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Florida Supreme Court Upholds Voter Loyalty Oath

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FLORIDA SUPREME COURT UPHOLDS VOTER LOYALTY OATH

Harold Fields, a Florida resident, brought suit in the state trial court seeking to enjoin state officials from enforcing a voter loyalty oath required of all prospective registrants.[1] The complaint charged that the loyalty oath represented: (1) an abridgement of his first and fourteenth amendment rights under the United States Constitution and (2) a denial of equal protection of the law to the class of persons of which he is a member. Defendant Askew contended that states have the power to determine the conditions under which the right of suffrage may be exercised and that the Florida loyalty oath is in no way discriminatory on its face. The trial court held for the defendant and refused to permit the plaintiff to register without taking the oath. On direct appeal, the Supreme Court of Florida, in this case of first impression, *held*, affirmed: the loyalty oath does not conflict with either the state constitution or with the first amendment or equal protection clause of the United States Constitution. *Fields v. Askew*, 279 So. 2d 822 (Fla. 1973), *appeal dismissed*, 94 S. Ct. 905 (1974).

It is no coincidence that the three wars of extensive American involvement, the Civil War, World War I and World War II, each spawned various loyalty programs to seek out those disloyal to this nation.[2] In times of stress, it is perhaps inevitable that "the herd instinct asserts itself by an urge toward conformity."[3] Accusations of disloyalty against those who hold extreme opinions are common and attempts to assure fidelity to the state are numerous. When confronted with the constitutionality of such loyalty programs and their corresponding oaths, the United States Supreme Court has attempted to balance the government's interest against that of the individual. In such cases, only if the government can show that its interests are endangered, does it have the power to protect itself at the expense of the individual's interest in the free exercise of his constitutional right to vote.[4]

While the question of loyalty oaths has long been the subject of legal

1. The plaintiff refused to take the oath. The defendant, accordingly, refused to register him as a voter and indicated that he would continue to do so in the future. The statute in question is FLA. STAT. § 97.051 (1971), which provides in part:

> A person making application for registration as an elector shall take the following oath: "I do solemnly swear (or affirm) that I will protect and defend the Constitution of the United States and the Constitution of the State of Florida . . . ."

2. The loyalty oath was also used, for example, in France against the Hugenots and during the Spanish Inquisition as a method of discovering "heretics." In America, they have existed since the search for "Loyalists" during the Revolutionary War. In the aftermath of the Civil War, state constitutions frequently required attorneys, teachers, officeholders and voters to subscribe to an oath of past loyalty to the United States. Loyalty oaths reappeared in the post-World War II era and reached a peak during the McCarthy investigations. *See, e.g.*, Note, *The Requirement of Specific Intent—A Further Limitation on Loyalty Oaths*, 21 SW. L.J. 685 (1967).

3. Fraenkel, *Law and Loyalty*, 37 IOWA L. REV. 153, 153 (1951).

4. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

controversy,[5] no other appellate court, state or federal, has ruled on the constitutionality of a currently enforced statute making such oaths a requirement for voter registration.[6] The overwhelming majority of the cases involving loyalty oaths have dealt with attempts by federal and state governments to determine the fitness of potential employees for public service.[7] On several occasions, the United States Supreme Court has upheld this type of loyalty oath.[8] In other instances, the Court has invalidated them.[9]

In the instant case, the Supreme Court of Florida was confronted with the state's voter oath and found it to be constitutionally valid. In a very brief opinion, the court sought to support its position, in the absence of precedent, by citing *Connell v. Higganbotham*[10] and *Cole v. Richardson*,[11] two recent United States Supreme Court decisions upholding loyalty oaths as a condition to public employment. The court further referred to a section of the state constitution which requires each state officer to swear to support the Florida Constitution before entering upon the duties of his office.[12] The particular portions of the cases cited by Justice McCain, writing for the court in *Fields*, emphasize that the oaths of support, as prerequisites to state employment, do not offend the first and fourteenth amendments to the Federal Constitution.[13]

5. *See, e.g.*, Comment, *Loyalty Oath—Key Sections of New York's Loyalty Statutes Declared Unconstitutional*, 19 S.C.L. REV. 422 (1967); Comment, *The Loyalty Oath as a Condition of Public Employment*, 19 BAYLOR L. REV. 479 (1967); Note, *Loyalty Oath—Specific Intent Requirement for Validity*, 16 DE PAUL L. REV. 209 (1966); Note, *Loyalty Oaths—A State Loyalty Oath Statute Which Fails to Require, as Part of the Membership Clause, Specific Intent to Further the Illegal Ends of the Proscribed Organizations is Unconstitutional*, 12 VILL. L. REV. 363 (1967).

6. Only five states presently insist upon voter registration loyalty oaths: ALA. CODE tit. 17, § 31 (1971); FLA. STAT. § 97.051 (1971); LA. CONST. art. 8, § 1(d); MISS. CONST. art. 12, § 242; N.C. GEN. STAT. §§ 163-72 (1971).

7. For an example of numerous state statutes requiring loyalty oaths as a condition to public employment, see Note, *Positive Loyalty Oaths—The First Amendment and Academic Freedom*, 14 WAYNE L. REV. 635-36 n.4 (1968).

8. *E.g.*, Adler v. Board of Educ., 342 U.S. 485 (1952) (teachers required to deny their membership in any organization advocating the overthrow of the government by force or violence); Garner v. Los Angeles, 341 U.S. 716 (1951) (affidavits compelling public employees to disclose their membership in the Communist Party); Gerende v. Election Bd., 341 U.S. 56 (1951) (oath requiring potential candidate for public office to stipulate that he is not engaged in attempt to overthrow the government).

9. Elfbrandt v. Russell, 384 U.S. 11 (1966) (statute must be restricted in scope to those who join an organization with the specific intent to further the unlawful goals of the organization); Baggett v. Bullitt, 377 U.S. 360 (1964) (a state may not stifle first amendment rights when the objective sought could be more narrowly achieved; nor may a state punish "knowing but guiltless" behavior); Cramp v. Board of Pub. Instructors, 368 U.S. 278 (1961) (oath will fail if vague or indefinite); Wieman v. Updergraff, 344 U.S. 183 (1952) (a state may not exclude persons from public service solely on the basis of organizational membership without regard to members' knowledge concerning the organization's purposes or activities); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (an oath may not operate as an ex post facto law or bill of attainder).

10. 403 U.S. 207 (1971).

11. 405 U.S. 676 (1972) [hereinafter referred to as *Cole*].

12. FLA. CONST. art. II, § 5(b).

13. 279 So. 2d at 823-24.

The common factor underlying the cited authorities is their application solely to those in public service, and although their language is similar to that of the Florida voter loyalty oath, their *raison d'être* is not. Chief Justice Burger's opinion in *Cole* declared:

> We have . . . recognized that the purpose leading legislatures to enact such oaths, just as the purpose leading the Framers to our Constitution to include the two explicit constitutional oaths, was . . . to assure that those in positions of *public trust* were willing to commit themselves to live by the constitutional processes of our system . . . .[14]

While it is clear that there is a valid governmental interest in requiring an oath of public employees and officials, it is equally clear that a voter is not in a position of "public trust," and, therefore, no similar governmental interest exists.

The United States Supreme Court, however, recently upheld the validity of a rule requiring applicants to the New York bar to swear an oath to " 'support the Constitution of the United States' as well as that of New York."[15] The attorney, like the voter, "does not hold an office or public trust in the constitutional or statutory sense of the term;"[16] nor is he a state or county officer.[17] Unlike the voter, however, the attorney is deemed an officer "of the court for the administration of justice,"[18] and, by his *Code of Professional Responsibility*, a "guardian of the law."[19]

An analogous situation, relied upon by the plaintiff Fields and ignored by the court, was presented in *West Virginia Board of Education v. Barnette*.[20] There the United States Supreme Court stated that the action of local authorities, in compelling the salute to the flag and the pledge of allegiance, "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[21] In Justice Jackson's words:

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14. 405 U.S. 676, 684 (1972) (emphasis added). Similarly, the instant defendant relied upon two equally non-analogous cases in attempting to support its first amendment argument. In Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd*, 390 U.S. 36 (1968) (per curiam), the district court upheld a New York teacher's oath on the grounds that "[a] state does not interfere with its teachers by requiring them to support the governmental institutions which shelter and nourish the institution in which they teach." *Id.* at 341. In Bond v. Floyd, 385 U.S. 116 (1966), the Court held that a Georgia oath required of state legislators merely called for the government officer to acknowledge his willingness to "abide by constitutional processes of government." Brief for Appellee at 5-6, Fields v. Askew, 279 So. 2d 822 (Fla. 1973).

15. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 161 (1971).

16. *In re* Clifton, 115 Fla. 168, 170, 155 So. 324, 326 (1934).

17. *In re* the Fla. Bar Ass'n, 40 So. 2d 902, 907 (Fla. 1949).

18. FLA. STAT. § 454.11 (1971).

19. CODE OF PROFESSIONAL RESPONSIBILITY, Preamble.

20. 319 U.S. 624 (1943) [hereinafter referred to as *Barnette*].

21. *Id.* at 642.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can proscribe 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.* If there are any circumstances which permit any exception, they do not occur to us now.[22]

The Court held that it was the purpose of the first amendment to avoid attempts at compulsory unification of opinion which begin with the coercive elimination of dissent and lead to the extermination of dissenters.[23] To this end, Justice Douglas, in his concurring opinion, declared: "Words uttered under coercion are proof of loyalty to nothing but self interest. Love of country must spring from willing hearts and free minds."[24] Indeed, a statute which allows subversives, trained to commit perjury, to take an oath and thereby qualify, for example, to vote, and which at the same time disqualifies those who refuse to take the oath for reasons other than disloyalty, does not accomplish any legitimate objective.[25]

An application of this reasoning to the instant case demonstrates that the three bases asserted by the state in defense of the oath[26]—a determination of good faith of its voters, protection of the purity of elections, and safeguarding against abuse of the elective franchise—are rendered ineffective. To the prospective voter, who, for conscientious, religious or political reasons, cannot take the oath, the restrictions on his first amendment rights and the disenfranchisement that results hardly seem justified.

Despite a first amendment mandate that Congress shall make no law abridging the freedom of speech, press and assembly, the Supreme Court has held that these freedoms are not absolute.[27] Rather, they are dependent on the need for constitutional government to survive; only if the government can show that there is a grave and immediate danger to interests which it may lawfully protect are the rights susceptible to restriction.[28] The Supreme Court of Florida did not address itself to this

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22. *Id.* (emphasis added).

23. *Id.* at 640-41.

24. *Id.* at 644. Similarly, the Court found unacceptable the proposition that the Bill of Rights, "which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634.

25. Mommer, *State Loyalty Programs and the Supreme Court*, 43 IND. L.J. 483 (1967-68).

26. Brief for Appellee at 13, Fields v. Askew, 279 So. 2d 822 (Fla. 1973).

27. Wiedman v. Updergraff, 344 U.S. 183 (1952); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

28. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); United States v. Noto, 262 F.2d 501, 507 (2d Cir. 1958). In Schenck v. United States, 249 U.S. 49 (1919), the defendant was appealing his conviction under the Espionage Act, 18 U.S.C. § 2388 (1970), for attempting to cause insubordination in the United States Armed Forces. The defendant's contention was that he had committed no act, but only spoke, and that such conduct was protected by the first amendment. While this may be true in normal circumstances, it was held that the character of every act must be judged according to the circumstances in which it was done. As Justice Holmes put it:

issue in *Fields*. It seems safe to conclude, however, that as no such danger resulted from silence during a pledge of allegiance to the flag at the height of World War II, when *Barnette* was decided, then, a fortiori, none exists today as the result of silence during voter registration.

The second significant aspect of the instant case involves the right to vote and the equal protection arguments under the fourteenth amendment which arise from attempts to regulate it. The right to vote, like the first amendment rights discussed above, is not absolute. The states have the power to regulate access to the franchise through imposition of voter qualifications.[29] As a general rule, however, the Court has consistently held that before the right to vote can be restricted, the "purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny."[30]

The initial question in such cases is whether the limitations employed by the state establish classifications. Where a conclusion is reached that a particular restriction does not create a classification, the necessity for considering the equal protection question is precluded—no classifications are created to which the law might be unequally applied. The court in *Fields* did not decide the classification issue. A conclusion may nonetheless be drawn that the loyalty oath in question creates two groups of voters: those who are able to take the oath and are thereby permitted to register and those who, for conscientious, religious or political reasons are unable to take the oath and are, in effect, thereby disenfranchised.

Which of the two equal protection tests established by the United States Supreme Court applies in judging the validity of the classification: the stringent "compelling state interest" test or the more flexible "rational basis" test?[31] Under the latter, the burden is on the citizen to show that the statute he is attacking either has no reasonable relation to the achievement of some legitimate state end or that the classification created is arbitrary. Absent such a showing, state laws are presumed to be constitutional.[32]

The Court's decision in *Shapiro v. Thompson*[33] eliminates this test

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> The question in every case is whether the words used are used in such circumstances and are of such nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that . . . no court could regard them as protected by any constitutional right.

Id. at 52 (emphasis added); *see also* Debs v. United States 249 U.S. 211 (1919); Frowerk v. United States, 249 U.S. 204 (1919); Note, 16 DE PAUL L. REV. 210-11 (1966-67).

29. Oregon v. Mitchell, 400 U.S. 112, 144 (1970); Carrington v. Rash, 380 U.S. 89, 91 (1965).

30. Evans v. Cornman, 398 U.S. 419, 422 (1970).

31. McDonald v. Board of Election, 394 U.S. 802, 806-07 (1969).

32. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). The rational basis test is justified on the ground that unless a fundamental right is involved, proper respect for the legislature as a coordinate branch of government, as well as judicial restraint, require a presumption of constitutionality. *Id.* at 420.

33. 394 U.S. 618 (1969).

in situations where the classification touches on a "fundamental right." In these instances, the "constitutionality [of the statute] must be judged by the stricter standard of whether it promotes a compelling state interest," and the burden is on the state to overcome a presumption of unconstitutionality.[34] In essence, the state must prove that the classification it has chosen not only nonarbitrary but necessary,[35] and that the interest sought to be furthered is not only legitimate but compelling.[36]

The holding in *Shapiro* raises the question as to whether the alleged discrimination in *Fields* must be examined under the newer and more stringent test. According to *Shapiro*, the test will have to be applied if the right to vote is a "fundamental right." In the 1886 case of *Yick Wo v. Hopkins*,[37] the Supreme Court declared that "voting is regarded as a fundamental political right, because preservative of all rights."[38] This principle was reaffirmed in *Dunn v. Blumstein*.[39] The Supreme Court of Florida in the instant case referred to the right to vote as "fundamental."[40] The final step is to link definitively this principle to the equal protection clause and the appropriate test. In *Kramer v. Union Free School District*,[41] Chief Justice Warren, writing for the majority, indicated that it was no longer sufficient that a disenfranchising classification be rationally connected with a legitimate state goal. He declared that:

> If a challenged state statute grants the right to vote to some bonafide residents of requisite age and citizenship and denies the franchise to others, the court must determine whether the exclusions are necessary to promote a compelling state interest.[42]

In 1972, when the Supreme Court last discussed this aspect of the right to vote, in *Dunn*, it became apparent that the new composition of the Court would not slow the trend toward expansion of the equal protection clause. In addition to adhering to the precise mandate of the above-cited *Kramer* test,[43] the Court in *Dunn* laid down the most stringent standards to date for the states in defending equal protection challenges: "To decide whether a law [has] violated the Equal Protection Clause, we look . . . to three things: the character of the classification; the individual interests affected by the classification; and the governmental interests asserted in support of the classification."[44]

The Supreme Court of Florida left many questions unanswered in *Fields*. In particular, it failed to determine the existence of either the

34. *Id.* at 638.
35. Kramer v. Union Free School Dist., 395 U.S. 621 (1969).
36. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
37. 118 U.S. 356 (1886).
38. *Id.* at 370.
39. 405 U.S. 330 (1972).
40. 279 So. 2d at 824.
41. 395 U.S. 621 (1969).
42. *Id.* at 627.
43. 405 U.S. 330, 337 (1972).
44. *Id.* at 334.

"clear and present danger" or "compelling state interest" that would justify the requirement of a voter loyalty oath and the resulting infringement on the fundamental right of free speech. Absent such a showing, the Burger Court's adherence to the Warren Court's pronouncements, regarding voters' rights, indicates that the burden of proving such an overriding state interest will become increasingly difficult to meet.

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