

1953

# Ralph V. Backman and Mathias C. Tanner v. E. Allen Bateman and Board of Education of Ogden City : Defendant's Brief

Utah Supreme Court

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E. R. Callister; John W. Horsley; Attorneys for Defendants;

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Defendants Brief

In the

# Supreme Court of the State of Utah

RALPH V. BACKMAN,

*Plaintiff,*

VS.

E. ALLEN BATEMAN, State Superintendent of Public Instruction, and BOARD OF EDUCATION OF SALT LAKE CITY, a municipal corporation,

*Defendants.*

Case No.  
8052

MATHIAS C. TANNER,

*Plaintiff,*

VS.

E. ALLEN BATEMAN, State Superintendent of Public Instruction, and BOARD OF EDUCATION OF OGDEN CITY, a municipal corporation.

*Defendants.*

Case No.  
8064

E. R. CALLISTER

*Attorney General*

JOHN W. HORSLEY,

*Assistant Attorney General*

*Attorneys for Defendants*

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RALPH V. BACKMAN,

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tendent of Public Instruction, and  
BOARD OF EDUCATION OF SALT  
LAKE CITY, a municipal corpora-  
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*Defendants.*

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DEN CITY, a municipal corporation.

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## STATEMENT OF FACTS

The two above entitled cases have been consolidated by an order of the court for purposes of briefs and oral argument. The cases differ in factual detail; the legal

issues, however, are identical, with the exception of one additional problem posed in the Tanner case which will be the subject of Point III of this brief.

Before this brief went to the printers, counsel for plaintiffs furnished to counsel for defendants a draft of the statement of facts which plaintiffs intended to incorporate in their brief. The statement was accurate and complete, although many of the details appear not to be essential to a determination of the legal issues in this case. Defendants concede the factual accuracy of both the plaintiffs' pleadings and the brief, but are in disagreement with plaintiffs as to the legal conclusions which follow. In the Backman Case, plaintiff is the principal of a Salt Lake City High School who was denied re-employment because of a ruling by defendant Bateman that such employment would be a violation of Utah's "anti-nepotism" statutes (Ch. 3, Title 52, U. C. A. 1953, as amended by Ch. 79, Laws of Utah 1953), plaintiff being a brother to a member of the Salt Lake City Board of Education who is also chairman of the Board. In the Tanner Case, plaintiff, a teacher of biology, was denied re-employment in the Ogden City High School for the reason that his brother was a member of the Board. An additional fact in the Tanner Case is that the Ogden City Board of Education has heretofore resolved, in accordance with statutes giving it that power, that the office of board member should be uncompensated.

The only questions involved in this appeal are whether the anti-nepotism statute is constitutional, and if so wheth-

er its correct construction makes it applicable to these plaintiffs.

## STATEMENT OF POINTS

### POINT I.

THE STATUTE IS A VALID EXERCISE OF THE STATE'S POLICE POWER.

### POINT II.

THE STATUTE IS APPLICABLE TO PLAINTIFFS.

### POINT III.

THE FACT THAT THE OGDEN CITY BOARD MEMBERS RECEIVE NO COMPENSATION IS WITHOUT LEGAL EFFECT IN THIS CASE.

## ARGUMENT

### POINT I.

THE STATUTE IS A VALID EXERCISE OF THE STATE'S POLICE POWER.

The statute in question now reads:

“52-3-1. It is unlawful for any person holding any position the compensation for which is paid out of public funds to retain in employment or to employ, appoint, or vote for the appointment of, his or her father, mother, husband, wife, son, daughter,



sister, brother, uncle, aunt, nephew, niece, first cousin, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, or daughter-in-law in or to any position or employment, when the salary, wages, pay or compensation of such appointee is to be paid out of any public funds; and it is unlawful for such appointee to accept or to retain such employment in all cases where the direct power of employment or appointment to such position is or can be exercised by any person within the degrees of consanguinity or affinity herein specified, or by a board or group of which such person is a member.

“52-3-2. Each day any such person, father, mother, husband, wife, son, daughter, sister, brother, uncle, aunt, nephew, niece, first cousin, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, or daughter-in-law, is retained in office by any of said officials shall be regarded as a separate offense.

“52-3-3. Any person violating any of the provisions of this chapter is guilty of a misdemeanor.

“52-3-4. In towns, this chapter shall not apply to the employment of uncles, aunts, nephews, nieces or cousins.”

The pleadings of plaintiffs urge that the statute is unconstitutional. Defendants answer that the statute is a valid exercise of the police power inherent in the government of this state.

A recent text has this to say about the nature of the police power (16 C. J. S., Constitutional Law, Sec. 175a):

“The police power is an inherent attribute of sovereignty, and exists without any reservation in the constitution, being founded on the duty of the

state to protect its citizens and provide for the safety and good order of society. In its nature it is broad and comprehensive, and the laws enacted for the purpose of regulation thereunder may be impolitic, harsh, and oppressive without contravening the constitutional inhibition. It corresponds to the right of self-preservation in the individual, and is an essential element in all orderly governments, because necessary to the proper maintenance of the government and the general welfare of the community. It comprehends reasonable preventive measures no less than the punishment of perpetrated offenses. On it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property, and it has been said to be the very foundation on which our social system rests. It has for its object the improvement of social and economic conditions affecting the community at large and collectively with a view of bringing about 'the greatest good of the greatest number.' It is founded largely on the maxim, *Sic utere tuo ut alienum non laedas*, and also to some extent on that other maxim of public policy, *Salus populi suprema lex*. The constitution presupposes the existence of the police power and is to be construed with reference to that fact, and police regulations presuppose conditions which, unless controlled, will operate to a public disadvantage."

Defendants concede, as of course they must, that the police power of a state is not without limits. Those limits are drawn, so far as this case is concerned, by the due process clauses in the federal and state constitutions. With respect to the problem of this interrelation between the police power and the due process clause the following quo-

tation is taken from 11 Am. Jur., Constitutional Law, Sec. 261, p. 997:

“In discussing the relationship between the guaranties of the Fourteenth Amendment and the police power of the states, Justice Holmes has pointed out: ‘We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power. (citing *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186, 32 L. R. A. (N. S.) 1062)”.

Another principle of constitutional law is relevant here. Many cases indicate the necessity of judicial restraint in adjudicating upon statutes passed under the police power. Large discretion is of necessity vested in the legislature in determining what measures ought to be passed in furtherance of the public welfare. Cases written by this court teach that it is not a function of the courts to inquire into legislative wisdom. In *State v. Packer Corporation*, 77 Utah 500, 297 P. 1013, the court sustained the validity of a statute which prohibited the advertisement of cigarettes upon billboards. The decision contains this language:

“It is well settled in this state, and elsewhere,

that the courts will not declare a statute unconstitutional unless it clearly and manifestly violates some provision of the Constitution of the state or of the United States. Every presumption must be indulged in favor of the constitutionality of an act, and every reasonable doubt resolved in favor of its validity. *Utah State Fair Ass'n. v. Green*, 68 Utah 251, 249 P. 1016. The whole burden lies on him who denies the constitutionality of a legislative enactment. *Brown v. Maryland*, 12 Wheat. 436, 6 L. Ed. 678.

“\* \* \* ‘Only in cases, however, where the legislature exceeds its powers, will the courts interfere or set up their judgment against that of the legislature. Where the act has a real and substantial relation to the police power, then no matter how unreasonable nor how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds, nor will the courts assume to determine whether the measures are wise, or the best that might have been adopted; or whether such laws are invalid on the ground of inexpediency, or whether they bear any real or substantial relation to the public welfare.’”

The same statute was again before the court with the same result, 78 Utah 177, 2 P. 2d 114, and the cases were affirmed by the United States Supreme Court in *Packer Corporation v. Utah*, 285 U. S. 105, 52 S. Ct. 273, 76 L. Ed. 643, 79 A. L. R. 564. A more recent case, *State v. Mason*, 94 Utah 501, 78 P. 2d 920, upheld the constitutionality of a statute which imposed license requirements upon all commission merchants taking possession of farm produce without paying cash. The case contained this thoughtful language regarding the relationship of the police power to the due process clause:

"It is urged that the act bears no relation to public health, morals or the general welfare of the State, the implication from the argument being that the power of the legislature in an act of this sort must fall under such classification. \* \* \* What defendant apparently has in mind is that, in determining what is or what is not due process as it affects the ordinary rights which citizens of all orderly governments enjoy, we generally look to see whether the legislation which affects or trammels those rights is reasonably related to and designed to protect the health, safety, morals, or public welfare of the people or any portion of them. This balance between police powers and due process is, therefore, more or less in a state of unstable equilibrium, changing with sociological and economic developments. As the protection of the due process clause recedes, the police power advances. There is always articulation between the two."

Other cases involving the police power are: *Utah Mfrs.' Assn. v. Stewart*, 82 Utah 198, 23 P. 2d 229; *Broadbent et al. v. Gibson et al.*, 105 Utah 53, 140 P. 2d 439, *Holden v. Hardy*, 14 Utah 71, affirmed 169 U. S. 366, 42 L. Ed. 780. And of course there are many cases based upon the well-settled proposition that all presumptions favor constitutionality: *Stillman v. Lynch*, 56 Utah 540, 192 P. 272, 12 A. L. R. 552; *State v. Sopher*, 25 Utah 318, 71 P. 482, 60 L. R. A. 468.

Any state obviously has an immediate concern in the employment practices of its own employees. As was said by McKenna, J., in *Atkin v. Kansas* (1903) 191 U. S. 207:

"It belongs to the state as the guardian of its people and having control of its affairs to prescribe



the conditions upon which it will permit public work to be done in its behalf, or on behalf of its municipalities.”

Inherent in any government, then, is a broad power over its employees. A striking example of the breadth of this power is found in *United Public Workers v. Mitchell*, 330 U. S. 75, 91 L. Ed 754, involving the constitutionality of the Hatch Act. That statute forbade employees of the executive branch of the federal government from taking “any active part in political management or in political campaigns.”

Now, interference with the basic political rights of a citizen is a grave and severe exercise of governmental power—much more so than that involved here. And the wisdom of the Hatch Act was and is hotly controversial. Yet the Act was upheld. The worker involved, Mr. Poole, was a skilled coin roller in a U. S. Mint, and the possibility of his unfair use of governmental prestige for political purposes would seem remote. In the majority opinion is a footnote (34) which is relevant to that case and to the one at bar (91 L. Ed., at 772) :

“When in 1891 New Bedford, Mass., under a rule removed a policeman for political activity, an opinion by Mr. Justice, then Judge, Holmes disposed summarily of McAulliffe’s contention that the rule invaded his right to express his political opinion with the epigram, ‘The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.’ *McAulliffe v. New Bedford*, 155 Mass. 216, 220, 29 N. E. 517.”

Nepotism has widely been regarded as harmful to the conduct of an efficient system of public employment. It would seem to follow that nepotism is a valid subject upon which a state may legislate. One case which so holds is *Barton v. Alexander*, 27 Ida. 286, 148 P. 471, which upheld the validity of the Idaho anti-nepotism statute as being a valid subject of police action. The Idaho court said:

“We believe it to be within the legislative power to prohibit officers from appointing persons to office related to them by affinity or consanguinity, in the interest of efficiency in public service and for the best interests of the people and of the municipal subdivisions of the state, and as a legitimate police regulation in regard to which the lawmaking power may legislate, and reasonable legislation in regard thereto is constitutional and enforceable. Nepotism is recognized as an evil that ought to be eradicated and stamped out, and we know of nothing in the state constitution that prohibits the legislature from passing reasonable regulations in regard thereto.”

Anti-nepotism statutes have a firm basis, therefore, in the sovereign police power of the state. Many states have statutes prohibiting nepotism in school district employment practices. Examples of these statutes are:

Ariz. Code Annotated 1939, Sec. 54-416(3);  
 General Statutes of Kansas Annotated 1949,  
 Sec. 17-1347;  
 Miss. Code 1942 Annotated, Sec. 6302;  
 Oklahoma Statutes Annotated 21-481.

In Arkansas there is a provision that one cannot be appointed as a teacher if he is related to a board member

unless the teacher is elected by petition of 50% of the patrons of the school involved.

Ark. Statutes 1947 Annotated, Sec. 80-509 (d-a).

In some states, school teachers are expressly excepted from the operation of the state's nepotism law:

Code of Iowa 1950, Sec. 71.1;

New Mexico Statutes 1941 Annotated, Sec. 10-110.

In other states the employment of a teacher related to a board member may validly be affected if the board member disqualifies himself from participation in the vote.

Idaho Code (1947 Ida. Code Commission) Sec. 33-714 (14) ;

Missouri Revised Statutes 1949, Sec. 163.080.

The above list of statutes does not purport to be complete. Indexing of nepotism statutes in the various code compilations is not standardized. The reason for citing the statutes is to show that the practice of nepotism in school districts is a subject upon which the legislatures of several states have seen fit to act.

It has been shown above that the practice of nepotism in schools is one which the legislature may suppress. The constitutional question of this lawsuit is whether this particular statute could reasonably have been considered by the legislature as tending to accomplish its purpose.

An Anti-nepotism statute has been on the Utah statute books since 1931. For over 20 years the statute read:

"52-3-1. It is unlawful for any executive, legislative, ministerial or judicial officer of this state or



any of its political subdivisions to retain in employment or to employ, appoint, or vote for the appointment of, his or her father, mother, husband, wife, son, daughter, sister, brother, uncle, aunt, nephew, niece, first cousin, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, or daughter-in-law, in any department of the state, or of a district, county, city or municipal government of which such executive, legislative, ministerial or judicial officer is a member, when the salary, wages, pay or compensation of such appointee is to be paid out of any public funds."

This prior statute has no effect where the hiring power was in a board since under it the board could employ a relative of any board member, the board member simply refraining from any participation in the vote necessary to affect the hiring. The rather wide extent to which this practice has been indulged in school district employment policies is disclosed by the pleadings. The same practices are available to city councils and county commissioners.

Evidently a majority of the members of the 30th Legislature decided that, as between board members and employees, the existence of close blood or marriage ties was not desirable. Whether or not this legislative decision was a wise one does not of course have anything to do with these lawsuits. The only question is whether the decision which the legislators made could have been reached on any rational basis.

There are well known factors upon which the legislature may have based this conclusion. Some of these factors are: (1) As between two co-workers, one of whom is re-

lated to a board member, frictions and jealousies are more likely. There may exist suspicion, justifiable or not, of some minor preference or advancement in any one of hundreds of ways; (2) public employment, being as it is a matter of public concern, necessarily draws public comment. There is plainly a greater likelihood of public criticism and lack of public confidence in a system honeycombed with relatives working for relatives. The above are only suggested as factors which the legislature validly may have considered. Other such factors may, and doubtless to exist and also were considered. This brief is not concerned with a defense of the wisdom of the recent amendment. Wise or not, the law was put upon our statute books by the department of our government to which the duty of writing laws is delegated by our constitution. Plaintiffs ask that this court set aside that policy determination. They ask, in effect, a repeal of the statute.

The only case upon which plaintiffs can place reliance for their contention that the statute is unconstitutional is the Florida case of *State ex rel Robinson v. Keefe*, . . . Fla. . . ., 149 So. 638. That case held quite correctly that the Florida anti-nepotism statute plainly did not, in terms, cover the employment of school teachers. The case goes on to imply, however, by a dictum that had the statute been intended to apply to school teachers it would have been unconstitutional. The dictum is, we think, not correct for the reasons outlined above. There are many decisions which have concerned themselves with nepotism statutes as applied to school teachers. See *Quattlebaum v. Busbea*, 204 Ark. 96, 162 S. W. 2d 44; *State v. School District No. 13*

(Mont. 1944), 151 P. 2d 168; *State ex rel. McKittrick v. Whittle*, . . . Mo. . . ., 63 S. W. 2d 100, 88 A. L. R. 1099. In none of these cases is the question squarely presented whether nepotism laws constitutionally can be applied to school teachers. Implicit in each case, however, is the assumption that the court is dealing with a valid law.

## POINT II.

### THE STATUTE IS APPLICABLE TO PLAINTIFFS.

By their pleadings, plaintiffs contend that the language of the statute does not include employment such as theirs.

It seems plain that it does. The statute, by its own terms, covers any employment compensated out of public funds. The money which goes to pay school teachers' salaries is money raised by taxation, which comes within the category of public funds. Plaintiffs doubtless will cite the Florida case, *State ex rel Robinson v. Keefe*, . . . Fla. . . ., 149 So. 638, as an instance in which the nepotism statute was held not to apply to school teachers. That case held that the Florida statute did not cover school teachers. The language of the statute there construed read as follows:

"Section 1. That any officer, member of state board, county officer, member of county board or commission, city official, or his appointee, who shall knowingly employ either directly or indirectly any person related within the fourth degree, either by consanguinity or affinity to such state officer, mem-

ber of state board, county officer, member of county board or commission, city official or his appointee, shall be deemed guilty of misfeasance and malfeasance in office and subject to removal therefor. Provided however that the provisions of this Act shall not apply to officers above who employ only one person related to him as above set out.

School teachers and school principals simply do not come within that language, and that is all the case holds. It is plain that the Florida legislature did not contemplate any effect upon the employment of school teachers; it is equally plain that the Utah legislature had such an intention.

Plaintiffs plead that the anti-nepotism statute is contradictory to Sec. 53-2-15, U. C. A. 1953, which provides that a certificate issued by the State Board of Education is valid in any school district.

This argument is not sound. If inconsistency indeed exists, and if the two statutes cannot possibly be harmonized, the recent anti-nepotism amendment, being later in time, prevails. 58 Am. Jur., p. 540-541. The more obvious answer, of course, is that there is not the slightest inconsistency. That fact that a teacher cannot lawfully be employed by a given school district does not make invalid his teaching certificate, even in that district. His certificate is valid. Certification by the state board is no guarantee of a job in any district a certified teacher might decide to offer his services to. If there is any interpretation by which two statutes can both operate, that is the one the courts will

follow. *Lagoon Jockey Club v. Davis County*, 72 Utah 405, 270 P. 543.

### POINT III.

#### THE FACT THAT THE OGDEN CITY BOARD MEMBERS RECEIVE NO COMPENSATION IS WITHOUT LEGAL EFFECT IN THIS CASE.

In this Point is considered the question whether the fact that the members of the Ogden City Board of Education are not compensated is of any materiality. The defendants submit that the plain wording of the statute demonstrates that this does not matter. The only question along that line is whether the teacher (plaintiff Tanner) is compensated out of public funds. The case is very clearly covered by the second clause of Sec. 52-3-1, U. C. A. 1953, as amended. The construction of the statute which defendants submit is the only reasonable construction is:

“\* \* \*; and it is unlawful for such appointee to accept \* \* \* such employment [i. e., any that is compensated out of public funds] in all cases where the direct power of employment to such position is or can be exercised by any person within the degrees of consanguinity or affinity herein specified, or by a board or group of which such person is a member.

### CONCLUSION

Defendants urge that the statute here under attack is well within the police power possessed by the legislature. The statute, by its express terms, squarely covers the fac-

tual situations presented by the cases of these plaintiffs. Plaintiffs' suit is but an appeal to this court to do what this court cannot do—repeal a statute.

Respectfully submitted,

E. R. CALLISTER  
*Attorney General*

JOHN W. HORSLEY,  
*Assistant Attorney General*  
Attorneys for Defendants