

# “A SPECIAL CONCERN”: THE STORY OF *KEYISHIAN V. BOARD OF REGENTS*

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## INTRODUCTION

In the early morning of January 24, 1967, Harry Keyishian was awoken by a phone call to his home.<sup>1</sup> A friend who worked at the *New York Times* was ringing to tell him that the Supreme Court had sided with him and four colleagues against their employer, the State University of New York (SUNY) at Buffalo.<sup>2</sup> One of these colleagues, George Hochfield, saw the decision reported in that day’s paper and danced down the hall of his office building in jubilation.<sup>3</sup> The five SUNY professors had won constitutional backing for their refusal, three years earlier, to sign an anti-subversive loyalty oath required by New York state law.<sup>4</sup> The Court’s ruling ended years of stressful legal wrangling for the professors and, for Keyishian, an episode that had cost him his job teaching English at the upstate school.<sup>5</sup>

The Court’s decision in *Keyishian v. Board of Regents* did more than vindicate its plaintiffs.<sup>6</sup> It also fundamentally altered First Amendment law.<sup>7</sup> For much of the Cold War, educators on the public payroll had been

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1. *In Search Of The Constitution: For the People* (PBS video 1989).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. 385 U.S. 589 (1967).
7. *Id.*

subject to loyalty oaths and background checks.<sup>8</sup> These programs focused particularly on excluding members of “subversive” organizations such as the Communist Party.<sup>9</sup> In a 1952 decision, *Adler v. Board of Education*, the Supreme Court laid down two doctrines that provided such efforts with constitutional legitimacy.<sup>10</sup> First, it stated generally that government could condition employment (or other “privileges”) on cessions of First Amendment freedoms it could not require of a private citizen, an idea known as the “right-privilege” distinction.<sup>11</sup> Second, it identified the academy—charged with educating captive and vulnerable young minds—as a place especially deserving of ideological scrutiny.<sup>12</sup>

*Keyishian* negated both of these doctrines.<sup>13</sup> Justice Brennan’s majority opinion forbade the government from requiring public employees to give up First Amendment freedoms that they would otherwise enjoy as private citizens.<sup>14</sup> And it spoke of academic freedom as a “special concern” of the First Amendment.<sup>15</sup> With this phrase, he overrode *Adler*’s concern with the vulnerability of students’ minds and required that educators receive the same First Amendment protections offered to all government employees.<sup>16</sup>

The establishment of these two doctrines capped a decade and a half of legal challenges to the *Adler* precedent—efforts in which educators such as the SUNY Buffalo professors had been especially active.<sup>17</sup> It also pulled

8. By 1956, twenty-four states and two U.S. territories mandated loyalty oaths of all public employees. RALPH S. BROWN, JR., *LOYALTY AND SECURITY* 93 (1958). These oaths are distinct, as Brown points out, from “constitutional oaths” that simply pledge allegiance to the United States and its Constitution. *Id.* For teachers, the numbers rose even higher. Thirty-two states, as well as the District of Columbia, imposed some kind of loyalty requirement. William B. Prendergast, *State Legislatures and Communism: The Current Scene*, 44 *AM. POL. SCI. REV.* 556 (1950); Alan M. Sager, *The Impact of Supreme Court Loyalty Oath Decisions*, 22 *AM. U. L. REV.* 39 (1972–73).

9. For an examination of the application and abuses of one such program employed by the Federal government, see Thomas Emerson & David Helfeld, *Loyalty Among Government Employees*, 58 *YALE L.J.* 6 (1948).

10. 342 U.S. 485, 492–93 (1952).

11. *Id.* at 492. It was first enunciated by Oliver Wendell Holmes when he served as a justice on the Massachusetts Supreme Court. See *McAuliffe v. City of New Bedford*, 29 N.E. 517 (1892).

12. *Adler*, 342 U.S. at 493.

13. *Keyishian*, 385 U.S. at 589.

14. *Id.* at 605.

15. *Id.* at 603.

16. *Id.*

17. Among the Supreme Court cases involving the “right-privilege” doctrine in which educators participated are: *Wieman v. Updegraff*, 344 U.S. 183 (1952), *Slochower v. Bd. of Educ.*, 350 U.S. 551 (1956), *Shelton v. Tucker*, 346 U.S. 479 (1960), *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961), and *Baggett v. Bullitt*, 377 U.S. 360 (1964). Cases not involving educators include *Schwartz v.*

the legal carpet out from under the loyal-security programs that public employers at all levels had used to screen out subversives.<sup>18</sup> For the millions of people subject to such programs, receiving a paycheck from the government no longer meant giving up First Amendment freedoms.<sup>19</sup>

From the perch of the *Keyishian* case, we will examine the way that the Cold War shaped the attitudes of the courts, the academy, the government, and the public toward the freedoms enshrined in the First Amendment. We will see one example of American institutions grappling with a tension fundamental to all democratic societies: the attempt to uphold foundational liberties while simultaneously preventing people from using those liberties to destroy the country from within.

### I. *KEYISHIAN*—PART I

The Buffalo branch of the State University of New York seemed the perfect backdrop for a challenge to *Adler*. First, New York was the state whose laws produced *Adler v. Board of Education*. A suit from that state was more likely than any to test the question of whether *Adler*'s basic principles still stood. Second, Buffalo's campus joined SUNY only in 1963, with all its employees suddenly finding themselves public servants subject to loyalty-security requirements. Their involuntary transition into government work exemplified the expansion of the public sector that made the right-privilege doctrine much less benign than when first enunciated by Oliver Wendell Holmes (then sitting on the Massachusetts Supreme Court) in the late nineteenth century.<sup>20</sup> Third, Buffalo's union with SUNY

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Bd. of Exam'rs, 353 U.S. 252 (1957), *Speiser v. Randall*, 357 U.S. 513 (1958), and *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964). For examples of cases in state courts, see *Bd. of Educ. v. Massachusetts*, 304 P.2d 1015 (1956) and *Beilan v. Bd. of Educ.*, 126 A.2d 327 (1956).

18. For the fundamental shift in legal doctrine caused by *Keyishian*, see the language used in *Ehrenreich v. Londerholm*, 273 F. Supp. 178, 180 (D. Kan. 1967) (“The ‘constitutional doctrine which has emerged’ since the *Adler* decision is that ‘legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations.’”). For a list of subsequent loyalty oath cases in which *Keyishian* was cited, see Sager, *supra* note 8, at 22.

19. In 1956, the number was 8.5 million. See BROWN, *supra* note 7, at 178. Many states also imposed loyalty tests on private employees, especially for professional licensure. *Id.* at 181. If these numbers are taken into account, 13.5 million people were covered by loyalty tests, or approximately one out of five people in a workforce of 65 million. *Id.*

20. On the difference with regard to “right-privilege” between Holmes’s time and the 1960s, see William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). For the extent of the expansion of public employment during this era, see Susan B. Carter, et al., *Government Employment and Compensation*, HISTORICAL STATISTICS OF THE

occurred at a time when the law was in a state of flux, making a tempting target for those brave enough to challenge the status quo.<sup>21</sup> The temptation would have been particularly strong at SUNY Buffalo, one of the few universities to retain a professor who had invoked the Fifth Amendment during the height of the McCarthy scare.<sup>22</sup> Still, these circumstances could do no more than provide a stage. Whether anyone would step onto it had yet to be determined.

The conflict that came to SUNY Buffalo arrived after nearly a decade of preliminary developments. The first of these, in 1953, was the extension of New York's anti-subversive law to public colleges and universities, requiring administrators at these schools to find ways to eliminate subversives from their institutions.<sup>23</sup> Three years later, in 1956, SUNY's Board of Trustees tried to enforce this law with a demand that all new hires sign a Certificate.<sup>24</sup> The document, known as the Feinberg Certificate (Certificate), pledged that the signers were not and never had been "member[s] of the Communist Party or any other organization that advocates the violent overthrow of the Government of the United States."<sup>25</sup> The applicants also provided addresses of former employers who could attest "to the qualities of the candidate[s'] citizenship."<sup>26</sup> As these requirements took hold, New York's Board of Regents took care to emphasize that they were only enforcing state law, not engaging in "witch-hunting."<sup>27</sup> Little did they know, however, that only a few years after authorizing these rules, many professors would not see them as so benign.

For five years, the Board of Trustees employed the Certificates without challenge. Then, in 1962, SUNY arranged to absorb the then-private

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UNITED STATES: MILLENNIAL EDITION ONLINE, <http://hsus.cambridge.org/> (last visited August 19, 2010). In 1929, approximately 3% of the United States' population received a government paycheck as salary or work relief (calculated based on 3,611,000 receiving such compensation out of 122,775, 046 counted in the 1930 census). *Id.* By 1967, the year of the *Keyishian* case, this percentage had jumped to 8% (16,169,000 receiving such compensation out of a total population of 203,211,926 counted in the 1970 census). *Id.*

21. *See supra* note 17. Many of the prior challenges to *Adler* had chipped away at the "right-privilege" doctrine and provided some room for a challenge to loyalty-security programs.

22. The episode, involving philosopher William Parry, occurred before Buffalo was absorbed by SUNY. *See* ELLEN SCHRECKER, *NO IVORY TOWER* 205–06 (1986).

23. Jerry Parsons, *The Feinberg Law* 45–46 (1970) (unpublished Ph.D. dissertation, on file with the SUNY Buffalo Library).

24. *Id.*

25. *Id.* at 50.

26. Procedure on New Academic Appointments (April 24, 1957) (on file with the SUNY Buffalo Library).

27. *Id.*

University of Buffalo into its system.<sup>28</sup> The local chapter of the American Association of University Professors (AAUP) immediately recognized that the merger made the University vulnerable to the state’s Feinberg Law. Their discomfort led them to issue a statement reaffirming the faculty’s commitment to academic freedom.<sup>29</sup>

Full-blown conflict, however, arrived only a year later. Over the summer of 1963, SUNY’s central administration decided to require all SUNY Buffalo professors—even those who had taught there before the merger—to sign the Certificate.<sup>30</sup> By late November, word of the new Certificate had spread among the faculty.<sup>31</sup> It arrived in their mailboxes about two weeks later.<sup>32</sup> In response, a committee set up by the local AAUP lambasted the Certificate as a violation of “[p]rinciples of academic freedom.”<sup>33</sup> Significantly, however, the committee conceded the Certificate’s constitutional legitimacy.<sup>34</sup> This moderation led the AAUP to confirm—multiple times—that it could not recommend that its members refuse to sign the Certificate.<sup>35</sup> The most substantive measure the AAUP offered to take on behalf of those who did not want to sign was to “consider the advisability of supporting individual cases as they may arise.”<sup>36</sup> One AAUP member recognized the vacuity of this statement when he scribbled on his copy of these words, in pink ink and with a large question mark: “how?”<sup>37</sup>

In this atmosphere, no professor could easily decide not to sign the Certificate, let alone consider challenging the state’s entire loyalty-security law. Not only had the AAUP refused to endorse a legal position against the document; almost all of the university’s 900 professors had signed the

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28. AAUP Resolution (May 5, 1962) (on file with the SUNY Buffalo Library).

29. *Id.* Apparently, Buffalo’s president, Clifford Furnas, had requested that the Feinberg Law not be enforced on his campus but, despite having initially acceded to the request, SUNY President Samuel Gould ultimately reneged and enforced the law anyway. KENNETH HEINEMAN, *CAMPUS WARS* 32 (1984).

30. Parsons, *supra* note 23, at 56–58.

31. *Id.*

32. *Id.*

33. *Id.* at 79.

34. Report to the AAUP Academic Freedom and Tenure Committee (undated) (on file with the SUNY Buffalo Library).

35. Letter from Constantine Yeracaris to AAUP Members (Jan. 3, 1964) (on file with State Univ. Buffalo); Yeracaris, Press Release (Jan. 20, 1964) (on file with the SUNY Buffalo Library).

36. AAUP Legal Report (Jan. 10, 1964) (on file with the SUNY Buffalo Library).

37. *Id.* Presumably, the mark was made by Bob Rodgers, whose Keyishian-related papers appear in this folder of the Lipsitz collection.

disclaimer by January's end.<sup>38</sup> All but five others would follow suit by June.<sup>39</sup>

But the story, of course, did not end with the 99.5% of the faculty who signed. Five people did hold out, each for individual reasons. Newton Garver, a young philosophy professor still completing his Ph.D., insisted that his Quaker religion forbade him to sign it.<sup>40</sup> Ralph Maud, an English professor well on his way to tenure, objected to the Certificate as "a demoralizing invasion of a person's privacy."<sup>41</sup> George Hochfield, an Associate Professor of English and the highest ranking member of the group, objected to the Certificate as a violation of civil liberties similar to what he had witnessed while teaching at Ohio State University.<sup>42</sup> There, he had joined students and faculty in protesting the university president's decision to bar certain controversial speakers from campus.<sup>43</sup>

The final two hold-outs objected not only to the Certificate, but to the entire anti-subversive law behind it. Harry Keyishian made his objections clear, stating "I declined to sign a Feinberg Certificate in the hope that my action would make possible a legal challenge to the Feinberg law."<sup>44</sup> This stance required sincere ideological commitment since, as a junior professor on a one-year contract, the university could simply refuse to offer him a position the following year without formal dismissal procedures.<sup>45</sup> George Starbuck, an accomplished poet hired to work in the library,<sup>46</sup> similarly emphasized that he did not enter this conflict for personal gain: "Had I wanted mere relief in equity," he wrote, "I would have found another job . . ." <sup>47</sup> Instead, he hoped that "by fighting to preserve my rights and employment at SUNYAB [*sic*], I may do some good for others in similar situations."<sup>48</sup>

By June of that year, individual attempts to break the standoff with the university had failed. They decided to band together to challenge the Certificate as a group.<sup>49</sup> They all shared significant risk in pursuing this

38. Parsons, *supra* note 23, at 64.

39. *Id.*

40. *Id.* at 90. As a conscientious objector, Garver had previously served a prison term for refusing to sign up for the draft. HEINEMAN, *supra* note 29, at 62.

41. Parsons, *supra* note 23, at 126. Letter from Ralph Maud to J. Lawrence Murray (June 29, 1964) (on file with the SUNY Buffalo Library).

42. Parsons, *supra* note 23, at 168.

43. *Id.* at 168–69.

44. *Id.* at 74.

45. *Id.* at 71.

46. *Id.* at 143.

47. Letter from George Starbuck to Louis Joughin (Feb. 6, 1964) (on file with the SUNY Buffalo Library).

48. *Id.*

49. Parsons, *supra* note 23, at 166–67. See also *id.* at 81–88 (about Garver), 168–69 (about Maud), 173–76 (about Hochfield), 163–67 (about Starbuck).

case. Because he refused to sign, Starbuck never even had the opportunity to begin his job at SUNY and had to collect unemployment.<sup>50</sup> Keyishian, because his contract was not renewed, moved in with his parents in Queens, New York, and worked various jobs while he completed his dissertation.<sup>51</sup> The three others were not fired, pending the outcome of the case, since they enjoyed protections provided by their longer term contracts. But they, too, sacrificed. All three suffered from delayed promotions and withheld raises.<sup>52</sup> Even Richard Lipsitz, the group’s attorney, readied himself “to lose a good deal of money by taking the case.”<sup>53</sup>

These strong sentiments and genuine sacrifices did not arise in a vacuum.<sup>54</sup> Though America had long since passed the height of 1950s McCarthyism, Cold War fears were visiting Buffalo at exactly this time. In April 1964, four months after the introduction of the Certificate and three before the five non-signers went to court, the House Un-American Activities Committee (HUAC) arrived. Paul Sporn, an English instructor at the university who had signed the Certificate, defied a subpoena to testify before the committee.<sup>55</sup> Because an informant had identified Sporn as a communist, the university administration took his refusal to appear as an admission of guilt and found that Sporn had lied in signing the anti-subversive pledge. They recommended immediate termination of his employment.<sup>56</sup>

Sporn’s firing struck fear into the faculty. They had thought that, by executing the Certificate, they had secured their jobs. But, now, anyone whom an informant could tenuously connect to the Communist Party stood to lose his job specifically *for* signing.<sup>57</sup> In their alarm, the faculty

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50. Parsons, *supra* note 23, at 166.

51. Email from Harry Keyishian to author (Jan. 21, 2010) (on file with author) [hereinafter Keyishian Email].

52. Letter from Richard Lipsitz to Herman Orentlicher (Sept. 7, 1966) (on file with the SUNY Buffalo Library).

53. Letter from George Starbuck to Foreman (Jan. 26, 1964) (on file with the SUNY Buffalo Library).

54. During the course of the Vietnam War, SUNY Buffalo became a hotbed of faculty and student political activism. HEINEMAN, *supra* note 29, at 66. However, the Feinberg Certificate affair and the Sporn affair preceded this later ferment and even helped inspire it. *Id.* at 108. See *id.* at length for a description of the political activism at Buffalo during the Vietnam era.

55. Parsons, *supra* note 23, at 209–12.

56. Hearing in the Matter of Paul Sporn (Oct. 27, 1964) (on file with the SUNY Buffalo Library).

57. Frank Nugent, Pamphlet, *The Feinberg Certificate at Buffalo I* (1965); Parsons, *supra* note 23, at 226; Harry Keyishian, Notes on the Feinberg Controversy (mailed to author on Aug. 20, 2009) (on file with author) [hereinafter Keyishian Notes].

protested vigorously on Sporn's behalf. They sent a petition, along with a number of sharply worded letters of complaint, to the university administration.<sup>58</sup> Local papers even quoted one of the non-signers, George Hochfield, excoriating the administration's decision to fire Sporn.<sup>59</sup> The Sporn episode made the faculty realize the actual harm that the Certificate could do.

Beyond the potential for immediate harm, the Sporn affair also made the non-signers' principles a matter of fierce public debate. Local papers and civic groups had already taken notice—mostly disapproving—of the five faculty holdouts.<sup>60</sup> Buffalo's largely working-class, conservative population had little sympathy for abstract rights such as academic freedom. They certainly did not want such rights to override measures taken in the name of combating communism. The case became a classic example of the "town and gown" conflict, with liberal professors fighting for causes that the local public could not support.<sup>61</sup>

The HUAC hearings raised the pitch of the conflict. On one side, the Student Senate provided funds so that willing parties could buy signs and picket the committee. Joan Baez, who had come to town for a concert, "startled some members of her concert audience by encouraging opposition to the committee."<sup>62</sup> These moves only fanned the suspicions of the other side. Rumors spread of a "serious and increasing infiltration by communists of both the faculty and student body."<sup>63</sup> In a speech from the House floor, New York congressman John Pillion wondered: "Is there a pipeline for the Communist Party into the faculty? Why are teachers with uncontradicted pro-communist backgrounds retained on the faculty? . . . Is there a communist pipeline for admission to the university?"<sup>64</sup>

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58. Petition to Clifford Furnas (July 27, 1964) (on file with the SUNY Buffalo Library); Parsons, *supra* note 23, at 223–26.

59. *UB Group Forms a Committee on Academic Freedom* (Buffalo Evening News Dec. 22, 1964) (on file with the SUNY Buffalo Library).

60. Keyishian Notes, *supra* note 57, at 4–5.

61. On Buffalo's population, see HEINEMAN, *supra* note 29, at 111–12. On their attitude towards the *Keyishian* case, see Keyishian Notes, *supra* note 57, at 4–5, 14–15. For Keyishian's reflections, see *id.* at 14–16. He noted that he and his colleagues could have done a better job of public relations. *Id.* The latter source notes the opposition of the two major local papers—the *Courier Express* and the *Buffalo Evening News*—to the legal efforts of the *Keyishian* plaintiffs. For an example, see the editorial cited *infra* note 66.

62. Keyishian Notes, *supra* note 57, at 9.

63. *Dr. Furnas Deplores Red Inferences Made Since HCUA Hearing* (Buffalo Evening News, May 26, 1964) (on file with the SUNY Buffalo Library) [hereinafter *Dr. Furnas*].

64. 93 CONG. REC. 10117-8 (1964) (on file with the SUNY Buffalo Library).



In the wake of all this negative publicity, President Clifford Furnas felt compelled to publish a statement in the local newspaper vehemently denying the charges of infiltration leveled at the university.<sup>65</sup>

The controversy did not focus solely on the generalities of communist infiltration. It turned specifically on the relationship between communism and academic freedom. The local Buffalo Evening News published an editorial addressed to the university’s student protesters with the title, “Academic Freedom?”<sup>66</sup> Representative Pillion, in turn, quoted the piece in his address to the House.<sup>67</sup> The editorial argued that the true threat to academic freedom was not the attempt to root out communists, but the subversives themselves, whose totalitarian ideologies would lead to “spiritual and intellectual blackout.”<sup>68</sup> Pillion urged SUNY and the New York legislature to conduct internal investigations and adopt “remedial legislation” to prevent such “communist infiltration.”<sup>69</sup>

## II. KEYISHIAN—PART II

Circumstances conspired to drive the five non-signers to court. However, two obstacles remained to their pursuing legal action. The first was money. Paying a lawyer required thousands of dollars that the young professors did not have. They had turned to the American Civil Liberties Union for assistance, but were rebuffed.<sup>70</sup> During the initial months of the dispute, each of the non-signers had also contacted the national office of the AAUP with a similar request. The AAUP kept “a close on eye on the situation,” but hesitated to expend funds on a losing case—or worse, on reaffirming “bad laws.”<sup>71</sup>

The big break came with the Supreme Court’s decision in *Baggett v. Bullitt*, handed down on June 1, 1964.<sup>72</sup> In that case, the Court sided with professors at the University of Washington who had challenged the state’s loyalty oath and the underlying anti-subversive statutes.<sup>73</sup> Both SUNY’s counsel and the non-signers recognized that this decision did not render New York’s statute—assumed to be better-written than Washington’s—similarly moot.<sup>74</sup> However, the Supreme Court’s ruling did bring one

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65. *Dr. Furnas*, *supra* note 63.

66. May 2, 1964 (on file with the SUNY Buffalo Library).

67. 93 CONG. REC., 10117-8.

68. *Academic Freedom?* (Buffalo Evening News, May 2, 1964) (on file with the SUNY Buffalo Library).

69. *Id.*

70. Keyishian Email, *supra* note 51.

71. Keyishian Notes, *supra* note 57, at 3–4.

72. 377 U.S. 360 (1964).

73. *Id.* at 368.

74. Letter from Crary to Clifford Furnas (June 24, 1964) (on file with the SUNY Buffalo Library); Keyishian Notes, *supra* note 57, at 5–6.

concrete benefit—it convinced the AAUP to finance the Buffalo holdouts’ legal challenge.<sup>75</sup>

This development still left unresolved their other major question: what legal approach to take. Ultimately, Richard Lipsitz, the local labor attorney handling the case, would make that decision.<sup>76</sup> But the non-signers had themselves been grappling with this issue since they first considered taking to the courts. Two approaches emerged. One, supported by both the local and national chapters of the AAUP, sought to protect the professors’ narrow interests by demanding institutional hearings that would exempt them from signing the Certificate.<sup>77</sup> They did not want to swipe more broadly at the anti-subversive statute for fear of goading the state into more efficiently applying its current law or, worse, passing a new, more legally sound one in its place.<sup>78</sup>

However, already in January of 1963, George Starbuck had hinted at the possibility of a broader approach. He could not stand the thought of arguing for his own rights while “throw[ing] the poor elementary school teacher out of the lifeboat.”<sup>79</sup> He did not want to “knuckle under” to the notion that states could, in most instances, impose ideological tests on their employees.<sup>80</sup> Harry Keyishian had expressed a similar sentiment when he indicated his desire to challenge the entire Feinberg Law rather than argue only for a personal exemption.<sup>81</sup>

With arguments pulling both for and against a broad legal challenge, two developments eventually settled the question. First, the university refused to grant the non-signers any institutional hearings. Thus, they did not have to decide whether to settle for an internal solution or take a bolder stand in the courts.<sup>82</sup> Second, the Supreme Court’s decision in *Baggett* convinced attorneys advising the group that a broad claim on First Amendment grounds—arguing that the law was “unduly vague, uncertain, and broad”—was possible.<sup>83</sup> Significantly, however, Lipsitz and his clients

75. Keyishian Notes, *supra* note 57, at 7.

76. For a brief background on Lipsitz, see Fred O. Williams, *Labor of Love: Richard Lipsitz Sr. Has Been Labor’s Advocate for More than Fifty Years*, BUFFALO NEWS, May 7, 2003, at B6. Keyishian was, apparently, the most high profile case Lipsitz ever handled in a practice that focused primarily on local labor issues.

77. Letter from Charles Morgan to Hunt (Mar. 20, 1964) (on file with the SUNY Buffalo Library); Letter from Rollo Handy to Furnas (May 26, 1964) (on file with State Univ. N.Y. Buffalo).

78. Keyishian Notes, *supra* note 57, at 11.

79. Letter from George Starbuck to Foreman, *supra* note 53.

80. *Id.*

81. Parsons, *supra* note 23, at 74.

82. Transcript of Record at 10, Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

83. *Id.*; Keyishian Notes, *supra* note 57, at 11.

did not try to challenge either principle laid down in *Adler v. Board of Education*. Their brief never argued that the government could not condition employment on the cession of First Amendment rights.<sup>84</sup> And it did not contest the notion that the classroom deserved especially close ideological scrutiny because of the presence of vulnerable young minds.<sup>85</sup>

Having decided on the line of attack, Richard Lipsitz filed his brief in Federal District Court on July 8, 1964.<sup>86</sup> This step capped months of decisions and preparatory work, but it represented only the beginning of a long process. For the next two and a half years, the non-signers' case yo-yoed up and down the federal judicial food chain. Initially, the outlook for the plaintiffs was less than promising. John O. Henderson, the presiding judge, saw little merit to the plaintiffs' case and refused to bar SUNY from enforcing its anti-subversive policies.<sup>87</sup> He found that the plaintiffs raised “no substantial federal question” because the matter at hand had been “laid to rest by the Supreme Court’s decision in *Adler v. Board of Education*.”<sup>88</sup>

Though the professors' initial attempt to pull away from *Adler* had failed, they quickly decided to appeal, having known from the outset that their fight would not end at the level of the District Court.<sup>89</sup> A day after Henderson made his ruling, Harry Keyishian gave Lipsitz formal instructions to continue with the case.<sup>90</sup> The non-signers would now ask the U.S. Court of Appeals for the Second Circuit to order a three-judge panel to hear their case. This time, two allies joined the plaintiffs and filed briefs *amici curiae*: the AAUP and the ACLU.<sup>91</sup>

Making it through this stage of the process took more than half a year. The parties filed briefs five months after Judge Henderson's decision and argued the case in March 1965.<sup>92</sup> The plaintiffs labored again to convince the judges not to shut down their suit because of the *Adler* precedent.<sup>93</sup> On May 3, 1965, the five non-signers found out that their arguments had reached a sympathetic ear. Where Henderson had refused to look beyond the *Adler* precedent, Judge Thurgood Marshall, writing for his peers on the Appeals Court, acknowledged the numerous ways in which the case at

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84. Brief for Appellees, *Keyishian*, 385 U.S. 589 (No. 105).

85. *Id.*

86. Transcript of Record at i, *Keyishian*, 385 U.S. 589 (No. 105).

87. *Keyishian v. Bd. of Regents*, 233 F. Supp. 752, 753 (W.D.N.Y. 1964).

88. *Id.* at 753–54. Henderson cited some of the cases that limited the scope of *Adler*, including *Baggett*, but he contended that the Feinberg Law fell within the bounds set by those rulings.

89. *See, e.g.*, Keyishian Notes, *supra* note 57, at 11.

90. Letter from Harry Keyishian to Richard Lipsitz (Sept. 4, 1964) (on file with the SUNY Buffalo Library).

91. Parsons, *supra* note 23, at 234.

92. *Id.* at 235.

93. *Id.*

hand differed.<sup>94</sup> In particular, he noted the string of holdings that limited the government's rights to condition employment on whatever terms it saw fit.<sup>95</sup> And he took notice of the ways in which New York's law resembled the one struck down in *Baggett*.<sup>96</sup> The court decided to order a three-judge panel to hear the case.<sup>97</sup>

The disagreement between the Court of Appeals and Judge Henderson reflected a broader fundamental dispute in the legal community over the constitutional status of loyalty-security programs. Judge Henderson saw the *Adler* decision as the basic, binding instruction on the state's right to purge communists from its employment rolls. Subsequent cases that struck down loyalty programs only confirmed, with their narrow holdings, the basic soundness of the *Adler* doctrine.<sup>98</sup> On the other hand, the Court of Appeals saw that, ever since *Adler*, the Supreme Court had slowly been chipping away at the principles that upheld New York's law. In so doing, the Court had suggested a new direction that implicitly, if not yet explicitly, would gradually undo what *Adler* had done. This tension arose yet again once *Keyishian* reached the Supreme Court, but that moment still lay more than a year in the future.

While *Keyishian* had been wending its way through the courts, the tension over the Feinberg Certificate had been building on Buffalo's campus. The '64–65 academic year began with the five holdouts' decision to file suit fresh on the minds of students and faculty. A joint group of students and professors met with SUNY President Samuel Gould to air their grievances.<sup>99</sup> They also picketed mid-year graduation ceremonies and conducted regular demonstrations. Still, as fall semester gave way to spring, the Certificate stood.<sup>100</sup>

The atmosphere of discontent thickened in the early months of 1965. Poet Gregory Corso came to Buffalo to teach a course on Shelley. Weeks into the semester, he was fired for refusing to sign a Certificate.<sup>101</sup> This caused such an uproar on campus that, when the issue arose again with another faculty member, President Gould stepped in to halt dismissal proceedings.<sup>102</sup>

94. *Id.* at 235–36.

95. *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965).

96. *Id.* at 238–39.

97. *Id.* at 236.

98. See *Keyishian v. Bd. of Regents*, 255 F. Supp. 981, 992 (D.C.N.Y. 1966) (narrowly construing *Wieman v. Updegraff*, 344 U.S. 183 (1952), *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961), and *Baggett v. Bullitt*, 377 U.S. 360 (1964)).

99. *History of Feinberg and the University*, SPECTRUM, June 15, 1965 at 1 (on file with the SUNY Buffalo Library).

100. *Id.*

101. *Id.*

102. *Id.*

But this did not stem the tide of protest. The AAUP, previously so timid in its stance on the Feinberg Certificate, suddenly became aggressive. In March of 1965, at the AAUP’s national convention, the Buffalo chapter introduced a resolution asking the organization to provide moving expenses for faculty members who would resign in protest against loyalty oaths.<sup>103</sup> A special AAUP committee began studying the matter. Upon returning from the convention, four SUNY Buffalo AAUP members sent a letter to President Gould highlighting the recent developments. If nothing changed soon, they threatened, SUNY—already experiencing difficulty recruiting distinguished professors—would start hemorrhaging valuable faculty.<sup>104</sup>

The mounting pressure eventually proved too much for the powers that be. President Gould, in his May meeting with the SUNY Board of Trustees, asked the body to repeal the Feinberg Certificate.<sup>105</sup> As he later told a student newspaper, “the feelings of the academic community” had made an impression on the Board.<sup>106</sup> On May 13, ten days after the Court of Appeals sided with the non-signers, the board of trustees voted unanimously to approve Gould’s motion.<sup>107</sup>

The rescission of the Feinberg Certificate brought “great jubilation” to the Buffalo campus.<sup>108</sup> Many had fought the disclaimer requirement since its introduction; their efforts had finally borne fruit. But, even though the Certificate had instigated the controversy over the Feinberg Law, its demise did not end the strife. After all, the law barring subversives remained in place. Professors and students alike had, by this point, come to see the loyalty requirements as odious—regardless of how they were enforced.<sup>109</sup> And, though the most blatant aspect of the anti-communist regime had just vanished, those hiring new SUNY employees still bore the responsibility of satisfying themselves of the person’s loyalty.<sup>110</sup> The non-signers decided, therefore, to pursue their case despite the Certificate’s cancellation.

Ironically, the repeal proved detrimental to the legal case of the five holdouts. The month before, the appellate court had ordered a three judge panel of the district court to hear the professors’ case. News of the

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103. Letter from Bob Schneidau to Davis (Mar. 31, 1965) (on file with the SUNY Buffalo Library).

104. Letter from Carl Moos et al. to Gould (Spring 1965) (on file with the SUNY Buffalo Library).

105. *Gould Announces Unanimous Decision*, SPECTRUM, June 15, 1965 at 1 (on file with the SUNY Buffalo Library).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Editorial Comments*, SPECTRUM, June 15, 1965 (State Univ. N.Y. Buffalo).

110. Statement to Prospective Professional Appointees (July 1965) (on file with the SUNY Buffalo Library).

Certificate's cancellation became public on June 10, 1965, only six days before Richard Lipsitz was to present arguments in front of that panel. The news gave the panel additional reason to reject the professors' claims. The professors had, among other points, complained that the lack of institutional hearings deprived them of "procedural due process."<sup>111</sup> But since the trustees had repealed the Certificate, the professors' loyalty could be tested only in a direct meeting with a university official. Such a meeting would give the professor ample opportunity to explain and, therefore, satisfy the demand for due process.<sup>112</sup> The trustees' withdrawal of the Certificate had, in the eyes of this court, left the plaintiffs with nothing to complain about. Relying on this and other arguments, the District Court denied the plaintiffs all relief requested.<sup>113</sup>

With their defeat locally, the non-signers had to decide whether to present their case to the Supreme Court. Some of the plaintiffs, like Harry Keyishian, had fully expected that the case would end up there.<sup>114</sup> However, going this route posed its own set of challenges. As with their initial foray into the judicial system, the five faculty members faced the problem of finances. The national AAUP had been paying the legal bills for the past year and a half, but the organization doubted that it could cover the cost of a Supreme Court appeal. Other crises, including a faculty strike at St. John's University in Queens, had been draining its resources. Buffalo's AAUP was told to start raising its own funds.<sup>115</sup>

At the meeting in which this development came out, some tried to put a positive spin on the situation: by donating, AAUP members would become "more actively" committed to "AAUP principles."<sup>116</sup> This perspective, however, only reflected the relative apathy with which most Buffalo faculty had treated the court challenge. This apathy only grew with the repeal of the Certificate, the absence of which gave many on the faculty the sense that they had secured their freedoms. A significant number apparently did not even realize that, behind the Certificate, an entire complex of laws remained in place.<sup>117</sup>

This became even clearer after fundraising efforts were underway. After setting up an ad hoc committee in late February, a letter went out to AAUP members explaining why the organization had taken up an appeal in

111. *Keyishian*, 255 F. Supp. at 990 (W.D.N.Y. 1966).

112. *Id.* at 989-91.

113. *Id.* at 989.

114. Keyishian Notes, *supra* note 57, at 11.

115. Minutes of Meetings Discussing Fundraising for Supreme Court Appeal (Jan. 27, 1966) (on file with the SUNY Buffalo Library).

116. *Id.*

117. Letter from Leo A. Loubere to Am. Ass'n of Univ. Professors (undated) (State Univ. N.Y. Buffalo); Letter from Am. Ass'n of Univ. Professors to Colleagues (Feb. 28, 1966) (on file with the SUNY Buffalo Library).

the first place and asking anyone who could to contribute. Two months into the campaign, only 47 of the 2,800 full- and part-time faculty members had contributed.<sup>118</sup> The donations from this .02% of the faculty totaled \$671—far below the \$2,500 that Richard Lipsitz had suggested as his fee.<sup>119</sup> Lipsitz himself sensed the AAUP’s financial hardships when, in stating this figure, he noted his willingness “in all sincerity” to consider modifying the fee if the AAUP “considered [it] to be out of line.”<sup>120</sup>

The money, of course, was only one of the problems. The plaintiffs also had to convince the Supreme Court to take the case, hardly a sure thing given that they had difficulty even persuading the district court to convene a three judge panel to hear their case. Lipsitz himself portrayed the situation optimistically. He thought the facts of the case to be as perfectly suited as any to challenge the Feinberg Law, and he blamed his lack of success so far on the lower courts’ unwillingness “to disturb *Adler*.” On the Supreme Court, by contrast, “there would be a substantial number of the present justices who would not agree with [the *Adler*] decision.”<sup>121</sup>

Lipsitz’s optimism carried the day; the AAUP soon granted permission to appeal to the Supreme Court.<sup>122</sup> Then the work began on persuading the Court to take the case. At first, Lipsitz tried to distinguish his case from *Adler* by emphasizing that his clients were college and university professors who enjoyed a special right of academic freedom and not, as in *Adler*, public school teachers.<sup>123</sup> He drew heavily on a 1957 decision, *Sweezy v. New Hampshire*,<sup>124</sup> in which a plurality—though not a majority—of the Supreme Court had recognized academic freedom as constitutionally protected under the First Amendment.<sup>125</sup> Lipsitz now hoped that this newfound freedom would find its way into the thinking of the majority. If it did so, Lipsitz could win his case without challenging *Adler*.

Nevertheless, in response to a brief filed by the counsel for New York State, Lipsitz decided that challenging *Adler* was exactly what he needed to do. Mere membership in a group should not, he said, disqualify someone for public employment.<sup>126</sup> He added emphatically that those aspects of

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118. Letter Regarding the Voluntary Fund (undated) (on file with the SUNY Buffalo Library).

119. *Id.*; Letter from Richard Lipsitz, to Herman Orentlicher (Jan. 22, 1966) (on file with the SUNY Buffalo Library).

120. *Id.*

121. Letter from Richard Lipsitz to Herman Orentlicher (Jan. 5, 1966) (on file with the SUNY Buffalo Library).

122. Parsons, *supra* note 23, at 241.

123. *Id.* at 154.

124. 354 U.S. 234, 250 (1957).

125. *Id.*

126. Answer to Motions to Dismiss at 9, *Keyishian*, 385 U.S. 589 (No. 105).

*Adler* inconsistent with this notion “should be overruled.”<sup>127</sup> With this statement, *Keyishian v. Board of Regents* now asked the Court to do much more than rule on a single state’s loyalty program. It challenged the Court to overrule a doctrine that had served as the basis for loyalty-security programs since the Cold War began.

The Supreme Court did not hesitate to take up the challenge. Eight out of the nine justices voted to hear the case, issuing an “Order Noting Probable Jurisdiction” on June 20.<sup>128</sup> From there, progression was slow. The attorneys filed briefs the following September and argued the case in front of the Court on November 17.<sup>129</sup> Oral arguments centered on technical questions involving the procedures used to ensure employees’ loyalty.<sup>130</sup> The briefs, on the other hand, presented the fundamental disagreements between the two sides. Both raised many points of law, but the central constitutional question remained whether *Adler*’s view of the rights of state employees should stand.<sup>131</sup>

After hearing oral arguments, the justices gathered in conference for an initial vote on the case. Four justices—Earl Warren, Hugo Black, William Douglas, and William Brennan—supported the plaintiffs and voted to overturn the decision of the District Court.<sup>132</sup> Four others—Tom Clark, John Harlan, Potter Stewart, and Byron White—voted to uphold the lower court decision.<sup>133</sup> The deciding vote fell into the lap of Abe Fortas.<sup>134</sup> At first, the tie-breaking justice indicated he would join Warren, Black, Douglas, and Brennan, but he quickly added that “he did not know which way he would ultimately turn.”<sup>135</sup> Fortas’s ambivalence reflected a nuanced attitude towards loyalty-security programs—particularly those affecting academics—that he had cultivated as an attorney in private practice. He had refused to represent academics known to have been

127. *Id.*

128. Stephen Goodman and Abraham Sofaer, Opinions of William J. Brennan Junior, VIII (on file with the Library of Cong.); Parsons, *supra* note 23, at 245.

129. Parsons, *supra* note 23, at 245–47, 260.

130. *Id.* at 270.

131. Brief for Appellees at 20, *Keyishian*, 385 U.S. 589 (No. 105); Reply for Appellants at 10–11, *Keyishian*, 385 U.S. 589 (No. 105). Within this broad framework, both sides maneuvered to make their positions seem less extreme. The state, for example, downplayed the extent to which its law deprived people of employment based on their association. In their view, *prima facie* disqualification did not amount to actual deprivation of employment. *See, e.g.*, Brief for Appellees at 11, *Keyishian*, 385 U.S. 589 (No. 105).

132. For a list of the justices’ votes, see Fred Graham, *High Court Voids Laws on Loyalty*, N.Y. TIMES, Jan. 24, 1967, at 1+.

133. *Id.*

134. *Id.*

135. Goodman and Sofaer, *supra* note 128, at VIII.



communists.<sup>136</sup> But he had also provided millions in free counsel to Owen Lattimore, a professor accused of serving as a communist agent.<sup>137</sup> Fortas knew first-hand the damage anti-communist hysteria could cause.<sup>138</sup>

Since the initial vote produced no definitive outcome, Chief Justice Warren decided to assign the writing of an opinion and see if a majority would agree to join it. Brennan, apparently, hoped that Warren would give that job to Fortas as a way of convincing him to vote with the court's liberal wing. In the end, though, Warren asked Brennan himself to draft a decision. Brennan now bore the burden of formulating an argument that would not only reflect his views on the case, but that would also convince Justice Fortas to join.<sup>139</sup>

In constructing such an argument, the former New Jersey Supreme Court justice faced a decision markedly similar to that which had previously confronted Richard Lipsitz. On the one hand, he wanted to overturn New York's loyalty law. On the other, he had to deal with the *Adler* precedent. Like Lipsitz before him, Brennan tried at first to distinguish the case at hand from *Adler*.<sup>140</sup> Additions to the Feinberg Law since 1952 might, he thought, allow him to throw out the statute without explicitly overturning the decade-and-a-half old precedent.<sup>141</sup> But then he, too, decided to abandon the attempt and instead get rid of *Adler* entirely.<sup>142</sup> He now had to convince the other justices to come along.<sup>143</sup>

The first step was to draft an opinion for circulation. The resulting piece negated *Adler*'s two central doctrines. First, he undercut the right-privilege distinction with his insistence that “constitutional doctrine which has emerged since [*Adler*] has rejected [the] premise . . . that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.”<sup>144</sup>

Second, he parried the claim that an exception to this rule should be made for the unusually sensitive area of the schoolroom. Rather than extra ideological scrutiny, educators deserve special ideological breathing space:

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

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136. See SCHRECKER, *supra* note 22, at 143.

137. *Id.*

138. *Id.* at 143, 166.

139. Goodman and Sofaer, *supra* note 128, at VIII.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967).

laws that cast a pall of orthodoxy over the classroom . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection [citations omitted]." <sup>145</sup>

With these words, Brennan attempted to grant Richard Lipsitz's wish and, for the first time, elevate academic freedom to the subject of a Supreme Court majority opinion.

All of these efforts, however, went into a legal opinion that had not yet received the backing of the majority of the court. Brennan still had to win over Justice Fortas. To begin the process, he circulated the opinion among his colleagues and, within a week, had the approval of the three justices who had already committed to supporting the non-signers' case. <sup>146</sup> Still, no word came from Fortas. <sup>147</sup>

In fact, rather than win any unexpected favor from his colleagues, Brennan's decision touched a raw nerve for Justice Clark, who set about writing a biting dissent. Clark's dissent displayed utter disdain for the "blunderbuss fashion in which the majority couches its 'artillery of words.'" <sup>148</sup> Beyond his dislike for the opinion's form, however, he was horrified at its implications: "[N]either New York nor the several States that have followed the teaching of *Adler v. Board of Education* for some 15 years, can ever put the pieces together again." <sup>149</sup>

To emphasize the point, Clark added in the margins of a later draft a Churchillian phrase that he ultimately included in the final version: "No court has ever reached out so far to destroy so much with so little." <sup>150</sup> Brennan's opinion would, he foresaw, undermine the loyalty-security programs that had rested for so long on the *Adler* decision.

What prompted such a colorful response? His deeply felt reaction stemmed from something more profound—and more personal—than a mere legal disagreement. <sup>151</sup> It related to the majority's contention that, since *Adler*, the Court had undermined the 1952 ruling's "major premise." <sup>152</sup> On the purely legal plane, Clark countered that none of the

145. *Id.* at 603.

146. Goodman and Sofaer, *supra* note 128, at VIII.

147. *Id.*

148. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 620 (1967).

149. *Id.* at 622 (citations omitted).

150. Draft of Opinion (undated) (on file with the Tarlton Law Library). *See also Keyishian*, 385 U.S. at 622.

151. *Keyishian*, 385 U.S. at 621–23, 627–28. Clark did, of course, disagree on various points of law. For example, he did not think the terms of the New York statute nearly as vague and uncertain as did Brennan.

152. *Id.* at 605.

decisions cited by the majority had ever explicitly done that.<sup>153</sup> But behind that legal-textual argument lay something deeper.

Ever since his days as Attorney General during the Truman administration, Clark had tried to strike a careful balance between the state’s right to combat subversion and the civil liberties of the people affected by such efforts. For example, as the nation’s highest law enforcement officer, he defied senatorial pressure to prosecute supposed communist spies, insisting he found no evidence of the “transmittal of information relating to the national defense.”<sup>154</sup> He would not “institute prosecutions to justify the publicity seekers.”<sup>155</sup>

In his early years on the Court, this balancing act emerged yet again. In 1952, when the *Adler* case came before the justices, Clark sided with the majority, voting to enshrine the right-privilege distinction in constitutional law.<sup>156</sup> Yet, later that year, when Clark was assigned to write the majority opinion in another case, *Wieman v. Updegraff*,<sup>157</sup> he sided on technical grounds with a group of professors challenging their state’s anti-subversive statute. He did make clear that he was not overruling *Adler*.<sup>158</sup> But he also emphasized the importance of limiting the state’s power to combat subversion “in time of cold war and hot emotions when ‘each man begins to eye his neighbor as a possible enemy.’”<sup>159</sup>

His words, carefully crafted to uphold *Adler* while preventing extreme applications of its doctrine, came back to haunt him fifteen years later. The Second Circuit Court of Appeals had cited them in its decision that *Adler* should not predetermine *Keyishian*’s outcome.<sup>160</sup> Justice Brennan, in turn, cited the court of appeals, as well as Clark’s opinion, as proof that “constitutional doctrine has developed since *Adler*.”<sup>161</sup> In so doing, Brennan used a passage that Clark had designed specifically to uphold *Adler* as the very basis for undermining that case. It was this use of Clark’s words against their author—and not merely the suggestion that subsequent cases had overridden *Adler*—that so incensed the justice from Texas.

In early drafts of his dissent, Clark considered making his anger on this matter explicit:

The first two [cases cited by the majority], *Wieman v. Updegraff*

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153. *Id.* at 624–25.

154. Emerson and Helfeld, *supra* note 9, at 14.

155. *Id.*

156. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

157. *Id.*

158. *Id.* at 191–92. His ruling was on the technical grounds that the Oklahoma statute had forbidden both knowing and unknowing membership, whereas *Adler* had allowed the government to forbid only knowing membership.

159. *Id.* at 191.

160. *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965).

161. *Keyishian*, 385 U.S. at 606.

and *Slochower v. Board of Education*, were both written by me, and in both cases *Garner* and *Adler* were discussed at some length and approved . . . . For the majority to say that these cases undercut *Adler* . . . just won't wash.<sup>162</sup>

In yet another draft, Clark tried to rephrase the point:

Today, however, the Court says that "constitutional doctrine . . . has rejected *Adler's* major premise." It can find no authority in this Court to do this . . . It does cite [unintelligible] cases of this Court but not one are [*sic*] in point. Indeed, I wrote two of the cases, *Wieman v. Updegraff* and *Slochower v. Board of Education*, in which the Court approved both *Garner* and *Adler* and discussed them at some length.<sup>163</sup>

In the final version of the dissent, Clark decided to omit any reference to his authorship, perhaps for reasons of tact. But the drafts show that the former attorney general thought it possible to structure loyalty-security programs to ensure security and respect civil liberties. He believed equally strongly in the communist threat and in the state's obligation to combat it within constitutional bounds. Brennan incensed Clark by upsetting this delicate balance with the very words used to create it.

Clark and Brennan simply held different perspectives on the central Cold War question: did communism threaten America more through direct attempts at subversion or through the ways it forced society to bend civil liberties? Clark took a clear stance on this question in the last line of his dissent: "The majority says that the Feinberg Law is bad because it has an 'overbroad sweep.' I regret to say—and I do so with deference—that the majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation."<sup>164</sup>

He continued by noting the compounded danger of doing so in the "public educational system [that] is the genius of our democracy."<sup>165</sup> As he put it in an earlier draft of that paragraph, he believed that the majority had swept away "the right of self-preservation" in "the most vulnerable spot that it could find."<sup>166</sup>

His opinion completed, Clark circulated it two weeks after Brennan had issued his. The piece quickly won the approval of the three justices who had previously committed to Clark's position. The decision now rested in Justice Fortas's hands.

Ironically, it was Justice Clark's reply, rather than Brennan's opinion, that drew Fortas to the Court's liberal wing. Fortas was "outraged by the

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162. Draft of Clark's Dissent (undated) (on file with the Tarlton Law Library) (citations omitted).

163. *Id.* (citations omitted).

164. *Keyishian*, 385 U.S. at 628.

165. *Id.*

166. Draft of Clark's Dissent, *supra* note 162.

dissent and its ‘McCarthyistic’ tone.”<sup>167</sup> Perhaps he was reminded of his days representing Owen Lattimore. Indeed, Clark himself was well aware of his piece’s stridency. He even wrote Brennan a note offering to change the language “if you think I am too ‘tough’ on you.”<sup>168</sup> Fortas could not swallow the “McCarthyistic” perspective on the communist threat. And so Brennan’s opinion became that of the majority, with the ruling publicly announced the Monday after Fortas’s decision.<sup>169</sup>

On January 23, 1967, the Justices read their opinions from the bench.<sup>170</sup> The occasion “was marked with some of the most impassioned oratory which followers of the Court had ever seen”—appropriate for a case in which much more than narrow legal or constitutional questions were at stake.<sup>171</sup> Brennan derided the dissent for “indulg[ing] in richly colored and impassioned hyperbole”; Clark responded by noting that his opinion “must have ‘hurt’.”<sup>172</sup> He then continued by trying “to rouse his fellow citizens in righteous indignation” against the majority’s dangerous stance.<sup>173</sup> The full force of the Cold War debate emerged from the Supreme Court bench.

The announcement of the decision ignited immediate, heated controversy. For the Buffalo professors, now scattered across the country, the decision ended years of suspense and vindicated their stubborn stance.<sup>174</sup> But they also recognized that this decision touched much more than New York’s law. In response to a query from a friend, Lipsitz exulted that “[the decision’s] effect, according to the dissent, is virtually to destroy the possibility of any constitutional legislative means of removing ‘subversives’ (whatever that means) from public employment.”<sup>175</sup> This may have seemed positive to him, but it did not please many others.

Newspapers, television stations, and cartoonists inveighed against the Supreme Court’s stance. A typical reaction of the media read “Communists 5, American people 4.”<sup>176</sup> Brennan himself received dozens

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167. Goodman and Sofaer, *supra* note 128, at VIII.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Goodman and Sofaer, *supra* note 128, at VIII.

173. *Id.* at IX.

174. On remand to the district court, they all received back pay and court costs, though none of those who had already left decided to return to SUNY Buffalo. See Parsons, *supra* note 23, at 272–74.

175. Letter from Richard Lipsitz to Mr. and Mrs. Thomas Connolly (Feb. 10, 1967) (on file with the SUNY Buffalo Library).

176. Letter from J. William Quinn to William Brennan (Feb. 2, 1967) (Library of Cong.). For other examples, among many, see *To Russia with Love*, N.Y. DAILY NEWS, Jan. 25, 1967, at 19 (on file with the Library of Cong.); *The Baby Goes out with the Bathwater*, CHI. TRIB., Jan. 24, 1967, at 16 (on file with the

of angry letters from a broad range of individuals, everyone from state legislators<sup>177</sup> to elementary school children.<sup>178</sup> This widespread reaction reflected the sensitivity—and significance—of the arena into which the Supreme Court had stepped.

Ultimately, judges, as well as the public, recognized that *Keyishian* represented a fundamental turning point in the battle against loyalty oaths.<sup>179</sup> In case after case, *Keyishian* served as a key precedent in dismantling loyalty statutes.<sup>180</sup> And this was not only in cases involving employment. *Keyishian* expanded legal rights to government “privileges” ranging from Medicare<sup>181</sup> to public schooling.<sup>182</sup>

In the decades since the 1967 decision, subsequent Courts have modified the *Keyishian* precedent.<sup>183</sup> In one recent example, the Court limited the First Amendment protection of employee speech to comments not made “pursuant to [the employee’s] official duties.”<sup>184</sup> Dissenting in that case, Justice David Souter worried that such a narrowing would threaten academic freedom of professors at public colleges and universities.<sup>185</sup> His words demonstrate that, even in the twenty-first century, academic freedom and the rights of public employees continue to move together.<sup>186</sup>

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Library of Cong.); *Reds Win, 5 to 4*, TULSA TRIB., Jan. 24, 1967 (on file with the Library of Cong.).

177. Letter from Harrison Mann, Jr. to Clark (Jan. 24, 1967) (on file with the Library of Cong.).

178. Letter from Sandi Gray to William Brennan (Jan. 28, 1967) (on file with the Library of Cong.).

179. *See, e.g., Ehrenreich*, 273 F. Supp. at 180: “Until the announcement of the *Keyishian* decision (January 23, 1967), it is likely that we would have held that plaintiffs’ constitutional rights are not violated by the requirement that they subscribe to the Kansas test oath. [...] While *Adler* has not specifically been overruled, the Supreme Court, speaking through Mr. Justice Brennan, has rejected its major premise.”

180. *See Sager, supra* note 8, at 76–77, tbls.IV, V.

181. *Reed v. Gardner*, 261 F. Supp. 87 (C.D. Cal. 1966).

182. *Richards v. Thurston*, 304 F. Supp. 449, 452 (D. Mass. 1969).

183. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). *See also Connick v. Myers*, 461 U.S. 183 (1983).

184. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

185. *Id.* at 438–39.

186. In another example of the connection between the two, the Court of Appeals for the Fourth Circuit ruled in *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) that individual academic freedom includes only those rights already enjoyed by all public employees. For further discussion, see *infra* note 190.

## III. CONCLUSIONS

*Keyishian v. Board of Regents* fundamentally altered the relationship of the First Amendment to the academy and to the rights of all government employees. Previous historical writing, however, has failed to recognize the centrality of the case to the story of the Constitution during the Cold War.<sup>187</sup> Even legal scholars who cite the case reference it either solely for its statement on academic freedom<sup>188</sup> or solely for its position on employee rights.<sup>189</sup> Few have recognized the significance of the decision as a cohesive unit—one in which academics won rights both for themselves and for all public employees.

Besides being a failure of historical analysis, this oversight has affected the interpretation of the legal doctrine *Keyishian* promulgated. Many writers, reading *Keyishian*'s passage on academic freedom in isolation, have concluded that the ruling intended to grant educators First Amendment protections beyond those guaranteed to all public employees. When these writers cannot find any instance where such special protection would be necessary, they conclude that academic freedom as a constitutional doctrine is meaningless. They then go one step further, arguing that, to the extent that constitutional academic freedom exists, it protects not individual academic employees, but the institutions that employ them. This has the ironic effect of insulating personnel decisions made by colleges and universities from scrutiny brought about by lawsuits such as that in *Keyishian*.<sup>190</sup>

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187. The only full-length piece dedicated to the case is that of Jerry Parsons. Parsons, *supra* note 23. See his evaluation of the meaning of the case. *Id.* at 286.

188. Examples of this are functionally infinite. For a judicial example, see *Regents v. Ewing*, 474 U.S. 214, 226 (1985). For academic literature, see, e.g., J. Peter Byrne, *Academic Freedom: A “Special Concern” of the First Amendment*, 99 *YALE L.J.* 251 (1989).

189. See, e.g., Peter C. McCabe III, *Free Speech of Government Employees*, 60 *IND. L.J.* 339 (1985).

190. For a judicial example, see *Urofsky*, 216 F. 3d at 410–15. For academic literature, see, e.g., Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 *U. COLO. L. REV.* 907, 909–10 (2006); Byrne, *supra* note 188, 264, 301–02, 309. Each argues that, constitutionally, academic freedom has little content as an individual protection of academics against their public university employers. They conclude, therefore, that constitutional academic freedom should be applied primarily to institutions rather than individuals. This has the effect of insulating personnel decisions made by colleges and universities from scrutiny brought about by lawsuits from their employees. Thus, a concept that began in *Keyishian* as a protection of individual professors ends up being used to protect colleges and universities from challenges by those very same professors. For a contrasting perspective, see David M. Rabban, *Academic Freedom: Individual or Institutional?*, 87 *ACADEME* 16–20 (Nov.–Dec. 2001). He points out that other lower courts have recently applied academic freedom as an individual freedom and

Our analysis reveals, however, that the doctrine of academic freedom is meaningful specifically because it never intended to extend academics' rights beyond those enjoyed by all public employees. The plaintiffs in *Keyishian* won their case most fundamentally through the assertion of rights that applied to all civil servants. But they used the doctrine of academic freedom to parry the claim that such rights should not apply in the especially vulnerable classroom setting. By taking note of the Cold War context, we realize that the doctrine of academic freedom was responding to a common Cold War claim about the vulnerable schoolroom rather than attempting to create a uniquely expansive First Amendment right.

Beyond the legal point, this integrated view of *Keyishian* also provides a vision of the academy that runs counter to one current in popular culture. We hear about academics as residing in ivory towers, apart from the needs and concerns of society at large. Ellen Schrecker has already definitively shown that this was not the case during the 1950s and 60s. As repeated victims of McCarthyist persecutions, academics of that era hardly enjoyed the luxury of a life above the fray.<sup>191</sup> *Keyishian* and its broader context augment this perspective, demonstrating that academics were not mere victims. Instead, they took part in—and, in many cases, led and won—the fight against some of the most wide-spread and concrete abuses of the McCarthy era.

Finally, this perspective allows *Keyishian* to serve as a window through which to view the ways American society handled the Cold War's challenges to First Amendment liberties. Individually, academic freedom and public employment rights appear as technical legal topics. However, when viewed together in their Cold War context, they become united reflections of a deeper story. They show the ongoing struggle of a democratic society to protect itself from attack while trying to preserve the values that would make the effort worthwhile.

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not only as an institutional one. He does not, however, spell out how such a freedom would differ substantively from that already enjoyed by other public employees.

191. SCHRECKER, *supra* note 22.



