Political Association Under the Burger Court: Fading Protection

By Kathryn A. Young* and Paul B. Herbert**

In its earlier decisions, the United States Supreme Court held that infringements on freedom of association were to be subject to the closest scrutiny. As the Court has faced associational issues in a variety of new contexts, it has gradually retreated from the traditional strict scrutiny in favor of the less stringent rational relation standard of review. This article outlines that trend and argues that the Court should enunciate a clear standard of review in such cases and that the strict scrutiny test best protects this important constitutional right.

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.[1]

Introduction

In *NAACP v. Alabama ex rel. Patterson*[2], the United States Supreme Court found unconstitutional an Alabama state court order directing the NAACP to disclose its membership lists. The Court held unanimously that freedom to associate for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech and that any action curtailing freedom of association would therefore be "subject to the closest scrutiny."[3] Consistently applying the strict scrutiny test in subsequent cases, the Warren Court found in a variety of contexts that par-

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[1] A. de Tocqueville, Democracy in America 203 (Bradley ed. 1954).

[2] 357 U.S. 449 (1958).

[3] *Id.* at 460-61.

ticular government interests were insufficiently compelling to justify challenged abridgments of political associational freedom.[4]

The Burger Court, however, confronted with freedom of association claims in a variety of new settings, has been inconsistent as to the appropriate evaluative standard to be applied. Sometimes it has appeared to adhere to the earlier strict scrutiny standard. However, in a number of other cases, it has discarded strict scrutiny in favor of a more deferential rational basis standard of review, in the process finding particular government interests sufficient to justify challenged limitations on freedom of association. The result has been threefold. First, those decisions applying a deferential rational basis standard of review in lieu of strict scrutiny have significantly eroded protection of freedom of association, both actually and as perceived. Second, the Court's indecision as to the proper standard of review in these cases has created uncertainty, with the concomitant potential for a chilling effect. And third, the lack of a clear standard of review for associational freedom claims suggests that the Court's analysis of claims in this area is sometimes manipulative rather than principled.

In parts I-V of this article, we review the Burger Court's approach to associational freedom with respect to separate categories of challenges: The conditioning of government benefits on restriction of first amendment activities, particularly free association (I); restrictions on free association in public institutions (II); restrictions on free association within the electoral process (III); infringements on associational privacy (IV); and *coerced* association (V). In our conclusion, we urge a return to the strict

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[4] The Supreme Court has not recognized a generalized constitutionally guaranteed right freely to associate with other persons. Freedom to associate is derived from the explicit first amendment guarantees of speech, press, petition, and assembly. The Court has consistently held that the first amendment shelters freedom to associate only where the particular association's goal is one which the first amendment independently protects, such as political advocacy, literary expression, litigation, or religious worship. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 700-02 (1978). *But see* Raggi, *An Independent Right to Freedom of Association,* 12 HARV. C.R.-C.L. L. REV. 1 (1977) (arguing for Court recognition of an independent right of associational freedom). This article focuses on political association, that is, association for the purpose of advancing political ideas or beliefs. Political association in a populous democracy is arguably the most vital application of the principle of free association and fairly reflects the Court's general approach to the principle.

scrutiny standard of review, which better serves the purpose and meaning of the Constitution's guarantee of associational freedom.

I. Conditioning Government Benefits on Restriction of First Amendment Activities

In cases where a plaintiff claims he is being denied government benefit solely because he has exercised a right guaranteed by the first amendment, the Burger Court has resurrected the "right versus privilege" distinction.[5] In doing so, the Court seeks to justify treating recipients of government benefits differently from members of the general public with respect to their right to associate freely.

A. Restrictions on Partisan Political Activities

The provisions of the Hatch Act prohibiting political activity by federal employees were challenged in 1973 in *United States Civil Service Commission v. National Association of Letter Carriers.*[6] Section 9(a) of the Hatch Act[7] provides that federal employees may neither use official authority to attempt to affect the result of an election nor take active part in political campaigns. Rules promulgated under this section by the Civil Service Commission ("CSC") specifically delineate the proscribed conduct.

In *Letter Carriers,* Justice White's majority opinion stated that the government's interest in regulating its employees' speech and conduct significantly differed from its interest in regulating speech in general. The right to free association was not absolute,[8] and the balance between the government and employee interests established in the Hatch Act was "sustainable by the obviously important interests" which the Act sought to serve.[9]

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[5] *See, e.g.,* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968).

[6] 413 U.S. 548 (1973).

[7] 5 U.S.C. § 7324(a)(2).

[8] Rosario v. Rockefeller, 410 U.S. 752 (1973); Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Bullock v. Carter, 405 U.S. 134, 140-41 (1972); Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

[9] United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973).

The plaintiffs challenged the prohibition of active participation in political campaigns as being vague and overbroad. Though the prohibition had been the subject of CSC rules, regulations, orders, and several thousand adjudications, the majority felt that the rules and adjudications "were subject to sufficiently clear and summary statement. . . ."[10]

Justice Douglas, joined by Justices Brennan and Marshall, dissented, arguing that even the thousands of CSC rulings on specific activities did not give precision to the critical prohibitions and that "[t]he chilling effect of these vague and generalized prohibitions is so obvious as not to need elaboration."[11] The CSC's definition of prohibited activity specifically included but was not limited to the categories listed, giving the CSC wide discretion in proscribing unlisted activities. Particular activities could fall within conflicting provisions, resulting in "self-imposed censorship imposed on many nervous people who live on narrow economic margins."[12]

Broadrick v. Oklahoma,[13] the companion case to *Letter Carriers,* involved Oklahoma's statute prohibiting state employees from involvement with political parties.[14] Justice White's majority opinion reiterated *Letter Carriers'* holding that the restrictions were sufficiently specific and understandable by an ordinary person. However, the majority further concluded that "even if the outermost boundaries of [the prohibition on political activity] may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the statute's proscription. . .".[15] Therefore the majority held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's legitimate sweep."[16] Under this test, the Court upheld Oklahoma's restriction because it was not substantially overbroad and could be corrected through separate individual suits.

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[10] *Id.* at 572.

[11] *Id.* at 596 (Douglas, J., dissenting).

[12] *Id.* at 600.

[13] 413 U.S. 601 (1973).

[14] OKLA. STAT. ANN., tit. 74, § 818.

[15] Broadrick v. Oklahoma, 413 U.S. 601, 605 (1973).

[16] *Id.* at 615.

In his dissent, Justice Brennan contended that previous Court decisions provided no support for the majority's new overbreadth analysis. He distinguished the Hatch Act prohibitions because they were limited by a complex network of regulations which made it clear that an individual could express his opinion privately and publicly. Oklahoma law, however, was almost wholly undefined and could be interpreted to forbid public expression of individual views. Since only five general rules and no Oklahoma Supreme Court decisions had construed or narrowed the Oklahoma statutory provisions, the statute could well reach protected speech.[17]

Criticism of the majority opinion in *Letter Carriers* has focused on the Court's unquestioning adherence to its 1947 decision in *United Public Workers v. Mitchell*[18] without considering the intervening changes in both circumstances and standards of review which arguably have made the *Mitchell* approach obsolete. The Hatch Act was aimed at correcting such historical evils as patronage.[19] In *Letter Carriers,* the Court ignored the previous application of more exacting standards of scrutiny for facial challenges since *Mitchell,* the Court's own previous refusal to allow the conditioning of public employment on the surrender of first amendment rights, its development of facial vagueness and overbreadth doctrines, and its requirement that first amendment restrictions be the least restrictive means of response to a clear and present danger.[20] By reverting to a rational basis standard of review in a first amendment case and reading an additional element of substantiality into the facial overbreadth test, the majority narrowed the scope of first amendment protections.[21]

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[17] *Id.* at 627-33 (Brennan, J., dissenting).

[18] 330 U.S. 75 (1947) (Hatch Act upheld).

[19] *See* Comment, National Association of Letter Carriers—*A New Standard for Facial Challenge of the Hatch Act,* (hereinafter cited as *New Standard for Facial Challenge)* 1973 UTAH L. REV. 479, 485; Note, *Section 15 of the Hatch Act is Impermissibly Vague and Overbroad in Violation of the First Amendment,* 26 VAND. L. REV. 355, 363 (1973).

[20] *See New Standard for Facial Challenges, supra* note 19, at 481-82; Note, *supra* note 19, at 360. Instead of using these constitutional tools of analysis, the majority merely balanced the government's interest in having regulations sufficiently broad to cover a variety of abuses against the employee's interest in knowing precisely what conduct would be prohibited.

[21] Note, *supra* note 19, at 363-65.

B. Employment Termination

In considering employment termination cases, the Burger Court has generally been reluctant to subject infringements on associational freedom to a strict scrutiny standard of review. The cases have arisen in two contexts: Jobs obtained through political patronage and jobs lost allegedly for the exercise of first amendment rights.

Five members of the Burger Court rejected the practice of political patronage in *Elrod v. Burns*.[22] Upon his election as Sheriff of Cook County, Democrat Richard J. Elrod promptly discharged Republican employees of the sheriff's office who did not belong to or support the Democratic Party. To maintain their jobs, employees had to work actively in Democratic Party politics.

In his plurality opinion, Justice Brennan referred to the Court's observation in *Letter Carriers* that public employees were to be kept free of improper influences. Under the patronage system, the individual's rights of belief and association and the free functioning of the electoral process suffer. Therefore, "the practice unavoidably confronts decisions by this Court . . . invalidating . . . government action that inhibits belief and association through the conditioning of public employment on political faith."[23]

The plurality declared that the government must establish a vitally important interest to justify a significant impairment of associational rights. A mere rational relation between means and end would not suffice; the government must show that it used means which least restricted freedom of association and that the benefits gained outweighed the loss of constitutionally protected rights.[24]

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented on the ground that the case involved no first amendment rights. The plaintiffs were "complaining employees who apparently accepted patronage jobs knowingly and willingly, while fully familiar with the 'tenure' practices long prevailing in the Sheriff's Office."[25] Moreover, Justice Powell

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[22] 427 U.S. 347 (1976).

[23] *Id.* at 357.

[24] *Id.* at 363.

[25] *Id.* at 380 (Powell, J., dissenting). Justice Powell cited no evidence that all discharged employees had been patronage hirees. It is inaccurate to say that all

would have upheld patronage because it stimulated political activity and strengthened political parties. He argued that often the only people interested in supporting a local candidate would be those who expected to benefit, concluding that "[t]he pressure to abandon one's beliefs and associations to obtain government employment . . . does not seem to me to assume impermissible proportions in light of the interests to be served."[26]

As the plurality predicted, political patronage does appear to be declining in importance today[27] and *Elrod* has not had a catastrophic effect on the two-party system. Promising government jobs to political recruits merely subsidizes political campaigns, which surely could be achieved by means less costly to government efficiency and freedom of association.

The Court recently returned to the patronage issue in *Branti v. Finkel.*[28] There, the incoming County Public Defender, a Democrat, sent dismissal notices to six of the nine assistant public defenders solely because they were Republicans, intending to replace them with Democrats selected by the local party machine. Both the trial court and the Second Circuit, attempting to apply the *Elrod* rationale, focused on whether assistant public defenders occupy "policymaking" or "confidential" positions, and concluded that they do not.[29] Hence, the attempted dismissals were improper, as no compelling state interest justified placing such a burden on the associational freedom of these employees.

While affirming entry of the injunction and endorsing *Elrod,* the Court apparently shifted gears by holding the proper test to be "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective perform-

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public employees have made a voluntary choice in entering into public employment; jobs in many fields exist only in the public sector. O'Neill, *Political Patronage and Public Employment,* 44 U. CIN. L. REV. 725, 727 (1975).

[26] Elrod v. Burns, 427 U.S. 347, 388 (1976) (Powell, J., dissenting).

[27] *See* Note, *Will the Victor Be Denied the Spoils? Constitutional Challenges to Patronage Dismissals,* 4 HASTINGS CONST. L.Q. 165, 180 (1977); Note, *Discharge of Non-Policymaking Public Employees on Ground of Political Affiliation Infringes Employees' Freedom of Association,* 26 VAND. L. REV. 1090, 1099 (1973). The decline of patronage may even augment government efficiency.

[28] 445 U.S. 507 (1980).

[29] *Id.* at 510-11.

ance of the public office involved."[30] The Court's use of the phrase "appropriate requirement," together with its failure even to allude to strict scrutiny, suggests waning enthusiasm for protecting associational freedom.

Justice Powell dissented, declaring that "[n]o constitutional violation exists if patronage practices further sufficiently important interests to justify tangential burdening of First Amendment rights."[31] In other words, loss of one's job constitutes only a "tangential" burden.[32] Moreover, the purported advantages of patronage constitute sufficiently important state interests (an even lower standard than the "compelling state interest" test) to vitiate the constitutional guarantee of associational freedom.

Several Court decisions involving dismissal of public employees have rested on the employees' procedural due process rights rather than on their first amendment claims. Nonetheless, these cases are instructive in gauging the Court's sensitivity to first amendment rights.[33]

For example, in *Board of Regents v. Roth*,[34] an assistant professor of political science contended that he was not rehired because he had publicly criticized the university administration. Roth alleged that his nonretention was in retaliation for his criticisms and was therefore a violation of his first amendment rights. In addition, he argued that the university's failure to provide a hearing and a stated reason for nonretention violated his right to due process of law.

In rejecting Roth's claim, the Court focused on the procedural due process issue, stating that the fourteenth amendment protected only liberty and property interests.[35] The Court did not

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[30] *Id.* at 518.

[31] *Id.* at 527 (Powell, J., dissenting).

[32] This appears to be a consistently held view on the part of Justices Powell and Rehnquist. For instance, in the subsequent case of Democratic Party of the United States v. La Follette, 101 S. Ct. 1010 (1981), Justice Powell, joined by Justices Rehnquist and Blackmun, opined in dissent that a state statute that could well alter the outcome at the Democratic Party's presidential nominating convention "does not impose a substantial burden on the associational freedom of the . . . Party." *Id.* at 1021. It is unclear what Justice Powell would consider a substantial burden.

[33] "Substantive constitutional protection . . . is useless without procedural safeguards." Board of Regents v. Roth, 408 U.S. 564, 585 (1972), (Douglas, J., dissenting), *quoting* trial court opinion.

[34] 408 U.S. 564 (1972).

[35] *Id.* at 569.

consider Roth's first amendment claims because he had not proved that the university had based its decision on his exercise of first amendment rights.[36] As a result of the Court's decision, it will be difficult, if not impossible, for one in Roth's position to substantiate his or her claim.

In dissenting, Justice Douglas stated that the first amendment, applicable to the states through the fourteenth amendment, protected the individual from state action infringing upon freedom of speech. Discharging a teacher because of political beliefs is a direct assault on the "transcendent value" of academic freedom.[37] Justice Douglas noted further that not only had previous Court rulings prohibited withholding government "privileges" because of the exercise of first amendment rights,[38] but also due process required that the state bear the burden of proving that the speech was not protected.[39]

Another professor challenged the nonrenewal of his teaching contract in *Perry v. Sindermann.*[40] Professor Sindermann brought suit alleging violation of first amendment freedom of speech and fourteenth amendment procedural due process rights. The Court acknowledged that, though an individual has no "rights" to a government benefit, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech;"[41] otherwise, first amendment freedoms would be penalized and inhibited. The Court stated that nonrenewal of a nontenured public school teacher's contract may not be based on constitutionally protected exercise of first amendment rights.

In *Arnett v. Kennedy,*[42] plaintiff Kennedy, a nonprobationary

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[36] The district court stayed proceedings on the first amendment issue, because it thought that such an issue was inappropriate for determination in a summary judgment proceeding. *Id.* at 568 n.5, 574.

[37] *Id.* at 582 (Douglas, J., dissenting), *quoting* Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[38] Board of Regents v. Roth, 408 U.S. 564, 583-84 (1972) (Douglas, J., dissenting), *citing* Speiser v. Randall, 357 U.S. 513 (1958) (denial of tax exemption); Weiman v. Updegraff, 344 U.S. 183 (1952) (opportunity for public employment); American Communication Ass'n v. Douds, 339 U.S. 382 (1950) (withdrawal of privilege to invoke NLRB facilities).

[39] Board of Regents v. Roth, 408 U.S. 564, 583-84 (1972) (Douglas, J., dissenting).

[40] 408 U.S. 593 (1972).

[41] *Id.* at 597.

[42] 416 U.S. 134 (1974).

federal employee, contested his discharge. The discharge was based on five written administrative charges, the most serious of which was that Kennedy had made defamatory statements about the regional director of his office. Kennedy had a statutory right[43] to review the material on which the charges were based and to respond to the regional director, who would make a ruling. In addition, Kennedy had a right of appeal. He contended that he was entitled to a pretermination trial-type hearing before an impartial hearing officer, and that the first amendment protected his alleged statements.[44]

The Court, in a plurality opinion by Justice Rehnquist, determined that Kennedy had a property interest in his position to the extent that the Lloyd-La Follette Act provided that a civil servant "may be removed . . . only for such cause as will promote the efficiency of the service."[45] Since the Act further expressly provided the procedures to determine cause, these procedures limited his substantive property right to continued employment. The Court concluded that the removal-for-cause provision was not impermissibly vague, and that "cause" did not include constitutionally protected speech.

In *Mt. Healthy City Board of Education v. Doyle*,[46] plaintiff Doyle had worked for five years for the city school system when the superintendent recommended that Doyle not be rehired. Doyle had given a school memorandum on teacher appearance to a local radio station and had directed obscene gestures at certain students.

The Court acknowledged that the exercise of constitutionally protected first amendment freedoms is not grounds for dismissing a public employee and that Doyle's communication was so protected. However, the unanimous Court held, a constitutional violation justifying remedial action would not necessarily occur if the same decision would have been reached absent the protected conduct. In proving causation, the dismissed employee initially bears the burden of showing that the protected conduct was a substantial factor in the decision not to rehire. Only when the employee carries that burden must the employer show that it would have reached the same determination of dismissal ab-

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[43] Lloyd-La Follette Act, 5 U.S.C. § 7501(b) (1976).
[44] Arnett v. Kennedy, 416 U.S. 134, 137-38 (1974).
[45] 5 U.S.C. § 7501(a) (1976).
[46] 429 U.S. 274 (1977).

sent the protected conduct.[47]

Thus, in the cases involving political patronage jobs, the Court focused on whether the nature of the job justified imposing party affiliation requirements. In other job termination cases, the Court has placed the initial heavy burden of proof on the fired employee to show that the protected conduct was a substantial factor in the termination. Plainly, the Court is not impelled to adhere to traditional strict scrutiny analysis in the employment area.

C. Loyalty Oaths

The Court has taken slightly divergent positions on loyalty oaths required of public employees versus similar oaths required for access to the ballot.

In *Cole v. Richardson,*[48] a state employee challenged the constitutionality of the loyalty oath required of all Massachusetts public employees. The oath required employees to swear to "uphold and defend" the United States and Massachusetts Constitutions and to "oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."[49]

In his opinion, Chief Justice Burger reviewed earlier cases concerning the constitutionality of oaths. He noted that public employment may not be conditioned on oaths that infringe on first amendment rights relating to political beliefs.[50] The Court also has rejected oaths requiring an individual to reach back into his past to "recall minor, sometimes innocent, activities."[51] Instead, an oath inquiring into past associational activities must be narrowly directed to *knowing* membership in an organization whose purpose of violent overthrow of the government the individual shares. Further, an oath may not be so vague that it could deter constitutionally protected activity.[52]

While the district court had sustained the "uphold and de-

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[47] *Id.* at 287.

[48] 405 U.S. 676 (1972).

[49] MASS. GEN. LAWS ANN. ch. 264, § 14 (West 1970).

[50] Cole v. Richardson, 405 U.S. 676, 680 (1972), *citing* Connell v. Higginbotham, 403 U.S. 207, 209 (1971); Law Students Research Council v. Wadmond, 401 U.S. 154 (1971); Baird v. State Bar of Ariz., 401 U.S. 1 (1971).

[51] Cole v. Richardson, 405 U.S. 676, 681 (1972).

[52] *Id.*

fend" clause of the Massachusetts oath, it had rejected the "oppose" clause for vagueness.[53] The United States Supreme Court rejected these "verbal calisthenics" and upheld the "oppose" clause as a redundant clarification of the "uphold and defend" clause. The Court found that the oath was "no more than an amenity,"[54] and that no one had been prosecuted for perjury since the oath's enactment in 1948.[55] Additionally, the Court held that since the oath was not an infringement of constitutional rights, the state of Massachusetts was not required to provide a pretermination hearing.[56]

Cole is a rather remarkable decision. The majority, over vigorous dissents by Justices Douglas and Marshall, upheld a government restriction on constitutionally protected activity, relying on the scrawny justification that the restriction was merely "an amenity," and allowed a fairly severe potential punishment[57] to remain law because it had not yet been actively enforced.

The Court held a similar oath, required for a spot on the Indiana ballot, to be unconstitutional in *Communist Party of Indiana v. Whitcomb*.[58] In that case, Justice Brennan's majority opinion emphasized the Court's development of the advocacy doctrine, as articulated in *Brandenburg v. Ohio*,[59] that only advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action"[60] may be constitutionally proscribed.

Under this doctrine a statute failing to distinguish mere abstract teaching from actually preparing for violent action impermissibly intrudes upon first amendment guarantees. Justice Brennan noted that the Indiana statute burdened both the Communist Party members' basic "First and Fourteenth Amendment rights to associate with others for the common advancement of political beliefs and ideas" and their interests in casting an effective ballot, merely because the Communist Party

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[53] Richardson v. Cole, 300 F. Supp. 1321, 1322 (D. Mass. 1969).

[54] Cole v. Richardson 405 U.S. 676, 685 (1972), *quoting* Cole v. Richardson, 397 U.S. 238, 240 (1970) (Harlan, J., concurring).

[55] Cole v. Richardson 405 U.S. 676, 685 (1972).

[56] *Id.* at 686-87.

[57] *Id.* at 694.

[58] 414 U.S. 441 (1974).

[59] 395 U.S. 444 (1969).

[60] *Id.* at 447.

urged certain beliefs.[61]

The different results in *Cole* and *Whitcomb* resulted from the votes of Justices Stewart and White. While concurring in *Cole*, the two justices joined the majority opinion in *Whitcomb*, without explaining why, in terms of constitutional analysis, access to government employment should be treated differently from ballot access.

D. Regulation of Professions

In *Baird v. State Bar of Arizona*[62] and *In re Stolar*[63] the Court considered cases in which state bar committees denied applicants permission to practice law because they refused to answer questions about their personal beliefs and political affiliations. In *Baird*, Justice Blackmun's plurality opinion held that the first amendment freedom of association prohibits a state from excluding an applicant from a profession merely because of membership in a particular political organization. The first amendment also limits the state's power to make inquiries about beliefs or associations because these inquiries tend to discourage exercise of constitutionally protected rights.[64] Therefore the Court held that these inquiries must be shown to be necessary to protect a legitimate state interest. Arizona did have a legitimate interest in determining whether Baird had the requisite character and competence to practice law. However, the state could not inquire into beliefs or associations solely for the purpose of withholding a right or benefit because of the person's beliefs.

In re Stolar[65] concerned a similar denial of bar admission based on a refusal to answer certain questions. Stolar, a member of the New York Bar seeking admission in Ohio, refused to state whether he had ever been a member of an organization advocating forcible overthrow of the United States government and to list all organizations to which he had ever belonged.

Justice Black wrote the plurality opinion, holding that the bar could not require an applicant to list affiliations, even if they included membership in an organization advocating violent overthrow. This sort of condition would cause law students to avoid

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[61] Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 449 (1974).
[62] 401 U.S. 1 (1971).
[63] 401 U.S. 23 (1971).
[64] Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971).
[65] 401 U.S. 23 (1971).

unpopular organizations and would penalize them for exercising their associational rights.[66]

Justice Blackmun's dissenting opinion, joined by Chief Justice Burger and Justices Harlan and White, argued that the challenged questions were constitutionally permissible because mere membership was not enough to deny bar admission. To Justice Blackmun, denying Ohio the authority to ask an applicant to list his affiliations would "forestall inquiry at the threshold."[67]

In *Law Students Research Council v. Wadmond*,[68] applicants claimed New York's bar admission program chilled first amendment rights by requiring them to furnish proof of their belief in and loyalty to the government. However, because the New York Bar Committee narrowly construed the requirement to mean only a willingness to take the support oath without reservations,[69] the Court upheld the oath's constitutionality.[70] Applicants also had to state whether they had ever been knowing members of an organization advocating violent overthrow, while possessing the specific intent to further this aim by unlawful means. The Court held that the requirement was "precisely tailored" and carefully comported with prior cases.

In his dissent, Justice Black criticized the majority's acceptance of the New York Bar's narrowing construction of the requirement that the applicant furnish proof of loyalty. He noted that the applicant still had the burden of "coming forward with some evidence"[71] and that previous cases clearly held that a government could not require proof of loyalty in order to obtain a government benefit.[72] This sort of burden of proof would deter the exercise of first amendment rights. Further, requiring applicants to take the oath without any mental reservations was an attempt to penalize them for failure to hold certain beliefs and constituted a previously rejected "sincerity test."[73]

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[66] *Id.* at 28.

[67] *Id.* at 34 (Blackmun, J., dissenting).

[68] 401 U.S. 154 (1971).

[69] *Id.* at 163.

[70] *Id.*

[71] *Id.* at 177 (Black, J., dissenting), *citing* the district court decision, 299 F. Supp. 117, 147 (S.D.N.Y. 1969).

[72] *See* Speiser v. Randall, 357 U.S. 513 (1958) (tax exemption to veterans).

[73] Bond v. Floyd, 385 U.S. 116 (1966). In Law Students Research Council v. Wadmond, 401 U.S. 154, 174, 175 (1971), Justice Black declared in dissent that "the First Amendment absolutely prohibits a State from penalizing a man be-

In a separate dissent, Justice Marshall criticized the challenged requirement as being overbroad by its inclusion of constitutionally protected conduct and vague since it did not give fair warning as to the political actions penalized. These constitutional vices are especially serious in first amendment cases where a chilling effect on protected activity might result: "The interwoven complexity and uncertain scope of the scheme heighten the danger that caution and conscientiousness will lead to the forfeiting of rights by prospective Bar applicants."[74] The restrictive construction placed on the requirement was only a declaration of good intentions which did not "neutralize the vice" of vagueness and overbreadth.[75]

In two client solicitation cases, the opposite results turned on the potentially murky issue of whether the offers of representation arose from political, rather than purely commercial, motivations. In *In re Primus*,[76] an attorney sent a letter to a woman informing her that the American Civil Liberties Union would be willing to file a lawsuit on her behalf. The attorney was charged with unethical solicitation and reprimanded by the South Carolina Supreme Court. However, the United States Supreme Court held that the case did not involve "in-person solicitation for pecuniary gain . . . [Primus'] actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain."[77]

The attorney's conduct, the Court found, "thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public."[78] Since the attorney's conduct was protected, the state must demonstrate that its regulation was a closely drawn means of furthering a compelling state interest, and the regulation with-

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cause of his beliefs" and a state therefore cannot, "consistently with the First Amendment, exclude an applicant because he has belonged to organizations that advocate violent overthrow of the Government, even if his membership was 'knowing' and he shares the organization's aims." *Id.* at 174, 175 (1971).

[74] Law Students Research Council v. Wadmond, 401 U.S. 154, 199 (1971) (Marshall, J., dissenting).

[75] *Id., quoting* Baggett v. Bullitt, 377 U.S. 360 (1964).

[76] 436 U.S. 412 (1978).

[77] *Id.* at 422.

[78] *Id.* at 431.

stand exacting scrutiny. Because the ACLU's activities did not present the harms of in-person attorney solicitation, the state's restrictions did not meet this test.

However the Court upheld sanctions for the purely commercial solicitation of legal business in the companion case of *Ohralik v. Ohio State Bar Association*.[79] Ohralik had pursued two young women involved in an automobile accident and had obtained their consent to represent them. The Court declared that he "could not contend . . . that his approaches to the two young women involved political expression or an exercise of associational freedom."[80]

In *Primus*, the majority carefully examined both the attorney's relationship with the ACLU and her actions and applied strict scrutiny. To an organization like the ACLU, which engages in litigation as the primary means of association, some form of communication with prospective litigants is, as a practical matter, necessary for effective association.

It seems fair to say that in the context of government benefits, the Burger Court generally has assumed a somewhat tentative posture in safeguarding freedom of association. Those who claim that governmental benefits or privileges are being denied them simply because they have exercised first amendment rights occupy a less-favored status than do those whose first amendment rights are being otherwise infringed.

Unfortunately, the Court not only has failed adequately to justify its different treatment of government benefits claims but also has been unable to articulate a coherent standard for evaluating these claims. Instead, the Court's holdings in this area are often irreconcilable and seem to be rationalized by only a grudging reference to the first amendment.

II. Freedom of Association in Public Institutions

The Burger Court increasingly has been disposed to give substantial weight to the special circumstances and characteristics of public institutions in balancing asserted government interests against the individuals' right to associate freely within these institutions. As a consequence, there has been an appreciable erosion of the right in this setting.

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[79] 436 U.S. 447 (1978).

[80] *Id.* at 458.

A. Educational Institutions

In the campus context, the Court has held that a college administration has a heavy burden of justifying infringements on the rights of students to freely associate.

In *Healy v. James*,[81] a state college in Connecticut had denied official recognition to a group of students who wished to form an independent local chapter of the Students for a Democratic Society ("SDS"). The Court held that the denial violated the students' constitutional rights of free speech and association. By denying official recognition to the group, the college burdened the students' associational rights by preventing access to campus facilities and campus communications, thereby seriously impeding the organization's growth. The administration's denial of recognition constituted a form of prior restraint which foreclosed a range of associational activities.[82] The college had a legitimate interest in preventing disruption but bore a heavy burden in seeking to justify its action.[83]

The Court reviewed the four grounds on which the administration had based its decision. The first ground, apprehension of a connection with the controversial national SDS, was not sufficient because "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization."[84] The Court also brushed aside as irrelevant the administration's second ground for denying recognition: that the organization advocated the national SDS's philosophy of destruction. The state may not restrict speech or association merely because the views expressed are abhorrent.[85]

Third, the administration also feared that the organization would be a disruptive influence. The Court noted that regulation of first amendment activity was permitted when advocacy was "directed to inciting or producing imminent lawless ac-

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[81] 408 U.S. 169 (1972).

[82] *Id.* at 184.

[83] *Id.*

[84] *Id.* at 185-86. In support of this statement, the Court cited United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); and Scales v. United States, 367 U.S. 203 (1961).

[85] Healy v. James, 408 U.S. 169, 187-88 (1972).

tion. . . ."[86] Under this criterion, given the special characteristics of the educational environment, associational activities *could* be limited where they substantially interfered with classes or the rights of other students. However, the Court felt that there was no substantial evidence that the organization would constitute a disruptive force.[87]

A fourth possible ground, though, existed: the organization's unwillingness to abide by the school's reasonable rules. Because the record left in doubt whether the organization would acknowledge its obligation to honor reasonable campus rules, the Court remanded that issue for determination. The Court concluded by affirming its "dedication" to first amendment principles, despite the "costs in terms of the risk to the maintenance of civility and an ordered society."[88]

Professor Gunther felt that Justice Powell's opinion in *Healy* failed to synthesize the dual ingredients of constitutional rights and the special environment of an educational institution. Justice Powell cited noncampus first amendment precedents in rejecting the first three justifications. In dealing with the fourth, however, he asserted limiting contours which apply only in the campus context. The opinion therefore moved in two different directions without adequate reconciliation.[89] Nonetheless, in *Healy* the Court came far closer to applying traditional constitutional analysis than in many other recent freedom of association cases. Since the Court did not specify how restrictive an administration's rules could be, future definition of the Court's analysis will be necessary to discern whether an organization faces substantial obstacles to recognition.[90] The Court has not uniformly extended the right to secure official recognition to purely social organizations.[91]

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[86] *Id.* at 188, *citing* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[87] Healy v. James, 408 U.S. 169, 190-91 (1972).

[88] *Id.* at 194.

[89] Gunther, *In Search of Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1019-20 (1972).

[90] *See* Note, *"One Step Forward, Two Giant Steps Backward"—The Court Looks at Student Rights*, 27 U. MIAMI L. REV. 538, 543 (1973); Comment, *College Administration May Not Unjustifiably Deny Official Recognition to a Student Organization*, 19 N.Y.L.F. 157 (1973); Note, *Freedom of Political Association on the Campus: The Right to Official Recognition*, 46 N.Y.U. L. REV. 1149, 1156-57 (1971) (hereinafter cited as *Freedom of Political Association*).

[91] Note, *Freedom of Political Association, supra* note 90, at 1160.

Further developments in this area will likely include the activities of student homosexual rights organizations. The Court denied certiorari in *Ratchford v. Gay Lib*,[92] where a divided Eighth Circuit panel had held that the University of Missouri had violated the constitutional rights of a gay rights organization's members. Gay Lib had disavowed any intent to violate Missouri's anti-sodomy statute, contending that its purpose was merely informational and supportive.[93]

Lower federal courts also have divided on the issue of advertisement by and incorporation of such homosexual rights organizations. Some courts have held that the unlawful and, in their perception, repugnant, purpose of the organizations may override associational freedoms. Tax exempt status for these organizations has been granted subject to restrictions not applicable to other types of organizations.[94]

The Court has shown considerable sensitivity to the associational rights of students. However, it has not yet articulated what types of restrictions it ultimately would find to be reasonable.

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[92] 558 P.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

[93] In dissent, Justice Rehnquist, joined by Justice Blackmun, summarized the university's position by analogizing an officially sanctioned Gay Lib meeting to a meeting of measles victims, in association with nonmeasles victims, for the purpose of urging repeal of a state law that measles sufferers be quarantined. He discounted the fact that Gay Lib would not advocate violation of Missouri law, since psychologists had testified that the organization's meetings would *eo ipso* lead to violations of the statute. Ratchford v. Gay Lib, 434 U.S. 1080, 1083 (1978) (Rehnquist, J., dissenting). Pursuing the measles simile, Justice Rehnquist observed: "The very act of assemblage under these circumstances undercuts a significant interest of the State which a plea for repeal of the law would in no wise do." *Id.* at 1084. Manifestly, this analysis would completely discard the tests of specific intent and the likelihood of success and replace them with a psychologist's conclusory assertions.

[94] Wilson & Shannon, *Homosexual Organizations and the Right of Association*, 30 HASTINGS L.J. 1029 (1979). One summary concluded that universities have contended that the presence of official gay groups would interfere with the university's educational functions and that recognition might generate illegal conduct and would imply university approval. In the absence of the conditions specified in *Healy*, these claims have been rejected as justifications for curtailing first amendment freedoms. Comment, *Beyond* Tinker *and* Healy: *Applying the First Amendment to Student Activities*, 78 COLUM. L. REV. 1700, 1705 (1978).

B. Military Institutions

In *Greer v. Spock*,[95] the Court upheld regulations banning partisan political activities on the Fort Dix military reservation. In so doing, the Court apparently retreated from its holding in *Flower v. United States*[96] that a civilian had the right to distribute political pamphlets on an open street within a military reservation.

Justice Powell's concurrence emphasized that preserving a politically neutral appearance justified a significant restraint on first amendment freedoms. In his view, the particular governmental interest only narrowly infringed individual rights. Television and newspapers were available on the base and service personnel could be politically active while off-base and out of uniform.

Justice Brennan, joined by Justice Marshall, found the majority's attempt to distinguish *Flower*[97] "wholly unconvincing, both on the facts and in its rationale."[98] Fort Dix was no less open than *Flower's* Fort Sam Houston. Moreover, the dissent pointed out that the Court did not consider whether it was actually necessary to exclude unapproved public expression. There was "no credible claim" that the distribution of political leaflets would impair the government's interests in training recruits and maintaining national defense.[99]

It is troubling that the Court in a dramatic and scarcely-explained departure from traditional first amendment analysis should defer so obligingly to generalized and self-claimed military interests as to confer an essentially conclusive presumption of constitutional validity on the particular restrictions at issue. In short, the Court simply discarded strict scrutiny in *Greer*.

C. Penal Institutions

In what one commentator called a "dangerous departure from its past history of active judicial review of regulatory actions,"[100]

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[95] 424 U.S. 828 (1976).

[96] 407 U.S. 197 (1972) (per curiam).

[97] *Id.*

[98] Greer v. Spock, 424 U.S. 828, 849 (1976) (Brennan, J., dissenting).

[99] *Id.* at 861.

[100] Comment, *Prisoner Representative Organizations, Prison Reform, and* Jones v. North Carolina Prisoners' Union: *An Argument for Increased Court Intervention in Prison Administration*, 70 J. CRIM. L. & CRIM. 42, 43 (1979)

the Burger Court recently indicated its intention to limit prisoners' rights and to return to the old "hands off" doctrine.[101] In *Jones v. North Carolina Prisoners' Labor Unions, Inc.*,[102] a prisoners' union was formed to work for improved working conditions through collective bargaining and to serve as a vehicle for voicing inmate grievances.[103] The state issued regulations prohibiting inmate solicitation of other inmates, meetings of union members, and bulk mailings; mere membership in the union was not proscribed. The union alleged that the regulations violated its rights and the rights of its members to engage in protected speech, association, and assembly activities.[104]

Justice Rehnquist's observation that the restrictions imposed were reasonable and consistent with legitimate operational considerations set the tenor of the majority opinion.[105] He emphasized the "complex and difficult" realities of running a penal institution and the resulting "wide-ranging deference to be accorded the decisions of prison administrators."[106] The Court held that "[p]erhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls."[107]

The Court held that North Carolina's prohibition of inmate solicitation did not "untowardly" infringe first amendment rights. Prison officials must be accorded judicial deference when they take reasonable steps to "contain the ever-present potential for violent confrontation and conflagration."[108] The challenged

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(hereinafter cited as *Prisoner Representative Organizations).*

[101] *See* Comment, *The Future of Prisoners Unions:* Jones v. North Carolina Prisoners' Labor Union, 13 HARV. C.R.-C.L. L. REV. 799, 803 (1978); Comment, *Prisoners' Rights*—Jones v. North Carolina Prisoners' Labor Union, Inc., 24 N.Y.L.S.L. REV. 290, 293 (1978) (hereinafter cited as *Prisoners' Rights).* In *Jones,* the Court did not withdraw rights extended to individual prisoners but refused to extend those rights to organizations. *Id.* at 300.

[102] 433 U.S. 119 (1977).

[103] *Id.* at 126. Collective bargaining with respect to pay, hours of employment, and other terms and conditions of incarceration is illegal under North Carolina law. N.C. GEN. STAT. §§ 95-98 (1975).

[104] Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 122 (1977).

[105] *Id.* at 130.

[106] *Id.* at 126.

[107] *Id.* at 125-26.

[108] *Id.* at 132.

regulations were not unnecessarily broad, designed as they were to meet the perceived threat of group meetings.[109]

Justice Marshall's dissent criticized the Court's use of a rational basis instead of a strict scrutiny test. The realities of running a school or city were as complex and difficult as those of running a prison, he observed, yet the Court had not deferred to the judgment of school or city officials simply because the judgment was ostensibly rational. Officials predictably would err toward unnecessarily restrictive rules[110] and it was the Court's role vigilantly to protect first amendment rights.

In sharp contrast to the majority opinion in *Jones*, lower federal courts had generally required that prison regulations pass much more exacting scrutiny. The state generally had to show that a clear and present danger constituting a compelling state interest was met with a narrowly drawn regulation, and that a necessary relation existed between the restraint and the purpose of imprisonment.[111] Less restrictive means than total prohibition do exist: Time, place, and manner restrictions[112] could apply to meetings, and prison officials could inspect bulk mailings for contraband. Prison officials should demonstrate that less intrusive means either are unworkable or would be inefficacious in safeguarding the prison's asserted interests.

Again, as it had done in *Greer*, the Court in *Jones* jettisoned traditional first amendment strict scrutiny. Instead of requiring the government to establish a compelling interest and to show that no less restrictive means would meet that interest, the Court gave so much weight to the government's bare assertions of important interests that it effectively created a conclusive presumption of constitutional validity.[113]

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[109] *Id.* at 133. In addition, the Court held that prison officials could treat the union's associational rights differently from those of organizations such as the Jaycees and Alcoholics Anonymous if the officials demonstrated a rational basis for so doing. Prison officials perceived the Jaycees and Alcoholics Anonymous as serving a rehabilitative purpose and working in harmony with prison administrators, while "the *administrators'* view of the Union differed critically." *Id.* at 134-35 (emphasis added).

[110] *Id.* at 142 (Marshall, J., dissenting).

[111] *See Prisoners' Rights, supra* note 101, at 295-96; Comment, *The First Amendment Behind Bars: Prisoners' Right to Form a "Union,"* 8 PAC. L.J. 121, 129 (1977).

[112] *See Prisoner Representative Organizations, supra* note 100, at 49-50.

[113] Under Justice Rehnquist's analysis, first amendment rights are not infringed when their exercise is made significantly and perhaps prohibitively

Prisons clearly have special problems of safety and security which set them apart from other public institutions. In fact, it is conceivable that sufficiently compelling government interests may justify certain restrictions, even under a traditional strict scrutiny analysis, upon the requisite showing by the government. The Court might also hold that, given the unique status of prisoners, freedom to associate is one of those constitutional rights that simply does not extend to them.[114] This sort of forthright holding would potentially weaken first amendment protections. By adopting a rational basis standard of review in *Jones*, the Court has accomplished essentially the same result and has simultaneously diluted the first amendment rights of the nonincarcerated.

III. Association in the Electoral Process

Associational rights claims arising in an electoral context have proven particularly troublesome for the Court, and it has not developed a coherent approach for them. Despite this, the Court has articulated a greater solicitude for associational rights in this area than in others.

A. Elections

The Court has been inconsistent in adjudicating suffrage and ballot access cases implicating associational freedom. In a few instances, it has forthrightly applied a rational basis test to uphold first amendment infringements. More typically, though, the Court has invoked the language if not necessarily the substance of strict scrutiny.

A New York statute required a registered voter to enroll as a party member thirty days before the general election in order to be eligible to vote in that party's next primary election.[115] The

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more costly and when alternative means of communication, no matter how ineffective, exist. This is the opposite of the conclusion reached by the Court in Healy v. James, 408 U.S. 169 (1972). Depending upon the union's financial status, it may not have been able to take advantage of the other avenues of information flow to which Justice Rehnquist referred.

[114] *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.").

[115] N.Y. Elec. Law § 186 (McKinney 1949). Section 187 provided for special

petitioners in *Rosario v. Rockefeller*[116] contended that this restriction abridged their freedom to associate with the political party of their choice by precluding them from voting in the party's primary election.[117] By a 5-4 vote, the Court held that the law did not absolutely disenfranchise those voters who were eligible to enroll in a party. The petitioners' plight was caused by "their own failure to take timely steps to effect their enrollment" and was not a ban on their freedom to associate.

Moreover, the Court held that the thirty-day limitation was "not an arbitrary time limit unconnected to any important state goal."[118] The Court found that advance enrollment accomplished New York's goal of preventing party raiding. Thus the Court upheld the New York statute as setting a reasonable time limit tied to a legitimate purpose.[119]

Justice Powell's dissent, joined by Justices Douglas, Brennan, and Marshall, noted that the formulation of the Court's standard of scrutiny, although "nebulous,"[120] resembled a rational basis test. While Justice Powell accepted the contention that the deadline was rationally related to a legitimate state purpose, he argued that a case involving fundamental constitutional rights required strict judicial scrutiny.[121] The Court previously had found that mere deferment of an essential constitutional right

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exemptions from the waiting period.

[116] 410 U.S. 752 (1973).

[117] *Id.* at 756. Justice Stewart distinguished previous cases in which the Court had held disenfranchising statutes violative of equal protection. Dunn v. Blumstein, 405 U.S. 330 (1972) (Tennessee disenfranchised new residents); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (nonproperty owners precluded from voting in bond elections); Evans v. Corman, 398 U.S. 419 (1970) (Maryland refused to permit residents of a federal enclave within state boundaries to vote in state elections); Cipriano v. City of Houma, 395 U.S. 701 (1969) (nonproperty owners precluded from voting in bond election); Kramer v. Union School Dist., 395 U.S. 621 (1969) (nonproperty owner or nonparents precluded from voting in school board elections); Carrington v. Rash, 380 U.S. 89 (1965) (Texas permitted servicemen to vote only in county where they resided at time of entry into service).

[118] Rosario v. Rockefeller, 410 U.S. 752, 760 (1973).

[119] *Id.* at 761-62.

[120] *Id.* at 767 (Powell, J., dissenting) ("Such nebulous promulgations are bound to leave the lower courts and state legislatures in doubt and confusion as to how we will approach future significant burdens on the right to vote and to associate freely with the party of one's choice.").

[121] *Id.* at 767-68.

constituted a breach of that right.[122]

The dissenters believed that the New York statute could not withstand strict judicial scrutiny. The state interest was not sufficiently substantial to sustain the presumption that all persons changing party affiliation did so for the purpose of raiding. The dissent stated that fluidity and overlap of philosophy characterize American political parties, and that citizens choose to vote for a particular party based on its response to their "immediate concerns and aspirations,"[123] rather than on party regimentation. To preclude citizens from voting in response to new and meaningful issues violated their fundamental rights.

The dissent further asserted that, even in pursuing its legitimate interests, a state "cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision'."[124] A state must choose the least drastic means available when it burdens constitutionally protected activity. Since other states had successfully maintained party systems without such severe advance enrollment deadlines, the dissent argued that New York had not proven that it had chosen the least drastic means of preventing party raiding.[125]

In *Kusper v. Pontikes*,[126] the Court took a different tack, explicitly enunciating a strict scrutiny standard and holding that Illinois' legitimate interest in preventing party raiding did not justify a twenty-three month advance enrollment deadline: "As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest."[127] A state must not unnecessarily restrict constitutionally protected activity, must adhere to "precision of regulation," and must choose the least restrictive means of achieving its legitimate interests.[128]

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[122] *Id.* at 766-67.

[123] *Id.* at 769.

[124] *Id.* at 770, *quoting* NAACP v. Button, 371 U.S. 415, 438 (1963).

[125] Rosario v. Rockefeller, 410 U.S. 752, 771 (1973) (Powell, J., dissenting).

[126] 414 U.S. 51 (1973).

[127] *Id.* at 58.

[128] *Id.* at 58-59. In dissent, Justice Rehnquist thought it significant that a voter was not required to swear that he had not participated in another party's primary unless challenged, and was not likely to be challenged where the state perceived no danger of raiding. *Id.* at 68 (Rehnquist, J., dissenting). This observation is eerily reminiscent of Chief Justice Burger's curious rationale in

The Court considered challenges to various restrictions on access to a position on the California ballot in *Storer v. Brown.*[129] The California Elections Code disqualified an independent candidate who had voted in the preceding primary or who had a registered affiliation with a political party within one year prior to the election.[130] The Court found the California provision to be very similar to the eleven-month waiting period in *Rosario.* It held that the statute was designed to eliminate the less popular candidates and thus reserve the general election for major struggles. By penalizing candidates who did not make early plans, the restriction worked against candidacies prompted by short-range political goals. The state's interest in political stability was compelling and outweighed a candidate's interest in making a late decision to run as an independent.

In his dissenting opinion, Justice Brennan, joined by Justices Douglas and Marshall, agreed with the majority that the relevant test was whether "the legislation, strictly scrutinized, is necessary to further compelling state interests."[131] Justice Brennan stated that the burden on freedom of association was inconsistent with the fluidity of American politics and that "often a wholly unanticipated event will in only a matter of months dramatically alter political fortunes and influence the voters' assessment of vital issues."[132]

The dissent argued that the Court must also determine whether the state had chosen a necessary and least drastic means of regulation, with the burden of proof on the state.[133]

Cole v. Richardson, 405 U.S. 676 (1972), that the loyalty oath there was constitutionally sound because prosecution for perjury was unlikely. *Id.* at 685-86.

[129] 415 U.S. 724 (1974).

[130] 1969 Cal Stats. § 948, at 1894, § 1 (c)-(d), current version at CAL. ELEC. CODE §§ 6830(c), 6830(d) (West 1977 & Cum. Supp. 1981).

[131] Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting). In stating that the majority had applied the strict scrutiny test, Justice Brennan relied on the majority's statement that the state's interest in the stability of its political system was compelling. The majority termed it "obvious" that the state's limit furthered the state's interest, and declared that it had no reason to conclude that California's restriction "was not an essential part of its overall mechanism to achieve its acceptable goals." *Id.* at 736. This analysis plainly does not rise to the level of a strict scrutiny, least restrictive means review of the legislation.

[132] *Id.* at 758.

[133] *Id.* at 760-61. It is interesting to compare Jenness v. Fortson, 403 U.S. 431 (1971), one of the Burger Court's first ventures into freedom of political

In *American Party of Texas v. White,* [134] certain minor political parties contended that particular Texas statutes violated their associational freedoms and invidiously discriminated against new and minority parties. Under Texas law, in order to qualify for entry on a general election ballot, any new party, any party that did not run a candidate for governor in the preceding election, and any party whose candidate for governor in the preceding election received less than two percent of the vote must demonstrate the support of a certain percentage of qualified voters. This demonstration is to be made by combining the number of participants in the party's precinct conventions with the number of *notarized* signatures on nominating petitions.

The Court upheld the law, ostensibly using a traditional strict scrutiny analysis. It pointed to such "compelling" state interests as "preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion."[135] With respect particularly to the requirement that all petition signatures be notarized, the Court upheld the lower court finding that the requirement was necessary to prevent cross-over or duplicate votes.

In *Mandel v. Bradley,*[136] an independent candidate for United States Senator challenged Maryland's election law, which required candidates affiliated with a party to file a certificate of candidacy 70 days before the party's primary election. Independent candidates had to file, by the same date, a certificate of candidacy plus nominating petitions signed by at least three percent of the state's registered voters. In a per curiam opinion, the Court directed the trial court to evaluate the evidence more carefully in order to assess "the extent of the burden imposed on independent candidates."[137] Nowhere did the Court even hint

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association, with Williams v. Rhodes, 393 U.S. 23 (1968), one of the Warren Court's last. While both cases involved the same basic issue, legislated obstacles to ballot access by candidates outside the two major parties, the two opinions diverge strikingly in their modes of analysis. In *Williams,* the Court unequivocally held that, as the challenged law infringed on the rights to vote and to associate politically, strict scrutiny was mandated; in *Jenness,* by contrast, the Court three years later reversed direction and, while not articulating any standard at all, contented itself with only the most cursory review.

[134] 415 U.S. 767 (1974).

[135] *Id.* at 782 n.14.

[136] 432 U.S. 173 (1977).

[137] *Id.* at 178, *quoting* Storer v. Brown, 415 U.S. 724 (1974).

that burdens on associational freedom require strict scrutiny. Only Justice Stevens, in dissent, suggested that the state must shoulder the burden of justifying this constitutional encroachment with substantial reasons. He found that the statute discriminated against independent candidates by requiring them to make candidacy decisions earlier than candidates from the national political parties. The state had given no justification for this sort of disparate treatment, he believed.[138]

B. Party and Individual Political Activity

The Court's standard of review in cases involving the selection of party delegates and limitations on political expenditures and contributions has also been somewhat opaque. Here too, however, the Court is striving for a somewhat more rigorous standard than the rational basis test.

In *Cousins v. Wigoda*,[139] the Court considered whether Democratic Party rules or the Illinois election law on selecting delegates to the 1972 Democratic National Convention should prevail. Justice Brennan's opinion for the Court held that the Democratic Party had a constitutional right of political association protected against infringement by the state or the federal government.[140] The Court felt that the selection of candidates for a national office by a national party transcended state lines. Therefore, "Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling. . . ."[141] The Court's analysis in *Cousins* significantly expands the associational rights of political parties and their members.[142] However, the dissent criticized the Court's analysis as being imprecise and overbroad.[143]

The Court eschewed an opportunity in *Democratic Party of*

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[138] Mandel v. Bradley, 432 U.S. 173, 180-81 (1977) (Stevens, J., dissenting).

[139] 419 U.S. 477 (1975).

[140] *Id.* at 487.

[141] *Id.* at 491.

[142] *See* Note, *National Political Party Conventions: State's Interest Subordinate to Party's in Delegate Selection Process*, 29 U. MIAMI L. REV. 806 (1975).

[143] The concurring opinion by Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, characterized the majority's language as unnecessarily vague and overbroad, and argued that the decision should rest unequivocally on the Democratic Party's freedom of association. Cousins v. Wigoda, 419 U.S. 477, 495-96 (1975) (Rehnquist, J., concurring).

the United States v. La Follette[144] to clarify its method of analysis regarding political freedom of association. In Wisconsin, publicly avowed Democrats chose delegates to the Democratic Party's National Convention in private caucuses. However, a state statute dictated that these delegates had to vote in accordance with the results of Wisconsin's "open" Democratic presidential preference primary in which any voter could participate. Rather than refine the *Cousins* analysis, Justice Stewart artlessly finessed the associational issue, declaring that Wisconsin's asserted interests went only to the conduct of the presidential preference primary, not to the imposition of voting requirements upon the delegates.[145] In other words, regardless of whether Wisconsin's interests are compelling, they are irrelevant. The Democratic Party does not and cannot object to Wisconsin's conduct of an "open" primary; it can, however, successfully resist Wisconsin's attempt to make that primary *binding* on the party contrary to the Party's rules.

Justice Stewart's analysis is objectionable in two respects. First, as the dissent recognized,[146] at least two of Wisconsin's asserted interests *do* go not only to the openness of its primary but also to the binding nature of the primary: "preserving the overall integrity of the electoral process . . . [and] increasing voter participation in primaries. . . ."[147] Surely the argument that these interests will be disserved by requiring Wisconsin to transmute its binding primary election into a practically meaningless popularity contest deserves some attention from the Court.

Second, and more disturbing, by forgoing an obvious opportunity to declare clearly that strict scrutiny is required where freedom of political association is burdened, the Court further evidenced a less faithful adherence to earlier first amendment principles regarding associational freedom.[148]

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[144] 101 S. Ct. 1010 (1981).

[145] *Id.* at 1020.

[146] *Id.* at 1025-26 (Powell, J., dissenting).

[147] *Id.* at 1020.

[148] Justice Powell, in dissent, joined by Justices Blackmun and Rehnquist, betrayed little, if any, sympathy for the Democratic Party's freedom of association. First, he attempted to distinguish *Cousins* on the ground that there the issue was whether the state could force a particular delegate on the Party, whereas in *La Follette,* the issue was whether the state could force a delegate to vote a particular way. In addition, he argued that the Democratic Party, unlike the NAACP, for instance, is not "an organization with a particular ideo-

In *Buckley v. Valeo,*[149] the Court considered challenges to the contribution and expenditure limitations and disclosure provisions of the Federal Election Campaign Act of 1971, as amended in 1974.[150] In a lengthy per curiam opinion, the Court first observed that the fundamental first amendment protections encompass political association. The Court noted that restrictions on spending for political communication reduced the number of issues discussed and the audience reached.[151] To sustain such an interference with constitutionally protected rights, the state had to demonstrate that it had a sufficiently important interest met by a narrowly drawn statute.

The Court found the contribution limitation only a marginal restriction. It would merely require candidates to amass resources from a larger number of contributors. Moreover, other associational activities were still available to contributors. However, the *expenditure* limitation "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association."[152]

The government justified the contribution restriction on grounds that it would prevent corruption, moderate the disproportionate influence of the affluent, and check skyrocketing campaign costs. The Court held that, under a rigorous standard of review, the Act's primary purpose of limiting the actuality and appearance of corruption provided a constitutionally sufficient justification for the restriction. However, this was an *inadequate* justification for the markedly greater burden on association

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logical orientation or political mission [and] is . . . not organized around the achievement of defined ideological goals." *Id.* at 1023-24 (Powell, J., dissenting). This declaration embodies two curious constitutional propositions: First, that associational freedom is somehow elastically related to the size, nature, and ideological orientation of each particular association; and second, that associational freedom does *not* protect an association's self-determination respecting admission to membership. In sum, one is left with the uneasy feeling after reading *La Follette* that a clear majority of the Court does not feel highly protective of associational freedom.

[149] 424 U.S. 1 (1976). Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments,* 86 YALE L.J. 953 (1977), argues that under the analysis employed in *Buckley,* Congress' response to *Buckley* is similarly unconstitutional.

[150] 86 Stat. 3 (1972); 88 Stat. 1263 (1974).

[151] Buckley v. Valeo, 424 U.S. 1, 19 (1976).

[152] *Id.* at 22.

caused by the expenditure limitations. The Court declared that the government may not restrain the voices of some constituencies in order to enhance the weight of others. Further, the people and not the government should retain control of the amount spent on debate of public issues during a political campaign.

As to the Act's requirements relating to *disclosure* of contributions and expenditures, the Court acknowledged the inherent potential for substantial infringement of first amendment rights,[153] hence triggering strict judicial scrutiny. However, the Court felt that the government's asserted interests—informing the electorate as to the source of candidates' funds, deterring corruption, and gathering data necessary to uncover violations—justified the requirements. In the Court's view, the nexus between the restriction and the important interests sought to be served was close enough.

Though purporting to undertake the traditional strict scrutiny analysis, the Court did not meaningfully address whether the government could achieve its asserted objectives through less expansive disclosure requirements. One must, therefore, at least question whether the strict scrutiny test of the Burger Court in *Buckley* is the same strict scrutiny test which the Warren Court employed nearly two decades earlier in *NAACP v. Alabama ex rel. Patterson.*[154]

IV. Associational Privacy

In *NAACP v. Alabama ex rel. Patterson,* the Warren Court recognized "the vital relationship between freedom to associate and privacy in one's associations."[155] Compulsory disclosure of organizational affiliation could constitute as effective a restraint on freedom of association as direct government action. In a variety of situations, however, the Burger Court has easily found the

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[153] *Id.* at 66.

[154] 357 U.S. 449 (1958). On the other hand, in rejecting a freedom of association challenge to the Presidential Recordings and Materials Preservation Act (under which the General Services Administration was authorized to screen all of former President Nixon's presidential papers and tapes, and to retain those of legal or historic importance), Justice Brennan carefully pointed out for the Court that the Act furthered compelling government interests *and* that no less restrictive means suggested itself. Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 465-68 (1977).

[155] 357 U.S. 449, 462 (1958).

asserted government interests sufficiently compelling to justify compulsory disclosure.

A. Organizational Privacy

The Court upheld reporting and recordkeeping provisions of the Bank Secrecy Act of 1970[156] in *California Bankers Association v. Schultz*.[157] The American Civil Liberties Union ("ACLU") argued that the government could unconstitutionally ascertain the identity of its members and contributors by examining its bank records. Justice Rehnquist's opinion for the majority acknowledged that *Patterson* had recognized an organization's right to protect its members from governmentally compelled disclosure. However, he concluded that earlier cases did "not elicit a per se rule that would forbid such disclosure in a situation where the governmental interest would override the associational interest in maintaining . . . confidentiality."[158] The ACLU had contended that a bank might not notify the organization that its records had been subpoenaed, and that informal access to records was widespread, justifying present injunctive relief. Since the ACLU failed to show any governmental attempt to compel disclosure, however, the Court felt that it could not weigh the competing associational and governmental interests involved in the recordkeeping requirements.[159]

The Court also upheld the reporting requirements. The majority considered the ACLU's claim "speculative and hypothetical" since the ACLU did not allege that it engaged in transactions large enough to trigger the Act's reporting requirements.[160]

Studies indicate that although the policy of the largest banks is to maintain confidentiality of bank records, this policy is not always enforced at the local level where government officials often are permitted to examine bank records without customer knowledge.[161] Therefore the infringement of associational rights potentially is very grave. Nor is the Bank Secrecy Act drawn

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[156] 12 U.S.C. §§ 1730(d), 1829(b), 1951-1959 (1970); 31 U.S.C. §§ 1051-1062, 1081-1083, 1101-1105, 1121-1122 (1976).

[157] 416 U.S. 21 (1974).

[158] *Id.* at 55-56.

[159] *Id.* at 56 & n.26.

[160] *Id.* at 76.

[161] Note, California Bankers Association v. Schultz: *An Attack on the Bank Secrecy Act*, 2 HASTINGS CONST. L.Q. 203, 209-10 (1975).

with the precision normally required of statutes burdening freedom of association. A comparison of the total numbers of arrests and examined bank accounts indicated that at most only 4.4% of the bank accounts mandatorily recorded under the Act would prove useful in criminal investigations.[162] Nonetheless, the majority discarded the traditional interrelation between first and fourth amendment protections[163] in permitting access to records without procedural guarantees.

Indeed, the offhand and unanalytical way in which the Court rejected the ACLU's constitutional claims is perhaps as significant as the rejection itself. The Court emphasized the superficial distinction that in *Patterson*[164] there was an official order demanding disclosure of the protected information whereas in *Schultz* the ACLU's bank records were as yet unsubpoenaed. In so doing, the Court overlooked its own essential teaching in *Patterson*. It is not only government *abuse* of confidential associational information that offends the Constitution but also the chilling effect which possible disclosure will have on members and would-be members of a controversial organization.[165] In just two bland paragraphs, the Court dispatched the ACLU's contentions, evincing apparent unconcern for defending associational freedom.[166]

In 1970 the Senate Subcommittee on Internal Security subpoenaed the bank records of the United States Servicemen's Fund, Inc. ("USSF"), a nonprofit organization aimed at informing service personnel of its opposition to United States involve-

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[162] *Id.* at 218.

[163] *See* Comment, *Bank Secrecy Act—Threat to First and Fourth Amendment Rights,* 27 RUTGERS L. REV. 176, 185 (1973).

[164] 357 U.S. 449 (1958).

[165] *See* Note, *supra* note 161, at 207-18.

[166] Congress recently amended the Act to provide some safeguards for certain bank customers. Under the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (Supp. III 1979) banks may not disclose to the government any financial records or information contained therein of "customers," as defined to include only individuals and partnerships of five individuals or less, except in accordance with one of five procedures specified in the act: (1) customer authorization; (2) administrative subpoena; (3) search warrant; (4) judicial subpoena; or (5) formal written request (with previous notice to the customer). It cannot be assumed that this amendment greatly assuaged the ACLU since that organization, and all corporations and large organizations, fall outside the amendment's definition of "customer" and hence outside its protection.

ment in Southeast Asia. In *Eastland v. United States Servicemen's Fund, Inc.*,[167] USSF charged that the investigation infringed on its first amendment rights. USSF argued that its sole source of financial support, contributions from private individuals, would be withdrawn if its bank records were disclosed. The Court held that the speech and debate clause[168] provided complete immunity for the subcommittee and its staff, and that the Court could not inquire into the motives of the legislative investigation. This absolute immunity extended to violations of first amendment rights.[169]

The Court's opinions in *Schultz* and *Eastland,* in refusing to guarantee confidentiality of the organization's records, failed to consider the possible chilling effect on associational freedom. This effect would apply to both current and potential members of those organizations.

B. Nonpartisan Association

A unanimous Court in *Whalen v. Roe*[170] declined to extend the right of associational privacy to persons not engaged in conventional partisan political activity. Concerned about drug abuse, the New York Legislature passed New York's Controlled Substances Act of 1972.[171] This act required that copies of all prescriptions for certain regulated drugs be transmitted to the New York State Department of Health, where the data would be recorded on tape for computer processing. Patients who regularly received the named drugs alleged that they had a right to

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[167] 421 U.S. 491 (1975).

[168] U.S. CONST. art. I, § 6, cl. 1.

[169] Eastland v. United States Servicemen's Fund, Inc., 421 U.S. 491, 507-10 (1975). In a concurring opinion, Justice Marshall observed that "the Speech or Debate Clause . . . extends to Members . . . acting in a legislative capacity; it does not preclude judicial review of their decisions in an appropriate case. . . ." *Id.* at 515 (Marshall, J., concurring). He argued persuasively that individuals, in being subpoenaed (directly or, as here, indirectly) by Congress, did not thereby relinquish their constitutional rights. Justice Douglas dissented, emphasizing the "awesome powers" entrusted by our governmental system to individuals acting under color of official authority and the concomitantly great neeed for recognizing and upholding first amendment protections in the face of the grave potential for abuse of such powers. *Id.* at 518 (Douglas, J., dissenting).

[170] 429 U.S. 589 (1977).

[171] N.Y. PUB. HEALTH LAW §§ 3300-3397 (McKinney 1972).

individual anonymity in their associations, pursuant to the Court's decision in *NAACP v. Alabama ex rel. Patterson.* The Court upheld the act under a rational basis analysis, noting that freedom of association cases such as *Patterson* protected the advancement of ideas and airing of grievances, not anonymity for medical treatment.[172]

Justice Stevens' opinion for the Court brushed aside the patients' chilling-effect argument. They contended that fear of possible public disclosure of drug use, and particularly the adverse effect such disclosure could have on their reputations, "makes some patients reluctant to use, and some doctors reluctant to prescribe, [regulated] drugs even when their use is medically indicated."[173] Justice Stevens simply declared that these effects did not infringe upon any constitutionally protected rights.[174]

V. Freedom From Association

Axiomatically, the constitutional right to associate freely necessarily implies the right to *refrain* from associations *not* of one's choosing. The Burger Court, however, has not warmly embraced claims of unconstitutional coerced association. Indeed, the Court may be drifting toward eventually treating claims of freedom *from* association as explicitly less favored than claims of freedom *to* associate.

A. Labor Unions

In *Abood v. Detroit Board of Education,*[175] the Court rejected a challenge to an agency shop arrangement for government employees which was based on freedom of association claims. Every employee represented by the union was, as a condition of em-

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[172] Whalen v. Roe, 429 U.S. 589, 604 n.32 (1977) (citations omitted).

[173] *Id.* at 600.

[174] *Id.* at 603-04. While a less controversial decision, *Whalen*'s treatment of the chilling effect argument is disconcertingly reminiscent of California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974). Again the Court—gratuitously in view of its distinction of NAACP v. Alabama *ex rel.* Patterson and its progeny as going only to *political* association—had called into question its sensitivity to the grave danger of a chilling effect on the exercise of constitutionally protected rights attending governmental intrusions into private affairs. *But see* Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

[175] 431 U.S. 209 (1977).

ployment, required to pay a service fee equal to union dues. However, employees did not have to join the union or to participate in union affairs.

In evaluating plaintiffs' claim that coerced membership in or contribution to a public sector union abridged their constitutionally protected freedom of association, the Court failed to articulate any clear standard of review. The standard it intimated, however, was not strict scrutiny; the Court declared that the state's interests "presumptively support the impingement upon associational freedom created by the agency shop here at issue."[176]

The Court had two "important" government interests in mind. First, the state wanted to allocate the cost of collective bargaining among all of the beneficiaries and to avoid "free riders."[177] Second, the state sought to avoid multiple negotiations with rival unions representing the same class of employees.[178] In *presuming* these interests to exist, and in requiring no showing by the government that they were "overriding," or "compelling," or that the challenged action was the least drastic means of furthering the interests,[179] the Court departed radically from traditional first amendment analysis.

The Court specifically declined to hold that a union could not constitutionally contribute to political or ideological causes. However, it held that a union may use dues money only from employees who voluntarily support such causes. The union must earmark those expenditures germane to the union's function as exclusive bargaining representative versus those for political, ideological, and social purposes.[180] The Court did not disapprove the latter type of expenditure because it felt that union members who wanted to contribute to these sorts of causes had an associational right to do so. Therefore, the Court felt that a fair remedy would be to require a dues refund and a future dues re-

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[176] *Id.* at 225. Chief Justice Burger's concern seven years earlier that the Court was reneging on the commitment it made in NAACP v. Alabama *ex rel.* Patterson to place associational freedom "on a high, if indeed not a 'preferred' plane," Russell v. Catherwood, 399 U.S. 936 (1970) (dissenting from denial of cert.), apparently was prophetic.

[177] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221-22 (1977).

[178] *Id.* at 224.

[179] *E.g.*, Elrod v. Burns, 427 U.S. 347, 362-63 (1976); Buckley v. Valeo, 424 U.S. 1 (1976).

[180] Abood v. Detroit Bd. of Educ., 421 U.S. 209, 235-36 (1977).

duction to the dissenting employees in proportion to the percentage of union expenditures devoted to political causes. Further, dissenting union members could state their opposition to all noncollective bargaining expenditures, rather than being required to specify individual expenditures to which they objected, because requiring specificity would infringe an individual's right to privacy in associational activity.

Justice Powell concurred in the result only, contending that a significant impairment of the right of association must survive exacting scrutiny. The asserted government interest must be vital and the government must bear the burden of establishing the interest. The concurring justices would require the government to show that the compelled contribution was "necessary to serve overriding governmental objectives."[181]

The view of the concurring justices that collective bargaining in the public sector is political in nature highlights the serious problem which a dissenting employee will face in attempting to prevent nonbargaining expenditures.[182] The Court offered no coherent guidelines as to what expenditures would be permissible. Lobbying clearly is a political activity, but it can also be a necessary means of working for improved wages, hours, and working conditions, goals that in the private sector would generally be characterized as nonpolitical.[183] The Court did not clearly specify whether the line is to be drawn between collective bargaining and noncollective bargaining or between political and nonpolitical expenditures.[184]

Further, it seems fairly clear that the Court flouted the least-restrictive-means test in requiring the employee to protest the expenditure or to litigate. A remedial program could be established that would guarantee the employee anonymity and relieve

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[181] *Id.* at 264 (Powell, J., concurring).

[182] Mitchell, *Public Sector Union Security: The Impact of* Abood, 29 LAB. L.J. 697, 707 (1978), discusses the Ninth and Tenth Circuits' acceptance of the union's rebate plan, and the Tenth Circuit's rejection of the employees' contentions as "speculative, conclusory, and argumentative." Reid v. International Union, United Auto., Aerospace and Agricultural Implement Workers of America, 479 F.2d 517, 520 (10th Cir. 1973).

[183] Mitchell, *supra* note 182, at 708.

[184] *Id.* at 707. The majority acknowledged that "[t]here will, of course, be difficult problems in drawing lines," but comforted itself by noting that "[w]e have no occasion in this case, however, to try to define such a dividing line." Abood v. Detroit Bd. of Educ., 451 U.S. 209, 236 (1977).

him of the burden of establishing the proportion of union funds spent on "ideological" versus collective bargaining activities. Moreover, the remedial program should allocate these expenditures prior to implementation of an agency shop so that employees will have the right to opt out of noncollective bargaining expenditures in privacy.[185] Justice Harlan's observation in *NAACP v. Alabama ex rel. Patterson* that protecting privacy in group association may be "indispensable to preservation of freedom of association"[186] seems equally apt in this context.

B. Private Associations

In analyzing infringements on private associational freedoms, the Court gave great deference to Congress in *Runyon v. McCrary*.[187]

Title 42 U.S.C. § 1981, which is derived from Section 1 of the Civil Rights Act of 1866, mandates that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[188] In *Runyon*, the Court extended this statute to the refusal of private schools to admit black students. The majority opinion by Justice Stewart held that the schools' racially exclusionary policies constituted a refusal to enter into a contractual relation with black parents and therefore amounted to a "classic violation of § 1981."[189]

The petitioner schools had contended that an application of section 1981 would violate constitutionally protected associational rights. The majority acknowledged that parents had a constitutional right to send their children to, and that children had a right to attend, educational institutions which promoted belief in racial segregation. However, the majority stated that "it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the [freedom of asso-

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[185] Comment, Abood v. Detroit Board of Education: *Association as a First Amendment Right—The Protection of the Nonmember Employee in the Context of Public Sector Unionism*, 1977 UTAH L. REV. 487, 497-98, refers to the British system, where an employee must give consent to contributions before dues can be used for political purposes and suggests that a check-off card with appropriate alternatives be distributed to all employees.

[186] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

[187] 427 U.S. 160 (1976).

[188] 42 U.S.C. § 1981 (1976).

[189] Runyon v. McCrary, 427 U.S. 160, 172 (1976).

ciation] principle."[190] The Court held that even if the practice of discrimination were characterized as a form of associational right, it was not entitled to affirmative constitutional protection, and that the teaching of discriminatory *ideas* could still continue after discriminatory *practices* were discontinued.[191] In gauging the level of the Court's zeal in safeguarding associational rights, it is perhaps instructive that the Court's analysis consisted of just two short paragraphs.

Justice Powell, concurring separately, emphasized that he felt the decision did not signify that every refusal to contract could be investigated. Certain close associations would remain beyond the reach of section 1981. However, the schools had exercised no personal choice in selecting among the students who responded to their public offer. Justice Powell argued:

> § 1981, as interpreted by our prior decisions, does reach certain acts of racial discrimination that are 'private' in the sense that they involve no *state* action. But choices, including those involved in entering into a contract, that are 'private' in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the 19th century Civil Rights Acts. The open offer to the public generally involved in the cases before us is simply not a 'private' contract in this sense.[192]

Justice White's dissenting opinion, in which Justice Rehnquist joined, argued very persuasively that the Court's expansive construction of section 1981's reach was resoundingly at odds with precedent, common sense, logic, the language of the statute, and clear legislative intent.[193] The dissent also noted that as the associational relationships became increasingly private, the pressures on the Court would result in increasing restriction on the application of section 1981, which would force courts to balance sensitive policy considerations manifestly more appropriate for legislative consideration.[194]

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[190] *Id.* at 176.

[191] *Id.*

[192] *Id.* at 189. (Powell, J., concurring). Methods of analysis for distinguishing between personal and commercial relationships, along the lines suggested by Justice Powell, are discussed in Note, *Section 1981 and Private Groups: The Right to Discriminte Versus Freedom from Discrimination,* 84 YALE L.J. 1441 (1975).

[193] *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 211 (White, J., dissenting).

[194] *Id.* at 212.

As in *Abood*,[195] the Court in *Runyon* sustained an abridgment of associational rights by *presuming* the presence and applicability of "important," not "compelling," government interests, without any showing by the government that its challenged action constituted the least restrictive means of effectuating these interests. In so doing, the court appreciably weakened constitutional protection of associational freedom. *Arguably*, the government has an interest in eliminating purely private racial discrimination; *arguably*, that interest is "compelling;" and *arguably*, section 1981, as applied in *Runyon*, is at once an appropriate and the least restrictive means of effectuating that interest. However, traditional first amendment analysis demands more than passive deference to Congress. It demands exacting scrutiny and a finding on a full record that the proponents of a challenged abridgment of associational freedom have met their burden of establishing vitally important, compelling, and overriding countervailing interests.

CONCLUSION

In order best to achieve the goals and to protect the values underlying the constitutional guarantee of associational freedom, the Supreme Court should review and analyze associational issues exactly as it does the explicit first amendment guarantees. The Court should take pains to articulate and to adhere to a traditional strict scrutiny analysis. The propriety of a consistently applied, exacting standard of review is especially manifest for issues addressing association for the advancement of ideas and beliefs.

The Burger Court's undulatory approach to associational freedom cases is somewhat difficult to describe precisely. However, at least three things can fairly be said of it. First, it diverges from and is more deferential than the approach adhered to fairly consistently by the Warren Court. Second, there appears to be a gradual but steady evolution toward ever greater deference.

Third, and perhaps most disconcerting, the method of analysis seems to be somewhat elastic in that it changes shape depending upon the context in which the claim is asserted. A claimant alleging a burdening of associational freedom in the electoral process, for instance, appears likely to stimulate what approaches a

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[195] 431 U.S. 209 (1977).

strict scrutiny standard of review. On the other hand, claimed intrusions on associational privacy and claims of coerced association appear subject to a highly deferential rational basis analysis. Finally, associational claims arising from the withholding of government benefits and those originating within a public institution evidently obtain an intermediate standard of review.

No reason readily justifies these distinctions. Rather, it would seem that the vital policies underlying associational freedom are equally involved in all of the categories of cases considered in this article. Because of the importance of associational freedom in our democratic system of government, the Court's oft-expressed concern that first amendment rights not be chilled, and the need for the Court to establish coherent and principled guidelines, a return to strict scrutiny in associational freedom cases is highly desirable.