AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Democratic Rights/Free Speech/Advocacy

**Keyishian v. Board of Regent of University of State of New York, 385 U.S. 589** (1967)

*In 1949, the state of New York adopted a law (known as the “Feinberg Law”) aimed at the “elimination of subversive persons from the public school system.” The law directed the board of regents of state public schools and universities to adopt necessary rules to remove teachers or employees for the “utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts.” Faculty were also required to sign a document certifying that they were not now nor have ever been a member of the Communist Party. The law was a revision of an earlier statute that originated in 1917 that imposed similar requirements.*

*A group of faculty members at the State University of New York at Buffalo refused to sign the loyalty oath and filed suit in federal district court challenging the law as an infringement of their First Amendment rights. A three-judge panel upheld the law as valid, given an earlier challenge to the law resolved by the Supreme Court in* Adler v. Board of Education of the City of New York *(1952). On appeal, the U.S. Supreme Court reversed the lower court and overturned* Adler*. The Court held that teachers could not be denied employment for exercising their constitutional rights and that the New York regulations swept too broadly so as to encompass not only illegal incitement to unlawful activity but also mere advocacy of revolutionary activity. As the Court had found elsewhere, mere advocacy of violent revolution is constitutionally protected speech.*

JUSTICE BRENNAN delivered the opinion of the Court.

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Our experience under the Sedition Act of 1798 taught us that dangers fatal to First Amendment freedoms inhere in the word "seditious." And the word "treasonable," if left undefined, is no less dangerously uncertain. . . .

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, , , , The difficulty centers upon the meaning of "seditious." Subdivision 3 equates the term "seditious" with "criminal anarchy" as defined in the Penal Law. Is the reference only to Penal Law § 160, defining criminal anarchy as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means.” But that section ends with the sentence "The advocacy of such doctrine either by word of mouth or writing is a felony." Does that sentence draw into § 105, Penal Law § 161, proscribing "advocacy of criminal anarchy"? If so, the possible scope of "seditious" utterances or acts has virtually no limit. For, under Penal Law § 161, one commits the felony of advocating criminal anarchy if he ". . . publicly displays any book . . . containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or ay unlawful means.”

Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy? It is no answer to say that the statute would not be applied in such a case. We cannot gainsay the potential effect of this obscure wording on "those with a conscientious and scrupulous regard for such undertakings." Even were it certain that the definition referred to in 105 was solely Penal Law § 160, the scope of § 105 still remains indefinite. The teacher cannot know the extent, if any, to which a "seditious" utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between "seditious" and nonseditious utterances and acts.

Other provisions of § 105 also have the same defect of vagueness. Subdivision 1(a) of § 105 bars employment of any person who "by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government. This provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract, without any attempt to indoctrinate others or incite others to action in furtherance of unlawful aims. *Yates v. United States* (1957). And in prohibiting "advising" the "doctrine" of unlawful overthrow, does the statute prohibit mere "advising" of the existence of the doctrine, or advising another to support the doctrine? Since "advocacy" of the doctrine of forceful overthrow is separately prohibited, need the person "teaching" or "advising" this doctrine himself "advocate" it? Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?

Similar uncertainty arises as to the application of subdivision 1(b) of § 105. That subsection requires the disqualification of an employee involved with the distribution of written material "containing or advocating, advising or teaching the doctrine" of forceful overthrow, and who himself "advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein." Here again, mere advocacy of abstract doctrine is apparently included. And does the prohibition of distribution of matter "containing" the doctrine bar histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolutions? The additional requirement, that the person participating in distribution of the material be one who "advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine" of forceful overthrow, does not alleviate the uncertainty in the scope of the section, but exacerbates it. Like the language of § 105, subd. 1(a), this language may reasonably be construed to cover mere expression of belief. For example, does the university librarian who recommends the reading of such materials thereby "advocate . . . the . . . propriety of adopting the doctrine contained therein"?

. . . . The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient in terrorem mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in "those who believe the written law means what it says." *Baggett v. Bullitt* (1964). The result must be to stifle "that free play of the spirit which all teachers ought especially to cultivate and practice. . . ." . . .

There can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion. But "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker* (1960). The principle is not inapplicable because the legislation is aimed at keeping subversives out of the teaching ranks. In *DeJonge v. Oregon* (1937), the Court said:

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

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 that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." In *Sweezy v. New Hampshire* (1957), we said:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," "[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone. . . ." For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *NAACP v. Button* (1963). The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. *Stromberg v. California* (1931).

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We therefore hold that § 3021 of the Education Law and subdivisions 1(a), 1(b) and 3 of § 105 of the Civil Service Law, as implemented by the machinery created pursuant to § 3022 of the Education Law, are unconstitutional.

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. . . . Mere knowing membership, without a specific intent to further the unlawful aims of an organization, is not a constitutionally adequate basis for exclusion from such positions as those held by appellants. In *Elfbrandt v. Russell* (1966), we said, "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." We there struck down a statutorily required oath binding the state employee not to become a member of the Communist Party with knowledge of its unlawful purpose, on threat of discharge and perjury prosecution if the oath were violated. . . .

These limitations clearly apply to a provision, like § 105, subd. 1(c), which blankets all state employees, regardless of the "sensitivity" of their positions. But even the Feinberg Law provision, applicable primarily to activities of teachers, who have captive audiences of young minds, are subject to these limitations in favor of freedom of expression and association; the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest, and has been documented in recent studies. . . .

. . . . [These laws] seek to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights. Where statutes have an overbroad sweep, just as where they are vague, "the hazard of loss or substantial impairment of those precious rights may be critical," since those covered by the statute are bound to limit their behavior to that which is unquestionably safe. . . .

*Reversed*.