Tulsa Law Review

Volume 4 | Number 2

1967

Constitutional Law: Academic Freedom Gains Full Constitutional Protection

Thomas F. Golden

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

 Part of the Law Commons

Recommended Citation

Thomas F. Golden, *Constitutional Law: Academic Freedom Gains Full Constitutional Protection*, 4 Tulsa L. J. 270 (2013).

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol4/iss2/10

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

CONSTITUTIONAL LAW:

ACADEMIC FREEDOM GAINS FULL CONSTITUTIONAL PROTECTION

Should a member of the Communist Party who has knowledge of its unlawful aims[1] be allowed to teach in state institutions of higher learning, if he be qualified otherwise? The United States Supreme Court in *Keyishian v. Board of Regents*[2] answered this question affirmatively, further establishing full constitutional protection of academic freedom. Rejecting the premise " . . . that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights . . ."[3] the Court held unconstitutional New York's model statutory scheme requiring loyalty oaths of state employees. Petitioner, an instructor in English at the privately owned University of Buffalo, was denied state employment when the university was merged into the State University of New York, solely because of his refusal to sign the so-called "Feinberg Certificate"[5] disclaiming present Communist Party membership and stating that if he ever had been a member of the party he had notified the president of the university of that fact.

Although the Court had upheld portions of the act as late as 1952,[6] Mr. Justice Brennan, writing for the five member majority, quickly disposed of any controlling effect of the *Adler* case by overruling the premise of conditional employment on which

[1] Assume for the moment that the Communist Party can be shown to be presently advocating the violent overthrow of government so as to make its aims unlawful.

[2] Keyishian v. Board of Regents, 87 Sup. Ct. 675 (1967).

[3] *Id.* at 685.

[4] N.Y. CIV. SER. LAW § 105; N.Y. ED. LAW §§ 3021, 3022; RULES OF THE BOARD OF REGENTS, ARTICLE XVIII, § 244 (Adopted July 15, 1949).

[5] RESOLUTIONS OF THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, NO. 56-98 (adopted October 11, 1956) *since rescinded and amended:* RESOLUTIONS OF THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, NO. 65-100 (adopted May 13, 1965).

[6] Adler v. Board of Education, 342 U.S. 485 (1952).

it stood. Relying on cases subsequent to *Adler,*[7] Mr. Justice Brennan found it ". . . too late in the day to doubt that the liberties of religion and expression may be infringed by a denial of or placing of conditions upon a benefit or privilege."[8] Making reference to cases such as *Schware v. Board of Bar Examiners*[9] and *Torcasco v. Watkins,*[10] dealing with state imposed conditions on the granting of benefits and privileges from state boards, the Court appears to negate all such conditions which require a "surrender of constitutional rights."

However, the Court went further than to just bury the premise of conditional employment. It witnessed the decline and fall of the "knowledgeable membership test" which grew out of *Wieman v. Updegraff.*[11] In *Wieman,* the Court held unconstitutional an Oklahoma statute which made Communist Party membership alone sufficient cause for terminating state employment. Striking the statute down as an ". . . assertion of arbitrary power"[12] the Court negated all similar statutes which were based on an "indiscriminate classification of innocent with knowing . . . ."[13] This "knowledgeable membership" test survived in cases such as *Slochower v. Board of Health and Education,*[14] *Adler v. Board of Education,*[15] *Garner v. Board of Public Works,*[16] and *Cramp v. Board of Public Instruction,*[17] as separate and apart from co-existing cases dealing with subversive memberships of the private individual as controlled under the Smith Act.[18] The effect of these two different lines of cases was to allow a state to prescribe higher

[7] *See* Baggett v. Bullitt, 377 U.S. 360 (1964); Shelton v. Tucker, 364 U.S. 479 (1960); Speiser v. Randall, 357 U.S. 513 (1958); Morris, *Academic Freedom and Loyalty Oaths,* 28 LAW & CONTEMP. PROB. 487 (1963).

[8] Sherbert v. Verner, 374 U.S. 398, 404 (1963).

[9] Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

[10] Torcasco v. Watkins, 367 U.S. 488 (1961).

[11] Wieman v. Updegraff, 344 U.S. 183 (1952).

[12] *Id.* at 191.

[13] *Id.*

[14] Slochower v. Board of Health and Education, 350 U.S. 551 (1956).

[15] *Supra* note 6.

[16] Garner v. Board of Public Works, 341 U.S. 716 (1951).

[17] Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

[18] Smith Act, 18 U.S.C. § 2385 (1962).

degrees of loyalty from individuals seeking government employment than could be criminally punished under the Smith Act. A state could bar members of subversive organizations who had knowledge of the unlawful aims of the organization from state employment, though their affiliations were not of sufficient gravity to illicit criminal sanctions under the Smith Act cases such as *Scales v. United States.*[19]

Mr. Justice Brennan destroys this distinction. The *Keyishian* decision eliminates the "knowledgeable membership" test, as applied to state employees as a condition of employment, in favor of the "active purposeful membership" guideline utilized to test criminal sanctions under the Smith Act. Recognizing the denial of governmental employment as a penalty, Mr. Justice Brennan states, " . . . legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization, or which is not active membership, violates constitutional limitations."[20] This is identical to the *Scales* decision dealing with subversive memberships of private citizens, requiring that " . . . the membership must be an 'active' one with a 'specific intent' to further the aims of the subversive organization"[21] before a state may legitimately apply negative criminal sanctions. Hence, a teacher's membership must now constitute criminal aspects before a state can either deny him employment or criminally punish him.

Keyishian does not stand alone in its theory. Considerable support is mustered from the two recent cases of *Aptheker v. Secretary of State*[22] and *Elfbrant v. Russell*[23] which are on point and hold in accord with *Keyishian,* although the force of their decisions is somewhat muted by discussions of criminal presumptions. Mr. Justice Douglas in *Elfbrant* could find no threat to the state from public employees ". . . who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities . . . ."[24]

[19] Scales v. United States, 367 U.S. 203 (1961).
[20] *Supra* note 2 at 686.
[21] *Supra* note 19 at 221.
[22] Aptheker v. Secretary of State, 378 U.S. 500 (1964).
[23] Elfbrant v. Russell, 384 U.S. 11 (1966).
[24] *Id.* at 17.

Although the Court adopted more stringent safeguards with which to test the constitutionality of loyalty oath statutes on their face, it did not relax the procedural safeguards which attach to their application. "Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules."[25] The Court interprets the constitution as requiring a simplicity of administration on the one hand, while demanding full procedural due process of law on the other. This appears to be a difficult task in light of the intricacies of due process of law which, by its very nature, entails a certain degree of "prolixity and profusion" of administrative machineries. Justification for these magnanimous standards is found by reference to *N.A.A.C.P. v. Button*[26] which states "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[27] Thus, the Court in *Keyishian* finds the ". . . regulatory maze created by New York wholly lacking in terms 'susceptible of objective measurement' "[28] rendering it unconstitutional due to vagueness because of " . . . the absence of sensitive tools which clearly inform teacher what is being sanctioned."[29]

Though the Court does not question the ". . . legitimacy of New York's interest in protecting its educational system from subversion . . . ."[30] it seems to disassociate this interest from the right of the state to self protection. In *Sweezy v. New Hampshire*[31] Mr. Justice Frankfurter suggested that a free society depended upon free universities and this required the exclusion of governmental intervention from the university campus. He described the Court's role as one of balancing the right of the citizen to political privacy against the right of the state to self-protection. In *Keyishian,* apparently Mr. Justice Brennan feels that the state cannot preserve itself as a democratic government without safeguarding the poli-

[25] Keyishian v. Board of Regents, *supra* note 20, at 684.
[26] N.A.A.C.P. v. Button, 371 U.S. 415 (1963).
[27] *Id.* at 433.
[28] *Supra* note 2 at 684.
[29] *Id.*
[30] *Id.* at 683.
[31] Sweezy v. New Hampshire, 354 U.S. 234 (1957) (concurring opinion).

tical privacy of its citizens, including those publicly employed. The two interests dichotomized by Mr. Justice Frankfurter and others (this view also obtains in the dissent of Mr. Justice Clark who is joined by Justices Harlan, Stewart and White) are merged into the identical interest by Mr. Justice Brennan in *Keyishian.* One becomes impossible without the other, thereby disallowing the placing of conditions upon the public employment in state universities short of permissible criminal limitations under the Smith Act.

There can be no doubt that the Supreme Court has narrowed the permissive breadth of state legislation in the area of inquiry by the state into the political affiliations of its employees, including employees of state owned and operated universities. By following up its decisions in *Aptheker* and *Elfbrant,* the Court is endeavoring to protect abstract expression, interchange and interplay of ideas, theoretical improvision and the professional associations of the university's faculty, all of which constitute the integral parts of academic freedom. Thus, academic freedom clearly gains full constitutional protection for the first time in our history as yet another "freedom" is afforded the intricate protection under the ever expanding "wall" of the Constitution.

> While the language of the Constitution does not change, the changing circumstances of a progressive Society for which it was designed, yield new and fuller import to its meaning.[32]

By applying the *Scales* test of active and purposeful membership to state loyalty oath statutes, the Court has changed the interpretation from which numerous statutes have been drawn. All such statutes, including the one in the State of Oklahoma,[33] which are based on the "knowledgable membership" test developed under the *Wieman* case are now of questionable validity and presumably they will have to be revised. The new test of active and purposeful membership requires a long list of safeguards:

1. Membership in a subversive organization which is known by

[32] *Id.* at 266.

[33] OKLA. STAT. tit. 51 § 36, 1-6 (1961), worded in part as follows: "I will not advocate . . . directly or indirectly, and will not become a member of . . . the Communist Party . . .or any party . . . known to me to advocate . . . sedition, treason . . . or the overthrow of the government of the United States . . . ."

the member to presently advocate the violent overthrow of government.
2. A specific intent to further this unlawful aim.
3. An active participation in the unlawful activities of the organization.

All the while the statute must allow due process of law which does not incorporate vague terminology while implementing the process with a simplicity of administration. The task for future drafters of state loyalty oath statutes appears to be most demanding, if in fact any need for them still exists exclusive of the protection afforded the state under the Smith Act.

Thomas F. Golden