The Privilege Argument--How It Has Fared in Constitutional Law

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NOTE

THE PRIVILEGE ARGUMENT—HOW IT HAS FARED IN CONSTITUTIONAL LAW

Practicing law and receiving unemployment compensation have something in common—courts have classified both of them as privileges.¹ Other examples of activities which the courts have called privileges include: selling liquor,² incorporating a business,³ being released early from prison because time is deducted for good conduct,⁴ receiving property upon the death of the owner,⁵ voting,⁶ hunting,⁷ and using the highways for commercial purposes.⁸ Encompassing them all is the usual definition of a privilege: "... a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantage of other citizens."⁹ In contradistinction to a right, a privilege is generally considered to be a mere gratuity which the government may entirely withhold.¹⁰

When the state or federal government takes action limiting a privilege,¹¹ the fact that it is only a privilege which is affected has often been used as a premise for an argument upholding the action against constitutional challenge. This "privilege argument" takes the following form. The government has the power to forbid absolutely the enjoyment of privileges. The power to forbid includes the power to condition. All that the government has done is to set up certain qualifications or conditions for the enjoyment of a privilege. Therefore, the disputed action is within the power of the government.

¹. In re Petition for Integration of the Bar of Minnesota, 216 Minn. 195, 12 N. W. 2d 515 (1943) (law); Dworken v. Collopy, 56 Ohio L. Abs. 513, 91 N. E. 2d 564 (C.P. 1950) (unemployment compensation).
¹⁰. See, e.g., Horn Silver Mining Co. v. New York State, 143 U. S. 305 (1892).
¹¹. This Note uses "privilege" only in the sense already given: as a special benefit conferred by the government upon a special group. The term, of course, has many other meanings, e.g., a permissive use of land, an immunity from testifying, or a protection from liability for slander. It might also be pointed out that the reference to "privileges and immunities" in the Federal Constitution does not refer to the type of "privileges" with which this Note is concerned. E.g., Bradwell v. Illinois, 85 U. S. (16 Wall.) 130 (1873) (practicing law not within the 14th Amendment privileges and immunities clause).
This Note is an attempt to cut horizontally through diversified areas of the law so as to provide an estimate of the general success with which this privilege argument has met. Because of the scarcity of literature concerning privilege and the great number of cases involved, it is necessary to use examples and proceed inductively. No effort is made to "solve" problems raised in the examples or to summarize the law in a particular area. For example, when considering the use of the privilege argument in upholding loyalty oaths, no attempt is made to determine what types of loyalty oaths are constitutionally permissible. Another limitation of this Note is that there has been no consideration of how the privilege argument has fared in two large fields: namely, the right to a hearing, either judicial or administrative, and the right to a review of a hearing.

**Illustration of the Use of the Privilege Argument**

*Loyalty Oaths*

Loyalty oaths have been litigated in many different contexts, so it is interesting to notice the efficacy of the privilege argument in upholding them. As to loyalty oaths relating to past conduct, the landmark cases arose out of the Civil War. Following the war, some of the states made test oaths prerequisite to such diverse activities as voting, holding public office, following various vocations, and opening up a default judgment. The required attestations were generally to the effect that the affiant had never supported the Confederacy or been disloyal to the United States. Arguing that a state could attach such qualifications as it wished to the various privileges involved, the proponents of these oaths thought them constitutional. This is the reasoning by which, for example, the Missouri court held an oath a proper prerequisite to the privilege of voting. On the other hand, opponents argued that the legislation requiring the oaths were really bills of attainder or ex post facto laws. This is the position which the United States Supreme Court took in two cases, *Cummins v. Missouri* and *Ex Parte Garland*. In the *Cummins* case the Court dealt with the oath required by Missouri for a priest to teach or preach. In the *Garland* case the oath was one required by Congress for a lawyer to practice in the federal courts.

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12. See Burkett v. McCarty, 10 Bush 758 (Ky. 1866).
14. See Murphy & Glover Test Oath Cases, 41 Mo. 339 (1867).
16. Blair v. Ridgely, 41 Mo. 63 (1867).
17. 73 U. S. (4 Wall.) 277 (1867).
18. 73 U. S. (4 Wall.) 333 (1867).
In both instances, by 5 to 4 decisions, the Court struck down the conditions as bills of attainder. A bill of attainder was defined as "a legislative act which inflicts punishment without a judicial trial." The Court reasoned that sympathy with the Rebellion did not constitute unfitness to preach or practice law; therefore, the conditions could not reasonably have to do with qualifications for the jobs, but rather stood only as punishment for past action.

Another loyalty oath case, *Wieman v. Updegraff,* places a different limitation on the state's power to deny a privilege because of past conduct. The limitation is the due process requirement of fairness. In the *Updegraff* case an Oklahoma statute required an oath that the affiant had, among other things, never belonged to an organization listed as "subversive" by the U. S. Attorney General. The oath was struck down because it excluded persons from the privilege of state employment regardless of their knowledge of subversive activities of organizations to which they had belonged. The Court felt that establishing "guilt by association" without more was not consistent with due process. This reversed the Oklahoma court, which had upheld the statute on the ground that if a person wanted public employment he could have it only on the terms suitable to the state.

The *Cummings* case and the *Updegraff* case, taken together, seem to limit considerably a government's power to withhold privileges because of past conduct. The *Cummings* case prevents the denial of privileges for punishment of past acts. It also introduces the idea of reasonable relationship. *I.e.,* if it is unreasonable to suppose the past conduct is related to the proper exercise of the privilege, under the *Cummings* case doctrine it is thought that the legislation is an unconstitutional attempt to impose punishment. The *Updegraff* case doctrine introduces the motion of fairness implicit in due process, and applies this to determine whether the qualification concerning past conduct is a proper one.

When disputed loyalty oaths relate to present or future conduct, the oaths often have been upheld. For instance, such a loyalty oath has been held to be a proper condition to the privilege of obtaining unemployment compensation. A well-noted case in which

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an oath relating to present conduct was sustained is *American Communications Ass'n, CIO v. Douds.*24 There the statute required a non-communist oath from labor union leaders before the NLRB could recognize the union as a bargaining agent. The Supreme Court, however, rejected the idea that the oath could be upheld on the bare idea that the use of the NLRB was a privilege which the government could withdraw.25 Rather, the Court chose to weigh the interests involved and take into account the reasonableness of a possible connection between communist labor leaders and disruptions of commerce.26 This association was thought to be sufficient so that the Court could say there was no unnecessary infringement of constitutional rights. The Court then went on to distinguish *Cummings v. Missouri* on the ground that the present oath did not punish anyone who was a communist, since it could be signed by anyone who would renounce any such association he had in the past.27

**Government Employment**

Government employment has often been labeled a privilege by the courts.28 It is in this area that the case of *United States v. Lovett*29 provides an interesting reiteration of the *Cummings* case doctrine. Congress had passed a bill cutting off the salaries of certain named federal employees. These persons had been suspected of subversive activities, but the evidence conflicts as to whether Congress had intended to punish or had simply thought the persons unqualified for government service.30 The Court found the legislation to be a permanent proscription from government employment because of past actions and, as such, punishment and a bill of attainder. With these conclusions the concurring justices did not agree. They pointed out that on its face the bill did not appear to be a bill of attainder, that it did not disqualify the persons from federal service, and that it could be regarded as only a stoppage of the normal method of compensating the employees for their services.31 In view of the Court's usual tendency to give legislation the benefit of a constitutional doubt, it seems that the Court has a marked antipathy

25. Id. at 390.
26. Id. at 387-389, 390-391.
27. Id. at 413-414.
toward attempts to punish for past conduct by withholding a privilege.

The Lovett case is doubly interesting in view of the traditional attitude the courts have taken toward government employment. Justice Holmes' statement that "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" perhaps best illustrates the thought that runs through many opinions. It is in the area of government employment that the privilege argument has been accepted with alacrity. Still, the cases in the Supreme Court seems to proceed on the implicit assumption that the qualifications on the employment are subject to requirements of due process. Thus, for example, in United Public Workers, CIO v. Mitchell, upholding a portion of the Hatch Act, and Adler v. Board of Education of New York City, upholding loyalty oaths for New York teachers, the opinions intimate that if these conditions had been unreasonable, they would have been struck down. The requirement of due process was made explicit in the Updegraff case, but the emphasis there seems more on the unfairness of the procedure as distinguished from the reasonableness of the restriction.

**Practice of a Profession**

There is another group of cases in which one finds the privilege argument: namely, cases dealing with the practice of those professions, such as medicine, which particularly concern the general public. The practice of these professions is often said to be a privilege. Yet, the courts frequently omit the privilege talk and make some hint about the necessity for qualifications on the profession to be reasonable. In this there seems to be a rejection of the bare privilege argument. However, it is difficult to find any cases in which the courts strike down qualifications as unreasonable, even where one might expect this to happen. For example, in 1872 the

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34. See Note, Restrictions on the Civil Rights of Federal Employees, 47 Colum. L. Rev. 1161 (1947) for a review of the extent to which the constitutional rights of government employees have been restricted; Note, The "Right" to a Government Job, 6 Rutgers L. Rev. 451 (1952) for a consideration of unconstitutional conditions on the privilege of government employment.
37. 330 U. S. at 100; 342 U. S. at 494-496.
39. E.g., Dent v. West Virginia, 129 U. S. 114, 122 (1889) (dictum) (condition must be "appropriate" and "obtainable").
Supreme Court upheld a condition forbidding any woman from practicing law. The concurring justices thought the public needed to be protected from all women lawyers, but one wonders whether the majority themselves thought this wholesale prohibition reasonably necessary. In re Summers, where the Court upheld a condition requiring a lawyer to swear to bear arms for the state if called, is another case in point. It is to be doubted that there is such a strong need for militant lawyers as to justify the condition as a reasonable qualification on the practice of law. Another instance where the Court took a liberal view of reasonableness is one concerning a statute prohibiting the practice of medicine if the person had previously committed a felony. The first Justice Harlan, writing the dissenting opinion, would have treated the act as a penal ex post facto law. Yet, although most state cases seem to refer to the revocation of licenses to practice medicine as penal in nature, the Supreme Court did not think the statute to be a penal ex post facto law, but rather only one imposing a reasonable condition on the profession. What appears to have happened in these cases is that the Court, after expressing a need for reasonable qualifications, is satisfied if the government might have had any sort of rational basis for connecting the condition with the occupation.

Use of Public Property

Another common occasion for the use of the privilege argument arises when the use of public property is made dependent upon the applicant giving up a constitutional right. The most familiar illustration has to do with the privilege of using the public streets for commercial transportation. It is this use, which has been so often classified as a privilege, that the Supreme Court considered in Frost & Frost Trucking Co. v. Railroad Comm'. There a state's attempt to require a private carrier to become a common carrier as a condition for using the roads was held unconstitutional. Justice

41. Id. at 139 (concurring opinion).
42. 325 U. S. 561 (1945).
45. Id. at 200 (dissenting opinion).
49. 271 U. S. 583 (1926).
50. Id. at 592-593.
Sutherland, speaking for the Court, bluntly posed the question whether a condition to a privilege could be the waiver of a constitutional right and answered it "no."

However admirable the Justice's answer may be as a statement of principle, it is another matter whether the doctrine is applied. As to this the Frost opinion contains an observation which perhaps retains its validity today: "And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it."

An example of the non-application of this principle is furnished by Justice Sutherland himself, in Stephenson v. Binford, decided six years later. In that case a state's attempt to require a private carrier to give up the constitutional right to set its own rates as a condition for using the roads was held constitutional. The opinion by Justice Sutherland emphasizes the state's power to condition privileges and makes broad statements to the effect that the courts have no power to review state action in prescribing qualifications on privileges it does not have to grant. Comparing the Frost and Stephenson opinions one is driven to the conclusion that they are simply inconsistent in principle.

Still, it is in cases involving the use of public property that the courts are coming to recognize the danger that constitutional rights may be restricted indirectly under the guise of conditioning privileges. A shift in this direction may be illustrated by two cases from the Supreme Court. In 1897 the Court decided that for a state absolutely or conditionally to forbid public speaking in a street or park was no more an infringement of a citizen's rights than if an owner of a private house forbade him to enter. Hence, it was said, the citizen had no right to use a public park except as the city might prescribe. In 1939 the Court rejected this idea, declaring that the public's power over streets and parks was not as complete as that which a private person could exercise over his property. Even though the right to assemble was not absolute, the city could not impose arbitrary conditions; constitutional rights could not be so easily foreclosed consistently with due process.

The courts have not, however, overwhelmingly recognized the danger in restricting constitutional rights via the privilege argu-

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51. Id. at 598.
52. 287 U. S. 251 (1932).
53. E.g., "... [I]t belongs to the State ... to prescribe the conditions upon which it will permit public work to be done. ... No court has authority to review its action in that respect." Id. at 276.
ment. This is pointed up by the cases which have dealt with the Gwinn Amendment to the Independent Offices Appropriations Act of 1953. The Gwinn Amendment provides that public housing built with the aid of federal funds shall be denied to a person who is a member of any organization designated as subversive by the Attorney General. In three of the seven cases found reaching the courts, the idea that housing is a government gratuity prevails, and those courts would allow the government to deny housing because the applicants have joined the wrong organizations. In the other two cases the courts refused to infringe upon the constitutional right of freedom of speech by so conditioning the privileges, and the state regulation enforcing the Gwinn Amendment was struck down. The opinions in the four cases show the range of concern over the dangers of restricting constitutional rights through the argument that the government is dealing with something less than a right.

Operation of a Business

The restriction of constitutional rights through qualifications on privileges has been often condemned in cases involving the privilege of operating certain businesses. In fact, it has been done so often that the reasoning used in rejecting the condition has been accorded a name—the doctrine of unconstitutional conditions. The prime example of the use of this doctrine has to do with statutes which required a foreign corporation doing business within the state to agree that it would not use the federal courts. In the first case dealing with these statutes, Insurance Company v. Morse, the Supreme Court held 5 to 4 that the state statute was unconstitutional as depriving the corporation of substantial rights without due process of law. A waiver of constitutional rights could not be made

59. See Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935), and Merrill, Unconstitutional Conditions, 77 U. Pa. L. Rev. 879 (1929) for excellent reviews of the doctrine of unconstitutional conditions.
60. 89 U. S. (20 Wall). 445 (1874).
the condition of a privilege. Dissenting, Chief Justice Waite advanced the privilege argument; the state could refuse permission to the corporation to operate or could impose such conditions as it thought proper. Although some of the later cases followed the Morse decision, others were decided inconsistently with it. These latter cases held the disputed statutes constitutional, on the rationale of the privilege argument. The irreconcilable conflict was finally noted by the Court in 1922, and the Court chose to follow the Morse line of cases and overrule the others. These two lines of cases illustrate a judicial wavering between acceptance and rejection of the privilege argument which has not been unusual when conditions on businesses are involved; in many instances the Supreme Court has allowed constitutional rights to be given up through privilege qualifications although there exist broad statements to the effect that this cannot be done.

CONCLUSIONS

Looking at the total effect of the privilege argument it would seem that it has had no overpowering success or failure. Rather, a principle exists that constitutional rights cannot be destroyed by conditioning privileges, but "this principle . . . is broader than the applications thus far made of it." Naturally enough, the unsettled case law in this area has resulted in a certain amount of judicial hesitance to speak in terms of proper or improper conditions.

When the Supreme Court does come to the privilege argument, an acceptance of it leads, of course, to an uncritical approval of the government's action as "master of its own house." If, on the other hand, the privilege argument is rejected the problem becomes a matter of weighing the interests involved and determining the reasonableness of the invasion of constitutional rights. This approach was used in the Douds and Mitchell cases. When interests are

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64. See Hale, op. cit. supra, note 59 at 322.
66. Watson v. Employers Liab. Assurance Corp., 348 U. S. 66 (1954) may be given as an example. As the concurring opinion of Justice Frankfurter points out, the Court chose to meet several constitutional hurdles rather than simply to say that the condition was a proper condition on a privilege. Id. at 74-78 (concurring opinion).
68. 339 U. S. at 405 (dictum).
weighed, the fact that it is a gratuity which the government is affect-
ing is, of course, one factor to be considered. And it may be proper
to resolve all doubts in favor of the government.\(^9\)

As to the matter of acceptance or rejection of the privilege argu-
ment, the Court appears to be influenced by its ideas as to whether
the qualification is germane to the exercise of the privilege; \(i.e.,\) if
the two are not thought reasonably related the Court is less likely
to look favorably on the idea that the government may condition
as it sees fit. We have seen this idea of reasonable relationship as a
major test in determining whether an attempt to condition is really
an attempt to punish for past conduct. Moreover, in many cases the
difference between the majority and minority opinions seems to be
disagreement over the connection between the condition and the
privilege. For instance, in the \(Frost\) case, Justices Holmes, Brandeis,
and McReynolds thought, contrary to the majority,\(^9\) that applying
public carrier regulations to private carriers was a means of aiding
the state to control highway traffic.\(^7\) We might also look at Justice
Frankfurter's concurring opinion in \(Watson v. Employers' Liab.
Assurance Corp.,\(^8\) in which he made an excellent analysis of uncon-
stitutional conditions on business. His conclusion was that the test
of the constitutionality of a condition on a privilege, for due process
purposes, is its reasonableness.\(^8\) Such a rationale would include
both a consideration of the condition's association with the privilege
and a weighing of the various interests involved.

Another factor tending toward the rejection of the privilege
argument would be a recognition of the danger that constitutional
rights may be taken under the guise of conditioning privileges. Such
recognition now is frequently found in the legal profession.\(^4\) This
may be due to an awareness of the increasing economic and social
activities of the government. This increasing activity, coupled with
the growing complexity of modern affairs, has led to a greater

\(^{69}\) Cf. United States v. Manzi, 276 U. S. 463 (192) (doubt concerning
privilege of citizenship should be resolved against claimant); Swan & Finch
Co. v. United States, 190 U. S. 143 (1903) (doubt concerning privilege of export
tax drawback should be resolved in favor of government); Hannibal & St.
granting privilege should be construed in favor of government).

\(^{70}\) Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U. S. 583,
591 (1926).

\(^{71}\) Id. at 601, 602 (dissenting opinions).

\(^{72}\) 348 U. S. 66 (1954).

\(^{73}\) Id. at 82 (concurring opinion).

\(^{74}\) For examples see Lawson v. Housing Authority of Milwaukee, 270
Wis. 269, 70 N. W. 2d 605, cert. denied, 24 U. S. L. Week 3128 (U.S. Nov. 7,
1955) (No. 354); Brief for American Bar Ass'n as Amicus Curiae, p. 29,
dependence on the exercise of privilege. Privileges are so essential to modern life that the individual really has no choice of escaping the conditions attached to the privileges. To say, for example, that members of a labor union may escape any restrictions which are attached to the use of the NLRB by the simple expedient of not using the agency is to make a statement which is theoretically correct but patently unrealistic. It therefore seems that a weighing of interests and a consideration of the relationship of the privilege to the condition to the privilege is preferable to an acceptance of the doctrine that the government may dispense its privileges at its uncontrolled discretion. While the term "privilege" may be useful to describe a government gratuity, the label itself should not become a substitute for judicial reasoning. The privilege argument leads too easily to a denial of constitutional protection.