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Constitutional Law: Academic Freedom Gains Full Constitutional Protection

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Should a member of the Communist Party who has knowledge of its unlawful aims 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 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, 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” 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, 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

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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.
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5 Resolutions of the Board of Trustees of the State University of New York, No. 56-98 (adopted October 11, 1956) since rescinded and amended: Resolutions of the Board of Trustees of the State University of New York, No. 65-100 (adopted May 13, 1965).
it stood. Relying on cases subsequent to Adler, 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." Making reference to cases such as Schwarte v. Board of Bar Examiners and Torcasco v. Watkins, 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. 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" the Court negated all similar statutes which were based on an "indiscriminate classification of innocent with knowing ... ." This "knowledgeable membership" test survived in cases such as Slochower v. Board of Health and Education, Adler v. Board of Education, Garner v. Board of Public Works, and Cramp v. Board of Public Instruction, as separate and apart from co-existing cases dealing with subversive memberships of the private individual as controlled under the Smith Act. The effect of these two different lines of cases was to allow a state to prescribe higher

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footnotes:

12 Id. at 191.
13 Id.
15 Supra note 6.
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*.

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." 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" 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* and *Elfbrant v. Russell* 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

20 *Supra* note 2 at 686.
21 *Supra* note 19 at 221.
24 *Id.* at 17.
NOTES AND COMMENTS

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 pro-
linxity and profusion of statutes, regulations, and administrative
machinery, and by manifold cross-references to interrelated enact-
ments and rules."25 The Court interprets the constitution as re-
quiring 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. Justi-
ification for these magnanimous standards is found by reference to
N.A.A.C.P. v. Button26 which states "[b]ecause First Amendment
freedoms need breathing space to survive, government may regu-
late 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 Hampshire31 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, ap-
parently 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.
27 Id. at 433.
28 Supra note 2 at 684.
29 Id.
30 Id. at 683.
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 Elbbrant, the Court is endeavoring to protect abstract expression, interchange and interplay of ideas, theoretical improvisation 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.

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, 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 ... ".

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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.

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