"[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."—Justice BRENNAN

"The problem in each such case is to weigh the legitimate interest of the State against the effect of the regulation on individual rights."—Justice HARLAN

NAACP v. Button

371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

As part of its program of "massive resistance" to thwart implementation of the School Segregation Cases (1954), Virginia joined the southern attack on the NAACP (see the headnote to NAACP v. Alabama, above, p. 798), enacting a bevy of laws to curb the organization's capacity "to litigate by day and to think about litigation by night." Given the NAACP's frequent tactic of urging its members to file law suits—under the rules of standing an individual litigant is almost always necessary—and even asking people at meetings to sign blank forms authorizing the Association to file suits in their names, southern states' readily available weapons were statutes regulating the practice of law and redefining the old crimes of barratry ("habitual stirring up of quarrels"), champerty (assisting another to start or continue a law suit), and maintenance ("officious intermeddling" in a law suit by encouraging another to sue, usually by paying money to the potential litigant).

The NAACP attacked the constitutionality of five of these statutes in a federal district court, which struck down three but under the doctrine of equitable abstention refused to rule on the others until they had been interpreted by state courts. Virginia appealed to the U.S. Supreme Court, which held that the district court should have applied equitable abstention to all five. Harrison v. NAACP (1959).

The NAACP went into state courts to repeat its challenge to four of the five acts. State judges declared two of the statutes inapplicable to the Association's activities and another unconstitutional. The NAACP then obtained certiorari to contest the other statute, chapter 33 of the Acts of the Assembly, 1956 Extra Session. That chapter banned in very general terms "improper solicitation of any legal or professional business."

Mr. Justice **BRENNAN** delivered the opinion of the Court. ...

II

Petitioner challenges the decision of the Supreme Court of Appeals on many grounds. But we reach only one: that Chapter 33 as construed and applied abridges the freedoms of the First Amendment, protected against state action by the Fourteenth. More specifically, petitioner claims that the chapter infringes the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights. We think petitioner may assert this right on its own

behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. Cf. Grosjean v. American Press [1936]. We also think petitioner has standing to assert the corresponding rights of its members. See NAACP v. Alabama [1958]; Bates v. Little Rock [1960]; Louisiana ex rel. Gremillion v. NAACP [1961]. ...

A

We meet at the outset the contention that "solicitation" is wholly outside the area of freedoms protected by the First Amendment. To this contention there are two answers. The first is that a state cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. Thomas v. Collins [1945]; Herndon v. Lowry [1937]. In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record ... subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right "to engage in association for the advancement of beliefs and ideas." NAACP v. Alabama. We have deemed privileged, under certain circumstances, the efforts of a union official to organize workers. *Thomas*. ... And we have refused to countenance compelled disclosure of a person's political associations. ...

The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

B

Our concern is with the impact of enforcement of Ch. 33 upon First Amendment freedoms. ... For us, the words of Virginia's highest court are the words of the statute. Hebert v. Louisiana [1926]. ... We read the decree of the Virginia Supreme Court of Appeals ... as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys. No narrower reading is plausible. ...

... It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens. ...

... If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. See e.g., Near v. Minnesota [1931]. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

C

The second contention is that Virginia has a subordinating interest in the regulation of the legal profession. ... However, the State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly, cannot obscure the serious encroachment worked by Ch. 33 upon protected freedoms of expression. The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. ... For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. ... [I]n *Bates*, we said, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." ...

However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious. ...

Mr. Justice **WHITE,** concurring in part and dissenting in part. ...

Mr. Justice **HARLAN,** whom Mr. Justice **CLARK** and Mr. Justice **STEWART** join, dissenting.
...

II

Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. Thomas v. Collins [1945]; NAACP v. Alabama [1958]; Bates v. Little Rock [1960]. And just as it includes the right jointly to petition the legislature for redress of

grievances, so it must include the right to join together for purposes of obtaining judicial redress. ... Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights. This is particularly so in the sensitive area of racial relationships.

But to declare that litigation is a form of conduct that may be associated with political expression does not resolve this case. Neither the First Amendment nor the Fourteenth constitutes an absolute bar to government regulation in the fields of free expression and association. This Court has repeatedly held that certain forms of speech are outside the scope of the protection of those Amendments, and that, in addition, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise," are permissible "when they have been found justified by subordinating valid governmental interests." The problem in each such case is to weigh the legitimate interest of the State against the effect of the regulation on individual rights. ...

... [T]he basic rights in issue are those of the petitioner's members to associate, to discuss, and to advocate. Absent the gravest danger to the community, these rights must remain free from frontal attack or suppression, and the state court has recognized this. ... But litigation, whether or not associated with the attempt to vindicate constitutional rights, is *conduct:* it is speech *plus.* Although the State surely may not broadly prohibit individuals with a common interest from joining together to petition a court for redress of their grievances, it is equally certain that the State may impose reasonable regulations limiting the permissible form of litigation. ...

So here, the question is whether the particular regulation of conduct concerning litigation has a reasonable relation to the furtherance of a proper state interest, and whether that interest outweighs any foreseeable harm to the furtherance of protected freedoms.

III

The interest which Virginia has here asserted is that of maintaining high professional standards among those who practice law within its borders. This Court has consistently recognized the broad range of judgments that a State may properly make in regulating any profession. But the regulation of professional standards for members of the bar comes to us with even deeper roots in history and policy, since courts for centuries have possessed disciplinary powers incident to the administration of justice. See Cohen v. Hurley [1961]; Konigsberg v. California [1957]; Martin v. Walton [1961].

The regulation before us has its origins in the long-standing common-law prohibitions of champerty, barratry, and maintenance, the closely related prohibitions in the Canons of Ethics against solicitation and intervention by a law intermediary, and statutory provisions forbidding the unauthorized practice of law. ...

First, with regard to the claimed absence of the pecuniary element, ... the attorneys here ... are in fact compensated for their work. Nor can it tenably be argued that petitioner's litigating activities fall into the accepted category of aid to indigent litigants. ... [A]voidance of improper

pecuniary gain is not the only relevant factor in determining standards of professional conduct. Running perhaps even deeper is the desire of the profession, of courts, and of legislatures to prevent any interference with the uniquely personal relationship between lawyer and client and to maintain untrammeled by outside influences the responsibility which the lawyer owes to the courts he serves.

When an attorney is employed by an association or corporation to represent individual litigants, two problems arise ... no matter how unimpeachable its motives. The lawyer becomes subject to the control of a body that is not itself a litigant and that, unlike the lawyers it employs, is not subject to strict professional discipline as an officer of the court. In addition, the lawyer necessarily finds himself with a divided allegiance—to his employer and to his client—which may prevent full compliance with his basic professional obligations. ...

Second, it is claimed that the interests of petitioner and its members are sufficiently identical to eliminate any "serious danger" of "professionally reprehensible conflicts of interest." ...

... [I]t may be in the interests of the Association in every case to make a frontal attack on segregation ... to sacrifice minor points that may win a given case for the major points that may win other cases too. But in a particular litigation ... a Negro parent, concerned that a continued frontal attack could result in schools closed for years, might prefer to wait with his fellows a longer time for good-faith efforts by the local school board than is permitted by the centrally determined policy of the NAACP. Or he might see a greater prospect of success through discussions with local school authorities than through the litigation deemed necessary by the Association. The parent, of course, is free to withdraw his authorization, but is his lawyer, retained and paid by petitioner and subject to its directions on matters of policy, able to advise the parent with that undivided allegiance that is the hallmark of the attorney-client relation? I am afraid not. ...

Third, it is said that the practices involved here must stand on a different footing because the litigation that petitioner supports concerns the vindication of constitutionally guaranteed rights. ... The true question is whether the State has taken action which unreasonably obstructs the assertion of federal rights. Here, it cannot be said that the underlying state policy is inevitably inconsistent with federal interests. The State has sought to prohibit the solicitation and sponsoring of litigation by those who have no standing to initiate that litigation themselves and who are not simply coming to the assistance of indigent litigants. ...

The impact of such a prohibition on the rights of petitioner and its members to free expression and association cannot well be deemed so great as to require that it be struck down in the face of this substantial state interest. The important function of organizations like petitioner in vindicating constitutional rights is not of course to be minimized, but that function is not, in my opinion, substantially impaired by this statute. Of cardinal importance, this regulatory enactment as construed does not in any way suppress assembly, or advocacy of litigation in general or in particular. ...

Editors' Notes

(1) **Query:** To what extent did Brennan's approach to constitutional interpretation exemplify *reinforcing representative democracy*? Are the right to litigate to vindicate constitutional rights, and the right to associate in order to do so, implicit in the scheme of government embodied in the Constitution? Indeed, is Brennan suggesting that these rights are as fundamental as the right to vote and the right to political association? Is Harlan again using a *balancing approach* as in Barenblatt v. United States (1959; reprinted above, p. 803)? To what extent did the two justices directly engage each other on the issue of the proper *approach*?

(2) **Query:** Is it possible to reconcile Harlan's dissent here with his opinion for the Court in NAACP v. Alabama (1958; reprinted above, p. 798)? Could Harlan distinguish the two on the ground that this case implicates the state's interest in "maintaining high professional standards among those who practice law"?

(3) **Query:** Brennan's opinion alluded to southern states' resistance to the School Segregation Cases (1954; reprinted below, p. 912), and the defiance publicly voiced by southern officials, including those of Virginia, must have moved the justices to read with suspicion supposedly neutral statutes. But he did not mention that, in most of the South it was extraordinarily difficult if not impossible for African Americans to vote. (The Voting Rights Act of 1965 was still two years in the future.) Thus, if Ch. 33 was, as its legislative authors boasted, an effort to keep the NAACP from litigating and if Virginia continued to be successful in barring blacks from the polls, what other avenues for social change were open to African Americans in the state? Against that background, was Harlan's dissenting opinion naive? Is the implication of his argument that African Americans could only "appeal to heaven," that is, resort to revolution? Cf. John Locke, *The Second Treatise of Civil Government* (1690), § 242. On the other hand, can one make a reasoned argument that Harlan's approach would not substantially impair organizations like the NAACP from vindicating constitutional rights?

(4) In *Button* and United States v. Harriss (1954), the Court was solicitous of a right to lobby public officials, though conscious of the possibility of its misuse. *Harriss* upheld, against a First Amendment challenge, provisions of the Federal Regulation of Lobbying Act requiring "every person receiving any contributions or expending any money" to influence passage or defeat of congressional legislation to file the name and address of each person who makes a contribution of $500 or more, or to whom $10 or more is paid, as well as the total of all contributions and expenditures.

Indeed, in both of these cases the justices practically assumed without discussion that a right to lobby is protected by the First Amendment. It had not always been so. Trist v. Child (1874) invalidated a contract under which Nicholas Trist agreed to give L.M. Child a share of what Child could persuade Congress to pay Trist for his negotiating the Treaty of Guadelupe Hidalgo with Mexico (1848). The Court treated lobbying, even as here where there was no evidence of any effort at bribery, with great moral disdain:

> If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of public morals and the degeneracy of the times. ... If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are

> polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point.

(5) For an analysis of *Button*, see: Walter F. Murphy and Robert F. Birkby, "Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Court," 42 *Tex.L.Rev* 1018 (1964). For a general approach to interest groups in the courts, see: Clement E. Vose, "Litigation as a Form of Pressure Group Activity," 319 *The Annals* 20 (1958); and Walter F. Murphy, C. Herman Pritchett, and Lee Epstein , *Courts, Judges, and Politics* (5th ed,; Boston: McGraw Hill, 2002). For detailed studies of the NAACP's tactics, see: Vose, *Caucasians Only* (Berkeley: University of California Press, 1959); and Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education* (Chapel Hill: University of North Carolina Press, 1987). For an analysis of the problems of attorney-client relationships in litigation designed to change public policy, see Derrick Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," 85 *Yale L.J.* 470 (1976).

(6) Brotherhood of Railroad Trainmen v. Virginia (1964), United Mine Workers v. Illinois State Bar (1967), and United Transportation Union v. State Bar of Michigan (1971) applied, to economic organizations, *Button* 's inclusion of a right under the First Amendment of groups to utilize the courts.