The “Communist Question” Cases Reconsidered

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INTRODUCTION

In 1979 John Pushinsky—a graduate of the University of Pittsburgh School of Law—applied for admission to the West Virginia State Bar. He was surprised by one of the questions on the application, which seemed like a relic of a bygone era: "Do you knowingly belong to any organization or group which advocates the overthrow of the Government of the United States of America or the State of West Virginia by force or violence?" He marked "decline to answer," one of the choices provided. After an interview with a bar examiner in which Pushinsky explained he thought the question was unconstitutional, the state bar would ultimately insist Pushinsky answer the question "yes" or "no." The conflict would only be resolved after two days of oral argument before the West Virginia Supreme Court.[1] It is puzzling that this kind of case would arise in 1980, and that the bar would be so insistent on asking the "communist question" at a time when the public fear of communism had largely subsided. Part of the project of this paper is to solve this puzzle.

This paper focuses on the American Bar Association's (ABA) and state bar associations' responses to communism in the 1950's and beyond. In particular, it re-examines the actions the bar took and advocated for against communist ideology in the era of "McCarthyism"—approximately 1948—1957. The dominant historical narrative is that the ABA and state bar associations were merely swept up in the national hysteria of McCarthyism, and this explains the actions the bar took against communists in this period. However, the "communist question" could still pose problems for prospective bar applicants well after the hysteria of McCarthyism had passed. By looking at the bar admission cases as part of larger whole, this paper argues that the persistence of problems with communism well after the McCarthy period is indicative of the

[1] *Pushinsky v. W. Va. Bd. of Law Exam'rs*, 164 W. Va. 736, 266 S.E.2d 444 (1980).

bar engaging with a deeper legal question about whether certain political theories are incompatible with an oath to uphold the United States Constitution.

During this period, the ABA advocated for dramatic action to be taken against communists, including a nationwide loyalty oath requirement for bar membership, and pursuing disbarment of attorneys who pled the Fifth Amendment privilege against self-incrimination when questioned about communist affiliations.[2] These actions prompted a strong and largely unprecedented public dissent from within the ranks of the bar, and many—but not all—state bar associations declined to follow the ABA's lead.[3] Perhaps most dramatically, Chief Justice Earl Warren resigned his ABA membership in 1959 in large part because of the ABA's anti-communist activities.[4] This was an extraordinarily turbulent period in the ABA's history. In his book, *The American Legal Profession in Crisis: Responses and Resistance to Change*, law professor James Moliterno provides an argument representative of the majority view of these activities:

> Efforts to prevent communist infiltration of the profession had but little effect on the long-term nature of the profession. As intense as the crisis was at its peak, it has had an almost imperceptible legacy . . . The legal profession became inflamed with fear of communism as had the HUAC and McCarthy-led committees. It was if anything, more inflamed than the general public . . . [i]n this crisis, the profession fueled the fires of passionate overreaction rather than dampen them, all in the service of preserving the professional status quo from the influence of feared outsiders.[5]

From this prospective, there was nothing unique or special about the way the bar acted during the 1950's—they were no different from the myriad of groups, institutions, and individuals who reacted fearfully to the perceived threat of communism. Once everyone "came to their senses,"

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[2] *See Generally* Paul M. Kraus, *Use of the Fifth Amendment by an Attorney as Grounds for Disbarment*, 31 NOTRE DAME L. REV. 465 (1956); Mary Elizabeth Basile, Loyalty *Testing for Attorneys: When is it Necessary and Who Should Decide?* 30 CARDOZO L. REV. 1843 (2009).
[3] JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS, RESISTANCE AND RESPONSES TO CHANGE, 61 (2013).
[4] Anthony Lewis, *U.S. Bar Accepts Warren's Action*, NEW YORK TIMES, 21 February 1959.
[5] MOLITERNO, *supra* note 3, at 69.

however, the bar's interest in excluding communists was simply extinguished. Surely a large part of the bar's actions in this period can be explained as part of the general social/political fear of communism, particularly its persecution of so-called "Fifth Amendment communists" and attorneys who represented accused communists under the Smith Act. However, this account fails to explain why—unlike other groups and institutions that were swept up in McCarthyism—the "communist question" could pose issues for bar admission long after the McCarthy era had passed.

Some attention by legal historians has been paid to the "communist question" cases; however, this paper provides a unique perspective by showing that cases both before and after the McCarthy era utilized the same types of arguments employed against communists. Viewed as a whole, the "communist question" cases are part of a larger phenomenon that has manifested itself in a variety of political contexts: the bar's belief that it owes special duties to the larger legal system and thus must police its membership for certain political beliefs incompatible with the constitutional order. This belief is the primary reason we see the bar continue to inquire about "subversive" political beliefs long after the interest in asking such questions had faded elsewhere. Moreover, this paper demonstrates—for the first time—how other activities of the bar in the 1950's provide insight into both the motivations of the bar in later admission cases, and the intellectual foundation of the argument that communists and other "subversive" political ideologies should be excluded. Part I discusses the notion of lawyers as quasi-government officials or "officers" of the court, which plays an important role in motivating virtually all of the bar admission issues, as well as the first bar admission case. Part II provides some brief background on the McCarthy era and in particular attempts to highlight how seriously people of this time viewed the ideological threat of communism. Part III canvasses the debates within the

bar during the McCarthy era. Specifically, it focuses on the "loyalty oath" proposed by the ABA in 1950-51 and the apparent criticism of the Supreme Court by the bar in 1959. This will lay the groundwork for the legal questions motivating the bar admission "communist question," and demonstrate that many people both inside and outside of the bar thought the legal profession owed special duties to uphold the constitutional order. Part IV examines the "communist question" bar admission cases, including *Pushinsky v. W. Va. Bd. of Law Exam'rs*. These questions were ultimately ruled unconstitutional under the First Amendment, but what is important for this project is that the bar persisted in asking the "communist" question well after the 1950's. Finally, Part V discusses the exclusion of Mathew Hale from the Illinois bar, which vividly demonstrates that modern proponents of excluding white supremacists from the legal profession, perhaps unwittingly, utilize the same form of argument advanced by proponents of excluding communists.

I. PRELUDE: "OFFICERS OF THE COURT," THE FIRST BAR ADMISSION CASE, AND THE LOOMING THREAT OF COMMUNISM

Although the bulk of cases involve communism, there was some precedent on bar admission questions prior to the 1950's. In *Ex Parte Garland*—decided in 1866—the Court confronted the issue of excluding attorneys from law practice based on political affiliations for the first time.[6] Augustus Hill Garland was a former U.S. Senator from Arkansas who joined the Confederate Senate during the War.[7] One of Arkansas' most prominent attorneys, Garland was denied permission to appear in federal court under a statute prohibiting former members of the Confederate government from serving in federal offices.[8] Congressional Republicans had

[6] *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).
[7] *See* BRIAN MCGINTY, LINCOLN AND THE COURT 252, 254-56 (2008).
[8] *Ex parte Garland*, 71 U.S. at 378.

reasoned that attorneys who practiced in federal court qualified as federal officers, but the Court rejected this argument, holding that as "officers of the court" attorneys are not government officials.[9] The majority opinion, authored by Justice Field, held that the statutory loyalty requirement was unconstitutional both as a bill of attainder and an ex post facto law.[10] Even though the Court struck this restriction down, the parallels between the facts of *Garland* and the later "communist question" cases are notable: there is no doubt that the Confederates intended to overthrow the United States government by force, and their political project was patently inconsistent with the existing form of government in the United States. These are the same kind of arguments that many in the legal profession would make in the 1950's and beyond. However, the *Garland* opinion has limited usefulness: most bar admissions were regulated at the state level, but *Garland* only applied to federal courts. Moreover, the case was complicated by the fact that President Johnson had pardoned Garland, and much of the case focused on the presidential pardon power.[11] Ironically, Augustus Garland would go on to become Attorney General of the United States under Grover Cleveland.[12]

In ruling that his exclusion from the bar was unconstitutional, the *Garland* Court settled an important question about the status of attorneys as "officers of the court," but left open the question whether individuals could be excluded from the bar because of political affiliations. Although *Garland* settled the question of whether lawyers are government officials, the notion of lawyers as "officers of the court" has proved remarkably resilient, and is still how the bar and

[9] *Id.*
[10] *Id.*
[11] *See* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1856-1918, 172-74 (1999).
[12] *See* FARRAR NEWBERRY, A LIFE OF MR. GARLAND OF ARKANSAS, A THESIS FOR THE MASTER'S DEGREE 79 (1908) https://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t3dz0cs0v;view=1up;seq=91.

many legal ethicists characterize lawyers today.[13] The meaning of "officers of the court" is "as elusive as its origins."[14] It is possible that the description is rooted in early-modern English legal practice, in which lawyers appearing in court were actually officers of the Crown.[15] As *Garland* demonstrates, the legal implications of this designation were legitimately ambiguous in the mid-19th century. Moreover, the Court only held that "officer of the court" does not mean "government official;" otherwise, Garland does not provide any additional insight into what this term means. At a minimum, the notion of "officers of the court" invokes the notion that lawyers are not simply "hired guns" for their clients, and instead owe some kind of higher duty to the legal system:[16]

> The characterization inherently suggests that lawyers owe a special duty to the judicial system or, perhaps, to the public that other participants in the legal process do not owe. At least implicitly, this special duty elevates the interests of the judicial system or of the general public above those of the client or lawyer.

As we will see, the opaque but remarkably persistent idea that the legal profession has special duties to the legal system is a common thread running through virtually all of the bar admission cases, even those that do not involve communism.

After *Garland*, the Supreme Court did not hear any cases involving bar admission and political affiliation/belief until the 1945 case *In re Summers*.[17] In 1942 Clyde Summers was a devout Methodist, a graduate of the University of Illinois College of Law, and a newly-minted law professor at the University of Toledo.[18] Summers' brother had enlisted in the army at the

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[13] *See generally* DEVINE ET. AL, PROBLEMS, CASES, AND MATERIALS IN PROFESSIONAL RESPONSIBILITY 12-21 (3d ed. 2004); NOONAN, JR. ET. AL, PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER 779-89 (3d ed. 2011).
[14] Eugene R. Gaetke, *Lawyers as Officers of the Court*., 42 VAND. L. REV. 39 (1989).
[15] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 162-63 (4th ed. 2007).
[16] Gaetke, *supra* note 14, at 43.
[17] 325 U.S. 561 (1942).
[18] *See* Lea Vandervelde, *A Singular Conscience: In re Summers*, 14 EMPL. RTS. & EMPLOY. POL'Y J. 153, 160-3 (2010).

beginning of World War II, but Clyde declared conscientious objector status on the basis of his religious beliefs.[19] The Illinois Supreme Court denied Summers admission to the bar because of his moral objection to military service.[20] Summers claimed this denial violated his right to free religious exercise, secured through the 14th Amendment, because he was being excluded from the bar on the basis of his religious beliefs.[21] There were no questions as to Summers' character and fitness apart from his conscientious objector status: by all accounts he was an honest, intelligent, and capable person.[22] Rather, Illinois justified its refusal to admit Summers on the ground that he would be unable to fulfill his oath to uphold the state constitution. The Illinois Constitution required individuals to serve in the state militia if called upon, and there was no conscientious objector exception to this requirement.[23] Thus, the Illinois Supreme Court argued that Summers' beliefs would prevent him satisfying his constitutional duty: "[Summers'] good citizenship, they think . . . is not satisfactorily shown. A conscientious belief in nonviolence to the extent that the believer will not use force to prevent wrong, no matter how aggravated, and so cannot swear in good faith to support the Illinois Constitution."[24]

A deeply divided Court upheld the denial of Summers' admission 5 to 4 on the grounds that he could not in good faith take the oath to uphold the Illinois Constitution.[25] Justice Black wrote an impassioned dissent in which he argued that Summers' exclusion was a clear violation of his right to religious exercise, and pointed out that the majority's reasoning would also justify the exclusion of Quakers or any other groups with strict non-violence beliefs from the practice of

[19] JOEL JOSEPH, BLACK MONDAYS: WORST DECISIONS OF THE SUPREME COURT 47 (1987).
[20] *In re Summers*, 325 U.S. at 562.
[21] *Id.*
[22] *Id.* at 574.
[23] *Id.*
[24] *Id.* at 569.
[25] *Id.* at 573.

law: "The conclusion seems to me inescapable that if Illinois can bar this petitioner from the practice of law it can bar every person from every public occupation solely because he believes in non-resistance rather than in force."[26]

Interestingly, although Illinois honed in on the argument about the state constitution during litigation, possibly for strategic purposes, there is some evidence that officials believed Summers' beliefs were inconsistent with the obligations of an attorney in a broader sense. Consider the following excerpt from an unofficial letter from the secretary of the Illinois Character and Fitness Committee to Summers:[27]

> You eschew the use of force regardless of circumstances but the law which you profess to embrace and which you teach and would practice is not an abstraction observed through mutual respect. It is real. It is the result of experience of man in an imperfect world, necessary we believe to restrain the strong and protect the weak. It recognizes the right even of the individual to use force under certain circumstances and commands the use of force to obtain its observance.

The secretary went on to claim: "I do not argue against your religious beliefs or your philosophy of non-violence. My point is merely that your position seems inconsistent with the obligation of an attorney at law."[28] This letter clearly goes beyond a mere inability to comply with a relatively obscure portion of the Illinois Constitution, and instead suggests that a "radical" belief in non-violence is inconsistent with some of the basic principles and philosophies of the American legal system. The secretary's claim appears to be that—beyond an inability to comply with specific constitutional duties—Summers is unqualified to be an attorney because he does not believe in a core value of the legal system.

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[26] *Id.* at 575 (specifically, Black noted that "the Quakers have had a long and honorable part in the growth of our nation, and an amicus curiae brief filed in their behalf informs us that under the test applied to this petitioner, not one of them if true to the tenets of their faith could qualify for the bar in Illinois.").
[27] *Id.* at 564, n. 3.
[28] *Id.*

The secretary's argument is difficult to accept: there is no reason to think that an individual who does not personally believe in the use of violence even for self-defense, for example, could not act as a competent attorney for someone who had used violence for such a purpose. The very nature of representing clients means that attorneys will not always act in accordance with their personal beliefs and preferences. But even though we may reject the arguments made by the Illinois bar in this case, it is striking how similar they are to the arguments utilized against communists in the McCarthy era and beyond. Justice Black was right that it is seemingly impossible to distinguish between the argument accepted by the majority and an argument that all who profess "radical" non-violent beliefs—such as Quakers—can be excluded from the legal profession. Although the members of the majority probably wouldn't have accepted this inference from their reasoning, it is important to appreciate just how powerful the principle articulated in *Summers* appeared at the time: individuals can be excluded from the bar if they hold beliefs that are inconsistent with their constitutional obligations. Indeed, when the "communist question" cases began to be litigated, many in the bar expected—with some justification—to rely on *Summers* to support their arguments that the legal profession had a legitimate interest in policing its profession for a political belief, communism, that they asserted was inconsistent with the Constitution.

Finally, a second World War II era case—while note a bar admission case—helps set the stage by providing a window into how some members of the Supreme Court viewed communism. *Schneiderman v. United States*[29] demonstrates that even individuals at the pinnacle of the legal profession viewed communism as an existential threat prior to the rise of McCarthyism. William Schneiderman was an immigrant, American citizen, and communist who

[29] 320 U.S. 118 (1943).

ran for governor of Minnesota in 1932 on the Communist Party of America platform.[30] In 1939, the Justice Department sought to cancel Schneiderman's citizenship on the grounds that it had been "fraudulently obtained."[31] The government argued that Schneiderman's naturalization was fraudulent because in the five year period prior to his obtaining citizenship, Schneiderman subscribed to communist political beliefs and thus "had not behaved as, a person attached to the principles of the Constitution of the United States."[32] A majority of the Court held that the Justice Department had over-reached: Schneiderman had not broken any laws, and had never personally advocated for the violent overthrow of the government. Mere membership in the communist party was not sufficient to prove disloyalty, particularly because there was evidence that Schneiderman sought to enact change through the electoral process—rather than a violent revolution.[33] However, in dissent Chief Justice Stone argued there was sufficient evidence to support the cancellation of citizenship: "[t]he fountainhead of Communist principles, the Communist Manifesto . . . openly proclaimed that Communist ends could be attained only by the forcible overthrow of all existing social conditions."[34] Stone believed that a devoutly loyal member of the communist party, like Schneiderman, categorically could not be committed to upholding the Constitution:[35]

> [I]t is not questioned that the ultimate aim of the Communist Party in 1927 and the years preceding was the triumph of the dictatorship of the proletariat and the consequent overthrow of capitalistic or bourgeois government and society. Attachment to such dictatorship can hardly be thought to indicate attachment to the principles of an instrument of government which forbids dictatorship and precludes the rule of the minority or the suppression of minority rights by dictatorial government.

[30] *Id.* at 127.
[31] *Id.* at 159, n. 54.
[32] *Id.* at 121.
[33] *Id.* at 158-60.
[34] *Id.* at 191.
[35] *Id.* at 187.

Justice Frankfurter agreed with Justice Stone, and believed the majority did not want to offend the Soviet Union because of its military alliance with the United States. In a letter to Stone, he indicated the decision was inherently political, and a different result would have been reached if Schneiderman were a member of the American Nazi Party.[36] Frankfurter also agreed with Stone's assertion that belief in communism was inconsistent with a desire to uphold the Constitution: "For me the essence of this case is the very simple vindication of the old truth that one cannot serve, in thought and feeling and action, two independent masters at the same time."[37] This "two masters" reasoning was also present in *Summers*, and a version of this principle is at the core of every bar admission case. Indeed, as we will see, at least one proponent of excluding white supremacists from the bar invokes this principle explicitly,[38] almost certainly not appreciating its connection to the "communist question" cases.

II. BACKGROUND: THE MCCARTHY ERA

During a speech in Wheeling, West Virginia on February 9th, 1950, Wisconsin Senator Joseph McCarthy proclaimed that he was aware of 205 card-carrying members of the Communist Party who worked for the United States Department of State.[39] This speech ignited nearly a decade of paranoia and persecution that has since become known as the "McCarthy era." Eleven days later, McCarthy addressed the Senate, and made a number of dubious claims against alleged communists. McCarthy offered virtually no evidence to support his claims, but he was elevated to a position in the national spotlight nonetheless. "Tail Gunner Joe" was a polarizing figure even in his own time, and he would eventually accuse scores of public officials of

[36] Letter from Justice Felix Frankfurter to Justice Harlan F. Stone (May 31, 1943) (on file with Library of Congress, Manuscript Division, Papers of Harlan F. Stone, Box 69).
[37] *Id.*
[38] *See* Carla D. Pratt, *Should Klansmen be Lawyers?: Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U.L. REV. 857 (2003).
[39] ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998).

communist affiliations—including such notables as Secretary of State Dean Acheson and Secretary of Defense George Marshall.[40] McCarthy's personal campaign of accusations continued virtually unabated until 1954, when he made the mistake of questioning members of the United States army for eight weeks in a series of televised hearings. McCarthy lost the confidence of the public when he questioned the loyalty of a number of decorated war heroes, and the Council for the Army famously queried: "At long last, have you no sense of decency left?"[41] The public apparently shared this sentiment, and McCarthy's reign of fear more or less ended in 1954.[42]

Today, the phrase "McCarthyism" is synonymous with an irrational, inquisitorial "witch-hunt" motivated by fear, and unsupported by evidence.[43] But McCarthy is merely the face of this era: many others advocated for and participated in the purging of alleged communists from political office.[44] Indeed, the seeds of McCarthy's movement were planted years prior to his 1950 speech in Wheeling. In 1945, President Truman established the Federal Employee Loyalty Program, which allowed the federal government to deny employment to "disloyal" individuals.[45] Between 1947 and 1948, the FBI examined over two million federal employees, and conducted full investigations of over 6,300 of them.[46] The government's "loyalty" determinations under this program considered "[a]ctivities and associations of an applicant or employee," including

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[40] *Id.*
[41] *Id.*
[42] *See* ALBERT FRIED, MCCARTHYISM: THE GREAT AMERICAN RED SCARE 2-3 (1997).
[43] https://www.merriam-webster.com/dictionary/McCarthyism ("a mid-20th century political attitude characterized chiefly by opposition to elements held to be subversive and by the use of tactics involving personal attacks on individuals by means of widely publicized indiscriminate allegations especially on the basis of unsubstantiated charges")
[44] *See, e.g.*, GRIFFIN FARIELLO, RED SCARE: MEMORIES OF THE AMERICAN INQUISITION 24 (1995) (describing McCarthy as the "opportunistic creature of larger events").
[45] *Id.* at 36-37; *see also* SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 177 (2d ed. 1999).
[46] Tomas I. Emerson & David M. Helfield, *Loyalty Among Government Employees*, 58 YALE L. J. 1, 14-17 (1948).

"[m]embership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive."[47] The Attorney General's list included 123 such "subversive" organizations.[48] He testified before a HUAC sub-committee that the federal government intended to "isolate subversive movements in this country from effective interference in the body politic."[49] By 1951, only one year after McCarthy's speech, the FBI had conducted full investigations of approximately 14,000 federal employees, leading to almost 2,000 resignations.[50]

While the executive branch was conducting this ideological purge, Congress was also taking actions to root out suspected subversives. From 1945 to 1957, the House Un-American Activities Committee (HUAC) conducted over 230 public hearings and examined approximately 3,000 witnesses.[51] In their investigative hearings, HUAC and its Senate equivalent, the Senate Internal Security Subcommittee (SISS), would consistently ask witnesses whether they were presently or had ever been a member of the Communist Party. This was a dangerous question to be asked. Witnesses who denied the charge could be convicted of perjury with conflicting circumstantial evidence, and those who admitted to a communist ideology could face severe consequences.[52] As a result, many declined to answer on constitutional grounds, citing the Fifth Amendment. However, this was scant protection. Those who asserted their constitutional right against self-

[47] *Id.* at 32.
[48] *See* ROBERT J. GOLDSTEIN, AMERICAN BLACKLIST: THE ATTORNEY GENERAL'S LIST OF SUBVERSIVE ORGANIZATIONS (2008).
[49] *Id.* at 64.
[50] Emerson & Helfield, *supra* note 46, at 32.
[51] Moliterno, supra note 3, at 259.
[52] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 77-82 (2000).

incrimination were labeled "Fifth Amendment Communists," and doing so was seen as admitting guilt.[53]

Many of the best-remembered anti-communist activities took place at the federal level, but nearly every state took actions against communists in this period as well; for example, "all but a handful of states adopted either loyalty oaths or communist-control laws or both."[54]The fear of internal subversion in this period was also enhanced by events abroad: "the Berlin blockade, the first Soviet test of an atomic bomb, and Mao Tse-tung's overthrow of Chiang Kai-Shek's government in China all contributed to the growing fear."[55] At home, the 1950 conviction of state department official Alger Hiss for perjury in connection with a Soviet spy ring,[56] and the trial of Julius and Ethel Rosenberg for treason[57] all enhanced the sense that Communism posed an existential threat to the American way of life.[58]

It is worth taking a moment to emphasize just how serious many Americans perceived the threat of communism to be. As early as the 1990s, the American memory of the McCarthy era had already started to fade.[59] Today, most Americans—if they think about McCarthyism at all—likely only associate it with an irrational, maybe even quaint, fear of a long-gone foreign power. But for Americans of the time, the ideological threat of the Soviet Union felt all too real.[60] The doctrine of Marxism-Leninism appeared inconsistent with basic American values like private

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[53] *See* SCHECTER, *supra* note 39 at 69.
[54] M.J. HEALE, MCCARTHY'S AMERICANS: RED SCARE POLITICS IN STATE AND NATION 1935-1965 (1998).
[55] MOLITERNO, supra note 3, at 259.
[56] *See, e.g.*, SUSAN JACOBY, ALGER HISS AND THE BATTLE FOR HISTORY 1-30 (2009); see also G. EDWARD WHITE, ALGER HISS'S LOOKING-GLASS WARS (2005).
[57] *See* JOHN F. NEVILLE, THE PRESS, THE ROSENBERGS, AND THE COLD WAR ((1995).
[58] *See* Fariello, *supra* note 44, at 24 (". . . encircled by the Soviets and betrayed from within, our nation was endangered.").
[59] *See Id.* at 23-24.
[60] For example, a 1949 poll found that 68% of Americans would outlaw communist party membership; 83% would make communists register with the government; 73% would ban them from college teaching. *See* RICHARD M. FRIED, NIGHTMARES IN RED: THE MCCARTHY ERA IN PERSPECTIVE 88 (1990).

property, freedom of expression, and religious liberty. As historian H. W. Brands vividly describes it, "Americans once more heard Marx rattling the chains of the proletariat, and again saw Lenin purchasing rope with which to hang the capitalists."[61] The United States and the Soviet Union appeared to be locked in a collision course, in which the triumph of one necessarily meant the complete destruction of the other. It is difficult to appreciate now just how easy it was to perceive the struggle against the Soviets as an existential struggle between two competing visions of political order:

> Postwar Europe lay in ruins, while the Soviet army occupied half the continent and threatened the rest. Communist parties contested for power in countries the Kremlin didn't control. Perhaps these parties took order from Moscow, perhaps not. But in either case, they had more in common with the socialist East than the capitalist West, and their victory would aggravate democracy's danger. The United States, out of a simple instinct for survival, had to take measures to offset Soviet strategic weight and circumscribe Soviet influence.[62]

The stakes couldn't have been higher. We may question in hindsight whether some of the premises supporting these beliefs were really true, and whether they were exacerbated by reactionaries in the media and government. We may also criticize how Americans acted on these beliefs, and mourn the lives they disrupted or even destroyed in the process.[63] Nevertheless, the fact remains that many Americans sincerely believed the country was locked in a fateful struggle with a foreign ideology, and we must take this belief seriously in order to accurately reconstruct the history of this period: "Although the Communist party did not provoke the repression visited upon it, its policies and practices could be seen as providing some justification for McCarthyism. . . . it was on some level a rational response to what was then perceived to be a real threat to America security."[64]

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[61] H.W. BRANDS, THE DEVIL WE KNEW: AMERICANS AND THE COLD WAR vi (1993).
[62] *Id.*
[63] Fariello, supra note 44, at 144-170.
[64] SCHRECKER, *supra* note 39 at 5-6.

However, by the 1960's the fear of the internal threat of communism had largely passed.[65] Communists still posed a threat to the United States in the public imagination throughout the Cold War, but after the 1950's this was largely an external fear of annihilation via nuclear holocaust rather than destruction through internal—ideological—subversion.[66] As this paper will demonstrate, although the public's preoccupation with the ideological threat of communism had ended, the legal profession continued to periodically engage with the idea that certain political beliefs—like communism—are incompatible with the lawyer's oath to uphold the Constitution.

III. THE BAR AND COMMUNISM

The legal profession was not immune to the national fear generated by the internal threat of communism. With the creation of the Special Committee on Communist Tactics, Strategy and Objectives (Communist Tactics Committee) in 1951, the ABA's anti-communist campaign began in earnest.[67] The most regrettable legacy of the bar's war on communism is surely the ruined careers of otherwise upstanding attorneys it left in its wake. This is illustrated dramatically both by the bar's persecution of so-called "Fifth Amendment communists," and its treatment of attorneys who represented alleged communists charged with Smith Act violations.

In the mid-1950's, the Communist Tactics Committee compiled lists of attorneys who had exercised their Fifth Amendment rights at various government inquires. The Committee encouraged state and local bar associations to revoke the licenses of these "suspected" communists. The most famous of these "Fifth Amendment communist" cases is *Sheiner v.*

[65] *See* FRIED, *supra* note 60, at 3.
[66] *Id.*
[67] *Id.*

Florida.[68] In that case the Florida Supreme Court reversed the disbarment of Leo Sheiner, who testified before a Congressional sub-committee that he was not currently a member of the Communist Party, but pled the Fifth Amendment when asked whether he had ever been a member of such party.[69] Although the Florida Supreme Court reversed the disbarment, the ABA praised the initial decision, and even directed the Communist Tactics Committee chairman to file an amicus brief opposing Sheiner's appeal.[70]

This movement had its critics. Among them was World War II veteran and Yale law professor Ralph Brown, who in 1954 published an editorial in the ABA Journal criticizing the persecution of "Fifth Amendment communists."[71] Brown pointed out that the bar had fundamentally misunderstood the nature of Fifth Amendment protection by assuming that a person who honestly invokes the privilege must have committed an undisclosed crime: "it is impermissible for a body of lawyers, who should know the history and purposes of the privilege, to assert that any one witness who claims it *ipso facto* concedes the point at issue."[72] Brown implied—but did not directly accuse—the bar of having been seduced by the political paranoia of McCarthyism: "It is possible . . . that the Committee and the House have been deafened by the trumpeting of some legislative investigators who declare that every claim of privilege entitled them to chalk up another Communist."[73]

Attorneys who represented communists were also vulnerable during this period: "The prospect of professional discipline from the representation of communists became so likely that representation in these cases became almost impossible to find. A lawyer willing to represent the

[68] 82 So. 2d 657 (1955).
[69] *Id.* at 657.
[70] *Id.*
[71] Ralph Brown, *Lawyers and the Fifth Amendment: A Dissent*, 40 A.B.A.J. 404 (1954).
[72] *Id.* at 405.
[73] *Id.*

government's mortal enemy risked near certain professional annihilation."[74] The Smith Act, passed in 1940, made it an offense to advocate or belong to a group that advocated the violent overthrow of the United States government.[75] Representing defendants in Smith Act cases exposed lawyers to the accusation of communist sympathies. Indeed, the consequences of representing suspected communists extended beyond mere social disapproval: in 1950 five lawyers were held in contempt after representing Smith Act defendants.[76] The Supreme Court upheld the contempt judgment; however, in dissent Justice Black lamented, "[T]his summary blasting of legal careers . . . constitutes an overhanging menace to every courtroom advocate in America. The menace is most ominous for lawyers who are obscure, unpopular, or defenders of unpopular persons or unorthodox causes."[77] Black's dissent further points out the presiding judge's clear bias against the attorneys, including several occasions during the trial on which the judge called the attorneys "liars" with no basis for doing so.[78]

This is only a snapshot of the story of the bar's actions in the McCarthy era, and there are many more episodes that could be explored further. However, the project of this paper is not to survey the entire history of the bar's reaction to communism in the 1950's. Instead, the information provided in this section provides necessary context for the discussion that follows. For the purposes of this paper, I focus on two events that caused significant dissent within the bar: the ABA proposed "loyalty oath," and the ABA's criticism of the Supreme Court in 1959. These events demonstrate that amidst all of the political overreaction to the threat of

[74] MOLITERNO, *supra* note 3, at 64; *see also In re Sawyer*, 360 U.S. 622, 626-627 (1959) (discipling Smith Act defense counsel for criticism of trial judge).
[75] *See generally* John McKiernan, *Socrates and the Smith Act*, 15 Temp. Pol. & Civ. Rts. L. Rev. 65 (2005).
[76] *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950); *see also* Fowler Harper & David Haber, *Lawyer Troubles in Political Trials*, 60 YALE L. J. 1 (1951).
[77] *Sacher v. United States*, 343 U.S. 1, 37-38 (1952).
[78] *Id.* at 17.

communism, there was a core substantive legal question about whether certain political theories are incompatible with a lawyer's oath to uphold the Constitution. The loyalty oath debates provide important insight into the arguments advanced by those in favor of excluding communists from the bar. Many of the "communist question" cases focused on matters of procedure, so examining the loyalty oath debates is essential to understanding the theories underpinning these later admission issues. The basic argument that emerges from these debates was another version of the "two masters" principle that undergirded *Summers*: prospective lawyers cannot hold political beliefs that conflict with their constitutional obligations. While the loyalty oath debates involve the internal regulation of the legal profession, the bar's criticism of the Supreme Court in 1959 shows that many—including those outside of the ABA—believed the bar owed duties to the larger legal system. This idea that the legal profession plays a role in upholding the constitutional order, grounded in the view of lawyers as "officers of the court," helps to explain why so many of the gatekeepers of the profession sincerely believed that communists should not be admitted.

A. The Internal Regulation of the Bar: The Proposed "Loyalty Oath" and the Communist Resolutions

The House of Delegates is the policy-making body of the American Bar Association. In the 1950's, the House was composed of 249 members representing both state and local bar associations, sections of the ABA, State and Assembly Delegates, and other legal organizations.[79] Only State and Assembly Delegates were elected directly by the lawyer members of the ABA.[80] For this reason, one may reasonably question whether the House of

[79] Proceedings of the House of Delegates: Midyear Meeting, Chicago, February 23-24, 45 A.B.A.J. 360 (1959).
[80] *Id.*

Delegates is an accurate proxy for the ABA or the legal profession generally. However, the House of Delegates was the only organization in the country that purported to represent even an approximate viewpoint of the legal profession; thus, its actions "must be regarded as important evidence of views which are widely, if not universally, held by American lawyers."[81] ABA President Ross Malone argued that "[i]n theory and in fact, when the House of Delegates of the American Bar Association speaks today, it represents the organized legal profession of the United States."[82] No organization could feasibly speak with one voice for all lawyers; however, the House of Delegates was really the only national mouthpiece that the legal profession had.

In 1950, the ABA House of Delegates took two important actions to combat the perceived threat of communism. First, it created the Committee to Study Communist Tactics, Strategy and Objectives. This committee's purpose was to study communism, prepare reports for the General Assembly outlining the political goals of Marxism-Leninism, and recommend resolutions for the bar to combat the threat this ideology posed.[83] Second, it passed the "loyalty oath" resolution. Proposed by Albert P. Jones, Robert G. Storey, Gordon Simpson, S. Allen Crowley, and Paul Carrington—all Texans. The resolution required:

> That the legislature, the court, or other appropriate authority of each state, or territory, and the District of Columbia, be requested to require each member of its Bar, within a reasonable time and periodically thereafter, to file an affidavit stating whether he is or ever has been a member of the Communist party, or affiliated therewith, and stating also whether he is or ever has been a member or supporter of any organization that espouses the overthrow, by force or by any illegal or unconstitutional means, of the United States Government, or the government of any of the states or territories of the United States; and in the event such affidavit reveals that he is or ever has been a member of said Communist Party, or of any such organization, that the appropriate authority promptly and

[81] Robert B. McKay, *The Supreme Court and its Lawyer Critics*, 28 FORDHAM L. REV. 615, 618 (1959).
[82] Ross L. Malone, *The Communist Resolutions: What the House of Delegates Really Did*, 45 A.B.A. J. 343 (1959). Malone goes on to argue that "Its ability to do so on a representative basis results from the fact that it is indeed a cross-section of the legal profession of the United States," and provides statistical support for this claim. *Id.*
[83] *Report of Communist Tactics Committee*, 79 A.B.A.J. 329 (1954).

> thoroughly investigate the activities and conduct of said member of the Bar to determine his fitness for continuance as an attorney.[84]

The resolution also contained language suggesting that lawyers have a greater duty than the average citizen to "support the principles of the Constitution and oppose the doctrines of Communism inconsistent therewith."[85] Otherwise, there is little in the ABA Report to explain the bar's motivations or justifications for adopting this loyalty oath. However, the proceedings of the House of Delegates one year later shed light both on the bar's motivations and dissent within the organization.

An oath requirement for admission to the bar dates back to the earliest periods of English law.[86] Traditionally the attorney oath included specific pledges of truth and trustworthiness to the court, one's clients, etc.[87] However, particularly in times of crisis, an additional oath of 'loyalty' to the government has also been required. In America, the requirement that attorneys take an oath of loyalty to the national (and state) government as a condition of practicing law dates back to the founding period, when some states required that attorneys take a 'test oath' renouncing loyalty to Great Britain.[88] After the Civil War, spurred by a lingering fear that Confederate sympathizers could disrupt Reconstruction, attorneys were required to swear an oath that they never adhered to the Confederacy as a condition for appearing before a federal court, including the Supreme Court.[89] The movement for an "anti-communist" oath in the McCarthy era is arguably a continuation of this dubious tradition. Indeed, this paper will argue that the

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[84] Sessions of the Assembly, 75 Ann. Rep. A.B.A. 87 (1950).
[85] *Id.* at 94.
[86] Basile, *supra* note 2, at 1847.
[87] Leonard S. Goodman, *The Historic Role of the Oath of Admission*, 11 Am. J. Legal Hist. 404, 410-11 (1967) (examining the connection between lawyers' oaths of admission in colonial America and early English law).
[88] Robert A. Emery, *"I Do Solemnly Swear": The Evolution of the Attorney's Oath in New York State*, N.Y. St. B.J. 48, 48 (2005).
[89] *See generally,* HAROLD HYMAN, ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION (2011).

"communist question" bar admission cases that occurred after the 1950's were motivated in large part by the same concerns that undergird loyalty oaths generally: "An attorney's loyalty to his country has referred to more than mere allegiance and support of the laws of the sovereignty in that it has been understood to concern specified beliefs, doctrines, and associations."[90]

In each case the oath was intended at least ostensibly to protect the legal community from the perceived threat of lawyers with political beliefs that threatened the status quo. However, there is an important difference between the "anti-communist" oath and the loyalty oaths following both the Revolutionary War and the Civil War: the "anti-communist" oath was not widely adopted.[91] Although the "anti-communist" oath enjoyed considerable support at the national level, the ABA did not have the authority to require state bar associations to adopt the oath.[92] As we will see, there was considerable opposition to the proposed loyalty oath, and few states complied with the ABA's request.[93]

In February 1951, the ABA House of Delegates met in Chicago. At this meeting, the chairman of the Communist Tactics Committee presented the Committee's report on communism.[94] These "communist resolutions" led to considerable debate within the House of Delegates.[95] The resolutions, and accompanying debates, are worth reproducing and discussing here for the insight they provide into how the bar was thinking about communism and "subversive" political ideologies in this era. The first resolution creates a simple syllogism:[96]

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[90] Basile, *supra* note 2, at 1843.
[91] MOLITERNO, *supra* note 3, at 61
[92] *Id*.
[93] *Id*.
[94] Proceedings of the House of Delegates, 76 Ann. Rep. A.B.A. 527, 530 (1951).
[95] *Id.* at 531.
[96] *Id.* The precise text of the resolution is as follows: WHEREAS, The Communist Party and Marxism-Leninism call for the establishment in the United States of a dictatorship "untrammeled by law," and WHEREAS, The American constitutional system and the American principle of individual rights and duties would be violated by such a system, and WHEREAS, Such concept is incompatible with the

1. Any political ideology that is incompatible with the American constitutional system is inconsistent with the obligations of lawyers (who take an oath to uphold the constitution).
2. Communism is a political ideology that is incompatible with the American constitutional system.
3. Therefore, a lawyer cannot both adhere to communism and fulfill his professional obligation to uphold the Constitution.

This syllogism has some intuitive logic, and ultimately serves as the foundation for all bar admission cases. Of course, it can also be criticized in a number of ways. For one, it assumes that anyone who subscribes to communism will actually take actions to accomplish its objectives. Indeed, members of the House of Delegates leveled this precise criticism against the resolution.[97] Whitney North Seymour of New York, perhaps anticipating later constitutional challenges, moved to insert "and who has forwarded the objectives of" after the words "who is a member of" in the first paragraph of the resolution.[98] Seymour also advocated substituting the words "the overthrow of the government by force" for the term "Marxism-Leninism," arguing that "Marxism-Leninism" is a vague term.[99] Similarly, Frederic Miller of Iowa proposed a substitute for the first paragraph of the resolution that included the language "is a member of and forwards the purposes of communism, or advocates the overthrow of the government by force and violence."[100]

Neither Seymour's nor Miller's amendments received the simple majority needed to pass, and the text of the resolution was ultimately adopted by the House of Delegates without any

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obligations of a lawyer as an officer of the courts of the United States and the several states, *Be It Now Therefore Resolved*, That the American Bar Association, proceeding only in the manner provided in its constitution and by-laws, expel from its membership any and every individual who is a member of the Communist Party of the United States, or who advocates Marxism-Leninism, and *Be It Further Resolved*, That this resolution be referred immediately by the President of the Association to an appropriate committee of the Association for prompt action.

[97] *Id.* at 531
[98] *Id.*
[99] *Id.* at 531
[100] *Id.* at 532

changes.[101] Unfortunately, the voting records are not available, so it is impossible to determine how much support either of the amendments had. However, both the resolution and the proposed amendments provide powerful insight into how the bar perceived the threat communism posed and what an appropriate response should look like. The core concern expressed by this resolution is that adherence to communism is incompatible with an oath to uphold the United States Constitution, and even at this early stage we see that at least some members of the bar were worried about the distinction between subscribing to an ideology and actively advancing all of its goals. Decades later, in the seminal bar admission question cases, this distinction is precisely why some inquiries about mere membership were held to violate the First Amendment.

During the third session on February 27, as a "special order of business" the House of Delegates considered a proposed resolution by Frank W. Grinnell—one of the most influential leaders in the history of the Massachusetts bar—[102]related to the "loyalty oath" adopted by the 1950 General Assembly.[103] Grinnell's resolution proposed the following:

> WHEREAS, the House of Delegates at the September Meeting, 1950, adopted a resolution from the Assembly recommending to the various state authorities the requirement of additional oaths by lawyers as set forth in detail in the record of the meeting of the House; now, therefore, be it Resolved, That on further consideration, the said vote of the House of Delegates approving said resolution of the Assembly is hereby rescinded and that the Assembly be notified of this fact and that the House recommend to the Assembly the rescission of its resolution as lawyers are already bound by a solemn loyalty oath on admission to the bar.[104]

In the House debate on the amendment, Grinnell pointed out that lawyers are already required to take an oath to support the Constitution of the United States when they are admitted

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[101] *Id.*
[102]John A. Dolan, *Hale and Dorr: Backgrounds and Styles* (Boston, Hale and Dorr, 1993) ("Were one to be asked to name the individual who in this century has made the most massive contributions to judicial administration and the dispensation of justice in Massachusetts there could be but one response -- Frank W. Grinnell").
[103] *Id.* at 545.
[104] *Id.* at 545-546.

to the bar; therefore, a further oath "is not only unnecessary, but would detract from the professional oath at admission."[105] Note that this argument is actually consistent with the syllogism created by the first resolution of the Communist Tactics Committee: one could simultaneously hold both that 1) communism is inconsistent with the obligations of bar membership, and 2) a separate loyalty oath would be redundant with the oath to uphold the Constitution. In others words, if an individual is willing to take an oath to uphold the Constitution—even if they cannot do so in good faith—there is no reason to think a separate oath would do any additional "work." Furthermore, Grinnell argued that only "an infinitesimal group of lawyers can be suspected of communist or 'subversive' sympathies," and so it would be insulting to the vast majority of lawyers to impose this oath.[106]

Even members of the House who supported Grinnell's resolution did not appear to disagree with the proposition that communists would be unable to fulfill their professional obligation to uphold the Constitution. The ABA Annual Report makes it clear that Grinnell's proposal sparked heated and extensive debate in the House of Delegates:

> In the debate which followed, many members of the House expressed their deep convictions on the several aspects of the resolution and the issues related to it. By common consent, the debate was not confined solely to the recommendation of the [Committee], or to the Grinnell resolution, but to the merits of the underlying issues.[107]

But opponents of the oath did not reject the idea that communism was inconsistent with the Constitution. Instead, they argued that 1) the oath would be ineffective in identifying persons with "subversive" or communist leanings, because such persons are not bound by oaths,[108] 2)

[105] *Id.* at 546.
[106] *Id.*
[107] *Id.* at 546.
[108] It is difficult to know exactly what is meant by this argument. Presumably the members of the House that made it must have believed that communists or other subversives do not believe in oaths conceptually or categorically, and thus do not consider themselves bound to keep them.

that redundant oaths would rob them of their "dignity and emphasis," and 3) that if the original oath of admission does not bind a lawyer, he will not be bound by subsequent oaths.[109]

Opponents of the Grinnell resolution were led by Robert G. Storey, one of the Texans who had originally proposed the 1950 "loyalty oath" resolution. Storey was a veteran of both world wars, had until recently been president of the Texas bar, and would go on to serve as president of the ABA from 1952-53. Perhaps most notably, Storey served as executive trial counsel under Chief Justice Robert Jackson during the Nuremberg trials, for which he received the U.S. Medal of Freedom and the French Legion of Honor. Storey responded to the argument that only a very small group of lawyers are actually "subversives" by claiming that "it is common knowledge that the communist tactic is to work through strategically located, effective minority leaders."[110] Furthermore, Storey argued that communism posed a unique threat to the legal profession in particular: "the first step taken by communists is to do away with the legal profession and institute in its stead a dictatorial judicial administration headed by the notorious 'people's courts.'"[111] Aside from those who supported Storey's arguments, a number of other members of the House argued that public confidence in the legal profession had been shaken by the perceived presence of "subversives." Even if Grinnell and his supporters were right about the redundancy of the oath, these members argued, a repetition of the oath would restore public confidence in the profession.[112] The House voted on the Grinnell resolution, and it was defeated.[113] This is not particularly surprising, since within the ABA the number of individuals who favored taking additional steps against communists generally almost certainly outnumbered those who did

[109] *Id.* at 527.
[110] *Id.* at 547.
[111] *Id.*
[112] *Id.*
[113] *Id.* at 548.

not.[114] Moreover, we have already seen that both sides apparently agreed with the basic premises underlying the proposed oath.

The proposed anti-communist oath stirred debate and dissent outside of the formal ABA institutions. Prior to the 1951 meeting of the House of Delegates that rejected Grinnell's resolution rescinding the oath, the ABA took the "unusual" step of publishing dissenting views in the February edition of its official journal.[115] The dissenting petition, which was signed by 27 members of the ABA, made many of the same arguments that would later be echoed at the 1951 House of Delegates meeting. The first argument the petition made was that an anti-communist oath is redundant with the existing responsibilities of lawyers: "Every lawyer, upon his first admission to the local Bar, has been called upon to take an oath of allegiance and loyalty to the federal and state constitutions."[116] The petition goes on to argue that only an "infinitesimal" fraction of lawyers support "subversive" movements, and that those lawyers who are "subversives" will simply lie during the oath.[117]

Two things are noteworthy about this petition: First, it takes for granted that subscribing to a "subversive" political ideology is inconsistent with a lawyer's sworn duty to uphold state and federal constitutions. Instead, the signers focused their attention on arguments that an additional anti-communist oath would not be effective in rooting out "subversives," and that such a comprehensive approach was inappropriate to catch what was surely a small number of perpetrators:

> We, therefore, oppose this method of intended detection as repetitious of the universally required initial professional oath, as unfounded in its implication of

[114] *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 232-41 (1976).
[115] *The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy*, 37 A.B.A. J. 123 (1951).
[116] *Id.* at 123.
[117] *Id.*

> widespread disloyalty and illegal acts on the part of lawyers generally . . . It violates the American tradition that suspicion of disloyalty shall not be cast upon an entire class or profession upon the chance of catching a few random delinquents.[118]

Second, the mere fact that the ABA was willing to publish a dissent from the official position of the bar during this period is telling. The publication of this petition is evidence that the proposed oath was sufficiently unpopular in the legal community that the ABA felt pressured to give dissenting voices a platform. Moreover, even though the petition was only signed by 27 members, it is evidence that voicing opposition to the bar's anti-communist actions was not professional suicide. Both here and at the House of Delegates meeting, some lawyers apparently felt opposing the anti-communist oath would not open them up to suspicion—and maybe disbarment—as potential "subversives." This interpretation is corroborated by the open opposition to the loyalty oath movement in some state bar associations, and of course the failure of a majority of states to follow the ABA's recommendation to adopt an anti-communist oath.[119]

Several state and local bar associations also actively opposed the anti-communist oath.[120] Published alongside the 27-member petition was a resolution passed by the New York City Bar Association opposing the oath.[121] The New York Bar also made the redundancy argument echoed by so many critics of the oath, claiming that: "The term 'loyalty oath' is of itself somewhat ambiguous. In a sense, it may fairly be said that every member of the Bar of this State has already taken one."[122] The New York Bar went a step further than others who had claimed the oath was redundant though, and argued that the practice of law itself is an affirmation of

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[118] *Id.*
[119] MOLITERNO, *supra* note 3.
[120] Basile, *supra* note 2, at 1857.
[121] Supra note 115, at 124 ("Recent proposals for 'loyalty oaths for lawyers' have led the Committee on Law Reform to consider the need for and the wisdom of such oaths in New York. The committee's study of this question has led it to conclude that such oaths for lawyers are neither necessary nor wise.").

[122] *Id.*

commitment to state and local constitutions: "[T]he almost 200,000 lawyers of the country, in their daily activities on behalf of their clients and otherwise, in court and out, are constantly and affirmatively demonstrating their loyalty and devotion to Constitution and country."[123] The New York resolution closed by expressing a concern that an anti-communist oath might dissuade lawyers from representing unpopular causes, "lest it be said that such representation constituted support of an organization of the prohibited kind."[124]

In Massachusetts the situation was more complicated. That Massachusetts Bar ultimately adopted policies that were consistent with the ABA recommendations.[125] However, there was significant dissent. For example, the Executive Committee of the Massachusetts Bar Association opposed loyalty oaths.[126] Harvard Law Professor George Gardner testified before the Massachusetts legislature in support of the Committee's position. Like many others, Gardner argued that the oath all lawyers take to uphold state and federal constitutions already operates as a kind of "loyalty oath," and to require an additional loyalty oath would make the existing oath "perfunctory in spirit and fact."[127] In response to the state bar's acquiescence to the ABA's recommendations, eleven dissenting members of the Massachusetts Bar published a letter of protest to the bar's actions, asking Massachusetts lawyers to "content [themselves] with the all-inclusive oath to support the Constitution, and not stimulate the invention of sub-loyalty oaths. For the rest, let us meet specific abuses within and without the profession by specific remedies, in the characteristic common-law way."[128]

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[123] *Id.* at 125
[124] *Id.*
[125] Basile, *supra* note 2, at 1858.
[126] *Id.*
[127] *The Current American Swearing Epidemic: The Hearing*, Mass L.Q. 47, 52-53. (1951).
[128] Record of the 40th Annual Meeting of the Massachusetts Bar Association at Plymouth, June 9, 1951, Mass. L.Q., July 1951 at 20-21.

The loyalty oath debates demonstrate that there was broad consensus in the 1950's, even among critics of the ABA's actions, that communism and other "subversive" political ideologies were inconsistent with a lawyer's obligations to uphold the Constitution. Both the debates within the House of Delegates and the subsequent reaction of the legal community at the state and local level cut against the view that the legal profession was simply swept up in the hysteria of McCarthyism. In the explicit arguments of dissenters and in the general failure of the anti-communist oath to take hold, we also see the legal community apparently wasn't persuaded that an additional loyalty oath would be effective in keeping lawyers with "subversive" political beliefs out of the profession. This result is difficult to explain if the bar was just as swept up in the same "passionate overreaction"[129] to communism as the rest of the country. The reasoning employed by proponents of the proposed loyalty oath follows essentially the same form as the reasoning employed in *Summers*: communists can't be members of the legal profession because they can't in good faith take an oath to uphold the Constitution. Opponents of loyalty oaths largely accepted this proposition and instead opposed an additional oath on other grounds. Of course, an irrational fear of outsiders and a foreign ideology surely informed many of the bar's actions in this period, and the tragedy of those lawyer's whose careers were needlessly ruined in communist witch hunts should not be understated.[130] But in the debates over the proposed loyalty oath we see a kernel of a substantive legal question which pre-dated the McCarthy era in the form of *Summers*, and lingered in the legal profession long after the national preoccupation with rooting out communists had passed.

[129] MOLITERNO, *supra* note 3.
[130] *See, e.g.*, *Barverman v. Bar Ass'n of Balt*., 209 Md. 328 (1955); *"Good Moral Character" as a Prerequisite to Admission to the Bar*, 65 Yale L. J. 873 (1956).

The loyalty oath debates are important because they provide the most insight into the reasoning of those who thought communists should be excluded from the bar. In many ways the loyalty oath debates provide the intellectual foundation for the later "communist question" cases, although *Summers* shows that the idea that inconsistent loyalties could serve as the basis for exclusion from the bar was taken seriously even before the McCarthy era. The following episode, the bar's criticism of the Supreme Court in 1959, demonstrates that many believed the bar has special duties to uphold the integrity of the legal system at large. Moreover, this idea appears to have been meaningfully constraining, as revealed by the bar's responses to accusations that it had criticized the Court. The notion of lawyers as quasi-public officials or "officers of the court" is critical to understanding the motivations of proponents of excluding communists from the bar, and as we will see, continues to undergird modern bar admission issues.

B. The Bar's External Relationships: Criticism of the Supreme Court and The Bar's Place in the Legal System

In 1959, for the first time in its roughly 80 year history, the ABA publicly criticized the Supreme Court.[131] This criticism came at the tail-end of the McCarthy era, and in a series of five resolutions the ABA House of Delegates accused the Court of undermining the nation's "internal security" by ruling in favor of communists and suspected subversives on mere legal "technicalities."[132] A swift public backlash against the bar followed: a number of individuals and legal groups spoke out against the bar,[133] at least one judicial official resigned his ABA

[131] Proceedings of the House of Delegates: Midyear Meeting, Chicago, February 23-24, 45 A.B.A.J. 360 (1959).
[132] *Id.*
[133] N.Y. Post, March 2, 1959, p. 19, cols. 1-2; Anthony Lewis, *Bar's Call for Court Curb Scored by Liberties Union*, N.Y. Times, April 19, 1959, p. 1, col. 3.

membership in response,[134] and a number of local bar associations adopted resolutions affirming their support of the Supreme Court.[135] The backlash was so intense that ABA President Ross Malone felt compelled to publicly defend the bar's actions,[136] and an article even appeared in the *Fordham Law Review* attempting to justify the resolutions.[137] While the proposed loyalty oath gives us insight into how members of the ABA thought about the role of the bar, this incident is noteworthy because it shows that even individuals outside of the bar thought the legal profession owed special duties to the larger legal system.

Criticism of the Supreme Court is nearly as old as the institution itself. Indeed, the dependence of the Court on its credibility with the public is well-documented.[138] Even though public criticism sometimes puts the Court in a precarious political position, many justices have insisted that such criticism is not only beneficial, but essential. In his 1898 Lincoln Day Address, Justice Brewer argued that:

> It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a -pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. [139]

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[134] *U.S. Judicial Aide Quits Bar Group*, N.Y. Times, April 9, 1959, p. 17, col. 3.
[135] Lewis, supra note 133.
[136] Ross L. Malone, *The Communist Resolutions: What the House of Delegates Really Did*, 45 A.B.A. J. 343 (1959).
[137] Roy M. Cohn & Thomas Bolan, *The Supreme Court and the A.B.A. Report and Resolutions*, 28 FORDHAM L. REV. 233 (1959).
[138] *See generally*, WILLIAM H. REHNQUIST, THE SUPREME COURT (Revised ed. 2002); *see also* Erwin Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 40 S. TEX. L. REV. 943, 944-948 (1999) ("[t]hroughout this century, the Court has handed down controversial rulings. Yet the Court has retained its legitimacy and its rulings have not been disregarded"); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH, 201-07 (1962) (arguing that judicial restraint is designed to preserve the Court's fragile institutional legitimacy); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS, 55-59 (1980).
[139] *See Bridges v. California*, 314 U.S. 252, n.5 (1941).

In *Bridges v. California*, Felix Frankfurter endorsed Justice Brewer's position, and added "judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."[140]

Public criticism of the Court's decisions has thus been the norm in American political discourse for most of American history. Virtually no one suggests that criticism of the Court is categorically inappropriate, and the Court itself has explicitly embraced the idea that it ought to be subject to criticism by the public. This background rule is what makes the criticism of the Court by the ABA in 1959 so fascinating. For the first time,[141] the bar waded into the field of Supreme Court criticism, and the public backlash it endured suggests the bar is an exception to the general rule that criticism of the Court is appropriate.

Tension between the bar and the Court had been building for years. In fact, just days before the mid-year House of Delegates meeting in 1959, the ABA formally accepted Chief Justice Early Warren's resignation from the Association.[142] Warren had submitted his resignation two months prior, but there was speculation that he intended to resign as far back as 1957.[143] In particular, Warren was irked by committee reports from the Communist Tactics Committee that he perceived as critical of the Court.[144] This same issue would rear its head once again in dramatic fashion just a few days after Warren's resignation was accepted.

On February 24, 1959, the ABA House of Delegates, acting on the Report and recommendations of the Communist Tactics Committee, passed five resolutions dealing with

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[140] *Id.* at 252.
[141] McKay, *supra* note 81 ("It is remarkable that during the eighty years in which the A.B.A. has been the principal organization of American lawyers, the Association as a whole before 1959 had never taken a stand substantially critical of the Court.").
[142] Anthony Lewis, *U.S. Bar Accepts Warren's Action*, N.Y. TIMES, Feb. 21, 1959 at 44.
[143] *Id.* ("the Chief Justice indicated to someone in the association at the time of the [1957] London meeting that he wanted to resign.").
[144] *Id.*

decisions of the Supreme Court concerning communism and national security.[145] The Report painted a dark and dramatic portrait of the internal threat posed by communism:

> [communism's] threat increases as far too many of us fail to comprehend its sinister purpose . . . to more effectively infiltrate life in America, to lower resistance to its propaganda, and to cripple our defenses against this tyrannical and deadly way of life. There is not one home in our land which is not affected by communism in some manner.[146]

Moreover, the Communist Tactics Committee argued that the judiciary, and in particular the Supreme Court, had played a role in crippling the government's ability to combat the threat of communism: "Our internal security has been weakened by . . . technicalities raised in judicial decisions which too frequently . . . free the subversive to go forth and further undermine our Nation."[147] The Report also alleged that a majority of the Supreme Court had failed "to recognize the underground forces that are at work and to appreciate how these decisions affect our internal security."[148] The heart of the Report is a summary of 24 cases that the Communist Tactics Committee argued were "illustrative of how our security has been weakened."[149]

Interestingly, the Communist Tactics Committee framed its recommendations as a means of defending the Court. In the foreword to its recommendations, the Committee expressed a concern that recent decisions had: "given rise not only to severe criticisms of the decisions, but unfortunately to condemnation of the Court itself, and to omnibus proposals for limiting its appellate jurisdiction."[150] Thus, the Committee viewed the recommendations of the Report as a means of saving the Court from itself by curing the underling defects in its decisions that had

[145] Proceedings of the House of Delegates, supra note 79, at 406.
[146] 105 Cong. Rec. A1471 (1959).
[147] *Id.*; *see also id.* at A1472 ("paralysis of our internal security grows largely from construction and interpretation centering around technicalities emanating from our judicial process").
[148] *Id.* at A1473.
[149] *Id.*
[150] *Id.* at A1471 .

given rise to public criticism. The Committee thought this was a means of fulfilling "the duty of the members of the bar to defend the institutions of the judiciary from unfair and unjust attacks."[151] However, it seems clear that what the Committee viewed as "unfair and unjust" about the criticism of the Court were proposals to limit the jurisdiction of the Court, not the criticism of the merits of the Court's decisions: "while members of this association view some of the decisions to be unsound and incorrect, they deem such broad omnibus proposals at this time unwise and likely to create more problems than they will solve."[152]

On the basis of this report, the House of Delegates adopted five resolutions which appeared to endorse the Committee's view of recent Supreme Court decisions.[153] The Report of the Communist Tactics Committee "aroused probably the most important debate of the entire meeting,"[154] and provides some insight into the message the House of Delegates thought it was conveying by adopting the resolutions. A minority of House members such as Orien S. Marden of New York—a future ABA President—wanted to defer consideration of the resolutions in order to provide time to "reflect carefully" on the proposals.[155] In particular, Marden was worried about the "overtones of the report and the recommendations" with respect to the Supreme Court.[156] Despite Marden's reservations, he did admit that "There is a good bit in the recommendations I think many of us will agree with."[157]

Marden was not the only one who worried that the resolutions might be inappropriately critical of the Supreme Court, and much of the debate centered around this issue. Franklin Riter,

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[151] *Id.*
[152] *Id.*
[153] Proceedings of the House of Delegates, *supra* note 79, at 406-410.
[154] *Id.*
[155] *Id.* at 406.
[156] *Id.*
[157] *Id.*

of Salt Lake City, Utah, endorsed an excerpt from an editorial in the *New York Times*, which argued there is "a special obligation on the lawyers of the United States to review judicial decisions for themselves and for laymen in language laymen will understand."[158] Alfred J. Schweppe, in particular, was critical of "a reluctance to criticize the Supreme Court."[159] He argued that "[d]ecisions of the courts should be subjected constantly to professional criticism," and furthermore that the bar was uniquely qualified to lead such criticism.[160] Schweppe went on to quote a number of Supreme Court justices to support the proposition that criticism is both necessary and helpful to the Court; however, only one of these quotations mentioned the role of the bar in criticizing the Court.[161] Schweppe pointed out that Justice Jackson seemed to endorse the role of the bar in providing professional criticism of the Court when Jackson argued that "acceptance or criticism by the profession" is one of the important criteria in determining a decision's "real weight in subsequent cases."[162] Schweppe concluded by arguing that "the weapon of professional criticism is the biggest weapon we have to keep that Court . . . within the proper course of constitutional government."[163] S. Chesterfield Oppenheim also spoke in favor of Schweppe's argument: "The law reviews criticize court decisions," he declared, "It seems to me it follows that the elder statesmen of the bar and the experienced practitioners can do so with greater justification. . . Let us not be guilty of not being willing to stand up and be counted."[164] In making "democratic" arguments about importance of criticism, these members of the bar likely failed to appreciate that communism itself was a critique of the American democracy. The same

[158] *Id.* at 407.
[159] *Id.* at 408.
[160] *Id.*
[161] Alfred J. Schweppe, *Criticism of the Supreme Court*, 44 MASS. L.Q. 31 (1959) (providing the quotations Schweppe read during the House debate on the resolutions).
[162] Reprinted in 44 A.B.A.J. 189 (1958).
[163] 45 A.B.A.J. at 408.
[164] *Id.* at 409.

lawyers who wanted to claim a role for the bar as a critique of the Supreme Court were apparently unwilling to tolerate dissent within their own ranks when it came to communism.

Backlash against the actions of the House of Delegates came swiftly and from many corners. Joseph Raugh, Jr., the former Chairman of the Americans for Democratic Action called the resolutions "a disgrace to the legal profession."[165] The American Civil Liberties Union criticized the House of Delegates' actions as "unprofessional and irresponsible"[166] and alleged that the resolutions were "unworthy of the intellectual standard the bar should represent and the standards of professional ethics required by the A.B.A."[167]

Criticism also came from individuals and institutions that were not natural political opponents of the ABA on the question of "internal security." Warren Olney III, Director of the Administrative Office of the United States Courts, resigned from the ABA in response to the resolutions.[168] Olney explained that "the action taken by the . . . House of Delegates with reference to the Supreme Court is, in my opinion, so discreditable to the association that I do not want to be identified with the organization any longer."[169] Olney's criticism of the ABA is notable not only because of his position in the judicial system, but also because he was a Republican.[170] Moreover, as former head of the Criminal Division of the Justice Department, Olney was known to have "strong disagreement" with Supreme Court decisions.[171] Olney also argued that in context the resolutions, despite objecting to particular cases, seemed to "reflect

[165] N.Y. Post, March 2, 1959, p. 19, cols. 1-2.
[166] Anthony Lewis, *Bar's Call for Court Curb Scored by Liberties Union*, N.Y. Times, April 19, 1959, p. 1, col. 3.
[167] *Id.* at p. 82, col. 1.
[168] *U.S. Judicial Aide Quits Bar Group*, N.Y. Times, April 9, 1959, p. 17, col. 3.
[169] *Id.*
[170] *Id.*
[171] *Id.*

generally on the court and its members."[172] For that reason, he believed "the delegates' action was inconsistent with their professional obligations, as lawyers, to the courts."[173]

The Committee on Federal Legislation of the New York City Bar Association issued a report on the resolutions that was also critical of the ABA: "The recent enactment by the House of Delegates of the American Bar Association of resolutions . . . has aroused concern and confusion about the attitude of the bar toward the Supreme Court."[174] The report goes on to note that although the House of Delegates claimed to not be criticizing the Court, "[u]nfortunately, the American Bar Association resolutions do leave the impression that recent decisions have endangered our security and that the Court has been insufficiently mindful of security needs."[175] The bulk of the report attacks the House resolutions and Communist Tactics Committee report on the grounds that it cherry-picked communism cases that were decided against the government,[176] ignored the broad range of justices that signed on to these cases,[177] and characterized well-established legal principles as mere "technicalities."[178] Perhaps most significantly, in the wake of the House of Delegates' actions a number of local bar associations felt compelled to adopt resolutions affirming their faith in and respect for the Court.[179] More than any of the public criticisms, these actions suggest a genuine concern that the ABA had crossed a line in its criticism of the Court.

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[172] *Id.*
[173] *Id.*
[174] REPORT OF THE COMMITTEE ON FEDERAL LEGISLATION ON THE AMERICAN BAR ASSOCIATION RECOMMENDATIONS CONCERNING LEGISLATION TO ALTER THE EFFECTS OF RECENT DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, 14 Record of N.Y.C.BA. 241 (1959).
[175] *Id.*
[176] *Id.* at 247-49.
[177] *Id.* at 251.
[178] *Id.* at 249-54.
[179] Lewis, *supra* note 166.

The backlash against the ABA was almost certainly strongly than anyone within the institution expected, and the principal response from the bar was to argue—unconvincingly—that the House of Delegates had not been engaged in criticism of the Court at all.[180] This episode suggests that while individual lawyers and legal organizations may freely criticize the Court, the bar is an exception to the general rule. One plausible explanation is that the Supreme Court is so dependent on its public credibility that it is just too destabilizing for the national mouthpiece of the legal profession to criticize its decisions openly. This seems to be the reasoning implicit in the criticism of the bar's actions, and could also explain why the bar had never engaged in such criticism prior to 1959.[181] Consider the following statement from Robert B. McKay, who published a contemporary response to a law review article defending the bar's actions:

> Manifestly, when *the principal lawyers' organization* calls for congressional action because Supreme Court decisions have weakened internal security, one may anticipate that nonlawyers are likely to accept such criticism as fact and to reflect nervous misgivings about the functioning of the Court. There is no positive indication that such an undermining of public confidence in the Court was intended by those who drafted or by those who voted for the resolutions. But the suggestion is here advanced that this possibility should have been considered.[182]

At the heart of this controversy was a disagreement about the obligations of the bar as a representative of the legal profession: does the bar owe a duty to the public to comment objectively on decisions of the Court, or does it have a duty to support and defend the dignity and credibility of the Court? The loyalty oath debates concerned the internal regulation of the bar's membership, but here we see that many—even outsiders—thought the bar held a special place in the broader legal system. It's not hard to see how these arguments are connected to the

[180] *See* Ross L. Malone, *The Communist Resolutions: What the House of Delegates Really Did*, 45 A.B.A. J. 343 (1959) (arguing that as a matter of procedure the House of Delegates resolutions did not amount to an endorsement of the Communist Tactics Committee report).
[181] *See* McKay, *supra* note 81.
[182] *Id.* at 624 (emphasis added).

loyalty oath debates; indeed, the idea that the bar owes special duties not to undermine the integrity of the constitutional order was a foundational premise for the argument that the bar has a duty to police its membership for views that are inconsistent with the constitutional order. That many people, even outside of the bar, took this view of the legal profession's duties seriously helps to explain why many advocated for the exclusion of communists.

It is difficult to sort out which members of the bar were sincerely adhering to principles and which were behaving opportunistically in this period. However, a principled argument for exclusion of communists did exist, based on the notions of conflicting loyalties and the role of the legal profession in defending the constitutional order. This argument may have ultimately been misguided, but at least some proponents of exclusion were making a straight-faced legal claim. Any doubts about this claim should be dispelled by the persistence of these same arguments in "communist question" cases long after McCarthy-era fear of communism had faded, and more importantly their use in bar admission issues having nothing to do with communism.

IV. BAR ADMISSION AND THE "COMMUNIST QUESTION"

Although the "loyalty oath" proposed by the ABA never caught on in state and local bar associations, many of the ideas and arguments surrounding the oath persisted in the form of bar admission questions. They varied somewhat in form and content, but the upshot of these questions was always to ask the respondent to reveal whether he had ever belonged to a political group or organization that advocated the overthrow of the United States government by force.[183] This kind of question is motivated by precisely the same ideas that inspired the failed "anti-

[183] *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 81 S. Ct. 997 (1961); *Baird v. State Bar of Ariz.*, 401 U.S. 1, 91 S. Ct. 702 (1971); *In re Stolar*, 401 U.S. 23, 91 S. Ct. 713 (1971).

communist" loyalty oath and the other communist resolutions proposed by the ABA. Indeed, the distinction between mere membership or belief in a "subversive" political group and actively advancing its aims anticipated by people like Whitney North Seymour in the 1951 House of Delegates meeting is ultimately what the constitutionality of these questions depended on. In a series of cases beginning in the late 1950's and culminating in a trio of rulings in 1971, the Supreme Court grappled with whether bar admission questions about membership in "subversive" political groups violate the First Amendment.

These cases are notable for at least two reasons. First, the McCarthy era is generally considered to have ended sometime in the late 1950's.[184] Certainly by the late 1960's and into the 70's the worst of the "passionate overreaction" to the perceived threat of communism and other "subversive" political ideologies had passed. And yet state and local bar associations continued to seriously pursue asking applicants the "communist question" well after McCarthy era fear ceases to be a plausible explanation of their motivations. That these questions were ultimately ruled unconstitutional is largely irrelevant to the project of this paper—what matters is that the bar was still interested in asking this question. Second, the opinions themselves reveal deep divisions in the Court as late as 1971 as to whether and to what extent the bar has a real interest in asking about "subversive" political ideologies.

A. *Konigsberg* I & II, *Schware*, and *Anastaplo*

The foundational "communist question" bar admission case is *Konigsberg v. State Bar of California*.[185] This case was a sequel to an earlier case, in which Konigsberg's exclusion from the practice of law in 1953 was based on his alleged affiliation with the Communist Party.[186] In

[184] Judge Walter L. Pope, *The Rediscovery of the Bill of Rights*, 66 J. Mo. B. 340, 344 (2010).
[185] 366 U.S. 36 (1961).
[186] *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

Konigsberg I, the Supreme Court held that Konigsberg's exclusion violated due process under the state constitution, since the evidence did not rationally support a finding that he failed to prove he did not advocate the overthrow of the government by force.[187] Moreover, in *Schware v. Board of Bar Examiners of New Mexico*,[188] decided on the same day, the court held that prior communist party membership does not justify an inference of bad moral character.[189] Notably, in his concurring opinion Justice Frankfurter argued that lawyers play a special role in protecting the constitutional order, stating that "all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers."[190] However, in both cases the court declined to rule on whether refusal to answer questions about communist affiliations was independently protected by the First Amendment.[191] On remand of Konigsberg's case, the California Supreme Court referred the matter to the Bar Committee for further consideration. At the hearings that followed, Konigsberg asserted his disbelief in violent overthrow of the United States government, and stated that he had never knowingly been a member of any organization that advocated such action.[192] However, he continued to refuse to answer any questions relating to his membership in the Communist Party. The Bar Committee again refused to admit Konigsberg to practice, setting the stage for the second *Konigsberg* case.

In *Konigsberg II*, the Supreme Court upheld Konigsberg's exclusion five to three.[193] The majority held that it was valid and proper for the Board to inquire about Communist Party

[187] *Id.*
[188] 353 U.S. 232 (1957).
[189] *Id.* at 243-46.
[190] *Id.* at 246.
[191] *Konigsberg*, 353 U.S. at 252.
[192] *Id.*
[193] 366 U.S. 36 (1961).

membership, because it is relevant to character and fitness to practice law. The Court grounded its relevance argument on the idea communists believed in using violence to enact their political program:

> It would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions.[194]

Thus, the Bar Committee could refuse to admit Konigsberg for refusing to answer questions about communist affiliations.[195] Although *Konigsberg* has never been directly overturned, the Supreme Court eventually ruled in the 1970's that certain questions about membership in "subversive" groups do indeed violate First Amendment rights to free speech and association.[196]

Decided on the same day as *Konigsberg* II, *In re Anastaplo*[197] involved the denial of bar admission to George Anastaplo by the Illinois Committee on Character and Fitness. Anastaplo is an intriguing and impressive figure: a World War II veteran, he served in both the Pacific and European theaters of operation.[198] Anastaplo also excelled in school; after the War, he attended the University of Chicago, where he received a doctoral degree in philosophy and graduated at the top of his law school class.[199] Anastaplo was denied admission to the Illinois bar when he refused to answer any questions regarding membership in the communist party on the grounds that such questions violated his constitutional rights to free speech and association.[200] By all accounts Anastaplo otherwise possessed the requisite moral character to practice law, and unlike

[194] *Id.* at 51-52.
[195] *Id.* at 37.
[196] Supra note 62.
[197] 366 U.S. 82 (1961).
[198] *Id.* at 98
[199] *Id.*
[200] *Id.* at 84.

in *Konigsberg*, there was no evidence that he had any affiliations with the communist party.[201] However, the Illinois Supreme Court denied Anastaplo's application solely on the grounds that his refusal to answer obstructed the performance of the Committee's functions. Although the state supreme court grounded its decision in Anastaplo's alleged obstruction of the Committee's legitimate inquires, its decision also reveals a belief that membership in the Communist Party might be inconsistent with the lawyer's oath to uphold the constitution:[202]

> It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. . . If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar.

The Supreme Court upheld the denial of admission, largely on the principles articulated in *Konisberg II*: the bar can deny admission to applicants on the grounds that they refuse to answer material questions, and questions regarding communist beliefs are material to character and fitness.[203]

B. *Baird*, *Stolar*, & *Wadmond*

The final trio of bar admission cases decided by the Supreme Court were *Baird v. State Bar of Arizona*, *In re Stolar*, and *Law Students Civil Rights Research Council, Inc. v. Wadmond*.[204] All three cases were decided in 1971 by a heavily divided court.[205] Sara Baird—a 1967 Stanford Law graduate—applied for admission to the Arizona State Bar, which required her to list all

[201] *Id.* at 86.
[202] 3 Ill. 2d, at 480, 121 N. E. 2d, at 831.
[203] *In re Anastaplo*, 366 U.S. at 88.
[204] 401 U.S. 1 (1971); 401 U.S. 23 (1971); 401 U.S. 154 (1971).
[205] *Baird*, 91 S. Ct. at 704 ("This has been an increasingly divisive and bitter issue for some years, especially since Senator Joseph McCarthy from Wisconsin stirred up anti-Communist feelings and fears by his 'investigations' in the early 1950's.").

organizations she had been associated with since the age of 16.[206] Baird apparently answered this question to the satisfaction of the Bar Committee; however, she refused to answer a question that 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."[207] When she refused to answer this question, the Committee declined to process her application any further.[208] A plurality of the Court consisting of Justices Black, Douglas, Brennan, and Marshall held that the First Amendment protects bar applicants from exclusion based on mere membership in a political group, at least when the applicant has provided the Committee with sufficient other evidence of character and fitness to practice law.[209] Justice Stewart concurred in the judgment.[210] Justices Blackmun, Burger, Harlan, and White dissented, arguing that this question—viewed in context—is not directed at mere belief, but at advocacy and the call to violence in support of that advocacy[211]

In *Stolar*, an applicant for admission to the Ohio State Bar provided the Ohio Bar Committee with all of the information he had previously given to the New York Bar Committee related to his admission to practice in New York a year prior.[212] This information included answers to questions about his belief in the principles underlying the form of government of the United States, his loyalty to the government, and his never having been a member of any organization that sought to the form of government in the United States or engaged in advancing the interest of a foreign country.[213] Although Stolar stated to the Ohio Bar Committee that he was not and

[206] *Id.* at 4.
[207] *Id.* at 4-5.
[208] *Id.* at 5.
[209] *Id.* at 6.
[210] *Id.*
[211] *Id.* at 11-12.
[212] *Stolar*, 401 U.S. at 25.
[213] *Id.* at 26.

never had been a member of the Communist Party, he nevertheless declined to answer a question on the Ohio application as to whether he was or had been a member of any organization which advocated overthrow of the government of the United States by force.[214] He also refused to respond to questions requiring the listing of all organizations of which he was or had been a member since becoming a law student.[215] The Ohio Committee recommended that the application to take the Ohio Bar examination be denied.[216]

As in *Baird*, the Court in this case ruled that the Ohio Bar Committee could not deny the applicant admission to the bar solely on the basis of his refusal to answer questions about affiliation in political groups.[217] The split of the Court was unsurprisingly identical to *Baird*. The plurality concluded that the First Amendment protects a prospective applicant from being denied admission "solely because he is a member of a particular organization . . . Since this is true, we can see no legitimate state interest which is served by a question which sweeps so broadly into areas of belief and association protected against government invasion."[218]The dissenters again argued that these questions do not relate to mere belief or membership, but instead go to willingness to participate in forceful or violent destruction of the government.[219]

It is surprising that the plurality in both *Baird* and *Stolar* viewed these bar admission questions as mere "relics of a turbulent period known as the 'McCarthy era."[220] Notwithstanding

[214] *Id.*
[215] *Id.* at 27.
[216] *Id.*
[217] *Id.* at 30.
[218] *Id.* (citations omitted).
[219] *Id.* at 33-34 ("As in Baird, and as noted above, it is not a mere question of membership present or past. It is a question of knowing membership and of willingness to participate in the forceful destruction of government. This is the crux. To forestall inquiry at the threshold stultifies Ohio's appropriate concern as to faithful adherence to a lawyer's trust when the State is about to vest great professional and fiduciary power in those who seek entrance to the Bar.").
[220] *Id.* at 24.

the plurality's assertion, the notion that these cases are mere "relics" is belied by the persistence of these bar admission questions so long after the McCarthy era had ended, and the divisions the question of their constitutionality produced on the Supreme Court. This is also true in light of the *Wadmond* case, which was decided in 1971 as a companion case to *Baird* and *Stolar*.[221]

Wadmond is probably the most important "communist question" bar admission case, because it brings together so many of the arguments and ideas that had been undergirding the bar's actions since *Summers*. The facts of *Wadmond* are slightly different from the classic "communist question" cases. In this case, a class of students and organizations challenged the entire New York bar admission procedure on the grounds that it was unconstitutionally vague and would chill speech in violation of the First Amendment.[222] The New York Rules required two affidavits from individuals acquainted with the applicant—one of which must be from a practicing attorney—and a questionnaire completed by the applicant. The Rules also required an in-person interview with each applicant and, as a final step, that the applicant take an oath that she will support the United States and New York Constitutions.[223]

The crux of the complaint was directed at two sets of questions. The first were generically directed at the "belief 'in the form of' and loyalty to the Government of the United States."[224] Notice that while it is not worded like the other "communist" questions, this oath is directed at the same concerns that motivate such questions: that some attorneys, because of their political beliefs, will not be able to uphold the federal or state constitutions. Indeed, the Court upheld these questions on the grounds that they are merely redundant with a requirement to take an oath

[221] *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1970).
[222] *Id.* at 156.
[223] *Id.*
[224] *Id.* at 161.

to uphold the Constitution, which is clearly permissible.[225] This is essentially the same argument that the critics of the proposed loyalty oath were making at both the national and state level in the early 1950's.

The second set of questions is more interesting, and reflects the importance the Court placed on the distinction between merely belonging to a group and actively advancing its goals. Question 26 is the classic formulation of the "communist question;" however, it contained this important caveat:

> [26](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?[226] (emphasis added)

Question 27 was as follows:

> 27. (a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.[227]

Questions 26 and 27 were "precisely tailored to conform to"[228] the Court's "communist question" cases. These questions, 26(b) in particular, distinguish between individuals who merely belong to a particular political group, and those who specifically intend to further all of its goals. It is striking how similar this revision to the traditional "communist question" is to the amendment proposed by Frederick Miller at the 1951 House of Delegates meeting, which sought to add the words "furthers the purposes of" to the resolution recommending that the Bar expel all adherents of communism.[229]

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[225] *Id.*
[226] *Id.* at 165.
[227] *Id.*
[228] *Id.*
[229] Proceedings of the House of Delegates, *supra* note 94.

Thus, *Wadmond* is a kind of affirmation of the 1951 House of Delegate dissenters, because it affirms their two most compelling arguments: 1) that an additional loyalty to oath is redundant with the existing oath to uphold the constitution, and 2) that merely inquiring about membership in the communist party is over inclusive as to individuals who are communists but do not desire to overthrow the U.S. government. And yet, *Wadmond* is also an affirmation of the premise, almost universally accepted in 1951, that a thorough belief in communism as a political project is fundamentally inconsistent with an obligation to uphold the Constitution:

> It is also well settled that Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer. Surely a State is constitutionally entitled to make such an inquiry of an applicant for admission to a profession dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government. The very Constitution that the appellants invoke stands as a living embodiment of that ideal. (citations omitted).[230]

With *Wadmond*, we have a fairly complete picture of the "communist question" bar admission issues. On one hand it is puzzling why the bar would continue to insist on asking about possible "subversive" ideologies so long after the national fear of communist infiltration had subsided. In this spirit, the *Pushinsky* case only further adds to this puzzle, because the bar was still insisting on asking the "communist question" as late as the 1980's, and long after such questions were declared unconstitutional under *Baird* and *Stolar*. On the other hand, *Wadmond* demonstrates that the "communist question" cases are a continuation and refinement of a substantive legal debate which began in the early years of the McCarthy era, one that is motivated not just by antipathy towards communists. When we consider the "communist question" cases in the context of the bar's view that it has special duties to uphold the constitutional order, it becomes less surprising that they insist on asking about "subversive" political beliefs even after the McCarthy

[230] *Wadmond*, 401 U.S. at 166.

era had passed. The Supreme Court has held that such questions must inquire about specific intent, but has otherwise conceded that it is legitimate for the bar to ask about political beliefs which may be fundamentally inconsistent with the Constitution, and the bar has consistently done so. Viewed in this light, *Pushinsky* is no puzzle at all—it is simply a continuation of this larger trend.

C. *Pushinsky*: The Last "Communist Question" Case

In 1980, few would have guessed that a state Bar Association would have any interest in continuing to ask the "communist question," least of all Jon Pushinsky. The question had been decided by the Supreme Court almost a full decade prior, and communism was no longer seen as a serious ideological threat to the United States. Pushinsky was still in high school when *Baird* and *Stolar* were decided. Now in his early twenties, the Philadelphia native had just graduated from the University of Pittsburgh School of Law and was preparing to start his first legal job.[231] Given what was to follow, it is fitting that Pushinsky was going to work in Wheeling, West Virginia—the same city that saw Joseph McCarthy kick off the "McCarthy era" in 1950.

Pushinsky always had an interest in civil rights law, and while at the University of Pittsburgh he got involved with the prisoner's rights division of a local legal services organization.[232] After he graduated, he was hired to start and run a prisoner's rights division of a legal services program in Wheeling.[233] As an out of state graduate, Pushinsky was required to take the bar exam over the course of three days in Charleston. The application process included a question that Pushinsky can still recite from memory 36 years later: "Do you knowingly belong to any organization or group which advocates the overthrow of the Government of the United States of America or the

[231] Pushinsky, J. (2016, November 1). Telephone interview.
[232] *Id.*
[233] *Id.*

State of West Virginia by force or violence?"[234] There were three choices: yes, no, and decline to answer. If you answered yes, there was a prompt to provide a written explanation. Pushinsky immediately concluded the question was unconstitutional under *Baird* and *Stolar*, and reasoned that "decline to answer"—which he circled—must have been included as an option for that reason. There is little reason to doubt Pushinsky's account in this respect. Even a cursory knowledge of *Baird* and *Stolar* would have led to the conclusion that this question is unconstitutional, as it is in almost every respect identical to the questions in those cases.

At that time, part of the bar admission process in West Virginia included an interview with a current member of the bar. Pushinsky cannot remember the name of the bar examiner he met with in Wheeling, but recalls that it was generally a "pleasant" conversation.[235] The purpose of the meeting was not to discuss Pushinsky's answer to the "communist question," but it did come up: "he asked me about my response to that question in a very conversational way, and I said 'well, the Supreme Court has declared the question unconstitutional.'"[236] The interviewer expressed an interest in this argument, and asked Pushinsky to send him the case citations.[237] That was the extent of their discussion about the question, and when Pushinsky returned to his office he sent the interviewer the citations as requested.[238]

While taking the bar exam in Charleston, Pushinsky had gotten to know a number of the other applicants, including others like him who were coming to the state to work for legal services. As time went on, he began to hear from a number of these people, who had received their exam results. Yet Pushinsky received nothing from the bar. Concerned, he called the Board

[234] *Id.* The question "Do you advocate the overthrow of the Government of the United States of America or the State of West Virginia by force or violence?" was also on the application, and was part of this litigation.
[235] *Supra* note 231.
[236] *Id.*
[237] *Id.*
[238] *Id.*

of Law Examiners to ask about his exam results. Pushinsky was shocked when the secretary informed him "we have a problem with you."[239] He received a letter informing him that it was the bar's position that he had refused to answer the question by circling "decline to answer."[240] Enclosed in the letter was a form with the question reproduced on it, this time with only two options: yes or no.[241] Pushinsky wrote them a letter in response explaining that he had already answered the question with one of the acceptable responses provided.[242]

Pushinsky was told that he had to participate in a second interview with a West Virginia attorney, Jeremy McCamick.[243] Pushinsky brought a local attorney to the meeting, which apparently angered McCamick.[244] As Pushinsky put it: "it went downhill from there." He was told that until he answered yes or no, his application would not be processed further.[245] At this point, Pushinsky filed a complaint with the West Virginia Supreme Court, which handled bar admission disputes.[246] Pushinsky recalls that the case received a considerable amount of publicity in Wheeling and around the state, and he frequently fielded calls of encouragement from attorneys in the state who supported his position.[247]

The case itself is fairly straightforward. The West Virginia Supreme Court held that the question was unconstitutional under *Baird* and *Stolar*: "We conclude that questions asked of an applicant to the bar by the Board of Law Examiners inquiring into mere advocacy of or knowing membership in organizations advocating the overthrow of the government by force or violence

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[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] McCamic is not the attorney who initially interviewed Pushinsky.
[244] *Supra* note 231.
[245] *Id.*
[246] *Id.*
[247] *Id.*

impermissibly infringe upon rights guaranteed by the First Amendment to the Constitution of the United States."[248] This was not a close case: this kind of question is clearly unconstitutional under existing Supreme Court precedent. Unlike *Wadmond,* the West Virginia Bar did not carefully distinguish between specific intent and mere membership. The West Virginia Bar appealed the case to the United States Supreme Court, and cert was denied. It is difficult to understand why, if this question was so important to the bar, they did not simply copy the *Wadmond* question word for word. However, it is possible that the West Virginia officials were not aware of this precedent.

One wonders why Pushinsky was so willing to fight this battle. After all, if he had simply answered yes or no he would have been admitted to the bar.[249] His stubborn refusal to answer might suggest he really was a communist or "subversive." This was almost certainly not the case. As an Ivy League graduate[250] and a legal services lawyer, Pushinsky was almost certainly farther left on the political spectrum than the average West Virginian—even the average West Virginia lawyer. But Pushinsky's actual political beliefs don't appear to be what this case was really about.[251] Pushinsky claims he was willing to battle the bar on this question because it was in his nature to do so: "First of all, I was even then a big First Amendment advocate . . . given that I wanted to do constitutional litigation I felt very strongly that starting out my legal career by answering an unconstitutional question, or by capitulating after asserting [Supreme Court precedent] . . . was the wrong way to start out my legal career."[252] This is a man that would go on

[248] *Pushinsky*, 164 W. Va. at 743.
[249] *Id.*
[250] Pushinsky graduated with a B.A. from the University of Pennsylvania in 1976.
[251] *Pushinsky*, 164 W. Va. at 739 ("Respondents assert that the inability to proceed further with petitioner's application was not due to any political beliefs or associations which he may have had, but was prompted by his refusal to respond to questions propounded by the Board.").
[252] *Supra* note 231.

to start his own solo civil rights practice in Pittsburgh, and who was once held in contempt of court for insisting that the judge could not force his co-counsel to use her husband's last name.[253] It is not difficult to detect in Pushinsky a desire to be viewed as a kind of civil rights hero in the style of Clyde Summers or George Anastaplo. However, for Summers and Anastaplo standing up for their beliefs meant placing their careers as lawyers in jeopardy; indeed, neither was initially admitted to the bar. Their principled stands took genuine courage. For Pushinsky the stakes were never this high. There was no indication that the bar would attempt to deny his admission even if he answered "yes" to the question, and more importantly he knew with reasonable certainty that the question was unconstitutional. He caught the bar with its hand in the cookie jar, and likely couldn't resist fighting a battle he was almost sure to win.

But why was the bar so insistent on asking this question, especially when they had chosen to provide "decline to answer" as an option? It is impossible to know for sure, but the circumstances of this case suggest it wasn't merely a pretext for excluding Pushinsky for other reasons. He was a young attorney who went to law school nearby, although admittedly in another state, and had no enemies in the state bar.[254] Moreover, he was going to run a prisoners' rights division of a legal services group. As such, some kind of economic protectionism explanation is unlikely—Pushinsky was not going to directly compete with anyone for clients. Simply put: it is difficult to imagine that anyone in the West Virginia Bar "had it out" for him. When I put the question to Pushinsky he could only offer: "I have no idea . . . they knew nothing really about me. I had just moved to the state as a new law school graduate."[255] Pushinsky's lawyer for the case, current West Virginia University College of Law professor Robert Bastress, agrees, and

[253] *Id.*
[254] *Id.*
[255] *Id.*

thinks the bar was litigating with a good faith belief that it was appropriate for it to ask about potentially subversive political ideologies.[256]

In the absence of alternative explanation, the most sensible thing is to look at what the bar argued in court. It turns out they offered a familiar argument, one whose roots go at least as far back as the debates in the ABA House of Delegates in 1951: the bar ought to be able to ask about "subversive" political beliefs because some political theories are inconsistent with the lawyer's obligation to uphold the Constitution.[257] The lawyer for the Board of Bar Examiners was quoted as saying "a lawyer lives by the rule of law and not by the rule of guns or violence…the basic requisite character for a lawyer is belief in the rule of law."[258] However, the West Virginia Supreme Court rejected the notion that the bar had a legitimate interest in excluding "subversive" attorneys:

> There is no indication in the prior decisions of this Court that the requirement of good moral character was established to protect the state from so-called "subversive attorneys." Rather we think the language of these cases amply indicates that the purpose of the requirements was to insure that dishonest, unscrupulous or corrupt individuals would not use their knowledge of the law to perpetrate fraud upon the unsuspecting and unknowledgeable public or to obstruct the proper administration of justice for their own or their clients' benefit.[259]

Of course, this isn't nearly as straightforward as the court claimed. *Konigsberg* explicitly states that excluding subversive attorneys is a legitimate interest of the bar, and has never been overturned. We have also seen a whole series of arguments—largely sanctioned in *Wadmond*—being made continuously since *Summers* that attorneys with certain political beliefs should not be allowed into the bar because they will be unable to fulfill their oath to uphold the

[256] Bastress, R. (March 7, 2017) telephone interview.
[257] *Pushinsky*, 164 W. Va. at 746 ("They assert that this is because the state has a right to protect itself from the danger of subversive attorneys.").
[258] Pittsburgh Post Gazette, *New Chief Justice's View on Rebellion Startles Court* (Jan. 9 1980).
[259] *Id.* at 745.

Constitution. Indeed, the *Pushinsky* court seems to ignore entirely *Wadmond*'s assertion that "[i]t is . . . well settled that Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer." Interestingly, this strong holding can partly be explained by the Chief Justice's belief that the West Virginia Constitution actually provides an explicit right to advocate the violent overthrow of the government.[260]

In some sense the *Pushinsky* case is unremarkable as just another chapter in the "communist question" cases. Its fact pattern is very similar to the landmark cases of *Baird* and *Stolar*, and the resolution of the legal question at issue was a straightforward application of existing precedent. And yet *Pushinsky* is remarkable because of *when* the case was litigated. In many ways the West Virginia Bar in this case was continuing to fight a battle conceived in the 1950's, and which the profession had been losing since 1971. This case is evidence that the profession continued to care about the syllogism noted in Part III long after the public hysteria of McCarthyism had passed.

Although it was the last "communist question" case decided by a court, the *Pushinsky* is not the last chapter in this story. In fact, as late as 1991 the New York Bar was still asking the classic formulation of the "communist question:"

> 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?

It is unclear why New York returned this older version of the question, particularly after its victory in the *Wadmond* case, and it is clearly unconstitutional under both *Baird* and *Stolar*. In a 1994 article in the Buffalo Law Review, Colin Fieman—a Columbia Law School graduate and

[260] Pittsburgh Post Gazette, *supra* note 258.

then an assistant district attorney in New York—describes his experience challenging this question.[261] It is striking how similar his experience was to Pushinsky's. In fact, even his motivation for challenging the question is almost verbatim the same that Pushinsky offered: "It was impossible for me to reconcile the purpose of the Character Committees' investigation, and my responsibilities as a prospective attorney . . . [i]n my mind, answering the question would mean that from the outset of my career I was willing to tolerate without protest unconstitutional state action."[262] Like Pushinsky, Feiman was also asked to explain why he declined to answer the question in a required meeting with a bar examiner, and was later told that his application would not be processed further until he answered to the Committee's satisfaction: "We find that the applicant's refusal to answer [the question], 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."[263] Feiman's project in his article was to show that the question was unconstitutional—and it was; however, "confronted with [a] procedural gauntlet, and under the pressure of professional considerations" he ultimately abandoned his challenge.[264] The title of Feiman's article invokes the notion that the "communist question" is a relic of the McCarthy era. Given its stubborn persistence throughout the decades following the 1950's, it might be more accurate to call it a legacy.

V. MATHEW HALE AND THE LEGACY OF THE "COMMUNIST QUESTION" CASES

The most powerful evidence that the "communist question" cases were motivated at least in part by substantive legal arguments is the exclusion of Mathew Hale from the Illinois bar. The

[261] Colin A. Fieman, *A Relic of McCarthyism: Question 21 of the Application for Admission to the New York Bar*, 42 BUFFALO L. REV. 47 (1994).
[262] *Id.* at 49.
[263] *Id.* at 50.
[264] *Id.* at 74.

Hale case is important because it features a return of the same arguments present in the "communist question" cases in a context in which the bar's actions cannot be chalked up to a larger political crisis. Rightly or wrongly, it is difficult to attribute the actions of the Illinois bar to anything other than a sincere belief that Hale's political beliefs disqualified him from membership in the legal profession. Yet, despite the lack of apparent ulterior motives, the Illinois bar grounded its reasoning in precisely the same principles offered by proponents of excluding communists. Indeed, as we will see, even defenders of the *Hale* decision in academia offered essentially the same form of argument advanced by the bar in the "communist question" cases. If we step back and view the bar admission cases as a whole, we see the same arguments appearing in different contexts from *Summers* to *Hale*. Viewed in this light, the "communist question" cases are more appropriately thought of as part of this larger trend, rather than an anomaly generated by a unique political hysteria.

Mathew Hale is a white Supremacist and the former "Pontifex Maximus" of the World Church of the Creator, a white supremacist organization that admires the Nazism of Adolf Hitler.[265] In 1998 Hale graduated from Southern Illinois Law School and passed the Illinois bar exam in July of that year.[266] Nevertheless, the Inquiry Panel for the Supreme Court of Illinois's Committee on Character and Fitness recommended denial of Hale's bar application 2-1, and the Character and Fitness Hearing Panel—with a lone dissenter—upheld this recommendation. In some ways Hale's case does not resemble the other bar admission cases we have examined so far. *Summers* and virtually all of the "communist question" cases involved individuals whose moral character was not really at issue: outside of the particular legal questions at stake in those

[265] In re Hale, COMM. OF CHARACTER & FITNESS (Ill. App. Ct. 1998), reprinted in GEOFFREY HAZARD ET. AL., THE LAW AND THE ETHICS OF LAWYERING 875 (3d ed. 1999).
[266] *Id.* at 876.

cases, no one questioned whether the applicants otherwise possessed the necessary moral character to practice law. Mathew Hale, on the other hand, is not a good person. Apart from his belief in the inferiority of non-white "mud races,"[267] Hale was sentenced to a 40-year prison sentence in 2005 for soliciting the murder of a federal judge.[268] Moreover, although its views are clearly inconsistent with many aspects of American law, the World Church of the Creator does not advocate for the overthrow of the United States government by force or violence.[269]

However, the connection between Hale's case and the "communist question" cases is impossible to deny. This is particularly true in light of the Inquiry Panel's decision, which relies on several of the "communist question" cases. Fortunately, the Panel understood that its decision was likely to be controversial, and was careful to articulate its grounds for denying Hale's application in detail. The Panel begins its constitutional analysis by noting that "[a]t an earlier time" the Committee on Character and Fitness might have disqualified Hale on the ground that, despite his statements to the contrary, his views make it impossible for him to take the required oath to uphold the state and federal constitutions, citing *Anastaplo*.[270] In particular, Hale's beliefs were apparently inconsistent with Article 1, § 20 of the Illinois Constitution, which condemns "communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation."[271] Moreover, the Membership Manual of Hale's "church," claimed that "A CREATOR puts loyalty towards his own race above every

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[267] *Id.*
[268] *See* RACE EXTREMIST JAILED IN PLOT TO KILL JUDGE, CNN (January 9, 2003). The judge in question had ruled against Hale's organization in an intellectual property dispute unrelated to the denial of Hale's law license. Although this incident occurred after the denial of Hale's admission to the bar, it obviously reflects poorly on his moral character.
[269] *See* Jason O. Billy, *Confronting Racists at the Bar: Mathew Hale, Moral Character, and Regulating the Marketplace of Ideas*, 22 HARV. BLACKLETTER J. 25 (2006).
[270] *In re Hale*, *supra* note 265, at 878.
[271] *Id.* at 879.

other loyalty." The Panel thought it was reasonable to question what would happen when such a loyalty conflicted with Hale's oath to support the United States and Illinois Constitutions. [272]

These arguments about the ability to take an oath to uphold the Constitution in "good faith" are precisely the same concerns raised in many of the "communist question" cases; however, the Panel ultimately concluded that in light of *Wadmond*, concerns about the sincerity of the oath taker "might be a frail reed" on which to deny admission.[273] However, the Panel did not think that in general the "communist question" cases prevented them from denying Hale's application; it determined that both *Stolar* and *Baird* were inapplicable, since those cases involved applicants who refused to answer questions about their views. Hale, on the other hand, was candid with the bar examiners and had "no interest in keeping his views a secret."[274] The majority ultimately grounded its rejection of Hale's application on the idea that the bar is committed to certain "fundamental truths," and that Hale's beliefs were inconsistent with these truths:[275]

1) All persons are possessed of individual dignity.
2) As a result, every person is to be judged on the basis of his or her own individuality and conduct, not be reference to skin color, race, ethnicity, religion or national origin,
3) The enforcement and application of these timeless values to specific cases have, by history and constitutional development, been entrusted to our courts and its officers—the lawyers—a trust that lies at the heart of our system of government,
4) Therefore, the guardians of that trust—the judges and lawyers, or one or more of them—cannot have as their mission in life the incitement of racial hatred in order to destroy those values.

Moreover, the Panel clearly thought these "fundamental truths" were rooted in the American constitutional order:[276]

> Commencing with Jefferson's ringing declaration that all men are created equal, and continuing with the adoption of our Constitution, the Emancipation Proclamation and the

[272] *Id.*
[273] *Id.*
[274] *Id.* at 880.
[275] *Id.* at 881.
[276] *Id.*

> Fourteenth Amendment, the moral, ethical and legal struggle for the precious values contained in those writings has been costly, difficult and long. The Bar and our courts, charged with the duty of preserving those values, cannot allow Mr. Hale or any other applicant the use of a law license to attempt their destruction.

Citing Justice Frankfurter's statement in *Schware* that constitutional guarantees are in the professional keeping of lawyers, the Panel concluded that these fundamental truths are "so basic" that they must take precedence over any first amendment rights Hale might assert: "[Hale is free] to incite as much racial hatred as he desires . . . But in our view he cannot do this as an officer of the court."[277] The lone dissenter argued that Hale had shown he could both hold racist views and practice law in accordance with his oath as an attorney, and worried that under the majority's approach "character and fitness evaluations will have to review the beliefs and scrutinize the papers, speeches and opinions of every applicant to the bar."[278] The Illinois Supreme Court denied Hale's petition for review of the Panel's decision,[279] and the United States Supreme Court subsequently denied his petition for certiorari.[280] In a separate lawsuit, Hale's exclusion from the bar was also upheld by the U.S. District Court for the Northern District of Illinois and the 7th Circuit Court of Appeals.[281]

The Panel's reasoning is striking, and there is no doubt that its decision was grounded on both 1) the alleged inconsistency of Hale's views with the constitutional order, and 2) the special relationship between the legal profession and the larger legal system as "officers of the court." As we have seen, these same ideas recurred again and again starting with *Summers*, continuing through the loyalty oath debates, the bar's clash with the Supreme Court, and the "communist question" bar admission cases. Although the Panel expressed doubts about the constitutionality

[277] *Id.* at 282.
[278] *Id.* at 884.
[279] In re Hale, M.R.16075, 1999 Ill. LEXIS 1639 (Ill. Nov. 12, 1999).
[280] Hale v. Comm. on Character and Fitness of the Ill. Bar, 530 U.S. 1261 (2000).
[281] *See Hale*, 2002 WL 398524, at *1.

of denying Hale's admission on the grounds that he could not take the oath in good faith, it ultimately employed a more abstract form of the same argument: Hale cannot both hold his racist political beliefs and remain committed to the basic principles of the Constitution.

Hale's case attracted a lot of attention from the legal academy,[282] and to some extent a renewed interest in the "communist question" cases. In fact, one of Hale's most vocal defenders was none other than George Anastaplo.[283] However, both critics and defenders of Hale's exclusion from the bar have failed to fully appreciate its connection to the "communist question" cases. Critics of the Panel's reasoning in *Hale* made compelling arguments that the decision is clearly inconsistent with modern First Amendment jurisprudence.[284] Many also worried that the reasoning employed against Hale could be applied to a variety of other political groups. For example, Harvard Law professor Alan Dershowitz considered representing Hale: "My fear was that if he was kept out of the bar, members of the Jewish Defense League, or radical black activists, or radical feminists could be kept out of the bar too on the basis of ideology."[285] Although a robust debate on the scope of First Amendment protections took place, the role of the "communist question" cases was never taken seriously by critics of the Hale decision; instead, they were primarily employed as a rhetorical tool to characterize Hale as a "return" to the McCarthy era.[286] *Summers* was almost never mentioned, despite employing essentially the same style of reasoning, and the "communist question" cases were consistently described as belonging

[282] *See* George Anastaplo, *Lawyers, First Principles, and Contemporary Challenges: Explorations*, 19 N. ILL. U. L. REV. 353 (1999); Richard L. Sloane, *Barbarian at the Gates: Revisiting the Case of Matthew F. Hale to Reaffirm that Character and Fitness Evaluations Appropriately Preclude Racists from the Practice of Law*, 15 GEO. J. LEGAL ETHICS 397 (2002); Mathew Stevenson, Hate Vs. Hypocrisy: *Matt Hale and the New Politics of Bar Admissions*, 63 MONT. L. REV. 419 (2002); Avi Brisman, *Rethinking the Case of Matthew F. Hale: Fear and Loathing on the Part of the Illinois Bar Committee on Character and Fitness*, 35 CONN. L. REV. 1399 (2003).
[283] *See* Anastaplo, *supra* note 301.
[284] *See* Billy, *supra* note 288, at 41.
[285] Elli Wohlgelernter, Spreading Hate on the Net, JERUSALEM POST, July 9, 1999, at 6B.
[286] *See, e.g.*, Wendel, W. Bradley, *Hate and the Bar: Is the Hale Case McCarthyism Redux or a Victory for Racial Equality*? (2001). Cornell Law Faculty Publications. Paper 496. http://scholarship.law.cornell.edu/facpub/496.

to the "McCarthy era," even though none of those cases were decided in McCarthy's lifetime. Instead of engaging with the substantive legal reasoning employed by the bar in the "communist question" cases, critics of the *Hale* decision merely used them to argue that the case was wrong by association.

Unsurprisingly, defenders of the *Hale* decision also were not eager to embrace the legacy of the "communist question" cases. However, their arguments have much more in common with the arguments employed by the bar in these cases than they would likely be comfortable admitting. In her article *Should Klansmen be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, law professor Carla Pratt defends the *Hale* decision on the grounds that white supremacists are unable to uphold the core constitutional value of "equal justice."[287] Pratt does not devote much time to discussing the "communist question" cases, but believes that racism is fundamentally inconsistent with constitutional values in a way that communism is not: "Unlike the racist, the communist does not seek to subvert the rights of a particular class of citizens identified solely on the irrational basis of an immutable characteristic. Also, unlike communism, racism is, in many contexts, proscribed by the law."[288] However, Pratt's argument is at bottom grounded on exactly the same kind of premises employed by the bar against communists: 1) the inconsistency of a set of views with the constitutional order, and 2) the special relationship between the legal profession and the larger legal system. In fact, Pratt opens her article with a quote from Mathew 6:24: "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other."[289] The reader may recall that this is exactly the same principle Justice Frankfurter alluded to when discussing communism in

[287] 30 FLA. ST. U.L. REV. 857 (2003).
[288] *Id.* at 897.
[289] *Mathew* 6:24 (King James).

his letter to Justice Stone: "For me the essence of this case is the very simple vindication of the old truth that one cannot serve, in thought and feeling and action, two independent masters at the same time."[290] As we have seen, the "two masters" principle is the foundation of the arguments employed by the bar in *Summers*, the loyalty oath debates, and the "communist question" cases. Pratt—and others like her—may disagree with the premises underlying these arguments, but there is no question that she is employing the same form of reasoning.

Pratt also relies on the special obligations of the bar to the legal system to defend the exclusion of white supremacists like Hale:[291]

> Lawyers are not merely hired guns who advocate their client's position. Lawyers are also officers of the court and thereby public servants. . . . Thus, if an applicant's religious beliefs mandate conduct that is contrary to the ethical obligations of an attorney, it is both fair and necessary to exclude such a person from the profession for the purpose of preserving the integrity of the legal system as a whole.

This line of reasoning goes at least as far back as *Garland*, and is grounded in the hazy notion of "officers of the court" as something in between private citizens and government officials. Moreover, there are obvious parallels to the bar's arguments about its special obligation to uphold the integrity of the legal system in the "communist question" cases, and to the arguments employed against the bar's alleged "criticism" of the Supreme Court in 1959.

Thus, both critics and defenders of Hale have failed to engage with the "communist question" cases in a meaningful way. Critics have virtually ignored *Summers* and any other evidence the bar was making a straight-faced legal argument in these cases that wasn't grounded entirely in an irrational fear of communism. Defenders, on the other hand, have been too quick to dismiss the communist cases as irrelevant to the argument for excluding white supremacists from

[290] Letter from Justice Felix Frankfurter to Justice Harlan F. Stone, *supra* note 36.
[291] Pratt, *supra* note 38, at 876.

the bar. While the arguments have different premises the form of reasoning is essentially the same, and has been employed more or less continuously since *Summers*. Moreover, this commonality does *not* mean that defenders of the *Hale* decision, like Pratt, are wrong. Guilt by association with the McCarthy era has too frequently been a barrier to appreciating the substantive legal argument at play in the "communist question" cases, and the defenses of *Hale* should similarly stand or fall on their own merit.

CONCLUSION

One of the principal goals of this history has been to demonstrate that the "communist question" cases have more continuing relevance than is commonly understood. A secondary goal has been to encourage historians to think more seriously about some of the other episodes the bar was involved with in the 1950's, and how these episodes provide insights into later bar admission issues. The core ideas surrounding incidents like the loyalty oath debates and the Communist Committee Report have survived in the form of bar admission cases, suggesting that a reactionary fear of communism was not the only thing motivating the bar. It is not the case that "[t]he communist crisis simply passed. Unlike others, it left little mark beyond ruined careers."[292] These cases are too often dismissed as simply a "relic" of a unique moment in the United States' history: one of many manifestations of an irrational and vindictive fear of communism, and nothing more. It was clearly unconstitutional for the bar to try and exclude communists, the Supreme Court said as much, and the issue has been settled. This view is neat, tidy, and incorrect. The Supreme Court's jurisprudence on the "communist question" is messy, and it has never held that subversive political beliefs are irrelevant to fitness to practice law. These cases were obviously "political" in the sense that they revolved around applicants' political beliefs, and

[292] MOLITERNO, *supra* note 3, at 68.

an irrational fear of the "other" almost certainly played a role. But to dismiss these cases as merely "political" is to ignore the substantive legal reasoning running through *Summers* to *Hale*: are certain political beliefs incompatible with the constitutional order, and what role if any does the legal profession play in upholding this order? I don't mean to suggest an answer here: this is a question about which reasonable people can and do disagree. However, taking the arguments of the bar seriously allows us to see how modern arguments about excluding white supremacists, supporters of terrorist organizations,[293] or any fringe political belief from the legal profession are connected to a larger tradition of arguments about the place of the legal profession in the constitutional order. This question has persisted in one form or another since at least 1942. It first emerged in *Summers* and continued to recur in debates over the proposed loyalty oath and the other "communist resolutions" passed by the ABA House of Delegates, survived the McCarthy era in the form of bar admission questions, and formed the foundation of Mathew Hale's exclusion from the Illinois bar. As long as the bar continues to conceive of itself as "officers of the court," we should expect this issue to occasionally arise. The communist crisis may have faded, but the theories undergirding the "communist question" cases have not.

The *Hale* case shows that a political crisis is not a necessary condition for these admission questions to arise; however, the reality that the overwhelming number of bar admission cases involve communism suggests such a crisis will result in a larger number of cases. In 1998—when Hale was denied admission to the Illinois bar—there was no larger political crisis

[293] In her 2008 piece *Loyalty Testing for Attorneys: When is it Necessary and Who Should Decide?*, Mary Elizabeth Basile points out that: "the modern day approximation of the guarantee of patriotism that the loyalty oaths of the 1950's were to accomplish among members of the bar is the application of the statute prohibiting material support of terrorist activity to attorneys." Basile, *supra* note 2, at 1867. The debates over both the wisdom and constitutionality of these statutes feature many of the same arguments that appeared in the 1950's House of Delegates meetings, and the subsequent "communist question" Bar admission cases—including the concern that these laws "do not require proof that an individual intended to further terrorist activity." This is just another version of the membership/advocacy distinction that was debated in the 1950's, and was utilized by the Supreme Court in *Barid* and *Stolar*.

involving white supremacists. There is now; particularly in light of the increased attention paid to the apparently growing political influence of white supremacist groups in the aftermath of the "Unite the Right" rally in Charlottesville on August 12th, 2017.[294] There is plenty of room to argue that white supremacists can be excluded from the bar in the wake of the *Hale* case, and we have good reason to expect more of these cases to arise in the future. Taking the "communist question" cases seriously, and accurately understanding the relationship between these cases and arguments for excluding other political beliefs from the bar, is essential to an honest discussion of this issue. Proponents of such exclusion should appreciate that, rightly or wrongly, they are utilizing essentially the same form of argument the bar employed to try and exclude communists. Opponents of such exclusion should meaningfully engage with the underlying substantive legal arguments, rather than using the boogeyman of "McCarthyism" to foster guilt by association.

[294] *See, e.g.*, Maggie Astor, Christina Caron, & Daniel Victor, *A Guide to the Charlottesville Aftermath*, N.Y. TIMES (Aug. 13, 2017) https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html.