Constitutional Law - Labor Law - Public Employees' First Amendment Right to Freedom of Association Violated by State Dismissal Based on Political Party Membership

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CONSTITUTIONAL LAW—LABOR LAW—Public Employees' First Amendment Right to Freedom of Association Violated by State Dismissal Based on Political Party Membership.

"To the victors belong the spoils" has been a basic premise of Illinois politics for years, and so when Paul Powell, the Democratic Secretary of State, passed away, no one was surprised that G.O.P. Governor Richard Ogilvie appointed a Republican, John Lewis, to fill the post. Among Lewis' first acts was the replacement of Democratic employees by Republicans.

Much to the chagrin of the new Secretary of State, who knew the unwritten rules of Illinois politics and expected even Democrats to abide by them, a number of employees balked at the idea of losing their jobs, and instead of gracefully withdrawing until another election might bring them better fortune, decided to fight back through the courts.

The individual plaintiffs were non-civil service, non-policy making employees of the Illinois Secretary of State. The plaintiffs brought a class action in the federal district court\(^1\) claiming that they had been discharged because of their political affiliations, and that the discharges violated their first amendment right to freedom of association as applied to the state by the fourteenth amendment. Plaintiffs also alleged that the summary dismissal had violated their procedural due process rights of prompt notice and hearing. Plaintiffs sought reinstatement to their jobs, back pay, and an injunction restraining the Secretary of State from firing employees in the future on the basis of political affiliation. Federal jurisdiction was predicated on the Civil Rights Act of 1871.\(^2\)

The defendant contended that plaintiffs failed to state a cause of action, filing a motion for summary judgment supported by an affidavit stating other grounds for plaintiffs' dismissals. Plaintiffs in turn propounded written interrogatories to the defendant and filed 94 affi-

\(^1\) Illinois State Employees Union, Council 34, American Federation of State, County and Municipal Employees, AFL-CIO v. Lewis, United States District Court for the Southern District of Illinois, Southern Division, Omer Poos, Judge, No. 4743.

\(^2\) 42 U.S.C. § 1983:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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davits indicating that the firings were politically motivated. Five of the affiants stated that they had been requested to switch party allegiance as a prerequisite to keeping their jobs.\(^3\) The district court granted defendant's motion, holding that plaintiffs' affidavits were insufficient as a matter of law, and that answers to their interrogatories (which had not yet been filed) could not lead to the discovery of relevant evidence creating a material issue of fact.\(^4\) In a two to one decision, the Seventh Circuit Court of Appeals reversed and remanded, holding that the district court erred when it granted summary judgment. The court found that the record did not support a factual finding that no plaintiff was dismissed for an impermissible reason, or a legal conclusion that defendant was justified in predicating continued employment on support of the Republican Party.\(^5\)

The Seventh thereby became the first circuit in the United States to explicitly recognize the rights of non-tenured, non-civil service public employees to retain their jobs in the face of politically motivated dismissals. In doing so, the court rejected the decision of the Second Circuit in *Alomar v. Dwyer*,\(^6\) and the Supreme Court of Pennsylvania in *American Federation of State, County and Municipal Employees, AFL-CIO v. Shapp*,\(^7\) both of which found no violation of constitutionally protected rights under similar circumstances.

**First Amendment Issue**

The political rights of public employees had been disputed long before 1892 when Mr. Justice Holmes, sitting on the Massachusetts Supreme Court, cryptically noted: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."\(^8\) The doctrine expressed in Holmes' statement was coined "right-privilege." The petitioner may have had a constitutional right to freedom of speech, but the benefit of government employment, or "largess" as it became known, was a privilege which could be applied or withdrawn by the state for any reason. No one had a "right" to a government job analogous to his "right" to freedom of speech.

This line of reasoning continued unchallenged into the present century, surfacing in 1927 at the infamous Scopes "Monkey Trial,\(^9\)

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3. Illinois State Employees Union v. Lewis, 473 F.2d 561, 564 (7th Cir. 1972).
4. Id. at 565.
5. Id. at 576.
7. 443 Pa. 527, 280 A.2d 375 (1971); 4-3 decision.
and again in 1951 when an equally divided United States Supreme Court affirmed *Bailey v. Richardson* without opinion. The circuit court in *Bailey* noted that the “first amendment guarantees free speech and free assembly, but it does not guarantee Government employ.”

To Judge Kiley, dissenting in *Lewis*, the Second Circuit in *Alomar*, and the Pennsylvania Supreme Court in *Shapp*, Holmes’ aphorism of 1892 remains a correct statement of the law. The United States Supreme Court’s refusal to grant certiorari in *Alomar* may lend credence to this position, though in view of post-*Bailey* decisions and extensive criticism of the right-privilege doctrine *Bailey* espouses, it is too early to forecast reversal of the legal conclusion reached in *Lewis* if and when the Supreme Court settles the conflict between the circuits. Certiorari in *Lewis* was denied February 20, 1973.

The earliest modern cases discussing the privilege of public employees to exercise political rights came in the late forties and early fifties with *United Public Workers v. Mitchell*, *Bailey v. Richardson*, and *Alder v. Board of Education of City of New York*. These cases represent the high water mark of right privilege from which the doctrine has been in slow but steady retreat. The majority opinion by Judge Stevens in *Lewis* cited *Mitchell* and *Bailey* in a discussion of the line of cases demarking the rise and fall of the doctrine.

The earliest of the cases, *Mitchell*, upheld the constitutionality of the Hatch Act, a federal statute enacted to promote governmental efficiency by withholding “active” political rights from most federal employees. The *Lewis* majority correctly noted that this decision could not be taken as a blanket denial of political rights to public employees:

> There was no dispute within the [Mitchell] Court over the proposition that the employees’ interests in political action were protected by the First Amendment. The Justices’ different conclusions stemmed from their different appraisals of the sufficiency of the justification for the restriction.

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[Petitioner] had no right or privilege to serve the state except upon such terms as the state prescribed. . . . In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of . . . the fourteenth amendment to the Constitution of the United States.

13. The Supreme Court denied petitions for certiorari from both defendant and plaintiff. Defendant sought review of the portion of the decision relating to first amendment rights while plaintiff questioned the due process holding.
17. 473 F.2d at 569, 570.
Justice Reed, writing for the majority in *Mitchell*, stated:

[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. . . . Appellants urge . . . that Congress may not ‘enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.’ None would deny such limitations of Congressional power. . . .\(^{18}\)

The extent of the regulation allowed in *Mitchell* went only to partisan activity by federal employees, leaving untouched the right to be a member of a political party or to participate in political decisions at the ballot box. The question resolved in *Mitchell*, though seemingly related to that in *Lewis*, hinged on political activity rather than political association. The court painstakingly emphasized that only action was being circumscribed, and not membership. Regulation of political activity,\(^{19}\) a more blatant form of association than mere membership in a political party, was allowed only because it achieved the legitimate governmental purpose of increased efficiency. *Mitchell* concluded that courts should interfere with the federal government’s regulation of its employees only when such regulation went beyond generally existing conceptions of governmental power developed from “practice, history, and changing educational, social and economic conditions.”\(^{20}\)

Four years later, educational, social and economic conditions had changed, and right-privilege had its finest hour: In the emotionally charged political atmosphere of the early fifties, the Circuit Court of the District of Columbia handed down *Bailey v. Richardson*, the authority upon which *Alomar* and the dissent in *Lewis* based their respective results.

The *Lewis* majority treated *Bailey* as just another case in the right-privilege group, disposing of it in a footnote in a section of the opinion which did not deal with the first amendment claim. This treatment was unfortunate since the case has played such a prominent role in patronage decisions. It may be that the majority felt that later cases


\(^{19}\) Typical “activities” are described in the Illinois equivalent of the Hatch Act, Ill. Rev. Stat. 1967 ch. 24 1/2 § 38(t): (1) Participating in the organization of any political meeting; (2) Soliciting money for a political purpose; (3) Assisting at the polls on behalf of a party or candidate; (4) Using influence or authority to coerce or persuade a person to follow a particular course of political action; (5) Initiating or circulating petitions on behalf of a candidate or political issue; (6) Distributing campaign literature; (7) Making contributions of money on behalf of a candidate or political issue.

interpreting Bailey so clearly laid to rest the right-privilege doctrine upon which Bailey predicated the rights of public employees, that additional comment was unnecessary. Alternatively, Judge Kiley in dissent felt that the majority had relied primarily upon a footnote in Board of Regents v. Roth \(^{21}\) to reject the Bailey premise.

The Roth footnote stated that the court has now "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." \(^{22}\) The dissent felt this statement should be narrowly construed to encompass only procedural due process issues raised in Roth and not first amendment rights, though the line of cases cited by the majority made this distinction academic. A reading of the majority's cases shows a refusal to interpret Bailey as an absolute denial of government employees' political rights almost from the beginning, and a resultant decline of the right-privilege doctrine in first amendment as well as due process cases.

Bailey involved a federal employee fired in accordance with civil service regulations when the Executive Department discovered "reasonable grounds" for belief that she was disloyal to the government. Information had been received that she was or had been a member of the Communist Party and several front organizations, and that she had associated with Communists. The court phrased the question presented: "Must the government continue to employ a disloyal person or publicly reveal the sources by which disloyalty is detected?" \(^{23}\) The issue was analyzed in the context of the United States' "adversary position to a government whose most successful recent method of contest is the infiltration of a government service by its sympathizers." \(^{24}\)

The plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations. That document . . . does not prevent Republican Presidents from dismissing Democrats or Democratic Presidents from dismissing Republicans. . . . The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ. \(^{25}\)

Despite these unequivocal statements, the court felt constrained to quote Mitchell and state that there were boundaries on the power of the government to regulate public employees in regard to their first amendment rights: the act must be "reasonably deemed by Congress

21. 408 U.S. 564, 571 n.9 (1972); Judge Kiley’s dissent in Lewis, 473 F.2d at 579.
22. 408 U.S. at 571 n.9.
24. Id.
25. Id. at 59.
to interfere with the efficiency of the public service."²⁸ It was hardly surprising that the court found disloyalty such a reasonable ground for dismissal.

One year later in Adler v. Board of Education of City of New York,²⁷ the court acknowledged that public employees had first amendment rights, but stated they had no right to work for the government on their own terms. Citing Mitchell, the court noted that employees of the state school system had to work under "reasonable terms" laid down by the state. These terms were reasonable in the Mitchell context: reasonable to accomplish a valid state purpose.

There was no doubt after these cases that the state could constitutionally inhibit the political rights of its employees to a great degree. However Wieman v. Updegraff,²⁸ decided soon after Adler, reversed the "right-privilege" trend, holding that fourteenth amendment protections extended to public servants whose exclusion from public employment was "patently arbitrary or discriminatory." The court noted that while it was true the government could condition public employment according to certain terms,

[T]o draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory.²⁹

Nearly ten years later, a second group of cases further examined the status of constitutional rights of public employees. The most important of these from the standpoint of Lewis was Cafeteria & Restaurant Workers Union v. McElroy,³⁰ cited by the Lewis majority and by the majority and dissent in State Employees v. Shapp. The Shapp majority quoted McElroy, stating that it had become a "settled principle" that government employment could be revoked "at the will of the appointing officer."³¹ Nevertheless, the dissent in Shapp, as well as the majority in Lewis, pointed out further language in McElroy which placed this statement in context:

"Those cases [Mitchell and Wieman] demonstrate only that the state and federal governments, even in the exercise of their in-

²⁷. 342 U.S. 485, 492 (1952): . . . public employees "have the right under our law to assemble, speak, think and believe as they will."
²⁸. 344 U.S. 183 (1952).
²⁹. *Id.* at 191-92.
ternal operations, do not constitutionally have the complete free-

dom of action enjoyed by a private employer. . . . We may assume

that [the discharged employee] could not constitutionally have

been excluded from the Gun Factory if the announced grounds for

her exclusion had been patently arbitrary or discriminatory—that

she could not have been kept out because she was a Democrat or

a Methodist.82

In the same year, the court handed down Torcaso v. Watkins,83 in

which denial of a state office for failure to declare a belief in God was

held to be an unconstitutional abridgment of first amendment rights.
The court stated:

[T]he fact, however, that a person is not compelled to hold public

office cannot possibly be an excuse for barring him from office by

state imposed criteria forbidden by the constitution. This was set-
t.

By our holding in Wieman v. Updegraff. . . .”34

Lewis noted an earlier case, Shelton v. Tucker,35 in which public

employed teachers were fired because they refused to file affidavits

listing organizations to which they belonged. Like the plaintiffs in

Lewis, the teachers had no form of job security. The Supreme Court

held that this disclosure requirement impaired the teachers' rights of

free association which lay at the “foundation of a free society” and was

“closely allied to freedom of speech.”36

The Lewis court used Shelton as a springboard to Pickering v. Board of

Education,37 another academic freedom case in which teachers

were fired for allegedly exercising rights of free speech. The Supreme

Court in Pickering stated:

The theory that public employment which may be denied alto-
gether may be subjected to any conditions, regardless of how un-
reasonable, has been uniformly rejected. . . . The problem in

any case is to arrive at a balance between the interests of the

teacher, as a citizen, in commenting upon matters of public con-
nern and the interest of the State, as an employer, in promoting the

efficiency of the public services it performs through its employees.38

32. Id. at 897, 898; Lewis, 473 F.2d at 570, 571. State Employees v. Shapp, (dis-
34. Id. at 495-96.
35. 364 U.S. 479 (1960).
36. Id. at 485-86.
37. 391 U.S. 563 (1968). Pickering in turn relied on Keyishian v. Board of
Regents, 385 U.S. 589 (1967). Keyishian held that the theory that public employment
which could be denied altogether could be subjected to any condition, regardless of

how unreasonable, has been “uniformly rejected.” 385 U.S. at 605-06.
(1967), in which an employee at a shipyard designated as a “defense facility” was
discharged because of his Communist affiliation. The court found that the employee's
freedom of association could not be curtailed by government action depriving him of
his employment unless the government could show a vital interest which dictated
this result.
These cases refine the problem presented by the constitutional rights of public employees on one hand, and the interests of the state on the other. In essence, Holmes was correct in 1892, as was the Bailey court in 1950: Standing alone, the statement that "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,"\textsuperscript{39} is accurate. No one has a constitutional claim to a government job just as no one has a constitutional right to appellate review,\textsuperscript{40} or education.\textsuperscript{41} However once the state provides this largess it cannot withhold it arbitrarily. Restrictions must be reasonable in the light of some valid governmental interest.

As the majority in Lewis noted, this doctrine was reaffirmed in 1972 in Perry v. Sinderman.\textsuperscript{42} Sinderman involved a state college professor who lacked tenure or contractual rights to re-employment, and was fired for criticizing the college administration. The Supreme Court held that lack of rights to re-employment did not defeat Perry's claim that his dismissal was violative of his first and fourteenth amendment rights:

For 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 deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It 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.' Such interference with constitutional rights is impermissible. . . .

Most often we have applied [this] principle to denials of public employment [citations omitted]. . . . We have applied the principle regardless of the public employee's contractual or other claim to a job. . . ."\textsuperscript{43}

It is evident from these statements of the law that right-privilege is a doctrine of the past. A state cannot do indirectly that which it is not allowed to do directly, in the Lewis case the suppression of public em-

\textsuperscript{39} McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).
\textsuperscript{40} Griffin v. Illinois, 351 U.S. 12, 18 (1956).
\textsuperscript{41} Brown v. Board of Education, 347 U.S. 483 (1954). See Schoen, Politics, Patronage, and the Constitution, 3 Ind. L.F. 35, 41 n.18 (1969). State constitutions may place obligations on the government to provide these, but the "right" to receive these benefits is measured against the federal constitution.
\textsuperscript{42} 408 U.S. 593 (1972), companion case to Board of Regents v. Roth, 408 U.S. 564 (1972).
\textsuperscript{43} 408 U.S. at 597; cited at 473 F.2d 571.
ployees' first amendment rights of association, at least absent a showing of a compelling state interest supporting the result.44

The dissent in Lewis and the majority in Alomar45 acknowledged that right-privilege was no longer viable as it pertained to due process, but argued that it still applied in first amendment cases or that doctrines which replaced it in such situations were inapplicable to patronage litigation.46

Alomar suggested that right-privilege as expressed in Bailey still applied to first amendment rights, a curious position when considered in light of post-Bailey decisions and the preferred status first amendment rights have traditionally enjoyed. The dissent in Lewis, while stating that it was persuaded by Alomar, proceeded to cite two cases dealing with public employees' first amendment rights which had rejected right-privilege47 in favor of what Professor William Van Alstyne has called "the doctrine of unconstitutional conditions."48 The dissent pointed out that the doctrine has a "basic flaw," quoting Van Alstyne and implying that this flaw made the doctrine inapplicable to Lewis:

The basic flaw in the doctrine is its assumption that the same evil results from attaching certain conditions to government connected activity as from imposing such conditions on persons not connected with government. In many cases this may be true, but the connection with the government may in certain circumstances make otherwise unreasonable conditions quite reasonable.49

The problem with the dissenting analysis is that the strict unconstitutional conditions doctrine which Van Alstyne criticized was not applied in Lewis precisely because of its basic flaw. Rather, the court used what Van Alstyne termed the "doctrine of unconstitutional effects:"

The doctrine of unconstitutional conditions has usually been applied only to regulations which directly forbid the enjoyment of an explicit constitutional right. The doctrine has been of little assis-

44. A restatement of the Supreme Court's doctrine of "compelling government interest:" "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Bates v. Little Rock, 361 U.S. 516, 524 (1960).
45. Alomar v. Dwyer, 447 F.2d 482, 483 (2d Cir. 1971), cert. denied, 404 U.S. 1020 (1972): "We are not to be understood as saying, however, that in all circumstances may a provisional employee be summarily discharged." The court goes on to discuss circumstances which would lead to violations of due process.
47. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439, 1445-46 (1968): The doctrine declares that whenever an express constitutional provision forbids the government to do something directly, it equally forbids the government to do it indirectly.
48. Id. at 1448; Quoted at 473 F.2d 580.
tance in those situations, however, where the regulation of status in the public sector has had only an indirect effect on such a right, without directly and wholly forbidding its exercise. The Supreme Court has nonetheless occasionally protected the petitioner's status under such circumstances by emphasizing the "unconstitutional effect" of the regulation, although still leaving undisturbed the conventional view that one has no constitutional right per se to status in the public sector. . . . The Court attempts to balance competing public and private concerns to determine whether the regulation as applied has a sufficient connection with important enough state interests to outweigh the incidental effect on the constitutional rights of the affected class.\(^4\)

The unconstitutional effects rationale is designed to circumvent the rigidity of the unconstitutional conditions doctrine, which is absolute and thereby impractical. Under unconstitutional conditions, any government abridgment of an explicit constitutional right is barred. Under unconstitutional effects, the competing interests are weighed. The majority in \textit{Lewis} acknowledged that in some situations a valid state interest would outweigh the right of a public employee to unfettered political association. The flaw in \textit{Alomar} is its reliance on \textit{Bailey} as good law. The flaw in the \textit{Lewis} dissent is this reliance coupled with confusion of what is a valid state interest and what is a purely political interest. The two are not necessarily coincidental.

In keeping with the unconstitutional effects doctrine, the \textit{Lewis} majority analyzed three justifications brought forward by the state to legitimate their violation of the petitioners' rights.

The initial justification was that plaintiffs were beneficiaries of the patronage system and should not have standing to object to its routine and foreseeable consequences. As noted in \textit{State Employees v. Shapp}, those who "live by the political sword must be prepared to die by the political sword."\(^5\) This waiver of constitutional rights was a determinative factor in the \textit{Shapp} decision, and was mentioned by the \textit{Lewis} majority as a possible defense for the state in future cases.

However in \textit{Lewis}, unlike \textit{Shapp}, there was no showing that all plaintiffs or particular plaintiffs were originally hired as patronage

\(^4\) Id. at 1449: Van Alstyn suggests Shelton v. Tucker, 364 U.S. 479 (1960), as a good example of this type of case. In \textit{Shelton}, teachers were fired when they refused to file affidavits listing organizations to which they belonged. This requirement was found to impair the teachers' right of association: "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." 364 U.S. at 485-86.

employees. The Lewis court refused to rule on the sufficiency or effect of the defense other than by reiterating that a waiver of constitutional rights will not lightly be assumed. It also warned that the right waived in Shapp was construed as a "right to continued public employment," a right not recognized in Lewis.

The result of the waiver defense, if and when it is asserted, is in doubt. The fact that public employees are non-civil service or non-tenured does not automatically lead to the conclusion that they are patronage employees. Even if the employee was politically sponsored at the time of hiring, it is inconsistent to apply a waiver if political sponsorship was the only means by which the job could be obtained. These circumstances involve coercion and could never be termed a "voluntary waiver" as the law requires for validity. Additionally, granting the defense serves only to continue the spoils system despite legislative and judicial antipathy.

The second justification advanced by the state to support discharge of the petitioners was that political affiliation was a relevant and proper criterion for dismissal from certain government positions. The state implied that eliminating politically motivated dismissals would thwart the will of the people as expressed through the ballot box, since successful candidates of one party, mandated by the electorate to carry out their policies, would have difficulty in administering their programs through the entrenched members of the other.

The Lewis majority recognized that this would be a legitimate argument as applied to employees in policy making offices or to those in positions where personal loyalty to the policy maker was essential to the efficient administration of government. Nevertheless, the court noted that this justification, like that of waiver would not apply automatically to all non-tenured or non-civil service public employees since all did not fit into policy making or loyalty positions. It would turn

51. Id. at 531. Plaintiffs freely admitted they were appointed "for political reasons."
52. 473 F.2d at 574.
54. 473 F.2d at 574.
on a matter of proof, and could not therefore serve as a basis for summary judgment for the state.

The final justification advanced by the state was that effective administration of state government required public executives to have the same latitude in hiring and firing that their fellows in the private sector enjoyed, and that a rule giving non-tenured employees an easily alleged cause of action for wrongful discharge would inhibit managerial discretion.\footnote{Id.}

The majority held that this justification, like the others, must await answers to plaintiffs' interrogatories since factual issues as to the sufficiency of the justification could hinge on information contained therein. At the same time, however, the court acknowledged that this argument appeared "to have the greatest force of the three,"\footnote{Id. See also concurring opinion at 578.} especially in view of the large numbers of employees potentially affected by the decision. Yet citing \textit{Cafeteria & Restaurant Workers v. McElroy}, the majority noted:

\begin{quote}
It is now axiomatic that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer.\footnote{Id. at 575; Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 897-98 (1961).}
\end{quote}

The court argued that political considerations were a factor not often found in the private sector in regards to employment; that this was a factor tending toward less efficiency in government rather than more. It also noted that the larger the number of employees affected, the more urgent the need to preserve their first amendment rights. The court felt that the problem of extensive litigation impairing governmental efficiency and clogging court procedures would arise only in the context of extensive hiring and firing of state employees in circumstances affecting their rights of association. In the long run, the interests of the state in efficient management would be better served by barring politically motivated dismissals.

While these premises cannot be denied, it may be that the majority was overzealous in determining what would or would not be best for the state in the long run. While protection of individuals' constitutional rights is within the purview of the federal court, determining what is good for the state is traditionally a matter for the state legislature. The majority comment may have been simply a dismissal of the
state's factual claim that patronage increased efficiency through the indirect means of promoting managerial discretion. The majority may also have been alerting future parties as to lines of argument to which the court would be receptive.

A direct statement by the court in this situation may have been more appropriate. Maintaining the patronage system in the context of more efficient state government, the major line of argument left open to the state, seems to apply factually only in the limitations subscribed by the state's second justification: in policy making and loyalty positions. In other situations, patronage leads to inefficiency. The interests of the state and the interests of the political party whose members govern the state should not be confused.

Underlying these justifications is a rationale more basic to the concept of the role of the spoils system in American government: Proscribing patronage will devitalize and ultimately destroy the political parties. As the parties decline, all levels of government in the United States will be engulfed by an unresponsive bureaucracy composed of entrenched and unimaginative civil servants exercising power unchecked by political responsibility. This reasoning is reflected in the statement of a man who ought to know, Senator George Washington Plunkett, late of Tammany Hall:

First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get the offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay.

This argument fuses the compelling interests of the state and of the political parties, a proposition constitutionally as well as factually sus-

58. See Wilson, The Economy of Patronage, 69 J. POL. Econ. 369, 370 n.4 (1961), defining patronage jobs as "all those posts, distributed at the discretion of political leaders, the pay for which is greater than the value of the public services performed." Present civil service acts were passed in response to blatant misuses of patronage and the resultant waste of public funds. Commonwealth v. Brownmiller, 141 Pa. Super. 107, 14 A.2d 907 (1940), is the sad tale of how 19,000 employees found themselves working for the state highway department just before elections. WALDBY, THE PATRONAGE SYSTEM IN OKLAHOMA (1950) at 5, describes how 8,000 employees were added to that state's highway department. KURTZMAN, METHODS OF CONTROLLING VOTES IN PHILADELPHIA (1935) at 40: "The Organization thinks that the man who spends a great deal of time ... performing his necessary duties to enable him to control the votes of that division, must be compensated from some source. The ... Organization, or any other political machine, cannot afford to pay out of its treasury for all the services that these workers perform. The public payroll, therefore, serves as a very convenient source from which to draw the necessary funds."


60. Id.
Though advanced by certain political scientists with less personal stake in patronage than politicians, the argument's predictions have not come to pass in light of large scale reductions in the number of patronage jobs caused by adoption of civil service statutes. It remains little more than an alarmist forecast.

**PROCEDURAL DUE PROCESS ISSUE**

While the court found that first and fourteenth amendment rights of non-civil service employees were protected, it found they had no due process rights of prompt notice and hearing before discharge, reacting to the Supreme Court's reversal of the circuit's earlier decision in *Roth v. Board of Regents*.

The Supreme Court in *Roth* found that procedural due process applied only to deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property. To qualify as a deprivation of "liberty," the state's reasons for firing the employee must involve charges which could seriously damage his standing and association in the community, or impose a stigma or other disability upon him which would foreclose his freedom to take advantage of other employment opportunities. The majority in *Lewis* noted that "loss of a patronage job would in no sense reflect adversely on the discharged..."
employees' reputation,” and that no charges of misconduct other than those made in an effort to defend the suit (which the court felt to be of no effect upon plaintiffs’ community standing or chances for reemployment) had been lodged.\footnote{66}

Likewise, the plaintiffs in \textit{Lewis} were not deprived of any “property” as defined by \textit{Roth}. The Supreme Court noted that a person must have more than an abstract need or desire for a state benefit before he has a property interest in it. He must have a “legitimate claim of entitlement,” based not on an interest created by the constitution, but one “defined by existing rules or understandings that stem from an independent source such as state law.”\footnote{67}

The court in \textit{Lewis} stated that “one who takes a patronage job may not even have an expectation of keeping it when the appointing officer is replaced, let alone a legitimate claim of entitlement to such a job.”\footnote{68} Non-civil service and non-tenured public employees thereby have no property interest in their employment which would entitle them to procedural protection under the fourteenth amendment, absent a “clearly implied” promise of continued employment which could be used as a basis for this protection.\footnote{69} Since no promise was alleged in \textit{Lewis}, summary judgment as to the procedural issue was correct.

\footnote{66} 473 F.2d at 563, 564 n.1. This may be an unwarranted conclusion. The allegations of wrong-doing made by the secretary of state (see 473 F.2d at 564, n.2) were not related to plaintiffs' duties with the state, though members of the community or future employers may not have notice of this.

The court in \textit{Lewis} relied on the fact that charges were brought against the dismissed employees after they had filed their suit. The court noted that procedural due process may lie if the charges were made simultaneously with the dismissal. 473 F.2d at 563, 564, n.1.

The problem with this distinction is that in each case where non-tenured employees are forced to bring suit to vindicate their constitutional rights, the state will bring up other charges against them in an effort to defend. Harm done by these charges will be just as immediate as that caused by charges brought up at the time of firing. The charges contemplated are those which would reflect adversely on the dismissed employee. For such charges to be effective as valid reasons for the state to dismiss the employee, they would necessarily go toward his effectiveness in his job. Dismissal for no reason, valid for a non-tenured employee, would be highly suspect to the court examining defendant's motives. This could cause public officials to come up with spurious reasons for dismissal which not only would be untrue, but would by definition reflect on plaintiff's fitness as an employee, affecting his community standings and employment prospects.

Justice Marshall's dissent in Board of Regents v. Roth, 408 U.S. 564, 589 (1972), recognizes that denial of employment itself “is a serious blow to any citizen.”\footnote{67} Id. at 577.

\footnote{68} 473 F.2d at 563, 564 n.1. This may be a restatement of the court's views on the validity of the "waiver" defense discussed infra.

\footnote{69} See Connell v. Higginbotham, 403 U.S. 207, 208 (1971). At first glance it would seem that the court, to be consistent with its holding that no non-tenured employee could be discharged for exercising his constitutional rights, would have to recognize some "implied promise of continued employment" to the employee who performs his job in an adequate manner. However, the employee can still be discharged for any reason or no reason, as long as the reason is not an improper one, and so he has no expectation of continued employment or implied promise thereof.
CONCURRING OPINION

Though Judge Campbell stated that his concurrence was based on the line of cases cited by the majority, he noted that he felt the decision was “dictated” in light of the Supreme Court’s opinion in *Perry v. Sinderman*. The concurrence was obviously troubled by the fact that most of the cases relied upon by the majority came in the realm of academic freedom, which is a “special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” Thus he felt that these cases could arguably be distinguished from *Lewis* on the basis of the type of state employment involved. *Sinderman*, however, laid to rest his doubts in language broad enough to make it plain that the court was referring to all state employees rather than only teachers. Though *Sinderman* involved a teacher and could have been decided on the basis of prior decisions such as *Pickering v. Board of Education*, it mentioned these only in support of the decision reached, rather than as narrowly construed precedent in the area of academic freedoms.

The remainder of Judge Campbell’s opinion was devoted to pointing out problem areas which he felt deserved discussion in light of the holding. He noted that *Shapp* and *Alomar* both reached a decision contrary to that in *Lewis*, and that certiorari had been denied in *Alomar* just six months before the decision in *Sinderman*, which did not discuss or cite either case. This lends some credence to his suggestion that academic freedom cases are not valid precedent in patronage situations, but a close examination of *Sinderman* leads to the conclusion that the denial of certiorari in *Alomar* and the decision reached in

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70. Judge William J. Campbell of the Northern District of Illinois, sitting by designation.

71. Illinois State Employees Union v. Lewis, 473 F.2d 576 (7th Cir. 1972).


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, 526. Such interference with constitutional rights is impermissible.

75. Judge Campbell also cited Norton v. Blaylock, 409 F.2d 772 (8th Cir. 1969), as being in conflict with *Lewis*, however this case dealt primarily with a violation of the merit system and the procedural process of terminating a civil service employee.
Sinderman have no bearing on each other. No lower court opinions were mentioned in Sinderman, though several Supreme Court decisions were cited which dealt with denials of public employment in fields other than academic, including all cases relied upon by the Lewis majority.\footnote{76} As the concurrence silently concluded, it is error to read too much into a denial of certiorari which may have hinged on reasons totally unrelated to the law in the case.\footnote{77}

Judge Campbell's second area of concern was the potential impact of the decision on state and local governments and on the federal court. He felt that the court would become a "super civil service commission" for state and local employees not already covered by civil service.\footnote{78}

Judge Campbell is correct in his analysis, but as the majority inferred, if the state persists in violating its employees' constitutional rights, the federal court must vindicate these rights. The greater the number of persons affected, the more immediate becomes the need to put a stop to the practice.\footnote{79} This logic is especially compelling in view of the rapidly increasing number of persons employed by various units of government.

The concurrence pointed out that in the case at bar, the number of possible trials and appeals could reach 1,946, the number of employees discharged by Lewis. This figure represents only one department of one state government in one change of administration. The volume of potential litigation, as the Judge noted, could be castastrophic.

This criticism must be evaluated in light of the number of such cases likely to be litigated, a figure far smaller than that the concurrence fears. This reduction would be primarily due to the restrictions laid down by the majority opinion which would serve to winnow out potential claimants, as well as a realization by state officials that politi-
cally motivated firings will only result in time consuming and potentially embarrassing litigation.

The probable solution to the problem would be extension of the civil service system to all non-policy making employees, to provide a relatively fast and quiet administrative system to facilitate discharge. This would eliminate the specter of the federal government ruling over state employment practices and reduce the amount of litigation to a figure proportionately above that currently encountered in civil service dismissals. Additionally, these cases are for the most part class actions brought by employees' unions. Individual plaintiffs are not likely to have the resources necessary to bring suit, a potentially limiting factor in the number of docket hours devoted to trying such actions.

Judge Campbell's final observation concerned the judicial standards by which non-policy making and policy making employees will be separated. Since this particular factual issue was not before the court, the majority mentioned the distinction without giving clues as to criteria by which employees would be classified, leaving the matter to the determination of the district court. The concurring opinion stated that the constitution would permit firing of "policy implementing" as well as "policy making" employees.

Policy implementing employees would fall within the standards outlined by the majority, which included employees whose loyalty to the
particular administrative head was needed to effectively carry out state policies. This category of employees would include both those whose positions would entitle them to potentially damaging knowledge and those who could frustrate the program of the particular officer. The problem comes in drawing a line between policy implementers who can be constitutionally discharged for political affiliation and those who cannot. In a sense even a road construction worker implements state policy.

In some instances the question will be a hard one for the courts, but one which is within reach of effective judicial determination. Issues presented will ultimately be decided on a case by case basis. Separation will have to come at a point where it becomes reasonably necessary to discharge employees for political affiliation in order to effectively carry out state government, keeping in mind that what is good for the state is not necessarily good for the political party. This standard is tenuous, but not so remote that judicial determination based upon it will be arbitrary. Because of the fluctuating nature of employment duties, a degree of discretion must be built in to whatever standard is eventually adopted by the courts.

The concurring opinion also felt that an equal protection problem might be presented by discharging some employees for reasons of political affiliation and not others. However, if the line is drawn at a point where a valid governmental interest can be inferred, the categories created would not be so unreasonable as to call for application of the doctrine.82

CONCLUSION

Lewis represents a step forward in judicial recognition of public employees' constitutional rights.83 Nevertheless, the opinion should not be construed too broadly.

The sufficiency of the justifications raised by the state were not explored by the majority, but the language of the opinion indicated that waiver defenses may be acceptable if the employee gained his job

82. Equal protection was not brought up by either party in Lewis, though such an issue may be raised in the context of protecting some employees under civil service and not others.

83. The court noted that even though the spoils system had been entrenched in American politics and government for over 200 years, this fact was irrelevant to the claim presented. The majority stated: "We therefore abjure argument founded only on political tradition in the State of Illinois or on notions of policy which may or may not lead to the extension of the civil service system. . . . Our concern is with the first amendment rights of a citizen. . . ." 473 F.2d at 569.
through political sponsorship. Granting such a defense would blunt the practical effect of the *Lewis* decision and serve to perpetuate the patronage system.

The majority also warned that the sufficiency of all the plaintiffs' claims in the class action was in doubt. The opinion termed the issue as "whether a non-policy making employee . . . may be discharged for refusing to transfer his political allegiance from one political party to another," though the court implied that merely dismissing an employee for reasons of political affiliation would likewise be circumscribed in the proper situation. The majority analyzed the problem by assuming that:

>[P]laintiffs were performing their jobs competently, that they have no responsibility for determining policy, that they were discharged simply because they are Democrats, and that, in at least some instances, they were offered continued employment if they would actively support the Republican Party.

Questions remaining as to the sufficiency of justifications, remedies available, and eligible plaintiffs must be settled at a later date, probably on an individual case basis because of the singular nature of the facts in each case as they relate to the type and level of employment within the state government. The district court in *Lewis* will solve some questions when it grapples with the problems remanded by the Seventh Circuit. Final answers will not come until the Supreme Court balances the arguments of public employees and patronage forces.

ROBERT CHRISTENSON

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84. *Id.* at 566.
85. *Id.*
86. *Lewis* may force reappraisal of such cases as United Public Workers v. Mitchell, 330 U.S. 75 (1947), in which a non-policy making federal employee was denied rights of political activity, a form of association. *Mitchell* has been roundly criticized on the basis of later cases, many of which *Lewis* relied upon. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1447 (1968); Rose, A Critical Look at the Hatch Act, 75 Harv. L. Rev. 510 (1962).