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Elfbrandt v. Russell: The Demise of the Loyalty Oath

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ELFBRANDT V. RUSSELL: THE DEMISE OF THE OATH?

In *Elfbrandt v. Russell*,[1] the Supreme Court, in a 5-to-4 decision, declared unconstitutional Arizona's requirement of a loyalty oath from state employees. At first glance, *Elfbrandt* appears to be just another decision voiding a state loyalty oath on limited grounds relating to the specific language of the particular oath.[2] Yet, several aspects of Mr. Justice Douglas' opinion for the majority suggest that *Elfbrandt* is really of far greater significance:[3] it may sharply

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[1] 384 U.S. 11 (1966).

[2] Immediate reaction generally placed the case in this category. The *New York Times*, for example, made the following comments in describing *Elfbrandt:* "The decision avoided sweeping terms that might also have invalidated loyalty oaths of other states. But it continued the high court's recent tendency to resolve all constitutional doubts against loyalty oath laws. . . .

"In the early nineteen-fifties the Supreme Court upheld loyalty oaths relating to Los Angeles city employees, teachers in New York State, and candidates for public office in Maryland. But in recent years without overruling the principle that public employees can be required to sign such oaths, it has struck down several, finding that they were improperly drafted." N.Y. Times, April 19, 1966, p. 1, col. 6; p. 1, col. 4. See also Chicago Tribune, April 19, 1966, p. 3, cols. 1–3; NEWSWEEK 21 (May 2, 1966).

[3] Even if the *Elfbrandt* ruling were limited to the particular language of the Arizona statute, it would still have a significant impact on the laws of several states since the Arizona provision is based on Maryland's widely copied "Ober Act." See MD. ANN. CODE, art. 85a, §§ 1, 10, 11 (1965 Supp.); FLA. REV. STAT., tit. 44, ch. 876, §§ 22, 24, 25 (1965 Supp.); MISS. CODE ANN., tit. 17, ch. 10, §§ 4064-01, 4064-02, 4064-03 (1964 Supp.); N.H. REV. STAT. ANN., ch. 588, §§ 1, 9 (1965 Supp.); OKLA. STAT.

limit the scope and coverage of loyalty oaths generally and, indeed, may presage a ruling invalidating all such oaths. Of course, only the Supreme Court can determine this. In the meantime, some evaluation by others seems appropriate, particularly in light of the numerous attacks against loyalty oaths currently being mounted in various state courts and legislatures.[4]

I. The Elfbrandt Opinions

A. THE BACKGROUND

In form, if not in substance, the Arizona loyalty oath considered in *Elfbrandt* was unusual. For its language contained none of the negative disclaimers of affiliation or advocacy that mark the test oath.[5] The employee merely swore to "support and defend the constitution of the United States against all enemies, foreign and domestic"; that he would "bear true faith and allegiance to the same"; and that he would "well and faithfully discharge the duties of [his] office."[6] An oath in this form had been required of Arizona's public employees since 1901.[7] In 1961, however, the legislature, in adopting Arizona's version of the Communist Control Act,[8] put a gloss on the 1901 oath that, in effect, turned it into a more typical loyalty oath. Section 5 of the Arizona Communist Control Act made it a crime "subject to all the penalties for perjury" for any employee, having taken the positive oath of allegiance, thereafter "knowingly and willfully" (1) to "commit or aid in the commission of any act to overthrow [the state government] by force or violence," (2) to advocate the overthrow of the state government by such means, or (3) to "become or remain a member of the Communist party, its subordinate organizations, or any

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Ann., tit. 21, ch. 52, §§ 1266.4, 1266.6 (1965 Supp.); Pa. Stat. Ann., tit. 65, ch. 11, §§ 212, 213, 214 (1965 Supp.); see also Ind. Stat. Ann., tit. 10, ch. 52, §§ 10-5203, 10-5207 (1965 Supp.).

[4] See ACLU, Feature Press Service Bulletin, § 2266, May 16, 1966.

[5] See Brown, Loyalty and Security 92–95 (1958); Koenigsberg & Stavis, *Test Oaths: Henry VIII to the American Bar Association*, 11 Law. Guild Rev. 111 (1951). See generally Hyman, To Try Men's Souls (1960).

[6] Ariz. Stat. § 38-231 (1965 Supp.).

[7] Ariz. Rev. Stat. § 222 (1901). The oath was originally adopted while Arizona was still a territory, and consequently was amended in several respects when Arizona was admitted to statehood.

[8] Ariz. Laws 1961, c. 108, § 1-9.

other organization having for one of its purposes the overthrow by force or violence of the [state] government" where the employee "had knowledge of said unlawful purpose of said organization or organizations."[9] To supplement § 5, the Arizona act also required all government employees to resubscribe to the oath of allegiance as interpreted in the light of the new section.[10]

Petitioner Elfbrandt, a teacher in the Tucson public schools, refused to take the oath and brought suit in the Arizona state courts to have the state oath requirement declared unconstitutional.[11] That litigation lasted five years and was twice taken to the United States Supreme Court before the Arizona statute was finally held unconstitutional.[12]

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[9] That section amended § 38-231 to read as follows: "E. Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment."

All references to § 5 in the text of this article refer to this provision, now ARIZ. REV. STAT. § 38-231E (1965 Supp.).

[10] ARIZ. REV. STAT. § 8-231(c) (1965 Supp.).

[11] Although the Arizona act requires all employees to take the oath, the only sanction provided for failure to do so is denial of compensation. Consequently, the petitioner retained her job and simply continued to teach without pay. This aspect of the case attracted at least as much attention from the press as did the Court's opinion. See, *e.g.*, NEWSWEEK, *supra* note 2. The back pay accumulated by petitioner and her husband, a fellow teacher who also refused to take the oath, amounted to over $60,000, but apparently the school boards involved were not entirely sure of the Elfbrandts' right to the money even after the Supreme Court decision. Ann Arbor News, June 23, 1966, p. 7, cols. 2–5.

[12] The Arizona Supreme Court later found in an opinion as yet unreported that the petitioner still was required to take the oath, although the special gloss of

On the first appeal to the Supreme Court, an Arizona Supreme Court decision upholding the oath was vacated,[13] and the case was remanded for reconsideration in the light of *Baggett v. Bullitt*.[14] In *Baggett* the Supreme Court had found unconstitutionally vague a Washington oath that contained language very much like that found in the first clause of § 5.[15] On remand, however, a majority of the Arizona court found that *Baggett* was inapplicable since the reference in § 5 to activity aiding an act designed to overthrow the government had a much narrower and more traditional scope than did a similar reference in the Washington oath.[16] One member of the Arizona court, Justice Bernstein, dissented on the ground that *Baggett* was controlling.[17] The dissent was not based on the first clause of § 5, however, but was tied entirely to the third clause of that section, which prohibits an employee from knowingly becoming a member of any organization "having for one of its purposes the overthrow by force or violence of the government."[18] Justice Bernstein found that this clause failed adequately to identify the nature of the organization in which membership was barred, and, therefore, that it was unconstitutionally vague. As an illustration, he pointed to the university scientist, who, he said, "could not know whether membership is prohibited in an international scientific organization which includes members from neutralist nations and Communist bloc nations—the latter admittedly dedicated to the overthrow of our government and which control the organization. . . . Though all might agree that the principal purpose of such organization is scientific, the statute makes [the scientist's] membership a crime if any subordinate purpose is the overthrow

§ 38-231E was no longer applicable. See Ann Arbor News, June 23, 1966, p. 7, cols. 2–5.

[13] 378 U.S. 127 (1964), *vacating* 94 Ariz. 1 (1963).

[14] 377 U.S. 360 (1964).

[15] Washington required public employees to swear that they were not subversive persons as defined by statute: " 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington or any political subdivision of either of them by revolution, force, or violence. . . ." Wash. Laws 1955, c. 377.

[16] 97 Ariz. 140 (1965). [17] *Id.* at 147. [18] See note 9 *supra*.

of the state government." "The vice of vagueness here," he concluded, "is that the scientist cannot know whether membership in the organization would result in a prosecution for violation of [§ 5] or in honors from his university for the encyclopedic knowledge acquired . . . in part through his membership."[19]

B. THE MAJORITY OPINION

On review of the Arizona decision, Mr. Justice Douglas, speaking for himself, the Chief Justice, and Justices Black, Brennan, and Fortas, agreed with Justice Bernstein that the invalidity of the third or so-called membership clause of § 5 rendered Arizona's oath requirement unconstitutional. In reaching this conclusion, however, the majority opinion, though quoting extensively from Justice Bernstein's dissent, did not rely upon the "void for vagueness" rationale that he had used.[20] Rather, Mr. Justice Douglas' opinion was based squarely on the ground that the membership clause of § 5 violated a basic principle restricting the scope of statutes affecting First Amendment rights. Quoting from *Cantwell v. Connecticut* and *Shelton v. Tucker*, Mr. Justice Douglas described that principle as follows:[21]

> "[A] statute touching . . . protected rights must be narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state." . . . Legitimate legislative goals "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Mr. Justice Douglas found that the Arizona statute failed to meet this standard because it applied to employees who might knowingly join organizations favoring violent overthrow of the government but who themselves might not subscribe to that goal. In including such persons, § 5 necessarily relied, said Mr. Justice Douglas, on an improper theory of "guilt by association" and the section therefore had "infringe[d] unnecessarily" on protected First Amendment rights.[22]

The crux of the reasoning that led Mr. Justice Douglas to this

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[10] 97 Ariz. at 147–48.

[20] 384 U.S. at 14–15.

[21] *Id.* at 18, quoting from Cantwell v. Connecticut, 310 U.S. 296, 311 (1940), and Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[22] 384 U.S. at 19.

conclusion is found in several paragraphs toward the end of his opinion.[23] First, he noted that in *Scales v. United States*,[24] the Court had recognized that " 'a blanket prohibition of association with a group having both legal and illegal aims' would pose 'a real danger that legitimate political expression or association would be impaired.' "[25] Accordingly, the Court in *Scales* had carefully limited the application of the membership clause of the Smith Act to those members of organizations advocating overthrow who were both "active" in their membership and had the "specific intent of assisting in achieving the unlawful ends of the organization."[26] The constitutional significance of the "specific intent" requirement imposed by *Scales* had been clearly established in *Aptheker v. Secretary of State*[27] when the Court voided a statute prohibiting the issuance of passports to members of "Communist organizations" precisely because that statute "covered membership which was not accompanied by a specific intent to further the unlawful aims of the organization."[28] The Arizona "oath and accompanying statutory gloss suffer from an identical constitutional infirmity" as the statute in *Aptheker*[29] Under § 5 a state employee who knowingly joins an organization "which has as 'one of its purposes' the violent overthrow of the government is subject to immediate discharge and criminal penalties" even though he "does not subscribe to the organization's unlawful ends."[30] As a result, here, as in *Baggett v. Bullitt*, persons risk prosecution by engaging in "knowing but guiltless" activity. Illustrative might be the teacher who attends the Pugwash Conference or "joins a seminar group predominantly Communist and therefore subject to control by those who are said to believe in the overthrow of the government."[31] Surely, Mr. Justice Douglas continued:[32] "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities pose no threat, either as citizens or public employees." A law which encompasses such persons "impose[s], in effect, a conclusive presumption that the member shares the unlawful aims of the organizations," and for that reason alone is clearly unconstitutional.[33] Summarizing the Court's position at the conclusion of the opinion, Mr. Justice Douglas wrote:[34]

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23 *Id.* at 15–18.
24 367 U.S. 203 (1961).
25 384 U.S. at 15.
26 *Ibid.*
27 378 U.S. 500 (1964).
28 384 U.S. at 16.
29 *Ibid.*
30 *Ibid.*
31 *Id.* at 17.
32 *Ibid.*
33 *Ibid.*
34 *Id.* at 19.

> A law which applies to membership without "the specific intent" to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of "guilt by association" which has no place here. . . . Such a law cannot stand.

C. THE DISSENTING OPINION

Mr. Justice White's dissenting opinion, joined by Justices Clark, Harlan, and Stewart, noted at the outset that "[a]ccording to unequivocal prior holdings of this Court, a state is entitled to condition public employment upon its employees abstaining from knowing membership in . . . organizations advocating the violent overthrow of the government which employs them," and "the state is [also] constitutionally authorized to inquire into such affiliations and . . . discharge those who refuse to affirm or deny them."[35] The dissent cited eight previous decisions in support of this proposition, and noted that Mr. Justice Douglas' opinion "does not mention or purport to overrule these cases."[36] Neither does the majority opinion, as Mr. Justice White read it, "expressly hold" that a state "must retain" as employees those who knowingly hold membership in organizations aiming at violent overthrow. "It would seem, therefore," he concluded, "that the Court's judgment is only aimed at the criminal provisions of the Arizona law which exposes an employee to a perjury prosecution if he swears falsely about membership when he signs the oath or if he later becomes a knowing member while remaining in public employment."[37]

Mr. Justice White then argued that the distinction the Court appears to have drawn between criminal and civil sanctions is invalid. The right to punish for intentional falsification is clear from prior cases. As for the punishment of employees who later join an organization of the proscribed type:[38] "If a State may disqualify for knowing membership . . . , it is likewise within its

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[35] *Ibid.*

[36] *Id.* at 20. Six cases were cited directly: Gerende v. Board of Supervisors, 341 U.S. 56 (1951); Garner v. Board of Public Works, 341 U.S. 716 (1951); Adler v. Board of Education, 342 U.S. 485 (1952); Beilan v. Board of Education, 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 468 (1958); Nelson v. County of Los Angeles, 362 U.S. 1 (1960). The dissent cited as "see also" two other cases: Wieman v. Updegraff, 344 U.S. 183 (1952); Slochower v. Board of Education, 350 U.S. 551 (1956).

[37] 384 U.S. at 20.

[38] *Id.* at 21.

powers to move criminally against the employee who knowingly engages in disqualifying acts during his employment." "The crime provided by the Arizona law," Mr. Justice White emphasized, "is not just the act of becoming a member of an organization but it is that membership plus concurrent public employment."[39]

The dissent also argued that "there is nothing in *Scales* . . . or *Aptheker* . . . dictating the result reached by the Court."[40] *Scales* involved the general criminal provisions of the Smith Act and therefore was not in point. Neither was *Aptheker*, since the statutory provision involved there applied to members who actually lacked knowledge of the organization's illicit purpose. In fact, *Speiser v. Randall*,[41] another case cited by the majority, had "carefully preserved" *Gerende v. Board of Supervisors*[42] and *Garner v. Board of Public Works*,[43] two cases upholding test oaths for employees that were based on the same principles as the Arizona oath. Finally, Mr. Justice White suggested that even if one were to accept the majority's position and were to hold that Arizona may not take criminal action against employees who are knowing members of organizations aiming at violent overthrow of the government, the appropriate remedy would not be to invalidate the Arizona oath requirement as the majority had done, but to remand the case to the state court to determine the severability of the criminal provisions of the Arizona statute.

D. THE IMPLICATIONS OF SILENCE

When viewed in light of the dissent, two aspects of Mr. Justice Douglas' opinion immediately stand out. Both deal, not unsurprisingly, more with what the opinion left unsaid than with what it said. The first is the complete absence of any reply to the dissent, either with respect to its narrow characterization of the majority ruling or with respect to the cases Mr. Justice White cited as clearly controlling if the majority had sought to rely on a broader ground. The second is the absence in both opinions, but particularly in the majority opinion, of any meaningful discussion of the nature of the state's interests in the loyalty oath requirement. These omissions are significant for more than the light they may shed

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[39] *Ibid.*

[40] *Id.* at 22.

[41] 357 U.S. 513 (1958).

[42] 341 U.S. 56 (1951).

[43] *Id.* at 716.

on the professional quality of the Court's opinion. The inferences to be drawn from the opinion's silence on these matters probably will determine what impact *Elfbrandt* will have upon the permissible scope and coverage of loyalty oaths.

II. The Significance of the Criminal Sanction

Dissenting opinions are hardly the best source for determining the breadth of a majority ruling. This is particularly true when a case is decided by a close vote as *Elfbrandt* was, and when the dissent is concerned with the next case and the possibility of accomplishing a shift in the Court's position not inconsistent with the immediate decision. Nevertheless, Mr. Justice White's characterization of the Court's ruling as grounded solely on Arizona's use of criminal sanctions finds just enough support in the majority opinion that it cannot be dismissed out of hand as simply a dissenter's tactic.

First, there is the fact that the majority made no effort to reply to Mr. Justice White's statement of its ruling. Admittedly Mr. Justice Douglas' opinion does not place primary emphasis on the criminal sanctions imposed by § 5, although it does make frequent mention of these sanctions.[44] It is also true, as will be seen later, that the cases cited by Mr. Justice White as otherwise controlling are distinguishable on grounds other than Arizona's reliance on criminal sanctions in § 5.[45] Still, since it would have taken so little flatly to reject Mr. Justice White's interpretation, it is difficult to understand why this was not done. Perhaps Mr. Justice Douglas, who had dissented in several of the cases cited by Mr. Justice White, felt that any attempt to distinguish those cases would give them undue recognition.[46] Perhaps the majority's failure to reply to the dissent reflects no more than the often criticized tendency of members of the present Court to engage "in separate monologues rather than a dialogue."[47] Yet the absence of any reply to an obvious attempt to limit a majority opinion is unusual, and a

[44] See 384 U.S. at 16–17.

[45] See text *infra*, at section III.

[46] Mr. Justice Douglas dissented in five of the eight cases cited by Mr. Justice White: *Garner*, *Adler*, *Beilan*, *Lerner*, and *Nelson*. See note 36 *supra*.

[47] Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 Geo. Wash. L. Rev. 587, 591 (1963).

possible inference therefrom is that at least one member of the majority accepted Mr. Justice White's interpretation of its ruling.

Another element that may be cited in support of Mr. Justice White's interpretation is the fact that the two cases on which Mr. Justice Douglas relied most heavily, *Scales* and *Aptheker*, both involved criminal statutes.[48] Moreover, insofar as *Scales* was concerned, it was commonly recognized that the Court there had employed a standard of review far different from that used in previous loyalty oath cases, such as *Garner* and *Gerende*.[49]

Nevertheless, Mr. Justice White's interpretation of the majority's ruling is most difficult to accept because such a decision would be unsupportable in either precedent or logic. Admittedly, the Court has generally distinguished statutes imposing criminal sanctions on speech or association, such as the Smith Act, from statutes imposing more "limited" sanctions, such as disqualification from employment under a state loyalty program. No matter whether the standard has been described in terms of balancing, overbroadness, or defining protected speech, the Court has always given considerably more leeway to a legislature's non-criminal sanctions.[50] Thus, in the Hatch Act case, *United Public Workers v.*

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[48] *Scales* involved a criminal prosecution under the Smith Act. 18 U.S.C. § 2385. *Aptheker* involved a suit for a declaratory judgment in which the Court was asked to declare unconstitutional a criminal provision of the Subversive Activities Control Act, 50 U.S.C. § 785 (1964).

[49] Although the Court had not actually discussed *Scales* as it related to the loyalty oath cases, the First Amendment issues in *Scales* were resolved largely on the basis of Dennis v. United States, 341 U.S. 494 (1951). *Dennis* involved a considerably more restrictive standard of review than the loyalty oath cases. See, *e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 49–51 (1961); Speiser v. Randall, 357 U.S. 513, 527–28 (1958).

[50] In Konigsberg v. State Bar, 366 U.S. 36 (1961), Mr. Justice Harlan described this distinction—actually based on the function of the restriction on speech—in terms of the difference between those cases in which the Court determines whether "the speech . . . [is] outside the scope of constitutional protection" and those in which the Court applies what is commonly referred to as the "balancing" test. *Id.* at 49–51. Unfortunately, the wide-ranging debate over use of "balancing" in First Amendment cases has tended to obscure the distinction drawn by Mr. Justice Harlan. Certainly, all decisions in this area, whether phrased in terms of balancing or defining the scope of "protected" speech necessarily involve an evaluation of competing interests. See Nutting, *Is the First Amendment Obsolete?* 30 GEO. WASH. L. REV. 167 (1961); Karst, *Legislative Fact in Constitutional Litigation*, [1960] SUPREME COURT REVIEW 75, 95. It is also true that the Court may sometimes speak in terms of balancing even in dealing with restrictions upon borderline classes of speech. See,

Mitchell,[51] the Court sustained the power of the federal government to discharge employees who engaged in certain political activities, although a criminal statute inhibiting such action by the general public clearly would be unconstitutional.[52] The distinction drawn in *Mitchell* and similar cases has not, however, rested on the nature of the sanction employed by the legislature, but on the purpose of the legislation.[53] Criminal sanctions gener-

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e.g., Dennis v. United States, 341 U.S. 494, 510 (1951), dealing with speech advocating illegal activity. But the type of balancing referred to by Mr. Justice Harlan in *Konigsberg* rests upon an entirely different approach, if not a different process, than that balancing involved without recognition in the obscenity cases and with recognition in *Dennis*. See generally Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* [1964] SUPREME COURT REVIEW 191, 213–17. But see Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424, 1429–32 (1962).

Unlike *Dennis* and other cases involving direct restraints, the Court in *Elfbrandt* does not proceed from the premise that there is a central core area of clearly protected speech and the relation of the legislatively proscribed speech to that core will, in large measure, determine the constitutionality of the proscription. See Kalven, *supra*, at 204–11. See also Dennis v. United States, 183 F.2d 201, 207 (2d Cir. 1950). Since the legislative restriction on speech in Mr. Justice Harlan's second category of cases is an incidental aspect of a general regulation, the nature of the speech involved obviously becomes less significant, and the basic assumption is that "compelling" state interest will justify an incidental restriction imposed even on speech within the central core area. See generally Bates v. Little Rock, 361 U.S. 516, 524 (1960). Accordingly, the Court's approach to "weighing" competing interests in this class of cases is much more akin to the normal standard of substantive due process than is the evaluation of the nature of the speech and the legislative interest in cases of direct restraints on speech, such as *Dennis*, or New York Times v. Sullivan, 376 U.S. 254 (1964).

[51] 330 U.S. 75 (1947).

[52] *Id.* at 101–04. The political activity involved in the case before the Court was participation "as [an] executive committeeman and a worker at the polls." *Id.* at 103.

[53] Although the Court in *Mitchell* did not attempt to distinguish cases involving restrictions aimed directly at the content of speech, it did emphasize that the congressional purpose in the Hatch Act was to preserve the efficiency of the federal service and not to restrict political activities. See 330 U.S. at 101–04. The distinction between cases like *Mitchell* and those involving direct restraints on speech was clearly stated in later cases. In Konigsberg v. State Bar, 366 U.S. 36, 49–51 (1961), the Court described that distinction as follows: "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand certain forms of speech, or speech in certain contexts, have been considered outside the scope of constitutional protection. See, *e.g.*, *Schenck* v. *United States*, 249 U.S. 47; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568; *Dennis* v. *United States*, 341 U.S. 494; *Beauharnais* v. *Illinois*, 343 U.S. 250; *Yates* v. *United States*, 354 U.S. 298; *Roth* v. *United States*, 354 U.S. 476. On the other hand, general regulatory

ally have been used in legislation aimed directly at suppressing a particular class of speech, either because of disagreement with its content or concern for its impact upon an audience.[54] The more limited sanctions, such as disqualification from public office or the denial of permission to use public streets for political rallies, are usually found in legislation aimed at the prevention of certain conduct other than that produced by the speech.[55] The regulation of speech in these circumstances imposes what the Court describes as an "indirect" restriction on speech, an "incidental" by-product of the prohibition of undesirable conduct.[56] Thus, the purpose of the Hatch Act was not to suppress political activities, but to prevent a situation conducive to the administrative evils of a spoils system.[57] Similarly, prohibitions against the employment of persons who advocate the overthrow of the government have traditionally been looked upon as an "indirect" restriction on speech because the legislation is aimed not at the content of the speech,

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statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the state to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. See *e.g.*, *Schneider* v. *State*, 308 U.S. 147, 161; *Cox* v. *New Hampshire*, 312 U.S. 569; *Prince* v. *Massachusetts*, 321 U.S. 158; *Kovacs* v. *Cooper*, 336 U.S. 77; *American Communications Ass'n* v. *Douds*, 339 U.S. 382; *Breard* v. *Alexandria*, 341 U.S. 622." See also American Communications Ass'n v. Douds, 339 U.S. 382, 396, 399 (1950). But *cf.* United States v. Brown, 381 U.S. 437, 456–60 (1965).

[54] See, *e.g.*, the first group of cases cited by Mr. Justice Harlan in the excerpt from *Konigsberg* quoted in note 53 *supra*.

[55] See, *e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382, 396 (1950): "But the question with which we are here faced is not the same one that Justices Holmes and Brandeis found convenient to consider in terms of clear and present danger. Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all. Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs." See also Speiser v. Randall, quoted *infra* note 58.

[56] See Konigsberg v. State Bar, 366 U.S. 36, 49–51 (1961); Speiser v. Randall, 357 U.S. 513, 527 (1958); American Communications Ass'n v. Douds, 339 U.S. 382, 396, 399 (1950).

[57] 330 U.S. at 102–03.

but at the potential performance of the speaker in public office. The reference to the speech of a particular content is viewed, in effect, merely as a means of identifying a person who is more likely to engage in undesirable conduct as an employee.[58]

While not all the members of the Court have agreed that statutes restricting government employment on the basis of speech or association should be characterized as indirect restraints on speech, generally they all do recognize that the key to such characterization must be the purpose of the legislation, not the nature of the sanction used to implement that purpose.[59] The Court has

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[58] See note *56 supra*. See also Speiser v. Randall, 357 U.S. 513, 527 (1958): "The appellees, in controverting this position, rely on cases in which this Court has sustained the validity of loyalty oaths required of public employees, *Garner* v. *Board of Public Works*, 341 U.S. 716; candidates for public office, *Gerende* v. *Board of Supervisors*, 341 U.S. 56, and officers of labor unions, *American Communications Assn.* v. *Douds*, *supra*. In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. The purpose of the legislation sustained in the *Douds* case, the Court found, was to minimize the danger of political strikes disruptive of interstate commerce by discouraging labor unions from electing Communist Party members to union office. While the Court recognized that the necessary effect of the legislation was to discourage the exercise of rights protected by the First Amendment, this consequence was said to be only indirect. The congressional purpose was to achieve an objective other than restraint on speech. Only the method of achieving this end touched on protected rights and that only tangentially. The evil at which Congress had attempted to strike in that case was thought sufficiently grave to justify limited infringement of political rights. Similar considerations governed the other cases. Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public."

But *cf.* United States v. Brown, 381 U.S. 437, 456–60 (1965). *Brown* possibly could be extended further to undermine this line of analysis. The Court there suggested that the legislative purpose to prohibit misuses of office could constitute "punishment" for the purposes of the bill of attainder prohibition. Whether the Court would then use the clause to invalidate a restriction stated in terms of a class larger than the membership of a particular organization remains to be seen. Certainly the opinion in *Brown* and certain aspects of *Elfbrandt* indicate it would not. 381 U.S. at 461–62; see text *infra*, at note 111–14.

[59] Of the present Justices who were then sitting, only Justices Black and Douglas did not join in the characterization of the loyalty oath cases as indirect restraints in *Konigsberg* or *Speiser*, *supra* note 56. Both Justices have rejected the application of the "balancing" test in these cases, but this stems from their belief that loyalty oaths are not really aimed at preventing misuse of conduct, but are "direct" restrictions designed primarily to punish speech. See Konigsberg v. State Bar, 366

recognized that indirect restraints *e.g.*, a limitation on the use of sound amplifiers, may be enforced by criminal sanctions.[60] The Court has also recognized that direct restraints need not always take the form of criminal prohibitions, as is illustrated by the restriction on the receipt of mail recently invalidated in *Lamont v. Postmaster*,[61] and the denial of a veterans' tax exemption voided in *Speiser v. Randall*.[62] To be sure, the purpose of the legislation has not always been clearly identified as the important factor in distinguishing between direct and indirect restraints.[63] As a result, there has been occasional confusion in the lower courts,[64] as indeed was exhibited by the Arizona Supreme Court in its first consideration of the *Elfbrandt* case.[65] But the Supreme Court itself has consistently recognized the basis of the distinction, although there has often been disagreement over its application.[66] Accordingly, whatever limitation *Elfbrandt* imposes upon the use of political association as a basis for restricting employment should, according to precedent, be applicable irrespective of whether the state implements its policy by discharging the employee or by imposing penal sanctions. Moreover, precedents aside, a different result would make little sense in terms of any theory of First Amendment

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U.S. 36, 56, 68–70 (1960); Barenblatt v. United States, 360 U.S. 109, 134, 141–53 (1959); Beilan v. Board of Education, 357 U.S. 399, 412, 414–15 (1958); Wieman v. Updegraff, 344 U.S. 183, 192 (1952). It is not entirely clear whether their view is based primarily on the history of loyalty oaths or on a general suspicion of any standard that operates with reference to the content of speech. Compare *Wieman* and *Barenblatt, supra,* with *Konigsberg*. In any event, it is clear that both Justices recognize the special nature of incidental restrictions on speech where it is clear that the restriction is not "aimed at speech" and does not "depend for its application upon the content of speech." Konigsberg v. State Bar, *supra,* at 70. See also Barenblatt v. United States, *supra;* Viereck v. United States, 318 U.S. 237, 249, 250–51 (1942).

[60] See Kovacs v. Cooper, 336 U.S. 77 (1949). See also Cox v. New Hampshire, 312 U.S. 569 (1941); Prince v. Massachusetts, 321 U.S. 158 (1944).

[61] 381 U.S. 301 (1965), especially at 307–08 (Brennan, J.).

[62] 357 U.S. 513 (1958).

[63] See, *e.g.*, Adler v. Board of Education, 342 U.S. 485, 492 (1952); Brotherhood of Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 7–8 (1964).

[64] See, *e.g.*, Brown v. United States, 334 F.2d 488, 492–96 (9th Cir. 1964), *affirmed on other grounds,* 381 U.S. 437 (1965); Weaver v. Jordan, 49 Cal. Rptr. 537, 543 (1966); In re Schlessinger, 404 Pa. 584 (1961).

[65] 94 Ariz. at 9–10.

[66] See Kalven, *supra* note 50, at 216.

protection, especially in view of the fact that, as the Court itself often has recognized, non-criminal sanctions may often pose more of a danger to the preservation of protected rights than criminal sanctions.[67]

In the light of this background, Mr. Justice White's interpretation of the majority ruling may be nothing more than an artfully employed "straw man." The failure of the majority opinion to reply to the dissent on this point probably can be attributed to Mr. Justice Douglas' views on the art of opinion writing.[68] The citation of *Scales* without mention of the difference in the nature of the statute there involved can probably be similarly explained. Mr. Justice Douglas has never been willing to accept the premise that loyalty oath cases should be treated as indirect restrictions on speech,[69] and, in large degree, he has been unwilling even to acknowledge that previous decisions have drawn a distinction between statutes like the Smith Act and employment disqualification provisions.[70] Also, since *Aptheker*, a case involving an indirect restraint under the traditional view, had already drawn upon reasoning similar to that employed in *Scales*, the distinction between the Smith Act and the Arizona legislation may well have been viewed as without importance for the purpose of applying *Scales* to this case.[71]

III. The Scope of Elfbrandt: Sub Silentio Overruling

The rejection of Mr. Justice White's interpretation of the Court's ruling does not eliminate all the problems presented by the majority's failure to respond to the argument of the dissent. There remains in particular the several cases cited by Mr. Justice White as generally controlling if the majority opinion were not

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[67] See *e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 277–78 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964); see also *In re* Sawyer, 360 U.S. 622 (1959).

[68] See generally Rogat, *Mr. Justice Pangloss*, N.Y. Rev. of Books, Oct. 22, 1964, pp. 5–7; see also Kurland, *Foreword, "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 Harv. L. Rev. 143, 167–68 (1964).

[69] See note 60 *supra*.

[70] See, *e.g.*, Killian v. United States, 368 U.S. 231, 261 (1961) (dissenting opinion) (relying on *Scales* aud *Yates* in a loyalty test case).

[71] Aptheker v. Secretary of State, 378 U.S. 500, 511–12 (1964); *cf.* United States v. Brown, 381 U.S. 437, 456 (1965).

narrowly based on Arizona's use of criminal sanctions to implement its loyalty oath.

Six of the eight cases cited by the dissent can be distinguished without serious difficulty. Four, *Lerner v. Casey*,[72] *Beilan v. Board of Education*,[73] *Nelson v. County of Los Angeles*,[74] and *Slochower v. Board of Education*,[75] deal solely with the right of federal or state officials to require an employee to reveal any past or present membership in organizations advocating violent overthrow of the government.[76] The determination that state and federal authorities had this power in no way established that such membership alone is an adequate basis for denying employment. The Court's rulings ouly indicated that the subject of the state's inquiry could be relevant to some valid standard for disqualification.[77] Since a question is relevant if it relates to any aspect of the state's standard, inquiry about membership in an organization advocating overthrow clearly would be relevant even under a standard that, consistent with *Elfbrandt*, was limited to exclusion only of those members who had a specific intent to further the illegal aims of the organization.

Both *Wieman v. Updegraff*[78] and *Adler v. Board of Education*[79] deal directly with use of speech and association as a basis for denying government employment, but they too can be distinguished. In *Wieman*, the Court voided an Oklahoma loyalty oath on the ground that it indiscriminately barred from employment all members of organizations advocating violent overthrow regardless of whether the members were aware of the organization's illegal

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[72] 357 U.S. 468 (1958).

[73] 357 U.S. 399 (1958).

[74] 362 U.S. 1 (1960).

[75] 350 U.S. 551 (1956).

[76] In *Slochower* the Court found that the state acted arbitrarily in discharging the petitioner solely because he relied upon the Fifth Amendment privilege against self-incrimination to refuse to answer an inquiry concerning past membership in the Communist party. *Beilan*, *Lerner*, and *Nelson* all upheld discharges under somewhat similar circumstances when the state based the discharge upon the employee's general lack of co-operativeness in failing to answer the inquiries, rather than upon his use of the privilege. See, *e.g.*, Nelson v. County of Los Angeles, 362 U.S. 1, 6–8 (1960).

[77] See, *e.g.*, Lerner v. Casey, 357 U.S. 468, 474, 477 (1958), where the Court specifically noted that it need not determine whether the particular standard employed by the state in that case was valid. See also Beilan v. Board of Education, 357 U.S. 399, 405 (1958); Nelson v. County of Los Angeles, 362 U.S. 1, 8 (1960).

[78] 344 U.S. 183 (1952).

[79] 342 U.S. 485 (1952).

purpose. While the opinion did not mention that the oath also failed to except the member who knew of, but did not share, that purpose, little significance can be attached to that omission, since the Court had no reason to consider the need for a "specific intent" requirement once the statute was found unconstitutional on other grounds.[80] In *Adler*, the Court sustained the New York loyalty program for teachers under the Feinberg Law. The Court's opinion dealt primarily with a provision making knowing membership in an organization advocating violent overthrow "prima facie evidence" of disqualification for employment.[81] Although the Feinberg Law was supposedly designed to implement a statute that denied employment to all knowing members of such organizations,[82] the Court's opinion indicates that it assumed, probably on the basis of a lower court opinion,[83] that an employee could successfully rebut the prima facie case by showing that he did not share the illegal aims of the organization.[84]

Gerende v. Board of Supervisors[85] and *Garner v. Board of*

[80] The arguments advanced by the Court in rejecting the Oklahoma oath related solely to the member who was unaware of the organization's illegal objectives and were not readily applicable to the knowing member who did not subscribe to the organization's illegal goals. See 344 U.S. at 190–91.

[81] N.Y. EDUC. LAW § 3022.

[82] The Feinberg Law does require the removal of all "subversive persons from the public school system," but it does not define "subversive persons." The Act defines subversive organizations, however, as those that advocate, advise, embrace, or teach the doctrine of violent overthrow. The N.Y. CIVIL SERVICE LAW § 12(a), the Act that the Feinberg Law was designed to implement, see 342 U.S. at 487–89, provides for the disqualification from public employment of any person who "becomes a member of any . . . group . . . which teaches or advocates that the government of the United States or of any state . . . shall be overthrown by force or violence. . . ." Accordingly the significance of the provision making membership in such organizations constitute only prima facie evidence of disqualification is not entirely clear from the face of the statute.

[83] See L'Hommedieu v. Board of Regents, 97 N.Y.S.2d 443, 452–53 (App. Div. 3d Dept. 1950), *aff'd*, 301 N.Y. 476 (1950). *L'Hommedieu* was a companion case to *Adler*.

[84] See 342 U.S. at 495–96, emphasizing the individual's opportunity to rebut the prima facie presumption arising from knowing membership. See also *id.* at 492, noting that only "unexplained" knowing membership in an organization advocating overthrow constituted a basis for removal under the New York statute.

The decision in Nostrand v. Little, 368 U.S. 436 (1962), apparently was based on the same assumption as *Adler*. See 362 U.S. 474 (1960); 58 Wash.2d 111 (1961).

[85] 341 U.S. 56 (1951).

Public Works[86] also deal directly with the state's power to deny employment to individuals solely on the basis of their associations, but these cases are difficult to distinguish from *Elfbrandt.* In *Gerende,* a unanimous Court, including Justices Black and Douglas, upheld a Maryland requirement that every candidate for political office "make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt."[87] Although the Maryland oath made no exception for knowing members who lacked the specific intent to support the organization's illegal goals,[88] the Court sustained the state oath requirement in a one-paragraph per curiam opinion that made no mention of the specific intent question. *Gerende* can nevertheless be distinguished from *Elfbrandt* on two grounds. First—and this ground will be discussed more fully—the oath in *Gerende* was limited to officials with policy-making functions.[89] Second, the Maryland oath might be interpreted as applying only to membership in organizations engaged in a present attempt to overthrow the government. Knowing membership in such a group could be distinguished from membership in a group that had merely advocated violent overthrow sometime in the future, on the ground that the immediate danger presented by the first type of organization so clearly established the individual's support for the organization's illegal objective that inquiry into his "specific intent" was unnecessary. Such a narrow interpretation of the Maryland oath, however, is subject to question. The oath applies to attempts "in one way or another" to overthrow the government, and this might well require no more than advocacy itself, especially when it is remembered that

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[86] 341 U.S. 716 (1951).

[87] *Id.* at 56–57. (Emphasis in original.)

[88] Moreover, there was nothing in the opinion of the Maryland Court of Appeals to suggest that a requirement of "specific intent" had been read into the state statute. See Shub v. Simpson, 196 Md. 177 (1950).

[89] See *infra,* at section VI. Although it is possible that not all elected officials would possess the type of discretionary authority that might be manipulated to serve an organization seeking violent overthrow, certainly the group as a whole can be classified as having such authority. Perhaps, a separate ground of distinction might be found in the very fact that these officials are elected. See DOUGLAS, THE RIGHT OF THE PEOPLE 130 (1958). But there is nothing in the subsequent treatment of *Gerende* that indicates the Court considered this an important factor.

the concept of advocacy used in this area is that of urging future action in language "reasonably and ordinarily calculated to incite persons to such action."[90] If this broad interpretation of the Maryland oath is accepted, then *Gerende* presents, aside from the first ground of distinction, the same difficulty in reconciliation with *Elfbrandt* as *Garner*.

In *Garner*, the Court upheld a statute denying employment to any person who within five years had been a knowing member of any organization that "advised, advocated, or taught the overthrow by force or violence" of the state or federal government.[91] Although no mention of the point was made in either the majority or dissenting opinions (including those of Justices Black and Douglas),[92] the statute in *Garner* clearly would exclude from employment knowing members who lacked the specific intent to further the organization's uulawful aims.[93] *Garner* therefore seems, at least on the surface, to be in direct conflict with *Elfbrandt*. Yet, cases are not ordinarily overruled sub silentio,[94] and Mr. Justice

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[90] See Yates v. United States, 354 U.S. 298, 316 (1957); Dennis v. United States, 341 U.S. 494, 511–12 (1951). The same standard is ordinarily applied to loyalty oaths. See, *e.g.*, 94 Ariz. at 8. Of course, *Gerende* was decided before *Dennis* and *Yates*, but this would not have prevented the Court from viewing "*Yates*-style" advocacy as constituting an attempt "in one way or another to overthrow the government by force and violence."

[91] 341 U.S. at 717–18.

[92] The dissenting opinion of Mr. Justice Douglas, joined by Mr. Justice Black, concentrated entirely on the contention that the Los Angeles ordinance was a bill of attainder. See 341 U.S. at 731–33. Mr. Justice Black's short dissenting opinion briefly mentioned the First Amendment issue, but discussed it in general terms. *Id.* at 730–31. Both Mr. Justice Frankfurter's separate opinion and Mr. Justice Clark's opinion for the Court did discuss that issue, however, in connection with the possible application of the ordinance to members who were unaware of an organization's illegal activity, the majority assuming that the statute incorporated a requirement of scienter, and Mr. Justice Frankfurter finding the statute unconstitutional because that assumption reasonably could not be made. *Id.* at 720–21, 723–24, 724.

[93] But see Horowitz, *Report on the Los Angeles City and County Loyalty Programs*, 5 STANFORD L. REV. 233, 244 (1953), possibly suggesting that the element of scienter read into the ordinance in *Garner* might make the ordinance inapplicable to the "employee [who] was a member of the organization but continually fought against policies of overthrow." The language of *Garner*, however, quite clearly discussed scienter strictly in terms of knowledge rather than intent. 341 U.S. at 723–24. This was reaffirmed in Wieman v. Updegraff, 344 U.S. 183 (1952).

[94] See Israel, *Gideon v. Wainwright: The "Art" of Overruling*, [1963] SUPREME COURT REVIEW 211, 214 n. 15, 215–26.

Douglas' opinion failed to mention the *Garner* case. It could reasonably be assumed that there was a basis for reconciling the two cases, and that *Garner* remains controlling precedent until explicitly overruled.[95]

A ground for reconciling *Garner* and *Elfbrandt* in fact can be found, if not without difficulty. The *Garner* statute applied to membership in organizations that were actively engaged in the advocacy of violent overthrow, and the Court obviously treated it as aimed at the Communist party or similar organizations that made the overthrow of the government a dominant organizational goal.[96] *Elfbrandt*, on the other hand, involves a statute prohibiting employee membership in an organization that has the violent overthrow of the government merely as "one of its purposes."[97] As Justice Bernstein noted in the Arizona court, the Arizona statute would encompass an organization for which overthrow was merely a "subordinate purpose."[98] Both Justice Bernstein and Mr. Justice Douglas mentioned the possible application of the Arizona statute to a teacher's membership in a seminar group dominated by Communist scientists. Certainly, a member of such a group cannot be compared to a member of an organization like the Communist party, either in terms of his contribution to the potential violent overthrow of the government or his lack of dedication to the present form of government.[99] The Court could have adopted the position that membership in such an organization does not justify employment disqualification without a showing of the individual's support for the policy of violent overthrow, although knowing membership in an organization like the Communist party would be sufficient justification for disqualification. In any event, the argument might continue, since *Elfbrandt*

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[95] *Cf.* United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 112 (1927), noting the need for caution in drawing "inferences from silence."

[96] See 341 U.S. at 719–20. The oath was combined with a requirement that every employee execute an affidavit stating whether he had ever been a member of the Communist party. *Ibid.*

[97] See note 9 *supra.*

[98] 97 Ariz. at 148; see text *supra*, at note 19.

[99] It might also be argued that a restriction extending to any organization that might have violent overthrow as "one of its purposes" would impose a greater deterrent to free association because the employee would have greater concern about not being able to recognize all the subordinate organizational purposes. The statute in *Elfbrandt* was limited to members with knowledge, but the impact of that safeguard upon the individual's willinguess freely to join various organizations is questionable.

went no further than to declare invalid a law covering the first situation, *Garner* still remains a valid precedent until the Court faces a statute dealing solely with membership in groups actively advocating overthrow.

Support for this view of the limited scope of the *Elfbrandt* opinion can be found in various portions of Mr. Justice Douglas' opinion. Justice Bernstein's dissent, which was based entirely on the "subordinate purpose" theme, is quoted at length in the majority opinion.[100] Mr. Justice Douglas also added his own discussion of the same point, including his hypotheticals concerning teacher participation in such events as the Pugwash Conference. Finally, throughout the majority opinion, Mr. Justice Douglas spoke solely in terms of organizations with an illegal "purpose" or "aim." No reference is made to membership in an organization presently advocating overthrow.[101] Nevertheless, although these elements of the majority opinion give this reading of the Court's ruling far more support than that suggested by Mr. Justice White, it too should be rejected.

If *Elfbrandt* is viewed as going no further than to invalidate a statute so broad as to encompass membership in a scientific seminar dominated by Communists, it becomes very difficult indeed to understand why the case was not clearly controlled by *Baggett v. Bullitt*,[102] and, if so, why (1) two members of the *Baggett* majority dissented in *Elfbrandt*[103] and (2) the majority relied primarily on *Scales*, and *Aptheker* rather than *Baggett*. In *Baggett*, the Court, with only Justices Clark and Harlan dissenting, held unconstitutional a Washington statute that barred from public employment all persons, *inter alia*, who "aid[ed] in the commission of any act intended to overthrow, destroy, or alter or assist in the overthrow, destruction, or alteration" of the state or federal government.[104] While Mr. Justice White's opinion for the Court was based on the ground that the statute was unduly vague, this rationale was keyed to the impact of the statute on First Amendment rights. The vagueness in the Washington statute entered the picture primarily because a

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100 384 U.S. at 14–15. The quotation included the entire discussion by Justice Bernstein of the "scientist" hypothetical.

101 See, *e.g.*, 384 U.S. at 16, 17.

102 377 U.S. 360 (1964).

103 The majority in *Baggett* included Justices White and Stewart, both of whom dissented in *Elfbrandt*.

104 377 U.S. at 362.

literal interpretation of the statute so clearly imposed on protected speech that the Court assumed that a somewhat narrower, but less well defined, compass was intended.[105] In listing the obviously impermissible bases for denial of employment that could fall within the state statute if literally interpreted, Mr. Justice White offered an illustration almost identical to that cited by Mr. Justice Douglas in *Elfbrandt*—the denial of employment to a scholar who "attends and participates in an international convention of mathematicians and exchanges views with scholars from Communist countries."[106] Mr. Justice White's discussion of this and other illustrations clearly indicated that the state could not deny employment to an individual simply because he unintentionally lent indirect aid to the "cause" of violent overthrow by engaging in lawful activities that he knew might add to the power of persons supporting illegal overthrow.[107] Thus, although the Washington statute, when read literally, was much broader in scope than the statute in *Elfbrandt*, the basic principle expressed in the *Baggett* opinion clearly would control *Elfbrandt* if that case were viewed as concerned primarily with the application of the Arizona statute to such matters as membership in a Communist-dominated scientific seminar.

While the Court's opinion in *Elfbrandt* does cite *Baggett v.*

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[105] *Id.* at 366–68. The opinion of the Court does not clearly express the interrelationship of the vagueness doctrine and the overbreadth of the statute when it is read literally. This point is given more explicit recognition, however, in a subsequent opinion that relied primarily on *Baggett*. See Dombrowski v. Pfister, 380 U.S. 479, 486–87, 490–92, 493–94 (1965); see also Aptheker v. Secretary of State, 378 U.S. 500, 515–16 (1964); United States v. National Dairy Corp., 372 U.S. 29, 36 (1963); N.A.A.C.P. v. Button, 371 U.S. 415, 432–33 (1963); Shelton v. Tucker, 364 U.S. 479, 491–92 (1960) (dissenting opinion); Amsterdam, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960).

[106] 377 U.S. at 369.

[107] Although the Court's opinion in *Baggett* raises some question concerning the nature of the individual's awareness that his acts would aid those seeking overthrow, the opinion also indicates that the activity discussed would be protected even if the individual knew "that his aid or teaching would be used by another and that the person aided has the requisite guilty intent." The discussion relating to the possible ambiguity in the oath's scienter requirement was discussed as a supplementary point. See 377 U.S. at 368–69. See also Dombrowski v. Pfister, 380 U.S. 479, 492–93. *Dombrowski* also indicates that the protection afforded by *Baggett* would be equally applicable to the person who is a member of an organization that itself lends indirect and unintended aid to those supporting overthrow by participating for other purposes in legal activities that will strengthen the position of such groups. *Ibid.*

Bullitt in connection with the discussion of the hypotheticals concerning scientific conferences, it does not rely heavily on that decision.[108] Both the citation and the hypotheticals seem to serve merely to supplement the argument for requiring an element of "specific intent" by presenting an extreme example of what could happen when a loyalty oath contained no exemption of members who lacked such intent. The primary emphasis in *Elfbrandt* is on *Scales* and *Aptheker*, both of which involved membership in the Communist party.[109] Reliance on these decisions, when *Baggett* was otherwise sufficient precedent, indicates that the Court's rejection of employment disqualification based solely on knowing membership in an organization supporting the violent overthrow of the government extends to all such organizations, including those in which violent overthrow is a matter of primary emphasis. *Garner v. Board of Public Works* must, therefore, be viewed as overruled. Admittedly, the assumption that the Court overruled an earlier precedent sub silentio is not to be lightly indulged. But two recent opinions by Mr. Justice Douglas seem to overrule several other cases in this manner.[110] And certainly the thrust of the majority opinion, as well as the cases cited therein, indicates that *Garner* was intended to share the same fate.

Actually, there are a few statements in *Elfbrandt* suggesting that a statute like that in *Garner* would be deficient on not one but two grounds. While Mr. Justice Douglas' several statements of the Court's ruling in the majority opinion consistently refer only to the improper disqualification of the knowing member who lacks "a 'specific intent' to further the illegal aims of the organization," a few comments in the opinion suggest that even a statutory restriction on employment limited to members with "specific intent" would not be valid. For example, in citing the *Scales* case, Mr. Justice Douglas noted that the majority there read the Smith Act "membership clause" to require not only that the member have the requisite intent but also that he be an "active" member.[111] At another point, the opinion might be taken to suggest that even "active" participation in the group's activities would not be enough

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108 384 U.S. at 16–17.

109 See 367 U.S. at 205–06, 378 U.S. at 504–05.

110 See Kurland, *supra* note 68, at 150, 167–68, discussing Gray v. Sanders, 372 U.S. 368 (1963), and Schneider v. Rusk, 377 U.S. 163 (1964).

111 384 U.S. at 15; see 367 U.S. at 222–24, 255 n. 29.

if the activities involved were all legal. Mr. Justice Douglas stated that 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 to society."[112] While this could be viewed as suggesting alternative requirements, it may indicate that the Court will not allow employment disqualification to be based on political association absent a showing of specific intent to promote the violent overthrow of the government plus previous participation in illegal activities serving that end. Some support for this second requirement might also be found in Mr. Justice Douglas' statement that a statute denying employment on the basis of speech-related activities must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state." The clear-and-present-danger standard, especially as viewed by Mr. Justice Douglas, could easily be taken to require prior participation in illegal activity.[113]

If these statements do not in themselves impose any additional requirements, they lay the foundation for a future decision to that effect.[114] Whether the Court's ruling will be expanded to require active membership or even actual participation in illegal activities will depend in large part on the precise nature of the considerations that led the Court to reject Arizona's reliance upon knowing membership as an appropriate basis for denying government employment. The nature of those considerations will also have considerable bearing on whether *Elfbrandt* will be applied to a statute requiring loyalty oaths of only a limited group of employees, such as those in sensitive positions. Unfortunately, however, the identification of these relevant considerations is hidden to a large degree

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[112] 384 U.S. at 17.

[113] See, *e.g.*, Dennis v. United States, 341 U.S. 494, 581 (1951) (dissenting opinion).

[114] The dissent at one point suggested that the majority did impose a requirement of active membership. See 384 U.S. at 22–23: "[T]he Court errs in holding that the act is overbroad because it includes state employees who are knowing members but who may not be active and who may lack the specific intent to further the illegal aims of the Party."

The majority opinion, however, refers to an "active" membership requirement only in connection with its general description of the *Scales* case. *Id.* at 15. The discussion of *Aptheker*, the reference to the possible scope of the statute, and the summary of the Court's ruling at the end of the opinion speak only of the element of "specific intent." *Id.* at 16–19.

by the manner in which the *Elfbrandt* opinion utilized the rule against overbroadness as the basis for its ruling.

IV. Overbroadness and the Nature of the State's Interests

The rule against overbreadth in legislation affecting First Amendment rights is a doctrine very much favored by the present Court.[115] In large part, this is probably due to the fact that it represents one of the few common meeting grounds for the variant views of the meaning of the First Amendment.[116] But, as one might expect of a doctrine serving this function, the rule is frequently used in different ways by different Justices in writing opinions for the Court. Thus, in some cases, the Court would seem to have rejected legislation as overbroad primarily because the means employed by the state bore little or no relationship to the interests it sought to implement.[117] In other cases, the Court has acknowledged the presence of a substantial relationship, but has still found the legislation invalid because the state interest could be attained by an alternative means that would impose less severe restrictions on the individual's personal liberty.[118] In still other cases, the Court seemed to reject legislation because, whatever the possible alternative

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[115] See, *e.g.*, Aptheker v. Secretary of State, 378 U.S. 500 (1964); N.A.A.C.P. v. Alabama, 377 U.S. 288, 307–08 (1964); N.A.A.C.P. v. Button, 371 U.S. 415, 432–44 (1963); Louisiana v. N.A.A.C.P., 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60, 62–64 (1960).

[116] Shapiro, Freedom of Speech: The Supreme Court and Judicial Review 140–41 (1966). *Compare* Justices Douglas' and Black's joining opinion for the Court in Shelton v. Tucker, *supra* note 115, *with* their use of a separate concurring opinion in Bates v. Little Rock, 361 U.S. 516, 527 (1960).

[117] See, *e.g.*, N.A.A.C.P. v. Button, *supra* note 115; Talley v. California, *supra* note 115; Lovell v. Griffin, 303 U.S. 444 (1938). Frequently, as in *Lovell* and, perhaps, *Talley*, there is the further suggestion that the restriction upon speech was so significant that the statute would not be sustained even if it did bear a relationship to some state interest. In fact, the decisions probably rested on this ground, since the state's use of an absolute prohibition against the distribution of all literature, as in *Lovell*, or all anonymous handbills, as in *Talley*, does serve the state's interest in eliminating obscene or libelous publications in the sense that the flat prohibition against distribution obviously is considerably easier to administer than one that attempted to specify what literature might fall in the obscene or libelous category. *Cf.* Note, *The Supreme Court, 1959 Term*, 74 Harv. L. Rev. 97, 130 (1960).

[118] See, *e.g.*, Aptheker v. Secretary of State, *supra* note 115; Shelton v. Tucker, *supra* note 115; Saia v. New York, 334 U.S. 558, 562 (1942).

means, the state interest served by the legislation was deemed insufficient to justify the extensive restriction it imposed upon protected speech or association.[119] While these varying uses of the "overbroadness" doctrine all rest on the same basic process of evaluating competing interests, the differences in underlying rationale may be relevant in determining the degree to which the rejection of legislation as "overbroad" might preclude an attempt to satisfy the same state interest through different means. Yet, opinions relying upon the "overbroadness" rule often provide no more indication of the Court's analysis than a conclusionary statement that a particular aspect of the statutory infringement on speech was overly broad as it applied to the particular interest that the state advanced in that case.[120] The majority opinion in *Elfbrandt* fits this pattern and, indeed, is more delinquent, since the Court failed in large part even to identify the state interest against which the legislation was balanced.

Mr. Justice Douglas' opinion starts with a description and evaluation of the interest of the individual in joining organizations having both legal and illegal objectives, and, except for one or two sentences, it never leaves that aspect of the case. Although the opinion states in conclusion that the Arizona statute "infringes unnecessarily on protected freedoms," it never clearly defines the state interests in relation to which the infringement was deemed "unnecessary."[121] The lack of any extended discussion of the state's interest is not surprising in an opinion by Mr. Justice Douglas, who generally seeks to avoid creating any impression that the Court might be engaged in "balancing" individual rights against a state's interests.[122] In the area of the legislation involved in *Elfbrandt*,

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[119] See, *e.g.*, N.A.A.C.P. v. Alabama, *supra* note 115; Louisiana v. N.A.A.C.P., *supra* note 115. See also Shelton v. Tucker, *supra* note 115, at 493 n. 3 (dissenting opinion).

[120] See, *e.g.*, Louisiana v. N.A.A.C.P., *supra* note 115; Talley v. California, *supra* note 115.

[121] 384 U.S. at 19. Although relying upon *Aptheker* for other purposes, the opinion ignores the statement in *Aptheker* that application of the rule against overbroadness requires examination of the state's interest. See Aptheker v. Secretary of State, *supra* note 115, at 508.

[122] Consider, for example, his treatment of the state's interest in the following description of *N.A.A.C.P. v. Alabama* and *Bates v. Little Rock*, as they relate to the power to compel disclosure of membership lists: "We deal with a constitutional right, since freedom of association is included in the bundle of First Amendment rights made applicable to the states by the Due Process Clause of the Four-

however, this omission takes on special significance, since at least three different state interests are commonly advanced to justify disqualification of individuals from public employment on the basis of membership in organizations advocating the violent overthrow of the government: (1) The elimination of persons who present a potential for sabotage, espionage, or other activities directly injurious to national security. (2) The elimination of persons who are likely to be either incompetent or untrustworthy in the performance of their duties. (3) The elimination of persons who, aside from any question of danger or fitness, simply are not considered deserving of a government position because they oppose the basic principles on which the government is founded. The *Elfbrandt* opinion contains no reference to any of these interests aside from a single ambiguous sentence. In that sentence, Mr. Justice Douglas emphasized that members who do not share an organization's unlawful purposes and never participate in its unlawful activities "surely pose no threat, either as citizens or as public employees."[123] The nature of the "threat" to which Mr. Justice Douglas is referring is not entirely clear, but the context of the sentence indicates that he was probably making reference only to the possibility of sabotage or similar activities. Since all three state interests were advanced in justification of the Arizona legislation, however, either in the briefs or in the opinions below,[124] it must be assumed that the Court found the statute unnecessarily broad as applied to all of them. And, as previously noted, the considerations that led the Court to reject these interests will determine the possibilities for the extension of the *Elfbrandt* ruling to loyalty oaths more limited than Arizona's.[125]

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teenth Amendment . . . [citations omitted]. And where it is shown, as it was in *N.A.A.C.P.* v. *Alabama, supra,* 462–463, that disclosure of membership lists results in reprisals against and hostility to the members, disclosure is not required. And see *Bates* v. *Little Rock, supra,* 523–524." Louisiana v. N.A.A.C.P., *supra* note 115, at 296.

123 384 U.S. at 17.

124 Although the respondent's brief placed emphasis upon the first of the state interests mentioned above, the opinion of the lower court made reference to the other two. See Brief for Respondent, pp. 8, 13; 94 Ariz. at 6, 10–11. See also the *Report of the Arizona Judiciary Committee in Support of the Committee Amendment to H.B. 115,* reproduced as Appendix B in Respondent's brief.

125 Of course, even if the opinion had clearly identified the state's interest and explained why the statute was overbroad in relation to those interests, the Court

V. The Denial of Support to Disloyal Groups

It has frequently been argued that persons who lack "fidelity to the very presuppositions of our scheme of government" should be denied public employment simply because the government need not support those who oppose it.[126] Taxpayers' funds," so the argument goes, "should not be spent to support . . . a person of doubtful loyalty to the very governmental system for which he wants to work."[127] Or, to look at it from the other side, the state should be allowed to promote loyalty to our basic institutions by employing only those who accept those institutions.[128]

Although this argument probably serves as the primary basis for much of our "loyalty" legislation,[129] the state interest it advances has not always been recognized as separate from that of excluding

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need not have committed itself on the weight of those interests in the case of a modified statute. See Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 U.C.L.A. L. Rev. 1, 15–17 (1965). Yet that would be the inevitable result of reliance upon several of the possible grounds for judgment that are discussed in the next three sections of this article.

126 Garner v. Board of Public Works, 341 U.S. 716, 725 (1951) (concurring opinion). See Brown, *op. cit. supra* note 5, at 205, 333, 335, 337; Linde, *Justice Douglas on Freedom in the Welfare State*, 39 Wash. L. Rev. 39 (1964) (both noting the argument, but not supporting it).

127 Linde, *supra* note 126, at 39. As used in this argument, "disloyalty" means only the denial of the basic premises on which the government is founded. In the case of persons believing in violent overthrow, it is the denial of the premise that change in government can take place only through the democratic means provided by the Constitution. See Brown, *op. cit. supra* note 5, at 6–7, 389.

Another concept of loyalty sometimes advanced in connection with this argument rests on the individual's alleged subservience to a foreign nation. See, *e.g.*, Ariz. Rev. Stat., tit. 16, ch. 2, § 16-205 (1965 Supp.) (Arizona Communist Control Act). This concept, however, does not relate to all groups advocating overthrow of the government, and it has been employed primarily in connection with Communist Control Acts. It could provide an entirely separate basis for denial of support through employment disqualification. See People v. Crane, 124 N.Y. 154, 161, 164 (1915), *aff'd*, 239 U.S. 195 (1915). But it would present essentially the same difficulties as *Elfbrandt* with respect to the need for a showing that the individual member owed his allegiance to a foreign country.

128 *Cf.* First Unitarian Church v. County of Los Angeles, 48 Cal.2d 419, 438–39 (1957), *rev'd*, 357 U.S. 545 (1958).

129 See Willcox, *Invasions of the First Amendment through Conditioned Public Spending*, 41 Cornell L.Q. 12, 48 (1955); Linde, *supra* note 126, at 39; Brown, *op. cit supra* note 5, at 337, 340.

potentially unreliable and incompetent employees. The two interests do often overlap, but they are distinct in one important respect.[130] The state's interest in obtaining fit employees relates to the individual's potential performance in public employment, while its interest in denying support to "disloyal" persons may relate only to the individual's attitude toward basic principles of constitutional government.[131] Thus, associational ties that might not be adequate to establish the likelihood that a person will act improperly in office may nevertheless be sufficient to show a lack of "loyalty," for example, in the individual's acceptance of a general theory that the violent overthrow of government is preferable to the constitutional processes for change provided in the Constitution.

The Court in *Elfbrandt* obviously found that the state interest in denying support to "disloyal" persons could not justify the Arizona loyalty oath. That conclusion may have been based on at least two distinct approaches, each furnishing somewhat different implications of the future effect of the decision. On the more limited approach, the Court may have agreed that the state has an interest in denying support to "disloyal" persons but still have found that the Arizona statute was not sufficiently related to that interest. Since, under the state's theory, the basis for denial of employment turns on the individual's rejection of the basic principles of constitutional government, the loyalty oath, to implement that theory, logically should exclude only those members who themselves subscribe to the illegal objective of violent overthrow.[132] The Arizona statute, as related to this state interest, could very properly be described as unnecessarily broad. A ruling based on this analysis would go no further than to require that the element of "specific intent" be added to the "membership clause" of § 5. The addition of an element of active participation in the organization's affairs would not be needed, since, as noted, "disloyalty" for the purpose of this theory need not be related to action.

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130 See BROWN, *supra* note 5, at 205. See also 94 Ariz. at 6, 10–11.

131 See note 127 *supra*. See also Sacks, *Federal Civilian Employees Security Program: An Analysis of the Wright Commission Report*, 52 NW. U. L. REV. 715, 719 (1958).

132 The Court adopted a similar view in interpreting the requirement of "attachment to the principles of the constitution" under the Nationality Act of 1906. See Nowak v. United States, 356 U.S. 660 (1958); Maisenberg v. United States, 356 U.S. 670 (1958).

This analysis would not in itself answer the argument, suggested by the dissent, that the individual by lending "his name and influence" to the organization automatically aided its illegal objectives, whatever his intent, and that the state could, therefore, exclude him from employment as a means of denying support to a "disloyal" organization.[133] On this point, the Court would be required to answer that the state's justification for a loyalty oath must relate directly to the denial of support to the individual, rather than to the organization, since it is the individual who suffers the brunt of the restriction. Some support for this position may be found in *Wieman v. Updegraff*,[134] where the Court held that the state could not deny employment to members of organizations advocating overthrow who were not aware that the organization had this objective. Certainly, a member in that category could give the organization as much aid by lending it "his name and influence" as the knowing member who did not share the organization's purpose.[135] While there is a significant difference in the fact that the member in the second case has knowledge of the organization's illegal goals, *Baggett v. Bullitt* indicates that, at least in the case of somewhat more indirect assistance such as united activity in support of a joint political objective, it matters not that the individual realizes that his assistance will indirectly further the organization's illegal objectives.[136] Membership in an organization actually advocating overthrow may, of course, constitute a much more direct contribution to its illegal objectives. But when the importance *Wieman* attached to freedom of association is also considered, the Court might well conclude that the state's interest in shutting off this additional element of organizational support was insufficient to outweigh the restriction on individual freedom. In sum then, under this first approach, the Arizona oath would be rejected because (1) the state's interest in denying support to "disloyal" persons is not sufficient so long as the individual does not himself subscribe

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[133] 384 U.S. at 20. This argument was also suggested in the Arizoua Supreme Court. See 94 Ariz. at 10–11.

[134] 344 U.S. 183 (1952).

[135] The Court has recognized that an individual can be an active member of an organization and still not be aware of its illegal objective. See Nowak v. United States, *supra* note 132; Maisenberg v. United States, *supra* note 132; *cf.* Rowoldt v. Perfetto, 355 U.S. 115 (1957).

[136] See text at note 107 *supra.*

to an organization's illegal goals, and (2) the state's interest in denying the organization whatever support comes from the membership of a person who does not favor its illegal ends is not sufficient to justify restricting that individual's right to join that organization in order to work for a legal objective he does favor.

A second and more far-reaching approach to both aspects of this problem would hold that the state's interest in denying support to "disloyal" persons or organizations is never a proper basis for employment disqualification, except possibly where the grounds of disqualification are limited to speech or association that could be directly proscribed under the Constitution. At the outset, it should be noted that the Court never has had occasion directly to accept or reject the principle that a state can base a loyalty test on its desire to deny employment to those persons who reject the basic principles of constitutional government. Scattered statements in one or two opinions might be taken as recognizing the state's interest in this regard, but these opinions dealt primarily with other state goals.[137] Moreover, these opinions were written before *Speiser v. Randall*.[138]

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[137] See Garner v. Board of Public Works, 341 U.S. 716, 725 (1951) (concurring opinion); Adler v. Board of Education, 342 U.S. 485, 492–93 (1952). The statements in *Adler* are ambiguous because the Court never defines the term "loyalty" when it speaks of determining "fitness and loyalty." Moreover, the various statements in *Adler* emphasizing the so-called privilege rationale were sharply limited only a year later in Wieman v. Updegraff, 344 U.S. 183 (1953).

[138] 357 U.S. 513 (1958). One post-*Speiser* statement that could be bracketed with the cases cited in note 137 is found in Flemming v. Nestor, 363 U.S. 603 (1960). The Court there sustained a statntory provision disqualifying from social security benefits persons who "had been deported on several grounds, including membership in the Communist Party." The Court noted that a rational justification for the statute might rest on the deportee's inability to aid the domestic economy by spending the benefits locally. The opinion then went on to make the following statements: "For these purposes, it is, of course, constitntionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply. . . . Nor, apart from this, can it be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute."

It is not entirely clear whether the last sentence refers to the fact that the deportee would be residing abroad or whether it establishes a right to deny support simply because alien Communists are not "deserving" of benefits. See Linde, *supra* note 126, at 17, suggesting the latter interpretation. In any event, subsequent cases, apparently viewing *Flemming* as based entirely on the first rationale, have treated *Speiser* and *Flemming* as consistent in the general principle eacli applied. See, *e.g.*, Sherbert v. Verner, 374 U.S. 398, 404–05, 409 n. 9 (1963).

In *Speiser* the Court held unconstitutional a California statute requiring every applicant for a veteran's tax exemption to swear that he was not presently advocating the violent overthrow of the federal or state government. The California statute was based on essentially the same state interest as is advanced to deny employment to "disloyal" persons. It was designed to "encourage . . . loyalty to our institutions" by denying support of persons who advocated the violent overthrow of those institutions.[139] Unlike the Arizona loyalty oath, however, the standard for denial of benefits was limited to speech that had been held to be outside the protection of the First Amendment.[140] The Court, therefore, did not have to deal directly with the question whether the denial of tax benefits could have been based on speech that could not be directly prohibited under the Constitution. Nevertheless, the Court's opinion indicated quite clearly that if such exemptions can be denied on the basis of speech at all, it must be on the basis of "proscribed speech for which [the individual] might be fined or imprisoned."[141] In particular, the opinion emphasized that legislation serving the function of the California statute constituted a direct restraint on speech, since it was "frankly aimed at the suppression of dangerous ideas," rather than the control of particular conduct relating to the benefit granted.[142] The Court carefully distinguished prior loyalty oath cases, such as *Gerende*, on the ground that the "principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public."[143] Finally, the Court, relying in part on *Wieman v. Updegraff*, rejected the argument that tax exemptions constituted a privilege and therefore were not subject to constitutional limitations upon the infringement of speech.[144]

In light of *Speiser*, a loyalty oath justified solely in terms of the state's interest in denying support to "disloyal" persons, as opposed to an interest in insuring employee reliability, must be viewed as a

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[139] 357 U.S. at 527. See also statement of Clark, J., dissenting: "The interest of the State . . . is dual in nature, but its primary thrust is summed up in an understandable desire to insure that those who benefit by tax exemption do not bite the hand that gives it." *Id.* at 543.

[140] *Id.* at 519–20.

[141] *Id.* at 520.

[142] *Id.* at 519.

[143] *Id.* at 527.

[144] *Id.* at 518–19.

direct restraint on speech. It follows that the only permissible standard for an oath serving that interest would be one tied, as in *Speiser*, to speech or association that might generally be made criminal under such legislation as the Smith Act.[145] Moreover, even if the standard employed were to meet the requirements of the *Scales* case, for example, there still might be some question about its validity when used in the context of a loyalty oath. *Speiser* only assumed *arguendo* that a state could deny benefits solely on "disloyalty" grounds where the speech involved was directly punishable.[146] The opinion then went on to reject the California statute because, in any event, it improperly shifted the burden of proof. In reaching this result, *Speiser* compared the California provision to a statute imposing a penalty for a crime.[147] Extending this reasoning, the Court might well rule, if forced to meet the issue, that a loyalty requirement "frankly aimed at suppressing speech," even if limited to constitutionally prohibitible speech, would still be invalid because it fails to afford the safeguards of the Sixth Amendment.[148] This would, in effect, reject any state employment test designed as a means of denying support to "disloyal" persons or organizations unless the standards under that test were relevant also to the quality of the employee's performance on the job.

Even if *Speiser* is not extended to its logical extreme, its application to the area of government employment still presents the problem of distinguishing (or rejecting) two "practical" precedents that are often cited to justify loyalty qualifications for government employees. The first is the traditional practice of hiring and firing under the spoils system that was so prevalent in this country before the advent of civil service (and is still not unheard of today).[149] If Republicans can deny employment to Democrats simply because they are Democrats, why not, it is asked, permit both parties to exclude persons who believe in the overthrow of the government?

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[145] See Thompson v. Gleason, 317 F.2d 901, 906 (D.C. Cir. 1952); *cf.* Danskin v. School Board, 28 Cal.2d 536 (1946); United States v. Schneider, 45 F. Supp. 848 (E.D. Wisc. 1942).

[146] 357 U.S. at 519–20.

[147] *Id.* at 525, citing Lipke v. Lederer, 259 U.S. 557 (1922).

[148] Cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 184 n. 39 (1963) (relying on Lipke v. Lederer, *supra* note 147).

[149] See Bailey v. Richardson, 182 F.2d 46, 59–60, 62–63 (D.C. Cir. 1950), *aff'd by equally divided court*, 341 U.S. 918 (1951) (collecting sources).

A possible answer could be that the spoils system was basically a product of a different era in which the characterization of employment as a privilege carried far more weight than it does today.[150] But the better answer is that the patronage system of employment has operated behind the Court's general refusal to examine the basis of the government's employment decisions unless the grounds for those decisions are clearly announced.[151] If the basic premise of the spoils system, insofar as it is not related to fitness, were clearly stated in statute or regulation, it would be rejected as arbitrary. This point seems clear from *United Public Workers v. Mitchell*, where the Court noted that "none would deny" that "Congress may not enact a regulation providing that no Republican, Jew, or Negro shall be appointed to federal office."[152]

The second precedent relied upon is the general requirement that government employees take an oath swearing to "bear true faith and allegiance" to the government, to "support and defend the Constitution against all enemies, foreign and domestic," and to "faithfully discharge the duties of [public] office."[153] An "affirmative" oath of this nature has been required of federal employees in the executive branch since 1884,[154] and a somewhat similar oath is required of the President by Article II of the Constitution. The contents of the oath, particularly the general requirement of defense of the Constitution, seems to indicate that it extends to matters beyond the individual's performance in office. Accordingly, it is argued that a requirement that employees believe in democratic processes for change, as opposed to violent overthrow, merely restates in a more specific fashion the employee's affirmative duty to defend the Constitution and to bear true allegiance to the government formed under the Constitution.[155] The short answer here

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150 See generally Willcox, *supra* note 129, at 12–15, 37–44. *Compare* Heim v. McCall, 239 U.S. 175, 191 (1915), *with* Wieman v. Updegraff, 344 U.S. 183, 192 (1952). See also Powell, *The Right To Work for the State*, 16 COLUM. L. REV. 99 (1916).

151 See, *e.g.*, Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

152 330 U.S. at 100.

153 5 U.S.C. § 16 (1964). See Constanzo, *Loyalty Oath Affidavit*, 37 U. DET. L. J. 718, 728 (1960); Willcox, *supra* note 129, at 49.

154 See 5 U.S.C. § 16 (1964); 23 Stat. 22 (1884).

155 The fact that the affirmative oaths refer to future conduct and therefore would not likely be enforced by a perjury prosecution would not in itself serve as an

is that the affirmative oath of allegiance refers only to positive acts in violation of a constitutionally imposed legal duty. In *In re Summers*,[156] for example, the Court, in finding that a person unwilling to bear arms could not conscientiously take the oath to "support the Constitution," specifically rested its conclusion on the assumption that the draft exemption for conscientious objectors was not constitutionally required and that the failure of a conscientious objector to bear arms could validly be made a crime. Similarly, the affirmative oath, if it applies to speech at all, creates a duty to abstain only from such seditious speech or association as could be directly prohibited consistent with the Constitution. This would be entirely consistent with at least the more limited view of *Speiser v. Randall* as restricting the basis for the denial of benefits "to proscribed speech for which [the individual] might be imprisoned or fined."[157]

As previously noted, the Court's opinion in *Elfbrandt* does not clearly indicate why it found the state's interest in denying support to "disloyal" persons insufficient to justify the Arizona loyalty oath. The Court probably did not advance beyond the first approach suggested above, that membership without specific intent to further illegal objectives bore an insufficient relationship to the state interest. The more broadly based ground would have required a discussion of *Speiser*, and that case was cited only once and for a different point.[158] On the other hand, four members of the *Elfbrandt* majority had previously urged a very broad interpretation

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adequate basis for distinguishing the loyalty oath. See Baggett v. Bullitt, 377 U.S. 360, 374 (1964): "Without the crimiual sanctions, it is said, one need not fear taking this oath. . . . This contention ignores not only the effect of the oath on those who will not solemnly swear unless they can do so honestly and without prevarication and reservation, but also its effect on those who believe the written law means what it says."

[156] 325 U.S. 561, 569–73 (1945). *Summers* involved the duty to support the state constitution (Illinois), but, at that time, a similar construction had been placed upon the requirement of support of the federal constitution in the oath of allegiance required by the Naturalization Act of 1906. See United States v. Schwimmer, 279 U.S. 644 (1929); United States v. MacIntosh, 283 U.S. 605 (1931), *overruled* by Girouard v. United States, 328 U.S. 61 (1945). The *Girouard* case found that Congress had not intended to make willingness to bear arms an absolute prerequisite to citizenship.

[157] See note 141 *supra*.

[158] 384 U.S. at 17–18.

of *Speiser* in another context.[159] Perhaps they viewed *Speiser* as so clearly rejecting this interest that no discussion was necessary. If this is true, *Elfbrandt* will have bearing beyond the employment situation and may, along with *Speiser*, provide the basis for rejecting such loyalty restrictions as that imposed under the recent Medicare legislation.[160]

VI. The State's Interest in Insuring the Fitness of Its Employees

The ruling in *Elfbrandt* indicates also that the Arizona oath requirement could not be sustained by the state's interest in insuring the fitness of its employees. Here again the significance of the decision will depend in large degree on which of two somewhat different rationales led the Court to this conclusion.

The first rationale would be based primarily on the total coverage of the Arizona statute. Although petitioner in *Elfbrandt* happened to be a teacher, the Arizona oath was required of all state and local employees, including janitors, street cleaners, and others with purely ministerial functions.[161] As applied to persons in these positions, the case for determining the prospective employee's potential performance on the basis of his membership in an organization advocating overthrow is very weak. The traditional argument for denying state employment to members of such organizations has rested on the likelihood that they would use their positions to strengthen the organization's ability eventually to attempt violent overthrow by (1) promoting the organization's influence through favoritism in the distribution of governmental benefits to those groups sympa-

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159 See Konigsberg v. State Bar, 366 U.S. 36, 75–80, 80–81 (1961) (dissenting opinions). See also the concurring opinion of Mr. Justice Douglas, joined by Mr. Justice Black, in *Speiser*. 357 U.S. at 532, 535–38.

160 See 79 Stat. 333 (1965), 42 U.S.C. § 427 (note) (Supp. 1965). This section generally extends hospital benefits to persons not insured under Social Security or Railroad Retirement, but makes an exception for a member of any organization ordered by the Subversive Activities Control Board to register as a Communist organization under the Internal Security Act of 1950. See also the various provisions cited in Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595, 1601–02 (1960).

161 Ariz. Rev. Stat. § 38-231 (B), (C) (1965). The Arizona oath was required of "any person elected, appointed or employed, either on a part-time or full-time basis by the state or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing." *Ibid.*

thetic to the organization's goals and (2) using government power to achieve social and economic conditions that are prerequisites to a successful attempt at revolution.[162] Typical examples offered in support of this position are the employees of legislative committees who attempted "to manipulate hearings so as to favor the friends of the party and depreciate its enemies,"[163] and the public school teachers who used their position to indoctrinate students through the teaching of "a prescribed party line."[164] While the Court has previously accepted the state's interest in preventing such misuse of office as an appropriate basis for imposing loyalty restrictions on teachers[165] and lawyers,[166] it would seriously strain this reasoning to sustain restrictions upon numerous positions that do not allow the employee sufficient discretion to permit any significant manipulation to benefit the organization. Nevertheless, the strained reasoning has been offered in several arguments supporting the application of loyalty tests to all government positions.

One such argument defends total coverage on the ground that it

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[162] See SELZNICK, THE ORGANIZATIONAL WEAPON 215–24 (1960); BROWN, *op. cit. supra* note 5, at 215–18, 336–38. A special danger frequently mentioned in connection with employment of Communist party members is their tendency "to influence specific [policy] decisions, especially on matters of less than central interest to the target government which may help a communist faction abroad or may increase vulnerability to Soviet diplomacy." SELZNICK, at 220. This possibility presents basically the same type of problems in devising an appropriate scope for loyalty oath requirements as the two types of misuse of position mentioned in the text.

[163] SELZNICK, *op. cit. supra* note 162, at 222, citing statements by former Senator R. M. La Follette, Jr., concerning the activities of "pro-communist elements" on the staffs of congressional committees.

[164] N.Y. Laws 1949, c. 360 (legislative findings supporting the Feinberg Law). See also HOOK, HERESY YES–CONSPIRACY NO 184–87 (1953); THOMAS, THE TEST OF FREEDOM 90–93 (1954).

[165] Adler v. Board of Education, 342 U.S. 485, 489–93 (1951). See also Beilan v. Board of Education, 357 U.S. 399 (1958).

[166] Konigsberg v. State Bar, 366 U.S. 36 (1961). Although the primary issue before the Court in the second *Konigsberg* case concerned the state's power to compel a bar applicant to answer an inquiry concerning membership in the Communist party, the Court did indicate that the standard for disqualification to which the inquiry related–advocacy of violent overthrow–was constitutionally valid. See *id.* at 51–52: "It would indeed be difficult to argue that a belief firm enough to be carried into advocacy, in the use of illegal means to change the form of the State or Federal government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions."

is not administratively feasible to identify those positions in which the opportunity for misuse of office in favor of organizational objectives is either nonexistent or negligible.[167] This is a difficult position to sustain in the light of the ability of the federal government, for example, to distinguish between sensitive and non-sensitive positions under the employee security program and between discretionary and ministerial functions under the Federal Torts Claims Act.[168] Also, it seems particularly unlikely to appeal to a Court that itself has undertaken the task of distinguishing between different state positions in order to determine which persons are "public officials" for the purpose of the *New York Times Co. v. Sullivan* rule.[169]

Another argument favoring total coverage rests on the thesis that the employment of members of groups advocating overthrow, no matter what the individual's position, will give the government service a bad public image and therefore impair its general effectiveness. Assuming that such public reaction is a reality,[170] decisions like *Wieman v. Updegraff*[171] would seem to foreclose its use for imposing a restriction upon constitutionally protected association. Although *Wieman* deals with the member of an organization who is unaware of its illegal objectives and *Elfbrandt* with the knowing member who merely does not support those objectives, the difference in the two is unlikely to be significant insofar as public reaction to employment of such persons is concerned. Except in unusual cases, the member's lack of awareness of the organization's objectives is unlikely to be a matter of public knowledge, and where it is, it will often be disbelieved.[172] Similarly, although *Wieman*, unlike

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167 *Cf.* Brief for Respondent, pp. 36–43, 56–60; Garner v. Board of Public Works, 341 U.S. 716 (1951).

168 See Cole v. Young, 351 U.S. 536 (1956); Dalehite v. United States, 346 U.S. 15 (1953). This is not to say that either of these distinctions is satisfactory for determining which positions might easily be misused to support organizational objectives, but only to suggest that the process of classifying government jobs for this purpose is no more difficult than drawing the distinctions required under the Federal Security program or the Federal Torts Claim Act.

169 See Rosenblatt v. Baer, 383 U.S. 75 (1966).

170 See STOUFFER, COMMUNISM, CONFORMITY AND CIVIL LIBERTIES 39–45 (1955).

171 344 U.S. 183 (1952).

172 See generally Mowitz, *Michigan–State and Local Attack on Subversion*, in THE STATES AND SUBVERSION 184, 206–15, 228–30 (1952) (Gellhorn ed.); STOUFFER, *op. cit. supra* note 170, at 39.

Elfbrandt, concerned membership in "front" organizations as well as those directly advocating overthrow, the Court has clearly indicated that the ruling there is applicable to members of either type of organization.[173] The negative impact upon free association is, of course, presumably less in *Elfbrandt* than in *Wieman* because the Arizona statute does include the element of "scienter." Yet this difference hardly seems likely to alter what might well be viewed in *Wieman* as a total rejection of public reaction as a factor that may be used in determining employment qualifications.[174] Adverse public reaction may justify otherwise irrational government action in other areas,[175] but the Court is not willing to give such reaction any weight where it would affect the exercise of a constitutionally protected right. As Mr. Justice Frankfurter stated in his separate opinion in *Garner:*[176] "[S]urely a government could not exclude from public employment members of a minority group merely because they are odious to the majority." This seems equally true whether the minority is defined in terms of race, religion, or politics.

Finally, the Court in *Garner* sustained the total coverage of a loyalty oath requirement on the ground that membership in a group such as the Communist party might be viewed as likely to affect the individual's performance in all government positions, "both high and low."[177] Unfortunately, the Court's opinion concentrated primarily on other issues and offered little explanation of its conclusion on this point.[178] The opinion does suggest that the Court viewed

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173 See Aptheker v. Secretary of State, 378 U.S. 500, 510 (1964); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957); see also Sweezy v. New Hampshire, 354 U.S. 234, 247–48 (1957).

174 344 U.S. at 190–91; see also *id.* at 194–97 (concurring opinion). Although the Court did not specifically mention the possible impact upon the public image of government service, the opinion clearly recognized the community attitude about persons discharged on loyalty grounds and emphasized that there was no state interest that justified imposing that burden on the "innocent" member. *Id.* at 191.

175 *Cf.* NEWSWEEK, *supra* note 2 (improper sexual activities); Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965).

176 341 U.S. at 724.

177 *Id.* at 720.

178 The Court devoted only two paragraphs to this issue, the first dealing primarily with the state's power to require that employees disclose by affidavit any past membership in the Communist party: "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into

the individual's willingness to support illegal overthrow of the government as a reasonable indication of a general lack of "integrity." It also has been suggested that members of such organizations tend to be inefficient and easily disgruntled employees because of their strong opposition to the government for which they work.[179] Additionally, their intense psychological involvement in the organization's "cause" allegedly makes them less able to devote their full efforts to their work.[180] All these points have relevance, however, only to the person who is deeply involved with the organization's purpose. Although there are obviously some hard core members ("cadres") of whom it may be true,[181] certainly membership with knowledge of the organization's illegal purpose would hardly indicate in itself that the individual falls in that category.[182] Accordingly, even if the Court gave full recognition to this argument, it could still reject a loyalty requirement applicable to all knowing members of an organization advocating overthrow irrespective of their purpose in joining the organization or their degree of participation in the organization's activities.[183]

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in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid.

"2. In our view the validity of the oath turns upon the nature of the Charter amendment (1941) and the relation of the ordinance (1948) to this amendment.... We assume that under the Federal Constitution the Charter amendment is valid to the extent that it bars from the city's public service persons who, subsequent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so. The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende* v. *Board of Supervisors of Elections*, 341 U.S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers* v. *Mitchell*, 330 U.S. 75, 102–103 (1947), and a State is not without power to do as much." 341 U.S. at 720–21.

179 BROWN, *op. cit. supra* note 5, at 336–37; ALMOND, THE APPEALS OF COMMUNISM 103, 260–62 (1954).

180 BROWN, *op. cit. supra* note 5, at 337; ALMOND, *op. cit. supra* note 179, at 258–59.

181 MEYER, THE MOULDING OF COMMUNISTS 132–52, 161–65 (1961); ALMOND, *op. cit. supra* note 179, at 232–33.

182 SELZNICK, *op. cit. supra* note 162, at 83–85; MEYER, *op. cit. supra* note 181, at 105–31.

183 In *Garner*, the total coverage of the Los Angeles oath was emphasized only in the ACLU brief as amicus curiae, p. 8. Respondent's reply simply brushed over

The Court's rejection of the state's interest in insuring employee fitness thus could have been based, in large part, upon the total coverage of the Arizona oath. Yet, although Mr. Justice Douglas does not in any sense reject this as the ground for decision, it seems likely that the *Elfbrandt* decision was intended to have a much greater reach. While the opinion does note that the Arizona statute applies to all employees, it places no emphasis on this factor.[184] On the other hand, the point on which Mr. Justice Douglas placed the greatest stress, the denial of employment to members lacking "specific intent," would seem to have significance no matter what the coverage of the statute. Thus, although it is far from clear, the opinion indicates that the Court would have reached the same conclusion had the Arizona oath been limited to employees, such as teachers, whose jobs were clearly capable of being manipulated to serve the interests of an organization advocating violent overthrow. If that is true, the Court's ruling is of considerably more significance, from a doctrinal as well as a practical viewpoint.

On a test oath limited to employees with discretionary authority, the state's argument for the exclusion of all knowing members of an organization advocating violent overthrow would rest essentially on the recognized tendency of these organizations to "promote" the "misuse" of such authority. As the Court at one time recognized in a related context, even members of such organizations who have no interest in promoting the overthrow of the government may be induced to misuse public power to achieve organizational objectives.[185] Thus, it has been suggested that teachers belonging to the Communist party will use their classes to advance the party line, not because they necessarily believe in overthrow, but because they be-

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this objection as an administrative matter on which the state's judgment must be respected. Respondent's brief, p. 66. Other than this the briefs concentrated almost entirely on the bill of attainder argument. Very little attention was given to the membership clause, and there was no mention of the absence of a requirement of specific intent to support the organization's illegal objective.

[184] 384 U.S. at 12. The Court mentioned the total coverage only in the general description of the facts of the case.

[185] See American Communications Ass'n v. Douds, 339 U.S. 382, 387–89 (1950). The Taft-Hartley provision sustained in *Douds* extended to all members of the Communist party, irrespective of the individual's attitude toward its illegal objectives. Of course, *Douds* has been undercut to a great extent by United States v. Brown, 381 U.S. 437 (1965), and though *Brown* rejects the *Douds* analysis primarily on other points, the opinion there suggests that the Court also would reject this aspect of the *Douds* reasoning. See *id.* at 455–56.

lieve in the legal objectives of the party and because the party strongly urges its members to engage in this activity as a means of achieving those objectives.[186] The statute in *Elfbrandt* was not, of course, limited in application to the Communist party, but the manipulation of public offices in the manner previously described would be an essential ingredient of the program of any organization that hoped to overthrow the government. In sum, the argument would be that even members who do not subscribe to the organization's illegal ends pose a danger because (1) the organization imposes great pressure on its members to build group strength through the employee's manipulation of discretionary authority, and (2) the nature of the manipulation is sufficiently related to the group's legal objectives to encourage participation by members who favor only those objectives. The first factor, the constant stress on manipulation, also serves to distinguish the state's regulation here from the possibly unconstitutional denial of employment to members of other groups that might profit by manipulation of public power. Thus, it provides the answer to the argument that the exclusion of Communist teachers logically would also permit the exclusion of Catholic clergy teaching in public schools because they too engaged in classroom indoctrination.[187] Although members of some other groups may occasionally misuse their public position to aid the group, only organizations advocating overthrow have actively promoted such activity, as logically they must if they are to achieve their basic goal.[188]

The opinion in *Elfbrandt* does not clearly indicate whether the Court considered this argument or, if so, on what grounds it rejected it. Certainly, the majority's reliance on the prohibition against "guilt by association" would not be an adequate ground. The denial of employment to all knowing members does not rest on a "conclusive presumption that the member shares the unlawful aims of the organization,"[189] but rather on the potential danger presented

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[186] See generally HOOK, *op. cit. supra* note 164, at 181–86; BROWN, *op. cit. supra* note 5, at 340–41.

[187] See Zeller v. Huff, 236 P.2d 949 (N.M. 1951); see also HOOK, *op. cit. supra* note 164, at 219–20.

[188] HOOK, *op. cit. supra* note 164, at 219–20; see also SELZNICK, *op. cit. supra* note 162, at 221–24.

[189] 384 U.S. at 17.

by the member even when he does not share these aims. In fact, the Court's reliance on this argument might well indicate that it did not appreciate the state's position in this regard.

On the other hand, the Court relied heavily on *Aptheker v. Secretary of State*,[190] which does provide an adequate basis for rejecting the state's argument. In *Aptheker* the Court held unconstitutional a section of the Securities Activities Control Act that made it a crime for any member of an organization found to be a "communist organization" to seek a United States passport.[191] The congressional purpose in enacting this provision had been to prevent travel abroad that could further the organization's relationship with the "world Communist movement" through the exchange of secret communiqués, the training of local leaders, and similar activities.[192] The Court majority there, including four members of the *Elfbrandt* majority,[193] held the statute unconstitutional because, as in *Elfbrandt*, the legislature had sought to achieve its objective "by means that sweep unnecessarily broadly and thereby invade the area of protected freedom."[194] The unnecessary breadth came from Congress' failure to take into consideration several factors that were considered relevant to "the likelihood that travel by such a person would be attended by the type of activity which Congress sought to control."[195] The Court particularly emphasized that the statute automatically denied the member's right to travel without regard to his knowledge of the organization's improper purpose, "his commitment to its purpose," "his degree of activity in the organization," his "purposes" for wishing to travel, and "the security-sensitivity of the areas in which he wishes to travel."[196]

Despite certain differences, a strong analogy can be drawn between *Aptheker* and *Elfbrandt*. Although the holding in *Aptheker* was framed in terms of the Fifth Amendment right to travel,[197] various references in the opinion indicate that the decision was

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[190] 378 U.S. 500 (1964).

[191] 64 Stat. 993, 50 U.S.C. § 785 (1964).

[192] 378 U.S. at 526–27 (dissenting opinion).

[193] The Chief Justice and Justices Black, Douglas, and Brennan. Mr. Justice Fortas, the fifth member of the *Elfbrandt* majority, was not then a member of the Court.

[194] 378 U.S. at 508, quoting from N.A.A.C.P. v. Alabama, 377 U.S. 288, 307 (1964).

[195] 378 U.S. at 510. [196] *Id.* at 510, 512. [197] *Id.* at 505–07, 514, 517.

grounded on the restriction upon free association. The Court relied in large part on First Amendment cases,[198] and specifically analogized the restrictions on the issuance of passports to loyalty restrictions on government employment.[199] Also, although the legislation extended to "Communist front" organizations and therefore included groups in which a large majority of members were unlikely to be aligned with the "world Communist movement,"[200] the Court's opinion did not refer to this fact, and it made no effort to distinguish between members of "Communist front" and "Communist action" organizations. Thus, despite Mr. Justice White's objection that "*Aptheker* did not deal with the government employee,"[201] the ruling in *Aptheker* clearly was entitled to significant consideration in determining the validity of an employment test imposing a similar type of restriction upon the individual's right of association.

Mr. Justice White also distinguished *Aptheker* on the ground that the statute involved there applied to members who were unaware of the organization's ties to the "world Communist movement."[202] The *Aptheker* opinion indicates, however, that the addition of this element of knowledge would not have altered the result in that case. The opinion placed great stress on the legislature's failure to consider the individual's "activity, commitment, and purpose in the places for travel."[203] Perhaps, the Court's reliance upon one of these factors, the member's commitment to the organization's purposes, could be distinguished in the situation presented by *Elfbrandt*. Unlike the prospect of manipulation of public office, the activities that Congress sought to inhibit in the passport legislation

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198 See, *e.g.*, *id.* at 517, 525; see also Note, 78 HARV. L. REV. 143, 195–99 (1964).

199 378 U.S. at 508, 510, 513–14.

200 Communist front organizations are those (1) "substantially directed, dominated, or controlled by a Communist action organization," and (2) "primarily operated for the purpose of giving aid and support to a Communist-action organization . . . or the world Communist movement." 64 Stat. 989, 50 U.S.C. § 785 (1964). See American Committee for the Protection of the Foreign Born v. S.A.C.B., 331 F.2d 63 (D.C. Cir. 1962), *vacated*, 380 U.S. 503, 505 (1965).

201 384 U.S. at 22.

202 *Ibid.*

203 *Id.* at 514. "In addition to the absence of criteria linking the bare fact of membership to the individual's knowledge, activity or commitment, § 6 also excludes other considerations which might more closely relate the denial of passports to the stated purpose of the legislation." *Id.* at 511.

would be undertaken only by members who shared the organization's goal of promoting the "world Communist movement." But the stress that *Aptheker* places on the other factors of activity and purpose of travel, especially when viewed in the light of the administrative burdens involved in considering those factors,[204] suggests a general policy, equally applicable to *Elfbrandt*, against the use of knowing membership as an indicator of an individual's tendency to act improperly on behalf of an organization. Surely, if this policy required legislative consideration of so many factors beyond the element of scienter in *Aptheker*, it could easily make similar demands of Arizona.

Reliance upon *Aptheker* becomes more difficult, however, if *Elfbrandt* is viewed as establishing a standard that would be applicable to a loyalty oath requirement limited to employees with discretionary authority. Although the *Aptheker* Court stated that several factors were relevant to the congressional purpose in restricting travel, it did not state that a legislative standard necessarily must include every one of these factors. In fact, it clearly avoided this conclusion when it stated that there was no need to consider the constitutionality of the passport regulation as applied to the petitioners—both very active high officials of the party—because the petitioners could, in any event, attack the legislation on its face.[205] Certainly the opinion left open the possibility that Congress might condition the issuance of passports on most of the factors mentioned, yet exclude others as not equally significant. Thus,

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[204] The Court did not mention the obvious administrative difficulties involved in considering all of these factors. The reference to the federal employees loyalty program, however, apparently constituted its answer to this problem. Whether the problems could be handled by an administrative program is uncertain. Could an administrative hearing determine, for example, whether Aptheker's purpose was *merely* to travel and lecture abroad, to visit the Bodleian library, etc.? In any event, the increase in administrative burden would obviously be great. But this factor was not cousidered worthy of discussion.

[205] See, *e.g.*, 378 U.S. at 514–17. One of the major questions presented in *Aptheker* was whether the Court should consider the lack of statutory recognition of such elements as scienter and active membership when the petitioners themselves clearly met those requirements. This question would have been irrelevant if, for example, the "purposes and places of travel" were factors that the legislature had to take into consideration. If that were the case, the statute would clearly be unconstitutional even as it related to the petitioners. The Court, however, did not rule on the statute as it applied to the active member, but held that the petitioners had standing to attack the validity of the statute "on its face." *Id.* at 515.

it might provide that all knowing members of "communist organizations," would be denied passports to visit the U.S.S.R. or the "satellite" countries except in connnection with very limited purposes. Whether the Court would reject this provision because it was not also limited to active members committed to the organization's illicit purposes is not settled by *Aptheker*. The validity of a loyalty oath based on knowing membership, but limited in application to a specific group, such as teachers, would present a roughly similar question. If *Elfbrandt* was intended to control in this situation, then it clearly has proceeded, albeit without discussion, beyond the position taken in *Aptheker*. This is not to suggest that the general tenor of the opinion in *Aptheker* might not furnish some support for such an extension. Certainly the basic thrust of Mr. Justice Goldberg's opinion in *Aptheker* might be viewed as indicating that legislation characterizing individuals according to membership will be accepted only when the class of members is so sharply limited by consideration of all relevant facts that the tendency ascribed to the group is shown to be an almost uniform characteristic of each member.[206] Under this premise, of course, *Elfbrandt's* requirement of "specific intent" is easily sustainable without regard to the limited nature of the positions covered by the oath requirement.

This view of *Aptheker* wonld also lend support to the suggestion in *Elfbrandt* that an appropriate loyalty oath would require that the excluded individual be an "active" member of the organization. Requiring this additional element would mean, in effect, that the constitutional limits imposed upon an indirect restraint aimed at preventing improper manipulation of public office would be identical, in the end, with the constitutional limits presently imposed under *Scales* on direct restraints on association.[207] Actually, as previously noted, the *Elfbrandt* opinion at one point suggests that the constitutional restrictions on the loyalty oath standard might be taken one step further to require membership with "specific intent"

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[206] Acceptance of this view of *Aptheker* might place the legislature on the horns of a dilemma, since legislation limited to such a specific class could present difficulties under the newly expanded concept of "bills of attainder" as presented in United States v. Brown, 381 U.S. 437 (1965). See also note 58 *supra*.

[207] See Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 267 U.S. 290 (1961).

plus past participation in the organization's unlawful activities. This proposal reflects the views of Justices Black and Douglas that "government can concern itself only with the actions of men, not with their opinions or beliefs."[208] If this position were applied literally to government employment, the Court would probably be forced to overrule all the cases cited in the *Elfbrandt* dissent, including the *Gerende* decision in which Justices Black and Douglas joined.[209] Moreover, the standard suggested would obviously extend beyond the security area and raise a serious question of the validity of common employment criteria, *e.g.*, personality profiles that are based in large part upon the individual's general attitudes and viewpoints.[210] It seems unlikely that the single reference in *Elfbrandt* to the individual's past participation in illegal action reflected the willingness of the majority as a whole to take this step. Chief Justice Warren and Mr. Justice Brennan, in particular, have carefully avoided joining those Black and Douglas dissents that suggest such a position.[211] The reference in *Elfbrandt* may reflect a possible change of heart on their part, but similar language found in Mr. Justice Black's opinion in *Schware* turned out to have little consequence.[212]

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208 Beilan v. Board of Education, 357 U.S. 399, 412, 415 (1958) (Black and Douglas, JJ., dissenting); see also Speiser v. Randall, 357 U.S. 513, 535–36 (1958) (same). But *cf.* DOUGLAS, *op. cit. supra* note 89, at 118–19.

Justices Douglas and Black have on several occasions argued that participation in the organization's illegal activities should be a prerequisite for employment disqualification. See, *e.g.*, Killian v. United States, 368 U.S. 231, 258 (1961); Beilan v. Board of Education, 357 U.S. at 412–16; Adler v. Board of Education, 342 U.S. at 511. Mr. Justice Douglas also has suggested that such activity is a constitutional prerequisite for the deportation of aliens. See Carlson v. Landon, 342 U.S. 524, 568–69 (1952) (dissenting opinion).

209 But see DOUGLAS, *op. cit. supra* note 89, at 130.

210 See generally, Mirel, *The Limits of Governmental Inquiry into the Private Lives of Government Employees*, 46 B.U. L. REV. 1 (1966); Creech, *Psychological Testing and Constitutional Rights*, [1966] DUKE L.J. 332.

211 See, *e.g.*, Beilan v. Board of Education, 357 U.S. 399, 411, 417 (1958) (dissenting opinions); Speiser v. Randall, 357 U.S. 513 (1958). Mr. Justice Brennan has been particularly consistent in this regard. See, *e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 80 (1961); Wilkinson v. United States, 365 U.S. 399, 429 (1961); Braden v. United States, 365 U.S. 431, 446 (1961); Barenblatt v. United States, 360 U.S. 109, 166 (1959).

212 Schware v. Board of Bar Examiners, 353 U.S. 232, 245–46 (1957); Konigsberg v. State Bar, 353 U.S. 252, 267 (1957).

VII. The State's Interest in Protecting Internal Security

The Court's ruling in *Elfbrandt* also constituted a rejection of the state's interest in preserving internal security as a justification for the Arizona oath. The problems presented by this aspect of the Court's decision are basically the same as those discussed in connection with the rejection of the state interest in insuring employee reliability. Here also, the significance of the decision depends in large part on how the Court viewed the state's interest as presented in *Elfbrandt.*

The Court has asserted that the state's interest in guarding against acts injurious to internal security, such as sabotage, espionage, or the unintentional release of confidential information, will be given substantial weight in justifying indirect restrictions upon speech.[213] The difficulty in *Elfbrandt,* once again, was that Arizona's oath requirement applied to all state employees. The decision in *Cole v. Young,*[214] although not based on constitutional grounds, certainly indicates that little, if any, weight will be given to the state's alleged interest in preserving internal security where no effort has been made to separate the sensitive from the non-sensitive position. The Court in *Cole* held that a federal statute authorizing summary discharge of employees "in the interest of national security"[215] could not properly be applied to all government positions. The dissent had argued that total coverage was necessary because "one never knows just which job is sensitive."[216] The majority concluded, however, that the task of distinguishing between jobs on the basis of task, access to information, and similar factors was not so difficult as to suppose that Congress meant to include all federal positions under an extraordinary procedure that denied the employee the normal safeguards of civil service procedures. Certainly, with First Amendment rights involved, the Court would expect the states to be equally capable of distinguishing between positions. Accordingly, insofar as the state's interest in protecting against subversion is concerned, a loyalty restriction encompassing all state employees might easily be characterized as using "means that broadly stifle

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213 See, *e.g.,* Communist Party v. S.A.C.B., 367 U.S. 1, 93–96 (1961); Barenblatt v. United States, 360 U.S. 109, 127–29 (1959).

214 351 U.S. 536 (1956).

215 64 Stat. 476, 5 U.S.C. § 22 (1964).

216 351 U.S. at 569.

fundamental personal liberties when the end can be more narrowly achieved."

As previously noted, however, there is little to indicate that the Court in fact based its decision on the total coverage of the Arizona oath requirement. On the other hand, as Mr. Justice White emphasized in his dissent, the majority opinion nowhere "expressly holds that a state must retain, even in its most sensitive positions, those who lend such support as knowing membership entails to those organizations, such as the Communist party, whose purposes include the violent destruction of democratic government."[217] The nature of the test oath is such, however, that it is unlikely to be used as a primary security device for the "most sensitive position," nor, for that matter, is the state government likely to have many such positions.[218] Nevertheless, a loyalty requirement of the type employed in *Elfbrandt* might well be imposed for a limited group of persons, such as state civil defense workers, police officers, and others who would occupy particularly important positions in time of emergency.[219] As limited to such positions, a state could defend a standard excluding all knowing members of organizations urging violent overthrow on at least two grounds that have considerable support in practice under state and federal security programs.

First, the state might argue that the importance of its interest in safeguarding against potential subversion justifies exclusion of all knowing members as the most effective administrative means of insuring complete exclusion of these knowing members who do

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[217] 384 U.S. at 20.

[218] Loyalty oaths are usually required of general classes of employees, *e.g.*, all teachers and civil defense workers. Those state employees who have access to classified information will usually constitute only a small group of upper-level officials within a department, *e.g.*, senior officers within the state militia. These people will often be subject to federal clearance, and the state is unlikely to single them out as the subjects for a special loyalty oath.

[219] See generally BROWN, *op. cit. supra* note 5, at 92–109, 235–53, 470–71. Various states presently require civil defense workers to take an oath patterned after the federal civil defense oath. 64 Stat. 1256, 50 U.S.C. § 2255 (1964). See, *e.g.*, CONN. REV. STAT. § 28-12 (1965 Supp.); ILL. ANN. ST., ch. 127, § 286 (1966 Supp.); MISS REV. STAT. 38610-18 (1964). A 1965 compilation of state statutes listed thirty states with special civil defense oaths. FUND FOR THE REPUBLIC, DIGEST OF THE PUBLIC RECORD OF COMMUNISM 347–82 (1955). Although these oaths vary in context, they all require a denial of membership in any group that advocates the overthrow of the government.

share the organization's illegal objectives.[220] The effectiveness of a provision like § 5 of the Arizona statute depends upon the deterrence potential of possible criminal prosecution for improperly subscribing to the state loyalty oath. Yet, while most knowing members arguably do support the organization's illegal objectives, proof of "specific intent" as it relates to a particular individual may often be very difficult.[221] Accordingly, to make the loyalty requirement an effective device, the state must be given administrative leeway to encompass an area of membership somewhat larger than that which is the direct source of the supposed evil. Admittedly, administrative leeway of this sort is not ordinarily accorded in areas affecting free association, but here, where the statute is appropriately limited to sensitive positions, the impact of the restriction on association is also limited and the state's need is greater. Any indication in previous cases that only knowing members may be automatically excluded even from sensitive positions in no way constitutes a rejection of this position.[222] Failure to require that the member at least be aware of the organization's illegal goals would vastly increase the area of associational freedom that would be subject to restraint. Moreover, the element of knowledge, so the argument goes, is not nearly so difficult to prove as that of specific intent to further the organization's illegal purposes.[223]

The state may also argue that the exclusion of all knowing members is justified because even the knowing member who does not share the organization's objective of violent overthrow may present a threat to internal security. As the Court has recognized on several occasions, security requirements for sensitive positions extend far beyond the individual's loyalty to his government.[224] A person who does not favor violent overthrow of the government but nevertheless joins an organization supporting that objective, either does not

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220 See BROWN, *op. cit. supra* note 5, at 235–43, 265.

221 See Noto v. United States, 367 U.S. 290 (1961).

222 *E.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952). *Wieman,* of course, involved an oath required of all state employees and could be distinguished on that ground. See Willcox, *supra* note 129, at 12, 50 n. 158.

223 See Killian v. United States, 368 U.S. 231, 244–58 (1961). See also HOOK, *op. cit. supra* note 164, at 89; GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENT RESTRAINTS 135 (1956).

224 See, *e.g.*, Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 898–99 (1961); Lerner v. Casey, 357 U.S. 468, 478 (1958); Cole v. Young, 351 U.S. 536 (1956).

consider that organization a serious threat or considers the achievement of other values more important than possibly increasing the risk of overthrow. In either case, the individual indicates a lack of appropriate concern for security measures.[225] Similarly, it might also be argued that anyone who associates with potential subversives necessarily puts himself in a position where he becomes a more likely subject of coercive pressure to join a subversive activity.[226] While both these arguments have an Orwellian air about them, the state could cite experience under the federal loyal security program to support their use in the case of employees who occupy sensitive jobs.[227]

Assuming the Court in *Elfbrandt* meant to reject all arguments of this type, the basis for its conclusion, at least as indicated by the majority opinion, again would rest primarily on *Aptheker*. The *Aptheker* decision seems to be relevant here in much the same sense as it would be in the situation where the state seeks to insure against possible misuse of public office by excluding knowing members from positions carrying considerable discretionary authority.[228] The difference in the nature of the interest in safeguarding against subversion is not likely to be controlling. *Aptheker*, after all, was itself presented to the Court as a case involving national security.[229] An argument could be made that the state's security interest is so greatly sharpened when only sensitive positions are involved that a policy announced in connection with the general restriction on travel voided in *Aptheker*, even if equally applicable to more limited restrictions concerning other state interests, would not be applicable here. Both past decisions and *Elfbrandt* itself suggest, however, that the *Elfbrandt* majority would not be receptive to such an argument, if for no other reason than that they wonld refuse to attach any special significance to the state interest in safeguarding against subversion by such groups as the police or civil defense workers.

The Chief Justice, and Justices Black, Douglas, and Brennan

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225 *Cf.* ATOMIC ENERGY COMMISSION, IN THE MATTER OF J. ROBERT OPPENHEIMER (1954). See HOOK, *op. cit. supra* note 164, at 225.

226 See BROWN, *op. cit. supra* note 5, at 254–61, 272; SELZNICK, *op. cit. supra* note 162, at 70–72.

227 See BROWN, *op. cit. supra* note 5, at 37, 254–79.

228 See text at notes 204–07 *supra*.

229 378 U.S. at 509.

all have indicated that they draw an important distinction between government positions classified as "sensitive" because of special access to confidential information and those placed in that category simply because of their potential significance during a period of national emergency. In fact, for Justices Black and Douglas, the state's interest in protecting against subversion by employees in the latter situation will rank no higher than its interest generally in preventing other types of misuse of position. Thus, in *Lerner v. Casey*,[230] Mr. Justice Douglas' dissent, joined by Mr. Justice Black, clearly gave no special weight to the fact that the employee, a New York subway conductor, was classified as working in a "sensitive" position under the New York Risk Law. Mr. Justice Douglas treated the question of the state's power to discharge the conductor on the basis of his speech or association as no different from its power to discharge the teacher involved in a companion case from Pennsylvania.[231] In response to the state's argument that the conductor's access to an important transportation facility placed him in an especially sensitive position, Mr. Justice Douglas quoted a lower court opinion noting that vast numbers of persons throughout the economy had access to prime sites for sabotage, that the imposition of restrictive security regulations on all such persons would be constitutionally impermissible, and therefore "in the event of war" we may just have to take our chances with the possibility of "Black Tom explosions on every waterfront, poison in our water systems, and sand in all important industrial machines."[232] Mr. Justice Douglas has recognized, on the other hand, that special considerations may require more flexibility in permitting the discharge of persons who have access to classified information or restricted locations.[233] Mr. Justice Brennan, along with the Chief Justice, also

230 357 U.S. 468 (1958).

231 357 U.S. at 415–16.

232 *Id.* at 416–17, quoting Judge Pope in Parker v. Lester, 227 F.2d 708, 721 (9th Cir. 1955). See also Black v. Cutter Laboratories, 351 U.S. 292, 300, 303–04 (1956) (dissenting opinion).

233 See DOUGLAS, THE RIGHT TO BE LET ALONE 118, 121 (1958). Although recognizing the importance of the security interest in this situation, Mr. Justice Douglas still opposes any type of administrative program that might involve "labeling." He would prefer that the executive in charge have absolute discretion to discharge men and women in "sensitive jobs for good reasons or for no reasons at all." *Id.* at 121. Exactly what would happen to the normal civil service protection of employees in this category is not stated, but the loss of that safeguard is apparently deemed to be the lesser of two evils.

has recognized this distinction, although it is not clear that they would go quite so far as Mr. Justice Douglas in their treatment of the fact that a particular government position provides the potential to cause substantial harm in an emergency situation.[234] While the remainder of the Court has not spoken to this point, it seems likely that at least Mr. Justice Fortas, who was in the majority in *Elfbrandt*, would also be reluctant to attach any substantial weight to the state's interest in preventing subversion as it related to jobs with particular security significance only under the "remote risk of a mass breakdown."[235]

VIII. The Practical Significance of Elfbrandt and the Future of Loyalty Oaths

In terms of the legal limits upon loyalty oaths, the ultimate significance of *Elfbrandt* will depend upon how the Court answers various questions left unanswered by Mr. Justice Douglas' opinion: whether the *Garner* case has been overruled; whether the Court has rejected the state's interest in denying support to "disloyal" persons as an appropriate basis for a test oath; whether the addition of an element of "specific intent to further the illegal aims of the organization" would be required in an oath limited in application to employees in positions that could easily be manipulated to serve organizational ends; whether the same would be true of an oath applicable only to employees in positions classified as "sensitive" from the standpoint of protecting internal security; and, finally, whether, wherever the specific intent element must be added, the Court will also insist upon a requirement of active participation in the organization's affairs, or even participation in illegal activities. On the other hand, in terms of its practical significance, the impact of *Elfbrandt* will be much the same whether these questions are answered in one way or in another.

Obviously, many oaths, no matter what view of *Elfbrandt* is taken, will survive litigation, at least temporarily. State courts, taking a page from the *Scales* case,[236] may "read into" the mem-

234 Lerner v. Casey, 357 U.S. 468, 417, 421–22 (1958).

235 Brown, *op. cit. supra* note 5, at 248.

236 367 U.S. 203 (1961). The Court there interpreted the Smith Act membership clause to require both "active" membership and "specific intent" to support violent overthrow, although neither element was mentioned in the statute. State courts have followed this pattern in the past with respect to the element of scienter. See Adler v. Board of Education, 342 U.S. 485, 494 n. 8 (1952).

bership clause of state oaths the requirements of specific intent and perhaps even active membership. In other instances, while the membership clause may be held unconstitutional, the state court will retain as properly severable that clause dealing with the individual's own advocacy of overthrow.[237] Even where the entire oath is voided, the likelihood is that the legislature will swiftly re-enact it in appropriately modified form. For the combination of cold war exasperation, fear, and chauvinism that produces community support for loyalty tests apparently is still present in most parts of the country. While Congress was repealing the loyalty affidavit requirements of the Defense Education Act and Economic Opportunity Act,[238] it was adopting a new loyalty requirement in the Medicare Act,[239] and the Office of Economic Opportunity was adding still another loyalty requirement for antipoverty workers.[240] Similarly, on the state level, organized efforts to gain legislative repeal of oaths have been noticeably unsuccessful.[241]

It is equally clear that the ardent opposition to the oaths will be only slightly mollified, if at all, by the addition to the oaths of such requirements as the member's "specific intent" to support the organization's illegal objectives. In the past that opposition has gone primarily to the basic concept of the loyalty oath, rather than to the specific standards employed in the oaths.[242] Resentment of individuals at being singled out as government employees or teachers to swear to such oaths will remain.[243] As for those employees whose associations might have been determined in part by the fear of a possible prosecution or loss of job, the addition of the elements of "specific intent" and "active membership" is unlikely to provide great comfort—especially when the Court itself warns that both prosecutors and juries are only "human" and may therefore have a

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237 *Cf.* Cramp v. Board of Public Instruction, 137 So. 2d 828 (Fla. 1962).

238 76 Stat. 1070 (1962); 79 Stat. 973 (1961). See N.Y. Times, Oct. 12, 1962, p. 13, col. 3; N.Y. Times, Oct. 18, 1962, p. 1, col. 2.

239 79 Stat. 333, 42 U.S.C. § 427 (note). See note 160 *supra*. This requirement has been implemented by the use of an oath.

240 ACLU, Feature Press Service Bulletin, § 2265, May 9, 1966.

241 See note 4 *supra*.

242 See Byse, *A Report on the Pennsylvania Loyalty Act*, 101 U. PA. L. REV. 480, 486 (1953).

243 See N.Y. Times, March 11, 1966, p. 9, cols. 3, 4.

tendency to "label as Communist [any] ideas which they oppose."[244]

In light of these facts, it is not surprising that current legal attacks against loyalty oaths frequently are concentrated not on standards used in the oaths, but on the alleged invalidity of any and all loyalty oaths, no matter what standards they employ.[245] The main argument being advanced is that, assuming the state may utilize some form of loyalty test based upon certain classes of speech and association to serve the legitimate interests of protecting internal security and insuring employee reliability, the loyalty oath is invalid because it is a totally inappropriate means of serving those interests. Thus, the petitioner in *Elfbrandt* based his argument in part on the alleged ineffectiveness of loyalty oaths in keeping undesirable persons out of government employment.[246] In support of this position, petitioner cited several commentators who have noted that oaths have been most ineffective in disclosing potential subversives.[247] The only employees who have objected to newly imposed oaths have been those with conscientious objections to the oath. On the other hand, "the really dangerous 'Reds,' the unidentified plotters, are unlikely to stickle at taking the oaths."[248] Mr. Justice Douglas took a similar extrajudicial view of the loyalty oath.[249] And the *Elfbrandt* opinion quotes an Arizona legislative report that notes the ineffectiveness of oaths against "the Communist trained in fraud and perjury."[250] The report appears to have been used to make another point,[251] however, and it seems unlikely that the Court as a whole would be willing to base its judgment in any large degree upon the alleged ineffectiveness of the

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244 384 U.S. at 16–17. See also Adler v. Board of Education, 342 U.S. 485, 509 (1952).

245 See note 4 *supra*.

246 Brief for Petitioner, 6, 27–28.

247 *Id.* at 28, citing Horowitz, *supra* note 93; Byse, *supra* note 242; Elson, *People, Government and Security*, 51 NW. U. L. REV. 83 (1956); O'Brian, *New Encroachments on Individual Freedom*, 66 HARV. L. REV. 1 (1952).

248 GELLHORN, *op. cit. supra* note 223, at 367–68, quoted in Byse, *supra* note 242, at 485.

249 DOUGLAS, *op. cit.*, *supra* note 89, at 135–36.

250 384 U.S. at 18, quoting from the report of the Arizona Judiciary Committee, Journal of the Senate, 1st Reg. Sess., 25th Legislature of Arizona 424 (1961).

251 The remainder of the quotation dealt with the impact of the oath upon public employees generally, and the report was cited to emphasize Mr. Justice Douglas' argument on that point. See 384 U.S. at 17–18.

oaths. Since the effectiveness of the oaths depends in large degree upon the fear of a possible prosecution for false swearing,[252] any attempt to evaluate its operation is necessarily speculative. Individuals who openly refuse to take the oath afford no basis for judgment.[253] The active member of an organization who might potentially misuse his office or even engage in subversion to assist the organization is not likely to announce that he is leaving government employment because he fears a possible criminal prosecution for false swearing. In the end, the effectiveness of the loyalty oath in forcing such persons out of government remains in large part a matter of conjecture.[254]

A more substantial argument supporting the rejection of all oaths could be based on the rationale of *Aptheker* and *Elfbrandt*, that the oath constitutes an unnecessarily restrictive means of accomplishing the state's objectives. First, it might be argued that the only legitimate objective of a loyalty oath is the exclusion of persons who might engage in undesirable conduct as an employee. This would require that the Court expand upon the theme of *Speiser* and find that the denial of employment for reasons unrelated to the employee's prospective performance in office constitutes punishment and cannot be imposed without the procedural guarantees afforded by the Sixth Amendment.[255] With this point established, it could be argued that the loyalty oath constituted an unnecessarily broad and rigid means of judging the employee's potential performance. The determination that an individual is likely to misuse his public position in order to aid a subversive organization or to engage in subversion cannot rest on the automatic application of any set criterion. Several factors, it could be argued, must be considered, and each is a variable that must be viewed in the light of the others. Even, for example, the individual's commitment to

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252 A substantial number of prosecutions for false swearing were brought on the basis of the Taft-Hartley loyalty oath sustained in American Communications Ass'n v. Douds, 339 U.S. 382 (1950). See 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 472 (1954). At least one criminal prosecution relating back to the Taft-Hartley oath is still pending. See Dennis v. United States, 384 U.S. 855 (1966).

253 On the other hand, it is relevant in determining the impact of the restriction on the free exercise of the right of association. See Byse, *supra* note 242, at 484–85.

254 See BROWN, *op. cit. supra* note 5, at 94–95.

255 See text at notes 138–52 *supra*.

the illegal goals of an organization and his active membership in the organization cannot be treated as sufficient. The state must also examine the nature of the position involved, the employee's past attitude toward his work, and the nature of the "subversive" organization to which he belongs. All of these are factors that must be considered and weighed on an individual basis. The oath is not sufficiently flexible to permit this and, as a result, may easily exclude a person who, upon consideration of all the relevant factors, would be found not to present a potential for either direct subversion or misuse of office. Accordingly, the argument would conclude, the loyalty oath constitutes a means of achieving a legitimate state end that "broadly stifle[s] fundamental personal rights when the end can be more narrowly achieved."[256]

Support for this argument could come from both *Aptheker* and *Elfbrandt* in so far as both cases suggest that multiple factors must be considered in administrating an employment standard related to speech or association. *Aptheker* also lends some support for the position that these factors cannot be weighted automatically by a loyalty oath. In striking down a statutory prohibition against the issuance of passports to members of "communist organizations," the Court in *Aptheker* specifically pointed to the Federal Employee Loyalty program as an analogous illustration of a "less drastic" means of achieving the congressional purpose of safeguarding national security.[257] The same federal program illustrates that here also the state's interests "can be adequately protected by means which, when compared with [the loyalty oath] are more discriminately tailored to the constitutional liberties of the individual."[258]

Although this position may indeed find a fair degree of support in *Aptheker* and *Elfbrandt*, its acceptance by the Court would be most unfortunate. It would iguore the fact that the rule prohibiting a state from using means that "broadly stifle fundamental rights when the end can be more narrowly achieved" represents a judicial, not a legislative, standard, and it is to be applied within the limits of the judicial function in reviewing legislation. As noted by Mr. Justice Frankfurter:[259]

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[256] Shelton v. Tucker, 362 U.S. 479, 488 (1961).

[257] 358 U.S. at 512–14.

[258] *Id.* at 514.

[259] 364 U.S. at 493–94.

> The consideration of feasible alternative modes of regulation . . . [does] not imply that the Court might substitute its own choice among alternatives for that of a state legislature or that the states . . . [are] to be restricted to the narrowest workable means of accomplishing an end. . . . The issue remains whether, in light of the particular kind of restriction upon individual liberty which a regulation entails, it is reasonable for a legislature to choose that form of regulation rather than others less restrictive. To that determination, the range of judgments easily open to a legislature in considering the relative degrees of efficiency of alternative means in achieving the end it seeks is pertinent.

The argument for total rejection of loyalty oaths simply fails to give weight to these pertinent factors. To suggest that the loyalty oath is unconstitutional because a loyalty program will provide less rigid standards and, therefore, will reach more appropriate results in an individual case is to ignore all considerations of cost, of administrative ease,[260] and perhaps even of the over-all impact on society in its exercise of associational rights. For one can easily argue that a loyalty program has a far greater restrictive impact on speech than does the loyalty oath. Admittedly, the program offers the individual a chance to explain his position, and therefore should produce a decision in which the individual would have more confidence. But loyalty programs also permit broad-ranging investigations of an individual's beliefs and background, involve considerably more delay and expense to the individual, and offer far greater opportunity for serious injury to his reputation.[261] In any event, irrespective of which type of regulation in fact constitutes a more serious deterrent to the exercise of individual rights, this hardly seems to be the type of judgment that the Court can adequately or appropriately make.

The relative merits or demerits of the loyalty oath and loyalty program point up the practical limits of a decision that would go so far as to find all loyalty oaths invalid. As noted, the public concern over security and loyalty matters still runs strong. The rejec-

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260 The costs of administration here are obviously far more substantial than in *Shelton*. See KALVEN, THE NEGRO AND THE FIRST AMENDMENT 103–05 (1965). See also Karst, *supra* note 125, at 15–18; BICKEL, THE LEAST DANGEROUS BRANCH 113–17 (1962).

261 See Adler v. Board of Education, 342 U.S. 485, 508 (1952) (dissenting opinion); Vitarelli v. Seaton, 359 U.S. 535, 540–45 (1959); BROWN, *op. cit. supra* note 5, at 21–61, 183–201, 235–83. But see Green, *Q-Clearance: The Development of a Personnel Security Program*, 20 BULL. ATOMIC SCIENTISTS 9 (1964).

tion of loyalty oaths might only produce a new series of loyalty programs. The Court has directly considered the constitutionality of a loyalty program only in *Adler*,[262] and even then it scrutinized only a part of the program. Nevertheless, the nature of the response by both majority and dissent to earlier cases involving the federal program indicates that with appropriate procedure and labels an administrative loyalty program limited in application to special groups of employees will be sustained.[263] Admittedly, administrative programs cost more to administer than loyalty oaths and consequently will not be used as extensively.[264] Yet it seems likely also that loyalty programs will be used in connection with those positions, such as public school teachers, where the programs can do the greatest damage to the spirit of free inquiry. In the end, looking to the impact on free association throughout the society, one must wonder which is the lesser evil. It must be recognized, however, that the loyalty oath and loyalty program can be, and sometimes are, cumulative and not alternative devices. In this light, a prohibition against oaths might well appeal to the Court as affording some diminution of the total restriction that may be imposed upon speech by loyalty measures.

IX. Conclusion: The Elfbrandt Opinion

At last, a few comments should be made concerning the *Elfbrandt* opinion, not as it reflects upon the future of loyalty oaths, but simply as it reflects on the art of opinion writing as practiced in the Supreme Court. If one were asked to pick that opinion in the 1966 Term that best lends support to the recent criticism of the Court's opinions,[265] there is no doubt that *Elfbrandt* would

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262 Adler v. Board of Education, 342 U.S. 485 (1952).

263 See Greene v. McElroy, 360 U.S. 474 (1959); Vitarelli v. Seaton, 359 U.S. 539 (1959); Peters v. Hobby, 349 U.S. 331 (1955). While Justices Black and Douglas have not hesitated in other cases to go beyond the procedural issue presented and find the entire state or federal program invalid, see, *e.g.*, Carlson v. Landon, 342 U.S. 524, 568 (1952); Lerner v. Casey, 357 U.S. 468, 512 (1958), they have not suggested here that the entire federal program is invalid. Mr. Justice Brennan and the Chief Justice clearly have been willing to assume that a program would be valid provided the proper procedures were followed and employees were not categorized as disloyal. See Beilan v. Board of Education, 357 U.S. 399, 417, 422 (1958).

264 The New York experience shows, however, that they are hardly so expensive as to be out of the state's reach. See also Horowitz, *supra* note 93.

265 See Shapiro, *supra* note 47, at 591 (collecting sources); Kurland, *supra* note 68, at 144–45.

rank at least among the quarter finalists. Certainly this is an opinion that ignores past precedent, that fails to define carefully the interests involved in the case, and that fails even to attempt to rebut the arguments of its opponents. Perhaps these features are a product of compromise among five Justices who could not agree, for example, on just how *Garner* should be handled and therefore decided that the best treatment was silence. Yet it seems likely from comparison with other opinions that *Elfbrandt* was less the product of compromise than the product of Mr. Justice Douglas' general approach to the writing of opinions. That approach, a reflection of what has been described as Mr. Justice "Douglas's relentless effort to simplify our understanding of the world,"[266] is rather nicely analyzed by Yosal Rogat as follows:[267]

> As presented by Justice Douglas, not a single case is hard enough to perplex a right thinking man; a case does not present a tangle of competing principles, but a single transcendent principle—for instance, free speech or religious freedom—which need only be identified for the solution to be plain. In this way, he avoids the task, so basic to legal analysis, of reconciling competing principles. Instead, he substitutes simple labels and lines. . . .

Obviously opinions of this type will hardly qualify Mr. Justice Douglas for membership in Holmes's Society of Jobbists,[268] a position to which Mr. Justice Douglas undoubtedly does not aspire.[269] Still, opinions like *Elfbrandt* seemingly also would leave a good deal to be desired for those who, like Mr. Justice Douglas, are interested in "results," not craftsmanship. Opinions that fail to resolve the competing issues, that ignore precedent and speak in generalities, are also opinions that are easy to distinguish. They provide stepping stones for moving backward or sideward as well as forward. Such opinions constitute "the law" for only so long as their author has the ready votes. To some degree this is always true, but Mr. Justice Douglas to the contrary notwithstanding, the weight of precedent does have a significant effect even in the area of constitutional law. To have such effect, however, an opinion should at least explore fully the issues before the Court and clearly and carefully resolve them.

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[266] Rogat, *supra* note 68, at p. 5, col. 1.

[267] *Id.* at p. 6, col. 2.

[268] Kurland, *supra* note 68, at 144–45.

[269] *Cf.* Brennan, *Charles Fahy*, 54 GEO. L. J. 1, 2 (1965).