NOTES AND COMMENTS

The Status of Civil Service in Ohio

Public office as a public trust, though a concept seemingly minimal to acceptable representative government, is not one of long acceptance. The history of English governmental administration reveals in the not too distant past a view of public office as essentially the property of the officeholder, a view so entrenched as to leave its traces in the American law of public officers.[1] If this low estimate of governmental service did not gain an equally strong hold in this country, the Jacksonian spirit spawned a more subtle, but no less vicious, attitude. No longer was the office the property of its incumbent; now it became the major spoils which of right belonged to the collective victor at the polls. Against this good old American tradition, decade after decade saw a losing battle waged by intelligent statecraft's plea for a governmental service based solely upon merit. That reckless age when America literally threw away its providence was not concerned alone with natural resources; it played fast and loose with manpower as well. With the coming of a measure of community sanity, however, the merit system in civil service administration took its place among the great reforms. If for no more lofty reason, a nation of taxpayers could no longer afford to entrust billion-dollar government to the sinecurists and party faithful. Paced by the Federal Civil Service Act of 1883,[2] the administration of the expanding American governments has largely risen in the dignity of career staffing. It has been recently observed that in New York less than one percent of public servants do not enjoy civil service merit rating;[3] while extension of the principle in the Federal Government continues with government attorney positions now "covered in" by Executive order.[4]

[1] Compare State *ex rel.* v. Hawkins, 44 Ohio St. 98, 5 N. E. 228 (1886), with Dullam v. Willson, 53 Mich. 322, 19 N. W. 17 (1884), as to power of removal over government workers. The difference in judicial attitude lies, significantly, in one's acceptance and the other's rejection of the idea of a property interest in a public office.

[2] 22 Stat. 403 (1883).

[3] Kaplan, *The Merit System and the Constitution* (1940) 27 NAT. MUN. REV. 83.

[4] H. Doc. No. 118, *Report of President's Committee on Civil Service Improvement*, 77th Cong., 1st Sess. (1941) 22.

The first wave of civil service reform reached Ohio in 1910, with the enactment of legislation requiring installation of the merit system in municipal administration.[5] But although large discretionary power with respect to the practicability of manning specific-type positions on the competitive basis was lodged in local civil service commissions, large areas were exempted from commission control to remain the spoils of party plunder. Two years later the subject was one of those caught up in the great constitutional reform movement that so significantly altered Ohio's constitutional framework. After little discussion and minor rephrasing, Art. XV, §10 went to the sovereign people for their solemn judgment. As adopted, the provision reads:

"Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

Taking prompt action, the 1913 legislature enacted the first statewide civil service law.[6] Appearances, however, belied the true situation. Although superior to the preconstitutional version in applying to all governmental units in Ohio, the new law continued the serious loophole exemptions. Amendments to the act in 1915,[7] while improving some of the administrative sections, served to make matters worse as to the coverage of the competitive examinations. Indeed, the 1915 changes produced a statute less effective than that of 1910 in terms of the types of positions included in the classified service, a retrogression strikingly paralleled by the Illinois experience during the same general period.[8] Since 1915 the Ohio law has remained substantially the same in the vital respect of its coverage.

Such a lapse of twenty-five years without effective improvement in state and local personnel provisions—years of such dynamic change in accepted conceptions of the rôle of Government—makes all the more grotesque the law that masquerades as Ohio's acceptance of an

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[5] OHIO GEN. CODE (1910) §§4477-4505.

[6] 103 Ohio Laws 698 (1913).

[7] 106 Ohio Laws 400 (1915).

[8] Ill. Legis. Reference Bur., *Const. Convention Bull. No. 9* (1919) 626-628. Ohio's constitutional provision of 1912 was in a sense matched by People *ex rel.* v. McCullough, 254 Ill. 9, 98 N. E. 156 (1912), holding an extended civil service system of 1911 valid even as to constitutional officers. The backsliding movement began in 1913. The period just before 1912 seems to have been one of considerable advance in civil service development. See Kettleborough, *Civil Service* (1912) 6 AM. POL. SCI. REV. 235. For an interesting thesis as to why such periods have occurred in the history of American civil service see Ford, *Political Evolution and Civil Service Reform* (1900) 15 ANNALS 145.

intelligent approach to the practical matter of adequately staffing some of the biggest socio-economic enterprises of our time. Nothing in the constitutional declaration suggests that the forces of evil intent should carry the day with disemboweling exemptions; the language that carries the stamp of final sovereignty expressly declares that the sole basis for placing a position in the unclassified service shall be the impracticability in the circumstances of a competitive examination. The legislative wording echoes back the expressed intent that the classified service shall be the rule, the unclassified the exception.

Yet the statute sets out twelve groups in the unclassified service.[9] An elected state officer may appoint three secretaries and one personal stenographer without regard to merit. No officer or employee of the general assembly need take an examination to determine his fitness for the position. Likewise no teacher, instructor, or professor in the public school system or in any public institution, or any member of the staff of any library supported wholly or in part by public funds, or most any employee of a court of record, need take any examination as a condition to appointment. One cannot but ask what is impracticable about holding competitive examinations for employees of the general assembly other than the fact of political inadvisability. Wisconsin has required such persons to prove their ability before they can be appointed.[10] If library management is the science and art it is now taken to be, it is not easy to understand why applicants for library positions are not compelled to submit to an examination to determine their fitness. The same question arises regarding many other groups placed in the unclassified category.

Responsibility for the continuation of this regrettable situation lies with Ohio's courts as well as with its legislature. True, the early decision of the Supreme Court in *State,* ex rel. *Bryson,* v. *Smith,*[11] carried dicta to the effect that the general assembly and the state judiciary faced no more imperative a duty than that of providing for compliance with the letter and spirit of Art. XV, §10. But as the

[9] The groups include elected officers, election officials and clerks, members of boards and commissions, all members and employees of the general assembly, all men in the military service of the state, all employees in public educational institutions employed in educational work, the staff of any library supported in whole or in part by public funds, several assistants or clerks for each elected official, the deputies of the elected officials authorized to act for their principals, certain employees in courts of record and assistants to the Attorney General, law directors, prosecutors, *etc.*

[10] WIS. STATS. (1937) §16.09; *Report On the Joint Legislative Committee on Administrative Reorganization of the Ohio General Assembly* (1921) 64.

[11] 101 Ohio St. 203, 128 N. E. 261 (1920).

course of litigation pricked out meaning for that supposed mandate, it became increasingly clear that judicial laxity would be the hallmark of its interpretation. The cornerstone of Ohio Court attitude was laid in *Ellis* v. *Urner,* decided in 1932.[12] There the court in holding that the legislature was justified in placing deputy clerks and deputy bailiffs in the unclassified service gave the civil service movement in Ohio a double setback. Mincing no words, the court declared Article XV, §10 not to be self-executing; this consequence was drawn from the declaration of the last line in the provision that "Laws shall be passed for the enforcement of this section." Moreover, not content to stop there, the court went on to deal a second blow in these words:

"The legislature having seen fit to provide . . . that these officials shall be in the unclassified service, such action on the part of the legislature is within its constitutional power and is a valid enactment . . . If the legislature has passed an unwise provision . . . the responsibility rests on the legislature and not upon the courts."[13]

At the very least such language ominously indicated judicial intent to accord every latitude to the legislative judgment on the practicability of ascertaining "merit and fitness . . . by competitive examination." This attitude, foreshadowed by the *Bryson* case, appears again, shortly after the Ellis decision, in *State* ex rel. *Day* v. *Emmons.*[14] There the positions of assistant cashier and supervisor of cigarette tax stamps, both in the office of treasurer of state, just as the position of cashier in the Secretary of State's office, litigated by Bryson and Smith, were deemed to require "strict integrity and high moral character." This made it "not easy" for the court "to understand how merit and fitness of the occupant of this position can be determined by competitive examination [but] by close and intimate knowledge of the applicant and opportunity for observation of him."[15] In both cases the positions involved required the handling of large sums of state monies. But although there stressed by Ohio's high court, the teaching of *Ellis* v. *Urner* itself is seemingly that any close association between deputy and principle creates a confidential if not a fiduciary relationship which is incapable of ascertainment by competitive examination. The Supreme Court held, very soon thereafter, that "The position of assistant director of law is necessarily a

[12] 125 Ohio St. 246, 181 N. E. 22 (1932).
[13] *Id.* at 250, 181 N. E. at 23.
[14] 126 Ohio St. 19, 183 N. E. 784 (1932).
[15] State *ex rel.* Bryson v. Smith, supra note 11, at 208, 183 N. E. at 785.

position of trust and confidence."[16] If to measure qualifications for such an office by examination would be "approaching assininity." as the court asserted, where lies the assininity when a common pleas court accepts a legislative exemption from the classified service of the personal stenographer and the private secretary of the Cleveland municipal court?[17]

The attitude revealed in this recent lower court judgment hints at judicial acceptance of an interpretation of the *Ellis* v. *Urner* language even more emasculative of the apparent intent of the Ohio constitution makers of 1912. An impression, though not an affirmation, is left that the legislative judgment on the issue of practicability is final, that, in other words, Art. XV, §10 is not judicially enforceable but directory only. It is clear that the Supreme Court did not start out with any such conception; *State ex rel.* v. *Smith*[18] asserted that the question of impracticability was "necessarily a judicial one." Yet the language of the influential *Urner* case is capable of the contrary import, and recent Supreme Court utterances continue the equivocation. Thus May of 1940 found the court twice affirming the authority of the General Assembly to relieve offices from civil service conditions, once in the case of health district employees[19] and again as to a county visitor attached to a juvenile court.[20] In neither instance was there independent consideration of the issue of practicability; on the contrary, finality of the legislative action appears to be accepted, although in the former opinion the court did find "no abuse of legislative authority." Ironically enough, the only instance of a Supreme Court declaration of legislative action beyond constitutional bounds is the recent *De Woody*[21] decision wherein the Akron City Charter had sought to place in the classified service the type of office which the court had, in the *Kerr* case,[22] held to be incapable of practicable staffing by competitive examination. After thirty years of constitutional provision, then, Ohio's civil service program can reap only the opposite of what was sowed!

Clearly, those seeds of promised reform fell on the rocky soil

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[16] State *ex rel* Ryan v. Kerr, 126 Ohio St. 26, 183 N. E. 535 (1932).
[17] State *ex rel.* Henry v. Civil Service Comm., 19 Ohio Ops. 545 (Cuyahoga County Com. Pleas 1941).
[18] *Supra,* note 11.
[19] Mawrer v. Underwood, 137 Ohio St. 1, 27 N. E. (2d) 773 (1940).
[20] Haskins v. Tyroler, 137 Ohio St. 24, 27 N. E. (2d) 931 (1940).
[21] DeWoody v. Underwood, 136 Ohio St. 575, 27 N. E. (2d) 240 (1940).
[22] State *ex rel.* Ryan v. Kerr, *supra* note 16.

of both legislative hostility and judicial unfriendliness. It is true that courts have neither the power nor the machinery to compel affirmative acts on the part of the legislative branch of government;[23] in this sense such a constitutional provision as Art. XV, §10 must necessarily be not self-executing. But the arsenal of actions by which judicial power is brought into play contains a device fitted to the occasion. The taxpayer's action is, indeed, an Ohio favorite; entertainment of such suits here could cut off the payment of salaries of persons not covered in by civil service in the manner and to the extent called for by the constitution's phrasing. The Ohio legislature has acted, however, and presumably will continue to carry civil service legislation on the statute books. More serious, therefore, is the Ohio Supreme Court's apparent position that in the presence of legislative action the constitutional provision is judicially enforceable only to retard civil service extension. This inversion of what one would normally expect is doubly tenuous. Interpretation of Art. XV, §10, as setting an upper limit to "covering in" for civil service is strikingly similar to the court's earlier fallacy in construing Ohio's Art. XV, §14, as a people's mandate that incumbent judges other than of the supreme and common pleas benches should be free to run for non-judicial office, legislative wishes to the contrary notwithstanding.[24] John Marshall's *Marbury* v. *Madison*[25] may be distinguished precedent for such interpretations, but it is admittedly bad law.[26] As questionable as the holding that Art. XV, §10 does set a constitutional ceiling on legislation favorable to civil service coverage, is any inference or assumption that the provision does not fix a minimum against unfavorable legislative action. The Chairman of the committee which unanimously proposed the civil service amendment to the Convention declared the purpose of placing such a matter in the constitution arose from the fact that "At present the merit system * * * depends upon mere legislative enactment which can be repealed at any time."[27] Contemporary comment, though apparently slight, assumed that ratification had resulted in a mandatory pro-

[23] See generally RATTSCHAEFER, CONSTITUTIONAL LAW (1939) 68-70.

[24] Fulton v. Smith, 99 Ohio St. 230, 124 N. E. 188 (1919).

[25] 1 Cr. 137 (U. S. 1803).

[26] Of Marshall's declaration that the words of U. S. CONST. Art. III, §2(2) must be given a negative or exclusive sense . . . or they have no operation at all, CORWIN, THE DOCTRINE OF JUDICIAL REVIEW (1914) 5-10 says: "But this is simply not so. For though given only . . . affirmative value, those words still place the cases enumerated by them beyond the reach of Congress, surely no negligible matter."

[27] 2 OHIO CONST. CONV., PROCEEDINGS AND DEBATES (1912) 1378.

vision,[28] and such clearly was the Supreme Court's first reaction.[29]

If the quoted language from *Ellis* v. *Urner*[30] be taken to intend judicial liberality in enforcing a constitutional mandate and not as an embracing of the view of the provision as directory only, the court's record is little better. For what little debate occurred in the constitutional convention indicates that the exemption for impracticability was incorporated in recognition of the fact that selection on a merit and fitness basis would not be satisfactory for "all the heads of state;"[31] such background does not justify the Supreme Court's repeated assertions or assumptions that the legislative judgment is to all intents final. This attitude appears to be traceable in large part to the court's confusion as to the meaning of "competitive examinations"; taking this phase in its narrow unaccepted meaning of wholly formal examinations on "book learning" has led the court to accord legislative backsliding every aid and abetment.[32]

By the time Ohio's courts were called upon to give life to the constitutional addition of 1912, New York had already experienced considerable judicial interpretation of similarly worded, though not identical, provision.[33] An early holding that the New York provision was self-executing[34] had been later qualified in *Chittenden* v. *Wurster*.[35] But the judgment in the *Chittenden* case left solidly entrenched the view of a mandatory constitutional safeguard, while

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[28] See Martzloff, *Notes on Current Legislation* (1912) 6 AM. POL. SCI. REV. 573, 576. *Cf.* (1913) 7 *Id.* 639, 646.

[29] State *ex rel.* Bryson v. Smith, *supra* note 11.

[30] *Id.* at p. 250.

[31] *Supra* note 27.

[32] That at the time the court acted civil service examinations were of much broader nature, see Coker, *Progress in Municipal Civil Service: A Review of Recent Reports* (1916) 5 NAT. MUN. REV. 574, at 575-579. Note especially this passage, at 575: "The examination is no longer necessarily and primarily a written test of memory and accumulated knowledge . . . its object is not solely, in many cases not mainly, to discover whether the applicants possess designated points of information and training; it may rather be to find out, on the one hand, their actual practical skill, and, on the other, their basic personal, mental or moral dispositions." See also Koran, *Machines in Civil Service Testing* (1942) 2 ED. AND PSYC. MEASUREMENT 167.

[33] Art. V sec. 6 of the Const. of New York reads as follows: "Appointments and promotions in the civil service of the state, and of all the civic subdivisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive . . . Laws shall be made for the enforcement of this section."

[34] People v. Roberts, 148 N. Y. 360, 42 N. E. 1082 (1896). In broad language the court said: "If the legislature should repeal all the statutes and regulations on the subject of appointments in civil service, the mandate would remain, and would so far execute itself as to require the courts, in a proper case to pronounce appointments made without compliance with its requirements illegal."

[35] 152 N. Y. 345, 46 N. E. 857 (1897).

other New York decisions have insisted upon a strict interpretation of the controlling phase "so far as practicable."[36] *Friedman* v. *Finegan* may be taken as typical:[37]

"The will of the people as expressed by section 6 of Art. V of the state constitution is that there shall be competitive examinations for all civil service appointments where practicable. Exemption is the exception, not the rule. The legislature cannot act arbitrarily and exempt places from competitive examinations at will * * * some good reason to justify the exemption must appear."

Neither the proceedings of Ohio's 1912 Constitutional Convention nor other sources make clear what was the origin of Art. XV, §10. But its great similarity to New York's Art. V, §6, together with some extraneous opinion evidence gives basis for the belief it was taken from the New York constitution.[38] It is well established rule of law that where a state adopts from another state a statute, which previous to such adoption, has been construed by the courts of that state, it is presumed to have been adopted with the construction so given it by that other state.[39] Such a presumption is of course rebuttable; yet the burden of proving a contrary intent is shifted onto the person claiming the absence of similarity. This rule has been extended to the analagous situation where one state adopts the constitutional provision of another state.[40] The Indiana Supreme Court expressed the rule very well in *City of Laporte* v. *Gamewell, etc. Co.*:[41]

"The clause in our constitution is in legal effect the same as that of Iowa and was no doubt taken from the constitution of that state. It is a familiar rule that where a clause is taken from the constitution or statutes of another state it will be deemed to have the meaning given it by the courts of that state."

Even though Ohio has elsewhere recognized this rule[42] it did

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[36] People v. Lyman, 157 N. Y. 368, 52 N. E. 132 (1898); Palmer v. Board of Education, 276 N. Y. 222, 11 N. E. (2d) 887 (1937); Anchesen v. Rice, 277 N. Y. 271, 14 N. E. (2d) 65 (1938); Matter of Wippler v. Klebes, 284 N. Y. 248, 30 N. E. (2d) 581 (1940).

[37] 268 N. Y. 93, 197 N. E. 755 (1935).

[38] *The Merit System and the Higher Courts* (1940) 16 GREATER CLEVELAND 45, Cf. Ordway, *The Civil Service Clause in the [New York] Constitution* (1914) 5 PROC. ACAD. POL. SCI. 251, at 253, who, though not so stating, emphasizes the fact that Ohio was the first state to "follow New York's example by putting a similar civil service clause . . . into its constitution."

[39] Brown v. State, 17 Ariz. 314, 152 Pac. 578 (1915); Hoffer Bros. v. Smith, 148 Va. 220, 138 S. E. 474 (1927); Denham v. Madale, 194 Wis. 583, 217 N. W. 423 (1938).

[40] City of Laporte v. Gamewell, *etc.* Co., 146 Ind. 466, 45 N. E. 588 (1896); Canfield v. Bank, 8 Cal. App. (2d) 277, 48 P. (2d) 133 (1935).

[41] *Supra* note 39.

[42] New Amsterdam Casualty Co. v. Nadler, 115 Ohio St. 472, 154 N. E. 736 (1926).

not choose to apply it in this instance, and the decisions of the New York courts have been given no weight or effect.

Since, then, the legalisms of the situation tip justice's scales in favor of the case for effective civil service, and since, certainly, the equities are all on this side of the issue, it is to be regretted that the Supreme Court of Ohio has failed to play an effective role as "watch-dog" over Art. XV, §10 of the Ohio Constitution.

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CONSTITUTIONAL LAW

GOVERNMENTAL POWER TO REGULATE DISTRIBUTION OF COMMERCIAL HANDBILLS

Plaintiff, refused permission by New York City officials to dock his submarine for exhibition off Battery Park, obtained a permit to dock at a state-owned pier. A handbill was prepared containing a cut of the submarine, a directional map, directions to see featured points of the sub under competent guide service, and a schedule of "popular prices." Informed by police that distribution of the handbill would be illegal under Sec. 318 U. Y. C. Sanitary Code,[1] plaintiff then printed a second handbill, substantially the same on one side, except that for the admission price schedule and guide-service references there was substituted a statement of the exhibit's uniqueness and a general description of what the submarine contained. On the other side, however, it carried a protest against city's refusal to grant a dock permit, mentioning that the sub could be seen by following the map on the reverse side. On being notified that street distribution of this handbill also was prohibited, but that the protest could be distributed if the "commercial advertising matter on its face were

[1] N. Y. C. Sanitary Code sec. 318: "No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building or in a letter box therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States Postal Service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."