CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

Elrod v. Burns, 427 U.S. 347 (1976)

Page 427 U. S. 348

Though First Amendment rights are not absolute, they may be curtailed only by interests of vital importance, the burden of proving the existence of which rests upon the government, Buckley v. Valeo, 424 U. S. 1, 424 U. S. 94.

Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment. [Footnote 10] Regardless of the nature of the inducement, whether it be by the denial of public employment or, as in Board of Education v. Barnette, 319 U. S. 624 (1943), by the influence of a teacher over students,

"[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Id. at 319 U. S. 642. And, though

Page 427 U. S. 357

freedom of belief is central, "[t]he First Amendment protects political association as well as political expression." Buckley v. Valeo, supra at 424 U. S. 15.

"There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. NAACP v. Button, 371 U. S. 415, 371 U. S. 430; Bates v. Little Rock, 361 U. S. 516, 361 U. S. 522-523; NAACP v. Alabama, 357 U. S. 449, 357 U. S. 460-461.

The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."

Kusper v. Pontikes, 414 U. S. 51, 414 U. S. 56-57 (1973)

These protections reflect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U. S. 254, 376 U. S. 270 (1964), a principle itself reflective of the fundamental understanding that "[c]ompetition in ideas and governmental policies is at the core of our electoral process. . . ." Williams v. Rhodes, 393 U.S. at 393 U. S. 32. Patronage, therefore, to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment." Illinois State Employees Union v. Lewis, 473 F.2d at 576. As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith.

The Court recognized in United Public Workers v. Mitchell, 330 U. S. 75, 330 U. S. 100 (1947), that "Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office. . . . '" This

Page 427 U. S. 358

principle was reaffirmed in Wieman v. Updegraff, 344 U. S. 183 (1952), which held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. And in Cafeteria Workers v. McElroy, 367 U. S. 886, 367 U. S. 898 (1961), the Court recognized again that the government could not deny employment because of previous membership in a particular party. [Footnote 11]

Particularly pertinent to the constitutionality of the practice of patronage dismissals are Keyishian v. Board of Regents, 385 U. S. 589 (1967), and Perry v. Sindermann, 408 U. S. 593 (1972). In Keyishian, the Court invalidated New York statutes barring employment merely on the basis of membership in "subversive" organizations. Keyishian squarely held that political association alone could not, consistently with the First Amendment, constitute

Page 427 U. S. 359

an.adequate ground for denying public employment. [Footnote 12] In Perry, the Court broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit, stating that the government

"may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would, in effect, be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Speiser v. Randall, 357 U. S. 513, 357 U. S. 526. Such interference with constitutional rights is impermissible."

408 U.S. at 408 U. S. 597.

Although the practice of patronage dismissals clearly infringes First Amendment interests, our inquiry is not at an end, for the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons. Keyishian and Perry, however, not only serve to establish a presumptive prohibition on infringement, but also serve to dispose of one suggested by petitioners' reference to this Court's affirmance by an equally divided court in Bailey v. Richardson, 341 U.S. 918 (1951), aff'g 86 U.S.App.D.C. 248, 182 F.2d 46 (1950). [Footnote 14] That is the notion that, because there is no right to a government benefit, such as public employment, the benefit may be denied for any reason. Perry, however, emphasized that,

"[f]or at least a quarter-century, this Court has made clear that, even though a person has no 'right' to a valuable governmental benefit, and even though the government may

Page 427 U. S. 361

deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."

408 U.S. at 408 U. S. 597. Perry and Keyishian properly recognize one such impermissible reason: he denial of a public benefit may not be used by the government for the purpose of creating a incentive enabling it to achieve what it may not command directly.

"'[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'"

Keyishian v. Board of Regents, 385 U.S. at 385 U. S. 605-606.

"It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

Sherbert v. Verner, 374 U. S. 398, 374 U. S. 404 (1963).

""[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a right' or as a `privilege.'""

Sugarman v. Dougall, 413 U. S. 634, 413 U. S. 644 (1973) (quoting Graham v. Richardson, 403 U. S. 365, 403 U. S. 374 (1971)). [Footnote 15]

Page 427 U. S. 362

While the right-privilege distinction furnishes no ground on which to justify patronage, petitioners raise several other justifications requiring consideration. Before examining those justifications, however, it is necessary to have in mind the standards according to which their sufficiency is to be measured. It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. Buckley v. Valeo, 424 U.S. at 424 U. S. 64-65; NAACP v. Alabama, 357 U. S. 449, 357 U. S. 460-461 (1958).

"This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. . . ."

Buckley v. Valeo, supra at 424 U. S. 65. Thus, encroachment "cannot be justified upon a mere showing of a legitimate state interest." Kusper v. Pontikes, 414 U.S. at 414 U. S. 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. Buckley v. Valeo, supra at 424 U. S. 94; Williams v. Rhodes, 393 U.S. at 393 U. S. 31-33; NAACP v. Button, 371 U. S. 415, 371 U. S. 438, 371 U. S. 444 (1963); Bates v. Little Rock, 361 U. S. 516, 361 U. S. 524 (1960); NAACP v. Alabama, supra at 357 U. S. 464-466; Thomas v. Collins, 323 U. S. 516, 323 U. S. 530 (1945). In the instant case, care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. Sherbert v. Verner, supra at 374 U. S. 406. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, see United Public Workers v. Mitchell, 330 U.S. at 330 U. S. 96, [Footnote 16] and the government must "emplo[y] means

Page 427 U. S. 363

closely drawn to avoid unnecessary abridgment. . . ." Buckley v. Valeo, supra at 424 U. S. 25.

"[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."

Kusper v. Pontikes, supra at 414 U. S. 59 (citations omitted). See United States v. Robel, 389 U. S. 258 (1967); Shelton v. Tucker, 364 U. S. 479 (1960). In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. [Footnote 17]

Page 427 U. S. 364

At the time a preliminary injunction was sought in the District Court, one of the respondents was only threatened with discharge. In addition, many of the members of the class respondents were seeking to have certified prior to the dismissal of their complaint were threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge. It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. See New York Times Co.

v. United States, 403 U. S. 713 (1971). [Footnote 29] Since such injury was both threatened and occurring at the time of respondents' motion, and since respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief. See Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 372 U. S. 67 (1963).

[Footnote 10]

"It is important to note that, while it is the Fourteenth Amendment which bears directly upon the State, it is the more specific limiting principles of the First Amendment that finally govern this case."

Board of Education v. Barnette, 319 U. S. 624, 319 U. S. 639 (1943).

[Footnote 11]

Protection of First Amendment interests has not been limited to invalidation of conditions on government employment requiring allegiance to a particular political party. This Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights.

In Torcaso v. Watkins, 367 U. S. 488 (1961), decided the same day as Cafeteria Workers, the Court squarely held that a citizen could not be refused a public office for failure to declare his belief in God. More broadly, the Court has held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds. Pickering v. Board of Education, 391 U. S. 563 (1968). And in Sherbert v. Verner, 374 U. S. 398 (1963), unemployment compensation, rather than public employment, was the government benefit which could not be withheld on the condition that a person accept Saturday employment where such employment was contrary to religious faith. Similarly, the First Amendment prohibits limiting the grant of a tax exemption to only those who affirm their loyalty to the State granting the exemption. Speiser v. Randall, 357 U. S. 513 (1958).

[Footnote 12]

Thereafter, United States v. Robel, 389 U. S. 258 (1967), similarly held that mere membership in the Communist Party could not bar a person from employment in private defense establishments important to national security.

[Footnote 14]

Brief for Petitioners 113.

[Footnote 15]

See also Board of Regents v. Roth, 408 U. S. 564, 408 U. S. 571 n. 9 (1972):

"In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a 'privilege,' not a 'right,' and that procedural due process guarantees therefore were inapplicable. Bailey v. Richardson, 86 U.S. App D.C. 248, 182 F.2d 46, aff'd by an equally divided Court, 341 U.S. 918. The basis of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year,"

"this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"

"Graham v. Richardson, 403 U. S. 365, 403 U. S. 374. See, e.g., Morrissey v. Brewer, ante at 408 U. S. 482; Bell v. Burson, [402 U.S. 535,] 539; Goldberg v. Kelly, [397 U.S. 254,] 397 U. S. 262; Shapiro v. Thompson, 394 U. S. 618, 394 U. S. 627 n. 6; Pickering v. Board of Education, 391 U. S. 563, 391 U. S. 568; Sherbert v. Verner, 374 U. S. 398, 374 U. S. 404."

[Footnote 16]

"[T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government."

United Public Workers v. Mitchell, 330 U.S. at 330 U. S. 96.

[Footnote 17]

The Court's decision in United States v. O'Brien, 391 U. S. 367 (1968), does not support petitioners. O'Brien dealt with the constitutionality of laws regulating the "nonspeech" elements of expressive conduct. No such regulation is involved here, for it is association and belief per se, not any particular form of conduct, which patronage seeks to control. Moreover, while partisanship may involve activities such as registering with a political organization, wearing a campaign button, or contributing to a campaign fund, we cannot say these activities can be equated with such conduct as destruction of a draft card which was involved in O'Brien. See Buckley v. Valeo, 424 U. S. 1, 424 U. S. 17 (1976). Finally, to paraphrase the Court's observations in Buckley:

"Even if the categorization of [partisan activity] as conduct were accepted, the limitations challenged here would not meet the O'Brien test, because the governmental interests advanced in support of the [practice of patronage] involve 'suppressing communication.'"

Id. at 424 U. S. 17. For the end to be furthered by the practice involves the compulsion of support for the incumbent political party. Indeed, unlike the legislation tested in Buckley, the practice of patronage does "focus on the ideas expressed by persons or groups subjected to [it]. . . ." Ibid. And, contrary to O'Brien's proscription, under patronage,

"the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."

391 U.S. at 391 U. S. 382.

[Footnote 29]

The timeliness of political speech is particularly important. See Carroll v. Princess Anne,

"[T]he purpose of the First Amendment includes the need . . . 'to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.'"

Id. at 370 U. S. 392 (quoting 2 T. Cooley, Constitutional Limitations 885 (8th ed.1927)).

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

The Court holds unconstitutional a practice as old as the Republic, a practice which has contributed significantly to the democratization of American politics. This decision is urged on us in the name of First Amendment rights, but, in my view, the judgment neither is constitutionally

Page 427 U. S. 377

required nor serves the interest of a representative democracy**. It also may well disserve -- rather than promote -- core values of the First Amendment**. I therefore dissent.