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Constitutional Law--Freedom of Speech--Loyalty Oaths [*Keysshran v. Board of Regents*, 385 US. 589 (1967)]

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CONSTITUTIONAL LAW — FREEDOM OF SPEECH
— LOYALTY OATHS

Keyishian v. Board of Regents, 385 U.S. 589 (1967).

Although the teaching community may view loyalty oaths as a most annoying infringement upon its academic freedom, the oaths are nevertheless required of faculty members in some public schools and universities.¹ Objections to loyalty oaths have been made in the courts,² and in 1952 one case reached the Supreme Court of the United States. *Adler v. Board of Educ.*,³ perhaps to the dismay of civil libertarians, upheld the New York Feinberg Law⁴ as a valid exercise of the state's police power over education,⁵ but the Court failed to reach the issue of the statute's vagueness, which was done twelve years later in *Baggett v. Bullitt*.⁶ The holding of *Baggett*, that due process requires the exact meaning of what is proscribed by a statute to be ascertainable on its face,⁷ is a corollary of the principle that, in first amendment cases, a statute or regulation can-

¹ E.g., FLA. STAT. ANN. §§ 875.05-.06 (1965); GA. CODE ANN. §§ 89-311, -314 (1963); LA. REV. STAT. § 42:52 (1965); PA. STAT. ANN. tit. 65, §§ 214-15 (1959); TEX. CIV. STAT. ANN. art. 6252-7.1 (1962).

² E.g., Georgia Conference of the Am. Assoc. of Univ. Professors v. Board of Regents, 246 F. Supp. 553 (N.D. Ga. 1965).

³ 342 U.S. 485 (1952).

⁴ N.Y. EDUC. LAW § 3022. This law implements § 3021 of the Education Law and § 105 of the Civil Service Law by empowering the Board of Regents, an administrative body, to devise procedures for enforcement of the statutes' policy. The loyalty oath, or "Feinberg Certificate" was devised by the Board of Regents in the exercise of that administrative power.

⁵ *Adler v. Board of Educ.*, 342 U.S. 485 (1952). To the contention by the majority that the entering of public employment constitutes a free choice to waive certain constitutional rights, Mr. Justice Douglas dissented vociferously. *Id.* at 508. The dissent by Mr. Justice Black expressed dismay at the uncontrolled discretion given the Board of Regents over first amendment freedoms. *Id.* at 496. Mr. Justice Frankfurter took a different approach in his dissent, insisting that the question should not have been decided at all, since taxpayers had no standing under article III to litigate the question of loyalty oaths for teachers, and that the question was purely abstract, since no actual grievance was presented to the Court. *Id.* at 497.

Critics sided with Mr. Justice Frankfurter. Professor Freund lamented: "It is greatly to be regretted that the Court exhausted its function in deciding these questions on so abstract a record." Freund, *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 96 (1952). A student opined that the Court was in danger of appearing arbitrary in the application of the case or controversy doctrine. Note, 66 HARV. L. REV. 99, 121 (1952).

⁶ 377 U.S. 360 (1964). That case held that the words "aiding or abetting" had too broad a sweep and might be stretched to include a lawful exercise of constitutional rights. It is not clear, for example, that a lawyer defending a person accused of violating the Smith Act would not be "aiding or abetting" Communism within the language of the statute. *Id.* at 368.

⁷ *Id.* at 371.

not sweep more broadly than the wrong to be remedied.⁸ Under the *Baggett* rationale if vague statutory language can be stretched to an unconstitutionally broad result, it cannot be enforced.⁹

In the recent case of *Keyishian v. Board of Regents*,¹⁰ the appellants, faculty members at the State University of New York, attacked the constitutionality of the Feinberg Law for a second time. Under a ruling promulgated by the Board of Regents under that law, the appellants were required to sign loyalty oaths as a precondition to continued employment.¹¹ Appellant Keyishian, along with four other University employees who refused to comply with the rule, sued for declaratory and injunctive relief, alleging that the ruling was unconstitutional. The district court's dismissal¹² was reversed by the Supreme Court.

A majority of five Justices, speaking through Mr. Justice Brennan, noted that while *Adler* had sustained the law, the problem of vagueness urged by these appellants had not been reached in that case.¹³ Moreover, to the extent that *Adler* sustained the dismissal of a faculty member for mere membership in the Communist Party without a specific intent to further its unlawful aims, it had been implicitly overruled by a subsequent decision.¹⁴ The Court held that the regulatory maze created by the statutes and administrative rulings was lacking in terms susceptible of objective measurement and was unconstitutionally vague under the doctrine of *Baggett v. Bullitt*.¹⁵ In the view of the majority, the vagueness of the Regent's ruling was aggravated by the "prolixity and profusion" of the statutes and other rulings and by the many cross-references they contained.¹⁶

⁸ For example, a teacher cannot be forced, as a condition of employment, to list every organization to which he has belonged during the last five years, for such a requirement would cut too broadly across his first amendment rights. *Shelton v. Tucker*, 364 U.S. 479 (1960).

⁹ *Baggett v. Bullitt*, 377 U.S. 360 (1964). This case may very well stand for the proposition that there is no presumption of constitutionality where statutes regulate first amendment freedoms.

¹⁰ 385 U.S. 589 (1967).

¹¹ *Id.* at 591-92. Other states have statutory requirements. See statutes cited note 1 *supra*.

¹² The district court initially refused to convene the three-judge court for lack of a federal question. *Keyishian v. Board of Regents*, 233 F. Supp. 752 (W.D.N.Y. 1964), *rev'd*, 345 F.2d 236 (2d Cir. 1965).

¹³ 385 U.S. at 594-95. See also note 6 *supra* and accompanying text.

¹⁴ *Elfbrandt v. Russell*, 384 U.S. 11 (1966). The Court cited a series of cases leading up to *Elfbrandt* which were decided subsequent to *Adler*. 385 U.S. at 606-07.

¹⁵ 377 U.S. 360 (1964). The Court in *Keyishian* cited a series of cases leading up to this decision. 385 U.S. at 603-04.

¹⁶ *Id.* at 604. Although it is dictum, this language may very well sound an alarm

The exact objection to the Board of Regents' plan appears to have centered around the problem of statutory definition.¹⁷ Both the Education Law¹⁸ and the Civil Service Law¹⁹ required the removal of state employees for treason or sedition. The Education Law, which governed the appellants, did not define these terms, but the Civil Service Law incorporated the definition of criminal anarchy in the Penal Law by reference.²⁰ Since the Feinberg Law empowered the Board of Regents to prescribe machinery for the enforcement of both the Education and the Civil Service Laws, and since the same language was used in both, it might be contended that the Education Law also incorporates by reference the definition of criminal anarchy contained in the Penal Law. But the statutes governing criminal anarchy²¹ proscribed its advocacy, which was defined to include the public display of any book advocating the overthrow of government by force.²² This was held to be too broad a restriction on first amendment rights.

This, then, is the crucial point. Because of the complexity and broadness of these interrelated rulings and statutes, "no teacher can know just where the line is to be drawn."²³ Therefore, since he cannot know exactly what conduct is prohibited, the teacher will avoid any controversial activity, thereby losing his academic freedom and the protection of the first amendment.²⁴ The *Keyishian* Court did not deny to the state the right to protect its educational system from subversion, but it did make it clear that no regulation can sweep away legitimate exercises of first amendment rights.²⁵

regarding the growing complexity of legislative and administrative regulations generally, for the Court appears to be equating vagueness with complexity.

¹⁷ *Id.* at 597-98.

¹⁸ N.Y. EDUC. LAW § 3021.

¹⁹ N.Y. CIV. SERV. LAW § 105.

²⁰ N.Y. PEN. LAW § 160.

²¹ N.Y. PEN. LAW §§ 160-61. Both sections are to be consolidated into one section entitled "criminal advocacy" effective Sept. 1, 1967. 385 U.S. at 599 n.6. This further strengthens the argument that the reference to § 160 ultimately brings § 161 into play.

²² See note 21 *supra*. The Court appears to have assumed that the prohibition against the mere display of books by Penal Law § 161 was unconstitutionally broad, for, having reached that point in the argument, Mr. Justice Brennan's opinion appears to move quickly into the conclusion. 385 U.S. at 598-99.

²³ *Id.* at 599.

²⁴ *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960). The *Keyishian* Court described the curtailing effect as caused by "a highly efficient *in terrorem* mechanism." 385 U.S. at 601.

²⁵ *NAACP v. Burton*, 371 U.S. 415, 444 (1962); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958); *Stromberg v. California*, 283 U.S. 359, 368-69 (1931).

Four Justices dissented. "No court has ever reached out so far to destroy so much with so little," declared Mr. Justice Clark, speaking for Justices White, Harlan, and Stewart.²⁶ Adopting a tack strikingly similar to that of the dissent by Mr. Justice Frankfurter in *Adler v. Board of Educ.*,²⁷ Mr. Justice Clark found that the issues presented were "abstract and entirely speculative in character,"²⁸ since the Board of Regents had relaxed its administrative requirements and no longer demanded the loyalty certificate.²⁹ In addition, he indicated that the appellants had not exhausted their administrative remedies.³⁰ Therefore, since no real controversy existed, the minority concluded that the case should not have been decided at all, but should have been rejected out of hand.³¹

However, if there had been enough of a "case" to warrant a decision on the merits, the dissenting Justices would nevertheless have upheld the statute. Four points were relied upon in support of this view: First, regardless of the rationalization used, the minority insisted that the Court was striking down the law it had upheld just fifteen years earlier.³² Second, *Adler* had been cited frequently with approval and had in no way been eroded by subsequent cases.³³ Third, it was asserted that the arguments briefed in *Adler* specifically discussed the vagueness problem, and by upholding the law that problem must have been resolved despite the tenor of the opinion.³⁴ With regard to the question of dismissal for mere

²⁶ 385 U.S. at 622.

²⁷ 342 U.S. 485, 497 (1952). See note 5 *supra*.

²⁸ 385 U.S. at 621. The majority opinion dealt with this question by indicating that while the actual requirement may be withdrawn, the machinery is merely dormant, and new methods may be devised by the Board of Regents pursuant to its statutory authority. Therefore, it was not so much the certificate as the statute behind it which was in question. *Id.* at 596.

²⁹ *But see* note 28 *supra*.

³⁰ 385 U.S. at 621 (dissenting opinion). See note 12 *supra*.

³¹ *Ibid.* Article III of the United States Constitution grants jurisdiction to federal courts to hear "cases and controversies." This has generally been interpreted to mean actual grievances presented by those actually aggrieved. *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Muskrat v. United States*, 219 U.S. 346 (1911). The former requirement is referred to as "standing," and bears striking resemblance to the procedural "real party in interest" provisions. A doctor does not have "standing" to assert the rights of his patient. *Tileston v. Ullman*, 318 U.S. 44 (1943).

³² 385 U.S. at 622. For the distinction utilized by the majority, see note 6 *supra* and accompanying text.

³³ *Id.* at 624-25.

³⁴ *Id.* at 626-27. The majority had stated that constitutional doctrine which has emerged since that decision [*Adler*] has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of consti-

membership in a Communist organization, such membership was considered to be merely *evidentiary* of subversive activity and, under the new ruling, did not result in automatic dismissal.³⁵ Finally, the minority reminded the Court that arrayed against all personal rights was the "right of self preservation."³⁶

These contentions are subject to at least two criticisms. First, in response to the proposition that the dispute was either too abstract or moot,³⁷ it must be recalled that the issue involved was a first amendment question and, as such, might be subject to special considerations. While it might have been appropriate to have withheld judicial review until the state courts had passed upon the question,³⁸ or to have waited until the situation became a real controversy,³⁹ such a delay could have cost the appellants their jobs. The mere threat of such a result⁴⁰ could cause a curtailment of free expression, since eventual reinstatement by court decree is both an uncertain and unsatisfactory vindication for anyone with a family to support. Second, to allow membership to be evidence of a specific intent to advocate the overthrow of the government, places the burden on the individual to show that his membership is passive and therefore, as a practical matter, restricts his freedom of association.⁴¹

There are at least three salutary effects of the *Keyishian* decision. First, and obviously, the Court in its discussion of the need for freedom of thought in the intellectual community clearly recognized the existence of academic freedom.⁴² Second, the Court recognized to a limited extent the autonomy of the academic commu-

tional rights which could not be abridged by direct government action. *Id.* at 605.

³⁵ *Id.* at 628. *Adler* was in accord with this line of thinking. *Adler v. Board of Educ.*, 342 U.S. 485, 490-91 (1952).

³⁶ *Ibid.*

³⁷ See notes 5 and 28 *supra*.

³⁸ See *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964).

³⁹ See note 31 *supra*.

⁴⁰ See note 24 *supra* and accompanying text. This is exactly why restrictions of this nature may not be broader than the wrong to be remedied. They may not, for example, sweep within their prohibitions legitimate exercises of constitutional rights under the first amendment. See cases cited note 25 *supra*.

⁴¹ See *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960). The point is persuasively argued by the appellants in the brief in *Keyishian*. Brief for Appellants, p. 73, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

⁴² 385 U.S. at 603.

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws which cast a pall of orthodoxy over the classroom. *Ibid.*

nity, which is the essence of its freedom.⁴³ Third, while not closing the door to legislative control of the academic community, it definitively stated under what conditions and with what standards of clarity such regulations may be imposed. This may elicit more thoughtful enactments from state legislatures and hopefully the repeal of such hysteria-bred legislation as the offensive "red flag"⁴⁴ and other poorly drafted anti-subversive laws.⁴⁵ Many of these statutes are relics of the McCarthy era and are in flagrant disregard of Supreme Court rulings. The public clamor which caused the enactment of these laws has subsided, and state legislators can now address themselves to the task of enacting statutes which will pro-

⁴³ The policy was stated by Henry Steele Commager, who observed that "questions of fitness to teach and carry on research are always academic questions." Commager, *The Nature of Academic Freedom*, Saturday Review, Aug. 27, 1966, p. 14.

⁴⁴ Many states have laws prohibiting the display of red flags or emblems associated with the Communist revolution. The California law prohibiting the display of a red flag was invalidated by the Supreme Court in 1931 on the grounds that it might sweep within its ambit peaceful and orderly demonstration protected by the first amendment. *Stromberg v. California*, 283 U.S. 359 (1931). Despite the clarity of the *Stromberg* opinion, many states still have similar questionable statutes in force, and, more regrettably, the annotators have in many cases failed to recognize *Stromberg* at all. The impingement upon academic freedom is obvious; teachers in states with "red flag" laws, unaware of the existence of *Stromberg* or unwilling to face the dour prospect of criminal prosecution, will be unwilling to display a red flag even for educational purposes. See the argument in note 24 *supra* and accompanying text.

At least eight states have such laws. MICH. STAT. ANN. § 28.237 (1962); MONT. REV. CODES ANN. § 94-4409 (1947); OHIO REV. CODE § 2921.07; OKLA. STAT. ANN. tit. 21, § 374 (1958); ORE. REV. STAT. § 162.740 (1955); WIS. STAT. ANN. § 946.04 (1958). Delaware has a provision for intent, which may make the statute constitutional. DEL. CODE ANN. tit. 11, § 863 (1953). Iowa makes the carrying of a red flag or emblem presumptive evidence of treason or inciting the overthrow of government. IOWA CODE ANN. § 689.6 (1949). The statute raises another constitutional question: that of the reasonableness of the connection between the fact proved and the fact presumed. *Manley v. Georgia*, 279 U.S. 1 (1929) (presumption of fraud at every bank insolvency invalid).

⁴⁵ More interesting provisions include the following, all questionable in light of *Keyishian* and recent cases: MASS GEN. LAWS ANN. ch. 264, § 20 (providing attorney general with injunctive machinery against convicted subversives teaching in public or private schools); N.M. STAT. ANN. § 5-3-12 (1953) (prohibiting any attempt, direct or indirect, to teach or justify subversive activity); N.C. GEN. STAT. § 14-12-1 (1951) (prohibits *public display* of books containing subversive material); R.I. GEN. LAWS ANN. § 11-43-14 (1956) (providing that any meeting to *discuss* overthrow of the government is unlawful assembly and may be treated as any public riot); TEX. CIV. STAT. ANN. art. 6252-7, § 3 (1962) (requiring authors of textbooks for public schools to certify their loyalty).

In *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), the Supreme Court declared that the states no longer had the right to punish advocacy of the overthrow of the United States government, since the federal interest is supreme and the state interest is preempted by comprehensive federal legislation. In addition, the Court felt that dual enforcement would create conflicts with the federal program. Despite the clarity of this pronouncement, many states still declare that they will punish sedition against the United States. *E.g.*, MONT. REV. CODES ANN. § 94-4401-02 (1947).

tect legitimate state interests while satisfying the requirements laid down by the Court in *Keyishian* and other cases.

Freedom for research and teaching⁴⁶ is a worthwhile objective in a free society. *Keyishian* gives substance to the independence of the academic community by providing a clear discussion of academic freedom,⁴⁷ treating it as an adjunct of the first amendment.⁴⁸ But perhaps more importantly, the Court's willingness to hear the case despite the apparent lack of a real controversy⁴⁹ suggests that first amendment rights, including that of academic freedom, do in fact possess a special, perishable status which will not tolerate delay.⁵⁰

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⁴⁶ Academic freedom should not be justified by the need for research alone, because that would lead a destruction of interdisciplinary communication. For example, it would raise the question whether a chemistry professor should be allowed to speak on the subject of sexual morals. Illinois refused to consider the constitutional implications of this question. *Koch v. Board of Trustees*, 39 Ill. App. 2d 51, 187 N.E.2d 340 (1962), *cert. denied*, 375 U.S. 989 (1964).

⁴⁷ It should be mentioned that academic freedom was not always thought of as a legal right. See Murphy, *Academic Freedom: An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROB. 447, 453-57 (1963).

⁴⁸ See note 42 *supra* and accompanying text. Perhaps it is a penumbral right. Cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵⁰ See notes 5, 28, 31 *supra* and accompanying text.

⁵¹ See text accompanying notes 37-40 *supra*.