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Constitutional Law - Bar Admission Procedures: Inquiry into Political Beliefs and Associations

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CONSTITUTIONAL LAW—BAR ADMISSION PROCEDURES: INQUIRY INTO POLITICAL BELIEFS AND ASSOCIATIONS

Sara Baird passed the Arizona state bar examination and revealed on the bar committee's questionnaire all the organizations with which she had been associated since she reached 16 years of age. However, she refused to answer question No. 27 which asked if she was presently or had ever been a member of the Communist Party or any organization which advocates the overthrow of the United States Government by force or violence. Solely because of her refusal to answer this question,[1] the bar committee declined to process her application further or to recommend her admission to the bar. The Arizona Supreme Court upheld her denial of admission to the state bar association. On certiorari, the United States Supreme Court held that a state is limited by the first amendment[2] and may not inquire about a bar applicant's beliefs or associations solely for the purpose of denying him admission because of what he believes. The Court concluded that Arizona engaged in such questioning and thus reversed and remanded the judgment of the Arizona Supreme Court. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).

Martin Stolar, a member of the New York bar, applied for admission to the Ohio state bar. On oral interrogation by the Ohio Bar Committee, Stolar stated that he was not presently nor had he ever been a member of the Communist Party, of any socialist party, or of the Students for a Democratic Society. However, he refused to answer three questions on the Ohio application: question 12 (g), which asked about membership in any organization which advocates the forceful overthrow of the United States Government; question 13 which sought a listing of all clubs, societies or organizations of which he had ever been a member; and question 7, which requested a listing of membership in all organizations since registering as a law student. Because of his refusal to answer these three questions, the Ohio committee denied Stolar admission to the Ohio state bar and the Ohio Supreme Court upheld the denial. On certiorari, the United States Supreme Court held that the first amendment

1. Brief for Petitioner, at 3-4, Baird v. State Bar of Arizona, 401 U.S. 1 (1971).

2. The first amendment, made applicable to the states by the fourteenth, forbids any "law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people, peaceably to assemble. . . ." U.S. CONST. amend. I.

prohibits a state from penalizing a man solely because he is a member of a particular organization and that it is impermissible to require a bar applicant to either list his membership in any organization which advocates the overthrow of the United States Government by force or to list all the organizations of which he has been a member. The Court thus reversed and remanded the judgment of the Ohio Supreme Court. *In re Stolar,* 401 U.S. 23 (1971).

The Law Students Civil Rights Research Council[3] instituted two separate actions for declaratory and injunctive relief in the United States District Court for the Southern District of New York. The plaintiffs attacked the constitutionality of New York's statutes, rules, and screening procedures for determining the character and fitness of applicants to the New York bar. The basic thrust of the plaintiffs' attack was that New York's screening system by its very existence works a "chilling effect" upon the free exercise of the rights of speech and association of students who must anticipate having to meet its requirements. A three-judge district court consolidated the suits and found certain items on the questionnaires as they then stood to be so vague, overbroad, and intrusive upon applicants' private lives as to be of doubtful constitutional validity.[4] It granted the partial relief indicated by these findings, approved revised questions, and otherwise sustained the validity of New York's system. On direct appeal, the United States Supreme Court was not persuaded that New York's screening system worked "chilling effects" upon the exercise of constitutional freedoms. The Court found that questions designed to determine the applicant's belief in and loyalty to the United States Government by judging his willingness to take an oath to support the Constitution, were within constitutionally prescribed limits. The Court also held as constitutional a two part question concerning an applicant's knowing membership in organizations advocating violent overthrow of the government and his specific intent to further such aims. The Supreme Court thus affirmed the judgment of the district court. *Law Students Civil Rights Research Council v. Wadmond,* 401 U.S. 154 (1971).

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3. The plaintiffs in this case included the Law Students Civil Rights Research Council, an organization of 1500 law students at 60 law schools, and also three law graduates, all of whom were seeking or were planning to seek admission to practice law in New York. The plaintiffs shall hereinafter be identified as LSCRRC. Defendants included two New York Bar Association Committees on Character and Fitness and their members and two appellate divisions and their judges.

4. Law Student Civil Rights Research Council [LSCRRC] v. Wadmond, 299 F. Supp. 117 (S.D. N.Y. 1969).

The significance of these three cases lies in the fact that they extend first amendment rights of belief and association to bar admission situations. They also set a standard which limits permissible inquiries by state bar associations. Justice Black in delivering the principal opinions in *Baird* and in *Stolar* makes reference to the "confusion and uncertainty created by past cases in this constitutional field."[5] Cases in this area, whether they involve doctors, lawyers, or government employees, concern themselves with the extent to which the Constitution protects persons against governmental intrusion and invasion into private beliefs and views which have not ripened into any punishable conduct.[6] The Court in *Baird* did not attempt to completely reconcile its decision with all that the Court had said in previous cases dealing with this particular phase of first amendment protection.[7] Rather the Court chose to handle *Baird* by narrating its simple facts and by relating them to the forty-five words of the first amendment.[8]

In the *Wadmond* case, Justice Black, this time with the minority, delivered a dissent in which he stated that he had difficulty reconciling *Wadmond* with *Baird* and *Stolar:*

> In *Baird* and *Stolar* five members of the Court agreed that questions asked by Bar admission committees were invalid because they inquired about activities protected by the First Amendment. Why then is the same result not required here?[9]

Thus, we have a situation in which *Baird* and *Stolar* cannot be completely reconciled with past cases, and a further complication in which *Wadmond* cannot be reconciled with *Baird* and *Stolar*.

The purpose of this casenote will be to attempt to reconcile the apparent confusion which these three cases bring to an already confused constitutional area. This attempt at reconciliation will necessitate a brief examination of the past cases which created the confusion, an analysis of the pertinent facts and issues[10] involved in the present three cases, and a projection concerning the impact that these three cases will have on future decisions.

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5. *In re* Stolar, 401 U.S. 23, 24 (1971).
6. *Id.* at 24-25.
7. Baird v. State Bar of Arizona, 401 U.S. 1, 7 (1971).
8. *Id.* at 4.
9. LSCRRC v. Wadmond, 401 U.S. 154, 182 (1971).
10. *Wadmond* involved a broad attack on the screening system for admission to the New York bar. In this casenote we shall limit ourselves to a consideration of the issues and holdings which directly relate to *Baird* and *Stolar*. Our concern is primarily with first amendment rights and we shall only briefly consider other areas of bar admission procedures such as the sources of a state's power to regulate bar admission procedures and requirements.

Historically, situations where lawyers have been denied their right[11] to practice law because of their political beliefs and associations have arisen at times when concern for national security was in sharp focus. After the Civil War the problem of interrelating loyalty with the right to practice law came to the fore in *Ex parte Garland*.[12] The Supreme Court in that case delineated the authority of a state to regulate admission to the bar and other licensed professions: "The Legislature may undoubtedly prescribe qualifications for the office [of attorney], to which he [the applicant] must conform."[13] Since *Garland* the Court has repeatedly deferred to state legislatures and has intervened in only a few cases where an applicant to the bar has been denied admission because there has been an infringement by the state against a right protected by the Constitution.

After World War I, the problem of loyalty and lawyers arose in the context of disbarment rather than admission to the bar.[14] The problem subsided during the years between the wars and not until the late World War II case of *In re Summers*[15] did the problem of bar admissions become a significant issue. The Supreme Court in *Summers* recognized that bar admission proceedings which deny the right to practice are subject to judicial review when constitutional questions are raised.[16] The Court found that Illinois did not discriminate against any first amendment right of the bar applicant. The Court could also find no violation of a federal right secured by the fourteenth amendment and therefore sustained the bar admission refusal.[17] The Court's treatment of this case typified both its historical reluctance to interfere in state bar admission proceedings and its avoidance of the use of the first amendment. The

11. Justice Black, delivering the plurality opinion in *Baird*, stated: "The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character." Baird v. State Bar of Arizona, 401 U.S. 1, 8 (1971). *See* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); *In re* Summers, 325 U.S. 561 (1945); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

12. 71 U.S. (4 Wall.) 333 (1866).

13. *Id.* at 379. *Accord*, Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872) (the decision of the Supreme Court of Illinois that females were not eligible to practice law under the statutes of Illinois did not violate any provision of the Constitution); *In re* Lockwood, 154 U.S. 116 (1894) (the Virginia Supreme Court of Appeals could construe the state's statute to determine whether the word "person" was confined to males and whether women can be admitted to practice law).

14. *See, e.g., In re* Clifton, 33 Idaho 614, 196 P. 670 (1921) (disbarment reversed and held that a lawyer's pro-German attitude toward World War I did not mean that he could not support and uphold the law).

15. 325 U.S. 561 (1945).

16. *Id.* at 568-69.

17. *Id.* at 571-73.

reliance on the fourteenth amendment created the legal framework for handling bar admission cases in the 50's and 60's.

The 50's found the United States in a period of acute national concern with the Communist Party.[18] Under the cloud of the McCarthy hearings, cases involving problems with bar admission proceedings were again before the Supreme Court. In *Schware v. Board of Examiners*[19] the Court held that a state cannot exclude a person from the practice of law in a manner or for reasons that contravene the due process or equal protection clauses of the fourteenth amendment, and that any qualifications which the state requires must have a rational connection with the applicant's fitness or capacity to practice law. With respect to Schware's prior membership in the Communist Party, the Court concluded that this past membership did not justify an inference that Schware presently had a bad moral character.[20] Because a decision was reached on the basis of the fourteenth amendment, the Court found it unnecessary to decide the issue of the right of free political association.[21]

In a case decided the same day, *Konigsberg v. State Bar of California*,[22] the Court also used due process grounds to strike down inferences made concerning Konigsberg's moral character and his advocacy of the overthrow of the government. Concerning his refusal to answer questions about his political associations, the Court noted that Konigsberg's claim that the questions were improper was not frivolous and that there was nothing in the record that indicated his position was not taken in good faith.[23] The Court especially noted that it was not deciding the issue of the constitutionality of the committee's questions and that Konigsberg was not denied admission to the California bar just because of his refusal to answer the questions. Prophetically the Court stated:

> If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly . . . . If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible.[24]

18. Baird v. State Bar of Arizona, 401 U.S. 1, 3 (1971); *In Re* Stolar, 401 U.S. 23, 24 (1971).

19. 353 U.S. 232, 238-39 (1957).

20. *Id.* at 243-45.

21. *Id.* at 243 n.13.

22. 353 U.S. 252 (1957).

23. *Id.* at 270-71.

24. *Id.* at 261.

The opportunity to meet this issue was presented by the same Konigsberg in the early 60's, but the Court still avoided using the first amendment to resolve the question.

On remand, the *Konigsberg* case was referred to the California Bar Committee for further consideration. Forewarned by the committee that his refusal to answer any questions pertaining to his membership in the Communist Party would result in his exclusion from the bar, Konigsberg nevertheless refused to answer. The committee declined to certify him "on the ground that his refusals to answer had obstructed a full investigation into his qualifications."[25] The United States Supreme Court accepted the validity of the California rule[26] that an applicant for admission to the bar has the burden of proving good moral character, and concluded that the fourteenth amendment's protection against arbitrary state action does not prevent a state from denying admission to a bar applicant who refuses to give unprivileged answers to questions which have a substantial relevance to his qualifications.[27] The Court, therefore, held that the committee was prevented from discharging its duty by Konigsberg's refusal to answer relevant questions and thus affirmed the denial of admission.[28]

A similar result was arrived at in the case of *In re Anastaplo*,[29] which was decided the same day as *Konigsberg II*. The Court, substantially on the basis of *Konigsberg II*, affirmed Illinois' denial of bar admission to George Anastaplo. On the basis of the record the Court concluded that Anastaplo had been fairly warned that exclusion from the bar might follow from his refusal to answer relevant questions and that his exclusion was not arbitrary and discriminatory.[30]

Because neither *Konigsberg II* nor *In re Anastaplo* were expressly overruled by the *Baird*, *Stolar* or *Wadmond* cases, it is important that *Konigsberg II* and *Anastaplo* be distinguished from the three principal cases of this note. Two major distinctions can be made. First, in both *Konigsberg II* and *Anastaplo*, the question of Communist Party membership was significantly involved.[31] The Court in these two cases held that ques-

25. Konigsberg v. State Bar of California, 366 U.S. 36, 39 (1961) [hereinafter the Konigsberg cases will be referred to as *Konigsberg I* and *Konigsberg II*].

26. CALIFORNIA BUSINESS AND PROFESSIONS CODE § 6060 (1937).

27. Konigsberg v. State Bar of California, 366 U.S. 36, 44 (1961).

28. *Id.* at 56.

29. 366 U.S. 82 (1961).

30. *Id.* at 94.

31. *Konigsberg II* and *Anastaplo* are distinguishable since testimony revealed that Konigsberg had been involved with the Communist Party, Konigsberg v.

tions concerning Communist Party membership were relevant to the determination of moral fitness and the refusal of the applicant to answer the questions obstructed the inquiry of the bar committee. This holding is in line with past cases where the Communist Party has been treated sui generis by the Supreme Court in the light of Congressional and judicial findings.[32] A second distinction is the fact that in both *Konigsberg II* and *Anastaplo* there was "no showing of an intent to penalize political beliefs."[33]

An indication of the Court's shift in the early 70's from fourteenth amendment to first amendment grounds in dealing with bar admission proceedings was given by Justice Black in his dissenting opinion in *Konigsberg II*.[34] Justice Black attacked the Court's use of the "balancing of interests" theory which had been advocated by Justice Harlan.[35] In

State Bar of California, 366 U.S. 36, 271-73 (1961), while the only evidence presented concerning Anastaplo was his refusal to answer questions concerning membership in the Communist Party, *In re* Anastaplo, 366 U.S. 82 (1961).

32. Brief for Petitioner at 18, *In re* Stolar, 401 U.S. 23 (1971). *See* Gibson v. Florida Legislative Committee, 372 U.S. 539 (1963); Barenblatt v. United States, 360 U.S. 109, 127-28 (1959). *See also* C. PRITCHETT, THE AMERICAN CONSTITUTION 544-50 (2nd ed. 1968) concerning the "curious" status the Communist Party has had in legal issues.

33. Konigsberg v. State Bar of California, 366 U.S. 36, 54 (1961). *See In re* Anastaplo, 366 U.S. 82, 95 (1961): "[T]here is nothing in the record which would justify our holding that the State has invoked its exclusionary refusal-to-answer rule as a mask for its disapproval of petitioner's notions on the right to overthrow tyrannical govenment."

34. Konigsberg v. State Bar of California, 366 U.S. 36, 56-80 (1961).

35. *Id.* at 49-56. Justices Black and Harlan were on opposing sides in *Konigsberg I, Konigsberg II,* and *Anastaplo,* as well as in the three principal cases of this note. In delivering the decision of the Court in *Konigsberg II,* Justice Harlan followed his "balancing of interests" theory in treating the issue of free speech and association. He began by rejecting the view that freedom of speech and association are absolutes. NAACP v. Alabama, 357 U.S. 449, 460 (1958). Rules compelling the disclosure of prior association are placed in the category of general regulatory statutes, not intended to control the content of speech, but incidentally limiting its unfettered exercise. Bates v. Little Rock, 361 U.S. 516, 524 (1960). This type of disclosure does not violate the first or fourteenth amendments when it is subordinate to a valid governmental interest. When constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected and that requires an appropriate weighing of the respective interests involved. Barenblatt v. United States, 360 U.S. 109, 126-27 (1959). With respect to the questioning of public employees relative to Communist Party memberships, the Court had previously held that the interest in not subjecting speech and association to the deterrence of subsequent disclosure is outweighed by the state's interest in ascertaining the fitness of the employee for the post he holds and therefore such questioning does not infringe upon constitutional protections. Beilan v. Board of Education, 357 U.S. 399 (1958); Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

Justice Harlan concluded that with respect to Communist Party membership, the

the view of Justice Black, the "balancing of interests" doctrine permits constitutionally protected rights to be "balanced" away whenever a majority of the Court thinks that the state's interest is sufficient to justify abridgement of those freedoms.[36] Justice Black, in accord with his "absolute" theory, remarked that he did not know to what extent the Court's suggestion would hold true that a literal reading of the first amendment would be unreasonable because it would invalidate many widely accepted laws.[37] Ten years later, Justice Black took such a position in delivering the opinion of the Court in *Baird*. He penetrated the existing confusion, and simply narrated the facts of the case and related them to the forty-five words of the first amendment.

Following the past historical trend, problems of the early 70's concerning bar admissions arose again during a time of unrest in our country. This time the struggle was not with external forces, but with the internal conflicts which erupted into the streets and onto college campuses. The role of attorneys came under close scrutiny as William Kunstler, defense counsel in the Chicago Seven conspiracy trial,[38] dominated the news media with his unusual trial conduct.[39] The effect of these occurrences on bar examining committees and on reviewing courts is difficult to determine. Nevertheless, the Supreme Court did change its approach to bar admission problems in the *Baird*, *Stolar*, and *Wadmond* cases.

By no means was any consensus reached in these three decisions. All were decided by 5-4 margins and a total of eleven opinions was delivered by the Court. Just as he had in the *Konigsberg II* and *Anastaplo* cases, Justice Stewart cast the deciding vote in all three cases.[40] He concurred

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state's interest in having lawyers who are devoted to the law in its broadest sense is clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure. Justice Harlan did not foresee any deterrence of association because bar committee interrogations are conducted in private, and neither would the state be afforded the opportunity for imposing undetectable arbitrary consequences upon protected association because a bar applicant's exclusion by reason of Communist Party membership is subject to judicial review. Shelton v. Tucker, 364 U.S. 479 (1960).

36. Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961). Justice Black further discusses "balancing" and "absolutes" in his dissenting opinion in *In re* Anastaplo, 366 U.S. 82, 97-116 (1961). *See also* Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

37. Konigsberg v. State Bar of California, 366 U.S. 36, 64 (1961).

38. United States v. Dellinger, Criminal No. 69-180 (N.D. Ill., Feb. 6, 1971).

39. For a further elaboration of disruptions in courtroom proceedings and a proposed remedy *see* Comment, *Judicial Administration—Technological Advances —Use of Videotape in the Courtroom and the Stationhouse*, 20 DEPAUL L. REV. 924 (1971).

40. Chief Justice Burger and Justices Blackmun, Harlan, and White decided for

with Justice Black in the plurality opinions in *Baird* and *Stolar* and delivered the majority opinion in *Wadmond*. It will be important therefore to carefully analyze Justice Stewart's assessment of the record in each of the three cases.

In the plurality opinion of *Baird*, Justice Black reflected that courts have in the past been sharply divided about questions involving beliefs and associations and refusals to allow people to hold public and even private jobs solely because public authorities have been suspicious of their ideas.[41] Continuing his "absolute" theory from *Konigsberg II* and *Anastaplo*, Justice Black noted that freedom to believe is absolute under the first amendment and that the protection of the first amendment[42] also extends to the right of association.[43]

A state is prohibited from excluding a person from a profession solely because he is a member of a particular political organization or because he holds certain beliefs.[44] The Court thus held that views and beliefs are immune from bar association inquiries which are designed to lay a foundation for barring an applicant from the practice of law and con-

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the state in each case. Justices Black, Douglas, Brennan, and Marshall decided against the state in all three cases.

41. *See* United States v. Robel, 389 U.S. 258 (1967) (statute making it a crime for any member of a Communist Party organization to be employed in any defense facility held to be an unconstitutional abridgement of the right of association on first amendment overbreadth grounds); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (statute sanctioning a teacher's mere knowing membership in the Communist Party without any showing of specific intent to further the Party's unlawful aims held invalid on first amendment overbreadth grounds); Elfbrandt v. Russell, 384 U.S. 11 (1966) (loyalty oath and accompanying statutory gloss which proscribed mere knowing membership in the Communist Party by public employees unconstitutionally infringed protected freedoms), noted in 16 DE PAUL L. REV. 209 (1966); Shelton v. Tucker, 364 U.S. 479 (1960) (statute requiring all teachers to disclose all organizations in which they had been members in the past 5 years unconstitutionally interfered with freedom of association); Beilan v. Board of Educ., 357 U.S. 399 (1958) (school teacher dismissed for incompetency based on the refusal to answer questions about activities). *See also* Brandenburg v. Ohio, 395 U.S. 444 (1969) (criminal syndicalism statute which punished mere advocacy of the use of force which is not directed to inciting or producing imminent lawless action held unconstitutional); Bates v. Little Rock, 361 U.S. 516 (1960) (disclosure of membership lists would significantly interfere with freedom of association when the state demonstrated no controlling justification for such interference); NAACP v. Alabama, 357 U.S. 449 (1958) (a sufficient state interest to obtain an association's membership list was not shown). *See generally* Note, *The First Amendment Over-Breadth Doctrine*, 83 HARV. L. REV. 844 (1970).

42. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

43. Schneider v. Smith, 390 U.S. 17, 25 (1968).

44. United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

cluded that Arizona had engaged in such questioning.[45] A key factor in the record which led to this conclusion was the bar committee's reasoning as to why it was entitled to an answer to question 27 regarding membership in the Communist Party or any organization which advocates the overthrow of the United States Government by force or violence.[46] The Court thus determined from the record that the Arizona Bar Committee made inquiries about protected beliefs and views.

Justice Stewart in his concurring opinion also considered that the explanation of the committee's purpose in asking the question made it "clear that the question must be treated as an inquiry into political beliefs,"[47] and thus cast his vote against the state. Justice Stewart, not going as far as Justice Black, reiterated that under certain circumstances simple inquiry into present or past Communist Party membership of an applicant for admission to the bar is not as such unconstitutional.[48] However, with respect to questions as to membership in organizations advocating forceful overthrow of the government, a state's inquiry is limited to knowing membership.[49] Thus, question 27 also faltered on this ground.

Justice Blackmun in the principal dissent[50] read the record quite differently. Concerning question 27 he stated that "a realistic reading of the question discloses that it is directed not at mere belief, but at advo-

45. Baird v. State Bar of Arizona, 401 U.S. 1, 8 (1971).

46. Brief for Petitioner, at 5-6; Baird v. State Bar of Arizona, 401 U.S. 1, 8 n.8 (1971): "Unless we are to conclude that one who truly and sincerely *believes* in the overthrow of the United States Government by force or violence is also qualified to practice law in our Arizona courts, then an answer to this question is indeed appropriate. The Committee again emphasizes that a mere answer of 'yes' would not lead to an automatic rejection of the application. It would lead to an investigation and interrogation *as to whether or not the applicant presently entertains the view* that a violent overthrow of the United States Government is something to be sought after. If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission." (Emphasis added by the Court).

47. *Id.* at 9.

48. Konigsberg v. State Bar of California, 366 U.S. 36 (1961); *In re* Anastaplo, 366 U.S. 82 (1961).

49. *See, e.g.*, United States v. Robel, 389 U.S. 258, 265-66 (1967); LSCRRC v. Wadmond, 401 U.S. 154, 165-66 (1971).

50. In a separate dissent applicable to both *Baird* and *Stolar*, Justice White held that a state may ask applicants preliminary questions which will permit further investigation and judgment as to whether the applicant will or will not advise lawless conduct as a lawyer. Baird v. State Bar of Arizona, 401 U.S. 1, 10-11 (1971). Justice Harlan, in a separate opinion dissenting in *Baird* and *Stolar* and concurring in *Wadmond*, rejected Justice Black's reading of the records and saw the Court's supervision over state bar admission procedures as a most extravagant expansion of the current chilling effects approach to first amendment doctrine. *Id.* at 34-36.

cacy and at the call to violent action and force in pursuit of that advocacy."[51] He considered the key words in the excerpt from the committee's memorandum[52] to be whether "violent overthrow . . . is something to be sought after," and thus concluded that it was an inquiry into willingness to participate in violence.[53]

The *Stolar* case expanded *Baird* by holding as unconstitutional two questions which required a listing of all organizations to which the applicant belonged.[54] The Court reasoned that law students who know that they must survive such a screening process before admission to the bar are encouraged to protect their future by shunning unpopular or controversial organizations.[55]

Stolar refused to answer a third question [12(g)] about membership in any organization which advocates the overthrow of the government of the United States. The Court held this question to be impermissible on the basis of *Baird*.[56]

Baird and *Stolar* thus extended first amendment protections to bar admission proceedings.[57] However, the Court in *Wadmond* limited this expansion and set a standard for permissible inquiry by bar examining committees. The holdings in *Baird* and *Stolar* seem to be irreconcilable with *Wadmond*, but a careful examination of the factual record in *Wadmond* will reveal their consistency.

The difference in *Wadmond* is reflected by Justice Stewart who shifted sides and joined the dissenters of *Baird* and *Stolar*. In writing the majority opinion, Justice Stewart first upheld New York's general requirement that bar applicants must possess good character and fitness.[58] The Court then proceeded to consider Rule 9406 of the New York Civil Prac-

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51. *Id.* at 17.

52. *Supra* note 46.

53. Baird v. State Bar of Arizona, 401 U.S. 1, 19 (1971).

54. Shelton v. Tucker, 364 U.S. 479 (1960).

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

56. *In re* Stolar, 401 U.S. 23, 30 (1971).

57. While the Court considered *Baird* and *Stolar* on first amendment grounds, both petitioners also sought to assert fifth amendment claims against self-incrimination. Brief for Petitioner at 39-43, Baird v. State Bar of Arizona, 401 U.S. 1 (1971). Brief for Petitioner at 48-50, *In re* Stolar, 401 U.S. 23 (1971). The Court has held that a lawyer in a disbarment procedure can assert the fifth amendment privilege. Spevack v. Klein, 385 U.S. 511 (1967). However the question must still be decided with reference to bar admission procedures.

58. All states have a similar requirement. *See* Konigsberg v. State Bar of California, 366 U.S. 36 (1961); Schware v. Board of Examiners, 353 U.S. 232 (1957); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866). *See generally* 5 MARTINDALE-HUBBELL LAW DIRECTORY (103d ed. 1970).

tice Law and Rules which requires an applicant to the bar to furnish satisfactory proof to the effect that he "believes in the form of the government of the United States and is loyal to such government."[59] This rule reflects the requirement that an applicant must swear (or affirm) that he will support the Constitution of the United States and of the State of New York. On its face, the language of Rule 9406 seemed to require an applicant to furnish proof of his belief in the form of the government of the United States and of his loyalty to the government. This construction of the language would pose substantial constitutional questions as to the burden of proof permissible in such a context under the due process clause of the fourteenth amendment,[60] and as to the permissible scope of inquiry into an applicant's beliefs under the first and fourteenth amendments.[61]

However, Justice Stewart noted that the appellees in the case were the very state authorities who were entrusted with the definitive interpretation of the language of the rule and that the construction given by the appellees was "both extremely narrow and fully cognizant of protected constitutional freedoms."[62] Accepting the construction, Justice Stewart found "no showing of an intent to penalize political beliefs."[63] This lack of intent to penalize political beliefs was also a distinguishing feature of *Konigsberg II* and *Anastaplo*.

The Court also considered the validity of a two part question (number 26) about membership in any organizations which advocated the overthrow of the government by force.[64] Part (a) of the question inquired

59. NEW YORK CIVIL PRACTICE LAW AND RULES, article 94, rule 9406 (McKinney 1963).

60. Speiser v. Randall, 357 U.S. 513 (1958) (held that taxpayers in order to obtain tax exemptions could not be required to bear the burden of proof that they did not advocate violent overthrow of the government).

61. *See, e.g.*, Bagget v. Bullitt, 377 U.S. 360 (1964) (loyalty oaths requiring teachers to swear respect for the flag and institutions of the United States and the State of Washington and state employees to swear that they were not members of a subversive organization held invalid on their face because their language was unduly vague, uncertain and broad). For further elaboration of oaths *see generally Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); *In re* Summers, 325 U.S. 561 (1945); Brown and Fasset, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480 (1953).

62. LSCRRC v. Wadmond, 401 U.S. 154, 163 (1971). As interpreted by the state authorities (1) the rule placed no burden of proof upon the applicants, (2) the "form of the government of the United States" and the "government" referred solely to the Constitution, which is all that the oath mentions, and (3) "belief" and "loyalty" meant no more than willingness to take the constitutional oath and the ability to do so in good faith.

63. Konigsberg v. State Bar of California, 366 U.S. 36, 54 (1961).

64. In *Wadmond* the Court also upheld the constitutional validity of question

whether such membership was "knowing." If this part was answered in the affirmative, the applicant was then required to answer part (b) which asked if the applicant had the "specific intent" to further the aims of the organization during the period of knowing membership. Justice Stewart held that the question was tailored to conform to the relevant decisions of the Supreme Court. The Court had previously held that knowing membership in an organization advocating the forceful overthrow of the government by one sharing the specific intent to further the organization's illegal goals, may be made criminally punishable.[65] Justice Stewart further concluded that the division of question 26 into two parts was permissible under *Konigsberg II* which approved asking whether an applicant had ever been a member of the Communist Party without asking in the same question whether the applicant shared its illegal goals.[66]

Crucial to the reconciliation of *Wadmond* with *Baird* and *Stolar* is Justice Stewart's assessment of the record in *Wadmond*. Twice in his opinion Justice Stewart pointed to the fact that there was no showing that any applicant for admission to the New York bar had been denied admission either because of his answers to these or any similar questions or because he had refused to answer them.[67] Twice he also noted that the state agents had shown every willingness to keep their investigations within constitutionally permissible limits.[68] Therefore, the Court was not persuaded that the careful administration of such a system as New York's would necessarily result in "chilling effects" upon the exercise of constitutional freedoms.[69]

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27 of the New York questionnaire which asked if there was any reason why the applicant could not take the oath supporting the constitution and whether the applicant was loyal to and ready to support the Constitution of the United States without any mental reservation? The Court considered the question as simply supportive of the appellees' task of ascertaining the good faith with which an applicant can take the constitutional oath. LSCRRC v. Wadmond, 401 U.S. 154, 165 (1971).

65. Scales v. United States, 367 U.S. 203, 228-30 (1961).

66. LSCRRC v. Wadmond, 401 U.S. 154, 165-66 n.19 (1971).

67. *Id.* at 158, 165.

68. *Id.* at 163, 167.

69. *Id.* at 167. In one of the two dissenting opinions Justice Marshall held that rule 9406, as written, sanctioned systematic inquiry into beliefs and also noted the fact that the majority opinion pointed to no New York case law that showed what the proffered state interpretation meant. *Id.* at 189-90. Justice Marshall also criticized the state's inquiries into bar applicants' willingness to take the constitutional oath. He stated that the Court had previously held that the power to test the sincerity of a person who must take an oath of constitutional support "could be utilized to restrict the right . . . under the guise of judging . . . loyalty to the Constitution." Bond v. Floyd, 385 U.S. 116, 132 (1966). Justice Marshall saw further problems with part (a) of question 26. He found it overbroad and an indis-

Thus, summarizing the law as it stands today in respect to bar admission inquiries into political beliefs and associations, it is still permissible on the basis of *Konigsberg II* for a state to inquire into Communist Party membership and to exclude an applicant for refusal to answer. On the basis of *Baird* a state may not inquire about a bar applicant's beliefs or associations solely for the purpose of denying him admission because of what he believes. *Stolar* prohibits requiring a listing of all organizations to which the applicant belongs. *Wadmond* limits *Baird* and *Stolar* by permitting a state to ask if the applicant was a *knowing* member of an organization which advocates the forceful overthrow of the government, and if so, whether the applicant during his period of membership had the *specific intent* to further the organization's aims. A state can further require an applicant to have the willingness and ability to take an oath to support the Constitution of the United States as well as the state constitution.

Baird, Stolar and *Wadmond* have added first amendment protections to bar admission procedures.[70] However, these three cases did not overrule the previous bar admission cases which were decided on the basis of the fourteenth amendment. In future cases the Court could revert back to an emphasis on due process. The Court will not have to wait too long before it will be faced again with these problems. The activist

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criminate and intrusive device designed to expose an applicant's political affiliations. LSCRRC v. Wadmond, 401 U.S. 154, 196 (1971).

In his dissent Justice Black came back again to his "absolute" theory and stated that a state cannot exclude an applicant because he has belonged to organizations that advocated violent overthrow of the Government, even if his membership was "knowing" and he shared the organization's aims. Yates v. United States, 354 U.S. 298, 339 (1957) (Black, J. concurring in part and dissenting in part). Justice Black objected to the inquiry of question 27 concerning whether an applicant is loyal to the Constitution "without mental reservation." He distinguished between this type of oath which requires an applicant to hold a certain belief (loyalty to the Constitution) from the constitutional oaths that are promissory oaths in which the declarant promises that he will perform certain duties in the future. LSCRRC v. Wadmond, 401 U.S. 154, 178-79 (1971).

Justice Black could not reconcile the two part question, 26(a) and 26(b) with *Baird* and *Stolar*. The Court's allowing the knowledge and specific intent elements to be split into two parts allowed the state to force an applicant to supply information about his associations which are protected by the first amendment. Justice Black considered that even combining the two parts would not satisfy previous Court standards. United States v. Robel, 389 U.S. 258 (1967); Brandenburg v. Ohio, 395 U.S. 444 (1969).

70. The *Baird, Stolar* and *Wadmond* cases are not part of any one theory of constitutionally protected rights. There are elements of the "absolute" theory, the "balancing of interests" theory, the "overbreadth" doctrine and the "chilling effects" doctrine. There is as yet no prominent trend toward one theory in this area of constitutional law.

college students of the late 60's and early 70's will soon be presenting themselves before bar examining committees. Present and former members of S.D.S. and like organizations are sure to evoke probing inquiries from bar examiners.

There are some indications that a shift back to fourteenth amendment grounds is possible. First, with the departure of Justices Black and Harlan and the formation of the "Nixon Court," the close 5-4 decisions could easily turn away from any expansion of first amendment protections. A second indication is Justice Blackmun's dissent in *Baird* where he noted that there has been

> an overabundance of courtroom spectacle brought about by attorneys—frequently those who, being unlicensed in the particular State, are nevertheless permitted, by the court's indulgence, to appear for clients in a given case.[71]

A third indication is the fact that Chief Justice Burger has called upon the legal profession to sternly regulate itself from within if it wants to avoid regulations from the outside and has noted that the licensing and admission of lawyers "has led to a hodge-podge of standards, and regulations are desperately in need of careful examination."[72]

The only consensus that can be reached in this confused realm of constitutional law is that the Supreme Court will not allow bar committees to penalize applicants because of their political beliefs and associations. This negative stance should compel the legal profession to reassess its own strength and to use this strength not to prohibit but to open its doors to applicants with diverse political views and associations.

John J. Lynch

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71. Baird v. State Bar of Arizona, 401 U.S. 1, 21 (1971). *Cf.* INTERNATIONAL HERALD TRIBUNE (Paris Edition), August 11, 1971, at 5, col. 4, where Mr. Kuntsler discussed the problem of unruly lawyers and stated: "There is not an uncivil lawyer. It's a myth he [Justice Burger] is deliberately creating to control the bar. . . . They are afraid of this new breed of lawyer coming out of law school."

72. CHICAGO TRIBUNE, July 6, 1971, § 1A, at 4, col. 4.