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# UNITED STATES SUPREME COURT CASES

**By Evan Gutman CPA, JD (2002)**

**EX PARTE GARLAND**, 71 U.S. 333 (1866)

The Civil War had ended. A.H. Garland, Esquire who was admitted to practice law before the United States Supreme Court in 1860, followed his home state of Arkansas when it seceded from the Union and became a member of the Confederate Senate. After the war, he received a Presidential Pardon and wanted to résumé practice before the U.S. Supreme Court. Congress had passed a legislative act prohibiting any person from being admitted to the Bar of the Supreme Court, unless they subscribed to a loyalty oath. Garland challenged the constitutionality of the act. The Supreme Court ruled in Garland's favor. The lead opinion was written by Justice Stephen Field. It conclusively established that the ability to practice law was a "Right," not a "Privilege". Justice Field wrote:

> **"The attorney and counselor, being by the solemn judicial act of the court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes is something more than a mere indulgence, revocable at the pleasure of the court or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency.**
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> The legislature may undoubtedly prescribe qualifications for the office to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question in the case is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution."

A Dissenting opinion by Justice Miller set the stage for numerous opinions of state courts in subsequent years during the ABA and NCBE's rise to power that would falsely assert the ability to practice law was a "Privilege," rather than a "Right." Yet, even in doing so, Miller could not help to refer to it as a "Right." Justice Miller states in his Dissent:

> "The **right** to practice law in the courts as a profession is a **privilege** granted by the law **under such limitations or conditions in each state or government as the lawmaking power may prescribe. It is a privilege, and not an absolute right**. . . .
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> Attorneys are often deprived of this **right** upon evidence of bad moral character or specific acts of dishonesty which show that they no longer possess the requisite qualifications." [182]

**IN RE SUMMERS**, 325 U.S. 561 (1945)

Petitioner Summers complied with all prerequisites for admission to the Illinois Bar, but was a conscientious objector who opposed the use of force for religious reasons. He refused to advocate force to meet aggressions no matter how aggravated, even if he was in danger of bodily harm. He was a believer in passive resistance without exception. Due to his conscientious objection to military service, he refused to take the required oath. That was the sole ground on which the Illinois court denied admission. Petitioner Summers described denial of his admission as follows:

> **"The so-called "misconduct" for which petitioner could be reproached for is his taking the New Testament too seriously. Instead of merely reading or preaching the Sermon on the Mount, he tries to practice it. The only fault of the petitioner consists in his attempt to act as a good Christian in accordance with his interpretation of the Bible, and according to the dictates of his conscience. We respectfully submit that the profession of law does not shut its gates to persons who have qualified in all other respects, even when they follow in the footsteps of that Great Teacher of mankind who delivered the Sermon on the Mount. We respectfully submit that, under our Constitutional guarantees, even good Christians who have met all the requirements for the admission to the bar may be admitted to practice law."**

The sincerity of his beliefs was never questioned. The Illinois Bar did not deny that he was honest, moral, intelligent, had never been convicted of, or charged with violating any law. He also was a law professor. The Illinois Bar did not contest that he would serve his clients faithfully. He explained his reasons for wanting to be a lawyer as follows:

> "I think the law has a place to see to it that every man has a chance to eat and a chance to live equally. I think the law has a place where people can go and get justice done for themselves without paying too much, for the bulk of people that are too poor."

Summers told his examiners that he would, if he could, obey to the letter the precepts of Christ to:

> "Love your Enemies; Do good to those that hate you; Even though your enemy strike you on your right cheek, turn to him your left cheek also"

In a 5-4 decision, the U.S. Supreme Court ruled against him. Justice Reed writing for the Court, first indicated the ability to practice law was a "Right":

> "A claim of a present **right** to admission to the bar of a state and denial of that **right** is a controversy. . . . it is a case which may be reviewed under Article III of the Constitution . . . ."

The Court then ruled that Summers' inability to take the oath to support the constitution of Illinois, which required a willingness to serve in the armed forces, was sufficient grounds for denying admission. The Court reasoned that since it was his inability to take the oath in good faith that constituted the ground for denial, he was not denied admission because of religious beliefs. A Dissenting opinion was written by the Great Justice Hugo Black. He was joined by Justices Douglas, Murphy and Rutledge. In years to come Justices Black and Douglas would write several Dissenting opinions on this subject. Justice Black wrote as follows, clearly asserting the ability to practice law was a "Right" rather than a "Privilege":

**"The State of Illinois has denied the petitioner the right to practice his profession and to earn his living as a lawyer. It has denied him a license on the ground that his present religious beliefs disqualify him for membership in the legal profession.** The question is therefore whether a state which requires a license as a prerequisite to practicing law can deny an applicant a license solely because of his deeply rooted religious convictions. The fact that petitioner measures up to every other requirement for admission to the Bar set by the State demonstrates beyond doubt that the only reason for his rejection was his religious beliefs.

. . .

Test oaths, designed to impose civil disabilities upon men for their beliefs, rather than for unlawful conduct, were an abomination to the founders of this nation.

. . .

**Under our Constitution, men are punished for what they do or fail to do, and not for what they think and believe.** Freedom to think, to believe, and to worship has too exalted a position in our country to be penalized on such an illusory basis." [183]

**SCHWARE V. BOARD OF BAR EXAMINERS OF NEW MEXICO**, 353 U.S. 232 (1957)

This is a landmark case pertaining to Bar admissions. It is still cited today. Rudolph Schware was denied admission to the New Mexico Bar on character grounds due to several arrests over a decade preceding his application. The arrests were for participating in labor protests. Additionally, he was a member of the Communist Party more than 10 years prior to applying for admission, and had used several aliases. He was never prosecuted or convicted of any crime. He served in the armed forces during World War II and received an honorable discharge. At the time of his application, he was married with two children, and actively involved in the community. His conduct during law school was exemplary. Schware was born in a poor section of New York City in 1914, and grew up in a neighborhood inhabited by immigrants. His father was an immigrant. From the time he left school until 1940, he worked at temporary jobs. In 1933, he found work in a glove factory, and participated in an effort to unionize the employees. Since the workers were principally Italian, he assumed the name of Rudolph Di Caprio. Wherever employed, he was an active advocate of labor organization.

Schware filed a complete and truthful application. The application however did not request disclosure of any information related to membership in the Communist Party. The Bar however, received confidential information that he had once been a member. At a Bar Hearing, although he testified truthfully about his membership in the Communist Party, the Board refused to let him see the confidential information against him. **Further, even though they used that information for purposes of denying his application. they did not make it part of the record of the hearing.** When he petitioned the New Mexico Supreme Court, the members of that Court purportedly did not look at the confidential information. The whole thing had the appearance of being very sinister and Machiavellian in nature. The State contended that although the use of aliases, the arrests and membership of the Communist Party would not justify exclusion if each stood alone, when all three were combined, the exclusion was not unwarranted. The U.S. Supreme Court ruled in favor of Schware. Justice Black who wrote the Dissent in Summers, now wrote the lead opinion which states:

> "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. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. **Even in applying permissible standards, officers of a State cannot exclude an applicant where there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory**. . . .
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> . . .
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> **There is nothing in the record which suggests that Schware has engaged in any conduct during the past 15 years which reflects adversely on his character**. . . . From the record, it appears he is a man of religious conviction, and is training his children in the beliefs and practices of his faith. . .
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> . . .
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> **The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct**. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.
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> . . .
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> There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law."

Justice Frankfurter wrote a concurring opinion that was joined by Justices Clark and Harlan. It states:

> ". . . the judgment here challenged involves the application of a conception like that of "moral character," which has shadowy, rather than precise bounds.
> . . .
> **Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause. Such is the case here."**

One of the most interesting aspects of the opinion is Footnote 5, which states:

> "We need not enter into a discussion whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace. *Ex parte Garland*, 4 Wall. 333, 379." [184]

Justice Black cited <u>*Garland*</u>. <u>*Garland*</u> irrefutably asserted that the ability to obtain a law license is a "Right". <u>*Garland*</u> written in 1866, was still good law on this issue in 1957, almost a hundred years later.

**KONIGSBERG V. STATE BAR OF CALIFORNIA,** 353 U.S. 252 (1957)

Two absolutely incredible cases. The Konigsberg admission cases were decided by the U.S. Supreme Court twice. First, in 1957 and then in 1961. Two opinions, diametrically opposed to each other and on the exact same issue. Both times the case was decided by slim 5-4 decisions. Justice Black wrote the lead opinion in Konigsberg I and a stinging Dissent in Konigsberg II. Justice Harlan wrote a stinging Dissent in Konigsberg I and the lead opinion in Konigsberg II.

First, I will review Konigsberg I and then its follow-up in 1961. Here are the facts. In 1954, Raphael Konigsberg was denied admission to the California Bar on character grounds. He was born in Austria and brought to this country at age 8. He was an immigrant which as stated previously, the Bars detest. The California Committee refused to certify him. The Committee conducted hearings on his application that were directed at finding out whether he had ever been a member of the Communist Party. They questioned him at length about his political affiliations and beliefs. He refused to answer, insisting the questions were an improper intrusion on his First Amendment rights.

Initially, there appear to be two issues facing the Court. First, whether the refusal to answer a question, in and of itself constitutes grounds for denying admission. Second, whether the record demonstrated adequate evidence to deny admission on character grounds. Here's where it gets real interesting. The Supreme Court in the first case determined that the refusal to answer was not relied on by the Bar Committee as the basis for denying admission. It then ruled in Konigsberg favor on the second issue. Justice Black wrote the lead opinion. The Court sidesteps the issue of whether refusal to answer Bar examiner questions constituted legitimate grounds to deny admission stating:

> "He was not denied admission to the California Bar simply because he refused to answer questions.
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> In Konigsberg's petition for review to the State Supreme Court, there is no suggestion that the Committee had excluded him merely for failing to respond to its inquiries. Nor did the Committee, in its answer, indicate that this was the basis for its action. . . .
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> There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee which has been called to our attention that suggests that failure to answer a Bar Examiner's inquiry is, *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character . . . Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable . . .
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> . . .
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> 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. . . ."

The Court then went on to hold that the evidence was not sufficient to demonstrate he should be denied admission on moral character grounds. It is somewhat similar in nature, to the ***Schware*** case. Based on the Court's opinion, it would seem Konigsberg would then be admitted to the Bar. The Court definitively and expressly reversed the California Bar's refusal to admit him. Justice Black's opinion concluded as follows:

"We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner, nor in such way as to impinge on the freedom of political expression or association. **A bar composed of lawyers of good character is a worthy objective, but it is unnecessary to sacrifice vital freedoms in order to obtain that goal.** . . . In this case, we are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government. **Without some authentic, reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law**. . . . A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action.

The judgment of the court below is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded."* [185]

The Court's opinion however, as stated previously did not directly and conclusively resolve the issue of Konigsberg's refusal to answer the Bar's questions. This then became the issue in Konigsberg II.

**KONIGSBERG V. STATE BAR OF CALIFORNIA**, 366 U.S. 36 (1961)

One would not expect to see this case again at the U.S. Supreme Court after the conclusion and extensive analysis in Justice Black's lead opinion the first time. Logic would dictate that Konigsberg would be immediately admitted. What happened instead is amazing. On remand to the California Supreme Court, Konigsberg predictably moved for immediate admission. The State Supreme Court vacated its previous order and referred the matter to the Bar Committee for further consideration. The Bar Committee again held hearings. Konigsberg was right back where he started!! The Committee asked him the exact same questions and he again refused to answer. It was absolutely unbelievable!!

The California Committee again declined to certify him, but this time they expressly stated that the ground for denying admission was his refusal to answer the questions. The California Supreme Court denied review, and the case was right back at the U.S. Supreme Court. This time, Justice Harlan, who wrote the Dissent in Konigsberg I wrote the lead opinion and Konigsberg loses. First, Harlan tries to dispel the fact that the California Bar's second denial was inconsistent with the U.S. Supreme Court's opinion in Konigsberg I. To accomplish this he relies on the flimsy premise that the Bar might have asked additional questions if it had known its' decision would be overturned. It was lame logic. Harlan wrote:

> "In its earlier proceeding, the California Bar Committee may have found further investigation and questioning of petitioner unnecessary when, in its view, the applicant's prima facie case of qualifications had been sufficiently rebutted by evidence already in the record. **While, in its former opinion, this Court held that the State could not constitutionally so conclude, it did not undertake to preclude the state agency from asking any questions or from conducting any investigation that it might have thought necessary had it known that the basis of its then decision would be overturned."**

The logical weakness of Harlan's opinion is delineated exquisitely by Justice Black's Dissent which responds as follows:

> "When this case was here before, we reversed a judgment of the California Supreme Court barring the petitioner Konigsberg from the practice of law in that State on the ground that he failed to carry the burden of proving his good moral character . . . . In doing so, we held that there was "no evidence in the record" which could rationally justify such a conclusion. Upon remand, the Supreme Court of California referred the matter back to the Committee of State Bar Examiners for further hearings, at which time Konigsberg presented even more evidence of his good character.
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> **. . .**
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> **What the Committee did do upon remand was to repeat the identical questions with regard to Konigsberg's suspected association with Communists twenty years ago that it had asked and he had refused to answer at the first series of hearings. Konigsberg again refused to answer these questions, and the Committee again refused to certify him. . . .**
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> **. . .**
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> **This alone would be enough for me to vote to reverse the judgment."**

Having irrationally decided that consideration of the case was not precluded by Konigsberg I, Harlan rests his opinion on what is known as the "balancing" approach. Essentially, it stands for the notion that First Amendment freedoms must be sacrificed when outweighed by governmental interests. Remember, Konigsberg is asserting that his right to refuse to answer the questions is protected by the

First Amendment. This is the most interesting and important part of the opinion. Harlan states in the lead opinion as follows:

> "At the outset, we reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are "absolutes," . . . Throughout its history, this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interest, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . . Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved. . . .
> **. . .**
> As regards the questioning of public employees relative to Communist Party membership, it has already been 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 hence that such questioning does not infringe constitutional protections. . . . With respect to this same question of Communist Party membership, we regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented."

Justice Black's Dissent, joined by the Chief Justice and Justice Douglas, quoted here at length is historic. He writes on behalf of the Dissenting power bloc:

> "Konigsberg's objection to answering questions as to whether he is or was a member of the Communist Party has, from the very beginning, been based upon the contention that the guarantees of free speech and association of the First Amendment as made controlling upon the States by the Fourteenth Amendment preclude California from denying him admission to its Bar for refusing to answer such questions. In this I think Konigsberg has been correct. . . . And yet it seems to me that this record shows, beyond any shadow of a doubt, that the reason Konigsberg **has been rejected is because the Committee suspects** that he was at one time a member of the Communist Party. I agree with the implication of the majority opinion that this is not an adequate ground to reject Konigsberg . . . .
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> **The majority avoids the otherwise unavoidable necessity of reversing the judgment below . . . by simply refusing to look beyond the reason given by the Committee to justify Konigsberg's rejection. In this way, the majority reaches the question as to whether the Committee can constitutionally reject Konigsberg for refusing to answer questions . . . even though it could not constitutionally reject him if he did answer those questions and his answers happened to be affirmative.**

The history of the First Amendment is too well known to require repeating here except to say that it certainly cannot be denied that the very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to "balance" the Bill of Rights out of existence. . . .

The Court attempts to justify its refusal to apply the plain mandate of the First Amendment in part by reference to the so-called "clear and present danger test" forcefully used by Mr. Justice Holmes and Mr. Justice Brandeis not to narrow, but to broaden, the then-prevailing interpretation of First Amendment freedoms. I think very little can be found in anything they ever said that would provide support for the "balancing test" presently in use. **Indeed, the idea of "balancing" away First Amendment freedoms appears to me to be wholly inconsistent with the view, strongly espoused by Justice Holmes and Brandeis, that the best test of truth is the power of thought to get itself accepted in the competition of the market**. . . . The "balancing test," on the other hand, rests upon the notion that some ideas are so dangerous that Government need not restrict itself to contrary arguments as a means of opposing them even when there is ample time to do so.

But I fear that the creation of "tests" by which speech is left unprotected under certain circumstances is a standing invitation to abridge it. This is nowhere more clearly indicated than by the sudden transformation of the "clear and present danger test" in *Dennis v. United States.* In that case, this Court accepted Judge Learned Hand's "restatement" of the "clear and present danger test":

> "In each case, (courts) must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

After the "clear and present danger test" was diluted and weakened by being recast in terms of this "balancing" formula, there seems to me to be much room to doubt that Justices Holmes and Brandeis would even have recognized their test. . . .

. . .

But I believe this Nation's security and tranquility can best be served by giving the First Amendment the same broad construction that all Bill of Rights guarantees deserve.

. . .

So the only issue presently before us is whether speech that must be well within protection of the Amendment should be given complete protection or whether it is entitled only to such protection as is consistent in the minds of a majority of this Court with whatever interest the Government may be asserting to justify its abridgement. **The Court, by stating unequivocally that there are no "absolutes" under the First Amendment, necessarily takes the position that even speech that is admittedly protected by the First Amendment is subject to the "balancing test," and that, therefore, no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgement. In my judgment, such a sweeping denial of the existence of any inalienable right to speak undermines the very foundation upon which the First Amendment, the Bill of Rights, and, indeed our entire structure of government rest. . . . Thus, the "balancing test" turns our "Government of the people, by the people and for the people" into a government over the people."**

I cannot believe that this Court would adhere to the "balancing test" to the limit of its logic. **Since that "test" denies that any speech, publication or petition has an "absolute" right to protection under the First Amendment, strict adherence to it would necessarily mean that there would only be a conditional right, not a complete right, for any American to express his views to his neighbors**. . . . In other words, not even a candidate for public office, high or low, would have an "absolute" right to print its opinion on public governmental affairs, and the American people would have no "absolute" right to hear such discussions. All of these rights would be dependent upon the accuracy of the scales upon which this Court weighs the respective interests of the Government and the people. It therefore seems to me that the Court's "absolute" statement that there are no "absolutes" under the First Amendment must be an exaggeration of its own views.

. . .

The Court seeks to bring this case under the authority of the street regulation cases, and to defend its use of the "balancing test" on the ground that California is attempting only to exercise its permissible power to regulate its Bar, and that any effect its action may have upon speech is purely "incidental." But I cannot agree that the questions asked Konigsberg with regard to his suspected membership in the Communist Party had nothing more than an "incidental" effect upon his freedom of speech and association. . . . I think the conclusion is inescapable that this case presents the question of the constitutionality of action by the State of California designed to control the content of speech. As such, it is a "direct," and not an "incidental," abridgement of speech. Indeed, if the characterization "incidental" were appropriate here, it would be difficult to imagine what would constitute a "direct" abridgement of speech. . . .

. . .

**Indeed, if the State's only real interest was, as the majority maintains, in having good men for its Bar, how could it have rejected Konigsberg, who, undeniably and as this Court has already held, has provided overwhelming evidence of his good character?** Our former decision, was that a man does not have to tell all about his political beliefs and associations in order to establish his good character and loyalty.

. . .

The interest in free association at stake here is not merely the personal interest of petitioner in being free from burdens that may be imposed upon him for his past beliefs and associations. It is the interest of all the people in having a society in which no one is intimidated with respect to his beliefs or associations. It seems plain to me that the inevitable effect of the majority's decision is to condone a practice that will have a substantial deterrent effect upon the associations entered into by anyone who may want to become a lawyer in California. **If every person who wants to be lawyer is to be required to account for his associations as a prerequisite to admission into the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid association with any organization that advocates anything at all somebody might possibly be against,** including groups whose activities are constitutionally protected under even the most restricted notion of the First Amendment. And, in the currently prevailing atmosphere in this country, I can think of few organizations active in favor of civil liberties that are not highly controversial. . . .

. . .

Thus, in my view, the majority has reached its decision here against the freedoms of the First Amendment by a fundamental misapplication of its own currently, but I hope only temporarily, prevailing "balancing" test. The interest of the Committee in satisfying its curiosity with respect to Konigsberg's "possible" membership in the Communist Party two decades ago has been inflated out of all proportion to its real value . . . . This, of course, is an

ever-present danger of the "balancing test" for the application of such a test is necessarily tied to the emphasis particular judges give to competing societal values. Judges, like everyone else, vary tremendously in their choice of values. . . . But it is neither natural nor unavoidable in this country for the fundamental rights of the people to be dependent upon the different emphasis different judges put upon different values at different times. . . .

. . .

**In my judgment, this case must take its place in the ever-lengthening line of cases in which individual liberty to think, speak, write, associate and petition is being abridged in a manner precisely contrary to the explicit commands of the First Amendment. . . .**

. . .

Nothing in this record shows that Konigsberg has ever been guilty of any conduct that threatens our safety. **Quite the contrary, the record indicates that we are fortunate to have men like him in this country, for it shows that Konigsberg is a man of firm convictions who has stood up and supported this country's freedom in peach and war.** The writing that the record shows he has published constitute vehement protests against the idea of overthrowing this Government by force. No witness could be found throughout the long years of this inquisition who could say, or even who would say, that Konigsberg has ever raised his voice or his hand against his country. **He is, therefore, but another victim of prevailing fashion of destroying men for the views it is suspected they might entertain."** [186]

And that is the Konigsberg line of cases which established that the refusal to answer an improper State Bar admission question, may in and of itself constitute grounds for denial of the application. The very same day on which the decision in Konigsberg II was handed down, April 24, 1961, the Court also rendered its' decision in the case **In re Anastaplo**, another Bar admissions case.

**IN RE ANASTAPLO**, 366 U.S. 82 (1961)

Like so many of the Bar admission cases, the Applicant Anastaplo was the child of parents who had immigrated to this country. In this particular instance, they immigrated from Greece prior to his birth.

The Anastaplo case was virtually identical to the *Konigsberg* case. Anastaplo refused to answer the inquiry into whether he was ever a member of the Communist Party. It was again a slim 5-4 decision, with Justice Harlan unsurpisingly writing the lead opinion, ruling against Anastaplo, and Justice Black writing a stinging Dissent, joined by Justices Douglas, Brennan and Chief Justice Warren. There was one major distinction however, from the *Konigsberg* case. Anastaplo contended he was not adequately warned by the Bar Committee of the consequences for his refusal to answer the question. His position was predicated on the fact that one of the Committee members made a statement that Illinois had no *"per se"* rule of exclusion, and that a refusal to answer would not automatically exclude admission. Justice Harlan determines the issue to be insubstantial on the ground that due process does not demand one be warned of the sanction applied if the law is violated.

The Great Justice Black's Dissent is similar to his Dissent in Konigsberg II. From a moral perspective, it differs in that he demonstrates the consequences of allowing the refusal to answer questions to constitute grounds for denial. In many regards, the words he quotes about Anastaplo himself, rather than the legal issues, are the most interesting aspects of his opinion. Other than his refusal to answer the questions related to whether he was a member of the Communist Party, Anastaplo's character was unchallenged by the Bar Committee. Quite simply put, his character was impeccable. After intensive investigation, not one person could be found who would say anything even faintly derogatory. He served in the Air Force during World War II, flying as a navigator in every major theater of the military operations of the war and received an honorable discharge. The Bar after interviewing individuals in his home town could not find even one statement about his life or conduct that casted doubt upon his fitness for admission. During all Bar proceedings he conducted himself with complete dignity, without exception. This is more than can be said for the Bar Examiners themselves, as will be demonstrated. The problems for Anastaplo during the admissions process began in an incredible fashion. They were due to the answer he gave to the following improper application question:

> "State what you consider to be the principles underlying (a) the Constitution of the United States."

Anastaplo answered as follows:

> "One principle consists of the doctrine of the separation of powers; thus, among the Executive, Legislative, and Judiciary are distributed various functions and powers in a manner designed to provide for a balance of power, thereby intending to prevent totally unrestrained action by any one branch of government. Another basic principle (and the most important) is that such government is constituted to secure certain inalienable rights, those rights to Life, Liberty and the Pursuit of Happiness . . . **And, of course, whenever the particular government in power becomes destructive of these ends, it is the right of the people to alter or to abolish it and thereupon to establish a new government."**

It was the last sentence the Committee wanted to question him about. During the discussions, he stood his ground that the people have a "right of revolution." At that juncture, a Subcommittee member interrupted with the question:

> "Are you a member of any organization that is listed on the Attorney General's list, to your knowledge?"

It was followed up by the question:

> "Are you a member of the Communist Party?"

Anastaplo challenged the validity of the questions, the Committee refused to certify his application, and another Hearing was set. What followed exposed the Bar admissions process at its' absolute worst. During the series of hearings that followed, the rift between Anastaplo and the Committee grew wider. The Committee asked questions regarding his "possible" association with scores of organizations, including the Ku Klux Klan, Fascists, every organization on the Attorney General's list, the Democratic Party, the Republican Party, and the Communist Party. At one point, at least two members insisted that he tell the Committee whether he believed in a Supreme Being. At the final session, his closing remarks to the Committee were as follows:

> **"It is time now to close. Differences between us remain. . . . you should want no higher praise than what I have said about the contribution the bar can make to republican government. The bar deserves no higher praise until it makes that contribution. You should be grateful that I have not made a complete submission to you, even though I have cooperated as fully as conscience permits.** To the extent I have not submitted, to that extent have I contributed to the solution of one of the most pressing problems that you, as men devoted to character and fitness, must face. This is the problem of selecting the standards and methods the bar must employ if it is to help preserve and nourish that idealism, that vital interest in the problem of justice, that so often lies at the heart of the intelligent and sensitive law student's choice of career. This is an idealism which so many things about the bar, and even about bar admission practices, discourage and make unfashionable to defend or retain.
>
> . . .
>
> I move therefore that you recommend to the Supreme Court of Illinois that I be admitted to the bar of this State. And I suggest that this recommendation be made retroactive to November 10, 1950 **when a young Air Force veteran first was so foolish as to continue to serve his country, by daring to defend against a committee on character and fitness the teaching of the Declaration of Independence on the right of revolution."**

Justice Black notes the sincerity and devotion of Anastaplo by citing the following remarks he made:

> **"I speak of a need to remind the bar of its traditions and to keep alive the spirit of dignified but determined advocacy and opposition. This is not only for the good of the bar, of course, but also because of what the bar means to American republican government. The bar, when it exercises self-control, is in a peculiar position to mediate between popular passions and informed and principled men, thereby upholding republican government**. . . . The bar, furthermore, is in a peculiar position to apply to our daily lives the constitutional principles which nourish for this country its inner life. Unless there is this nourishment, a just and humane people is impossible. The bar is, in short, in a position to train and lead by precept and example the American people." [187]

At no time did Anastaplo ever even remotely express a belief that this country was an oppressive one in which the "right of revolution" delineated in the Declaration of Independence should be exercised. Justice Black notes that quite to the contrary, the entire course of his life was one of

devotion to his country. Black stresses that this case illustrates the consequences to the Bar, of not affording the full protections of the First Amendment.

Anastaplo was a man victimized by the traditional State Bar witch-hunt. Subjected to intense scrutiny which ultimately uncovered absolutely nothing incriminatory, he was denied admission solely on the ground that he refused to answer improper questions. Those questions included groundless inquiries regarding his membership in countless organizations and the consistency of his religious beliefs with an attorney's duty to take an oath of office.

The Bar's interest in accomplishing the fortification of political power through its' membership can be demonstrated further by considering the case of *Lathrop v. Donohue*, 367 U.S. 820 (1961), a case while admittedly not directly related to the admissions process, provides insight into what the Bar is all about.

**LATHROP v. DONOHUE,** 367 U.S. 820 (1961)

This case demonstrates how uncomfortable the U.S. Supreme Court is in dealing with issues pertaining to the State Bar's power to regulate the legal profession. The end result is basically a U.S. Supreme Court opinion that says absolutely nothing. As Justice Hugo Black, the staunchest supporter of the First Amendment states with an amusing smart-alecky nature in the very first sentence of his dissent:

> "I do not believe that either the bench, the bar, or the litigants will know what has been decided in this case--certainly I do not."

He then goes on to say:

> "Two members of the Court, saying that "the constitutional issue is inescapably before us" vote to affirm the holding of the Wisconsin Supreme Court that a State can, without violating the Federal Constitution, compel lawyers, over their protest, to pay dues to be used in part for the support of legislation and causes they detest. Another member, apparently agreeing that the constitutional question is properly here, votes to affirm the holding of the Wisconsin Supreme Court because he believes that a State can constitutionally require a lawyer to pay a fee to its' "designee" as a condition to granting him the "special privilege" of practicing law, even though that "designee", over the lawyer's protest, uses part of the fee to support causes the lawyer detests. Two other members of the Court vote to reverse the judgment of the Wisconsin court on the ground that the constitutional question is properly here, and the powers conferred on the Wisconsin State Bar by the laws of that State violate the First and Fourteenth Amendments. Finally, four members of the Court vote to affirm on the ground that the constitutional question is actually not here for decision at all. . . . If ever there were two cases that should be set over for reargument in order for the Court to decide--or least make an orderly attempt to decide the basic constitutional question involved in both of them, it is this case and the companion case of *International Association of Machinists v. Street*."

Now let's look at the case itself. The case dealt with the requirement promulgated by the Wisconsin Supreme Court that attorneys in Wisconsin be a member of the integrated State Bar. The Bar then required its' members to pay annual dues of $ 15. The appellant, a Wisconsin lawyer instituted an action for refund of the $ 15 dues on the grounds they were paid under protest. When paying the $ 15 he attached a letter that stated as follows:

> "**I do not like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities** . . . . A major portion of the activities of the State Bar as prescribed by the Supreme Court of Wisconsin are of a political and propaganda nature."

He alleged further that the State Bar:

> "used its employees, property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by plaintiff, all contrary to plaintiff's convictions and beliefs"

The core of his argument was that he could not be constitutionally compelled to give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its funds to influence legislation. Stated simply, the Bar's policy was, if you want to practice law, you must provide financial support to our political causes. It is important to note when reviewing this case, that the attorney instituted his action in 1959. The Wisconsin State Bar was created in 1957, only two years earlier. Prior to that time, although an individual was required to be licensed to practice law, they were not required to join the State Bar which was merely a voluntary association. The process of requiring lawyer professionals to be a member of an organization that goes beyond mere professional licensing was known as “integrating” the Bar. The legitimacy of integrating the Bar was a highly controversial issue during this period. The Wisconsin Legislature initiated the movement for integration of the Bar in 1943 when it passed a statute providing:

> "There shall be an association to be known as the "State Bar of Wisconsin" composed of persons licensed to practice law in this state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin."

The State Supreme Court twice refused to order integration, but finally relented thirteen years later in 1956. That resulted in the creation of the Wisconsin Bar on January 1, 1957. The purposes of the organization were stated in Rule 1, Par. 2 and included the following that expressly confirmed the monopolistic, anticompetitive mentality.

> "to safeguard the proper professional interests of the members of the bar"

Note the lack of emphasis on safeguarding the public’s interest, but rather the concentration on “professional interests.” The Appellant attacked the power of the Bar on the ground that its' legislative activities gave it the character of a political party. He was astutely noting that the Bar's activities relegated it to a self-serving entity, rather than a licensing and disciplinary authority designed to promote the public interest. The U.S. Supreme Court plurality affirmed only the State's right to require lawyers to become members of an integrated Bar and to pay reasonable annual dues as members of that Bar. It did not decide the core issue of the case, which was whether those lawyers may be constitutionally compelled to contribute financial support to activities they oppose.

As Justice Black correctly noted, it's kind of a ridiculous opinion. The issue not decided was the primary reason the case was there in the first place. The case was relegated to addressing the legitimacy of an integrated Bar which was tangential to the appellant's assertion that he was being unconstitutionally required to financially support political activities. The facts left no doubt that the Bar was attempting to influence legislation on behalf of its' members and was designed to promote their professional interests. It was not functioning as a State agency to ensure only that competent individuals perform legal services. The case also briefly addressed the economic protectionist Bar issue of UPL (Unauthorized Practice of Law). Footnote 12 of the lead opinion states:

> "Revenues from integration enabled the State Bar to employ a lawyer whose principal task is the investigation of complaints of unauthorized practice and the effort to achieve its discontinuance. A number of legal action to prevent unauthorized practice have been instituted . . . **The Committee on Unauthorized Practice has also worked with the Committee on Interprofessional and Business Relations in conferring with other professional groups to establish demarcation lines between their activities and those of the bar. Thus an agreement was negotiated with the Association of Certified Public Accountants, and a joint committee provided to police it."**

Take note of what is occurring here. A Wisconsin lawyer must contribute financial support to the political activities of a Bar that has as its' purpose "to safeguard the proper professional interests of the members of the bar." Those proper “professional interests” are comprised of an aggressive UPL police enforcement policy, which itself was largely dependent on the “Committee on Interprofessional and Business Relations.”

Justice Douglas indicates in his stinging dissent that the Bar had essentially forced its' lawyers to join a guild. If the State can compel lawyers to join a guild, then why not doctors, dentists, nurses, insurance agents and certified public accountants. The same criteria that the plurality uses to support the legitimacy of the integrated bar would be applicable to all other professions. Douglas recognizes the nexus between an integrated bar, UPL and monopolistic, anticompetitive policy. He states:

> **"It is true that one of the purposes of the State Bar Association is "to safeguard the proper professional interests of the members of the bar." . . . In this connection, the association has been active in exploiting the monopoly position given by the licensed character of the profession.** Thus, the Bar has compiled and published a schedule of recommended minimum fees. . . . Along the same line, the Committee on Unauthorized Practice of the Law, along with a Committee on Inter-professional and Business Relations, has been set up to police activities by nonprofessionals within "the proper scope of the practice of law."

One of Douglas' most interesting footnotes depicts the economic danger of having a mandatory agency that adopts a policy of furthering the economic interests of its' members in favor of the public interests. He includes a commentary published in a newspaper in England, pertaining to the regimented Bar in England in the following Footnote (the term “solicitor” basically means attorney in England):

> **"The immense groups controlling financial operations are becoming more and more interlocked, and have an increasing tendency to cover up each other's errors**. . . . The great firms of solicitors are less and less inclined to offend the powerful financial houses which place the biggest business; and if dishonesty is alleged, they all to often refuse "to act" . . . . Slowly, dangerously, and without the public fully realizing what is happening, a nation of great power . . . is being brought within the grip of a minority of extremely powerful men whose genius is to deny the smallest pretension of power, but who, in fact, are wholly ruthless in a persistent search for power."

On the other end of the spectrum sharply contrasting with the compelling Dissents of Justices Black and Douglas, is a stinging concurrence written by Justice Harlan that is Pro State Bar down the line. Harlan rather than just affirming the constitutionality of the integrated Bar, would give the stamp of approval to exacting dues for political causes. To properly appreciate the weakness of Harlan's logic it should be compared with Justice Black's position, as their diametrically opposed opinions are written directly to each other. They both only agree that the constitutionality of the dues issue should have been addressed. Harlan has no doubt about Wisconsin's right to use the dues in furtherance of political purposes. He supports this conclusion on the basis that application of the First Amendment freedom of speech is predicated on a balancing approach. The balancing approach, in Harlan's opinion dictates that the interests of the state be balanced against any degree to which appellant's freedom of speech is inhibited by the requirement that he give financial support to causes he does not espouse. Black does not support the balancing approach.

I quote applicable portions of Harlan's concurring opinion and Black's Dissent by presenting them in the form of a conversation with each other. I close with a comment in Douglas' opinion. This

I believe will best enable the reader to ascertain who makes logical sense, and who is just blowing hot air.

HARLAN: I agree with my Brother BLACK that the Constitutional issue is inescapably before us. **. . .** I think that there can be no doubt about Wisconsin's right to use appellant's dues in furtherance of any of the purposes . . . Orderly analysis requires that there be considered, first, the respects in which it may be thought that the use of a member's dues for causes he is against impinges on his right of free speech, and, second, the nature of the state interest offered to justify such use of the dues extracted from him. . . .

BLACK: **The "balancing" argument here is identical to that which has recently produced a long line of liberty-stifling decisions in the name of "self-preservation." The interest of the State . . . is magnified to the point where it assumes overpowering proportions, and appears to become almost as necessary a part of the fabric of our society as the need for "self-preservation." On the other side of the "scales," the interest of lawyers in being free from such state compulsion is first fragmentized into abstract, imaginary parts, then minimized part by part almost to the point of extinction, and finally characterized as being of a purely "chimerical nature."** As is too often the case, when the cherished freedoms of the First Amendment emerge from this process, they are too weightless to have any substantial effect upon the constitutional scales, and must therefore be sacrificed in order not to disturb what are conceived to be the more important interests of society.

HARLAN: As I understand things, it is said that the operation of the Integrated Bar tends (1) to reduce a dissident member's "economic capacity" to espouse causes in which he believes; (2) to further governmental "establishment" of political views; (3) to threaten development of a "guild system" of closed, self-regulating professions and businesses; (4) to "drown out" the voice of dissent by requiring all members of the Bar to lend financial support to the views of the majority; and (5) to interfere with freedom of belief by causing "compelled affirmation" of majority-held views. With deference, I am bound to say that, in my view, all of these arguments border on the chimerical.

BLACK: I cannot agree that a contention arising from the abridgement of First Amendment freedoms which results from a compelled support of detested views can properly be characterized as of a "chimerical nature," . . . . Quite the contrary, I can think of few plainer, more direct abridgements of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes they are against. . . .

HARLAN: . . . I do not think it can be said with any assurance that being required to contribute to the dispersion of views one opposes has a substantial limiting effect on one's right to speak and be heard.

BLACK: At stake here is the interest of the individual lawyers of Wisconsin in having full freedom to think their own thoughts, speak their own minds, support their own causes, and wholeheartedly fight whatever they are against . . .

HARLAN: In this instance, it can hardly be doubted that it was constitutionally permissible for Wisconsin to regard the functions of an Integrated Bar as sufficiently important to justify whatever incursions on these individual freedoms may be thought to arise from the operations of the organization.

BLACK: I do not believe that the practice of law is a "privilege" which empowers Government to deny lawyers their constitutional rights. The mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights for the precise purpose of insuring the independence of the individual . . . What I said in the *Cohen* case is, in my judgment, equally applicable here:

> "One of the great purposes underlying grant of those freedoms was to give independence to those who must discharge important public responsibilities. . . . If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wield governmental power at the moment. Wherever that has happened in the world, the lawyer, . . . has ceased to perform the highest duty of his calling, and has lost the affection and even the respect of the people."

DOUGLAS: Congestion of traffic, street fights, riots and such may justify curtailment of opportunities or occasions to speak freely. . . But when those laws are sustained, we require them to be "narrowly drawn" so as to be confined to the precise evil within the competence of the legislature. . . . **Once we approve this measure, we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose. . . . we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades. . . . Those brigades are not compatible with the First Amendment. . . . the First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority.** [188]

Another landmark case that warrants serious recognition, even though it does not bare directly on the subject of State Bar admission is *NAACP v. BUTTON*. It deals with the issue of UPL and once again demonstrates the irrational nature of the State Bar mindset and its' organizational "group" goals.

**NAACP v. BUTTON**, 371 U.S. 415 (1963)

With a heightened sense of arrogance that is admittedly normally characteristic only of members of the Judiciary, I assert that in my own esteemed and absolutely correct opinion that *NAACP v. BUTTON* is the second best opinion ever written in the history of the United States Supreme Court (the best is *Ex Parte Garland*). Sadly, it has been completely misinterpreted and its' intent evaded by State Supreme Courts. As a result, the Court's brilliant opinion has never fulfilled its' expectations. Concededly, misinterpretation and evasion of the opinion by State Supreme Courts is not surprising since the opinion when properly read and complied with would divest State Bars of their ability to evade the First Amendment. Here are the facts.

The case has its' roots in *Brown v. Board of Education*, 347 U.S. 483 which held in 1954 that segregation by race in public schools violated the Equal Protection Clause of the Fourteenth Amendment. The losing litigant in *Brown* was the State of Virginia. In an attempt to frustrate implementation of *Brown*, while still giving the appearance of compliance, Virginia enacted five legislative bills as part of a "general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." Those are the words of Judge Soper writing for the court in *NAACP v. Patty*, 159 F. Supp. 503, 515 as cited by Justice Douglas in the *Button* case. (NOTE : the *Button* case was originally delineated as *Patty* in the lower court). The amendments were enacted two years after the *Brown* decision, in 1956. Arkansas, Florida, Georgia, Mississippi, South Carolina and Tennessee passed similar laws following the *Brown* opinion. The link between utilizing UPL as a State Bar mechanism to promote racial prejudice was established.

The issue in *Button* was the constitutionality of Chapter 33 of the Virginia Acts of Assembly, 1956 Extra Session on the ground that the statute was in violation of the Fourteenth Amendment. That statute made it an offense for organizations falling within specified criteria, to solicit business for an attorney. The NAACP at this time was devoting much of its funds and energies to an extensive program of assisting litigation on behalf of its declared purposes. They financed cases when certain litigants retained an NAACP attorney to represent them. The Conference maintained a legal staff of 15 attorneys, each required to agree with the policies of the NAACP pertaining to professional services. The staff lawyer received per diem compensation from the NAACP and was not allowed to accept compensation from the litigant. The client was free to withdraw at any time. Essentially, the NAACP would identify cases that furthered their goals of equality and then provided free legal services to the litigant through their lawyers. Virginia having failed in *Brown* to subvert legal activities of the NAACP, was now trying to “back door” their neutralization policy by disallowing the NAACP’s solicitation of cases. Virginia's side of the case can be summed up by their assertion that the NAACP was "fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability."

The U.S. Supreme Court in an opinion written by Justice Brennan held that the activities of the NAACP were protected by the First Amendment, which Virginia could not prohibit under its' power to regulate the legal profession. The Court concluded that under the statute, an attorney who advises another person that their legal rights have been infringed and refers that person to an attorney has committed a crime. There thus adheres in the statute the gravest danger of smothering discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. The Court determined that the Virginia statute potentially prohibited every cooperative activity that would make advocacy of litigation meaningful. Virginia contended it had an interest in regulation of the legal profession and that the NAACP's activities fell within the purview of state regulation. The U.S. Supreme Court responded that a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. It determined that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.

The NAACP claimed that the statute infringed on their right to have members and lawyers associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed rights. Virginia opposed their contention on the ground that "solicitation" of cases was outside the freedom protected by the First Amendment. The Court determined that a State can not foreclose constitutional rights by mere labels. The First Amendment protects not only abstract discussion, but advocacy against governmental intrusion. Litigation is a means for achieving lawful objectives of equality of treatment. The Court interestingly notes:

> "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."

In response to Virginia's attempt to falsely categorize a First Amendment violation as the regulation of professional conduct (the standard defense State Bar's assert with respect to UPL) the Court notes:

> "Thus, it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression."

Justice Harlan the stalwart proponent of State Bar regulatory power, even when it opposed American freedoms wrote a stinging Dissent. His initial attack is on the NAACP. He delineates the degree of control that the NAACP holds over cases that its' attorneys litigate. He determines that the organization rather than the attorneys, control the timing of suits, form of pleading and the type of relief to be requested. Essentially, it is his position that as a result of the NAACP's activities the normal incidents of the attorney-client relationship are lost. Consequently, he concludes that the NAACP's solicitation activities are within the purview of State regulation. Harlan then addresses the argument adopted by the Court that such regulation infringes on the First Amendment. His attack on First Amendment protections relies on the premise that the activities consist not only of speech, but also conduct. He submits it is "speech plus." This is the heart of the State Bar's justification for UPL enforcement. As a result, it is his position the State may restrict those undertaking to represent others in legal proceedings, to properly qualified practitioners and also determine that an association does not have standing to litigate the interests of its members.

Under Harlan's theory, the key issue becomes not whether free speech has been infringed, but instead whether the particular regulation of conduct has a reasonable relation to the furtherance of a proper state interest. The majority determined an infringement on speech must serve a compelling state interest. Harlan asserts it must meet only a legitimate state interest. By changing the categorization of activity from speech to conduct, the standard to be met has been reduced to one more lax, than that of comparable First Amendment infringements. I am forced to concede the deceptive brilliance of the legal manipulation. Once the standard is reduced from a compelling interest to merely a legitimate state interest, Harlan demonstrates how the regulation of conduct furthers a legitimate state interest. He appears to compare the NAACP's activities with being just beyond that of ambulance chasing lawyers stating:

> "But a State's felt need for regulation of professional conduct may reasonably extend beyond mere "ambulance chasing." [189]

Then Harlan makes a colossal blunder. He compares the ***Button*** case with the case of ***In re Brotherhood of Railroad Trainmen***, 13 Ill.2d 391, 150 N.E. 2d 163. He notes that the NAACP's practices are similar to those of the ***Brotherhood*** which was also a case involving UPL. It involved a

labor union's policy of advising injured members about seeking legal assistance. Harlan confidently relies on the reasoning of the State Court opinion in that case that condemned the union's practices. One slight problem though. Approximately, 15 months after the ***Button*** case, Harlan's reasoning will be demolished when the U.S. Supreme Court validates labor union practices with respect to alleged UPL by vacating the Virginia Supreme Court's decree in ***Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State Bar***, 377 U.S. 1 (1964). Harlan also Dissents in that case.

In considering ***Button***, the reader is asked to ponder the following questions that are conclusive on the UPL issue. Consider your own personal experiences and interaction with people both from a social and business perspective. Consider most importantly your general "feel" of what is right and wrong.

1. When a person gives verbal or written assistance, including legal help to the best of their ability, is it more an issue of speech or conduct?

2. Should a State's asserted power to curtail the provision of verbal or written assistance be required to meet a strict standard?

3. If you are personally ever the victim of some type of improper state action, and somebody you know has the means to give you verbal and written advice, do you want them to be under the threat of imprisonment should they provide that advice to you?

The key question is #2. I believe virtually everyone, including those who have virtually no knowledge of the law would answer "yes" to question #2. If question #2 is answered yes, then #1 is automatically answered as speech rather than conduct. If question #2 however is answered as "no," you must be willing to accept that the answer to question #3 is "yes."

**WILLNER V. COMMITTEE ON CHARACTER AND FITNESS**, 373 U.S. 96 (1963)

Sometimes admission proceedings can take a lengthy period of time. *Willner* presents the case of a man trying to gain admission to the New York Bar for the incredible period of 25 years.

He passed the New York Bar exam in 1936. It was alleged that in 1937 he was shown a letter by a member of the Bar, that was from a New York attorney and which contained adverse statements about him. It was further alleged that he was promised a confrontation with that attorney by a member of the Character Committee. The promise however, was broken by the Committee member. In 1938 after several Hearings, the Committee refused to certify him. In 1943 he applied for an Order directing the Committee to review its 1938 determination which was denied. In 1948 he received permission to file a new application that was denied in 1950. In 1951, he became a Certified Public Accountant and again applied for an Order regarding his Bar application. Specifically, he requested that the Committee to furnish him with a statement of reasons for its refusal to certify him. His request was denied. In 1954, he filed another application that was denied. In 1960, he filed his fifth application that was denied without opinion. The New York Court of Appeals granted leave to appeal and after oral argument affirmed without opinion. The U.S. Supreme Court then granted certiorari.

Willner's claim was that he was denied the constitutional right to confront his accusers and that in spite of repeated attempts he could not be sure of the Committee's reasons for denying his application. The lead opinion of the U.S. Supreme Court by Justices Black and Douglas ruled in his favor. Concurring opinions were written by Justices Goldberg, Brennan and Stewart, and a Dissenting opinion by of course, Justice Harlan joined by Justice Clark. It is quite clear the Bar admission cases were close calls with a sharply divided Court. Harlan and Black always the leaders on opposing sides. Justices Black and Douglas' once again "conclusively" establish that the ability to engage in the practice of law is a "Right," rather than a "Privilege." Once again, they cite the 19th century case of *Ex parte Garland* in support. It was 1963 and *Garland* was still relied on 97 years after it had been rendered. The opinion states:

> "The issue presented here is justiciable. "A claim of present right to admission to the bar of a state and a denial of that right is a controversy." *In re Summers*, 325 U.S. 561. Moreover, the requirements of procedural due process must be met before a State can exclude a person from practicing law.
>
> . . .
>
> As the Court said in *Ex parte Garland*, 4 Wall. 333, 379, the right is not "a matter of grace and favor." [190]

The Court concludes that an Applicant has a right to procedural due process including a hearing and being informed of the grounds for rejection. Even Harlan's Dissent does not appear to contest that point. Instead, he dissents on the ground that the case does not present a substantial federal question due to the lengthy period of time involved, the messiness of the opaque record and the number of times it was reviewed by the New York Courts.

Some facts pertaining to Mr. Willner are interesting. The primary nature of the complaints against him arose from two lawyers, Wieder and Dempsey. Wieder alleged that Willner was discharged from his office for unsatisfactory performance during a clerkship. Dempsey's complaint related to civil litigation in which Willner was purportedly involved in fraud pertaining to accounting services he performed.

Willner initially stated in his application that he had not been "connected" with any law offices, although he later confirmed he was employed by Wieder for a short time. The meaning of the term "connected" is obviously ambiguous. He also stated he served "no clerkship," although he subsequently informed the Committee of filing a certificate of clerkship with the Court of Appeals in

Albany. This issue may have been attributed to the fact that since he had not completed the clerkship, he properly believed the answer should be "no clerkship." Essentially to assert that he had done a "clerkship" when it had not been completed would be misleading. He also failed to disclose an annulment suit brought against him by his 16 year old wife, later stating that he omitted it because "Some people consider it a heinous offense." Assuming the marriage was not illegal, (the Court's opinion is unclear on the issue), the issue while admittedly "immoral" in nature, under contemporary standards is unrelated to the ability to practice law.

In considering the issue of nondisclosure, if the question is too personal in nature, then the inquiry itself must logically be considered immoral, to an extent exceeding the Applicant's failure to disclose. Willner's failure to disclose, was obviously attributable to embarrassment more than anything else. This author believes the legal profession should not unconstitutionally place Applicants in a position of having to disclose embarrassing personal facts that are immaterial to the practice of law. Concededly though, having a sixteen year old wife does sound rather bad.

He also failed to disclose six other lawsuits or judgments against him. The Court's opinion does not address the type of lawsuits, or the amount of time lapsed between them and his application. If they were minor in nature, simply dismissed, or occurred more than a few years prior to his application, the failure to disclose such could be a matter of inadvertence, immaterial or innocent error. To the extent, the Bar's questionnaire inquires about lawsuits of a minor nature occurring several years prior to the application, the Bar places an unreasonable burden on the Applicant. This assumes one even believes civil lawsuits should be disclosed, which this author does not. The cumbersome requirement of providing immaterial, dated information reflects more poorly on the moral character of Bar Examiners, than the Applicant. It is difficult to surmise any relevancy to requiring disclosure of civil lawsuits before one becomes a lawyer.

Willner's case is particularly interesting due to the variety of issues. While the U.S. Supreme Court deals only with the due process and procedural issues, ruling in his favor, the character issues extend farther. Unfortunately, they are not discussed at length in the opinion but just referred to in the footnotes. Here you have a man at least in his fifties being required to disclose all aspects of his entire life. While the issues are numerous, for the most part with the exception of the 16-year old wife, and the lawsuit possibly involving fraud, the others are irrefutably immaterial in nature. As pertains to the 16-year old wife, assuming it was not an illegal marriage, and notwithstanding that it sounds bad, it's an issue that is simply not related to the ability to practice law. As pertains to the suit purportedly involving fraud, the Court's decision does not disclose the nature of the final judgment. It cannot be determined from reading the opinion whether he really committed fraud or not. Accusations are meaningless unless proven.

On the other side of the coin, you have a Bar Committee delving into the most personal aspects of a man's life, magnifying each shortcoming beyond its importance, and then not even providing the constitutional right of confrontation or a proper hearing. People have pasts. It is unlikely that most people in their fifties do not have some aspect of their life that reflects negatively upon them.

Not everyone's an Anastaplo. And he didn't get into the Bar either.

**IN RE STOLAR**, 401 U.S. 23 (1971)

In 1971, the Bar admissions process was on the verge of becoming constitutionalized. Three cases were decided by the U.S. Supreme Court on the exact same day February 23, 1971. Two ruled in favor of the Applicants. They were narrow 5-4 decisions, once again demonstrating the difficulty and uncertainty the Court had in dealing with the issue. The third case, **Law Students Civil Rights Research Council v. Wadmond**, 401 U.S. 154 (1971) substantially diluted the impact of the Applicant's victories in the first two cases. After these three cases, the only thing one could conclusively say, was that the Court was having great difficulty with the issue.

The *Stolar* case involved a New York attorney who applied for admission to the Ohio Bar. As part of his application, he made available all information given on his New York application. He refused to answer three questions on the Ohio application that inquired about organizations he was a member of, on the ground the questions infringed upon his First and Fifth Amendment rights. As part of his New York application, Stolar was required to answer the following question, which I present simply to show the ridiculous nature of the application process (his answers in italics):

> 18. State whether you have participated in activities of a public or patriotic nature or in philanthropic, religious, or social services? If so, state the facts fully.
>
> *I was a Cub Scout and Boy Scout and Explorer Scout during elementary and high school.*
>
> *I also participated fully in my Temple's religious education programs until I went to college.*

On the Ohio application, Stolar refused to answer the following questions:

> 7. List the names and addresses of all clubs, societies or organizations of which you have been a member since registering as a law student.
>
> 13. List the names and addresses of all clubs, societies or organizations of which you are or have been a member.
>
> 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 . . .

The lead opinion was written by Justice Black, joined unsurprisingly by Justices Douglas, Brennan and Marshall. Chief Justice Warren previously part of Justice Black's power bloc had now been replaced by Chief Justice Burger who became part of the Harlan faction. Justice Blackmun, now on the Court was a staunch conservative, although would later become one of the more liberal members after his opinion in *Roe v. Wade*. Blackmun joined Justice Harlan's power bloc along with Justice White. If this case had been heard later in Blackmun's career, his opinion probably would have been substantially different.

It was Justice Stewart however, who was the swing vote. He merely concurred in the judgment where the two Applicants won and wrote the lead opinion in the case that the Applicants lost. The issues addressed were similar to Konigsberg I, II and Anastaplo. Basically, it was four against four, with Stewart only concurring in the result not the reasoning of the lead opinion where the Applicants won. Once again, just like in the *Konigsberg* and *Anastaplo* cases, it was absolutely nothing short of a

mess. Justice Black's lead opinion in <u>*Stolar*</u> first notes that the issues are related in large part to the McCarthy era. He writes as follows:

> "This is the second of two cases involving the refusal of States to admit applicants to practice law because they declined to answer questions relating to their beliefs about government and their affiliations with organizations suspected of advocating the overthrow of government by force. **These cases, which concern inquisitions about loyalty and government overthrow, are relics of a turbulent period known as the "McCarthy era," which drew its name from Senator Joseph McCarthy from Wisconsin. We have just referred in our opinion in *Baird v. State Bar of Arizona,* ante, p.1, to the confusion and uncertainty created by past cases in this constitutional field**. The central question in all of them has been the same, whether involving lawyers, doctors, marine workers, or State or Federal Government employees, namely : to what extent does the First or Fifth Amendment or other constitutional provision protect persons against governmental intrusion and invasion into private beliefs and views that have not ripened into any punishable conduct ? . . . Here, we hold that Stolar's refusal to answer certain questions asked him by the Ohio Bar Committee were also protected by the First Amendment."

The Court's opinion notes that in his New York application, Stolar was required to provide the following information, which in and of itself I find to be somewhat incredible, and indicative of the Bar's overly inquisitive and prejudicial mindset:

1. the names, addresses and occupations of his parents
2. the names and addresses of his elementary school and high school principal

Justice Black concludes the opinion as follows, ruling in Stolar's favor:

> "The record shows a young man who, from boyhood up, had no adverse marks except for two speeding convictions. He answered numerous prying questions about personal affairs that could hardly have been necessary for a State interested only in whether he would make an honest lawyer faithful to his clients. . . . The State points to not one overt act on Stolar's part that even suggests a possible reason for denying his application. . . . The judgment of the Ohio Supreme Court is reversed. . . ."

Justice Blackmun's Dissent, joined by Chief Justice Burger, Justices Harlan and White is predicated not on the nature of the questions, which he virtually concedes to be unconstitutional, but rather on Stolar's refusal to answer. The obvious dilemma this creates is that under Blackmun's reasoning it would be almost impossible to challenge unconstitutional Bar admission questions, unless the answer resulted in denial of admission. Further, the answers to unconstitutional questions could then be used surreptitiously by the Bar to deny admission ostensibly on other grounds.

For instance, let us consider two fictitious Applicants with misdemeanor convictions, both of whom disclose such on their application. One discloses that he has never been a member of any organization, and the other discloses that he has been a member of some organization the Bar does not like. By allowing the Bar to ask the organizational question, it has the ability to deny the second Applicant admission based on the misdemeanor conviction, while granting the first Applicant admission notwithstanding the misdemeanor conviction. The ostensible ground for denial of the one Applicant would be the conviction, but the true reason would be his answer to the organization question. This is just the type of diabolical scheme the Bar loves. It goes all the way back to the NCBE's inception in

1931, and in fact even the eighteenth century when colonial lawyers were simply admitted based on who they knew. The Bar's concept is to use the Applicant's answer to an unconstitutional question as a means to determine admission ostensibly on other grounds. Justice Blackmun's Dissent states:

> "This case . . . presents another instance of a well educated . . . and obviously able young person who seeks admission to the Bar, but, to an extent, at least, upon his own terms. His case is made the more acute and appealing because he already has been admitted to practice in the State of New York. . . . The decisions in *Konigsberg v. State Bar* 366 U.S. 36 (1961) and *In re Anastaplo* 366 U.S. 82 (1961) are again challenged."

Justice Harlan, in addition to joining Blackmun's Dissent, writes his own opinion that states as follows:

> "My Brother BLACK's opinion announcing the judgments of the Court in Baird and in the present case, and his dissenting opinion in the Wadmond case, could easily leave the impression that the three States involved are denying Bar admission to professionally qualified candidates solely by reason of their membership in so-called subversive organizations, irrespective of whether that membership is born of a purely philosophical cast of mind . . . or that these States are at least trying to discourage prospective Bar candidates from joining such organizations. In the latter respect, my Brother MARSHALL's opinion . . . seems to me to lend itself to a similar interpretation.
> . . .
> They show no more than a refusal to certify candidates who deliberately, albeit in good faith, refuse to assist the Bar admission authorities in their "fitness" investigation by declining fully to answer the questionnaires. . . .
> . . .
> . . . Knowing something of the great importance which the New York Bar attaches to the independence of the individual lawyer, I have little doubt but that the candidates involved in *Wadmond* will promptly gain admission to the Bar if they straightforwardly answer the inquiries put to them without further ado. And I should be greatly surprised if the same were not true as to Mrs. Baird and Mr. Stolar in Arizona and Ohio. **But, if I am mistaken, and it should develop that any of these candidates is excluded simply because of unorthodox or unpopular beliefs, it would then be time enough for this Court to intervene."** [191]

**Justice Harlan's last sentence above was unbelievable to me!!** He was softening. He was forthrightly doing nothing less than telling the State Bars that the individuals in these cases better be admitted to the practice of law. I just have to quote that last sentence again:

> **"But, if I am mistaken, and it should develop that any of these candidates is excluded simply because of unorthodox or unpopular beliefs, it would then be time enough for this Court to intervene."**

That time has come.

**BAIRD V. STATE BAR OF ARIZONA,** 401 U.S. 1 (1971)

Five-to-four again. Perhaps it should be more accurately stated as four against four, with Justice Stewart concurring separately, thereby resulting in a five to four plurality. Black, Brennan, Marshall and Douglas, against Harlan, White, Blackmun and Burger. Same type of issue as *Konigsberg*, *Anastaplo*, *Schware*, and *Stolar*.

The facts are once again particularly interesting. This time we are dealing with a female Bar applicant. Mrs. Baird was a graduate of Stanford Law School without a single mark against her moral character. She refused to answer the question inquiring whether she had ever been a member of the Communist Party or any organization that advocates overthrow of the United States by force or violence. Her refusal was predicated on the ground that the question would require her to make a guess as to whether any organization to which she ever belonged advocated such. Essentially, she asserted that since in Arizona at the time, answering a Bar Committee's questions falsely constituted perjury, the question required her to run the risk of a perjury conviction, if her lack of knowledge proved incorrect. She did answer the question requiring her to provide a list of the organizations that she had been a member of since age 16. That list was comprised of the following. Church Choir, Girl Scouts, Girls Athletic Association, Young Republicans, Young Democrats, Stanford Law Association and Law School Civil Rights Research Council. The difficulties which the U.S. Supreme Court faced in dealing with this issue over the years, is summed up in Justice Black's lead opinion which states:

> **"Sharp conflicts and close divisions have arisen in this Court concerning the power of States to refuse to permit applicants to practice law in cases where bar examiners have been suspicious about applicants' loyalties and their views** on Communism and revolution. **This has been an increasingly divisive and bitter issue for some years, especially since Senator Joseph McCarthy** from Wisconsin stirred up anti-Communist feelings and fears by his "investigations" in the early 1950's. One applicant named Raphael Konigsberg was denied admission in California, and this Court reversed. . . . The State nevertheless denied him admission a second time, and this Court then affirmed by a 5-4 decision. . . . An applicant named Rudolph Schware was denied admission in New Mexico, and this Court reversed, with five Justices agreeing on one opinion, three Justices on another opinion, and one not participating. . . . In another case, an applicant named George Anastaplo was denied admission in Illinois on grounds similar to those involved in Konigsberg and Schware, and the denial was affirmed by a 5-4 margin. . . . With sharp divisions in this Court, our docket and those of the Courts of Appeals have been filled for years with litigation involving inquisitions about beliefs and associations and refusals to let people practice law and hold public or even private jobs solely because public authorities have been suspicious of their ideas."
>
> . . .
>
> In Arizona, it is perjury to answer the bar committee's questions falsely, and perjury is punishable as a felony. . . . In effect, this young lady was asked by the State to make a guess as to whether any organization to which she ever belonged "advocates overthrow of the United States Government by force or violence.
>
> . . .
>
> . . . when a States attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas, as Arizona has engaged in here, discourage citizens from exercising rights protected by the Constitution."

Then the issue of "Right" versus "Privilege" arises again. Justice Black again cites *Ex parte Garland*, the case now having withstood the test of time for over a hundred years:

> **"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. See *Schware v. Board of Bar Examiners, supra,* and *Ex parte Garland,* 4 Wall. 333 (1867).** This record is wholly barren of one word, sentence, or paragraph that tends to show this lady is not morally and professionally fit to serve honorably and well as a member of the legal profession. It was error not to process her application and not to admit her to the Arizona Bar."

Justice Stewart's fairly short concurring opinion reveals one fact that is particularly interesting. Apparently, the Respondent Arizona Bar conceded that it would deny admission solely because of an Applicant's beliefs, if it found such beliefs objectionable. Justice Blackmun writes the Dissent. He notes that Mrs. Baird was seeking the overruling or delimiting of the *Konigsberg* and *Anastaplo* cases. His response to Mrs. Baird's assertion that answering the question required her to engage in guesswork with respect to associations she had been a member of, was that she could have stated her lack of knowledge. Blackmun addressed the "Right" versus "Privilege" debate as follows:

> "There is talk, of course, in the briefs here about whether admission to the Bar and receiving authority to practice law is a "right" or a "privilege". I am old enough and old-fashioned enough always to have regarded it more as a privilege than as a right. I at least thought that was the tradition. A century ago, Mr. Justice Field referred to the practice of law by a qualified person as a right, and not as a matter of the State's grace or favor. *Ex parte Garland*, 4 Wall. 333, 379 (1867). The Arizona court has spoken in similar terms. Application of Klahr, 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967). . . . Indeed, this is precisely the way the Arizona court has phrased it:
>
> > "The practice of law is not a privilege, but a right, conditioned solely on the requirement that a person have the necessary mental, physical and moral qualifications."
>
> . . .
> The characterization of Bar admission as a right or as a privilege may be little more than an exercise in semantics." [192]

**LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL V. WADMOND**, 401 U.S. 154 (1971)

Based on the opinions in *Baird* and *Stolar* on February 23, 1971 in favor of the Applicants, one would think that this case would also be decided in favor of the Applicants. It was the most important of the three, and the Bar won. In both *Baird* and *Stolar*, Justice Stewart was the swing vote and he only concurred in the judgment, but did not join the lead opinion. In this case, Stewart writes the lead opinion which rules in favor the Bar. Black, Douglas, Marshall and Brennan all Dissent.

Whether one agrees with the viewpoint of the Harlan bloc or the Black bloc, it strikes me as absolutely beyond logical belief that Justice Stewart who was the swing vote in all of the cases, could rule in favor of the Applicants in *Baird* and *Stolar*, and then decide the lead opinion in favor of the Bar in this case on the exact same day. The three cases are virtually impossible to logically reconcile with each other.

The Court in this case is dealing with a group of Applicants, rather than one sole Applicant as in the other cases. None claimed to have been denied admission to the New York Bar. Instead, they launched a broad attack on grounds of vagueness and overbreadth against the system for screening Applicants for admission. The basic thrust of their argument was that the admissions process worked a "chilling effect" upon freedom of speech. As part of the admission process, the Character Committee requested affidavits from two persons (one of whom must be a practicing attorney), and completion of a character questionnaire. The stated purpose was to "be satisfied that such person possesses the character and general fitness requisite for an attorney."

The U.S. Supreme Court (Justice Stewart specifically) dropped the ball in this case. At the time of the opinion, Justice Blackmun was a conservative justice. Subsequent to this case, Justice Blackmun wrote the opinion in *Roe v. Wade*, viewed as a liberal opinion. It had the effect of alienating him from the conservative bloc and he became more liberal as the years went by. There is little doubt in my mind that if he had rendered his vote in *Wadmond*, near the end of his Supreme Court career he would have voted differently.

The stated ground for upholding the admission requirements was that the system for screening applicants was construed narrowly, since it encompassed no more than "dishonorable conduct relevant to the legal profession." The term "dishonorable" obviously is vague and ambiguous. It is a term subject to varying interpretations by different people. The phrase "relevant to the legal profession" is similarly vague, encompassing a wide realm of otherwise lawful conduct. The questions included on the application in *Stolar*, determined to be unconstitutional in Justice Stewart's concurring opinions were:

> 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.
>
> 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.

In *Baird*, Stewart's concurring opinion concluded that an inquiry as to whether an Applicant had ever been a member of the Communist Party or any organization that advocated overthrow of the United States Government by force or violence was unconstitutional. In *Wadmond*, the related issue was New York's Rule 9406 which required the Applicant to furnish satisfactory proof that he:

"believes in the form of the government of the United States and is loyal to such"

On this point, Stewart votes in favor of the Bar. Whether one agrees or disagrees with the Bars or Applicants generally, Stewart's positions irrefutably lack consistency. Basic predicates of logic dictate that any individual who was knowingly a member of an organization that "advocates overthrow of the United States Government by force" (the ***Stolar*** question) could not possibly "believe in the form of the government of the United States" (the ***Wadmond*** question). Yet, Stewart holds the former to be unconstitutional and the latter constitutional. His illogical justification is as follows:

> "If all we had before us were the language of Rule 9406 . . . this would be a different case. For the language of the Rule lends itself to a construction that could raise substantial questions . . .as to the permissible scope of inquiry into an applicant's political beliefs under the First and Fourteenth Amendments. But this case comes before us in a significant and unusual posture: the appellees are the very state authorities entrusted with the definitive interpretation of the language of the Rule. We therefore accept their interpretation, however we might construe that language were it left for us to do so. . . .
> . . .
> The appellees have made it abundantly clear that their construction of the Rule is both extremely narrow, and fully cognizant of protected constitutional freedoms. There are three key elements to this construction. First, the Rule places upon applicants no burden of proof. Second, "the form of the government of the United States" and the "government" refer solely to the Constitution, which is all that the oath mentions. Third, "belief" and "loyalty" mean no more than willingness to take the constitutional oath and ability to do so in good faith.
>
> Accepting this construction, we find no constitutional invalidity in Rule 9406. There is "no showing of an intent to penalize political beliefs."

Essentially, Stewart's position can be summarized as follows. Although the rule looks unconstitutional based on its' express language, since the agency that enacted it says it really means something other than its' express language clearly indicates, it is constitutional. While it is obvious my sentiments in these cases are with Justices Black, Douglas, Brennan and Marshall, I must concede that Justice Harlan's position along with that of his power bloc throughout the admission cases was for the most part at least consistent. For Justice Stewart however, to issue opinions concurring in ***Stolar*** and ***Baird***, and then adopt the foregoing stance in ***Wadmond*** on the exact same day, is in my belief, one of the most unbelievable events to transpire at the U.S. Supreme Court. Justice Black's Dissent is beautiful stating:

> **"the right of a lawyer or Bar applicant to practice cannot be left to the mercies of his prospective or present competitors."**
> . . .
> "the State seeks to probe an applicant's state of mind to ascertain whether he is "without any mental reservation, loyal to . . . the Constitution." But asking about an applicant's mental attitude toward the Constitution simply probes his beliefs, and these are not the business of the State."
> . . .
> "I do not see how today's decision can be reconciled with other decisions of this Court, to which I shall refer later. The majority seeks to avoid this conflict by a process of narrowing construction."

Then the part I love best. Justice Black writes:

> **"As I have pointed out in another case involving requirements for admission to the Bar, society needs men in the legal profession:**
>
> "like Charles Evans Hughes, Sr., later Mr. Chief Justice Hughes . . . and the multitude of others **who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it."**

He then concludes:

> **"I must repeat once again that consistently with due process of law, applicants for a profession cannot be turned over to the whim of their prospective competitors to determine their right to practice.** I think the District Court did magnificent service in stripping the New York Bar of much of its unbridled power over the admission of new members. My only regret is that it did not strip it further."

One of the most interesting facets of *Wadmond* is delineated in a Dissent written by Justice Marshall, joined by Justice Brennan. Apparently, during the litigation in the lower courts, many of the practices being challenged were changed by the Bar Committee in order to avoid review by the U.S. Supreme Court. The U.S. Supreme Court dealt only with what Marshall classified as the "residuum of the appellants' original challenge. One of the questions not addressed by the U.S. Supreme Court which personifies the prying, inquisitive and unconstitutional nature of the Bar admissions committee was as follows:

> 31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness ? If the answer is "Yes," state the facts.

As I read the foregoing question, which I believe raises issues of even greater importance than the political beliefs issues, I earnestly believe that laughter is the proper logical response. Was the Bar admissions committee kidding? How could anyone possibly answer that question? If you don't answer it at all, are you lying? To answer it accurately, do you have to recite your entire biography from childhood ? Here is a hypothetical answer that I have drafted to this question.

> "When I was five I stole a cookie by sneaking into the kitchen when my mom didn't see me. (detrimental).
>
> "When I was six I used the five dollars I got for my birthday to buy my brother a present" (favorable)
>
> "When I was ten I threw a snowball at another kid during the winter." (detrimental)
>
> "When I was eighteen I bought a cute girl at a bar a drink." (favorable?) (detrimental?)

"When I was sixteen and underage I used a false ID like all of my friends to gain admittance into a bar." (detrimental)

"When I was an adult I challenged the State Bar admissions process in Court." (favorable ? detrimental ?)

Additional insight presented by Justice Marshall's Dissent states:

"The underlying complaint, strenuously and consistently urged, is that New York's screening system focuses impermissibly on the political activities and viewpoints of Bar applicant's, 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.

. . .

As we said not long ago in Stanley v. Georgia, 394 U.S. 557, 565 (1969), "Our whole constitutional heritage rebels at the thought of giving government a power to control men's minds." **The premise that personal beliefs are inviolate is fundamental to the constitutional scheme as a whole. . . . In the present case, we have a rule of New York law which, as written, sanctions systematic inquiry into the beliefs of Bar applicants, and excludes from the practice of law persons having beliefs that are not officially approved. . . .**

**. . .**

The irreducible vices of due process vagueness, arising when those who may be penalized by a legal rule cannot ascertain the rule's scope and avoid its burdens, . . . are inevitably heightened when the result is deterrence of protected activity. . . . Appellants' fundamental complaint throughout this litigation has concerned the inhibitory impact of New York's screening system of the exercise of First Amendment rights.

**. . .**

**Even when viewed in isolation from Rule 9406, Question 26(a) reveals itself as an indiscriminate and highly intrusive device designed to expose an applicant's political affiliations to the scrutiny of screening authorities.** As such, it comes into conflict with principles that bar overreaching official inquiry undertaken with a view to predicating the denial of a public benefit on activity protected by the First Amendment."

**. . .**

In "stating the facts" as required by Question 26, an applicant exposes himself to the grave risk that screening officials will find him wanting in respect of the requisite beliefs and loyalties. The impermissible latitude of Rule 9406 as a criterion for exclusion, in conjunction with overintrusive probing for details about an applicant's associational affiliations, creates an obvious *in terrorem* effect on the exercise of First Amendment freedoms by law students and others. The interwoven complexity and uncertain scope of the scheme heighten the danger that caution and conscientiousness will lead to the forfeiting of rights by prospective Bar applicants." [193]

Thus ended what my research reveals was the last set of cases dealing with State Bar character inquiries at the U.S. Supreme Court. The year was 1971. Faced with the extreme divisiveness of the Court, it is an issue they apparently do not want to deal with. The ultimate result of the cases is that the Bars are undeterred in their quest to pry into every facet of Applicant's lives. With some exceptions, they steer clear of the political beliefs arena, but everything else is fair game. Denial of admission based on "attitude" is common. Typically, what the Bars do is ask a wide realm of questions. The interview process is then used to subjectively assess the applicant's "attitude," "race" and "appearance," with the determination of whether to admit, based in form on matters included in the application, but in substance on the "attitude," "race," "appearance" and other unconstitutional assessments.

And then, we're supposed to have faith and confidence in the agency that regulates attorneys. To have such faith, would be irrational.