outer limits. The most unfortunate aspect of such uncontrolled growth is the failure to realize its detrimental affect upon the health, safety, and economic well-being of the community.

(dissent). First Amendment liberties should occupy their "preferred place," not only in calm times, but especially in times of crisis and peril.

98. When it is granted that many direct conditions imposed upon governmental privileges operate as indirect abridgements of recognized constitutional rights, and, further, that many activities which bear the courts' label of privilege are, in reality, so important to the individual as to assume the status of a right, grave doubts must be cast upon the constitutional validity of the current procedures being employed against undesirable groups. See SHARP, *The Old Constitution,* 20 U. OF CHI. L. R., 529, 534-44 (1953).

1. For a discussion of the post-war construction boom, see Fortune, June 1950, p. 67, col. 1. The results of the 1950 census show that the greatest increase in population in the past decade occurred in suburbs of metropolitan areas. See BUREAU OF THE CENSUS, POPULATION OF URBANIZED AREAS (DEPT. COMMERCE P-C-3, No. 2, 1950).

2. Subdividing is usually defined as division of a parcel of land into a specified number of lots for the purpose of sale or building. See notes 99-102 *infra* and accompanying text. See also Appendix, p. 574, col. 11 *infra.*