For many years it has been a bone of contention in California, and other states, that government officials are not taking the prescribed oath as required by the state's laws or constitution. Generally speaking the oaths that come into question are those that added the so-called "loyalty" clause during the "McCarthy Era" when it was feared by American lawmakers and government that communism, left to its own devices, was sure to overrun our constitutional republic in some of the most subversive ways one could imagine. Among the methods which the government feared the communists would employ to brainwash our people into accepting the belief system that communism was a far superior way of life to that of capitalism was the infiltration of our educational system. One of the means utilized by the various state and federal governmental agencies to combat this feared infiltration was to add to the oath of fidelity a corresponding "loyalty oath" which one would have to attest in order to find employment in and with government services and entities.

The new oath not only consisted of swearing allegiance to the United States and the particular state government it was fashioned for, but as well, disavowing any connection, membership, or contact with any organization or association which was listed by a government agency as a communistic organization or association which advocated overthrowing the government by force or any other unlawful means. Among the stalwarts who took exception to this type of so-called "political terrorism" by our government were the educators, who led the charge against "loyalty oaths".

The purpose of this paper is to determine whether or not the Constitutional Oath required by the Constitution of the State of California is a constitutionally valid oath which merits application to all whom seek government employment and who are commanded to take such an oath prior to holding office or gaining employment in the government of the state of California. As it stands today, while the full California Oath is still set forth within the California Constitution, the second paragraph of the Constitutional oath, the "loyalty oath", is no longer taken by any employees or persons elected to any office or public trust, or any judicial, legislative, or executive officers.

In an effort to better understand if the California Oath is being lawfully administered today, or not, we must examine the history and developmental case law which purportedly has answered

this question in the affirmative. That is to say, that omission of the “loyalty oath” contained within the California Constitutional Oath is the correct application of the oath. Or is it? Let’s find out ----------

Pockman v. Leonard (1952) 39 Cal.2d 676 was one of the first California cases which addressed loyalty oaths in California. This particular oath was a result of the “Levering Act” (Stats. 1951 [3d Ex. Sess. 1950, ch. 7], p. 15.). The oath was placed in the Government Code at Section 3103 and read as follows:

"I, ____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

_____

(If no affiliations, write in the words “No Exceptions”)
and that during such time as I am a member or employee of the
_____ I will not
(name of public agency)

advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."

The *Levering Oath* was required to be taken by the following people: “Members of the Legislature, and all public officers and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted . . . . .”
"`Public officer and employee' includes every officer and employee of the State, including the University of California, every county, city, city and county, district, and authority, including any department, division, bureau, board, commission, agency, or instrumentality of any of the foregoing."

However the oath found in the California Constitution at the time did not incorporate the **second paragraph** of the *Levering Oath*, **which was known as the loyalty oath**. The Constitutional Oath read as follows:

“I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of California; and that I will faithfully discharge the duties of the office of _____, according to the best of my ability.”

Following the oath was the prohibition which stated “And no other oath, declaration, or test, shall be required as a qualification for any office or public trust.”

The Constitutional Oath was to be taken by "Members of the Legislature, and all officers, executive, legislative, and judicial, except such inferior officers as may be by law exempted . . .”

This language had been brought forward from the 1879 California Constitution which was brought forward from the 1849 Constitution.

The *Pockman* case, brought by a state college professor, raised three questions all which were decided against the professor. The First was whether the provisions which declare public employees to be civil defense workers, "subject to such civilian defense activities as may be assigned to them by their superiors or by law," render the entire act invalid. The court found that it did not. The Court held that the state could properly create job descriptions which included the performance of certain duties as a condition of employment.

The next argument advanced was that in view of the fact that the professor had previously taken the constitutional oath in 1946, which did not contain the offending paragraph two, he should not have to take another oath, having already taken the one prescribed by the

constitution, arguing that the constitutional provision which states, "And no other oath, declaration, or test shall be required as a qualification for any office or public trust.", would be offended. The court rejected this argument taking the position that it is within the power of the legislature to prescribe any form of oath, so long as they do not go beyond the intent, object, and meaning of the Constitution.

The last question was whether the oath infringed upon the professor's contract since he would not be paid according to his contract until and unless he took the new oath. The court found that it was within the police powers of the state to require loyalty of its public employees and in doing so it found there can be no question that an implied condition of the agreement is that they will be loyal to the government and that they will not advocate its overthrow by force.

The court found in *dictum* that the oath did not offend either the 5th Amendment or implicate the 1st Amendment since the disclosure of the required information was a reasonable condition of qualification of employment, an interest above and beyond that of self-incrimination, and it did not require one to disavow political beliefs or membership in any named political party, respectively.

The Pockman Court took solace in its decision citing to the United States Supreme Court decisions of *Garner v. Los Angeles Board*, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317; and *Adler v. Board of Education* of City of New York, 342 U.S. 485, 72 S.Ct. 380, 385, 96 L.Ed. 517.

Keep in mind that First Amendment challenges were not directly made by the professor in *Pockman*, therefore the case was not decided on that basis which left the issue wide open for future review.

Thereafter, in 1953, the new detailed form of oath was deleted from Government Code section 3103 and was set forth in section 3 of article XX of the Constitution of California, which had been amended as of November 4, 1952, so that it required public employees to subscribe to an oath containing identical language to that approved in the Pockman decision.

In the case of *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 22 [64 Cal.Rptr. 409, 434 P.2d 961] the California Supreme Court purportedly overruled *Pockman* concluding that "the oath required by the second paragraph of section 3 of article XX of the California Constitution is invalid. . . ." based on the authority of *Keyishian v. Board of Regents* 385 U.S. 589, 17 L.Ed.2d

629, 87 S.Ct. 675 (1967) which in turn had supposedly overruled Adler v. Board of *Education of City of New York, supra*; and, *Elfbrandt v. Russell*, 384 U.S. 11, 16 L.Ed.2d 321, 86 S.Ct. 1238 (1966).

Or did it? We must now exam the *Vogel, Keyishian, and Elfbrandt* cases to find exactly what those cases accomplished. After which we are constrained to ask ourselves “can any part of a constitutional amendment be declared unconstitutional by the courts once it is lawfully adopted and ratified?”

When the *Vogel* decision was handed down in 1967, the oath contained in Section 3 of Article XX read as follows:

“I, ____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows: ____, (If no affiliations, write in the words "No Exceptions") and that during such time as I hold the office of ____ (name of office) I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means.”

Section 3 also required this oath be taken by the following people: “Members of the Legislature, and all public officers and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted . . . . .”

"`Public officer and employee' includes every officer and employee of the State, including the University of California, every county, city, city and county, district, and authority, including any department, division, bureau, board, commission, agency, or instrumentality of any of the foregoing."

Once again, it was a California College Professor who brought the action to nullify the second paragraph of the now new Constitutional Oath, i.e, the “loyalty oath”. The Court first noted that the Pockman case previously discussed was decided with reliance principally on *Adler v. Board of Education of the City of New York, supra*. However, the Court noted that the Adler decision was overturned by the United States Supreme Court in *Keyishian v. Board of Regents*, 385 U.S. 589, 595; 17 L.Ed.2d 629, 636; 87 S.Ct. 675. Thus, the court determined that the Pockman case must be re-examined in this light. Prior to proceeding, it is incumbent that we look at the *Adler* case at this point.

In *Adler* the Civil Service Law of New York, Section 12 a, made ineligible for employment in any public school any member of any organization advocating the overthrow of the Government by force, violence or any unlawful means. Section 3022 of the Education Law, added by the *Feinberg Law*, required the Board of Regents (1) to adopt and enforce rules for the removal of any employee who violates, or is ineligible under, Section 12 a, (2) to promulgate a list of organizations described in § 12 a, and (3) to provide in its rules that membership in any organization so listed is prima facie evidence of disqualification for employment in the public schools. Section 3022 was attacked on the grounds that it was an abridgment of the freedom of speech and assembly of persons employed or seeking employment in the public schools of New York; and, that the law violated the principles of due process.

Section 3021of the Education Law, the so called Feinberg Law of the Act, implemented Section 3022. The constitutionality of which was not brought into question in the state courts, so when the case came before the Supreme Court they declined to entertain such a challenge to Section 3021 until such time as the state courts had an opportunity to do so. Section 3021 stated as follows: "A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

It was first argued that the *Feinberg Law* and the rules promulgated thereunder constituted an abridgment of the freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York. The court found that no such abridgment existed. It determined rather that perhaps an individual's freedom of choice was being limited. That is to say, his choice to belong to one of the named subversive groups or his choice to work within the public educational system. Thus, if a person was found to be unfit and disqualified from employment in the public school system because of membership in a listed organization, he was not thereby denied the right of free speech and assembly.

The Court, in dictum, opined that "One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined, in part, by the company he keeps." In short, at this time the Supreme Court had no problem in the finding of "guilt by association." While this concept may still be ingrained today in our society in a communal sense, it should have no application in our courts or legal system without more substance than mere association.

It was next argued that since the statute directed the Board of Regents to find that membership in any named organization constituted prima facie evidence of disqualification, it was a violation of due process. This again addressed the "guilt by association" doctrine. In short, the violation of the statute arose simply because of a person's membership in an organization with the presumption that the person knew of the organization's quest, i.e., the subversive overthrow of government by unlawful means or methods, whether he actually did or did not know. The justices also rejected this contention.

The Court found that there are many presumptions in law which have been vigorously upheld by the courts and our legal system, both of a criminal and civil nature. These presumptions, which of course, must give way once substantial evidence to the contrary is presented thus preserving due process to the extent that the presumption was not conclusive but rather subject to rebuttal.

The statute was also attacked from a procedural due process aspect. However, the court rejected the contention as well because the accused was entitled to a hearing to defend himself and bring forth evidence to rebut the presumption of guilt which was written into the statute.

As a result the Civil Service Law of New York was preserved. However, the question which must be asked appears to be obvious. “Since this case did not require the taking of an oath of loyalty, but rather upheld a law which forbade treasonable or seditious utterances or acts or anyone who advocated the overthrow of government by force, violence, or any unlawful means; or published material advocating such overthrow; or organized or joined any society advocating such doctrine, what has that to do with actually subscribing to an oath which either requires one to deny or admit the same?”

In any event it would appear the *Pockman’s* Court reliance upon the Alder case, was at best tentative and at worst untenable. Yet, *Keyishian v. Board of Regents*, 385 U.S. 589, 595; 17 L.Ed.2d 629, 636; 87 S.Ct. 675 still must be examined to determine the basis for overruling the *Alder* decision and the impact this had on the loyalty oath.

The *Keyishian* case arose as a result of a lawsuit brought by faculty members of the State University of New York along with a non-faculty employee, seeking declaratory and injunctive relief, claiming that New York's teacher loyalty laws and regulations were unconstitutional. They were terminated for refusing to sign a certification or to sign an oath as to whether they had advocated or been a member of a group which advocated the forceful overthrow of the government. Once again the same Sections, i.e, 3021 and 3022 of the New York Education Law were to be examined by the court just as in the *Alder* case.

Remember, *Adler* was a declaratory judgment suit in which the Supreme Court held, in effect, that there was no constitutional infirmity in Section 12 a or in the *Feinberg Law* on their faces and that they were capable of constitutional application. But the contention urged in the *Keyishian* case that both § 3021 and § 105 were unconstitutionally vague was not heard or decided. Section 3021 of the Education Law was challenged in Adler as unconstitutionally vague, but because the challenge had not been made in the pleadings or in the proceedings in the lower courts, the Court refused to consider it.

The *Keyishian* Court went on to explain that “ . . . to the extent that Adler sustained the provision of the *Feinberg Law* constituting membership in an organization advocating forceful overthrow of government a ground for disqualification, pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested. *Adler* is therefore not dispositive of the constitutional issues we must decide in this case.” So at this point, *Adler* has

not been overturned; it just sets no precedent which the *Keyishian* Court can rely upon in forming its opinion. The case continues . . . .

Prior to the *Keyishian* case reaching the Supreme Court, or even trial, the offending certifications and oaths were withdrawn from the regulations, which the government argued, mooted the case. The Supreme Court felt otherwise, noting that while those offending regulations may have been disposed of, the law which implemented them remained in effect, which is the true difficulty which gives rise to the lawsuit in the first instance.

In any event, the case was brought before the Supreme Court questioning the vagueness of the laws which would test the loyalty of the teachers, professors, and employees of the New York Educational system. It was complained that the words "treasonable or seditious" were undefined in the law and therefore the law was overbroad and vague as no one could reasonably know when and if, or how, they may have violated the law, thereby leaving it to the discretion of administrative officers to determine, by whatever means, if an educator had violated the law.

By way of comparison the Supreme Court cited to the Smith Act noting that " . . the Smith Act, 18 U.S.C. § 2385, punishes one who "prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of" unlawful overthrow, provided he is shown to have an "intent to cause the overthrow or destruction of any such government." Here, in order to violate the Smith Act the government must show there is **the intent or mens rea** to overthrow, or cause to overthrow or destroy or cause to be destroyed the government. No such qualification could be found in the New York civil or educational laws. Hence the vagueness and ambiguity of the law.

It is axiomatic in law that a criminal law or any law which punishes must be stated in sufficient terms to particularly describe the proscribed conduct. As we were told in *Viereck v. United States*, 318 U.S. 236 (1943) " . . . men are not subjected to criminal punishment because their conduct offends our patriotic emotions or thwarts a general purpose sought to be effected by specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, **to define** and condemn. For the

courts are without authority to repress evil save as the law has proscribed it and then only according to law."

In any event the *Keyishian* Court found Section 3021 of the Education Law and subdivisions 1(a), 1(b) and 3 of Section 105 of the Civil Service Law as implemented by the machinery created pursuant to Section 3022 of the Education Law unconstitutional. It was found that the vagueness of the words "treasonable or seditious" were such that the law impermissibly and unreasonably infringed upon the First Amendment protections of Freedom of Speech.

Once again the Court was not in a position to strike down an Oath, nor was it in a position to declare a State Constitutional Amendment to a State Constitution unconstitutional. So, once again, one must ask why is the Vogel Court relying upon this case when the question before it is whether the second paragraph of California Constitutional can be lawfully administered to state officers, offices, public trusts, and employees? Moreover, the offending words, "treasonable or seditious" do not appear in the California Oath, so the principal of vagueness could not apply in the *Vogel* Court as decided by the *Keyishian* Court, at least to that extent.

In *Keyishian* the constitutionality of the discrete provisions of subdivision 1(c) of § 105 and subdivision 2 of the *Feinberg Law*, which make Communist Party membership, as such, prima facie evidence of disqualification were also challenged. Subdivision 2 of the *Feinberg Law* was, however, before the Court in *Adler* and its constitutionality was sustained. Thus, the Supreme Court had to find new reasons or interpretations of law since *Alder* was decided to hold that this section was constitutionally infirm.

The court cited a plethora of cases demonstrating that constitutional law had evolved since *Adler*. That being the case the Court felt that whether mere membership in a listed organization was cause for removal from public service needed to be examined. It was at this point that the Court turned its attention to *Elfbrandt v. Russell*, 384 U.S. 11, (1966). And the Court explained that, "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." *Id.*, at 17. We there struck down a statutorily required oath binding the state employee not to become a member of the Communist Party with knowledge of its unlawful purpose, on threat of discharge and perjury prosecution if the oath were violated. We found that "[a]ny lingering doubt that proscription of mere knowing membership, without any showing of

‘specific intent,' would run afoul of the Constitution was set at rest by our decision in *Aptheker v. Secretary of State*, 378 U.S. 500." *Elfbrandt v. Russell, supra*, at 16. In Aptheker we held that Party membership, without knowledge of the Party's unlawful purposes and specific intent to further its unlawful aims, could not constitutionally warrant deprivation of the right to travel abroad. As we said in *Schneiderman v. United States*, 320 U.S. 118, 136, "[U]nder our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization . . . do not subscribe unqualifiedly to all of its platforms or asserted principles." "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." *Elfbrandt, supra*, at 19. Thus mere Party membership, even with knowledge of the Party's unlawful goals, cannot suffice to justify criminal punishment, see *Scales v. United States*, 367 U.S. 203; *Noto v. United States*, 367 U.S. 290; *Yates v. United States*, 354 U.S. 298;[fn11] nor may it warrant a finding of moral unfitness justifying disbarment. *Schware v. Board of Bar Examiners*, 353 U.S. 232.” 385 @ 607.

Unlike the *Alder* case the Supreme Court recognized in *Elfbrandt* that the doctrine of “guilt by association” was one not recognized in law. A better outcome? I think we would all agree that it is. In society we may be known by the company we keep. But as a matter of law we are blind to that childhood admonition. As the Court explained in *Keyishian* “*Elfbrandt* and *Aptheker* state the governing standard: 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.” 385 @ 608

Here again the high Court speaks of legislation and not constitutional amendments made in due course according to the process laid out by law such as was accomplished when Article XX, Section 3 of the California Constitution was amended to accommodate the loyalty oath. And, remember, there was no penalty set forth in California law which punished one’s association with a listed organization. In other words there was no California equivalent to the New York *Feinberg Law*, i.e., Education Law Section 3022.

Given that the *Vogel Court* also relied upon *Elfbrandt* in rendering its opinion, we must now turn to that case prior to further examination of the *Vogel* decision to which we shall then return.

The *Elfbrandt* case has a bit of history behind it which must first be examined before dissecting the final opinion of the United States Supreme Court. This case, which involved questions concerning the constitutionality of an Arizona Act requiring a loyalty oath from state employees, was before the Supreme Court. However, the Court, without reaching the merits of the case vacated the judgment of the Arizona Supreme Court which had sustained the oath in 94 Ariz. 1, 381 P.2d 554. The case was remanded to the Arizona Supreme Court for reconsideration in light of the United States Supreme Court decision in *Baggett v. Bullitt*, 377 U.S. 360. On reconsideration the Supreme Court of Arizona reinstated the original judgment. 97 Ariz. 140, 397 P.2d 944. The case was then again appealed to the United States Supreme Court which accepted certiorari, 382 U.S. 810.

We first exam the Arizona Supreme Court's initial decision in this matter in *Elfbrandt v. Russell*, 94 Ariz. 1 (1963). The Arizona Supreme Court relied upon the Adler case, supra and the reasoning and logic enunciated therein when it came to upholding the loyalty oath for government employees opining that "We do not doubt that the legislature in order to preserve the integrity of the public service and safeguard it from disloyalty may enact statutes designed to reasonably attain those ends. Loyalty may be a prescribed qualification for the holding of public employment." Id.@ 6. The initial oath took the following form:

" State of Arizona, County of _____ I, _____ (type or print name) do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona, that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of _____ (name of office) according to the best of my ability, so help me God (or so I do affirm)."

_____

(signature of officer or employee)

The Court explained that they found "nothing within the express language of the oath to which all may not conscientiously and with devotion to the government subscribe."

The Court then went on to note that – "There is, however, incorporated within the oath a promise that the public officer or employee is not presently engaged in and in the future will refrain from certain conduct. [To Wit] "Any officer or employee * * * having taken the * * * oath or

affirmation * * * knowingly or wilfully at the time of subscribing * * or * * * thereafter during his term of office * * * does commit or aid in the commission of any act to overthrow by force or violence the government of this state or * * * advocates the overthrow by force or violence * * * or * * * becomes * * * a member of the communist party * * * or its successors or any of its subordinate organizations * * having for one of its purposes the overthrow by force or violence of the government of the state of Arizona * * * shall be guilty of a felony and upon conviction * * * subject to all the penalties for perjury; * * *." § 38 231, subd. E. *94 @ 6,7*.

The complaining teacher attacked the loyalty portion of the oath in almost every aspect imaginable which were disposed of as follows: there was no indiscriminate classification of innocence with knowing activity; it did not have the unconstitutional vice of vagueness and indefiniteness as it contained the element of mens rea; it did not violate any rights protected by the Fifth and Sixth Amendments to the Constitution of the United States for neither are there penalties imposed for past activities nor did it require divulgence of past activities or associations; it was not a Bill of Attainder; not a want of substantive due process and no denial of procedural due process; and, a person who has in the past engaged in the prohibited conduct can escape punishment by altering the course of his present activities.

However, the Court did take cognizance of the fact that the most serious of considerations which must be given to the challenge of the oath legislation was the First Amendment challenge thereto juxtaposed to the exercise of the legitimate police powers of the state to compel such an oath of loyalty. As to those concerns the Court stated “We recognize the prohibited conduct in denying membership in the enumerated organizations diminishes the individual's freedom of association and hence the unfettered communication of ideas, but whatever test be applied, constitutional restraints are satisfied. The conduct sacrificed to governmental interests only minimally and incidentally conflicts with the First Amendment. The gravity of the evil sought to be reached, discounted by its improbability, justifies the invasion.”

Thus the legislation was upheld by the Arizona Supreme Court and the loyalty oath survived all constitutional challenges. As previously explained the Supreme Court, after accepting certiorari, remanded the case back to the Arizona Supreme Court for further consideration. The Arizona Supreme Court in it second shot at *Elfbrandt v. Russell*, 97 Ariz. 140 (1964) made the following considerations, findings and decisions, once again upholding the Arizona loyalty oath even in light of the United States Supreme Court’s decision in *Baggett v. Bullitt* 377 U.S. 360, (1964).

The question which was re-examined in Arizona was whether the oath offended due process considerations because it was vague and indefinite. A question in their first decision that the Arizona Supreme Court summarily dismissed because the oath "[did] not have the unconstitutional vice of vagueness and indefiniteness in placing an accused on trial for an offense, the nature of which he is given no fair warning, for punishment is restricted to specified acts knowingly and wilfully committed." The same issue addressed in the *Baggett* case, *supra*.

In distinguishing the oath challenged and found lacking in Baggett the Arizona Court found that “The Washington oath [in *Baggett*] did not by its language confine the taker to the undertakings of citizenship and the faithful and impartial discharge of the duties of an office. It offended because it "is not open to one or a few interpretations, but to an indefinite number" and that only "extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty." *Baggett v. Bullitt*, 377 U.S. 360, 378. Thus, the vital distinction between the Washington act and the Arizona act was the fact that it was the susceptibility of the Washington statute to the interpretation of required forswearing of an undefinable variety of "guiltless knowing behavior" which was condemned; an infirmity that was not present in the Arizona act creating the loyalty oath because Arizona punished only those who committed an act or aided in the commission of an act to overthrow the government by force or violence – an act which could not be innocently committed or aided in as the legislature provided that it must be done "knowingly or wilfully."

Notwithstanding the fact that it would appear that these distinctions were not only in line with Bagget, but also with *Keyishian*, the Supreme Court once again granted certiorari in the *Elfbrandt* case. 382 U.S. 810. And again, it must be noted that the Courts are discussing and the teachers are challenging legislation in both states which added to the constitutional oath of each state which was already in place in each state’s constitution, as opposed to a challenge to the actual constitutional oath contained within the constitutions of both Washington and Arizona.

We now turn to *Elfbrandt v. Russell*, 384 U.S. 11 (1966). First the Court notes that “This case, which involves questions concerning the constitutionality of an Arizona Act requiring an oath from state employees, has been here before. We vacated the judgment of the Arizona Supreme Court which had sustained the oath (94 Ariz. 1, 381 P.2d 554) and remanded the cause for reconsideration in light of *Baggett v. Bullitt*, 377 U.S. 360. See 378 U.S. 127. On

reconsideration the Supreme Court of Arizona reinstated the original judgment. 97 Ariz. 140, 397 P.2d 944."

To be sure, the United States Supreme Court was not happy with the Arizona Supreme Court's decision which reinstated their decision the United States Supreme Court obviously wanted vacated and re-decided consistent with its political beliefs, which in turn once again led to the grant of certiorari.

Keep in mind though that once again, the U.S. Supreme Court did not have to pass on the constitutionality of the Arizona's constitutional oath as it did not have one, except as provided for its judicial offices.[6] The Arizona oath of office was created as a result of legislation which was not even sanctioned by its constitution. Hence, the statutory oath of office was never a part of the Arizona State Constitution. The U.S. Supreme Court only had to decide upon the constitutionality of state legislation which created a general oath of office which may, or may not have offended the U.S. Constitution, which in turn did not require nor rely upon any Arizona state constitutional authority. This, once again, is a far cry from a Court having before it a State's constitutional oath of office, contained within that State's Constitution originally or as amended thereby. Nevertheless, let us examine *Elfbrandt, surpa*.

Upon a rather disquietingly succinct opinion, the Court, relying heavily upon *Speiser v. Randall*, 357 U.S. 513, found that the Arizona legislation establishing its oath and the punishment for not honestly subscribing thereto was vague and therefore the Arizona Act threatened the cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment, thus finding it unconstitutionally infirm. *Baggett v. Bullitt, supra; Cramp v. Board of Public Instruction, supra. Cf. N.A.A.C.P. v. Alabama,* 357 U.S. 449, 460 et seq.; *Gibson v. Florida Legislative Committee,* 372 U.S. 539, 543 546.

On the other hand, the dissent, consisting of Justice White, with whom Justice Clark, Justice Harlan and Justice Stewart joined, thought it improvident by the majority to strike down the Arizona Oath in its entirety as it was apparent to them that the only infirmity with the oath, as found by the majority, was the fact that one could be subject to criminal prosecution for not honestly subscribing thereto, noting that the majority did not even mention, much less over-rule *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56; *Garner v. Board of Public Works*, 341 U.S. 716; ***Adler v. Board of Education***, 342 U.S. 485; *Beilan v. Board of Education*, 357

U.S. 399; *Lerner v. Casey*, 357 U.S. 468; *Nelson v. County of Los Angeles*, 362 U.S. 1, which held that state legislatures had the right to require such oaths as a condition of state employment. See also, *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Board of Education*, 350 U.S. 551.

With this history behind us we now turn to the Vogel decision which purports to deal with California's Constitutional Oath of Office based upon these past decisions; Or, does it?

As in the previous cases, the *Vogel* case was brought by the educational system, specifically, a university professor for the State of California. Keep in mind that when the *Vogel* case came before the California Supreme Court, the constitutionality of the loyalty oath had not only been decided in *Pockman, supra*, but as well by the United States Supreme Court, as previously explained in the cited cases. The loyalty oath, which at that time was merely legislation enacted by the *Levering Act*, was adopted and became a part of the California Constitution approximately two years after *Pockman*. Thus, the loyalty oath was relegated from the abyss of legislation to the heights of constitutional status. 7

In *Vogel* the court first took a look at the history of the Court decisions which purported to examine loyalty oaths such as California's which have previously been examined herein. After noting the *Adler* and *Pockman* decisions, and by implication, all cases which stemmed therefrom sustaining the vitality of those cases, the California Supreme Court decided that not only had the view of prevailing law regarding such oaths somehow changed, but in addition, because of this announced, unarticulated change, the Court's decision in *Pockman* was now necessarily subject to re-examination. The court also said, without explanation, that the *Keyishian* and *Elfbrandt* decisions rejected the *Alder* Court's viewpoint. Yet, we already know that that simply was not, and is not today, the case.

However, no case cited or relied upon by the *Vogel* court had ever struck down a State's Constitutionally required oath of office. In this vein, the California Supreme Court took a quantum leap completely unjustified by any decision it was persuaded to rely upon.

The *Vogel* Court now moved from the state's legitimate and justifiable concerns which conditioned state employment upon the imposition of a loyalty oath to First Amendment

freedom of association and speech considerations previously advanced and rejected by the Courts beginning with challenges made in *Alder, et seq*. And it stated:

"Even where a compelling state purpose is present, restrictions on the cherished freedom of association protected by the First Amendment and made applicable to the states by the Fourteenth Amendment must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected wherever possible. When government seeks to limit those freedoms on the basis of legitimate and substantial governmental purposes, such as eliminating subversives from the public service, those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of our most precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective. (*Keyishian v. Board of Regents, supra*, 385 U.S. 589, 602 603 [17 L.Ed.2d 629, 640 641, 87 S.Ct. 675]; *Elfbrandt v. Russell*, 384 U.S. 11, 15 et seq. [16 L.Ed.2d 321, 324, 86 S.Ct. 1238]; N.A.A.C.P. v. Button, 371 U.S. 415, 432 433 [9 L.Ed.2d 405, 417 418, 83 S.Ct. 328]; *Shelton v. Tucker*, 364 U.S. 479, 488 [5 L.Ed.2d 231, 237, 81 S.Ct. 247]; *Bagley v. Washington Township Hospital Dist., supra*, 65 Cal.2d 499, 506 509; *Fort v. Civil Service Com., supra*, 61 Cal.2d 331, 337 338.)"

Thus, following the lead of First Amendment advocates, the California Supreme Court assumed the authority to invalidate a California Constitutional provision. However, in every case relied upon by the *Vogel* Court, the prevailing theme was not primarily meritorious First Amendment objections per se, but rather, the punishment which was inflicted upon the individuals because of their association with "listed groups" which advocated the illegal or unlawful, or violent overthrow of the government. This was much more akin to a due process question regarding overbreadth and vagueness of a statute as opposed to a First Amendment issue which could conceivably, if not improbably, invalidate a state's constitutional mandate.

Remarkably, the Court was unusually dismissive of any argument which would support the vitality of the constitutionality of the California Constitutional Oath on due process grounds, assuming they had the power or authority to question the same in the first instance. (*Cf. County of Madera v. Gendron*, 59 Cal.2d 798, 801 [31 Cal.Rptr. 302, 382 P.2d 342, 6 A.L.R.3d 555].)

As a result of the *Vogel* decision, the second paragraph of the California Constitutional Oath, the loyalty oath, was declared invalid. Not unconstitutional, but rather invalid. Assuming, without *arguendo*, "invalid" means "unconstitutional" we have a penultimate and ultimate question to examine.

The penultimate question proposed then is "What is the virtue of foreclosing Court expansion of and protections under the First Amendment in this instance, the same which is surely one of the very essential elements of the heart of this nation?"

Ultimately, however, is the most fundamental question. One which simply cannot be ignored. And that is **"Can an amendment to a state constitution, duly adopted and ratified, be declared unconstitutional by any branch of government which the constitution itself has created; the constitution being the supreme law of the land?** We will examine the second question first, as the penultimate question serves only as a basis for intellectual debate, and not as an explanation as to the current state of the law and where, or if, our courts have decided this issue in error.

The recognized presumption of constitutionality requires that a constitution and its provisions are to be upheld against all legislation. In *Katzberg v. Regents of University, California*, 29 Cal.4th 300 (2002) the Court reminded us that "Article I, section 26 of the California Constitution states: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Under this provision, "all branches of government are required to comply with constitutional directives (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 493, fn. 17; *Bauer Schweitzer Malting Co. v. City and County of San Francisco* (1973) 8 Cal.3d 942, 946) or prohibitions (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 8)." (*Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1454 (Leger).) **As we observed more than a century ago, "[e]very constitutional provision is self executing to this extent, that everything done in violation of it is void." (*Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479, 484.)**

It would appear then, unless the Court's words and reasoning are superfluous, that a long string of uninterrupted California Court decisions have come to the same conclusion, that is – (1) the California Constitution, and its provisions are the supreme law of the land in this state, (2) these Constitutional provisions are not in need of any legislative assistance to be in full force and effect; and, (3), anything which is attempted to be done or accomplished by any government

branch which is contrary to the California Constitution has no effect whatsoever. As the *Katzberg* Court recognized above, not only are all the provisions of the Constitution self-executing, the California Constitution, in and of itself, provides for that very proposition; and this has been the rule for over 100 years in this State. Hence, that which is worth repeating, i.e., the California Constitution is the supreme law of the land in the State of California.

It seems that little more need be said about the supremacy of the California Constitution and the mandate and directive that all branches of the California government are required to comply with all constitutional provisions, mandates, and directives. So which California branch of government then, in the Constitutional scheme of things, has been empowered with, and can declare by such empowerment the very document or any part thereof which created these same branches of government, as unconstitutional? The California Supreme Court in *Katzberg* says, unequivocally, that no branch has that power unless, by express words, the Constitution has granted that power unto some branch of government. A thorough reading of Article 20, Section 3 leaves no doubt in the mind of the reader that no such power was granted to any branch of government which would allow any such branch to invalidate or ignore any part of the California Constitutional Oath.

Yet apparently, according to the Vogel Court, that may not be the case when it comes to the application of the Constitutional Oath required of all public officials which can, to this day, still be found in Article 20 Section 3 of the California Constitution; and, contrary to the Vogel Court opinion, or any interpretation given to that opinion, **the oath is still in full force and effect**.

For example let's examine a case relied upon by the *Katzberg* Court. In *Mosk v. Superior Court* (1979) 25 Cal.3d 474 the California Supreme Court Justices were under investigation for judicial misconduct. Justice Mosk was subpoened to testify before the Commission on Judicial Performance. Mosk moved the Superior Court for a petition to quash the subpoena which was denied. Eventually, the petition made its way to the California Supreme Court. Among the questions posed by Mosk was "Whether the public investigation authorized under rule 902.5 of the California Rules of Court was unconstitutional in light of California Constitution article VI, section 18, subdivision (f), which requires the Judicial Council to make rules which provide for confidentiality of proceedings before the Commission?"

The Court answered the question in the affirmative. Thus, it was established that the Judicial Commission cannot make rules or regulations which conflict with the Constitution and expect to use those rules.

To suggest that any government body can enact rules, regulations, or statutes which are contrary to the constitution, one only needs to consult the constitution itself which declares itself to be the supreme law of the land, nothing to the contrary notwithstanding. Article VI, United States Constitution. Additionally, Article 3, Section 1 of the California Constitution states that the State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land. Furthermore, the United States Constitution and Statutes requires each state to adopt a Constitution consistent with that of the United States Constitution. Article IV, Section 4; **Also See**, various statutes admitting states to the union.

It must then follow that a State's Constitution is the supreme law of the land for each state, with the obvious exception of federal preemption laws under the United States Constitution.

We have thus far established that no judicial decision, legislative enactments, nor executive rule making powers can trump constitutional mandates, in either the federal constitutional system or the state constitutional system. But, can any court, even a State Supreme Court, declare a state constitutional amendment as "unconstitutional should it be properly adopted and ratified?"

In the case of *First Unitarian Church v. County of L.A.,* 48 Cal.2d 419 (1957) the Court said, when examining the "constitutionality" of a constitutional amendment that —

"No meritorious argument has been or can be advanced to the effect that section 19 of article XX [of the California Constitution] is not a valid enactment under state law or that it is inapplicable to the church property exemption provided for in section 1 1/2 of article XIII. Section 19 of article XX was adopted in accordance with the procedures required by the Constitution for an amendment to that document by vote of the electors of this state."

In the case of *Carter v. Seaboard Finance Co.,* 33 Cal.2d 564 (1949) the court explained in great detail how the State Constitution and the amendments thereto were the supreme law of the land of the state and clearly stated —

“It may be said without question that the objective of the amendment was to abolish the inflexible, inadequate and unworkable provisions of the usury law and to reestablish in the Legislature the power to enact laws affecting the business of lending money in this state. This change could be brought about only by amending or repealing the usury law by vote of the people or by a constitutional amendment. The latter course was followed and as all statutes enacted either by the Legislature or under the reserved initiative power of the people must be in conformity with and be governed by the Constitution **the amendment of 1934 became the supreme law of the state on the subjects to which it relates**.”

Again, the State Supreme Court recognizes that once passed, a constitutional amendment is the supreme law of the state “on the subjects to which it relates.” There is absolutely no wiggle-room here. Should it be otherwise our constitutions and amendments thereto would not and could not be considered the guiding document for all state laws made in pursuance thereof.

In *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340 [276 Cal.Rptr. 326, 801 P.2d 1077] the court found as unconstitutional that part of an initiative which would have amended the California State Constitution in such a manner which would have effectively made the California judiciary dependent on the federal judiciary, effectively negating California’s Judicial Branch of government, which in turn certainly would have had devastating effects upon the constitutional republican form of government which Article IV, Section IV of the United States Constitution guarantees.

In *Bramberg v. Jones*, 20 Cal.4th 1045 (1999) the California Supreme Court examined proposition 225 establishing term limits. The sole question before the Court was the validity of the particular term limits measure embodied in Proposition 225. It was recognized by the Court that “In the wake of the United States Supreme Court decision in *U.S. Term Limits, Inc. v. Thornton* (1995) 514 U.S. 779, supporters of congressional term limits instituted an organized campaign in numerous states to secure the adoption of an amendment to the federal Constitution that would establish congressional term limits. The drafting and circulation of the initiative measure that ultimately became Proposition 225 was part of that multi state campaign.”

The Court found that “Proposition 225 both directly instructs, and indirectly attempts to coerce, California's congressional and state legislators in the exercise of their federal constitutional

function of proposing and ratifying amendments to the United States Constitution," concluding that "the proposition clearly conflicts with the amendment process authorized by Article V and is therefore unconstitutional."

Thus, in the cases where the California Supreme Court has found a state constitutional amendment unconstitutional was for one of two reasons; To Wit, whether the amendment would destroy a part of our constitutionally guaranteed republic, or whether an amendment would be in violation of the United States Constitution's supremacy clause, Article VI.

Most assuredly in the *Raven* decision the question of individual rights and the protection thereof under the California State Constitution was dealt with, but only in dictum. But even in raising that question, it was not found that an amendment duly passed to the California Constitution which did not conflict with the United States Constitution's supremacy clause, even though it may have had an adverse impact on individual rights guaranteed under the California Constitution would have, or could have, been held as unconstitutional.

Thus, it would appear that all duly enacted revisions or amendments to the California Constitution, however accomplished within the prescriptions of the law, become a part thereof after adoption, unless directly or indirectly contrary to the United States Constitution.

Which brings us back to the First Amendment objection leveled against the 2nd paragraph of California's Constitutional oath. It does not appear, given the cases examined that the First Amendment to the Bill of Rights, United States Constitution could stand as a federal constitutional bar to California's Constitutional Oath of Office. After all, the main objection to such oaths in other states which we examined consisted of two elements: To Wit, First the state oath was mere state legislation and not a constitutional provision within a state constitution, duly adopted thereby; Second, the California oath prescribes no punishment because of the admitted associations with "listed organizations" as other state legislative oaths did.

No other objections raised to the oath of office were ever upheld by the courts. And, as to the first challenges to such oaths, the First Amendment objections raised fell in every California and Federal Supreme Court decision. Absolutely nothing the United States Supreme Court did or said changed, upon that Court's re-examination of the First Amendment considerations to

loyalty oaths, which would have prevented the constitutional application of California's loyalty oath, paragraph 2, which is still in full force and effect in that state constitution today. California's constitutional oath, however, has never been taken to the United States Supreme Court. The most conceivable reason rests with and in the erroneous decision by the *Vogel* Court.

Nevertheless, in a society where our government is hell-bent on election to curtail or completely dissolve constitutional protected rights, guaranteed to us as a birth-right, do we really want to make an issue out of cases which seemingly go too far in protecting a citizen's individual rights when that citizen is a government employee? Or do we suggest that citizens have no rights or at least limited rights once engaged in government service? After all, our country was founded on the principles that an individual's right to life, liberty, and the pursuit of happiness would be jealously protected by the government though it may not seem the case today in many instances!

What advantages do we have to gain, other than the mere enforcement of the "rule of law," today which would benefit us by attempting to reduce the protection of individual rights? Is the "rule of law" today still to be an absolute mandate upon our judiciary? And what, if anything, is so important about taking an oath which carries no punishment for violation thereof? Merely a sense of profound duty recognized by the affiant, perhaps? Specifically speaking the United States Constitution, while mandating an oath be taken by the president, prescribes no punishment should befall upon him should he fail to abide by such an oath. Article II, Section 1, Clause 8. Yes, he can be impeached, but not necessarily for failing to abide by his oath. And it must be noted that all other oaths required by any federal official, elected or otherwise, is a matter of legislative will, not constitutional law.

So again, what is the advantage of further pursuing this matter? Nothing, nothing at all, so long as "We the People" have decided to abdicate the "rule of law" for the "rule of expediency." But we are said to be a "nation of laws," not a "nation of men." So expediency should not factor into this equation, not in this country. Not in a country where the government was purposefully designed to be deliberative and inefficient.

In the end, the Constitutional Oath of Office required by the state of California should either be enforced, or the Constitution should be amended. To those who would be employed by the

state yet object to the oath, let them seek private employment. We need them not in our government nor in our service when they object to the core constitutional principles upon which our country and our government was founded. Ironically, that same government in which they seek employment.

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1 It is important to note that the government contended that the professor was not entitled to the benefit of this constitutional prohibition because he was not the holder of an "office or public trust" within the definition of those terms under the meaning of that provision. Thus, it was the government's position that a public employee - not considered to be an "office or public trust"such as a member of the legislature, executive, or judicial branch - could be required to take as many oaths as the legislature deemed appropriate. The court squarely rejected the government's argument finding it was without merit.

2 It is of interest to note that not only are these lawsuits being brought by the educational arm of our society but, indeed, many of these laws were directed solely at educational institutions. It was the belief that since educators played such an instrumental role in the shaping of young minds that any educator who had communistic tendencies or beliefs, and it was believed that many did, could easily convey those tendencies and beliefs onto the young minds whom they were teaching and influencing at a time when our young are easily susceptible to influence, rebellion, and corruption.

3 See, Wieman v. Updegraff, 344 U.S. 183; Slochower v. Board of Education, 350 U.S. 551; Cramp v. Board of Public Instruction, 368 U.S. 278; Baggett v. Bullitt, 377 U.S. 360; Shelton v. Tucker, 364 U.S. 479; Speiser v. Randall, 357 U.S. 513; see also Schware v. Board of Bar Examiners, 353 U.S. 232; Torcaso v. Watkins, 367 U.S. 488. In Sherbert v. Verner, 374 U.S. 398, 404, we said: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." 385 @ 605.

4 The *Feinberg* Certificate was explicit stating that: "Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University." This official administrative interpretation was supported by the legislative preamble to the *Feinberg Law*, Section 1, in which the legislature concludes as a result of its findings that "it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced."

5 From a historical perspective it must be remembered that California either adopted or fashioned many of its laws from New York Laws; or, at the very least took direction from them.

6 Article 6, Section 26, Arizona State Constitution.

7 Keep in mind that in the State of California the State Constitution is the supreme law of the land giving way only to the United States' Constitution in some instances. And even then, in other instances in state matters, the California State Constitution can trump the United States' Constitution. What is important is that the State Constitution is the basis for all other law made in California. Thus, it would be absurd to assume a state constitutional provision could be held unconstitutional by a court which the constitution itself created and conveyed authority upon.