A Relic of McCarthyism: Question 21 of the Application for Admission to the New York Bar

Colin A. Fieman
New York County District Attorney's Office

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview
Part of the Constitutional Law Commons, and the First Amendment Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol42/iss1/4

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
A Relic of McCarthyism: Question 21 of the Application for Admission to the New York Bar

COLIN A. FIEMAN*

INTRODUCTION

In the Spring of 1991, after passing the New York State Bar Examination, I began preparing my application for admission to the bar. As part of the application process, I completed and submitted a personal questionnaire, formally titled “Application for Admission to the Bar and Statement Required Pursuant to Article 94 of the Civil Practice Law and Rules,” to the Committees on Character and Fitness (“the Committees”). For the most part, the application seeks general information about the applicant’s education, residency in New York, and financial history. Question 21 of the application (Question 21), however, reads as follows:

* J.D. Columbia Law School 1990. The author is an assistant district attorney in the New York County District Attorney’s Office. The views expressed in this piece are those of the author and not necessarily those of the District Attorney’s Office.

The author wishes to thank Carol Elewski, James M. McGuire, Paul Shechtman, and Ronald J. Warfield for their assistance in preparing this article.

1. Civil Practice Law & Rules Article 94 regulates admission to legal practice, and Rule 9404 provides that the Appellate Division can prescribe a “statement or questionnaire to be submitted by the applicant.” In addition, Rule 9401 provides that “the appellate division in each judicial department shall appoint a committee . . . for the purpose of investigating the character and fitness of every applicant for admission to practice,” including review of the applicant questionnaire. After completing an investigation, the Committees determine whether an applicant is “entitled to admission,” and forward their admission recommendation to the Appellate Division. See N.Y. Civ. Prac. L & R § 9404 (McKinney 1981). The Appellate Division, in turn, reviews the Committees’ recommendations and renders admission decisions. See also Arthur H. Schwartz, What is a Character and Fitness Committee, 49 N.Y.St. Bar J. 302 (1977); Matter of Brennan, 230 A.D. 218 (N.Y. 1930).

Section 53 of the Judiciary Law provides that the Court of Appeals has ultimate authority over the admission of attorneys. N.Y. Jud. Law § 53 (McKinney 1983). See also Matter of Shaikh v. Appellate Division, 39 N.Y.2d 676 (1976). Section 520.10 of the Rules of the Court of Appeals requires, among other things, that an applicant submit proof of good moral character to the Committees and § 520.10(c) of the Rules vests discretion in the Appellate Division in each department to “adopt for its department such additional procedures for ascertaining the moral character and general fitness of applicants as it may deem proper.” As discussed infra, those procedures and the Appellate Division’s admission determinations pursuant to these rules are subject to review by the Court of Appeals. See also, Frank S. Smith, Admission to the Bar in New York, 16 Yale L.J. 514 (1907) (for a history of New York bar admission procedures).
Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.

Although by the time I prepared my application I had forgotten much of the constitutional law I had learned in law school, I knew that there was an extensive body of federal constitutional law, particularly First Amendment law, dealing with loyalty oaths and investigations. After first reading Question 21, I concluded that it was probably a permissible exercise of the state's power to regulate the practice of law, despite what I believed was the obviously anachronistic purpose of the question. Moreover, I expected that there would be judicial authority dating from the McCarthy era upholding the validity of questions like Question 21. After some research, I found the relevant United States Supreme Court decisions, including a number of decisions dealing specifically with bar admission inquiries. I was surprised to learn that Question 21 violates the First Amendment.

The Supreme Court has long held that free speech and association are fundamental and "preferred" constitutional rights. In a series of three bar admission cases—Baird v. State Bar of Arizona, In re Stolar, and Law Students Research Council v. Wadmond—the Supreme Court held that while a state may investigate the background of bar applicants to ensure that they are persons of "good moral character," the First Amendment requires that questions about political advocacy or prior associations asked for that purpose be narrowly tailored. Specifically, such questions must be expressly

2. Between 1950 and 1954, Wisconsin Senator Joseph R. McCarthy spearheaded congressional investigations into Communist activities in the United States. McCarthy's investigations were marked by "abuses of governmental process, procedural rights, civil liberties and civility," and his name became synonymous with a period of virtual national hysteria over internal security and the menace of Communism. JAMES M. BURNS AND STEWART BURNS, A PEOPLE'S CHARTER: THE PURSUIT OF RIGHTS IN AMERICA 289 (1991) [hereinafter BURNS]. As one historian has noted, "all issues of the day" were pervaded with "the increasingly obsessive quest for a standard of loyalty which was constantly on the verge of being translated into a requirement of political conformity." WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 173-74 (1970) [hereinafter SWINDLER]. See BURNS supra, at 268-302 (brief history of the constitutional and political crises arising from "post-war pre-occupation with national security"); ROBERT GRIFFITH, THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE (1970); ARTHUR KINOY, RIGHTS ON TRIAL (1983).
limited to determining whether an applicant ever had the "specific intent" of acting violently or illegally. Since Question 21 asks about an applicant's "knowing membership" in a group advocating government overthrow without focusing on the applicant's specific intent during that membership, it is overbroad and violates the First Amendment's guarantees of free speech and association.\(^7\)

Overbroad inquiries about political opinions and activities, especially when backed by the potential sanction of professional disqualification, are unconstitutional because they may inhibit the exercise of free association and political speech which are at the heart of the First Amendment's guarantees.\(^8\) The mere possibility of denial of admission to the bar for having espoused a political view or associated with a group that meets with the Character Committee's disapproval may be enough to discourage prospective bar applicants from fully exercising their First Amendment rights. This "chilling effect" which flows from the State's requirement that applicants answer Question 21 renders that question unconstitutional.\(^9\)

In addition, Question 21 affects more than the constitutional rights of individual applicants to the bar. State regulations which target or inhibit the free exercise of First Amendment rights by members of the legal community may be especially troublesome, since lawyers must at times represent the interests of people whose views do not conform to popular opinion. To the extent that Question 21 is a means for state enforcement of political uniformity among members of the bar, those members may not reflect the full spectrum of political values and may be less inclined to represent unpopular views. Hence, not only are the constitutional rights of bar applicants implicated by this question, but ultimately so are the rights of those individuals who require the service of zealous advocates who will not hesitate to represent unpopular positions for fear

\(^{7}\) A state may require an applicant to subscribe to "oaths, addressed to the future, promising constitutional support in broad terms." Cole v. Richardson, 405 U.S. 676, 681 (1972). The state is simply limited, as discussed infra, in investigating an applicant's beliefs or associations, or withholding admission to the bar because of those beliefs or associations.

\(^{8}\) See generally N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1962), ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); note 46, infra. See also Nicholson v. Judicial Commission, 50 N.Y.2d 597, 607 (1980). In Nicholson, the Court of Appeals noted that "the rights of political expression and association are at the heart of the First Amendment." Although, as the Court stated, not every interference with those rights violates the constitution, significant restrictions on First Amendment rights may be sustained only "if the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedom." Id., quoting Buckley v. Valeo, 425 U.S. 1, 25 (1976).

\(^{9}\) See, e.g., Bates v. State Bar of Arizona, 433 U.S. 350 (1975); note 102 infra.
of professional sanctions.

After studying the Supreme Court’s decisions and thinking about these issues, I was confronted with a serious dilemma. I was anxious to be admitted to the bar, not only because I had invested considerable time and resources in my legal education, but also because I had started work as an assistant district attorney and could not appear in the grand jury or at trial until I was admitted. At the same time, I was deeply troubled by the prospect of having to answer a constitutionally impermissible question in order to gain admission. After all, the very purpose of the admission process was to ensure that I was willing and able to uphold the law and the Constitution. Indeed, the oath I would take upon admission to the bar would include an express promise to uphold the Federal and New York State Constitutions.10

It was impossible for me to reconcile the purpose of the Character Committees’ investigation, and my own responsibilities as a prospective attorney, with answering Question 21. In my mind, answering the question would mean that from the outset of my legal career I was willing to tolerate without protest unconstitutional state action. Therefore, I decided that the proper course of action was to decline to answer the question, and cite the relevant Supreme Court authority. In doing so, I was hopeful that the Character Committees and the Appellate Division would recognize and respect the legal basis for my response. This confidence was bolstered by my belief that any real governmental interest in rooting out “subversives” was a thing of the past.

I was wrong. Some weeks after submitting my application, I was interviewed by a member of the Committees on Character and Fitness for the Second Judicial Department. The Committees member and I discussed the constitutionality of Question 21, and he asked me to submit a letter explaining my position in greater detail. After a few more weeks, I was informed that the Committees had forwarded my application to the Appellate Division, without a recommendation or findings about my character, for that Court’s decision of the constitutional issue I had raised. Six months later, the Appellate Division referred my application back to the Committees, without decision, for their resolution. After approximately six more weeks, I was informally told by a committee member that my application had again been sent to the Appellate Division, this time with

10. Attorneys, upon admittance to the New York State bar, take the following oath: “I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New York and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my ability.” N.Y. JUD. LAW art. 15, § 466; N.Y. CONST. art. 13, § 1.
a favorable recommendation for admission. Soon thereafter, the Appellate Division summarily denied my application with leave to renew. The Court's memorandum decision stated: "We find that the applicant's refusal to answer Question 21, which we deem to be a proper question, constitutes willful obstruction of the legitimate function of the Committees to inquire into an applicant's character and fitness to practice law."

In light of the relevant case authority I believe that the Appellate Division's decision was error. Question 21 is not a constitutionally "proper" question because it makes no reference to specific intent. Moreover, legitimate constitutional objections to the question do not constitute "willful obstruction." Question 21 must, therefore, be rewritten to include the necessary specific intent element or, preferably, be removed from the application altogether. In the meantime, applicants should not be denied admission to the bar for refusing to answer Question 21.

Part I of this article will summarize two United States Supreme Court cases, *Schware v. Board of Bar Examiners* and *Konigsberg v. State Bar*, involving due process challenges to bar admission inquiries about advocacy and associations. These cases were decided by the Supreme Court before it reached the underlying First Amendment issues, and were largely subsumed by the Court's decisions in *Baird, Stolar*, and *Wadmond*. Nevertheless, these decisions place the later First Amendment decisions in context, and also establish that Question 21 implicates independent and important due process considerations.

Part II of this article will discuss the bar admission cases decided on First Amendment grounds, and Part III will discuss the significance of the specific intent element. These sections will focus on the balance struck by the Supreme Court between the state's interest in regulating the practice of law and the First Amendment rights of bar applicants. In weighing these interests, the Supreme Court drew upon fundamental principles of First Amendment law developed in a series of cases involving prosecution of "subversive activities" and loyalty oaths. In particular, the Court's requirement that states limit bar admission inquiries about an applicant's advocacy or associations to his or her "specific intent" during the advocacy or association is a result of the Court's efforts to limit the sweep

11. Notably, the Character Committees confirmed that the delay in processing my application was not based on any reservations about my "good character" or fitness to practice law.


of state investigations that had resulted in some of the worst abuses of power of the Cold War. The Wadmond decision represents the merger of these First Amendment principles with the Court's earlier efforts to address, on due process grounds, the problems posed by state investigation of bar applicants.

Finally, in Part IV, I will briefly discuss the results of my own challenge to Question 21 and the lack of procedural safeguards for bar applicants who contest admission decisions. Although the Supreme Court has held that a bar applicant must be afforded a formal opportunity to be heard before he or she is denied admission to the bar, New York does not provide for such a hearing. This omission violates the Fourteenth Amendment. The potential consequences of this procedural failure are perhaps best evidenced by my lack of an opportunity to present the arguments summarized in this article to the Appellate Division before it denied my application. Had there been a hearing, the Court would have been in a better position to appreciate the implications of upholding the constitutionality of Question 21, and may have reached a different decision consistent with the controlling Supreme Court authority.

I. THE DUE PROCESS CASES

Before it addressed the First Amendment implications of bar admission inquiries about advocacy of government overthrow and membership in subversive groups, the Supreme Court decided two due process challenges to bar admission proceedings. These cases laid the constitutional groundwork for later First Amendment challenges. In the first case, Schware v. Board of Bar Examiners, the petitioner's application for admission to the New Mexico bar was denied for lack of "good moral character" based on his membership approximately fifteen years earlier in the Communist Party and his arrests, but not conviction, for "suspicion of criminal syndicalism" while participating in labor strikes. In reversing the denial on appeal, the Supreme Court first noted that "[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." A state can demand these qualifications because attorneys act as officers of the state's courts and the state has a substantial interest in protecting the public from unscrupulous attorneys and ensuring that it re-

17. Id. at 237.
18. Id. at 239. For a discussion of whether the good moral character requirement is itself vague, overbroad, and unconstitutional see Michael D. White, Note, Good Moral Character and Admission to the Bar: A Constitutionally Invalid Standard?, 48 U. CIN. L. REV. 876 (1979).
ceives competent legal services.19 At the same time, the Court held that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law."20 Historically, courts had considered admission to the bar and the practice of law a "privilege," subject to such conditions as the state saw fit to impose.21 Further, applicants for admission to the bar had borne the burden of offering at least prima facie proof of their qualifications for admission.22 In Schware, the Supreme Court took a somewhat different view. The Court allowed that an applicant must demonstrate his or her qualification for admission, but went on to note that the practice of law "is not a matter of the State's grace."23 Although the Court did not decide whether the practice of law is best characterized as a "right" or a "privilege," it concluded that the petitioner was entitled to admission because he had made a "forceful showing of good moral character" and that his membership in the Communist Party and the related arrests did "not justify an inference that he presently has bad moral character."24 In particular,

20. Schware, 353 U.S. at 239.
21. See, e.g., In Re Cassidy, 51 N.Y.S.2d 202, 204 (N.Y. App. Div. 1944) (holding that "[m]embership in the Bar is not a right; it is a privilege."). Cf. In re Summers, 325 U.S. 561, 568 (1945). In Summers, the petitioner, a conscientious objector, was denied admission to the bar because he refused to swear allegiance to the state constitution and its requirement that state citizens be willing to serve in the militia. The petitioner claimed that he was denied admission in violation of the due process clause of the Fourteenth Amendment and the free exercise clause of the First Amendment. The State, however, argued that there was no case or controversy for the Court to review because the petitioner's application for admission to the bar was merely a petition for a ministerial appointment as an officer of the state court. Id. at 365. The Court rejected this argument, stating that petitioner could claim a "right to admission." Id. at 568. The Court ultimately held that the State's denial did not violate the "principles of religious freedom which the Fourteenth Amendment secures against state action." Id. at 573. See also Ex Parte Garland, 71 U.S. at 379 (1866) (in which the Supreme Court stated that an attorney does not hold "office" merely "as a matter of grace or favor").
23. Schware, 353 U.S. at 239 n.5.
24. Id. at 246. Interestingly, the Court was unclear about whether an applicant's arrest, without conviction, was a proper consideration in determining the applicant's good character. The Court stated that "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct," and also noted that an arrest is not competent evidence at either criminal or civil trials. Id. at 241. At the same time, the Court considered the facts underlying the petitioner's arrests in de-
the Court noted that there are many reasons why a person might join the Communist Party (including youth and poverty, as in Schware's case) which "are not indicative of bad moral character." Accordingly, Schware's application was remanded for proceedings not inconsistent with the Court's opinion.

Subsequent to Schware, the Court held that the right to practice a chosen profession falls squarely within the liberty and property interests protected by the due process clause of the Fifth Amendment and applicable to the states under the Fourteenth Amendment. And, when the Court decided Baird in 1971, it expressly held that the right to practice law in particular is a protected interest. Indeed, in Supreme Court of New Hampshire v. Piper, the Court characterized the practice of law as a "fundamental right" of those qualified by training and character. Schware, then, was notable for recognizing that bar applicants have a constitutionally protected interest in admission, and that the state's admission power must be exercised consistent with constitutional guarantees.

The second due process case, Konigsberg v. State Bar, was factually different from Schware. Unlike Schware, Konigsberg's application was rejected after he refused to answer any questions about his political affiliations, beliefs, and membership in the Communist Party based on his rights guaranteed by the First and Four-
teenth Amendments. The California Committee of Bar Examiners claimed that it did not deny Konigsberg admission merely because he refused to answer its questions, but because the refusal "tends to support an inference that he is a member of the Communist Party and therefore a person of bad moral character."

In its decision, the Court avoided the question of whether the petitioner had a First Amendment right to refuse to answer "inquiries about political associations and his opinions about matters of public interest." Instead, the Court ruled on whether, as a matter of due process and equal protection, there was sufficient evidence in the record to support the state's inference that Konigsberg was a person of poor moral character. Finding that there was not, the Court held that the committee's denial was "arbitrary and discriminatory."

In short, the Court did not hold in either Schware or Konigsberg that the questions asked by the bar examiners were impermissible inquiries. Strictly speaking, the Court only held that the pe-

30. Id. at 258.
31. Id. at 270. The state also based its denial on testimony from an ex-Communist that Konigsberg had attended Party meetings, and on editorials Konigsberg wrote for a local newspaper criticizing the Korean War. The Supreme Court found all of these grounds insufficient to justify the denial. Id. at 266-269.
32. Id. at 261. Nevertheless, the Court acknowledged that there was some support in earlier decisions for Konigsberg's First Amendment claims, id. at 270, and that states must not exercise their power over the bar "in such a way as to impinge on the freedom of political expression or association." Id. at 273.
33. Id. at 262. See also Wieman v. Updegraff, 344 U.S. 183 (1952); Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951) (discussing arbitrary state action and due process).
34. Prior to Schware and Konigsberg, however, the Court had held that a state could not, consistent with due process, ask an individual about anything less than "knowing activity" in a subversive organization, Wieman v. Updegraff, 344 U.S. 183, 191 (1952). In Wieman, the Supreme Court struck down an Oklahoma loyalty oath statute which required all state employees to swear, among other things, that they were not affiliated with any organization that advocated the overthrow of state or local government by force or unlawful means, or any "party" or "group" which was on the United States Attorney General's list of subversive organizations. Id. at 184 n.1. The Court considered whether "a state, in attempting to bar disloyal individuals from its employ, [can] exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged." Id. at 190. After all, as the Court noted, mere membership may be ignorant or innocent, or have occurred sometime before or after an organization was corrupted by subversive influences. Id. The Court ruled that "[i]ndiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." Id. at 191. See also Garner v. Board of Public Works, 341 U.S. 716 (1951) (affirming city's requirement that employees disclose membership in communist organizations); Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (allowing state to require that political candidates affirm their lack of subversive intent); Adler v. Board of Education, 342 U.S. 485 (1952) (addressing loyalty oaths and knowing membership in subversive organizations).
petitioners had been improperly denied admission because the states' reasons for denial did not demonstrate that the applicants were unfit to practice law. Nevertheless, the decisions in Schware and Konigsberg established certain constitutional principles for bar admission proceedings that, as discussed below, still apply to New York's Question 21. First, a state does not have limitless authority to deny admission based on its view that the candidate is morally unfit. The state's authority is limited by an applicant's right to practice law, assuming he or she is qualified by training and offers credible proof of good character. Second, an applicant for admission to the bar retains general constitutional rights, such as the right to due process, which also limit the state's action. In particular, the basis on which an applicant is denied admission must bear a rational relation to the state's interest in regulating admission.

The Supreme Court soon reached the First Amendment issues raised by bar admission questions concerning political advocacy and associations. At first, a few years after the decision in Konigsberg in a case involving the same petitioner, the Supreme Court held that the First Amendment did not prohibit a state from asking an applicant about political beliefs or associations, or from denying an applicant admission for refusing to answer such questions. Then, in 1971, the Court reversed itself, and in deciding Baird, Stolar, and Wad mond, narrowed the scope of permissible state inquiries and upheld the right of an applicant to refuse to answer broadly-worded inquiries about membership or advocacy.

II. BAR ADMISSION DECISIONS AND THE FIRST AMENDMENT

After his case was remanded by the Supreme Court, Konigsberg was again asked by the California Bar Committee about his political beliefs and affiliations. Konigsberg willingly told the committee "unequivocally" that he did not believe in "violent overthrow," and that "he had never knowingly been a member of an organization which advocated such action."35 He still, however, refused to answer questions about past or present membership in the Communist Party.36 As a result the bar committee again denied his application, this time relying "on the ground that his refusal to answer

36. Id. at 38. The opinion does not quote the questions asked by the committee, but they were evidently directed to past or present membership without qualification. The opinion notes that Konigsberg argued to the Court that the committee's questions were irrelevant because "bare, innocent membership" is not a basis for denial, and he had answered the "ultimate" question of whether he had "knowingly belonged to an organization advocating violent government overthrow." Id. at 46.
had obstructed a full investigation into his qualifications." On appeal, Konigsberg claimed not only that the committee's denial violated due process, but also that he had a First Amendment right to refuse to answer the committee's questions.38

The Court first rejected the due process claim, concluding that "the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications." The Court explained that the questions had relevance because even if the committee could not infer that Konigsberg was a member of the Communist Party or had poor character from his refusal to answer questions about Party membership, the questions were a proper "preliminary" to determining whether, if he had been a Communist, he had advocated unlawful or violent acts.40 By refusing to answer the committee's questions, Konigsberg prevented the committee from completing its investigation and reaching an informed decision about his character and fitness. Since Konigsberg bore the initial burden of establishing his right to admission, and the committee was not required to ignore potentially relevant avenues of inquiry, the committee was entitled to refuse admission based on Konigsberg's failure to cooperate with the admission authorities.

The Court then considered Konigsberg's claim that questions about his membership in the Communist Party impinged upon his rights to free speech and association guaranteed by the First and Fourteenth Amendments.41 In doing so, the Court weighed the government's interest in regulating the practice of law against the petitioner's First Amendment rights. On one side of the scale the Court

37. Id.
38. Konigsberg also claimed that the committee's decision was inconsistent with the Court's decision in his first appeal. The Court disagreed:
The Court did not consider [in the first case] . . . all questions as to the permissibility of the State treating Konigsberg's refusal to answer as a ground for exclusion, not because it was evidence from which substantive conclusions might be drawn, but because the refusal had thwarted a full investigation into his qualifications.
Id. at 43.
39. Id. at 44.
40. Id. at 46-47. Konigsberg argued that the committee's questions about Communist affiliations were irrelevant because "bare, innocent membership" in the Communist Party is not a ground for denial and he had answered "such ultimate questions as whether he himself believed in violent overthrow or knowingly belonged to an organization advocating violent overthrow." Id. at 46. The Court rejected this argument because the committee was not required to accept Konigsberg's answers at face value, and could properly ask about his knowledge of the aims and functions of the Communist Party and his activities. Id. at 46-47.
41. Id. at 49.
placed a state's need to discover those "applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions" who may be willing to use illegal means to change those institutions. On the other side, the Court placed what it simply termed the "minimal effect" on First Amendment rights occasioned by disclosure of political beliefs and associations. Cast in these terms, the Court's finding in favor of the State was not hard to predict.

In deciding in favor of the state, the Court concluded that the questions directed at Konigsberg were proper because their purpose

42. Id. at 52.
43. Id. In reaching this conclusion, the Court stated that "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 employees for the post he holds . . . " Id. at 52 (citing Beilan v. Board of Public Education, 357 U.S. 399 (1957)). In Beilan, the petitioner was a public school teacher who refused to answer questions about Communist Party membership, and was discharged for "incompetency" based on this refusal, not because of his activities or associations. Id. at 405-06. On appeal, the petitioner never claimed that he had a First Amendment right to refuse to answer. Instead, he claimed that the incompetency finding violated due process and that, also as a matter of due process, he should have been warned of the consequences of refusing to answer. Id. at 404, 408. Consequently, while Beilan may have been relevant to the due process issues in Konigsberg II, it had nothing to do with the Court's conclusion that Konigsberg's First Amendment interests were minimal.

In finding that disclosure had "minimal effect," the Court also relied on Garner v. Los Angeles Board, 341 U.S. 716 (1950). Garner was closer to the point, but nevertheless missed it. See Konigsberg II, 366 U.S. at 52. In Garner, various City employees were discharged for refusing to take an oath or file an affidavit stating, among other things, that they did not advocate government overthrow and had never been affiliated with a group that did. Garner, 341 U.S. at 718-19. The Court upheld the city's action after ruling that its loyalty requirements did not violate the First Amendment. Id. at 720-21. However, in doing so, the Court read a scienter element into the oath and affidavit, and assumed that they pertained only to knowing membership in subversive groups. Id. at 723-24. As a result, Garner was part of a series of cases first holding that the government could only seek information about knowing membership, and ultimately limiting the scope of governmental inquiries to those directed at "specific intent." See infra part III. Apparently, the questions Konigsberg was asked were not similarly circumscribed.

44. See Konigsberg II, 366 U.S. at 62-71 (Black, J. dissenting). In his dissent, Justice Black attacked the majority's balancing test by arguing that the First Amendment's guarantees are absolute, especially where, as here, the State's questions about Communist affiliations did not have a merely incidental effect on speech but in fact targeted speech and association for the "avowed purpose" of penalizing unpopular views. Id. at 70. Justice Black further argued that even if the government has the right to regulate speech under some circumstances, the recognized constitutional standard for determining the need for regulation is the clear and present danger test. A clear and present danger arises, however, only when the danger is so severe and imminent that there is "no time for rational discussion." Id. at 63. See also text accompanying notes 77-78. While the majority made passing reference to clear and present danger, see Konigsberg II, 366 U.S. at 50, it did not claim that the case involved an imminent danger to state interests, and went on to apply a balancing test instead without fully discussing the authority or reasons for doing so.
was “to deny positions [of public trust] to persons supposed to be
dangerous,” not to “penalize political beliefs.” This distinction,
however, misapprehends the First Amendment issue in the case.
Certainly, a state has the right to deny bar admission based on an
applicant’s illegal act or even illegal intent. But the critical First
Amendment question in Konigsberg II is whether the state’s means
of investigating possible bases for denial were constitutional. Even
assuming that the questions served legitimate purposes, the scope
and wording of the questions required independent scrutiny to de-
termine whether they were sufficiently tailored to serve those pur-
poses without unduly trenching on First Amendment rights. In
Konigsberg II, however, once the Court found that the purpose of the
State’s questions was proper, it said nothing at all about the lan-
guage and scope of the questions themselves apart from its con-
clusory assertion that they were minimally intrusive.

Eleven years later, in Baird v. State Bar of Arizona, the Su-
preme Court all but expressly overruled Konigsberg II. Although the
Court did little in the way of analyzing the content of the questions
about loyalty and advocacy at issue in the case, its decision in Baird
demonstrated that the Court would no longer endorse a state’s in-

45. Id. at 54. See also Hallinan v. Committee of Bar Examiners, 421 P.2d 76, 87
(Cal. 1966) (“The purposes of investigation by the bar into an applicant’s moral character
should be limited to assurance that, if admitted, he will not obstruct the administration of
justice or otherwise act unscrupulously in his capacity as an officer of the court.”).
46. See generally Shelton v. Tucker, 364 U.S. 479 (1960). In Shelton, the Court
struck down an Arkansas statute requiring teachers annually to file a list of their organ-
izational affiliations. In its analysis, the Court explained the requisite constitutional fit
between state means and ends as follows:

In a series of decisions this Court has held that, even though the governmental
purpose be legitimate and substantial, that purpose cannot be pursued by
means that broadly stifle fundamental personal liberties when the end can be
more narrowly achieved. The breadth of legislative abridgment must be viewed
in the light of less drastic means for achieving the same basic purpose.

Id. at 488 (footnotes omitted). See also Goldblatt v. Town of Hampstead, 369 U.S. 590,
594-95 (1962) (when states exercise their powers to protect the public welfare, safety, or
morals, the means used must be “reasonably necessary for the accomplishment of the
purpose, and not unduly oppressive upon individuals”); Cantwell v. Connecticut, 310 U.S.
296, 311 (1939) (statutes impinging on fundamental rights must be “narrowly drawn to
define and punish specific conduct as constituting a clear and present danger to a sub-
stantial interest of the State”); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW,
709-13 (1978) [hereinafter TRIBE] (discussing generally overbreadth and “least restrictive
alternatives”).

47. See also In re Anastapalo, 366 U.S. 82 (1961). In Anastapalo, the Supreme Court
held that an applicant’s due process rights were not violated when he was denied admis-
sion to the bar for refusal to answer bar committee inquiries about advocacy of govern-
ment overthrow on First Amendment grounds. The Court premised its decision on the
now rejected views that admission to the bar was a “privilege,” rather than a right, sus-
ceptible to comprehensive state regulation, and the inquiries at issue did not overly bur-
den First Amendment rights. See id. at 89-90.
vestigation at the expense of rights guaranteed by the First Amendment. In Baird, the petitioner had passed the Arizona Bar Examination. As part of the examination, she was asked questions pertaining to her character and fitness. Baird answered all the questions except one which asked her to state whether she had ever been a member of the Communist Party or any organization “that advocates overthrow of the United States Government by force or violence.” Based on Baird’s refusal to answer that question, the bar examiners declined to process her application. Baird appealed the examiners’ decision to the Supreme Court on the ground that it violated the First Amendment’s guarantee of freedom of association.

In its decision, the Court first summarized its previous bar admission cases, and found them to be characterized by “[s]harp conflicts and close divisions” that frequently yielded puzzling results. Then the Court reaffirmed that states have a “legitimate interest in determining whether [an applicant] has the qualities of character and professional competence requisite to the practice of law.” In contrast to the overwhelming weight the Court attributed to this interest in Konigsberg II, however, in Baird the Court asserted that the state bears a “heavy burden” when it “seeks to inquire about an individual’s beliefs and associations.” In the Court’s view, “[t]he practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character,” and “whatever justification may be offered, a State may not inquire about a man’s views or associations solely for the purpose of withholding a right or benefit because of what he believes.” Thus, the Court broadly held that an applicant’s exercise of First Amendment rights is “immune” from bar admission “inquisitions.”

Taken literally, the state’s burden would be an impossible one if applicants enjoy such immunity. In fact, as the later Wadmond decision shows, the state can make circumscribed inquiries about an applicant’s views and associations. Nevertheless, while never expressly overruling Konigsberg II, or even stating that Arizona’s

49. Id. at 5.
50. Id. at 2, 4.
51. Id. at 7.
52. Id. at 6.
53. Id. at 8. Cf. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 n.5 (1957) (declining to decide whether the practice of law is a right or privilege).
55. Id. at 8.
56. See infra text accompanying notes 66-70.
57. After criticizing Konigsberg II and other cases for their “puzzling holdings,” the Court simply stated that the “best way” to decide Baird’s case was “to narrate its simple
question was unconstitutional, the Court evidently sought to redress the balance struck in that case between the State's interests and the First Amendment. Hence, while the decision made plain the Court's view that Arizona's inquiries about the petitioner's associations were constitutionally impermissible, it left open the question of where a new balance would be found.\textsuperscript{58}

The Court reached a similar result in the companion case of In re \textit{Stolar}. The petitioner in \textit{Stolar} was denied admission to the Ohio Bar for refusing to answer an application question which asked "whether you have been, or presently are . . . a member of any organization which advocates the overthrow of the government of the United States by force."\textsuperscript{59} The Ohio Bar Committee contended that its question served "a legitimate interest because it needs to know whether an applicant has belonged to an organization which has 'espoused illegal aims' and whether the applicant himself has espoused such aims."\textsuperscript{60} The Supreme Court, however, ruled that "the First Amendment prohibits Ohio from penalizing an applicant by denying him admission to the Bar solely because of his membership in an organization" or "because he personally . . . 'espouses illegal aims'."\textsuperscript{61} Moreover, since the State could not deny admission because of membership, the question about membership served no purpose for the admission proceedings. Thus, the Court concluded that the question itself violated the First Amendment because "no legitimate state interest . . . is served by a question which sweeps so broadly into areas of belief and association protected against government invasion."\textsuperscript{62}

The statement in \textit{Stolar} that "espousal of illegal aims" is not a constitutional basis for denial is very broad, and again, if taken literally, the Court's language would seemingly preclude any state investigation of political beliefs or associations. When read in the proper context, however, the Court's statement is unsurprising. In rejecting espousal of illegal aims as a basis for denial, the Court

\textsuperscript{58} Id. Interestingly, while holding that the question as to whether the petitioner had belonged to the Communist Party violated the First Amendment, the Court was apparently unconcerned about the constitutionality of another question which required that an applicant list the organizations to which she had belonged since the age of sixteen. See \textit{id.} at n.7. For First Amendment purposes, such an inquiry seems little different from a question specifically directed to affiliation with the Communist Party, since the amendment protects freedom of association in general.

\textsuperscript{59} \textit{In re Stolar}, 401 U.S. at 27.

\textsuperscript{60} Id. at 28.

\textsuperscript{61} Id. at 28-29.

\textsuperscript{62} Id. at 30.
cited its earlier decision in Cantwell v. Connecticut. There, in striking down a statute which forbade solicitation for religious causes without a license, the Court stated that the First Amendment "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Consistent with this distinction, in Stolar the Court, by stating that mere espousal of an illegal aim is not a proper basis for denial, was simply reaffirming the traditional broad line between impermissible state sanction of political opinion or speech and permissible regulation of action designed to implement the views espoused. Since a person's illegal conduct poses a concrete threat to society, a state's denial of admission based on conduct may be justified by its interest in protecting society.

Ultimately, the Court held in Law Students Research Council v. Wadmond that a state could deny admission to the bar if an applicant's advocacy of government overthrow, or membership in a group advocating overthrow, was coupled with the specific intent to achieve that end. In Wadmond, various individuals and student organizations challenged an earlier version of the New York State bar application, in which the text of the existing Question 21 was designated Question 26(a) and was followed by subparagraph (b), which stated:

[If your answer to (a) is in the affirmative,] did you during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?

The Court held that this question, taken as a whole, could be asked because it has long been recognized "that knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals, may be made criminally punishable." Since subparagraph (b) of the question expressly fo-

63. 310 U.S. 296 (1939).
64. Cantwell, 310 U.S. at 303-04.
65. Id. at 304.
67. Id. at 175. None of the petitioners in Wadmond had been denied admission. Instead, their challenge was based on the claim that Question 26 chilled the exercise of protected constitutional rights by New York law students. Id. at 158-59.
68. Id at 165. (citation omitted). Wadmond presented an issue that Justice Stewart anticipated in his concurrence in Baird, 401 U.S. at 9 (Stewart, J., concurring) (noting that the "mere membership" penalized by the Arizona inquiry "can be quite different from knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organiz-
cused on specific intent, New York could ask in subparagraph (a) about "Communist affiliations as a preliminary to further inquiry about the nature of the association and may exclude an applicant for refusal to answer."69

Although the majority did not further elaborate on its reasons for approving the question challenged in Wadmond, in contrast to the questions found improper in Baird and Stolar, the decision was evidently premised on the Court's view that an applicant who had the specific intent to bring about government overthrow had crossed into the realm of action, and was no longer immune from state inquiries and sanctions.70 Further, the question in Wadmond did not ask about mere, unqualified membership in an organization, as did the more "sweeping" questions at issue in Baird and Stolar. Rather, the question expressly asked whether the applicant was a "knowing member" in a group advocating unlawful action, and whether he or she "specifically intended" unlawful action while a member. According to the Court, the question was therefore precisely tailored to a legitimate area of inquiry.71

The question remains, however, whether an inquiry like New York's Question 21 targeting knowing membership alone, without reference to the applicant's specific intent, is sufficiently tailored to pass muster under the First Amendment. Earlier Supreme Court case law makes plain that the answer to this question is no: without expressly focusing on the applicant's specific intent while a member of an organization, "knowing" or otherwise, any question about an applicant's associations will violate the First Amendment.

III. THE CONSTITUTIONAL IMPORT OF "SPECIFIC INTENT"

The import of the "specific intent" language which allowed the question in Wadmond to pass constitutional muster may first seem elusive. In fact, specific intent is a critical component of the Supreme Court's First Amendment jurisprudence and places important limits on a state's ability to test a person's loyalty or scrutinize his or her past associations. Following the Second World War, the Court de-

70. Id. at 165. See also id. at 181-82 (Black, J., dissenting). The majority's conclusion that these questions do not violate the First Amendment seems to be based on the assumption that the state may punish a man for knowing membership in an organization which advocates violent overthrow of the Government if he specifically intends to bring about such overthrow. On this assumption, the majority appears to conclude that since such conduct is criminally punishable, the state may inquire about it in order to exclude an individual who has been a member of one of these organizations with the requisite intent.
71. Id. at 165.
cided a series of cases involving inquisitions about political loyalties and government overthrow. The central issue in each case was the same, "whether involving lawyers, doctors, marine workers, or State and Federal Government employees, namely: to what extent does the [constitution] protect persons against governmental intrusion and invasion into private beliefs and views that have not ripened into any punishable conduct?"

In the first of these cases, arising from federal prosecutions under the Smith Act, the Supreme Court held that the First Amendment requires more than mere "knowing membership" in a subversive or illegal organization before an individual can be punished for affiliation with such an organization. In Dennis v. United States, the Court found that the "structure and purpose" of the Smith Act, which punished "knowing[] or willful[]" advocacy of government overthrow, required "the inclusion of intent as an element of the crime." Although the Act said nothing at all about proof of intent, the Court read that element into the statute and then found the Act constitutional. In narrowing and upholding the Smith Act in this manner, the Court relied on the "clear and present danger" doctrine first articulated by Justice Holmes in Schenck v. United States and later in Gitlow v. New York. Recognizing that government has a

---

72. Many of the Supreme Court's loyalty oath cases also discuss the Fifth Amendment implications of requiring an applicant to divulge association with a subversive organization. See generally Structural Analysis supra note 3, at 82; TRIBE, supra note 46 at 708 (summarizing the Supreme Court's "confused" precedents dealing with loyalty tests and the fifth amendment). Since criminal prosecution for political affiliations is now extremely unlikely, the possible Fifth Amendment issues arising from Question 21 have little practical significance and will not be discussed.

73. Stolar, 401 U.S. at 24-25.

74. 18 U.S.C. § 2385 (1993). Among other things, the Smith Act makes it unlawful for any person to "knowingly or willfully" advocate overthrowing or destroying any government in the United States by "force or violence," or to organize or to help to organize any "society, group, or assembly of persons who teach, advocate, or encourage the overthrow of national or local government "by force or violence."

75. 341 U.S. 494 (1951).

76. Id. at 499.

77. 249 U.S. 47 (1919). Schenck involved the conviction of a Socialist for printing and distributing a document allegedly calculated to incite insubordination in the military. Holmes, writing for the Court and affirming the convictions, stated that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils Congress has a right to prevent." Id. at 52.

78. 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting). Indeed, Dennis is notable for being one of the first instances in which the Court applied the clear and present danger standard, at least in name. Notably, while Chief Justice Vinson, writing for the majority in Dennis, invoked this standard and narrowed the Smith Act, the Court nevertheless deferred to "wholesale legislative determinations" about the dangers of subversive influences and upheld the basic constitutionality of the Act. TRIBE, supra note 45, at 613-14;
legitimate interest in protecting itself “from change by violence, revolution and terrorism,” the Court found that advocacy of government overthrow presents a clear and present danger to the state, and that the state may therefore proscribe or penalize membership in groups advocating overthrow. However, in reaching this conclusion, the Court assumed that advocacy meant speech coupled with an intent to carry out violent or unlawful actions, and that it was the intent and not the speech which was targeted by the Smith Act. Thus, the Court concluded that while the First Amendment protects political speech and freedom of association, the government could “indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go.”

In Scales v. United States, the Supreme Court affirmed a conviction under the Smith Act for “the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government of the United States by force or violence.” In doing so, however, the Court limited prosecution under the Act to “active” members having also a guilty knowledge and intent. The Court reasoned that even if a person joins a group advocating impermissible ends with knowledge of the ends advocated, he or she may join in support of other legitimate purposes embraced by the group, or in the belief that he or she can influence the group to pursue lawful aims. Indeed, a person may even approve of the illegal aims of the group, but personally do nothing to advance those aims. As a result, unless there is proof of a “specific intent” to accomplish something unlawful, even an “active” member who knows of the group’s illegal ends cannot be prosecuted.

See generally Swindler, supra note 2, at 245-46 (analyzing the Court’s use of the “clear and present danger” rationale in Dennis.).

79. Dennis, 341 U.S. at 501.
80. Id. at 515. See also Gitlow, 268 U.S. at 669 (stating that government interest in regulating speech is limited to incitement presenting “a sufficient danger of substantive evil”).
82. Id. at 516. See also Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring) (“The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.”); Yates v. United States, 354 U.S. 298 (1956) (holding that in addition to knowing membership in a group advocating forcible overthrow of the government, the advocacy at issue must be of immediate action, not abstract doctrine or action at some future time).
84. Id. at 205.
85. Id. at 228-30. See also Wieman v. Updegraff, 344 U.S. 183 (1962) (distinguishing “active” from mere knowing membership).
86. Scales, 367 U.S. at 228-30.
87. Id. at 228.
88. Id. at 229. See also Noto v. United States, 367 U.S. 290, 298 (1961) (Smith Act
The reasoning articulated in *Dennis, Scales*, and their progeny readily encompassed and was applied to cases involving other penalties imposed by the federal and state governments for membership in the Communist Party or advocacy of government overthrow. For example, in *Elfbrandt v. Russell* the Supreme Court struck down an Arizona law mandating discharge of state employees who "knowingly and willfully" joined the Communist Party or any group which advocated government overthrow. The Court noted that "[t]hose who join an organization but do not share its unlawful purpose and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." Accordingly, absent a specific intent to commit unlawful acts, the State was not faced with conduct "'constituting a clear and present danger to a substantial interest of the State.'" The Arizona statute, by penalizing mere "knowing" membership in the Communist party or other organizations, threatened "the cherished freedom of association protected by the First Amendment." Similarly, in *Keyishian v. Board of Regents* the Court struck down a regulation of the State University of New York barring employment of teachers who were members of the Communist Party and other listed organizations. The Court held that "[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for excluding teachers from a professional position they were otherwise qualified to hold.

It is in this widening circle of constitutional protection, centered on the Supreme Court's specific intent requirement, that the bar admission cases ultimately assume their place. The question in *Wadmond*, as noted, included both "knowing membership" and "specific intent" elements which were not in the questions at issue in *Baird* and *Stolar*. But it is specific intent alone which renders the question sufficiently tailored to pass muster under the Supreme

prosecutions require "rigorous standards of proof" of "present" advocacy of government overthrow.

90. Id. at 13.
91. Id. at 17.
92. Id. at 18 (quoting Cantwell v. Connecticut, 310 U.S. 296, 311 (1939)).
95. Id. at 606.
96. Id. See also Federation of Federal Employees v. Greenberg, 789 F. Supp. 430 (D.D.C. 1992) (holding that Pentagon security clearance questionnaire which inquired about past associations violated the First Amendment.).
Court's decisions limiting intrusions upon freedom of speech and association. Of course, reasonable minds may differ as to whether the question approved in Wadmond was so precisely tailored. Consider the situation of an applicant who was a knowing member in a subversive group, but did not harbor a specific intent to overthrow the government. Even though the applicant answers "no" to part (b) of the Wadmond question, he or she must still answer "yes" to part (a). Presumably, the state need not accept the applicant's responses at face value (after all, part (a) is a "preliminary" inquiry), and may demand additional information about the applicant's membership to gauge the nature of his or her involvement. This demand might not only include the name of the organization, but also the identity of other members who might have information about the organization or the applicant. Thus, Wadmond does little to narrow the potential scope of a state's inquiries, since applicants may still be required to divulge constitutionally protected activities and explain those activities to state officials. Indeed, given that the Supreme Court has held that membership lists may be protected by the First Amendment, the Court's approval of the question in Wadmond invites additional conflicts over the permissible scope of bar admission inquiries.

Nevertheless, by relying on the specific intent element to uphold the question in Wadmond, the Supreme Court grounded bar admission proceedings on fundamental principles of First Amendment law. First, a state may investigate, restrict or penalize advocacy or association with a political group only when the advocacy or association poses a danger to legitimate state interests. Second, there is insufficient danger to state interests to warrant regulation or penalties unless an individual had the specific intent of acting, or making others act, violently or illegally. Finally, any regulation of speech or association which is not narrowly tailored to the investigation or punishment of a person's specific unlawful intent is overbroad and impermissibly trenches on freedom of speech.

Certainly, the potential danger to state interests at issue in bar admission proceedings hardly amounts to the type of imminent crisis which justifies regulation under the clear and present danger test. And the Court has never articulated a consistent, alternative reading of the First Amendment which would accommodate state


98. NAACP v. Alabama, 357 U.S. 449, 462 (1958) ("[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association," since "[I]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs").
regulation or sanction of political speech and association based on a lesser or less immediate danger. Specific intent, however, at least requires the state to demonstrate and define a tangible threat to its interests that justifies regulation of speech and association. As a result, the *Wadmond* decision has one very important practical effect—it requires that the state justify its questions and, if an applicant is denied admission, its reason for denial. Instead of unrestrained investigation into an applicant's political opinions and associations, the state's questions must be expressly directed to the applicant's specific intent. While specific intent is not itself well-defined, its resonance with the mental state underlying most criminally culpable acts and the requirement that the state provide sufficient evidence to support a denial of admission significantly curtails the state's ability to base denial on arbitrary or discriminatory motives. In short, specific intent provides at least some assurance that the state cannot place official political preferences before an applicant's First Amendment rights or right to practice a chosen profession.

Thus, in *Wadmond*, the First Amendment and due process issues underlying bar admission proceedings merged. Due process mandates that the state can deny admission only if the basis of denial has a rational relation to a legitimate state interest. Arguably, an applicant's affiliation with an organization advocating violent or illegal government overthrow is a relevant, rational consideration in determining the applicant's good character and willingness to support the constitution, even if the manner in which the question is asked violates the First Amendment. But once the Supreme Court incorporated specific intent into the First Amendment jurisprudence of bar admissions, a state's legitimate interest was limited, as a matter of due process, to whether an applicant's intent justified denial. Any inquiry not tailored to determining whether the applicant had that intent, even if it has some potential relevance to the applicant's character, is not related to a legitimate subject of state inquiry and violates both the First Amendment and due process.¹⁰⁰

Question 21 of the New York bar admission application is such an unconstitutional inquiry. The question asks only whether the applicant has "ever organized or helped to organize or become a

---

99. See part I, supra.

100. Although the decision was not premised on due process, the Court noted in *Stolar* that "no legitimate state interest ... is served by a question which sweeps so broadly into areas of belief and association protected against government invasion." *In re Stolar*, 402 U.S. 23, 30 (1971). Similarly, in upholding the question in *Wadmond*, the Court relied on the fact that the specific intent to overthrow the government by force or violence may be criminally punishable and a proper subject of state investigation. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 165 (1971).
member of any organization" which he or she knew was advocating or teaching unlawful or violent action against the Government. Nowhere in Question 21, or anywhere else in the application, is there any inquiry about whether the applicant had the specific intent of advancing those unlawful or violent acts. This shortcoming is fatal. Even if the Appellate Division or the Committees on Character do not actually discriminate between applicants based on their responses to the question, the potential for such discrimination is sufficient to render the question unconstitutional. Questions like Question 21 are "easily adapted to fit personal views and predilections," and remain "dangerous instrument[s] for arbitrary and discriminatory denial of the right to practice law." 101

With this potential, Question 21 hangs like the "sword of Damocles" over the heads of future New York lawyers, and the possibility of non-admission to the bar based on an unsatisfactory answer to Question 21 may chill the free exercise of First Amendment rights by aspiring attorneys. 102 Given the tremendous investment of time, money, and expectations which attend preparation for a legal career, many students may choose not to express potentially controversial opinions or join unpopular groups to avoid any possible impediment to later admission to the bar. Admittedly, membership in the Communist Party or other groups considered highly suspect a few decades ago may not carry the same taint it once did, and there have been no recent reports of the Character Committees engaging in "witch hunts" for subversive applicants. Nevertheless, the question remains a ready tool for arbitrary or discriminatory denial of admission to the bar predicated on the political preferences of the state officials who must approve an applicant's "good character." 103 Even if


102. See NAACP v. Alabama, 357 U.S. 449, 462 (1958) (discussing chilling effect of "compelled disclosure of affiliation with groups engaged in advocacy"); Cummings v. Hampton, 485 F.2d 1153, 1154 (9th Cir. 1973) (discussing the chilling effect on physicians of inquiries by veterans hospital about membership in organizations advocating unlawful government overthrow not limited to the physicians' "specific intent"); Bates v. State Bar, 433 U.S. 350, 380 (1977) (holding that First Amendment rights of attorneys were "chilled" by "in terrorem" effect of statute regulating attorney advertising); Ozonoff v. Berzak, 744 F.2d 224, 228 (1st Cir. 1984) ("if the plaintiff's interest in getting or keeping a job is real, the likely 'chilling effect' of an apparent speech-related job qualification constitutes a real injury").

103. See Ralph S. Brown & John D. Fassett, Loyalty Tests for Admission to the Bar, 20 U. CHI. L. REV. 480, 500-02 (1953) (discussing the risk and examples of "aimless[] hectoring" about political beliefs which may attend bar admission interviews). Aside from prevailing public views about the legitimacy of a political position or organization, the inevitably imprecise nature of the "good character" and "fitness" requirements for admission to the bar readily allows the personal preferences of officials charged with regulating
Question 21 is not actively employed to enforce official views of political fitness for the practice of law, an applicant's mere expectation of being called upon to list and account for "knowing membership" in a group and the potential for denial because of membership goes a long way toward ensuring political conformity. After all, "the value of a sword of Damocles is that it hangs—not that it drops."\(^{104}\)

Of course, more than just the rights of bar applicants, or the integrity of the bar admission process, may suffer because of Question 21. If tolerance of state investigation of political views and political conformity among members of the bar makes it less likely that lawyers will represent individuals or organizations that espouse unorthodox views, the legal profession cannot fulfill its public responsibilities. Although those unorthodox segments of society may be most in need of sympathetic legal counsel because of their differences, they may at the same time find it far more difficult to find counsel.\(^{105}\) Ultimately, to the extent that each person's ability to "think as you will and speak as you think are indispensable to the discovery and spread of political truth," society at large is ill-served by New York's means of screening for subversive bar applicants.

The admission process to intrude on admission determinations. See Pushinsky v. Board of Law Examiners, 266 S.E.2d 444, 450 (W. Va. 1980) ("One cannot be held to have failed to prove good moral character in the sense of being an honest and truthful person simply by the fact that he clings to certain political philosophies with which the Board of Law Examiners and, perhaps, a majority of Americans disagree."); Deborah L Rhode, Moral Character as a Professional Credential, 94 YALE L.J. 491 (1985); White, supra note 18 (discussing whether the good character requirement is unconstitutionally vague).


105. This point was perhaps best made by the petitioner in Baird, who wrote the following in her brief for the Supreme Court about the Arizona counterpart to New York's Question 21:

Question 27 does nothing to accomplish the objective of screening unethical lawyers. It acts as an impediment to the unorthodox applicant and to the applicant who believes that the question violates the Bill of Rights. As a result, the public suffers. Lawyers have a duty to serve the entirety of the public regardless of its individual political views and activities. The profession may be unable to fulfill this duty if the establishment is entitled to weed out of the bar those who, by virtue of their own outlooks, may view with sympathy the legal problems of the anti-establishment minorities.

Brief for Petitioner at 36, Baird v. State Bar of Arizona, 401 U.S. 2 (1971). Certainly, New York has a long tradition of respecting the right to express unorthodox views, and the need for legal counsel to represent those who espouse such views. In 1920 Charles Evans Hughes represented five Socialist Party members when the New York State Assembly denied them their seats in the New York State Assembly, arguing that "it is the essence of the instruments of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts . . . ." 5 NEW YORK LEGIS. DOC. NO. 30, 143d SESS., p. 4 (1920).

IV. QUESTION 21 AND PROCEDURAL DUE PROCESS

In light of Wadmond and the other cases I have discussed, the Appellate Division, Second Department, erred in denying my application for admission. The Court's view that the question is "proper" simply ignores the controlling United States Supreme Court authority.\(^\text{107}\) The Appellate Division's other, related reason for denial, that my refusal to answer the question was "willful obstruction of the legitimate function of the Committees" to inquire into my character,\(^\text{108}\) was equally erroneous.

In Baird and Stolar, the Supreme Court held that states could not deny admission to applicants who refused to answer questions on legitimate First Amendment grounds. Indeed, in both cases, the Court rejected the states' arguments that they had denied admission to the petitioners because they had obstructed the admission process.\(^\text{109}\) More basically, it simply makes no sense to find that an applicant's refusal to answer an impermissible question is cause for denial. After all, one of the central purposes of the application and review process for admission to the bar is to identify candidates who are able and willing to uphold the federal and State constitutions. Surely, an applicant's refusal to comply with a request that violates constitutional law cannot reflect negatively on his or her legal abilities or good character.\(^\text{110}\)

Perhaps the most troubling aspect of the Appellate Division's decision, however, is that it might have been avoided had the court

---

108. *Id.*
109. Although in the *Baird* opinion the Court did not directly address the question of obstruction, Arizona largely relied on the second *Konigsberg* decision to argue that regardless of the constitutional merits of the petitioner's arguments she had frustrated legitimate ends of the bar screening committees. Brief for Respondent at 8, *Baird*, 401 U.S. 1. The Court, by its decision, implicitly rejected this argument. In *Stolar*, however, the Court expressly stated that the petitioner had not "obstructed or frustrated" the bar admission process by not answering questions which violated the First Amendment, noting that "he did answer all of the . . . questions relevant to his fitness and competence to practice law." *In re Stolar*, 401 U.S. 23, 30 (1971). See also Pushinsky v. West Virginia Board of Law Examiners, 266 S.E.2d 444, 446 (W. Va. 1980) (holding that an applicant's response of "decline to answer" to a question similar to Question 21 was "one of three possible answers," along with "yes" or "no," and cannot be characterized as a refusal to answer or obstruction).
110. Oddly enough, before concluding that I was obstructionist, the Second Department had rejected a proposal I submitted of answering the question approved in Wadmond, which incorporates Question 21 in paragraph (a) but also contains the requisite "specific intent" language in paragraph (b). See Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 164-65 (1971). This response would have met constitutional requirements while satisfying the Appellate Division's request for an answer to the question on its application. The Appellate Division, however, declined to accept anything but a one word "yes" or "no" answer to Question 21 as written.
not violated a fundamental guarantee of due process—the right to a formal hearing prior to denial of admission to the bar. More than twenty years ago, in a case arising from another bar admission denial by the New York Appellate Division, the United States Supreme Court held that due process is violated if a bar applicant is denied admission without a hearing. In *Willner v. Committee on Character*, the petitioner’s application for admission to the New York Bar was denied when an attorney submitted a letter to the character committees attacking the petitioner’s character. On appeal, the New York Court of Appeals rejected the petitioner’s claim that the lack of an opportunity to either confront his accuser or refute the basis of denial violated the Fifth and Fourteenth Amendments. The Supreme Court overruled that decision, holding that “the requirements of procedural due process must be met before a State can exclude a person from practicing law” and that the “petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division.”

The various laws and rules regulating New York State bar admission procedures do not provide for a hearing before a denial of admission. At no time, formally or informally, was I afforded an opportunity by the Appellate Division to present my reasons for not answering Question 21, either in person or in a brief. Indeed, had it not been for an informal communication from the Character Committees that a minority of its members had dissented from the Committees’ favorable admission recommendation because of my refusal to answer Question 21, I would have had no idea that my response to the question was still an issue after the recommendation had been forwarded. I was not allowed to see a copy of the Charac-

---

111. 373 U.S. 96 (1963).
112. *Id.* at 101.
113. *Id.* at 102.
114. *Id.* at 105. *See also* Economico v. Village of Pelham, 405 N.E.2d 694, 696 (N.Y. 1980) (the “essence” of due process is “fundamental fairness,” and “[i]t demands that the government treat all justly by granting to the individual against whom governmental decisions operate the right to be heard.”); *In re Mitchell*, 351 N.E. 2d 743, 745 (N.Y. 1976) (“the requirements of procedural due process must be met before a State can exclude a person from practicing law.” (quoting *Willner v. Committee on Character*, 373 U.S. 96, 102 (1963))).
116. I was also informally told that the minority dissent was not based on doubts about my character stemming from that refusal, but on the view that the Committees could not issue its recommendation until the Appellate Division had decided whether Question 21 was proper and whether I was required to answer the question.
ter Committees' decision, and had no word from the Appellate Di-
vision that it was considering denial until the order of denial was for-
mally issued. Under these circumstances, it was simply impossible
for me fully to address the legal issues surrounding my response to
Question 21. Common sense suggests that it was equally impossible
for the Appellate Division fairly to determine whether my objections
were made in good faith, or were merely obstructionist.

With no opportunity to argue against denial of my application
before the Appellate Division issued its order, I decided to exercise
the only remaining procedural safeguard—review of the Appellate
Division's order by the Court of Appeals. While the Court of Ap-
peals has ultimate authority over bar admissions, and the Court has
taken appeals from a number of bar admission denials, there is no
mechanism in the laws or rules regulating admission procedures for
appeal of adverse admission decisions in the Appellate Division. In-
stead, like any other petitioner to the Court, I had to satisfy the
often complex procedural requirements which limit the appealability
cases to the Court of Appeals.

First, with a few exceptions not relevant here, an appeal to the
Court of Appeals can only be made from a "final" determination of a
lower court. In addition, I had to establish that the Court of Ap-
peals had statutory jurisdiction to hear the appeal; that the legal

117. The failure of the Committees or the Appellate Division to warn me that my re-
sponse to Question 21 might be cause for denial may also have violated due process. See
Konigsberg v. State Bar, 353 U.S. 252, 261 (1957) ("Serious questions of elemental fair-
ness would be raised if the Committee had excluded [the petitioner] simply because he
failed to answer questions without first explicitly warning him that he could be barred for
this reason alone."); Konigsberg v. State Bar, 365 U.S. 36, 49 (1961) (noting that the bar
committee had expressly warned the petitioner that he could be denied admission). Of
course, while I was aware that a decision on my application had been delayed because of
my response and expected that the Character Committees or the Appellate Division
might demand an answer to Question 21 or a compromise alternative question, I was not
warned, and did not expect, that the Appellate Division might summarily deny my appli-
cation for not answering the question.

118. See supra note 2 (discussing the Court of Appeals' authority over admission
proceedings).

119. See NEW YORK STATE BAR ASSOCIATION, PRACTITIONER HANDBOOK FOR APPEALS
TO THE COURT OF APPEALS 10 (2d ed. 1991). While finality has no hard and fast definition,
"a judgment disposing of all the issues in an action and either rewarding relief to the
plaintiff or dismissing the complaint is obviously final." Id.

120. The Court of Appeals has jurisdiction to review an Appellate Division order if it
is appealable "as of right" or if permission is granted by either the Appellate Division or
Court of Appeals. An applicant can appeal as of right if the final determination of his or
her application for admission to the bar directly involves substantial issues of either fed-
eral or New York constitutional law. See N.Y. CIV. PRAC. L & R. § 5601 (b)(1) (McKinney
1992); In re Anonymous, 549 N.E.2d 472, 474 (N.Y. 1989) (Court of Appeals has jurisdic-
tion to review denial of bar admission "to ensur[e] that... no right of the petitioner has
been violated"); In re Goodman, 92 N.E. 211 (N.Y. 1910). The difficulty may lie in convinc-
issues raised on appeal had been preserved;\textsuperscript{121} and that there were no issues of fact.\textsuperscript{122} In particular, I had to demonstrate that there were no questions of fact regarding my good character or qualifications to practice law, and that the Appellate Division's denial was based solely on my assertion of constitutional rights.\textsuperscript{123} Finally, I had to demonstrate that the Appellate Division's decision was not discretionary, a particularly problematic procedural hurdle considering that the rules of the Court of Appeals vest the Appellate Division with discretion in determining bar applications.\textsuperscript{124} Failure adequately to plead any of these procedural requirements is likely to foreclose appeal.

\textsuperscript{121} See, e.g., Telaro v. Telaro, 255 N.E.2d 158, 159-61 (N.Y. 1969).
\textsuperscript{122} See, e.g., Lue v. English, 376 N.E.2d 201 (N.Y. 1978); N.Y. CIV. PRAC. L & R. § 5501(b) (Consol. 1978) (limiting Court of Appeals review, in virtually all cases, to questions of law).

123. As noted, I had received a favorable admission recommendation from the Committees on Character and Fitness, and therefore argued that there were no issues about my character and that I was "entitled to admission" under N.Y. CIV. PRAC. L & R. § 9401 (Consol. 1978). One obstacle for me to overcome, however, was the fact that the Appellate Division, although it did not dispute the Committees' findings with respect to my character and qualifications, nevertheless characterized its decision as a "finding." See In re Fieman, No. 6193N (N.Y. App. Div. 1992). But even when a court purports to base its decision on a "finding" or factual determination, review by the Court of Appeals is still possible on the ground that the purported finding is not factual but rather an error of law. See HENRY COHEN & ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS 471 (1992) [hereinafter COHEN & KARGER] ("the court below cannot convert a conclusion of law into a question of fact by so labeling it").

Moreover, even if there was a factual issue underlying the Appellate Division's order, the Court of Appeals has authority to review denial of bar admission "to ensure[ ] . . . that there is evidence to sustain the decision of the Appellate Division." In re Anonymous, 549 N.E.2d at 474 (N.Y. 1989). See also In re Goodman, 92 N.E. 211 (N.Y. 1910) (with respect to attorney disbarment); COHEN & KARGER, supra at 452 (in disbarment proceedings, the Court of Appeals is entitled to "review any question of law on which the Appellate Division's decision is shown to have turned"); In re Kaufman, 157 N.E. 730, 732-34 (N.Y. 1927).

124. See N.Y. RULES OF COURT §§ 520.10(a), 520.10(c) (McKinney 1992) (providing that the Appellate Division is entitled to condition admission to the Bar on such "procedures for ascertaining the moral character and general fitness of applicants as it may deem proper," and to determine that an "applicant possesses the good moral character and general fitness requisite for an attorney"). See generally DAVID D. SIEGEL, NEW YORK CIVIL PRACTICE, 822-24 (2d ed. 1992) (discussing reviewability in the Court of Appeals of discretionary lower court decisions).

The Appellate Division, however, has neither the discretion to render an admission decision based on an error of constitutional law nor to exercise its authority "on the basis of plainly impermissible considerations." Barasch v. Micucci, 404 N.E.2d 1275, 1277 (N.Y. 1980).
Confronted with this procedural gauntlet, and under the pressure of professional considerations, I ultimately withdrew my appeal to the Court of Appeals, renewed my application in the Appellate Division with an answer to Question 21, and was promptly admitted to the bar. There is no question that in doing so I compromised my strongly-held belief that the question is improper. Unfortunately, the lack of adequate procedures within the admission process for pre-denial hearings and for review of admission denials not only enhances the vulnerability of bar applicants to arbitrary governmental action based on Question 21, but makes it likely that Question 21 will go unchallenged.

CONCLUSION

As one court has stated, "The right to practice law, or to engage in an occupation requiring a State license, must not be predicated upon the relinquishment of constitutional rights." Yet applicants for admission to the New York bar routinely must choose between answering Question 21 and relinquishing their First Amendment rights to be free from unwarranted state investigation or sanction of speech and association, and practicing law in New York. While appeal to the Court of Appeals is a possible recourse, the length and uncertainty of the procedures for obtaining review in the Court of Appeals make it unlikely that bar applicants will appeal an adverse admission decision based on Question 21. This enforced election not only compromises the constitutional rights of bar applicants, but by demanding that applicants accept unconstitutional state investigation of their own conduct, Question 21 undermines the very purpose of the bar admission process of ensuring that attorneys will be sensitive to constitutional issues and practice law conscientiously.

Plainly, the New York Legislature, the Court of Appeals, or the Appellate Division should change the admission application or the rules of admission. The admission application could be amended to include the requisite specific intent element. In other words, the question approved in Wadmond can be reinstated. Alternatively, the Judiciary Law, the rules of the Court of Appeals, or the rules of the

125. See John R. Starrs, Considerations on Determination of Good Moral Character, 18 U. DET. L.J. 195, 216 n.57 (1955) (for a commentary on the potential delay and frustrations of seeking appellate review of adverse bar admission decisions).
127. Further, any examination intended to determine the fitness of bar applicants to practice law and uphold the constitution which contains a question which is unconstitutional is unlikely to foster respect for the legal institutions responsible for the admission process. After all, far from setting an example of conscientious attention to constitutional requirements, Question 21 demonstrates disregard for the Supreme Court's First Amendment precedents by these institutions.
Appellate Division departments could be amended to limit the use of information elicited through Question 21, effectively precluding the Character Committees and Appellate Division from drawing any adverse inference about an applicant's fitness to practice law from knowing membership in an organization, regardless of the views it advocates. Admission regulations would need to provide expressly that the information could be used only as a preliminary to further inquiry about the applicant's specific intent while a member of the organization. Coupled with provisions for a formal hearing prior to denial, this might be sufficient to satisfy constitutional requirements.

Both of these remedies, while perhaps satisfying the letter of the controlling First Amendment and due process authority, are nevertheless unsatisfactory when viewed in light of the spirit and import of those constitutional guarantees. Ideally, questions about advocacy and past associations should be eliminated entirely from the admission process. Of course, illegal conduct by a prospective attorney is a legitimate state concern. That concern, however, is best met by considering whether an applicant for admission has ever been convicted of a crime or successfully sued civilly. Even when limited to investigating an applicant's specific intent, questions about advocacy and prior associations allow character committees to probe protected areas of political belief and expression. And while a state is required to justify denial of an application based on political belief or action with evidence of specific intent, it is easy to imagine various pretexts available to state officials for denying an application because they disapprove of the applicant's political views, even though those views are constitutionally protected. Where the procedure for review of bar admission decisions may be protracted and unpredictable, as in New York, standards for admission should be far more carefully defined than even *Wadmond* requires.

For these reasons, Question 21 should be removed from the New York application for admission to the bar, and all similar inquiries into an applicant's exercise of First Amendment rights should give way to more tolerant practices than those rooted in the era of Senator Joseph McCarthy.