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Constitutional Law - Attorney's Loyalty Fitness

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Plaintiff-law students challenged, primarily on first and fourteenth amendment vagueness and overbreadth grounds, New York's system for screening bar applicants. New York statutes and rules require generally that the defendants (appellate division of the state supreme court and, preliminarily, committees on character and fitness) ". . . be satisfied that [an applicant] possesses the character and general fitness requisite for an attorney . . . ." Specifically, however, the committees require affidavits from two acquaintances of the applicant and the latter's completion of a questionnaire, followed by a personal interview. Finally, each applicant must swear or affirm that he will support the constitutions of the United States and the state of New York. Rule 9406 of the New York Civil Practice Law reflects these requirements in directing the committees not to certify an applicant for admission ". . . unless he shall furnish satisfactory proof . . . that he believes in the form of the government of the United States and is loyal to such government." Two questions in the applicant's questionnaire ask whether (a) the applicant had ever helped organize or had joined any organization known by him to advocate unlawful overthrow of the United States or any state government, with specific intent on the applicant's part to further such an objective, and (b) whether the applicant could take the supportive loyalty oath conscientiously and without mental reservation. Plaintiffs attacked this procedure as invalid on its face and as applied, not because of any unjustifiable denial of bar admission but on the ground that the screening system works a "chilling effect" upon the exercise of law students' free speech, belief, and association. The three-judge United States District Court found certain minor imperfections in the questionnaire, but otherwise sustained the screening statutes and rules as valid. On appeal to the United States Supreme Court, *affirmed* (5-4). The Court held (1) that Rule 9406, as consistently and narrowly interpreted by the New York judges and committees, imposed on plaintiffs no impermissible burden of proof or invalid scope of inquiry into their political beliefs, requiring no more than a willingness to take the constitutional oath in good faith; and (2) that the questionnaire inquiries into an applicant's organizational activity and scienter are "precisely tailored to conform to the relevant decisions of this Court." *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971).

Clearly a state may require bar applicants to possess the good "character and general fitness requisite for an attorney and counsellor-at-law."[1] Presently every state, as well as the District of Columbia, requires "good moral character" or something comparable.[2] The United States Supreme Court requires of applicants for admission to its bar that "their private and professional characters shall appear to be good."[3] Also there is no remaining doubt that an applicant may constitutionally be required to state his allegiance to the United States and state constitutions.[4] The Court, however, has invalidated a number of loyalty oaths going beyond a simple affirmation demanding, in effect, complete freedom from subversive belief, association, and activity.[5] In *Wadmond* there was little doubt of the oath's validity *per se*.[6] The main question litigated in *Wadmond* was the validity of Rule 9406[7] and two related questions on the required applicant questionnaire.[8] The Court conceded that Rule 9406 on its face raised substantial constitutional ques-

1. Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957). The New Mexico Bar refused to permit an applicant to take the bar examination on the grounds that the applicant had not shown "good moral character." Mr. Justice Black, writing for the court which determined the applicant's former Communist Party membership insufficient to show lack of good moral character, said, "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment. [citations] A State can require high standards of qualifications, 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." *See also* Note, *The New Mexico Bar Admission Loyalty Oath: A Study in Unconstitutionality*, 9 NAT RES. J. 248 (1969).

2. *See generally* 5 1971 MARTINDALE-HUBBELL LAW DIRECTORY (103d ed. 1970).

3. U.S. SUP. CT. RULE 5 (1).

4. Hosack v. Smiley, 390 U.S. 744 (1968); Knight v. Board of Regents, 390 U.S. 36 (1968).

5. Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Baggett v. Bullitt, 377 U.S. 360 (1964); Elfbrandt v. Russell, 384 U.S. 11 (1966); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

6. "I do solemnly swear (or affirm) 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 the office of . . . , according to the best of my ability." N.Y. CONST., art. XIII, § 1; N.Y. JUDICIARY LAW § 466 (McKinney 1968).

7. N.Y. CIV. PRAC. LAW AND RULES, Rule 9406 (McKinney 1963).

8. The defendants had already, both before and after commencement of this litigation, eliminated or revised certain questions to which plaintiffs had originally raised objections. Other questions were ordered revised or eliminated by the district court.

tions both as to the burden of proof permissible under the due process clause of the fourteenth amendment, and as to the permissible scope of inquiry into an applicant's political beliefs under the first and fourteenth. In *Speiser v. Randall*[9] it was held as a matter of procedural due process that a state may not even place on an applicant for tax exemption the burden of proving that he has not engaged in criminal activity. The Court in *Wadmond* concluded however that there was no true burden of proof, in the sense of a burden persuasion, imposed upon the applicant, but only the lighter burden of going forward with the evidence which could be satisfied by his answering two questions on the questionnaire.

In *Elfbrandt v. Russell*[10], the Court declared that a statute which, touches the protected rights of the first and fourth amendments must be narrowly drawn. Legislative goals cannot be pursued by means which broadly stifle fundamental personal liberties. *NAACP v. Button*[11] declared "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions." The dangers of this "chilling effect" upon the exercise of vital first amendment rights must be guarded against by sensitive legislation which clearly informs as to what is being proscribed. Without appearing to disturb these precedents however, the Court in *Wadmond*, held the screening inquiries proper. Accepting defendants' narrow construction, regardless of the meaning that might have been given Rule 9406 and the key questionnaire inquiries by the Court itself, the Court reasoned that if the defendants are regarded as state courts, the United States Supreme Court was bound by the defendants' construction; and if the defendants are viewed as state administrative agencies charged with enforcement and construction of the Rule, the defendants' interpretation is at least entitled to "respectful consideration."[12]

As urged in the dissents of both Mr. Justice Marshall and

9. 357 U.S. 513 (1958).
10. 384 U.S. 11 (1966).
11. 371 U.S. 415, 433 (1963).
12. *See* Baggett v. Bullitt, 377 U.S. 360, 375 (1964); Kingsley Int. Pic. Corp. v. Regents of N.Y.U., 360 U.S. 684, 688 (1959); Speiser v. Randall, 357 U.S. 513, 519 (1958); Fox v. Standard Oil Co., 294 U.S. 87, 96 (1935). The majority accepted the narrow construction of Rule 9406 offered by the defendants' (the Committees on Character and Fitness and their members and two appellate divisions and their judges). *But see* Justice Marshall's dissent where he argues that prior to the *Wadmond* litigation it appears that defendants thought it was their duty to make virtually unlimited inquiry into an applicant's as-

Mr. Justice Black, this rationale appears to conflict with *Bond v. Floyd*,[13] where the Court refused to allow a majority of state legislators to test the sincerity with which another duly-elected legislator can swear to uphold the Constitution. The majority, however, declared that "at the most, the Rule as authoritatively interpreted . . . performs only the function of ascertaining that an applicant is not one who swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath,"[14] and that such inquiry falls into the area left permissible by *Bond*.

Plaintiffs challenged the questionnaire as requiring disclosure of acts and associations beyond the state's constitutionally permissible scope of inquiry. Only two numbered questions[15] were in dispute:

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

The Court refused plaintiffs' argument and declared that both questions were legitimate inquiries.

The majority of the Court has recently been more restric-

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sociational, political, and journalistic activities. *See also* Judge Motley's dissenting opinion in the *Wadmond* litigation in the lower court, Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117, 137-139 (S.D.N.Y. 1969).

13. 385 U.S. 116 (1966).

14. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 163 (1971).

15. The lower court had ordered all other questions revised or eliminated and only two questions (both revised by the district court) remained in dispute. *See* Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 164 (1971).

tive about the permissible scope and coverage of oath and investigative provisions.[16] This view is reflected in *Baird v. State Bar of Arizona*[17] and *In Re Stolar*,[18] two bar admission denial cases decided the same day as the principal case. In *Baird* and *Stolar*, the Court refused to allow denials of admission to practice law for refusals to answer questions relating to applicants' beliefs about government and their affiliations with organizations suspected of advocating unlawful overthrow, on the ground that such denials contravene first amendment protections. In *Baird*, Mr. Justice Black, writing for the majority with three Justices concurring and one Justice concurring in the result, declared "[t]he First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because . . . he holds certain beliefs."[19] When a state seeks to inquire about an individual's beliefs and associations, a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest. 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.[20] *Prima facie*, the disputed provisions in *Wadmond* seem replete with the same defects which were fatal to the questionnaires in *Baird* and *Stolar*. Two differences, however, were apparently decisive. The majority in *Wadmond*, unlike *Baird* and *Stolar*, emphasized that no person before the Court had actually been refused admission to the New York Bar. Secondly, defendants in *Wadmond* proffered, in defense of New York's screening process, evidence of a restrictive interpretation and application of the broadly-drawn admission criteria rather than an attempt to

16. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). *See* Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480 (1953); Countryman, *Loyalty Tests for Lawyers*, 13 LAW. GUILD REV. 149 (1953); Frankel, *Law and Loyalty*, 37 IOWA L. REV. 153 (1951); Koenigsberg and Stavis, *Test Oaths: Henry VIII to the American Bar Association*, 11 LAW. GUILD REV. 111 (1951); Note, *The New Mexico Bar Admission Loyalty Oath: A Study in Unconstitutionality*, 9 NAT. RES. J. 248 (1969); Comment, *Constitutional Law—Loyalty Oaths*, 20 S. CAL. L. REV. 333 (1968); Comment, *California's Application Forms for Admission to Practice Law and the First Amendment*, 55 CALIF. L. REV. 407 (1967).

17. 401 U.S. 1 (1971).

18. 401 U.S. 23 (1971).

19. 401 U.S. 1, 6 (1971).

20. *Ibid.*

justify the statutes on their face.

One may reasonably conclude that a state may escape invalidation of a statute which apparently exceeds permissible Bill of Rights limits if the state shows that the statute does not operatively mean what it appears to say, but rather requires only an allegiance to the Constitution, and secondly, that a state may properly make inquiries to determine the oath affirmant's sincerity and good faith.

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