CONSTITUTIONAL LAW: FIRST AMENDMENT LIMITATIONS ON STATE REGULATION OF THE LEGAL PROFESSION—LITIGATION AS A PROTECTED FORM OF EXPRESSION

LITIGATION to enforce civil rights, carried on in an environment where other meaningful opportunities for political expression have been curtailed, has been held to be a form of expression protected by the first and fourteenth amendments in a recent decision of the United States Supreme Court. In *NAACP v. Button*,[1] the Court held unconstitutional a Virginia anti-solicitation statute which was construed by a state court to prohibit the NAACP from advising prospective school segregation litigants to seek the assistance of any particular attorney.

In 1956, the Virginia legislature adopted a series of provisions designed to augment its statutory regulation of the practice of law. Included therein was chapter 33,[2] which made unlawful the solicitation of legal business for an attorney or for an organization which retains an attorney in connection with an action to which the organization is not a party and in which it has no pecuniary right or liability. The statute imposed criminal penalties on both the lawyer who accepted and the agent who solicited such legal business.[3] The NAACP, fearful of possible prosecution as an agent engaged in unlawful solicitation, sought a judgment declaring the statute inapplicable to it or, alternatively, unconstitutional under the fourteenth amendment.[4] Affirming a lower court decision, the Virginia

---

[1] 371 U.S. 415 (1963).

[2] VA. CODE ANN. § 54-79 (1958), which codifies chapter 33, provides that "It shall be unlawful for any person, corporation, partnership or association to act as a runner or capper . . . to solicit any business for an attorney at law or such person, partnership, corporation, organization or association ['which employs, retains, or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability' (§ 54-78)] . . . ."

[3] The statute provides for a fine of not less than one hundred nor more than five hundred dollars, or imprisonment for not less than one nor more than six months, or both. VA. CODE ANN. § 54-82 (1958). An additional provision allows the Virginia Attorney-General, or any party threatened with injury, to seek injunctive relief against solicitation. VA. CODE ANN. § 54-83.1 (1958).

[4] The instant case, involving chapter 33, has a long and rather complicated history, owing to the fact that it grew out of a broad attempt by the NAACP to test the constitutionality of other sections of the Virginia Code pertaining to the solicitation of legal business. The case had its origin in a federal district court where the NAACP

Supreme Court of Appeals held that certain activities of the NAACP fell within the statutory prohibitions and that the state could constitutionally curtail such activities.[5] In upholding the constitutionality of the statute, the Virginia high court indicated that the statute did not prevent the NAACP from informing persons of their legal rights, advising them to assert such rights through litigation, or even contributing funds to individuals to aid them in financing suits. As construed by the court, the statute prohibited only NAACP solicitation of clients for particular attorneys. However, the Virginia court failed to establish clearly whether the statute prohibited the NAACP only from referring litigants to attorneys connected in some manner with the Association or whether, more generally, it imposed a blanket prohibition against referral to any specific attorney.[6]

On certiorari, the United States Supreme Court concluded that a fair reading of the statute, as construed by the state court, seemed to prohibit the NAACP from referring litigants, not only to its own attorneys or attorneys associated with it, but to any particular attorney whatever. In that context, the Court held that the statute violated the petitioner's constitutional rights. Mr. Justice Brennan, delivering the opinion of the Court,[7] emphasized that the litigation

and the NAACP Legal Defense and Education Fund, Inc., sought to enjoin enforcement of chapters 31, 32, 33, 35, and 36 of the 1956 session laws of Virginia. In NAACP v. Patty, 159 F. Supp. 503 (E.D. Va. 1958), the court held unconstitutional chapters 31 and 32, requiring the NAACP and the Defense Fund to register with the state, and chapter 35, defining the crime of harratry. The court refused to pass on the constitutionality of chapters 33 or 36, the latter prohibiting advocacy of suits against the state, until they had been construed by a state court. On appeal, *sub nom.* Harrison v. NAACP, 360 U.S. 167 (1959), the United States Supreme Court reversed, holding that the federal court could not pass upon the constitutionality of any of the statutes until they had been construed by a state court. The NAACP and the Defense Fund then sought a declaratory judgment from the state courts. A Virginia lower court invalidated all but chapters 33 and 36. In NAACP v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1960), the Virginia Supreme Court of Appeals declared chapter 36 unconstitutional, but upheld chapter 33 as constitutional. The Supreme Court then granted the instant petition for certiorari. NAACP v. Harrison, 365 U.S. 842 (1961).

[5] NAACP v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1960), *rev'd sub nom.* NAACP v. Button, 371 U.S. 415 (1963).

[6] "[T]he appellants, or those associated with them, shall not solicit legal business for their attorneys or any particular attorneys . . . ." *Id.* at 165, 116 S.E.2d at 72.

[7] 371 U.S. at 417. Justices Douglas and White wrote separate opinions. Mr. Justice Douglas, while concurring in the decision of the Court, submitted that the Virginia statute was also invalid under the equal protection clause of the fourteenth amendment as a discriminatory state law enacted specifically for the purpose of curtailing NAACP activities. *Id.* at 445. Mr. Justice White, concurring in part and dissenting in part, expressed concern that the tenor of the opinion of the Court indicated potential hostility to a hypothetical statute, more narrowly drawn to proscribe only NAACP interference with the actual control and direction of litigation. *Id.* at 447.

of civil rights is a form of expression protected from undue state infringement by the first amendment. While the rights guaranteed by the first amendment are not absolute, the Court determined that the state had failed to show the type of legitimate interest that would justify proscribing such guarantees, especially where, as here, litigation might well be the only effective avenue for expression available to a minority. Of special concern to the Court was the breadth and vagueness of the language employed in the statute, which, it concluded, made it hazardous for an attorney or the NAACP to attempt even the sort of preliminary advice and support that the Virginia court's interpretation of the statute purported to allow.

Mr. Justice Harlan, joined by Justices Clark and Stewart, dissented[8] on the ground that a fair reading of the statute as interpreted by the Virginia Supreme Court of Appeals prohibited only NAACP referral of litigants to attorneys associated in some way with the NAACP. The dissenters concluded that the state had demonstrated such a valid regulatory interest as would justify the limited intrusion on petitioner's first amendment rights resultant from such an enactment.

State regulation of the legal profession, either through court-adopted rules or legislative enactment, traditionally has been regarded as within the valid exercise of state power.[9] Sound policy reasons, posited on the need for competence and high ethical standards in a profession which so greatly affects the public interest, sustain the need for such regulations.[10] One of the most prevalent of the regulations adopted by the states is that against the solicitation of legal business, either by the lawyer himself or by an agent. Anti-solicitation regulations have been rationalized on various grounds, primarily on the theory that the use of judicial machinery should be reserved exclusively for the use of those who feel sufficiently damaged to institute litigation on their own volition.[11]

---

[8] *Id.* at 448.

[9] See Lathrop v. Donohue, 367 U.S. 820 (1961) (establishment of integrated bar in state); Cohen v. Hurley, 366 U.S. 117 (1961) (state regulation of professional conduct of lawyers); *Symposium—The Practice of Law,* 107 U. PA. L. REV. 387 (1959).

[10] See generally *Symposium—The Practice of Law, supra* note 9.

[11] See 3 RACE REL. L. REP. 1257, 1263 (1958); Comment, 25 U. CHI. L. REV. 674, 676 (1958). The commentator in the latter work concludes, however, that "if individual rights be emphasized and the theory be adopted that the function of the courts is to enforce *all* valid claims, then stirring up litigation must be considered a desirable activity." *Id.* at 676-77.

The modern rules against solicitation have grown out of the common law doctrines of barratry, champerty and maintenance, which made such solicitation criminal conduct.[12] The historical development of the common law crimes indicates that they were directed primarily toward curbing the malicious incitement of litigation and the practice of stirring up litigation with the prospect of deriving private gain from another's legal action.[13]

While states are free to exercise considerable discretion in regulating the legal profession, including the practices of solicitation, such regulation is not without constitutional restrictions. The Supreme Court, for example, has held that the states' power to regulate the legal profession is subject to procedural due process guaranteed by the fourteenth amendment.[14] Moreover, a long line

[12] "Barratry is the crime or offense of frequently stirring up suits and quarrels between individuals, either at law or otherwise." 9 C.J.S. *Barratry* § 1 (1938).

"Champerty consists of an agreement whereby a person without interest in another's suit undertakes to carry it on at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.

"Maintenance exists when a person without interest in a suit officiously intermeddles therein by assisting either party with money or otherwise to prosecute or defend it." 14 C.J.S. *Champerty and Maintenance* § 1 (1939).

[13] The common law doctrines had their formative development in the medieval period as a means of preventing corruption of the judicial machinery and the oppression of commoners by feudal lords. See Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48 (1935). The early law developed with a strictness which prohibited any assistance at all, monetary or otherwise, by a person with no interest in an action. The doctrine at one time reached a point where it prohibited volunteering evidence without first being subpoenaed for such a purpose. PERKINS, CRIMINAL LAW 448, 449 (1957); Master v. Miller, 4 Term R. 320, 340, 100 Eng. Rep. 1042, 1053 (K.B. 1791). With the passing of the feudal system and the conditions which gave rise to the strict application of the early doctrines, the older harshness of the doctrines was relaxed to a considerable extent. One manifestation of this relaxation was the exceptions which permitted the giving of assistance where there was a family relationship or where the aid was given to an indigent person. See, *e.g.*, Wallach v. Rabinowitz, 185 Wis. 115, 200 N.W. 646 (1924). The main development since the demise of the feudal period has been to relax the strict severity of the doctrines, but to preserve them through codification for use where the evils for which they were intended as remedies make themselves apparent. "Modern authority . . . has introduced the idea that maintenance is not committed unless something is done which tends to obstruct the course of justice, or is against good public policy in tending to promote unnecessary litigation, and is performed under a bad motive." 10 AM. JUR. *Champerty and Maintenance* § 1 (1937). Thus modern anti-solicitation statutes emphasize the general feeling that solicitation is likely to have a detrimental effect on the attorney-client relationship, on the public in general, and on the profession. Undue emphasis on pecuniary gain, the possibility of stirring up fraudulent claims, and, where a lay intermediary is used for purposes of solicitation, the possible conflict between loyalty to client and loyalty to intermediary, are considered the main problems to be guarded against. See generally Note, 7 VAND. L. REV. 677 (1954).

[14] Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957).

of cases has gradually absorbed into the due process clause of the fourteenth the freedoms guaranteed by the first amendment, including those of expression, association and petition involved in the *Button* case.[15] Thus there is presented the potential for conflict between a state attempt to prohibit solicitation under its substantive power to regulate the legal profession and the protected rights of political expression and association, where the exercise of such rights takes the form of litigation. This potential for conflict was increased by *Brown v. Board of Education*[16] in 1954, a decision which provided the legal stimulus for increased NAACP activity in the field of assisting individuals in the institution of suits to combat racial discrimination. In response to this activity, seven Southern states, including Virginia, enacted statutes redefining and broadening

In *Schware* petitioner had been denied permission to take the state bar examination on the ground that he did not have the good moral character required by statute of applicants seeking to take the examination. The State Board of Bar Examiners based its conclusion on petitioner's own admission that he had twice been arrested, though not convicted, for criminal syndicalism and violating the Neutrality Act of 1940, and on the fact that petitioner had been a member of the Communist Party for eight years, some fifteen years prior to his petition for permission to take the state bar examination. On certiorari, the United States Supreme Court concluded that there was no evidence which rationally justified a finding that petitioner was morally unqualified to take the examination and that disqualification violated petitioner's right to due process under the fourteenth amendment.

Konigsberg involved a candidate for admission to the bar who had been denied membership because he had failed to prove that he was of good moral character and that he did not advocate overthrow of the government by force and violence. Petitioner refused to answer questions asked of him in regard to his political views or associations, except to state that he did not advocate the overthrow of the government by force. Denial of admission to the bar was based on evidence that petitioner had attended Communist Party meetings many years before and on editorials he had written criticizing the Supreme Court and other public bodies. On certiorari, the United States Supreme Court concluded that the evidence presented did not warrant denial of admission to the bar for the reasons advanced by the state, and, therefore, such denial violated the due process clause of the fourteenth amendment.

[15] The first indication of such incorporation of first amendment rights into the due process clause of the fourteenth was in Gitlow v. New York, 268 U.S. 652, 666 (1925): "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

The first actual use of the first amendment to protect freedom of speech from state intrusion was in Fiske v. Kansas, 274 U.S. 380 (1927). Thereafter followed the full incorporation of the first into the fourteenth amendment. *E.g.*, Near v. Minnesota, 283 U.S. 697 (1931) (freedom of the press); De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of religion); Shelton v. Tucker, 364 U.S. 479 (1960) (freedom of association); Edwards v. South Carolina, 372 U.S. 229 (1963) (freedom to petition for redress of grievances).

[16] 347 U.S. 483 (1954).

solicitation offenses.[17] Though stated in general terms, the statutes were obviously enacted to exact penalties against organizations such as the NAACP and attorneys cooperating with them.[18]

First amendment cases present the Supreme Court with certain profound and difficult constitutional questions. The difficulty stems from a growing awareness that the guarantees embodied in the first amendment are fundamental to a democratic society,[19] and even, perhaps, that these rights enjoy a preferred position therein.[20] In *Button,* this primacy of first amendment rights resulted in the Court's rejection of the presumption of constitutionality usually afforded legislation not affecting these freedoms.[21] On the other hand, the Court has demonstrated a belief that the exercise of reserved powers by the states is necessary to good social order and must be validated even where there is a danger of some infringement of first amendment rights. In situations where conflict arises between

[17] ARK. STAT. ANN. §§ 41-703 to -712 (Supp. 1961); FLA. STAT. §§ 877.01-.02 (1961); GA. CODE ANN. §§ 26-4701, -4703 (Supp. 1961); MISS. CODE ANN. §§ 2049-01 to -08 (1956); S.C. CODE ANN. §§ 16-521 to -525 (1962); TENN. CODE ANN. §§ 39-3405 to -3410 (Supp. 1962); VA. CODE ANN. §§ 54-74, -78, -79 (1958).

[18] 3 RACE REL. REP. 1257 (1958).

[19] "The fundamental concept of liberty embodied in [the fourteenth] . . . Amendment embraces the liberties guaranteed by the First Amendment." Cantwell v. Connecticut, *supra* note 15, at 303 (1940).

"[T]his Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recoguized to be of this 'fundamental nature' and therefore immune from state invasion by the Fourteenth, or some part of it, are the First Amendment freedoms of speech, press, religion, assembly, association, and petition for redress of grievances." Gideon v. Wainwright, 372 U.S. 335 (1963) (dictum).

[20] The possibility that the freedoms embodied in the first amendment may stand on a higher plane than other substantive provisions in the Constitution was first indicated by Mr. Justice Stone in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938): "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . whether prejudice against . . . minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Several cases quite clearly indicate a preferred position approach: Saia v. New York, 334 U.S. 558 (1948); Follett v. McCormick, 321 U.S. 573 (1944); Prince v. Massachusetts, 321 U.S. 158 (1944). The Court in the instant case referred to the rights protected by the first amendment as "our most precious freedoms." 371 U.S. at 438. *But see* Breard v. Alexandria, 341 U.S. 622, 650 (1951); Kovacs v. Cooper, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring), indicating that the Supreme Court never did or, at least, no longer does adhere to a preferred position view.

[21] See, *e.g.,* Mugler v. Kansas, 123 U.S. 623, 661 (1887).

state regulations and first amendment freedoms, the Court's usual, though not exclusive, approach is to attempt to balance the competing public and individual interests.[22] Thus, despite very definite first amendment ramifications, the Court has made it clear that the states may properly police their streets and keep them open to traffic,[23] prevent fraud on the part of solicitors for charity by requiring them to identify themselves,[24] and forbid a parent to allow a child to distribute literature.[25] Where the question of state regulation of admission to the practice of law is involved, the Court has upheld state denial of admission to the bar because of an applicant's refusal to answer questions concerning certain associational activities, where the questions were deemed essential to an inquiry into the fitness of a candidate for the bar. While recognizing that the first amendment encompasses the right of association and the right to remain silent, the Court nevertheless has permitted state bar boards to disqualify applicants on the ground that failure to cooperate made it impossible for the bar examiners to determine the applicants' fitness for the practice of law.[26]

Though it is arguable that the Court in *Button* did not resort to a balancing test at all in invalidating the legislation in question,[27] balancing would seem an inevitable concomitant of the Court's re-

[22] See, *e.g.*, *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); Uphaus v. Wyman, 360 U.S. 72 (1959). Mr. Justice Black has for many years been the leading opponent of the balancing test as applied to first amendment cases. See, *e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 57 (1961) (Black, J., dissenting). See also Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

[23] Cox v. New Hampshire, 312 U.S. 569 (1941).

[24] Cantwell v. Connecticut, *supra* note 15.

[25] Prince v. Massachusetts, 321 U.S. 158 (1944).

[26] *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961).

[27] The problem of determining whether the Court in the instant case did balance or not arises because of considerable confusion as to the precise meaning of that term and its applicability to a particular set of facts. The balancing test, as originally espoused in Schneider v. State, 308 U.S. 147 (1939), was to be applied where a general regulatory statute, having its principle effect on conduct, also had the incidental effect of depriving individuals or groups of a means of communicating with the public. In such a case, the approach would be to weigh the interests of the state in regulating such conduct against the magnitude of the effect that the regulation has on proscribing first amendment rights. Under such a view of the balancing test, it could be argued that balancing was inapplicable in *Button*, because the statute involved therein, while superficially directed at the regulation of conduct, was primarily directed at curtailing a means of communication. The difficulty with such a conclusion, however, is that more recent developments in the balancing doctrine indicate that the Court is willing to validate even those statutes aimed primarily at the regulation of speech, if the public interest to be served thereby outweighs the detrimental effect on first amendment liberties. See Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

luctance to interfere with state regulation of the legal profession. The Court has shown a marked proclivity toward careful examination of the record in determining where the balance shall be struck in a particular case.[28] Thus in *Button,* careful scrutiny was given to the historical development of the type of statute being reviewed, and it appears the Court's decision was determined to a marked degree by its conclusion that the record in the instant case failed to manifest the presence of the type of evils traditionally remedied by anti-solicitation statutes. The Court's approach in this respect was not dissimilar to that in the case of *NAACP v. Alabama,*[29] where it invalidated a state's use of a technical statute designed for controlling business enterprises, where applied to limit the activities of the Association in seeking to advance minority interests.

The Court also displayed notable concern and sensitivity as to the necessary effect of the Virginia enactment. There was no hesitation in recognizing that the modification of anti-solicitation statutes in Virginia and several other Southern states[30] followed closely on the heels of the provocative *Brown* decision, which gave fresh impetus to the institution of civil rights litigation. Significantly, cognizance was taken of the fact that the statute would be applied in a situation where the minority group's opportunity for effective political expression and petition for redress of grievances of other means already had been effectively stymied. The likely result from such a composite of facts weighed heavily on the Court: If the NAACP were not allowed to provide the impetus in instituting

[28] Edwards v. South Carolina, 372 U.S. 229 (1963). "Many times in the past this Court has said that despite findings below, we will examine the evidence for ourselves to ascertain whether federally protected rights have been denied .... Even a partial abandonment of this rule makes a dark day for civil liberties in our nation." Feiner v. New York, 340 U.S. 315, 322-23 (1951) (Black, J., dissenting).

[29] 357 U.S. 449 (1958). This case arose when the state attempted to enjoin the NAACP from conducting further activities within the state. It was contended that the NAACP was not entitled to do business in the state because of failure to comply with a statutory requirement that foreign corporations file their corporate charters with the Secretary of State and designate a place of business and agent to receive process. A state court then restained the NAACP from further activity, and required the Association to produce the names and addresses of all its members and agents within the state. The NAACP was willing to disclose the names of its officers and employees in the state, but refused to disclose the names of ordinary members, contending that such refusal was privileged under the first and fourteenth amendments. On certiorari, the Court held that required disclosure of rank-and-file members violated constitutional guarantees of speech and association and that the state had demonstrated no interest sufficient to justify the deterrent effect disclosure would have on association.

[30] See note 17 *supra.*

claims for redress in this area of the law, such claims would quite likely never be made at all, particularly in view of the reluctance white Southern lawyers have demonstrated in accepting such cases.[31]

In view of the emphasis placed on the record in first amendment cases,[32] the significance of the *Button* decision must be assessed primarily in light of the detailed facts of the case. At a minimum, therefore, it may be said that *Button* stands for the proposition that broadly construed statutes, applied in a context where litigation is a manifestation of political expression, will be invalidated where the dangers that the statutes were designed to combat have not been substantiated. It may well be that a more carefully drawn statute, proscribing only NAACP referral of litigants to NAACP associated lawyers, and not to any particular lawyer, would not be governed by the instant case. A showing that the NAACP actually interfered in the details of litigation after referral was made, or that there were real dangers of divided loyalty on the part of the lawyer, might result in an outcome quite different from that in the instant case.[33]

If *Button* stands on a broader basis, however, then the Court's position in recent cases,[34] upholding state denial of admission to the bar where the petitioners alleged violations of free speech by such denial, may warrant critical review. The cases involved candidates for admission to the bar who refused to answer questions pertaining to their past or present membership in the Communist Party, contending that such refusal was privileged under the first amendment. The Court held that the states' interest in requiring a full showing as to the fitness and qualifications of those seeking admission to the bar warranted the states' refusal to grant admission to a candidate

[31] 371 U.S. at 443.

[32] See note 28 *supra*.

[33] *But see* 371 U.S. at 447 (White, J., dissenting in part).

[34] *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961). After the Supreme Court's decision in the first *Konigsberg* case, *supra* note 14, the state bar examiners held further hearings on petitioner's qualifications for admission to the bar, during the course of which the petitioner was asked again about Communist Party membership. He refused to answer on the ground that the questions violated his first amendment rights of thought and expression. Petitioner was then denied admission on the ground that his refusal to answer had obstructed the efforts to ascertain his qualifications. On certiorari, the United States Supreme Court affirmed the state's decision to deny admission, concluding that a state has a legitimate interest in requiring candor from applicants for admission to the bar, and if lack of candor obstructs a full investigation into a candidate's qualifications, then the state may rightfully deny admission. Konigsberg v. State Bar, *supra*. A similar conclusion on facts substantially the same was reached in *In re* Anastaplo. *supra*.

whose refusal to disclose certain associational activities amounted to obstruction of a proper state function.

If the broad basis on which the *Button* decision rests is a willingness of the Court to examine closely a state's exercise of regulatory powers over the legal profession and determine for itself on the basis of the record whether the fundamental purpose of the regulation is to work a deprivation of constitutionally protected rights, then it would seem that the decisions in the bar admission cases are lamentably inconsistent with the outcome in *Button.* As Mr. Justice Black indicated[35] when he registered his dissents in the bar admission cases, the Court refused to look beyond the reasons given by the bar examiners to justify rejection of petitioners for admission to the bar, despite a strong indication in the record that refusal was based primarily on conjecture as to the past or present political suasion of the petitioners in those cases. The difference in approach of the Court in *Button* may indicate that the Court in the future will feel less constrained to accept at face value a state's assertion of a regulatory interest over the legal profession where there are involved possible infringements of first amendment guarantees.

[35] "[T]his record shows, beyond any shadow of a doubt, that the reason Konigsberg has been rejected is because the Committee suspects that he was at one time a member of the Communist Party.

"The majority avoids the otherwise unavoidable necessity of reversing the judgment below on that ground by simply refusing to look beyond the reason given by the [bar examiners] to justify Konigsberg's rejection." Konigsberg v. State Bar, *supra* note 34, at 59-60 (1961) (Black, J., dissenting).