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various programs would seem to require such access. The lack of a specific legislative provision for access rights is immaterial; the development of the labor law under the National Labor Relations Act, in which there was a similar lack of specific provision, has shown that they may be fairly implied when necessary to accomplish the legislative mandate.[65] The needed establishment of access rights in this area will probably be achieved in future cases either by a recognition of the constitutional rights involved or by a pragmatic balancing of the owners' property rights with access rights fairly implied from the stated purposes of the Economic Opportunity Act.

Boyd Mangrum

Law Students Civil Rights Research Council v. Wadmond: The Permissible Scope of Inquiry by Bar Admission Committees into an Applicant's Beliefs

Law students, organizations of law students, and applicants to the bar,[1] in a combined class action sought injunctive and declaratory relief[2] to have invalidated[3] certain parts of the New York procedure governing admissions to the state bar. The bar admissions standards were administered by the defendants, members of the Committee on Character and Fitness of Applicants for Admission to the Bar of the Appellate Division of the Supreme Court of New York in the First and Second Judicial Departments.[4] The plaintiffs, the lead plaintiff being the Law Students Civil Rights Research Council (LSCRRC), attacked the statutory scheme,[5] specific rules,[6] and questions[7] designed to determine

> workers, its disposition will affect the government's ability, at least in the State of New Jersey, to ensure the continued effective operation of farm worker assistance programs.

Id. at 1.

[65] *See, e.g.*, note 25 *supra*, and accompanying text.

[1] The first named plaintiff, the Law Student's Civil Rights Research Council, Inc., draws upon 1500 law students from sixty law schools throughout the United States. The stated principal objectives of this nonprofit corporation are nonpartisan research and active participation in the areas of civil rights and civil liberties. Included as plaintiffs in this case were individuals who had taken and passed the written exam required for admission to the New York Bar.

[2] 28 U.S.C. §§ 2201-02 (1971), provides for declaratory and other relief.

[3] The suits were brought under 28 U.S.C. § 1343(3) (1971) and 42 U.S.C. § 1983 (1971).

[4] N.Y.R. CIV. PRAC. 9401, 9404, provide for the appointment of a character committee for each judicial district in a department by the respective appellate division and authorize these committees to prescribe questionnaires. New York is divided by law into four judicial departments. N.Y. CONST. art. VI, § 4; N.Y. JUDICIARY LAW § 90 (McKinney 1968).

[5] To gain admission to the state bar of New York one must meet certain entrance requirements. In addition to the normal residency and examination requirements, New York also requires that the Appellate Division of the State Supreme Court in the judicial department where an applicant resides must "be satisfied that such person possesses the character and general fitness requisite for an attorney and Counsellor-at-law." N.Y. JUDICIARY LAW § 90(1)(a) (McKinney 1968). To carry out this statutory requirement, committees on character and fitness receive affidavits from two persons acquainted with applicant (one of whom must be a practicing attorney), and a questionnaire completed by the applicant. The committees also conduct personal interviews with each applicant. As the final step before

whether an applicant possessed the required character and general fitness for admission to the bar primarily on grounds of first amendment vagueness and overbreadth. The LSCRRC challenged the admission procedure, not because any applicant had ever been unjustifiably denied permission to practice law in New York, but on the basis that it worked a "chilling effect" upon the exercise of free speech and association of law students. With the exception of certain items on the questionnaire which were found to be so vague, overbroad, and intrusive on the applicant's privacy that they were of doubtful constitutional validity, the three-judge district court sustained the validity of the procedure and upheld the statute and rules as valid on their face.[8] *Held, affirmed*: New York's carefully administered screening system does not necessarily result in a chilling of the exercise of constitutional freedoms, and the statutes and rules used to ascertain the character and general fitness of applicants to the bar are constitutional. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971).

I. STATE'S INTERESTS VERSUS INDIVIDUAL RIGHTS

Admission to the Bar. Each state has its own standards by which it selects prospective applicants for the bar.[9] Generally, it is required that applicants pass a written proficiency test on the laws of the state, that they swear to uphold the state and federal constitutions, that they do not advocate the violent overthrow of the government, and that each applicant possess the proper moral character for an attorney at law.[10]

No significant challenge to bar admission standards was made until 1957. In *Konigsberg v. State Bar*[11] (*Konigsberg I*) an applicant had been denied admission to the California bar on the grounds that he had failed to meet his burden of proof.[12] Konigsberg had refused to answer the bar committee's ques-

admission to the bar, the applicant must take an oath that he will support the United States and New York Constitutions. N.Y. CONST. art. XII, § 1; N.Y. JUDICIARY LAW § 466 (McKinney 1968).

[6] The LSCRRC concentrated their challenge on N.Y.R. CIV. PRAC. 9406:

> PROOF
>
> No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:
> 1. that he believes in the form of the government of the United States and is loyal to such government;
> 2. that he is a citizen of the United States;
> 3. that he has been an actual resident of the state of New York for six months prior to the filing of his application for admission to practice; and
> 4. that he has complied with all the requirements of this rule and with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.

[7] *See* note 60 *infra*, and accompanying text.

[8] Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969).

[9] J. BRENNER, REPORTS OF CONSULTANT AND THE ADVISORY AND EDITORIAL COMMITTEE ON BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 77-123 (1952).

[10] *See* National Conference of Bar Examiners, THE BAR EXAMINERS HANDBOOK (1968).

[11] 353 U.S. 252 (1957).

[12] Konigsberg had allegedly failed to prove that he was of good moral character and

tions concerning his past and present affiliation with the Communist Party. The Supreme Court held that the evidence submitted to the committee did not support the two grounds upon which admission was denied and that no inference of bad moral character could be drawn from a refusal to answer.[13] In *Schware v. Board of Bar Examiners*[14] an applicant to the New Mexico bar had been denied a permit to take the written examination on the grounds that he had not shown good moral character. The applicant was found not to possess the required moral character because of incidents and affiliations in his past.[15] The Supreme Court held unanimously that Schware had been denied due process of law. The Court reviewed all the evidence in the case and found that none of the facts could disprove Schware's showing of good moral character. The Court found no rational connection between past membership in the Communist Party and present moral character.[16]

While the Court would not let arbitrary or discretionary decisions by state bar officials result in an applicant being denied certification to practice law, the noncooperation of an applicant could result in denial of admission to the bar. The Court has held that when an applicant refuses to answer bar committee's questions, he is obstructing a full investigation into his qualifications, and the state is, therefore, justified in denying his application.[17] This obstruction rule was the theory the Court relied on in sustaining state decisions that had denied applicants the right to enter the bar.[18]

Although the obstruction rule has never been expressly overruled, the Court's recent decisions in *Baird v. State Bar of Arizona*[19] and *In re Stolar*,[20] companion

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that he did not believe in or advocate the overthrow of the government by unconstitutional means. 353 U.S. at 253.

[13] 353 U.S. at 262. The Court reserved judgment on the issue of whether Konigsberg could be properly denied admission solely on the grounds of his refusal to answer.

[14] 353 U.S. 232 (1957).

[15] In the past Schware had been arrested in several labor disputes prior to 1940, employed certain aliases during his earlier years, and been a member of the Communist Party. Schware was never indicted or tried as a result of any of his arrests. 353 U.S. at 234.

[16] "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239.

[17] Konigsberg v. State Bar, 366 U.S. 36 (1961) (*Konigsberg II*). The Court reasoned that since the burden of proof is upon the applicant, once that applicant has made a prima facie case of good moral character the investigating committee could attempt to refute that case by evidence of bad character. Because of the committee's inability to conduct a full independent investigation, it must rely on the interrogation of the applicant during the meetings. If an applicant refused to answer the questions put to him by the committee he was obstructing the committee from performing its proper function. Justice Harlan, speaking for the majority, stated: "We think it clear that the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications." *Id.* at 44.

[18] *Id. See also In re* Anastaplo, 366 U.S. 82 (1961). *Konigsberg II* and *Anastaplo* stand for the proposition that an applicant's refusal to answer investigation questions can be grounds for his exclusion from practicing law in a state on the premise that his uncooperation obstructs the committee's function. The procedural safeguards that now surround disbarment proceedings cast a new reflection upon the possible validity of cases like *Konigsberg II* and *Anastaplo*. In Spevack v. Klein, 385 U.S. 511 (1967), *overruling* Cohen v. Hurley, 366 U.S. 117 (1961), the Court held that the fifth amendment self-incrimination clause is applicable to disbarment proceedings, and an attorney who invokes the amendment during a disbarment hearing cannot be disbarred solely because of his use of the self-incrimination protection.

[19] 401 U.S. 1 (1971).

[20] 401 U.S. 23 (1971).

cases of *Law Students Civil Rights Research Council, Inc. v. Wadmond*,[21] cast serious doubt on the continuing validity of the rule. The facts in both cases were similar. Baird and Stolar had been denied admission to practice law in Arizona and Ohio respectively. Each had refused to answer questions put to him concerning his past and present membership in the Communist Party or any other organizations that advocated the overthrow of the United States Government by force or violence.[22] In both cases the Court reversed their denials of admission and upheld their right to refuse to answer the questions put to them.[23]

Public Employment and Limitations on Scope of State's Inquiry. Loyalty tests as a condition of employment were common during the early 1950's. The Supreme Court, in analyzing these cases, was able to equalize the interests of the individual by means of the broad concept of due process. The Court upheld the validity of the oath requirement as not violative of due process in the majority of these cases.[24]

As the McCarthy period ended and more challenges to these loyalty-security programs began to appear, the Court began to reevaluate the practice of conditioning public employment or benefits on a limitation of first amendment freedoms. Therefore, a California statute requiring applicants for a veteran's property tax to bear the burden of proving their nonsubversive nature was held unconstitutional as a limitation of free speech and a denial of due process.[25] Furthermore, the Court has also rejected the contention that state legislators

[21] 401 U.S. 154 (1971).

[22] In *Baird* the petitioner was asked, among other things, to reveal all organizations with which she had been associated since she reached 16 years of age, and she was asked to state whether she had ever been a member of the Communist Party or any organization "that advocates overthrow of the United States Government by force or violence." 401 U.S. at 4-5. The questions in *Stolar* were:

> 12. State whether you have been, or presently are . . . (g) a member of any organization which advocates the overthrow of the government of the United States by force . . . .
>
> 13. List the names and addresses of all clubs, societies or organizations of which you are or have been a member.
>
> 7. List the names and addresses of all clubs, societies or organizations of which you are or have been a member since registering as a law student.

401 U.S. at 27.

[23] The Court in *Stolar* held that Ohio could not require that an applicant for admission to the bar state his present or past affiliations with any organization advocating the overthrow of the United States Government by force. 401 U.S. at 30. The Court in *Baird* stated: "Without detailed reference to all prior cases it is sufficient to say we hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law." 401 U.S. at 7-8. It should be noted that in *Baird* and *Stolar* detailed information had been given to the bar committees. In the case of Stolar, his entire file concerning his admission to the bar in New York was in the hands of the Ohio committee. Sara Baird had given the Arizona committee extensive personal and professional information listing all former employers, law school professors, and other references. Also, in Arizona it is perjury to answer bar committee's questions falsely. ARIZ. REV. STAT. ANN. § 13-561 (1956).

[24] *See* Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951). *But see* Wieman v. Updegraff, 344 U.S. 183 (1952), in which a state statute requiring employees to swear that they did not or had not belonged to certain specified organizations was held invalid because it did not make an employee's knowledge of the nature or purpose of such organization a consideration.

[25] Speiser v. Randall, 357 U.S. 513 (1958). "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526.

have the right to test the sincerity with which another duly elected representative has taken the oath of office.[26]

The Court's dislike of public employment or benefits being conditioned on limitations of first amendment freedoms was vividly seen in the area of public education. An Arkansas statute which required, as a condition of employment in a state-supported school or college, that annually every teacher file an affidavit listing without limit every organization to which he had belonged or regularly contributed during the preceding five years was struck down as depriving teachers of their right of associational freedom.[27] Loyalty oaths as a condition to employment were struck down numerous times because of broad, vague, and uncertain terms.[28] When regulatory schemes and state loyalty oaths were so vague "as to make men of common intelligence speculate at their peril on its meaning,"[29] or when they operated "to inhibit the exercise of individual freedoms affirmatively protected by the Constitution,"[30] the Court has refused to let them stand.

While the Court dealt strongly with state statutes and regulatory schemes that had deterrent effects on first amendment liberties, it did not ever hold that loyalty oaths per se were unconstitutional. The loyalty oath system that does not offend first amendment rights and due process, and still serves the interest of a state has not been clearly defined by the Court. It did affirm a lower court holding that New York could reasonably require teachers in public or tax-exempt institutions to subscribe to an oath supporting the federal and state constitutions, and to promise compliance with professional standards of competence and dedication.[31]

Scienter-Intent Requirement. The Court has shown a continued adherence to the proposition that state regulations and investigatory schemes should not be so random and broad as to include both innocent and illegal conduct within the ban of their prohibitions. The Court has feared that constitutionally protected political expression and associations might be inhibited by blanket prohibitions

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[26] Bond v. Floyd, 385 U.S. 116 (1966). The Georgia legislature contended that statements made by Bond concerning national foreign policy and the selective-service system rendered him unable to take the constitutional oath of office with sincerity. *Id.* at 130.

[27] Shelton v. Tucker, 364 U.S. 479 (1960).

> The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with association freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into fitness and competency of its teachers.

Id. at 490.

[28] Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961). The Florida statute involved in this case required all employees to swear that they had never "knowingly lent their aid, support, advice, counsel, or influence to the Communist Party." *Id.* at 279. In Baggett v. Bullitt, 377 U.S. 360 (1964), the Court noted that:

> Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.

Id. at 372.

[29] Whitehill v. Elkins, 389 U.S. 54, 59 (1967).

[30] Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961).

[31] Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd per curiam*, 390 U.S. 36 (1968).

of organizations having both legal and illegal aims.[32] It became established (in Communist Party criminal prosecution cases) that when the governmental purpose is to regulate associational freedoms, the statute must require that the individual be a knowing, active member with the specific intent of furthering the organization's unlawful objectives.[33]

The guidelines that the Court had established in Communist Party criminal prosecutions were used as a basis for determining the constitutionality of state loyalty-security programs.[34] When a state statute did not require active membership with the specific intent of achieving the overthrow of the government by force or violence, the oath required by the statute was held to infringe unnecessarily on the freedom of association protected by the Constitution.[35] The Court went so far as to invalidate an entire security investigation system for failing to provide an effective method of determining whether an individual employee of the state had the necessary intent to carry out the illegal purposes of the organization even if he had knowledge of those purposes.[36] The Court's adherence to a requirement of knowledge of the illegal purposes of the organization coupled with the specific intent to further those purposes became a limitation on the scope of state loyalty-security programs.

Chilling Effect. When a statute or regulation is challenged on the grounds that it chills the exercise of first amendment liberties, the chilling effect doctrine has been used: (1) to justify the relaxation of rules which inhibit the litigation of constitutional claims in the federal courts; (2) as proof of irreparable injury and a basis for injunctive relief; and (3) to demonstrate the need to create a substantive immunity from governmental control.[37] However, the fact that a law chills free speech or association creates no absolute presumption that the law is unconstitutional; rather, the Court continues to employ a balancing test.[38] A significant factor to be considered when applying the balancing test, especially when free speech or association are concerned, is the effect a "chilling" law will have on others in the same situation and class as the plaintiff.[39]

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[32] *See, e.g.*, Scales v. United States, 367 U.S. 203 (1961).

[33] *Id.* at 230. The two elements needed to sustain criminal prosecutions set out in *Scales* were projected in the Court's decisions in Aptheker v. Secretary of State, 378 U.S. 500 (1964), and United States v. Robel, 389 U.S. 258 (1967).

[34] Elfbrandt v. Russell, 384 U.S. 11 (1966).

[35] *Id.* "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or public employees." *Id.* at 17.

[36] Keyishian v. Board of Regents, 385 U.S. 589 (1967). "Thus, mere Party membership, even with knowledge of Party's unlawful goals, cannot suffice to justify criminal punishment . . . ; nor may it warrant a finding of moral unfitness justifying disbarment." *Id.* at 607, *citing* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). The same provision challenged in this case had been sustained earlier by the Court in Adler v. Board of Educ., 342 U.S. 485 (1952). In *Adler* the Court had indicated that if teachers did not agree with the terms set by the school authorities, then they should retain their beliefs and seek work elsewhere. The Court in *Keyishian* replied to that premise: "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 U.S. at 606.

[37] Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

[38] *See* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 91 (1961); Barenblatt v. United States, 360 U.S. 109, 125-34 (1959).

[39] In Wieman v. Updegraff, 344 U.S. 183 (1952), a case concerning loyalty oaths required of all prospective teachers, the Court recognized this problem:

> Such unwarranted inhibition upon the free spirit of teachers affects not only

Laws, regulations, or investigations that impose a duty upon organizations to divulge the names and addresses of members have been declared to have an unconstitutionally inhibitory effect upon freedom of association.[40] The same result has been reached when individuals were forced to disclose their associational ties and activities, because the disclosure demanded could lead to repression of opinions of those exposed to public hostility, to the refusal of members to renew organizational ties, and could dissuade others from joining the organization.[41] The threat of a perjury prosecution in a loyalty oath system can have a similar chilling effect on associational rights.[42] The Supreme Court has found the exercise of associational rights chilled by oaths that discourage continued association with a certain organization,[43] or result in an individual's forbearance from protected expression or conduct.[44] Oaths can also discourage individuals from seeking certain types of employment.[45]

Although a determination that a demand for disclosure chills the exercise of first amendment freedoms will not automatically result in unconstitutionality, it does substantially narrow the scope of permissible inquiry. The Court has used the scienter and specific intent requirements to see that the inquiry is directed only at active participation in an organization by an individual who has knowledge of the organization's illegal aims and intends to further those aims.[46]

III. LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL v. WADMOND

In *Wadmond* the Supreme Court held the statutory bar admission procedure administered by the State of New York constitutional. In upholding the New York system, the Court used a step-by-step method. By pyramiding conclusions, the Court avoided the major emphasis of the LSCRRC attack—that the New York system, by its very existence, worked a "chilling effect" upon the free exercise of first amendment rights.

The first step in the Court's analysis was to validate New York's requirement that applicants to the bar possess the character and general fitness of an attorney at law. The Court unanimously agreed that states can require certain

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> those who . . . are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.

Id. at 195. *See also* Keyishian v. Board of Regents, 385 U.S. 589, 601-02 (1967).

[40] *See, e.g.*, Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

[41] *See, e.g.*, Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Barenblatt v. United States, 360 U.S. 109 (1959); Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[42] *See* Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); Elfbrandt v. Russell, 384 U.S. 11, 19 (1966); Baggett v. Bullitt, 377 U.S. 360, 372 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

[43] *See* Elfbrandt v. Russell, 384 U.S. 11 (1966); American Communications Assoc. v. Douds, 339 U.S. 382 (1950).

[44] *See* Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Speiser v. Randall, 357 U.S. 513 (1958); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[45] *See* Whitehill v. Elkins, 389 U.S. 54 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964).

[46] *See* notes 31-35 *supra*, and accompanying text.

moral and character standards of prospective attorneys.[47] The Court then examined the methods of discovery used in New York. Rule 9406 has been the major tool used by the various New York bar admission committees to determine an applicant's "character and general fitness."[48] The majority admitted that the rule on its face posed substantial problems regarding the permissible burden of proof as well as the permissible scope of inquiry into an applicant's political beliefs.[49] The majority avoided these apparent problems by deferring to the interpretation given the rule by the Committee on Character and Fitness. Since a state can constitutionally administer oaths in support of state and federal constitutions,[50] the New York committees have read rule 9406 as requiring the valid support oath. These committees have promised to construe the rule such that: (1) the burden of proof is not placed upon applicants; (2) the terms "form of government of the United States" and the "government" refer solely to the Constitution; and (3) the words "belief" and "loyalty" denote no more than willingness to take the constitutional oath and the ability to do so in good faith.[51] By accepting the interpretation of the state character committees the Court avoided what appears to be a direct conflict between rule 9406 and the holding in *Speiser v. Randall*.[52] The rule on its face states that the burden is upon the applicant to present satisfactory proof before he can be certified. Unless there is a significant distinction between veterans seeking a tax exemption and law students seeking admission to the bar, rule 9406—absent the committees' interpretation—would seem to be governed by that holding.

More important than the sidestepping of the *Speiser* problem is the Court's skirting of the basic thrust of the LSCRRC attack on the New York scheme. By accepting the committee's construction of rule 9406, the Court seemed satisfied that the vagueness and overbreadth problems posed by the rule itself avoided the constitutional infirmities that have invalidated similar provisions in other areas.[53] The Court's reliance on the interpretation of these committees would be justified if they were state court interpretations.[54] Similarly, if these committees were state agencies the Court might consider their interpretation as a basis for clarification.[55] But these committees are neither.[56] Their interpretation might deserve the respect of the Court, as pointed out in Justice Marshall's dissent, but there was no case law in New York showing the use of the rule as interpreted,

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[47] Even the four dissenting justices agreed that a state may require that applicants to the bar possess certain character and general fitness requirements. 401 U.S. at 174, 186 (1971).

[48] N.Y.R. CIV. PRAC. 9406; *see* note 6 *supra*.

[49] 401 U.S. at 162.

[50] Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd per curiam*, 390 U.S. 36 (1968).

[51] 401 U.S. at 163.

[52] 357 U.S. 513 (1958). *See* note 25 *supra*, and accompanying text.

[53] *See* notes 24-30 *supra*, and accompanying text.

[54] Baggett v. Bullitt, 377 U.S. 360, 375 (1964); Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684, 688 (1959); Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949).

[55] Fox v. Standard Oil Co., 294 U.S. 87, 96-97 (1935).

[56] In *Konigsberg II* the Court referred to the action of the California Bar Committee as an "essentially administrative type of proceeding." 366 U.S. at 44. The action of a district or state court in denying an application for admission to its bar upon an evaluation of the qualifications of an applicant under its rules is a "ministerial act," which is performed by reason of judicial power, rather than a judicial proceeding. *In re* Summers, 325 U.S. 561 (1945); Brooks v. Laws, 208 F.2d 18 (D.C. Cir. 1953).

nor any other means of ascertaining whether the application of the rule had been in the narrow context promised by the committee.[57] The committee's interpretation seems little more than a promise of future action, and the Court has said that "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."[58]

However, accepting the interpretation given by the committee does not avoid the problems posed by the Court's decision in *Bond v. Floyd*.[59] By accepting the committee's interpretation of rule 9406, the majority simply ignored the holding of *Bond*. If a unanimous Court can find that the right to administer a support oath does not carry with it the license to let legislators test the sincerity with which other duly elected legislators take the same oath, then on what theory can bar admission committees rely on a support oath as authorization to test the sincerity of bar applicants?

In the last step of the Court's analysis the questionnaires that applicants must fill out were examined. It was at these questions that the LSCRRC directed its primary attack. Questions 26 and 27 were the two parts of the questionnaire considered by the Court.[60] In sustaining the validity of question 26, the majority reasoned that the question taken as a whole merely conformed with the Court's past decisions on inquiry into associations.[61] Certainly, if question 26 were viewed as merely *one* inquiry into the applicant's associations, the question could stand on the grounds that it adhered to the Court's scienter-specific intent test[62] used in past cases and to the Court's holding in *Konigsberg II*. However, New York did not phrase the question as one inquiry, but divided it into two questions requiring two answers that do not meet the scienter-specific intent requirements. The fact that 26(b) may narrow the impermissible scope of 26(a) would not be sufficient to validate the question under the Court's holding in *In re Stolar*[63] that a question, which is preparatory to further questions that will be specific, will not be allowed when the preparatory question is impermissible in itself.[64]

[57] 401 U.S. at 191. Prior to the LSCRRC attack, the committee did not view the scope of inquiry so narrowly, but its questionnaires were subsequently revised. *Id.* n.7.

[58] Baggett v. Bullitt, 377 U.S. 360, 373 (1964).

[59] 385 U.S. 116 (1966); *see* note 25 *supra*.

[60] The questions, set out in the Court's opinion, were:

> 26(a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means? If your answer is in the affirmative, state the facts below.
>
> (b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?
>
> 27(a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.
>
> (b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?

[61] 401 U.S. at 165.

[62] *See* notes 32-36 *supra*, and accompanying text.

[63] 401 U.S. 23 (1971).

[64] *Id.* at 30.

In both *Baird v. Arizona*[65] and *Stolar* the Court held that questions which focus on beliefs and associations cannot be asked by a bar admission committee. The Court, by allowing question 26 to stand, has permitted New York to force an applicant to supply information about his associations apparently merely because the two questions were numbered (a) and (b), rather than as two separate questions. Why should the way in which a state numbers its questions have any effect on the substantive content of the questions themselves?

Question 27(b) is the means by which bar admission committees can ascertain the good faith with which an applicant can take the constitutional support oath. Since the sincerity or good faith with which one takes an oath cannot be tested under the Court's holding in *Bond v. Floyd*,[66] the interpretation given to question 27(b) would seem to fail. Without the interpretation, the question focuses on applicants' beliefs. It calls on the applicant to confirm, "without any mental reservation," that he is loyal to and ready to support the Constitution. Questions that call on an applicant to possess a certain belief and condition a benefit upon that belief have continually, in the past, been denied effectiveness by the Supreme Court.[67]

After finding that these questions were a valid exercise of the state's right to determine whether applicants meet admission standards, the Court upheld the entire New York procedure. The Court approached the procedures in this case in piecemeal fashion, sustaining the parts until they validated the whole. Justice Marshall, in his dissent, pointed to the misdirection of the Court's attention:

> I believe that appellants' basic First Amendment complaint, transcending the particulars of the attack, retains its validity. The underlying complaint, strenuously and consistently urged, is that New York's screening system focuses impermissibly on the political activities and viewpoints of Bar applicants, that the scheme thereby operates to inhibit the exercise of protected expressive and associational freedoms by law students and others, and that this chilling effect is not justified as the necessary impact of a system designed to winnow out those applicants demonstrably unfit to practice law.[68]

IV. CONCLUSION

The Supreme Court was given a timely opportunity in *Wadmond*, *Baird*, and *Stolar* to clear up this confusing area of constitutional law. The dockets of the Supreme Court and the courts of appeals have been filled for years with cases in which people have been denied the right to practice law or hold public or even private jobs because public authorities have been suspicious of their beliefs and associations. Justice Black, speaking for the majority in *Baird*, pointed out that the result of all this litigation has only been "thousands of pages of confusing formulas, refined reasonings, and puzzling holdings that touch on the same suspicions and fears about citizenship and loyalties."[69] These three cases

[65] 401 U.S. 1 (1971).
[66] 385 U.S. 116 (1966).
[67] *See* notes 19-23 *supra*, and accompanying text. *See also* Baird v. Arizona, 401 U.S. 1 (1971); *In re* Stolar, 401 U.S. 23 (1971).
[68] 401 U.S. at 186.
[69] 401 U.S. at 4.

could have served as a springboard for the Court to settle the questions of the constitutionally permissible focus on an individual's beliefs and associations. While *Baird* and *Stolar* follow the same logic and are consistent with each other, *Wadmond* runs opposite them in reasoning and result. Procedurally *Wadmond* is different from the other two cases since no specific person had been denied admission by the state of New York, and the entire bar admission procedure was attacked. The dissimilarities end there. Substantively, the basic tenets used in *Baird* and *Stolar* retain their validity and apply equally as well to the situation in *Wadmond*. The main idea expressed in both *Baird* and *Stolar*, that inquisitions into bar applicants' views and beliefs will not be allowed when they are designed to serve as a basis for barring that applicant from the practice of law, seems to have been lost in *Wadmond*. The difference in result can be partially explained by the switch of Mr. Justice Stewart from the invalidating side in *Baird* and *Stolar* to the sustaining side in *Wadmond*. Justice Stewart's main concern in these cases focused around the states' use of the scienter-specific intent requirement in their questions to bar applicants.[70]

Viewing the Court's decision in *Wadmond* from two levels, its break with the thrust of the other two cases does not seem valid. The Court's decision to accept the bar committee's interpretation of rule 9406, from a procedural viewpoint, seems unusual constitutional procedure in light of the committee's lowly position in the judicial scheme. And accepting the interpretation, from a substantive viewpoint, raises serious questions as to the validity of that interpretation when compared to prior case law. The Court's holding in *Bond* could only be overcome by some kind of a distinction, which the Court does not draw, between a Georgia legislator and an about-to-be-licensed attorney.

It must be remembered that the right of a lawyer or bar applicant to practice his chosen profession was at stake in all three of these cases. When a state seeks to deny someone the right to practice that profession, it should "proceed according to the most exacting demands of due process of law."[71] As Justice Black put it in his dissent in *Wadmond*: "[T]his must mean at least that the right of a lawyer or Bar applicant to practice cannot be left to the mercies of his prospective or present competitors."[72]

Individuals must be afforded the opportunity to express their views in any manner condoned within the law. The Constitution, therefore, must provide stringent safeguards for those individuals so that they will not later be denied the right to practice law because of passing membership in radical organizations. Neither should their desires to join organizations be stifled by procedures they must meet in the future. Justice Black, in his dissent in *In re Anastaplo*, gave the best reason for the legal profession being filled with men of different ideas and temperaments: "The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like [Charles Evans Hughes, John W. Davis, Lord Erskine, James Otis, and Clarence Darrow]. To

[70] *See* Justice Stewart's concurring opinions in Baird v. Arizona, 401 U.S. 1, 9 (1971), and *In re* Stolar, 401 U.S. 23, 31 (1971).

[71] 401 U.S. at 174 (Black, J., dissenting).

[72] *Id.*