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“The Hysteria of Our Times”: Loyalty Oaths in California

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THE GREAT DISSENTS OF THE “LONE DISSENTER”

*Justice Jesse W. Carter’s Twenty Tumultuous
Years on the California Supreme Court*

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“THE HYSTERIA OF OUR TIMES”: LOYALTY OATHS IN CALIFORNIA¹

By Marc Stickgold*

The period immediately after World War II saw a great upsurge in efforts to define and constrain the United States’ newest “enemy”—the Soviet Union. Although an ally in the battle against Hitler’s Germany, the animosity between the U.S. and Russia had festered during the war, and erupted fairly quickly thereafter. History usually pegs the start of the “Cold War”² to Winston Churchill’s speech in 1946, in which he declared that “an iron curtain has descended across” Europe.³ In the years immediately following, the United States government, as well as many of the states, including California, enacted an almost endless stream of laws designed to weed out, isolate, sanction, and punish anyone thought to share any ideas or associations that could be labeled subversive.

This historical period, called the “American inquisition,”⁴ saw the enactment and enforcement of a wide variety of laws meant to accomplish these purposes. People were subject to criminal prosecution for their beliefs, associations or advocacy;⁵ denial of, or discharge from, employment;⁶ denial of

1. *Steinmetz v. Calif. Bd. of Educ.*, 44 Cal. 2d 816, 826 (1955) (Carter, J., dissenting).

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2. Bernard Baruch, a financier and presidential advisor, used this phrase initially in testimony before Congress in 1947. It was picked up shortly thereafter by the then well-known political columnist and author, Walter Lippman. *See generally* David Reynolds, *ORIGINS OF THE COLD WAR IN EUROPE* (1994).

3. *The Sinews of Peace*, Westminster College, Fulton, Missouri (Mar. 5, 1946).

4. Cedric Belfrage, *The American Inquisition, 1945–1960* (1973); *see also* Stanley Kutler, *The American Inquisition* (1982).

5. *See Dennis v. U.S.*, 341 U.S. 494 (1951) (affirming the conviction of Eugene Dennis, General Secretary of the Communist Party); *Yates v. U.S.*, 354 U.S. 298 (1957) (concerning the prosecution of California Communist Party members).

6. *See, e.g., Keyishian v. Bd. of Regents of the State of N.Y.*, 385 U.S. 589, 603–04 (1967) (summarizing and discussing the leading cases on the subject).

government benefits or licenses;⁷ and exclusion from publicly funded housing.⁸ One of the many tools used to identify or uncover suspected subversives was to extract oaths of loyalty that normally required the target to disclaim, or admit, to any belief, advocacy or association—past, present, or future—that the government deemed suspicious. Both the United States Supreme Court and the California Supreme Court, rendered many decisions concerning the validity of these “loyalty oaths.”⁹

In *Steinmetz v. California State Board of Education*,¹⁰ Justice Jesse Carter said in his dissent that “even if one should be so caught up in the *hysteria of our times* that he fails to perceive the intrinsic unconstitutionality of [this oath statute¹¹], he still must recognize the fact that the decision of the majority ... is erroneous.”¹² In an earlier case Justice Carter observed, also in dissent, that the majority opinion brought “into sharp focus the *loyalty oath hysteria* which has pervaded this country and particularly this state during the past five or six years.”¹³

7. See, e.g., *Cohen v. Hurley*, 366 U.S. 117 (1961), overruled by *Spevack v. Klein*, 385 U.S. 511 (1967), and *Malloy v. Hogan*, 378 U.S. 1, 84 (1964) (disciplinary proceeding against an attorney).

8. See *Lawson v. Housing Auth. of City of Milwaukee*, 270 Wis. 269 (1955), cert. denied 350 U.S. 882 (1955), *Chi. Housing Auth. v. Blackman*, 4 Ill. 2d 319 (1954); *First Unitarian Church of L.A. v. County of L.A.*, 48 Cal. 2d 419, 447–48 (1957) (Traynor, J., dissenting) (reversed by *First Unitarian Church of L.A. v. County of L.A.*, 357 U.S. 545 (1958)).

9. California Supreme Court cases are summarized and discussed in: *Vogel v. L.A. County*, 68 Cal. 2d 18, 20–24 (1967); U.S. Supreme Court cases are summarized and discussed in: *Keyishian v. Bd. of Regents of the State of N.Y.*, 385 U.S. 589, 603–04 (1967).

10. See *Steinmetz*, 44 Cal. 2d at 826 (Carter, J., dissenting).

11. The statute in Steinmetz, section 1028.1 of the Government Code of California, known as the Luckel Act, required any public employee, when summoned before any “state or local agency,” to answer under oath questions pertaining to “[p]resent personal advocacy,” or “present ... or past knowing membership” in the Communist Party or “any organization” that “advocated the forceful or violent overthrow of the [g]overnment....” *Steinmetz*, *supra* note 1, at 818–19; see also CAL. GOV’T CODE § 1028.1 (1953), Stats. 1953, c. 1646, p. 3367, § 3.

12. See *Steinmetz*, 44 Cal. 2d at 826 (Carter, J., dissenting) (emphasis added). Justice Carter states later in his dissent, “It may also be true that the witness ... is a completely loyal American who believes that the recent rash of ... loyalty oaths ... has overstepped the boundary of individual liberty.... What a rude awakening it must be when this ... witness finds even the court of his state caught up in the *hysteria of the times....*” *Id.* at 833–34 (emphasis added).

13. *Pockman v. Leonard*, 39 Cal. 2d 676, 688 (1952) (overruled by *Vogel v. L.A. County*, 68 Cal. 2d 18, 26 (1967) (emphasis added)).

Historical Background

Justice Carter wrote of the long history of various loyalty oaths, finding in that history a number of important lessons. Quoting U.S. Supreme Court Justice Robert Jackson, a former Nuremberg Trials Chief Prosecutor, Carter agreed that

if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.¹⁴

His deep aversion to loyalty oaths was expressed in an opinion as early as 1946, where he wrote a separate concurring opinion in a case striking down the required signing of a loyalty oath in order to hold a meeting in a public school. In that case, a representative of the ACLU had to sign an oath indicating, “I do not advocate … the overthrow of the … [g]overnment … by force, violence, or other unlawful means” in order to use a school auditorium for a meeting. Justice Carter found this to be an unconstitutional “prior censorship on the right of assembly.”¹⁵ In opinions that followed, Justice Carter was always aware in reviewing loyalty oaths, that understanding the oppressive history of these oaths was critical. He felt, as Confucius had 2,500 years earlier, “[s]tudy the past if you would divine the future.”¹⁶

He wrote that oaths, as tools to silence dissenters in the Anglo-American system, began in the 1200s, and were used by the ecclesiastical courts of England for hundreds of years. First in support of the Catholic Church in Rome, and then in the service of the Anglican Church after Henry VIII made his break with Rome (over, among other things, its refusal to allow him to annul one of his six marriages), various oaths, and proceedings to enforce oaths, became routine. These inquisitions, as they came to be called, began to face resistance. Fueled by “crusade[s] against heresy” in the 16th century, the proceedings became more and more oppressive until Sir Edward Coke, in 1609, issued a prohibition against further proceedings of the High Court of Ecclesiastical Causes

14. *First Unitarian Church of L.A. v. L.A. County*, 48 Cal. 2d. 419, 457 (1957) (Carter, J., dissenting) (quoting *W. Va. State Bd. v. Barnette*, 319 U.S. 624, 642 (1943)), reversed by *First Unitarian Church of L.A. v. County of L.A.*, 357 U.S. 545 (1958).

15. *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 556 (1946) (Carter, J., concurring).

16. Confucius. See, e.g., Richard Alan Krieger, CIVILIZATION’S QUOTATIONS 40 (2003).

in a particularly outrageous case.¹⁷ The height of abuse of these oath proceedings is exemplified most clearly in the infamous operation of the Court of the Star Chamber. Parliament finally abolished both the High Court of Ecclesiastical Causes and the Court of the Star Chamber in 1641.¹⁸

In the United States, the history of the abuses imposed through loyalty oaths, restrictions on assembly and association, and punishment of religious and political beliefs, were well known to the founders. Justice Carter said that “[i]t must be remembered that while our government was ‘conceived in liberty,’ it was born in revolution.”¹⁹ Moreover, he added, “[t]he Declaration of Independence was the antithesis of a pledge of allegiance or loyalty to the British government of which the then American colonists were a part.”²⁰

In the constitutional debates, an oath of allegiance was discussed in some detail, as was other historical tyranny and oppression of the English Crown. The result was that the U.S. Constitution includes only two provisions related to oaths. Article II designates a simple affirmative oath for the President of the United States;²¹ Article VI recognizes the right of legislatures to require an oath similar to the one in Article II for other key government officials, but bars any religious oaths to hold office under the authority of the United States.²² “Test oaths,” wrote Justice Hugo Black, “designed to impose civil disabilities upon men for their beliefs rather than for unlawful conduct were an abomination to the founders of this nation.... Test oaths are notorious tools of tyranny. When used to shackle the mind, they are, or at least they should be, unspeakably odious to a free people.”²³

17. *Edward’s case*, 13 Rep. 9 (1609), discussed in Justice Carter’s dissent in *First Unitarian Church*, 48 Cal. 2d at 458–59 (Carter, J., dissenting).

18. See a lengthy discussion in Justice Carter’s dissent in *First Unitarian Church*, 48 Cal. 2d at 457 *et seq.* (Carter, J., dissenting); see also Steinmetz, 44 Cal. 2d at 830–31.

19. See *First Unitarian Church*, 48 Cal. 2d at 451.

20. *Id.*

21. U.S. CONST., art. II, § 1, cl. 7 states, “I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.” Note that this oath only requires commitment to do your best job as President, and follow the law. It makes no inquiry at all with regard to any past beliefs or behavior, or as to current or future beliefs, advocacy, affiliations or political views, other than a commitment to uphold the law while President.

22. U.S. CONST., art. VI, § 3, cl. 3 states, “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

23. See *First Unitarian Church*, 48 Cal. 2d at 461, 456 (Carter, J., dissenting) (citing *In re Summers*, 325 U.S. 561, 576 (1945) and *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952)).

With regard to required oaths in the California constitution, Justice Carter wrote that “[t]he abhorrence for test oaths for the servants of the public which prevailed in Monterrey in 1848 and in Philadelphia in 1787 prevailed in Sacramento in 1878.”²⁴ The California constitution established a simple affirmative oath to support the Constitutions of the United States and California, and to “faithfully discharge the duties of the office.” It then clearly states that “[n]o other oath, declaration or test shall be required as a qualification for any office or public trust.”²⁵ “Thus,” said Justice Carter, “it appears, if anything, that the California delegates, though taking a leaf from the federal Constitution, went further and proscribed not only religious test oaths, like the federal delegates, but any test oath.” He continued, “it is clear that the constitutional oath is a promissory declaration intended to solemnize an occasion and impress upon the mind of the employee the trust upon which he is about to enter.” He concluded, it “is not intended to inhibit one’s thinking nor one’s associations.”²⁶

The Context of the “Cold War” Oaths

The historic distrust of loyalty oaths in the United States was overrun by the growth of anti-Communism during world events in the late 1940s and early 1950s. Fear replaced reason in many quarters. While Justice Carter cried out against the hysteria of the time, his view remained a dissenting one for many years. He even tried to ridicule those who assumed that loyalty oaths had anything at all to do with safety against real subversion. “The concept that a person exposed to subversive activity may be immunized against such exposure by the taking of a so-called loyalty oath opens the door for vast exploration in the field of metaphysical research.”²⁷

World events were quite powerful. Conflicts between the United States, its European allies, and the Soviet Union and other Communist countries, developed quickly. The Soviet Union began to exercise dominant influence over many of the countries of Eastern Europe. Struggles between communist and non-communist forces occurred in Turkey and Greece. In 1948, Stalin closed Berlin (located in the Russian controlled Eastern Zone of Germany). The United

24. See *Pockman*, 39 Cal. 2d at 692. A major constitutional convention in 1878 substantially revised the original 1848 state constitution. See, e.g., George E. Connor et al., *THE CONSTITUTIONALISM OF AMERICAN STATES* 725 (2008).

25. CAL. CONST., art. XX, §3.

26. See *Pockman*, 39 Cal. 2d at 692–93.

27. *Id.* at 688.

States began the Berlin Airlift during that year to deliver food to the people of Berlin, an incredibly tense and confrontational year in which the fear of war constantly loomed. In 1949, the Communist revolution in China succeeded, and communist control over the Northern Zone of the Korean peninsula solidified. In 1950, the Korean War broke out, continuing until 1953.²⁸

On the home front, spies were seemingly being uncovered everywhere. The cases of Julius and Ethel Rosenberg and Alger Hiss, just to mention the two most publicized cases, received national attention.²⁹ Major federal prosecutions against Communist Party members continued into the late 1950s.³⁰ The hearings of the House Un-American Activities Committee, the Senate Internal Security Committee, and Senator Joseph McCarthy’s various hunts for subversives also dominated our public life.³¹

28. See generally Reynolds, *supra* note 2.

29. Julius Rosenberg, who worked for the Army as a civilian engineer during World War II, and his wife, Ethel, were charged in 1950 with conspiracy to provide secret information on the atomic bomb to the Soviet Union. They were convicted in 1951, and executed in 1953. There are dozens of books on the Rosenberg case. The first in-depth examination was WALTER & MIRIAM SCHNEIR, *INVITATION TO AN INQUEST* (Doubleday 1965); see also ROBERT & MICHAEL MEEROPOL, *WE ARE YOUR SONS: THE LEGACY OF ETHEL AND JULIUS ROSENBERG* (2nd ed., University of Illinois Press 1986). Hiss, who had earlier worked for the State Department and played a prominent role in establishing the United Nations, was accused of being a Soviet spy in 1948, and convicted of perjury in connection with the case in 1950. He was never convicted of being a spy. ATHAN G. THEOHARIS, *Beyond the Hiss Case: The FBI, Congress and the Cold War* (1982); ALGER HISS, *RECOLLECTIONS OF A LIFE* (1st ed., Little Brown & Co. 1988). In 1995, the U.S. National Security Agency broke a half century of silence by releasing translations of Soviet cables decrypted back in the 1940s by the Venona Project. Venona was a top-secret U.S. effort to gather and decrypt messages sent in the 1940s by agents of what is now called the KGB and the GRU, the Soviet military intelligence agency. It is believed some of the cables refer to the Rosenbergs. See *Secrets, Lies and Atomic Spies*, www.pbs.org/wgbh/venona/nova (February 5, 2002). There is still significant controversy in both cases over the validity of the charges and the fairness of the trials.

30. See *supra* note 5 discussing these prosecutions.

31. The House Un-American Activities Committee (HUAC), originally established in 1938 to investigate fascism, really began its work in 1947 with a “hunt” for Communists, when it came to Los Angeles to investigate the movie industry. The actions of the Committee, together with those of frightened movie executives and private political vigilante groups, gave rise to the famous “Hollywood Black List,” which barred hundreds of movie professionals from work for many years, and destroyed many promising careers. The most famous of this group is the “Hollywood 10,” ten writers who refused to cooperate with the Committee. HUAC changed its name in 1969 and was abolished in 1975. See Dan Georgakas, *Hollywood Blacklist*, in *ENCYCLOPEDIA OF THE AMERICAN LEFT* (Mari Jo Buhle et al. eds., University of Illinois Press 1992). The Senate Internal Security Committee (often called the

Although both state and federal governments used a variety of techniques to thwart subversive thought, oaths of loyalty played a significant role. The oaths took several forms. One involved summoning a person to testify before some government official or body, and requiring that testimony under oath be given. Then questions concerning political beliefs and affiliations would be posed. Another form required the signing of a written oath foreswearing past, present and/or future political views, advocacy or actions condemned in the required oath, as well as memberships in various organizations.

One of Justice Carter’s contemporaries, Justice Hugo Black of the United States Supreme Court, dissented in a loyalty oath case that demanded a signed oath from any public employee that s/he had not been a member of any subversive organization. Justice Carter quoted him to make the point that:

“individual liberty is intermittently subjected to extraordinary perils.... The first years of our Republic marked such a period. Enforcement of the Alien and Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about government.... [T]he present period of fear seems more ominously dangerous to speech and press than was that of the Alien and Sedition Laws. Suppressive laws and practices are the fashion.... [The] oath statute is but one manifestation of a national network of laws aimed at coercing and controlling the minds of men.”³²

At that time, Justice Black, along with Justice William O. Douglas, were the great dissenters on the U.S. Supreme Court on issues of free speech and liberty.

McCarran Committee), was established in 1950 and abolished in 1977. It was the Senate equivalent of HUAC. Its most noteworthy project was trying to prove, along with Senator McCarthy, that Owen Lattimore, the most influential scholar of Central Asia in the 20th century, was a Russian spy. They failed. Senator McCarthy set as his primary goal the elimination of all Communists, subversives and “fellow travelers” from employment with the federal government. Thousands of people lost their jobs and had their lives and careers destroyed as a result of his effort. Senator McCarthy lost much of his power in 1954 as a result of his behavior during his investigation of the United States Army, and a scathing report by respected television reporter Edward R. Murrow. Edward R. Murrow, *A Report on Senator Joseph R. McCarthy, SEE IT Now* (CBS-TV, Mar. 9, 1954), transcript available at <http://honors.umd.edu/HONR269J/archive/Murrow540309.html>. McCarthy was censured by the Senate later that year, and died in 1957. See FRED J. COOK, THE NIGHTMARE DECADE: THE LIFE AND TIMES OF SENATOR JOE McCARTHY (1971); ARTHUR HERMAN, JOSEPH McCARTHY: REEXAMINING THE LIFE AND LEGACY OF AMERICA’S MOST HATED SENATOR (Free Press 2000).

32. *First Unitarian Church*, 48 Cal. 2d.

Justice Carter played the same role on the California Supreme Court during this period. He, like Black and Douglas, found “the right to dissent the essence of democracy—the will to dissent is an effective safeguard against judicial lethargy—the effect of a dissent is the essence of progress.”³³ In a prescient forecast of the future impact of his dissents, and those of Black and Douglas, on the development of constitutional law, he said, “A supreme court decision which cannot stand the test of a vigorous dissent should never stand as a decision of the court.”³⁴

The California “Cold War” Cases

While there were a number of cases concerning loyalty oaths decided in California between 1946 and 1958, three stand out as representative of the continuing battle by Justice Jesse Carter for an interpretation of both the United States and California Constitutions that would destroy the loyalty oath as a “tool of tyranny.”³⁵ While there were cases earlier than 1952,³⁶ that year represents a turning point in California. First, it is the year that the California Supreme Court handed down a package of cases concerning loyalty oaths.³⁷ Second, it was the year that the California Constitution was amended to make loyalty oaths a widespread phenomenon.³⁸

The controversy in California really began in 1949 when the Board of Regents of the University of California imposed a loyalty oath on all employees, including faculty. While loyalty oaths were being applied elsewhere in Cali-

33. Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118, 118 (1952–53).

34. *Id.* Justice Carter quotes Justice Douglas at length in this same article. *Id.* at 121–23. He also relies extensively on Justice Douglas’s views in his dissenting opinion in *First Unitarian Church*, 48 Cal. 2d at 468–70.

35. See *First Unitarian Church*, 48 Cal. 2d at 455 (Carter, J., dissenting).

36. See, e.g., *Danskin*, 28 Cal. 2d at 536.

37. See *Pockman*, 39 Cal. 2d at 676. Companion cases decided the same day were *Hirschman v. County of L.A.*, 39 Cal. 2d 698 (1952) (upholding Los Angeles County required oath for employees); *Tolman v. Underhill*, 39 Cal. 2d 708 (1952) (declaring an oath mandated by the University of California Board of Regents preempted by the Levering Act, the state law involved in *Pockman*); *Bowen v. L.A. County*, 39 Cal. 2d 714 (1952) (upholding Levering Act); *Fraser v. Univ. of Cal.*, 39 Cal. 2d 717 (1952) (upholding Levering Act as applied to U.C. professors).

38. CAL. CONST., art. XX, § 19 (1953) (added Nov. 4, 1952, repealed June 8, 1976). It required a loyalty oath from any person who will “[h]old an office or employment” with the State or any of its subdivisions, as well as to “receive any exemption from any tax.”

fornia, the University conflict was the public face of the issue. For three years the struggle continued. It concluded when the California Supreme Court determined that the regents' rule was invalid since a state statute, the Levering Act, preempted it.³⁹ However, in a series of cases decided the same day, the Court upheld the constitutionality of the Levering Act, the primary California loyalty oath statute, and the struggles continued.⁴⁰

The Levering Act was passed in 1950.⁴¹ It was a statute that declared all public employees to be “civil defense workers,” and therefore required to take a new oath. The core of the oath was that the signer swore that s/he was not now, nor for five years prior, an advocate of, or a member of any organization that advocated, the overthrow of the government by force or violence, or other unlawful means. It also required a listing of any possible suspect affiliations, and a commitment not to advocate, or to associate with, during the time of government employment, any such views.⁴²

David Gardner, a young professor at Berkeley during the controversy, and later President of the University of California, wrote that “[t]he California conflict ... inaugurated a nadir in the history of American academic freedom. [It] reflected the pathology of the country's seemingly inescapable preoccupation with communism and security[, and] contributed ... to the neurosis that ... encouraged those forces ranged against freedom of inquiry and dissent.”⁴³

Leonard Pockman was a professor at San Francisco State College and had been since 1946. When the Levering Act was passed, he, as all other faculty, was asked to sign the new oath. He refused. The same occurred throughout the state. Marjorie Bowen, a civil service employee in Los Angeles, and Russell Fraser, an instructor at the University of California, both refused to sign the Levering Act oath. Marjorie Hirschman refused to sign a similar oath imposed by the Los Angeles County Board of Supervisors. The California Supreme

39. See Tolman, 39 Cal. 2d at 708. The Levering Act will be discussed, *infra*, text accompanying notes 43–53.

40. See cases, note 38.

41. CAL. GOV'T CODE. §§3100–3109 (1951) (enacted by Stats. 1950, 3rd Ex. Sess., c. 7, p. 15, §1, eff. Oct. 3, 1950. Amended by Stats. 1971, c. 38, p. 50, §5).

42. CAL. GOV'T CODE §3103 (1951) (containing the oath).

43. The primary work on this subject is DAVID P. GARDNER, THE CALIFORNIA LOYALTY OATH CONTROVERSY (University of California Press 1967). See GARDNER, at vii–viii; see also David Hollinger, *Honor guards: The loyalty oath threatened academic freedom but spawned heroes*, CALIFORNIA MAG., Mar./Apr., 2007, at 62, available at http://alumni.berkeley.edu/calmag/200703/100years/62_63.pdf; Cathy Cockrell, Public Affairs, *University Revisits Controversial Loyalty Oath*, 28 BERKELEYAN, Oct. 13, 1999, available at <http://www.berkeley.edu/news/berkeleyan/1999/1013/loyalty.html>.

Court eventually heard and decided five cases on October 17, 1952, all of which upheld the various test oaths involved.⁴⁴ Justice Carter dissented in all of these cases, writing his dissent in the lead case, *Pockman v. Leonard*.⁴⁵

The primary thrust of the case, as seen by the majority, was whether the extensive amendments imposed by the Levering Act, to the basic oath required of government employees, violated the state constitutional provision declaring that “no other oath, declaration or test shall be required as a qualification for any office or public trust.”⁴⁶ The old oath only required the employee, as the constitution had originally stated, to support the Constitution and laws of the United States and California, and to “faithfully” perform the job “without any mental reservation.” The question was whether all the new requirements concerning advocacy and affiliation were in violation of the “no other oath” provision. The majority found that these additions were really implicit in the constitutional oath, and so posed no problem.

Justice Carter begged to differ. Not only did he refute at great length the reasoning and understanding of California history reflected in the majority opinion,⁴⁷ but he recognized the broader issue of abuse of government power. He stated:

The principle here involved is of tremendous importance to those who believe in preserving the constitutional guarantees of fundamental civil liberties. These constitutional guarantees were written in the light of bitter experiences arising out of the exercise of arbitrary power ... by the legislative or executive branch of the government. Constitutions were written to protect the individual against the exercises of such arbitrary power. The lessons of history reveal that at various times under the stress of inflamed opinion both the Legislative and the Executive have attempted to circumvent constitutional restrictions by adopting measures which seemed expedient in view of the exigencies of the situation at hand. In my opinion the Levering Act is such a measure.⁴⁸

It was three years later that Justice Carter got the opportunity to fully address major U.S. constitutional issues. Professor Harry Steinmetz had become a professor of psychology at San Diego State College in 1930. He had, throughout his career, been an outspoken liberal in the then strongly conservative city

44. See cases, *supra* note 38.

45. See *Pockman*, 39 Cal. 2d at 688.

46. *Id.* at 681 (citing CAL. CONST., art. XX, § 3 [1853]).

47. *Id.* at 689–96 (Carter, J., dissenting).

48. *Id.* at 696 (Carter, J., dissenting).

of San Diego. Efforts to get him fired for various political reasons dated back to before World War II. Finally, he was fired in 1954 after ostensibly failing to answer questions concerning his politics and memberships under oath.

As one commentator remarked:

Although this scenario seems all too common for the times, the professional demise of Professor Steinmetz constitutes a special case among the casualties of the Cold War. In this instance, California law was significantly altered for the express purpose of effecting his dismissal.... [H]e was perceived as a threat and clearly its intended target.⁴⁹

This statute, called the Luckel Act after the San Diego legislator who introduced it, required that any public employee, when summoned before any state or local agency, had to answer under oath questions related to advocacy of, or membership in an organization that espoused “forceful or violent overthrow of the [g]overnment.”⁵⁰ It then continued, “Any employee who fails or refuses to ... answer under oath *on any ground whatsoever* ... shall be guilty of insubordination ... and shall be ... dismissed from his employment.”⁵¹

The majority found that Steinmetz had not properly preserved his rights against self-incrimination protected under the Fifth Amendment to the federal Constitution or section 13 of Article I of the California constitution. It also rejected other attacks under state law on various provisions of the Luckel Act. Justice Carter was the lone dissenter. He began his dissent by asserting that the Luckel Act “is unconstitutional because it denies to public employees the fundamental rights and liberties guaranteed to them” under both the federal and state Constitutions. He indicated, “the arguments opposed to the majority decision ... are like a Roman gladiator’s trident. The central point is that the statute is an abridgment of the constitutionally guaranteed privilege not to testify against oneself.” The other two points are, he asserted, a lack of proof that Steinmetz actually violated the statute, and that the statute is an “arbitrary deprivation of due process.”⁵²

He reasserted his opposition to “the right of the state to inquire into the private affairs of its citizens” which was “made clear by my dissenting opinion[] in *Pockman v. Leonard*....”⁵³ He continued,

49. Paul J. Eisloeffel, *The Cold War and Harry Steinmetz: A Case of Loyalty and Legislation*, 35 J. SAN DIEGO HIST. 4 (1989), at 2, available at <http://www.sandiegohistory.org/journal/89fall/cold.htm>.

50. CAL. GOV’T CODE § 1028.1 (1953) (b), (c).

51. CAL. GOV’T CODE § 1028.1 (1953) (d) (emphasis added).

52. See *Steinmetz*, 44 Cal. 2d at 826 (Carter, J., dissenting).

53. *Id.* at 829 (citing *Pockman*, 39 Cal. 2d at 676) (additional citations omitted).

Government Code, section 1028.1, meets an even broader constitutional objection than did the loyalty oath statute considered in the Pockman case.... The section makes of the public employee a second-class citizen by denying him, under penalty of exclusion from his means of livelihood, the right to refuse to answer questions which might tend to incriminate him—a right guaranteed to every citizen by the Constitutions of the United States and of California.⁵⁴

After a review of the history of the privilege against self incrimination, Carter also found that “[s]ince its penalty falls on the innocent as well as the guilty, without even the formality of hearing evidence against the victim, this statute is clearly a deprivation of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.”⁵⁵ He continued,

One must be indeed naïve if he cannot see the parallel between the situation of Dr. Steinmetz before this investigating board, and the witness called before the ecclesiastical court or Star Chamber in England in the 15th, 16th or 17th centuries. The very evils which prompted an early Congress to add to our Constitution the protection of the Bill of Rights are now being revisited upon us by a statute which purports to protect our constitutional form of government.⁵⁶

While the United States Supreme Court denied review in the *Steinmetz* case, Justices Black and Douglas dissenting, the Court did accept for review a very similar case from New York.⁵⁷ Indeed, Justice Carter noted in his *Steinmetz* dissent, “I am confident that the Supreme Court of the United States will reverse the [New York case].”⁵⁸ And indeed they did. In *Slochower v. Board of Education*, the Court reversed the dismissal of a college professor discharged under almost identical circumstances to Dr. Steinmetz. Echoing Justice Carter, the Court said:

At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person’s constitutional right under the

54. *Id.* at 830.

55. *Id.* at 834.

56. *Id.* at 837–38. “As many as 10 other state college system employees after Steinmetz were also discharged by means of the Luckel Act.” Eisloeffel, *supra* note 54, at 12.

57. Certiorari Denied by *Steinmetz v. Cal. State Bd. of Educ.*, 351 U.S. 915 (Apr 23, 1956) (Black, J. & Douglas J., dissenting. The New York case was *Slochower v. Bd. of Educ.*, 350 U.S. 551, 552–53 (1956) (relying on city charter professor dismissed for using “the privilege against self-incrimination to avoid answering a question related to his official conduct....”).

58. See *Steinmetz*, 44 Cal. 2d at 838 (Carter, J., dissenting).

Fifth Amendment. The right of an accused to refuse to testify ... has been recognized as ‘one of the most valuable prerogatives of the citizen.’ ... *The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as the equivalent either to a confession of guilt or a conclusive presumption of perjury.*⁵⁹

Justice Carter’s views in his *Steinmetz* dissent had been vindicated. Two years later, the California Supreme Court decided *First Unitarian Church v. County of L.A.* and *Speiser v. Randall*.⁶⁰ These cases were based on an amendment to the California constitution passed by the voters in 1952. The new section 19 of article XX⁶¹ stated that notwithstanding any other constitutional provision:

no person ... [who] advocates the overthrow of the [g]overnment ... by force, violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall (a) Hold any office or employment [in the state or any of its subdivisions]; or (b) Receive any exemption from any tax imposed by [the state or any of its subdivisions].⁶²

The First Unitarian Church was denied its exemption as church property on the ground that it failed to comply with Revenue and Taxation Code section 32, which was added to California’s statutes under the authority of Article XX, section 19. It required that the claimant must declare an oath as prescribed in section 19. If any claim “does not contain such declaration, the persons or organization making such statement ... shall not receive any exemption from the

59. See *Slochower*, 350 U.S. at 557 (emphasis added) (citations omitted). While struggles over the precise applicability of the privilege against self incrimination with regard to loyalty matters continued in the Supreme Court for ten more years, in *Malloy v. Hogan*, 378 U.S. 1 (1964), the U.S. Supreme Court held that the self incrimination clause of the Fifth Amendment was directly applicable to the states by incorporation into the Fourteenth Amendment. Then in *Spevack v. Klein*, 385 U.S. 511 (1967), and *Garrity v. N.J.*, 385 U.S. 493 (1967), the Supreme Court overruled an earlier case restricting the applicability of the Fifth Amendment in state employment proceedings, and indicated that the state cannot use the threat of discharge to secure incriminating evidence against an employee. “We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.” *Garrity*, 385 U.S. at 498.

60. *First Unitarian Church v. County of L.A.*, 48 Cal. 2d 419 (1957), *rev’d and remanded* by 357 U.S. 545 (1958); *Speiser v. Randall*, 48 Cal. 2d 903, *rev’d and remanded* by 357 U.S. 513 (1957).

61. See *supra* note 39 and accompanying text.

62. *Id.*

tax to which the statement ... pertains.”⁶³ The plaintiffs in *Speiser* were honorably discharged veterans who were entitled under the law to a veteran’s property-tax exemption. When some vets failed to sign the oath, their exemptions were denied. In both cases, the basis of denial was not any finding of disloyalty, but merely a failure to sign the oath.

In both cases, the California Supreme Court upheld the oath, and the denial of the exemptions to which the plaintiffs would clearly have been entitled absent failure to provide the declared oath. These decisions, however, were 4–3, with Justices Traynor and Gibson dissenting in one opinion, and Justice Carter dissenting in a separate opinion. Justice Traynor, in his dissent, relied primarily on the ground asserted by Justice Carter in his *Steinmetz* dissent—that it is unconstitutional because the “provisions infringe the right to engage in ... advocacy without reference to its seriousness ... and penalize the belief that the government has no right to require professions of innocence in the absence of proof of guilt. A law with such consequences cannot stand.”⁶⁴

Justice Carter, in his dissent, went significantly further. He found “that the oath here is unconstitutional in that it violates the equal protection clauses of both the federal and state Constitutions and that it also violates the First Amendment to the Constitution of the United States.”⁶⁵ He reviewed at some length the history of loyalty oaths in English and U.S. history. In exploring the equal protection issue, he indicated that there must be a rational relationship between the denied exemption and the prevention of actual subversive activity. He first said

[it] should be emphatically stated and understood that not one of the churches or veterans here involved has been so much as accused of subversive activities. But through their refusal to take the unconstitutional (as I believe) oath, they are penalized in advance for something they have not done and will, in all probability, never do.

He concludes that “the legislation ... bears no relation whatever to the objective to be achieved.... Property taxes and unpopular beliefs or advocacy would appear to be as far apart as the poles and bear no reasonable relationship to one another.... [I]t is arbitrary,” and therefore violates equal protection.⁶⁶

The most significant part of his opinion is his discussion of why the oath is a violation of freedom of speech. After a close review of U.S. Supreme Court

63. CAL. REV. & TAX. CODE §32 (1953).

64. See *First Unitarian Church*, 48 Cal. 2d at 451–52 (Traynor, J., dissenting).

65. *Id.* at 462–63 (Carter, J., dissenting).

66. *Id.* at 463, 466.

cases of the day,⁶⁷ he applies the rules to determine that under no interpretation of those cases is there a “clear and present” danger of serious harm from any of these claimants. He ridicules the “absurdity of this tempest-in-a-teapot ... [where] there is no showing that the churches or veterans were highly organized into a war-like machine dedicated to the overthrow of the government by force and violence with leaders highly trained and ready to give the ‘word’ when the time was ripe for revolution!”⁶⁸

“In my opinion it constitutes an unconstitutional invasion of freedom of speech with the absurdity of the entire situation pinpointed by the thought that any embryo revolutionist would surely not hesitate to subscribe to such an oath.”⁶⁹ He then supports his point in a broad ranging essay on the significance of the First Amendment. He explains passionately why “the spirit of Inquisition,” as represented by these loyalty oaths, “has always been obnoxious to our political and social life.”⁷⁰

Quoting Thomas Jefferson, Justice Carter concludes that

It behooves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own. It behooves him, too, in his case to give no example of concession, betraying the common right of independent opinion, by answering questions of faith which the laws have left between God and himself.⁷¹

The Tide Turns: U.S. Supreme Court Decisions

In his years of dissent, Justice Carter identified and discussed almost every federal constitutional objection to the loyalty oath process. He discussed serious problems under the 14th Amendment due process clause;⁷² the 14th Amend-

67. The primary case discussed by Justice Carter is *Dennis v. United States*, 341 U.S. 494 (1951). See *First Unitarian Church*, 48 Cal. 2d. In 1957, *Dennis* was the most important case in explaining the “clear and present danger test” with regard to punishing illegal advocacy. *Dennis*, 341 U.S. at 505.

68. See *First Unitarian Church*, 48 Cal. 2d at 468 (Carter, J. dissenting).

69. *Id.*

70. *Id.* at 470.

71. *Id.* at 471–72 (citing Letter from President Thomas Jefferson to Benjamin Rush (Apr. 21, 1803)).

72. See *Pockman*, 39 Cal. 2d at 692; see also *Steinmetz*, 44 Cal. 2d at 826–34.

ment equal protection clause;⁷³ the privilege against self-incrimination;⁷⁴ the bills of attainder clause;⁷⁵ and, of course, the First Amendment free speech and association provisions.⁷⁶ But the U.S. Supreme Court did not review any California decision in this area until 1958. Both *First Unitarian Church*, and its companion case, *Speiser v. Randall*, were accepted for review.⁷⁷ The Supreme Court’s decisions in these cases marked a turning point in the continuing challenges to the constitutional validity of loyalty oaths.

Early U.S. Supreme Court loyalty oath cases followed the same path as the decisions of the California Supreme Court. Loyalty oath schemes, by and large, were upheld against most constitutional attacks. In fact, the California court in the 1952 *Pockman* case⁷⁸ relied primarily on the U.S. Supreme Court decision of the same year, *Adler v. Board of Education of the City of New York*.⁷⁹ The U.S. Supreme Court in *Adler* rejected all constitutional arguments attacking a New York law, almost identical to the laws in California, which instituted a loyalty program for government employees, including teachers. It found no violations of procedural due process; no issue of vagueness of the statutory language; and no abridgement of freedom of speech or assembly.

Although an occasional Supreme Court case, like *Wieman v. Updegraff*, found fault with a loyalty test program,⁸⁰ “the *Wieman* decision … represented the only restriction imposed by the Supreme Court upon State loyalty tests. A few years later the Court greatly expanded the impact of loyalty tests.... The result was that numerous dismissals under State loyalty tests, especially among university faculties, were based upon the [mere] refusal to answer questions”⁸¹ about political activities. A great many decisions supporting loyalty programs, often decided 5–4, were rendered between 1951 and 1958.⁸²

73. See *First Unitarian Church*, 48 Cal. 2d at 462–66.

74. See *Steinmetz*, 44 Cal. 2d at 826–39.

75. *Id.* at 838.

76. See *First Unitarian Church*, 48 Cal. 2d at 461–472.

77. See *supra* note 61.

78. See *Pockman*, 39 Cal. 2d at 688. See *supra* text accompanying notes 41–54.

79. *Adler v. Bd. of Educ. of the City of N.Y.*, 342 U.S. 485 (1952), overruled in part by *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589 (1967).

80. See *Wieman v. Updegraff*, 344 U.S. 183 (1952) (declaring an Oklahoma loyalty test unconstitutional as a violation of First Amendment due process). “Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.” *Id.* at 191.

81. Thomas I. Emerson, *The System of Freedom of Expression* 230–231 (1970).

82. For contemporary accounts of the loyalty test period, see HAROLD M. HYMAN, *TRY MEN’S SOULS: LOYALTY TESTS IN AMERICAN HISTORY* (University of California Press 1959), RALPH S. BROWN, *LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED*

In *Speiser v. Randall*⁸³ and *First Unitarian Church*⁸⁴ the Supreme Court reversed the decisions of the California Supreme Court. In doing so, it began a new trend of decisions that within ten years overruled, or severely limited, most of its prior oath supportive decisions. The appellants raised a large number of constitutional objections. The primary objection was that the scheme denied “them freedom of speech without the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment.”⁸⁵

The Court made clear that statutes cannot “unfairly shift the burden of proof,” even in civil cases.⁸⁶ Therefore,

it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate when applied to penalize speech.... Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.⁸⁷

Justice Black concurred in the result, but added that there was a more significant First Amendment issue involved than merely inadequate procedure. Justice Black said the program in *Speiser* “constitutes a palpable violation of the First Amendment....” Justice Black continued, “Loyalty oaths ... tend to stifle all forms of unorthodox or unpopular thinking or expression.... The result is a stultifying conformity....”⁸⁸ And in language clearly reminiscent of Justice Carter’s views in *First Unitarian Church*, Justice Black concludes, “I am certain that loyalty to the United States can never be secured by the endless

STATES (Yale University Press 1958). A discussion of all the major cases of the period, and an extensive bibliography, can be found in THOMAS I. EMERSON, DAVID HABER & NORMAN DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (3d ed., Little, Brown & Co. 1967).

83. *Speiser v. Randall*, 357 U.S. 513 (1958).

84. *First Unitarian Church v. L.A.*, 357 U.S. 545 (1958). The lower court’s decision was reversed based upon the opinion in *Speiser* handed down the same day. *Supra* note 61 (California case) and *supra* note 84 (U.S. Supreme Court case).

85. *Speiser*, *supra* note 84 at 517. In addition, the appellants claimed a violation of freedom of speech, the equal protection clause, and the supremacy clause, in that the federal government had exclusive control over such loyalty matters. *Id.* at 517 footnote 3 (citing *P.A. v. Nelson*, 350 U.S. 497 (1956)). The Court chose not to address these issues. *Id.*

86. See *Speiser*, 357 U.S. at 524.

87. *Id.* at 525–26.

88. *Id.* at 530, 532 (Black, J., concurring).

proliferation of ‘loyalty’ oaths; loyalty must arise spontaneously from the hearts of the people who love their country and respect their government.”⁸⁹

Justice Carter’s views were beginning to take hold. In his *Steinmetz* dissent he had indicated, “since its penalty falls on the innocent as well as the guilty ... this statute is clearly a deprivation of due process....”⁹⁰ This is the view adopted by the Supreme Court’s opinion in *Speiser*. And as early as 1952, Justice Carter had indicated that oaths were “not intended to inhibit one’s thinking nor one’s associations.”⁹¹ His extensive discussions of free speech and association values, which pervade many of his dissents in the loyalty oath cases, are clearly reflected in Justice Black’s concurrence, as the views of Justices Black and Douglas are reflected in Justice Carter’s opinions.

This change of tone in U.S. Supreme Court opinions continued into the 1960s. “Beginning with its decision in *Shelton v. Tucker* ... the Supreme Court began to chip away at State loyalty tests until they had been reduced in number, scope and significance.”⁹² In the *Cramp* case the next year, the Supreme Court unanimously invalidated a loyalty oath using the *void for vagueness* doctrine.⁹³ This doctrine became a tool in subsequent loyalty cases. In *Baggett v. Bullitt*,⁹⁴ the Court struck down a loyalty oath plan from the State of Washington not unlike California’s scheme. “Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law,”⁹⁵ said Justice White for the Court.

Of the many cases decided by the Court between 1960 and 1967, two are of particular relevance to the California program. In *Elfbrandt v. Russell*,⁹⁶ the Supreme Court struck down an Arizona loyalty oath program on both due process and First Amendment associational grounds. The Court stated that the Act “threatens the cherished freedom of association protected by the First Amendment.”⁹⁷ The Court relied on *Speiser*, the case from California in which

89. *Id.* at 532.

90. See *Steinmetz*, 44 Cal. 2d at 834 (Carter, J., dissenting).

91. See *Pockman*, 39 Cal. 2d at 693 (Carter, J., dissenting).

92. Emerson, *System of Freedom* supra note 82, at 233. See *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (finding state statute requiring teachers in public schools to file affidavits giving names and addresses of all organizations to which they had belonged or contributed within the preceding five years as a prerequisite to employment was “unlimited and indiscriminate” and “far beyond what might be justified.”).

93. *Cramp v. Bd. of Public Instruction*, 368 U.S. 278, 286–87 (1961).

94. *Baggett v. Bullit*, 377 U.S. 360 (1964).

95. *Id.* at 373.

96. *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

97. *Id.* at 18.

Justice Carter’s views were vindicated, saying, “[t]he unconstitutionality of this Act follows a fortiori from *Speiser v. Randall...*”⁹⁸

In *Keyishian v. Board of Regents*,⁹⁹ the Supreme Court reexamined the same New York law (so similar to the California law) originally involved in the *Adler* case in 1952. It not only found all challenged sections unconstitutional as either vague or overbroad, but, for all practical purposes, overruled *Adler*.¹⁰⁰ The provisions were vague because they were “plainly susceptible of sweeping and improper application.” Quoting the *Shelton* case, the Court said, “even though the governmental purpose be legitimate..., that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”¹⁰¹

“When one must guess what conduct or utterance may lose him his position, one necessarily will ‘steer far clear of the unlawful zone....’ The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.”¹⁰² The statute also failed because “[w]here statutes have an overbroad sweep, just as where they are vague, ‘the hazard of loss or substantial impairment of those precious rights may be critical.’”¹⁰³ And finally, “the stifling effect on the academic mind from curtailing freedom of association ... is manifest....”¹⁰⁴

That year the Court also decided *Whitehill v. Elkins*,¹⁰⁵ in which it struck down a Maryland loyalty oath program applicable to teachers. The Court said

We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom.... The lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find an overbreadth that makes possible oppressive or capricious application as regimes change. That very threat ... may deter the flowering of academic freedom....¹⁰⁶

98. *Id.* at 17.

99. See *Keyishian v. Bd. of Regents of the State of N.Y.*, 385 U.S. at 589 (1967).

100. “[T]o the extent that Adler sustained the [New York oath law], 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.” *Id.* at 595.

101. *Id.* at 602.

102. *Id.* at 605 (quoting *Speiser*, 357 U.S. at 526) (other citations omitted).

103. *Id.* at 609 (quoting *Dambrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

104. *Id.* at 607.

105. *Whitehill v. Elkins*, 389 U.S. 54 (1967).

106. *Id.* at 59, 61–62 (citations omitted).

Justice Carter Prevails

While the U.S. Supreme Court in the *Speiser* case, accepting Justice Carter’s arguments, had overturned some provisions of California law relating to oath requirements for church or veteran tax exemptions, it had done so on the basis of procedural problems with the statutory scheme.¹⁰⁷ Still standing were the more basic loyalty tests that applied to a wide range of persons, primarily public employees and teachers.¹⁰⁸ As just discussed, although the U.S. Supreme Court had significantly altered its view of the constitutional problems associated with loyalty programs by 1967, the California Supreme Court had not yet spoken. The oath requirements were still on the books, and although enforcement had declined, their validity was still uncertain.

In 1967 the California Supreme Court heard a case in which taxpayers sued to prevent the use of public money to administer or enforce the state constitutional provision requiring an oath from public employees.¹⁰⁹ The Court recognized that “in [the 1952 case of *Pockman v. Leonard*, we] upheld the validity of the substantially similar oath … in … the Levering Act,” and at that time the reasoning of the U.S. Supreme Court in the *Adler* case had supported the *Pockman* decision. “Subsequent decisions of the United States Supreme Court, however, have established constitutional doctrines not recognized in *Adler*, and the holding in that case has since been rejected....”¹¹⁰

The California Court then “reexamine[d] *Pockman* in light of the recent decisions....”¹¹¹ The Court explained,

Even where a compelling state purpose is present, restrictions on the cherished freedom of association protected by the First Amendment ... must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected whenever possi-

107. See *supra* notes 83–87 and accompanying text.

108. The breadth of loyalty programs was enormous. Justice Douglas indicated that because of these programs “[g]overnment employees, lawyers, doctors, teachers, pharmacists, veterinarians, subway conductors, industrial workers and a multitude of others have been denied an opportunity to work at their trade or profession.... [T]hose without jobs have been denied unemployment insurance.... These are merely random samples; I will not take the time here to refer to innumerable others, such as oaths for hunters and fishermen, wrestlers and boxers and junk dealers.” See *Speiser*, 357 U.S. at 531 (Douglas, J., concurring).

109. *Vogel v. County of L.A.*, 68 Cal. 2d 18 (1967).

110. *Id.* at 20–21 (citing *Keyishian*, *supra* note 7 at 595). See *supra* notes 43–49 and accompanying text.

111. *Id.* at 21.

ble.... Precision of regulation is required so that the exercise of our most precious freedoms will not be unduly curtailed.¹¹²

The Court reviewed the line of U.S. Supreme Court cases beginning with *Speiser*, and then declared “[t]wo recent decisions [*Elfbrandt* and *Keyishian*] ... control this case. They make it clear that the oath required by [California law] is invalid because it bars persons from public employment for a type of association that may not be proscribed consistently with First Amendment rights.”¹¹³ Noting that other courts had recently struck down loyalty oath statutes “due to similar considerations of the requirements of clarity and precision in restrictions in the sensitive and important First Amendment area,” the Court indicated that the California laws also “suffered from impermissible overbreadth in that they improperly proscribed activities protected by the First Amendment....”¹¹⁴ The Court concluded, “*Pockman v. Leonard*, holding to the contrary, is overruled.”¹¹⁵

Justice Jesse Carter died on March 15, 1959, at the age of 70. He lived to see his dissenting view supporting the privilege against self-incrimination adopted by the U.S. Supreme Court majority in *Slochower*, and to see his dissent requiring First Amendment due process become the majority view of the U.S. Supreme Court in *Speiser*. Finally, eight years after his death, the U.S. Supreme Court in *Keyishian*, and the California court in *Vogel*, echoed his strong language finding serious First Amendment defects in loyalty oath provisions. Jus-

112. *Id.* at 22 (citations omitted).

113. *Id.* at 22.

114. *Id.* at 24–25.

115. *Id.* at 26 (citation omitted). The Court, in a footnote, acknowledged a range of other constitutional objections to the oath presented in the case. “[T]he oath is vague..., it constitutes an improper prior restraint on the exercise of First Amendment freedoms, that it improperly shifts the burden of proof of loyalty, that it constitutes a bill of attainder, that [it is] a denial of due process of law, that the oath invades a field pre-empted by federal law, and that the oath results in a violation of the privilege of self incrimination.” *Id.* at 26, n. 1. The Court concluded, however, that the opinion in the case made it “unnecessary to consider the additional contentions of plaintiff....” *Id.* Justice Carter had expressed himself on all of these issues in his various opinions. “Other arguments which are raised by Dr. Steinmetz in his petition, and which I believe are meritorious, are ... that the Luckel Act ... contravenes ... the Fourteenth Amendment to the United States Constitution [and] ... is, in essence, a bill of attainder.” *Steinmetz, supra* note 1 at 838 (citations omitted). In *Steinmetz*, Justice Carter’s primary ground for invalidating the oath was a violation of the right against self incrimination “guaranteed to them by the Fifth Amendment.” *Id.* On his “prior restraint” objections, see *Danskin, supra* note 15. On the issue of “shifting the burden of proof,” see *Steinmetz, supra* note 56.

tice Carter had written, “[n]either prejudice nor hate nor senseless fear should be the basis for abridging freedom of speech.”¹¹⁶

His view on all main constitutional points involved in loyalty oath challenges, passionately expressed in his dissents, was now the law. He wrote, “history shows that the dissenting opinion has exercised a corrective and reforming influence upon the law.... Dissenting opinions are powerful weapons against error.... If all men thought alike and if all men were afraid to change, there would be no progress and no endeavor.”¹¹⁷

His opinions in the loyalty oath area expressed his deep commitment to the concept of expansive protection of civil liberties. “The law can not, and must not, stand still while the rest of the world moves on.... The writers of dissents are usually men who look forward—not back, nor to the immediate present—but to the future.”¹¹⁸ Nowhere was his forward looking view more courageous, and ultimately successful, than in his fight against the tyranny of loyalty oaths.

116. See *First Unitarian Church*, 48 Cal. 2d at 470 (Carter, J., dissenting).

117. Carter, *supra* note 34 at 118, 119.

118. *Id.* at 119, 121.