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LOYALTY AND THE FIRST AMENDMENT— A CONCEPT EMERGES

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The First Amendment to the Constitution of the United States is written in terms of "freedom of speech," "press," and the right to "peaceably assemble." In order to bring out the full meaning of these terms, the Supreme Court has had to designate and elucidate certain related concepts as being entitled to First Amendment protection. We thus find the Court, in addition to referring to "speech," "press," and "assembly," also using such terms as "association," "advocacy," "beliefs," and a somewhat all inclusive term, "expression." These, the Court has often said, are within the meaning of the First Amendment and therefore entitled to protection against action by the federal government, and from state government action through the Due Process Clause of the Fourteenth Amendment.

These concepts have not generally been used when the Court has been faced with reconciling the governmental interest in security, such as in the loyalty oath and disclosure cases, with an individual's rights under the Constitution.

In the recent case of *Elfbrandt v Russell*,[1] however, the Supreme Court did make use of the "freedom of association" concept. It combined it with certain principles enunciated in a line of cases which involved the question of "punishment" for membership in a "subversive" organization. The combining of the "freedom of association" concept with these principles resulted in a concept which briefly stated is that government infringement upon "mere knowing membership, without any showing of 'specific intent,' would run afoul of the Constitution"[2] because it "threatens the cherished freedom of association protected by the First Amendment. . . ."[3]

It will be the purpose of this article to examine the cases which have formed the background for this approach to "loyalty" cases, and to show its culmination in the *Elfbrandt* decision.

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1. 384 U. S. 11 (1966).
2. *Id.* at 16.
3. *Id.* at 18.

An examination will first be made of the "association" cases in which the Court has been called upon to determine under what circumstances an individual can be "punished"[4] for membership in a "subversive"[5] organization. A look will then be taken at the cases where the Court has had to decide whether "freedom of association" prohibited the forced disclosure of membership lists to the government. It will be shown how the principles stated in these cases were merged into the concept that was then used by the Court to decide the *Elfbrandt* Case. An attempt will then be made to restate this Concept[6] in somewhat broader terms and to analyze the "loyalty" cases heretofore decided by the Court to determine what effect it would have had upon them. Finally, a suggestion that will be made that this Concept provides a better approach to the "loyalty" cases than that used in the past, and that it therefore ought to be used in such cases in the future.

"FREEDOM OF ASSOCIATION"

"Freedom of association" is generally thought of in connection with membership in an organization, although this is not a necessary characteristic. One might be "associated" with other individuals in a non-organizational manner and his "freedom of association" might then be involved.[7] Infringement by the government, federal or state, upon "freedom of association," however, usually reaches the Supreme Court with one of three possible factual situations. One, the government seeks to determine an individual's membership in, or (2) to punish him for membership in, a "subversive" organization. The third situation is where the government seeks to have an organization (or an individual member thereof) reveal the names of its members. In these cases the government asserts that "punishment" for such membership, as in the first situation, or disclosure of membership, as in the second and third situations is necessary because of a governmental interest which is greater than the rights of the individuals or organizations involved.

4. Punish as used here is not confined to criminal penalties, but includes de-naturalization, deportation, and "Deprivation or suspension of political or civil rights " Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 322 (1867).

5. The word "Subversive" will hereinafter be used as a short term to refer to activity aimed at the overthrow of the government by force or violence.

6. The word "Concept" or "Elfbrandt Concept" will hereafter be used to refer to the basis of the decision in the Elfbrandt Case, *supra*, note 1, as hereinafter restated.

7. See, *e.g.*, DeJonge v. Oregon, 299 U.S. 353 (1936) Uphaus v. Wyman, 360 U.S. 72 (1958).

"PUNISHMENT" FOR INDIVIDUAL MEMBERSHIP IN A "SUBVERSIVE" ORGANIZATION

The question to be explored here is: Under what circumstances has the Supreme Court approved or disapproved governmental action punishing an individual for membership in a "subversive" organization?

Whitney v California[8]

Charlotte Whitney was tried and convicted for violating the California Criminal Syndicalism Act, which was aimed at preventing industrial or political changes through commission of crimes or unlawful acts of force, violence or terrorism. The statute made it a felony for "any person who: 4. organizes or assists in organizing, or is or knowingly becomes a member of, any organization . . of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism. . ."[9]

The defendant was charged and convicted of a violation of this section because she had become a member of, and assisted in organizing the Communist Labor Party of California, which was found to have been organized to advocate, teach or aid and abet criminal syndicalism as defined in the statute.

She contended, however, that there was no showing of specific intent on her part to participate in the illegal purpose of the Communist Labor Party To this the Court replied that the examination of the evidence, even though foreclosed by the verdict of the jury, clearly showed that she knew and acquiesced in the purposes of the Party

The Court discussed the Constitutional objections of violation of due process, and equal protection, and found no such violation. It then turned its attention to the First Amendment and stated that the essence of the offense against the defendant was "the combining with others in an association for the accomplishment of the desired ends through advocacy and use of criminal and unlawful methods."[10] What the Court is saying is that there is more to this offense than just membership. There was here, knowledge together with some activity aimed at upsetting the peace and welfare of the state.

Justice Brandeis in a concurring opinion, in which Justice Holmes joined, was struck with the fact that this statute was aimed at "association."

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8. 274 U.S. 357 (1926).
9. *Id.* at 360.
10. *Id.* at 371-2.

> The novelty in the prohibition introduced is the statute aims, not at the practice of criminal syndicalism, nor even at the preaching of it, but at association with those who propose to preach it.[11]

After reviewing the background of the First Amendment, Justice Brandeis continues,

> I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment.[12]

Even though the statute was a novel one and they had doubts whether just assembling to advocate the desirability of mass revolution at some time far in the future could be punished, both justices agreed with the majority that the evidence was sufficient to find the "existence of a conspiracy which would be furthered by activity of the society of which Miss Whitney was a member "[13]

While this case does not set forth any clear principles indicating under what circumstances an individual may be "punished" for membership in an organization considered "subversive," it does appear from both opinions that at least in this case there was something more than just membership.[14]

Justice Brandeis pinpointed the real problem, however, when he questioned whether an individual could be punished for being a member of an organization "formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future. "[15]

Schneiderman v United States[16]

Twelve years after Schneiderman had been granted a certificate of citizenship, the government brought suit to have it cancelled on

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11. *Id.* at 373.
12. *Id.* at 379.
13. *Id.* at 379.
14. But See, Scales v. United States, 367 U.S. 203, 225, n.16 (1960) for what might be a contrary opinion.
15. 274 U.S. 357, 379. Several other Criminal Syndicalism cases reached the Court about this time, none of which are particularly helpful in the analysis undertaken here. These cases are Burns v. United States, 274 U.S. 328 (1926) Fiske v Kansas, 274 U.S. 380 (1926) and DeJonge v. Oregon, *supra* note 7. DeJonge, however, did involve the legality of a conviction because the defendant, "Assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party." (p. 362) The Court reversed the conviction relying upon the First Amendment's provision regarding the right to peaceable assembly It might be said that in this case the seeds of the right of association were being nurtured. See Bates v. Little Rock, 361 U.S. 516, at 523, 528 (1959).
16. 320 U.S. 118 (1943).

the ground that it was illegally procured. The government charged that during the five years preceding his naturalization the petitioner had not behaved as a person attached to the principles of the Constitution. Specifically the government charged that, "[petitioner] was a member of and affiliated with and believed in and supported the principles of certain organizations then known as the Workers (Communist) Party of America and the Young Workers (Communist) League of America. "[17] These organizations, the government claimed were "subversive."

In discussing the petitioner's conduct during the five years in question, the Court noted that he had been a law abiding person, had not been arrested, nor involved in any disorders. "The sole possible criticism is petitioner's membership and activity in the League and the Party, but those memberships *qua* memberships were immaterial under the 1906 Act."[18] Noting that the First Amendment protects the right of free discussion and free thinking the Court points out that with the exception of the membership in these organizations, there was no evidence by conduct or statements that petitioner believed in or advocated "subversive" action as a means of attaining political ends.

There not being any direct evidence that the petitioner himself advocated "subversive" action, the government sought to show that the organizations with which he was actively affiliated did advocate the overthrow of the government. The Court upon examining the evidence concluded that the issue was in some doubt as to whether the organization with which the petitioner was affiliated called for "present violent action which creates a clear and present danger" as opposed to "mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time. ."[19] Thus the Court held that the government had failed to show that petitioner was not attached to the principles of the Constitution and therefore could not be de-naturalized.

The *Schneiderman* Case was followed in two more recent cases containing similar facts. They are *Nowak v United States*,[20] and *Maisenberg v United States*.[21] In *Nowak* the Court again found that the government had not established its case, i.e. that Nowak knew of the Party's illegal advocacy Thus "the fact that Nowak was an active member and functionary in the Party does not of itself suffice to establish this vital link in the Government's chain of proof."[22]

17. *Id.* at 121-2.
18. *Id.* at 134.
19. *Id.* at 157.
20. 356 U.S. 660 (1958).
21. 356 U.S. 670 (1958).
22. *Supra* note 20, at 666.

These three cases indicate that where the government is attempting to inflict "punishment," here de-naturalization, upon an individual, more is required than just proof of membership. Even assuming that it could be proved that the Communist Party was a "subversive" organization during the time that the individuals were members thereof, there was not sufficient proof that these persons knew of the Party's illegal advocacy Therefore their citizenship could not be taken away

These decisions rested upon the failure of the government to prove that the individuals were not attached to the principles of the Constitution. No investigation of "freedom of association" was therefore made by the Court.

"MEANINGFUL ASSOCIATION"

There have been several cases involving the question of deportation of aliens for membership in the Communist Party In *Galvin v Press*,[23] the petitioner urged the Court to construe the Internal Security Act, which provided for deportation of aliens who are members of the Communist Party, as requiring deportation only of those aliens who joined the Party knowing of its purposes and who by such joining committed themselves to this violent purpose. This the Court refused to do, construing the statute instead as requiring only "that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will." While this seems to indicate that the petitioner's knowledge concerning the Party's advocacy of violent overthrow of the government was of no import, the opinion does go on to say that "the record does not show a relationship to the Party so nominal as not to make him a 'member' within the terms of the Act."[25]

The case of *Rowoldt v Perfetto*,[26] is similar to *Galvin*, except that here, even though the membership in the Communist Party was established, the Court held that that was not enough to make the alien deportable. There must be a "meaningful association"[27] the Court says in order to support a deportation order

The *Rowoldt* Case was affirmed in *Gastelum-Quinones v Kennedy, Atty. Gen.*[28] In a footnote to this case[29] Justice Goldberg who wrote the majority opinion, states that *Galvin* and *Rowoldt*

23. 347 U.S. 522 (1954).
24. *Id.* at 528.
25. *Id.* at 529.
26. 355 U.S. 115 (1957).
27. *Id.* at 120.
28. 374 U.S. 469 (1963).

are not inconsistent. He calls attention to the fact that in *Rowoldt*, Justice Frankfurter, who wrote the majority opinion there, distinguished the two cases because of a difference in facts. This would imply that while membership in *Galvin* was meaningful, it was not so in *Rowoldt* or *Gastelum-Quinones*.

Although these cases were all decided on grounds other than the First Amendment, they are of importance here to demonstrate what the Court has been doing in the area of "punishment" for membership in a "subversive" organization. These cases indicate that even in deportation cases, the membership must be more than just membership. It must be a "meaningful association."

Schware v Board of Bar Examiners[30]

Petitioner Rudolph Schware was denied permission to take the New Mexico Bar examination on the ground that he had failed to prove good moral character Investigation had revealed that he had used certain aliases, had been arrested but never convicted, and that from 1932 to 1940 had been a member of the Communist Party.

Without discussing "freedom of association" under the First Amendment, the Court held that it was a denial of due process under the Fourteenth Amendment not to give the petitioner the opportunity to qualify for the practice of law

> There was nothing in the record, however, which indicates that he ever engaged in any action to overthrow the Government of the United States or of any State by force or violence, or that he even advocated such actions.[31]

Although this was a unanimous decision, Justice Frankfurter wrote a concurring opinion in which Justices Clark and Harlan joined. To these Justices, there was a denial of due process because the Supreme Court of New Mexico had erroneously concluded that the petitioner's several years of loyalty to the Communist Party made him a person of questionable character. To the rest of the Court (Justice Whittaker did not participate) neither the membership in the Communist Party, nor the use of aliases, nor the arrests, nor all three of these combined justified a finding that petitioner was of bad moral character and thus not qualified to practice law

Although Schware contended that denial of his application on the grounds of his membership in the Communist Party was a violation of his "freedom of association," the Court did not pass

29. *Id.* at 478.
30. 353 U.S. 232 (1956).
31. *Id.* at 245-6.

upon that contention. Rather the case was decided solely upon due process grounds. The Court, however, did discuss two points that are pertinent here: (1) that the state could not use as evidence against the petitioner what may or may not have been proved in another case to which the petitioner was not connected, and (2) that even assuming that some members of the Communist Party had engaged in illegal activities, this may not be true of all members. In connection with this last point the Court stated, " 'indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.' "[32] Thus it can be seen that the Court was concerned about how meaningful Schware's membership in the Communist Party actually was.

"KNOWING .ACTIVE, NOT NOMINAL, PASSIVE OR THEORETICAL"

The question of the approval or disapproval of governmental action punishing an individual for membership in a "subversive" organization received its most direct treatment in the case of *Scales v United States*.[33] In this case the defendant was convicted under the membership clause of the Smith Act, which provides for a fine and imprisonment for one who, "becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof. ."[34] Such society, group or assembly meaning a "subversive" society as hereinbefore defined.

The Court construed the statute as not punishing "membership in Communist organizations, as such, but only in organizations engaging in advocacy of violent overthrow" and then only those members " 'knowing the purposes thereof,' " and who are "active, and not nominal, passive or theoretical. . ."[35]

Having thus narrowly construed the statute, the Court turned to the Constitutional objections. As to the claim of the violation of the Fifth Amendment Due Process Clause, the Court concluded that the statute sufficiently met that requirement in that it reached only "active" members having also guilty knowledge and intent. This the Court states "prevents a conviction on what otherwise might be regarded as merely an expression of sympathy unaccompanied by any significant action. "[36]

Turning to the claim of the violation of the First Amendment, the Court disposed of that principally on the basis of *Dennis v*

32. *Id.* at 246.
33. 367 U.S. 203 (1961).
34. *Id.* at 205.
35. *Id.* at 207-8.
36. *Id.* at 228.

United States,[37] that if the advocacy, not of abstract doctrine, but advocacy of action could be punished there, there was no reason why membership, knowing and active, could not be punished here.

> We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.[38]

The analysis which the Court uses here to sustain the statute from due process attack, leaves the implication that had the statute not been construed to reach only "active" members, it would not have withstood due process scrutiny Further, the reference to the *Dennis* Case standard, i.e. advocacy of action as sustaining those convictions, and "active" membership to sustain this conviction also implies that without those qualifying terms, the conviction would not have met First Amendment standards.

Justice Black in dissent concluded that the Act violated the First Amendment which "absolutely forbids Congress to outlaw membership in a political party or similar association "[39] just because that organization believes in the overthrow of the government at some future date.

To Justice Douglas the matter was equally clear What was being done here was "legaliz(ing) guilt by association, sending a man to prison when he committed no unlawful act."[40]

"INTENT"

In the *Scales* Case, supra, the Court examined in detail the sufficiency of the evidence concerning whether or not the Communist Party was engaged in the present advocacy of violent overthrow of the government. The conclusion was that the evidence was sufficient. On the same day that the Court decided that case, it decided the case of *Noto v United States*,[41] but reached an opposite conclusion. The Court took the position that a defendant must be judged on the evidence at his own trial and not what may have been found to be true in another trial. On this basis the conviction was set aside.

Whether the defendant was an "active" member was not specifically determined, nor was the First Amendment discussed. The Court does, however, point out that in a membership clause prose-

37. 341 U.S. 494 (1951).
38. *Supra* note 33, at 229.
39. *Id.* at 260.
40. *Id.* at 268.
41. 367 U.S. 290 (1961).

cution whether the defendant had the requisite criminal intent is a requirement. And that this element

> [M]ust be judged *strictissimi juris* [so that] one in sympathy with the legitimate aims of such organization, but not specifically intending to accomplish them by resort to violence, might be punished for adherence to lawful and constitutionally protected purposes, because of other unprotected purposes which he does not necessarily share.[42]

This implies again that membership in a "subversive" organization does have some constitutional protection, but from which amendment is not stated.

"KNOWING AND UNKNOWING MEMBERS"

Section 6 of the Subversive Activities Control Act was before the Court in *Aptheker v Sec. of State*.[43] This Section made it unlawful for any member of a Communist organization (which was registered or ordered to register) to make application for a passport, or a renewal thereof, or to make use of one already held. After passage of the Act the State Department notified the petitioners that their passports were revoked. They brought this action to have this section of the Act declared unconstitutional.

The Court, after pointing out that the right to travel was part of the liberty protected by the Due Process Clause, held that the Act was unconstitutional on its face. It swept too broadly, and indiscriminately across the liberty guaranteed in the Fifth Amendment. Among the objections which the Court found was that "the section applies whether or not one knows or believes that he is associated with an organization operating to further aims of the world Communist movement"[44] and thus "sweeps within its prohibition both knowing and unknowing members."[45]

MEMBERSHIP CASES REVIEWED

This somewhat detailed review of the membership cases since *Whitney*, indicates that where membership in a "subversive" organization is used as a basis for "punishment," the Court has required a showing of more than membership per se. Even in *Whitney*, the Court including Justices Brandeis and Holmes were able to find a "meaningful association."

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42. *Id.* at 299-300.
43. 378 U.S. 500 (1964).
44. *Id.* at 510.
45. *Id.* at 510.

These cases, however, do not formulate with any precision a definite standard. In the de-naturalization cases, such as *Schneiderman, Nowak,* and *Maisenberg,* the missing link was the establishment of "knowledge" on the part of the individuals of the Party's illegal purposes. The deportation cases, *Galvin, Rowoldt,* and *Gastelum-Quinones,* set forth a requirement of "meaningful association" which means something more than just knowledge.

The *Schware* Case, gives no test, except the Court does indicate that indiscriminate classification of innocent with knowing activity could not stand.

A standard of some precision is put forth in *Scales,* although not a Constitutional one. In construing the Smith Act the Court read it as punishing only those members of the Communist Party who knew the purpose thereof and who were "active, and not nominal, passive or theoretical."

In *Noto,* the Court talked about the "intent" and in both *Scales* and *Noto* the Court required evidence that the Communist Party was engaged in the advocacy of the violent overthrow of the government. A similar point was also made in *Schware.*

The vice of *Aptheker* was also that it did not distinguish between "knowing and unknowing" members.

Certainly these cases indicate that just membership itself in a "subversive" organization is not a sufficient justification for "punishment." The Supreme Court has not always reached this result on Constitutional grounds. And when the Court has found that the governmental action did violate the Constitution resort has been had to the Fifth Amendment Due Process Clause rather than the First Amendment concept of "freedom of association."

DISCLOSURE OF GROUP MEMBERSHIP

As pointed out above, the problem in these cases generally arises when the government attempts to secure a list of the members of a certain organization, or makes inquiry of an individual about certain of his associations. They are important to our analysis because it is in these cases that the concept of "freedom of association" is most fully articulated.

Bryant v Zimmerman[46]

In this case there was an attack upon a New York statute which required organizations, which had an oath as a prerequisite to membership, to file with the state, a roster of its members. The Supreme

46. 278 U.S. 63 (1928).

Court upheld the law stating that it did not violate the Constitutional provisions concerning privileges and immunities, due process, or equal protection.

The defendant did raise the question of the invasion of his right of membership in the association, but the Court summarily dismissed this, stating that "his liberty in this regard must yield to the rightful exertion of the police power,"[47] thus indicating that if there were a right of association the governmental interest was greater

Watkins v United States[48]

This case has a slightly different factual situation than the "membership" cases hereinafter discussed, but is important from the point of view that the First Amendment was discussed by the Court. The decision, however, was finally based upon a violation of the Due Process Clause of the Fifth Amendment.

The petitioner was testifying before a Congressional Committee investigating "subversive" activities. He testified freely about his own activities and associations, but refused to answer questions as to whether he had known other persons to have been members of the Communist Party He did not plead the protection of the Fifth Amendment's provision against self-incrimination, but asserted that no law required him to testify about others, and further that such questions were not relevant.

The Court in agreeing with the petitioner, on the issue of relevancy, discussed at some length the First Amendment's freedom of speech, press, religion and political belief and association and concluded that "the First Amendment may be invoked against infringement of protected freedoms by law or law making."[49]

The Court then decided the matter upon due process grounds, holding that the petitioner was unable to determine from the proceedings whether he was within his rights in refusing to answer

This case while not decided on the basis of a Constitutional "freedom of association" gives recognition that such a concept is within the meaning of the First Amendment and entitled to Constitutional protection.

> The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions, or associations is a measure of governmental interference.[50]

47. *Id.* at 72.
48. 354 U.S. 178 (1957).
49. *Id.* at 197.
50. *Id.* at 197.

NAACP v Alabama[51]

It is in this case that "freedom of association" finally emerged as a concept within the First Amendment and thus entitled to its full protection. This case arose out of the attempt by Alabama to force the NAACP to reveal its membership lists. The NAACP, in resisting this, claimed the right to assert the rights of its members from compelled disclosure of their affiliation with the Association.

The Court unanimously agreed with the NAACP and held that the Constitution prohibited such forced disclosure using as a basis for its decision the First Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment.

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny [52]

Especially of concern to the Court was the effect of compulsory disclosure on the individual's affiliation with the Association, noting that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[53]

Not finding a sufficient justification for disclosure, the Court held that the NAACP could not be held in contempt for refusing to produce its membership lists.

In two substantially similar cases, *Bates v Little Rock*,[54] and *Louisiana, ex rel Germilloin, Atty Gen. v NAACP*,[55] the Court again rendered unanimous decisions that the government could not force disclosure of membership lists of the NAACP In both cases the Court relied upon the concept of "freedom of association" as the basis for its decision.

Communist Party v Subversive Activities Control Board[56]

When the Court believes that the governmental interest is greater than the individual's "freedom of association," it has required regis-

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51. 357 U.S. 449 (1958).
52. *Id.* at 460-1.
53. *Id.* at 462.
54. 361 U.S. 516 (1960).
55. 366 U.S. 293 (1951).
56. 367 U.S. 1 (1961).

tration and disclosure of membership lists. This is the essence of the decision reached in Subpart B of Part V of the opinion in this case.

The Control Board had entered an order requiring the Communist Party to register as a communist-action organization. Registration would have included giving the names and addresses of the officers and members of the Party In reaching its decision the Court was not unaware of such cases as *NAACP* and *Bates*. They were distinguishable the Court said, "in the magnitude of the public interests which the regulation and disclosure provisions are designed to protect. "[57]

The Court accepted the findings of Congress that the government was menaced by a world-wide integrated movement. Thus the Act was sustained against a First Amendment attack.

Gibson v Florida Legis. Investigation Committee[58]

The State of Florida, through a legislative investigating committee was investigating the infiltration of Communists into various organizations operating in Florida. The petitioner, Gibson, as custodian of the records of the NAACP there, was ordered to appear before the Committee and bring with him the records of the Association. He appeared, but did not bring the records, declaring that he would not produce them for the purpose of answering questions concerning membership in the NAACP He answered questions as to his personal knowledge testifying that he could not associate with the NAACP any of the 14 persons about which inquiry was made of him.

The Court held that the "freedom of association" as enunciated in *NAACP* and *Bates*, and other cases, still applied to this case.

> The entire thrust of the demands on the petitioner was that he disclose whether other persons were members of the NAACP, itself a concededly legitimate and non-subversive organization.[59]

There being no evidence of any connections between the NAACP and "subversive" or other illegal activities, the Court upheld the petitioner's right to withhold the records.

> To permit legislative inquiry to proceed on less than an adequate foundation would be to sanction unjustified and unwarranted intrusions into the very heart of the constitu-

57. *Id.* at 93.
58. 372 U.S. 539 (1963).
59. *Id.* at 548.

> tional privilege to be secure in associations in legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights. . [60]

In order to reach this conclusion the Court was called upon to distinguish several cases wherein an individual's contempt conviction was upheld because he refused to disclose to a Congressional investigating committee his own membership in the Communist Party This caused Justice Douglas to comment in a concurring opinion that the opinion of the Court "is carefully written within the framework of our current decisions."[61] Both he and Justice Black, however, would have placed greater emphasis upon the "freedom of association" concept. The decisions which the Court refers to will be discussed hereafter.

Uphaus v Wyman[62]

This case came to the Court with a factual situation somewhat unlike the cases discussed above. While the subject matter of the investigation was "subversive" activity, the disclosure requested was not membership in an organization.

The Attorney General of New Hampshire was conducting an investigation into "subversive" activities within the state. The appellant, who maintained a summer camp in New Hampshire was called to testify He was ordered to produce certain records of his camp relating to his nonprofessional employees and to give the names of all persons who attended the camp during the period of time under investigation. He refused to supply this information. In upholding the request for disclosure against the right of association the Court concluded that the interests of the state in self preservation was greater

> This governmental interest outweighs individual rights in an associational privacy which, however real in other circumstances, cf. National Association for the Advancement of Colored People v Alabama, supra, were here tenuous at best.[64]

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60. *Id.* at 558.
61. *Id.* at 559.
62. 360 U. S. 72 (1959).
63. *Id.* at 74.
64. *Id.* at 80.
65. 371 U.S. 415 (1963).
66. 377 U.S. 1 (1964).

NAACP v Button,[65] and *Brotherhood of Railroad Trainmen v Virginia*[66]

These two cases represent another facet of "freedom of association." In the *Button* Case the NAACP sought review of certain Virginia laws regulating the legal profession. These laws forbid "solicitation of legal business by a 'runner' or 'capper' [which terms] include . an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."[67]

The NAACP carried on a program of assisting in litigation aimed at ending racial segregation. It had been active in this area in Virginia for more than 10 years. The state contended that these activities fell within the statutes and therefore were illegal. The Court held otherwise basing its decision on the freedoms of the First Amendment, stating that "the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments. ."[68] As the Court saw it, associating for litigation may be an important form of political association.

Nor did the Court agree with the state's contention that its interest in regulating the legal profession was greater than the "freedom of association."

> We conclude that although the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibition which it has imposed.[69]

The *Brotherhood of Railroad Trainmen* Case, supra, extended the "freedom of association" of the *Button* Case to a situation where the state sought an injunction against a labor union which was actively engaged in advising its injured members to secure legal assistance and in recommending specific lawyers to handle their claims. In vacating the injunction granted by the State Court, the Supreme Court, in referring to the *Button* Case, states,

> The Brotherhood's activities fall just as clearly within the protection of the First Amendment. And the Constitution

67. *Supra* note 65, at 423.
68. *Id.* at 428-9.
69. *Id.* at 428-9.
70. *Supra* note 66, at 8.

protects the associational rights of the members of the union precisely as it does those of NAACP.[70]

GROUP DISCLOSURE CASES REVIEWED

These cases indicate that there is now a "freedom of association" concept in full bloom, and that the government cannot violate it without "a compelling state interest in the regulation of the subject matter"[71] attempted to be regulated. The Court has been more readily able to find an overriding governmental interest when the government is directing its investigation at "subversive" activity, except that even then the Court drew a distinction in the *Gibson* Case, between those investigations of a "subversive" organization itself and an investigation of infiltration of subversives into an admitted nonsubversive organization. The Court upheld the disclosure in the former, but prohibited it in the latter.

THE MAKING OF A CONSTITUTIONAL CONCEPT

If we combine the principles enunciated by the "group disclosure" cases, just discussed, with the "punishment" cases discussed before, we find a Constitutional Concept which may be phrased as follows: the First Amendment protects an individual from governmental infringement upon his "freedom of association" either by (1) "punishment" for membership in a "subversive" organization, or (2) by disclosure of such membership unless (A) that association was a "meaningful association" or (B) there is a "compelling" governmental interest in the matter to be regulated that even a "mere member" may be "punished" or required to disclose membership.[72]

The idea of such a Concept, of course, is not new. Its seed can be traced as far back as *Whitney v California*, where Justice Brandeis stated,

> I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment.[73]

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71. NAACP v. Button, *supra* note 65, at 438. See also Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE LAW JOURNAL 1 (1964) Douglas, *The Right of Association*, 63 COLUMBIA LAW REVIEW 1361 (1963) Rice, *The Constitutional Right of Association*, 16 HASTINGS LAW JOURNAL 491 (1965).

72. I have adopted the language in the Rowold Case, 355 U.S. 115 (1957) to include "with knowledge of illegal advocacy" (de-naturalization cases) "meaningful association" (Rowoldt), "active, and not nominal, passive or theoretical" (Scales) and with "intent" (Noto). The term "mere member" will be considered to mean something less than "meaningful association" for the rest of this paper.

73. 274 U.S. at 379 (1926).

Justice Brandeis found indication in the majority opinion "that to knowingly be or become a member of or assist in organizing an association"[74] to advocate "subversive" action at some future date might be punishable. With this he disagrees, and what he seems to be saying in reply is that the First Amendment, by virtue of the Fourteenth, would protect an individual in such a situation against governmental action.

As indicated above, and as will be further explored below, there have been other assertions that the First Amendment does protect individual association with "subversive" organizations.[75]

THE CONCEPT IN FULL BLOOM

As indicated at the beginning of this paper, the recent case of *Elfbrandt v Russell,* illustrates the merger of two principles and the formulation of a Concept. Let us then, examine that case in more detail.

By statute employees of the State of Arizona were required to take an oath of allegiance. When enacting the oath statute, the legislature attached certain provisions under which an employee taking the oath could be punished. This legislative gloss subjected to punishment (prosecution for perjury and discharge) an employee "who took the oath and who 'knowingly and willfully becomes or remains a member of the communist party ' or 'any other organization' having for 'one of its purposes' the overthrow of the government where the employee had knowledge of the unlawful purpose."[76]

In meeting the Constitutional question, the Court cites such cases as *Scales, Noto,* and *Aptheker,* for the proposition that, "mere knowing membership, without any showing of 'specific intent,' would run afoul of the Constitution. . . "[77] Applying this to the Arizona oath, with the legislative gloss, the Court finds that it "suffer[s] from an identical constitutional infirmity."[78]

> Nothing in the oath, the statutory gloss, or the construction of the oath and statutes given by the Arizona Supreme Court, purports to exclude association by one who does not subscribe to the organization's unlawful ends.[79]

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74. *Id.* at 371.
75. See dissenting opinions of Justice Black and Douglas in Scales v. United States, 367 U.S. at 259, 263 (1961) and of Justice Black in Comm. Association v. Douds, 339 U.S. at 445 (1950).
76. 384 U.S. 11, 13 (1966).
77. *Id.* at 16.
78. *Id.* at 16.
79. *Id.* at 16.

The Constitutional significance of this, the Court states is

> This Act threatens cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment.[80]

Among the cases cited in support of this are two cases to be discussed hereafter, and *NAACP* and *Gibson.*

To conclude its decision the Court states,

> 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. See Schneiderman v United States, 320 US 118, 136; Schware v Board of Bar Examiners, 353 US 232, 246. Such a law cannot stand.[81]

Thus we have the culmination of an idea that may have actually started with Justice Brandeis in *Whitney,* but seems to have gotten lost or clouded along the way

One cannot accept this, however, and store it away for future use, without first examining the cases cited by Justice White in the first paragraph of his dissent in the *Elfbrandt* Case.[82] These cases and others need to be explored in the light of this Concept.

THE LOYALTY CASES RE-EXAMINED

There are two types of "loyalty" cases that should be examined in the light of the *Elfbrandt* Concept. The first are the usual loyalty oath cases, here confined to those having to do with membership, and second the cases where the government seeks to have an individual disclose whether or not he is, or was a member of a "subversive" organization. The loyalty oath cases will be examined first.

Loyalty Oath Cases

Communication Association v Douds,[83] Osman v Douds[84]

In these two cases the Court was called upon to determine the legality of Section 9(H) of the National Labor Relations Act which required as a condition to the utilization of the Act by a union that each of its officers file an affidavit with the Board, "that he is not

80. *Id.* at 18.
81. *Id.* at 19.
82. *Id.* at 19-20. See also Justice Clark's dissent in Aptheker, 378 U.S. at 527.
83. 339 U.S. 382 (1950).
84. 339 U.S. 846 (1950).

a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches,"[85] "subversive" action. It was a criminal offense to knowingly file a false affidavit.

In the first *Douds* Case the membership portion of the oath was held not to violate the First Amendment by 5 of the 6 justices who participated in the decision. Only Justice Black dissented on this point.

In discussing the First Amendment generally, the Court placed great emphasis upon the fact that what Congress was intending to regulate was not speech at all but conduct. To sustain this the Court cites many First Amendment cases in which regulation of conduct was permitted even though there was also a regulation of speech.

The Court continues its discussion of freedom of speech, but never really seems to come to grips with any "freedom of association" issue. The opinion does point out, however, that the "statute does not prevent or punish by criminal sanctions the affiliation with any organization"[86] and that its general discussion of the First Amendment, as it applied to the beliefs portion of the oath, was also intended to apply to the membership clause.

The Court also acknowledged that restrictions upon speech were not justified unless substantial interests of society were at stake. In this case the effect upon the First Amendment's freedoms were small and the public interests were concluded to be substantial.

Justice Jackson in concurring as to the validity of the membership clause does so upon making a detailed analysis of "the decisive difference between the Communist Party and every other party of any importance in the long experience of the United States with party government."[87]

Justice Black's dissent was based upon the grounds that this oath violated the First Amendment's freedoms of belief and association. His position being "that penalties should be imposed only for a person's own conduct, not for his beliefs or for the conduct of others with whom he may associate. Guilt should not be imputed solely from association or affiliation with political parties or any other association, however much we abhor the ideas which they advocate."[88]

When the first *Douds* Case was decided, Justices Douglas, Clark, and Minton did not participate. Thus Section 9(H) was back before

85. 339 U.S. at 386.
86. *Id.* at 402.
87. *Id.* at 422.
88. *Id.* at 452.

the Court again in *Osman v Douds*, supra, wherein it was again sustained. This time Justices Douglas and Minton participated, with Justice Minton joining in upholding the validity of both the membership and beliefs portions of Section 9(H), whereas Justice Douglas joined those holding the beliefs portion unconstitutional. Thus the membership clause was sustained by a 7 to 1 majority and the beliefs clause by a 4 to 4 tie.

If the Concept suggested above had been used here it would have required the Court to declare the membership clause unconstitutional because the oath is not confined to the type of membership envisioned in the Concept. In other words Section 9(H) contains no provision restricting the holding of union office only to those having a "meaningful association" with the Communist Party. Thus the oath did not exclude membership by a person who did not subscribe to its illegal purposes.

It is to be noted, however, that the Court did place stress upon its determination that the effect upon First Amendment freedoms was slight, and the public interest substantial. In attempting to draw a line between those situations where there is a "compelling" governmental interest and those where there is not, the minds of men will differ. In view of the fact that this question arises in this case and will arise in many of the cases hereinafter to be discussed, it will not be discussed here, but will be taken up in a later portion of this paper and all of the cases will be discussed together Another pertinent question in this case and in those to be examined hereafter is whether the detriment which the individual suffers because of the governmental requirement of a loyalty oath or disclosure of membership in the Communist Party is "punishment." This question was discussed quite thoroughly in *Cummings v. Missouri*, where the Court said,

> We do not agree with the counsel of Missouri that 'to punish is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determing this fact. . . . Disqualification

89. 71 U.S. (4 Wall.) 277, 320. See also United States v. Brown, 381 U.S. 437 (1965).

> from the pursuits of a lawful avocation, or from the privilege of appearing in the courts may also, and often has been imposed as punishment.[89]

This is not a question of an individual having a right to hold union office, to public employment, to be a member of the Bar, or to teach. The question is, to what extent can an individual be "punished" for the exercise of a Constitutional "freedom of association."

That the Court had this broad concept in mind in *Elfbrandt* is evidenced by the fact that it cites the *Schneiderman* and *Schware* Cases, in neither of which was the detriment suffered by the individual a criminal penalty

Gerende v Election Board[90]

The State of Maryland had a statute requiring each candidate for public office to file an affidavit that he or she was not a "subversive" person, as defined in the statute, before such persons name could appear on the ballot. This statute was construed by the Maryland Supreme Court to mean "that to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is engaged 'in one way or another in an 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."[91]

When the case was argued before the Supreme Court, the Maryland Attorney General stated that he would advise the proper authorities to accept the affidavit in the terms laid down by the Maryland Court. On this basis the Supreme Court upheld the oath in a Per Curiam opinion.

This oath, even though narrowly construed by the Maryland supreme court does not meet the requirements of the Concept. It does not distinguish between types of memberships. It is true that the construction of the oath limited its application to knowing members, but it does not limit it to those who though being knowledgeable have some "meaningful association" with the aims and activities of the "subversive" organization.

Garner v Board of Public Works of Los Angeles[92]

The City of Los Angeles required each city employee to take an oath by which he affirmed, among other things, " 'that I am

90. 341 U.S. 56 (1951).
91. *Id.* at 56-7 (Underscoring indicates italics in orginal).
92. 341 U.S. 716 (1951).

not now and have not been or become a member of or affiliated with any organization or party which advises, advocates or teaches.' "[93] "subversive" action. The employee was also required to affirm that he would not become a member of a "subversive" organization while employed by the City In addition he was required to execute an affidavit giving information as to whether he was or had been a member of the Communist Party of the United States. Thus it can be seen that while the oath pertained to membership in a "subversive" organization, the affidavit required disclosure of membership present or past in the Communist Party For our purposes here we will treat only the oath part of the ordinance and discuss the disclosure affidavit hereafter.

The oath was sustained against an attack that it was unconstitutional as a bill of attainder, ex post facto law, and violated due process. The Court did not discuss "freedom of association" except to point out that it had "no reason to suppose that the oath will be construed as affecting adversely those persons who during their affiliation with a proscribed organization were innocent of its purpose."[94] Scienter, the Court believed was implicit within the oath.

Applying the Concept to this case would result in a decision that the oath was unconstitutional. Even though scienter is assumed to be part of the oath, it should be examined to determine its effect upon one whose membership is less than "meaningful." An employee who was a "mere member" would be unable to take the oath and thus would be subject to discharge.

Wieman v Updegraff[95]

All employees of the State of Oklahoma were required to take an oath affirming that they were " 'not affiliated directly or indirectly with any foreign political agency, party, organization or Government, or with any organization, association or group which has been officially determined by the United States Attorney General to be a communist front or subversive organization.' "[96] The employee was further required to state that he had not been a member of such an organization. This statute was interpreted by the Oklahoma Supreme Court as referring only to those organizations which were on the list at the time of the passage of the Act.

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93. *Id.* at 718-19.
94. *Id.* at 723.
95. 344 U.S. 183 (1952).
96. *Id.* at 186.
97. *Id.* at 190.
98. *Id.* at 190.

The employees who had previously refused to take the oath then appealed to the Oklahoma Supreme Court for permission to take it as so construed. This the Court refused. Thus in effect these employees were being required to take the oath in the terms of the statute as enacted. Since the Oklahoma Supreme Court should have had before it the Supreme Court's decision in *Garner*, the Supreme Court concluded that knowledge was not a part of the Oklahoma statute.

With that analysis as a basis, the Court discusses membership, although not necessarily in "freedom of association" terms, but in due process terms. The Court makes an inquiry "whether the Due Process clause permits a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organization membership, regardless of their knowledge concerning the organizations to which they had belonged. For, under the statute before us, the fact of membership alone disqualifies. "[97] In answering this inquiry the Court notes that "membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes."[98]

It is clear that in its classification here of "innocent" membership the Court means only that the individual did not know of the assumed illegal purposes of the organization. This "indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power The oath offends due process."[99]

The Oklahoma oath violated due process because it touched innocent membership, meaning membership without knowledge concerning the activities and purposes of the organization. It would also have violated the Concept, for the same reason, except it would have been upon the First Amendment's "freedom of association" rather than due process.

Cramp v Board of Public Instruction[100]

The following oath, which was part of a Florida statute, was before the Court in this case:

> I do hereby swear or affirm that I am not a member of the Communist Party; that *I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party* that I am not a member of any "subversive" organization.[101]

The petitioner did not attack the membership provisions recited

99. *Id.* at 191.
100. 368 U.S. 278 (1961).
101. *Id.* at 279, n.1. (Underscoring indicates italics in original).

above. In fact in his complaint he stated he was not a member of the Communist Party, nor of any other "subversive" organization. He did, however, contend that the portion of the oath italicized above, "impinges upon his constitutionally protected right of free speech and association, and that the language of the required oath is vague and uncertain as to deny him due process of law"[102]

After deciding a standing question, the Court turned its attention to the merits of the petitioner's due process claim. The Court noted that in a previous case the Supreme Court of Florida had held that there was an element of scienter here. With that understanding and confining its discussion to the portion of the oath italicized above, the Court agreed with the petitioner that the statute violated due process.

> Those who take this oath must swear that they have not in the unending past ever knowingly lent their 'aid,' or 'support,' or 'advice,' or 'counsel' or 'influence' to the Communist Party [103]

The vice of this, of course, was that no one could ever honestly be sure that he had *never* given "aid" etc. to some cause the Communist Party also supported.

Recognizing that the vice of unconstitutional vagueness may inhibit individual freedoms, the Court does not spell out which freedoms it is referring to, although several First Amendment cases are cited.

The application of the *Elfbrandt* Concept to the membership provision of this oath would have required the Court to reach the same decision that it did. The oath refers to membership in the Communist Party, or other "subversive" organizations, but does not distinguish between a "meaningful association" and just membership per se.

Baggett v Bullett[104]

Two oath statutes required by the State of Washington were before the Court in this case. For our discussion, however, only the 1955 statute and the oath promulgated thereunder is pertinent because that statute and oath contains a membership clause. The 1931 oath statute did not.

The 1955 statute required an oath from state employees who were required to swear that they were not a subversive person as

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102. *Id.* at 282.
103. *Id.* at 286.
104. 377 U.S. 360 (1964).

defined in the statute, or that they " 'with knowledge that the organization is an organization as described in subsection (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization.' "[105]

The oath form required to be signed by the employee contained this statement, " 'I do solemnly swear (or affirm) that I am not a member of the Communist Party or knowingly of any other subversive organization.' "[106]

Treating this as a case similar to *Cramp*, the Court held that it was just as unconstitutionally vague as the statute stricken down in that case.

The Court does not discuss the membership clause of either the 1955 statute, or the oath form promulgated thereunder Yet the *Elfbrandt* Concept would require the same decision that the Court did reach, i.e. that the statute violated the Constitution, here the First Amendment "freedom of association."

The opinion does however refer to "the hazard of being prosecuted [punished] for knowing but guiltless behavior "[107] Thus again recognizing the principle which is the essence of Part (a) of the Concept.

Adler v Board of Education[108]

Although this is not an oath case, it falls within the classification of "loyalty" cases and therefore ought to be examined in the light of the *Elfbrandt* Concept.

New York State had adopted a detailed loyalty program for its employees called the Feinberg Law This law provided, among other things, that membership in a "subversive" organization made an individual ineligible for state employment. Subdivision (c) of Section 12-A reads as follows:

> '(c) Organizes or helps to organize or becomes a member of any society or group which teaches or advocates that the government of the United States shall be overthrown by force or violence, or by any unlawful means. '[109]

Another section of the law provided that the Board of Regents shall, after holding a hearing, promulgate a list of the organizations it finds to be "subversive." Evidence of membership in any organi-

105. *Id.* at 362.
106. *Id.* at 364, n.3 and 4.
107. *Id.* at 373.
108. 342 U.S. 485 (1952).
109. *Id.* at 487, n.3.

zation on the list would be prima facie evidence of disqualification for a position in the school system.

A declaratory action was brought to have the law declared unconstitutional upon grounds that it violated freedom of speech, assembly and due process. As to the question of the violation of the First Amendment because of the membership provision, the Court adhered to its decision in the *Garner* Case. And while the Court admitted that one's freedom of choice between membership and employment might be limited by a statute such as the Feinberg Law, the Court believed that that limitation is one that the states could make under their police power

The question of the effect of the part of the statute whereby membership is prima facie evidence of disqualification was also discussed and it was pointed out that the presumption was not conclusive. The Court emphasizes this fact by quoting the New York Court of appeals to the effect that " 'the phrase prima facie evidence of disqualification imports a hearing at which one shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned' "[110] by the statute.

On this basis the Court did not find any Constitutional infirmity in the law Justice Douglas, however, dissented in an opinion joined by Justice Black. He points out that "a teacher is disqualified because of her membership in an organization found to be 'subversive.' The findings as to the 'subversive' character of the organization is made in a proceeding to which the teacher is not a party and in which it is not clear she may even be heard."[111]

This is a difficult case in which to apply the Concept, because it does appear that once membership in an organization declared "subversive" has been established, the employee is given a hearing. In such hearing, the membership is only prima facie evidence of disqualification. This seems to imply to the Court that if the employee could furnish a good explanation for the membership, then membership alone would not be grounds for disqualification. If this in effect means, that disqualification for "mere membership" would not be allowed, and that a "meaningful association" must be established before disqualification then the statute would meet the *Elfbrandt* Concept.

This, of course, is not answered by the Court's opinion. Nor is there an answer to the question raised by Justice Douglas. It appears that an employee wishing to object to the inclusion of a certain organization on the Board of Regents list, would have had

110. *Id.* at 495.
111. *Id.* at 508-9.

to appear at the hearing held by the Board when it determined what organizations to include on the list. If he did not do so, apparently the establishment of the "subversive" characteristic of the organization would be conclusive in any hearing the employee had as to his eligibility for employment. In *Noto*, which is a later case, and also a criminal one, the Court stated that one must be judged on the evidence at his own trial, and not what may have been found in another one. The same point was made in *Schware*, which also was a later case but not a criminal one.

Summarizing the "loyalty oath" cases discussed here it appears that the application of the Concept would have required the oaths to be held invalid in *Douds*, *Gerende*, and *Garner*. In *Wieman*, *Cramp*, and *Baggett*, the Court would have reached the same decision that it did but on First Amendment grounds.

The *Adler* Case seems not to lend itself to a clear decision either way, under the Concept. If the employee could not be disqualified by "mere membership" the decision would withstand the *Elfbrandt* test, leaving the question raised by Justice Douglas unanswered.

Cases Concerning Disclosure of Individual Membership

In a number of cases going back to *Garner*, the Court has been faced with the question whether or not an individual can be required to disclose present or past membership in the Communist Party In all of the cases, except two, the Court held that disclosure could be required, being of the opinion that the governmental interest in the subject matter being regulated was sufficient.

In some of the cases the governmental interest was the desire of the government to have qualified employees, such as city employees and teachers. In other cases it was the public need for trustworthy lawyers. Where the disclosure was requested during a governmental investigation of "subversive" activities, the public interests were held greater than the individual's rights, and disclosure was again directed. In a recent case, however, the Court held that an individual need not disclose whether or not he was a member of the Communist Party prior to the effective date of the state law relating to "subversive" investigations.

In the *Garner* Case, in addition to taking an oath, the Los Angeles City employees were required to execute an affidavit stating whether they were or ever had been a member of the Communist Party. Against an attack that the affidavit requirement violated freedom of speech and assembly, the Court concluded that there was nothing in the Constitution that precluded such an inquiry.

Membership in the Communist Party, past or present was pertinent to the employee's fitness for employment. The Court carefully pointed out, however, that it was not deciding whether an employee could actually be discharged for disclosure of such a political affiliation.

The question was presented again in *Beilan v Board of Education*,[112] but here the individual, Mr. Beilan, was a teacher At two different times he had been summoned into his superintendent's office and asked whether he had held a certain position in the Communist Political Association. He refused to answer this question each time. The Superintendent warned Mr Beilan that if he refused to answer he might be dismissed. He still refused and was eventually discharged.

The Supreme Court, relying upon its decision in *Garner* affirmed the dismissal, pointing out that Mr. Beilan was discharged for incompetency because of being insubordinate and lacking in frankness and candor

The question whether an applicant for a license to practice law can be required to disclose past or present membership in the Communist Party has been before the Court in three cases: *Konigsberg v State Bar of California*,[113] *Konigsberg v State Bar of California*,[114] and *In Re Anastaplo*.[115]

In the first *Konigsberg* Case the Court read the record as indicating that Mr Konigsberg's application was denied because the applicant "failed to demonstrate good moral character and failed to show he did not advocate"[116] "subversive" action. It was therefore specifically determined by the Court that the Committee of Bar Examiners did not deny Konigsberg's application simply because he refused to answer questions with regard to membership in the Communist Party

It was upon that analysis of the record that the Court examined the evidence and agreed with the applicant that it did not support the two grounds relied upon by the Committee in denying him admission to the Bar The decision was therefore arbitrary and discriminatory thus violating the Due Process Clause.

When the case was remanded to the California supreme court, it was referred to the Committee of Bar Examiners for further consideration. Additional hearings were held and the applicant was again questioned about his past or present membership in the Com-

112. 357 U.S. 399 (1958).
113. 353 U.S. 252 (1957).
114. 366 U.S. 36 (1961). Hereafter referred to as Konigsberg II.
115. 366 U.S. 82 (1961).
116. 353 U.S. 252, 259.

munist Party. He again refused to answer This time in denying the application the Committee specifically stated that it was doing so because of the applicant's refusal to answer the questions.

Thus the groundwork was laid for a specific determination by the Supreme Court of the question whether refusal to answer questions about ones political associations could be used as a ground for the denial of a license to practice law The Court's conclusion was that the state could inquire into the possibility of Party membership and that denial of a license upon refusal to disclose such association or non-association was not a denial of due process.

Konigsberg had also contended that under the First Amendment's protection of free speech and "association" he could not be compelled to answer questions propounded dealing with Party membership. After pointing out that freedom of speech and "association" have never been treated as absolutes, the Court stated that:

> [G]eneral regulatory 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 Amendment forbade . when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality. . . .[117]

In the light of this the Court concluded that the interest of the state

> [I]n having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented.[118]

In Re Anastaplo, is a case similar to *Konigsberg II.* Anastaplo was denied admission to the Bar of Illinois upon his refusal to answer questions put to him by the Bar Examining Committee, concerning possible membership in the Communist Party The Committee had been supplied with uncontroverted evidence of his good moral character.

Konigsberg II settled two of the issues in this case, i.e. a state can adopt a rule refusing admission to the Bar if the applicant obstructs the work of the Committee by refusing to answer material questions, and the interests of the state in such a case outweighs

117. *Supra* note 114, at 50-51.
118. *Supra* note 114, at 52.

the deterrent effect upon freedom of speech and "association."

Anastaplo argued further, however, that he was not given adequate warning as to the consequence of refusal to answer the questions relating to the Communist Party, and even so his refusal to answer did not obstruct the work of the Committee because it already had sufficient evidence of his good character

As to the first of these contentions, the Court concluded that he had been adequately warned. As to the second, the Court found nothing in the Constitution that required the Committee to conclude its investigation having once secured evidence of good moral character

Barenblatt v United States,[119] and *DeGregory v Atty. Gen. of N H.*,[120] involve the question of whether an individual may be required to answer questions concerning membership in the Communist Party, during an investigation of "subversive" activities. In *Barenblatt*, the investigation was being conducted by a Congressional Committee investigating the alleged infiltration of Communists into education. The petitioner, Barenblatt, was called to testify and after answering a few preliminary questions refused to answer questions directed to the question of his being a member of the Party He refused to answer the questions basing his refusal on a claim that the questions infringed protected rights under the First Amendment.

In answer the Court pointed out that the First Amendment does not give an absolute right to refuse to answer relevant questions propounded in an investigation such as this. There is a balancing issue involved here the Court said between public and private interests. In matters such as here the Communist Party, the Court notes, has always been viewed as different from an ordinary political party

> We conclude that the balance between the individual and the governmental interest here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended.[121]

The *DeGregory Case* arose in New Hampshire where the Attorney General was conducting an investigation of "subversive" activities within the state, under a statute enacted in 1957 DeGregory was called before the Attorney General and answered questions concerning his relationship with Communist activities since 1957,

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119. 360 U.S. 109 (1959).
120. 383 U.S. 825 (1966).
121. *Supra* note 119, at 134. This case was followed in Wilkinson v. United States, 365 U.S. 399 (1961), and Braden v. United States, 365 U.S. 431 (1961).

but refused to answer any questions about his associations prior to that date. He did so basing his refusal upon his First Amendment rights. With this the Court agreed:

> There is no showing of "overriding and compelling state interest" (Gibson v Florida Legislative Comm. 372 US 539, 546) that would warrant intrusion into the realm of political and associational privacy protected by the First Amendment.[122]

The case of *Shelton v Tucker*,[123] presents the question of individual disclosure in a somewhat different factual setting. Here an Arkansas statute required teachers in state supported schools or colleges, "to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years."[124]

The statute was attacked by several teachers upon the grounds that it violated their rights to personal, associational, and academic liberty In upholding this contention the Court states that the "unlimited and indiscriminate sweep of the statute brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."[125]

Setting aside for a moment the question of the balancing of the governmental interests against the rights of the individual, the application of the Elfbrandt Concept in all of these cases, except *DeGregory* and *Shelton*, would have brought about a decision contrary to the decision the Court did reach. The inquiry was not confined to whether there was a "meaningful association" under any of the criteria set forth in the "punishment" cases heretofore discussed.

This question was raised in *Konigsberg* II, where the petitioner contended that "the questions as to Communist Party membership were made irrelevant by the fact that bare, innocent membership is not a ground of disqualification. "[126] The Court answered this by referring to the Committee Chairman's statement to the petitioner and his Attorney The Committee Chairman had told Konigsberg that if he had acknowledged that he was a member of the Communist Party, "the Committee would then be in a position

122. *Supra* note 120, at 829.
123. 364 U.S. 479 (1960).
124. *Id.* at 480.
125. *Id.* at 490.
126. *Supra* note 117, at 46.

to ask you what acts you engaged in to carry out the functions and purposes of the Party "[127] The Chairman further pointed out that a whole new area of investigation might have been opened up, if they had been able to determine whether petitioner was a Communist Party member.

This is not a sufficient answer when tested against the *Elfbrandt* Concept. Under that Concept Konigsberg would have had a freedom to be a member of the Communist Party for which he could not have been "punished" unless it was first determined that his was a "meaningful association." It being only "meaningful association" that the state could punish the *Elfbrandt* Concept would have required that the petitioner be questioned only to determine whether such "meaningful association" did in fact exist, thus giving protection to the "freedom of association." The inquiry therefore should have been directed to determining whether the petitioner was an *active* member in any organization which he *knew* advocated the overthrow of the government by force or violence.

The end sought to be achieved in these disclosure cases is the desire of the state to protect itself from "subversive" activity. Restricting the questioning to information concerning the individuals present, knowing, active conduct would give the state the information it needs to protect its interest and at the same time not infringe upon the individual's "freedom of association." As the Court pointed out in *Elfbrandt*, "those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or public employees."[129]

Shelton v Tucker confirms this approach. The Court there stated:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties *when the end can be more narrowly achieved.*[128]

What has been said here applies with equal force to the other disclosure cases. What the Court has permitted in these cases is the "punishing" of an individual for not disclosing membership in an organization for which under the Concept (if the membership was known) the same "punishment" could not have been inflicted

127. *Id.* at 46.
128. *Supra* note 123, at 488. (Underscoring added).

unless the membership was a "meaningful association." Furthermore, assuming in these cases that the membership has been disclosed, as the Court pointed out in *Schware* and explicitly held in *Noto*, one must be judged by the evidence in his own case. This would have required the government in each instance not only to show "meaningful association" but that the Communist Party was a subversive organization, before the individual could be "punished." In *Barenblatt, Wilkinson,* and *Braden,* the individuals were *criminally punished* for non-disclosure of membership, for which if disclosure had been made, they could not have been "punished" unless the association was "meaningful" and the government could prove that the Communist Party was a "subversive" organization.

Because the minds of men will differ on the question of whose interests are greater, those of the government or of the individual, the Concept seeks to focus the inquiry not upon "mere membership," which may be nominal, passive or theoretical but upon knowing, active membership which is a "meaningful association," the purpose of which is "subversive" activity Only in those cases where there is a "compelling" governmental interest would the Concept allow the individuals "freedom of association" to be subordinated.

In applying this to all of the "loyalty" cases hereinbefore discussed, the governmental interest should have been found to be inferior to the individuals "freedom of association" because there is no "compelling" governmental interest that could not have been adequately protected by requiring inquiry only as to knowing, active membership.

The point can be illustrated by the use of the facts of the *Schware* Case where Schware's membership in the Communist Party was admitted. He had, however, quit the Party some 14 years prior to making his application to take the New Mexico Bar examination. The Court had no difficulty in determining that his Constitutional rights had been violated, although the decision was based upon due process grounds. There clearly was no "meaningful association" in this case.

Suppose, however, that Schware had been a member of the Party until one day prior to submitting his application. Would the governmental interest now be greater, thus giving New Mexico sufficient grounds for refusing to allow him to take the Bar examination? If the answer to that question is yes, then at what point in time between fourteen years and one day does the membership become so meaningful that the governmental interest is then superior? Under the *Elfbrandt* Concept, this difficult question need

129. 384 U.S. at 17 (1966).

not be answered because the issue would not be raised in that manner. The inquiry would be directed as to whether the applicant was a knowing, active member of an organization advocating "subversive" action. If the answer to that question is no, that concludes the matter as far as further questioning on that subject is concerned. If the applicant is not truthful he would be subject to whatever penalties any applicant would be subjected to for giving false information to the Committee. This protects both the state's interest and the individual's "freedom of association."

SUMMARY

The *Elfbrandt* Case seems to be the merging of the principles of the "punishment" cases and the concept of "freedom of association" noted by Justice Brandeis in *Whitney*, but really developed in the first *NAACP* Case and subsequent cases. Although the *Elfbrandt* Case does not clearly define the Concept, nor state its boundaries, an attempt has been made here to do so by an examination of the cases that form the background for the Concept. As shown, there are a line of cases in which the Court has been called upon to determine under what circumstances an individual can be "punished" for membership in a "subversive" organization. In developing these cases the Court has required that there be a showing of "knowledge of illegal advocacy;" that the membership be "active, and not nominal, passive or theoretical;" and that there be "specific intent" to further the illegal purposes of the organization. All of these are bound up with the phrase "meaningful association."

As this principle was being developed by the Court there was also emerging a First Amendment "freedom of association" through the group disclosure cases heretofore discussed. Thus we see the Court on the one hand requiring something more than membership before an individual could be "punished" and on the other hand a fast developing "freedom of association" which was entitled to protection under the First Amendment. The merging of these two principles bring into full bloom, the Concept that: the First Amendment protects an individual from governmental infringement upon his "freedom of association" either by (1) "punishment" for membership in a "subversive" organization, or (2) by disclosure of such membership unless (a) that association was a "meaningful association" or (b) there is a "compelling" governmental interest in the matter to be regulated that even a "mere member" may be "punished" or required to disclose membership.

If this Concept had been applied to the loyalty oath and disclosure cases heretofore decided by the Court it would have resulted in a

series of decisions which would have given greater protection to "freedom of association," yet at the same time, would have allowed the government to protect itself against "subversive" activity The Concept would have required the focus to be upon whether the individual was engaged in a "meaningful association" for the purpose of "subversive" activity If he were not, his "freedom of association" would have been protected and the governmental interest in self preservation would have been preserved.

The use of the Concept in future cases of this type will provide a more definite standard than balancing each case, because the emphasis will be upon the individual's actions rather than upon his mere association with unpopular causes.