

1962

The Integrated Bar Association

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

The Integrated Bar Association, 30 Fordham L. Rev. 477 (1962).

Available at: <https://ir.lawnet.fordham.edu/flr/vol30/iss3/9>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

isolated group chargeable with liability has an element of unfairness about it. If liability is to be imposed at all, would it not be more equitable to make each stockholder bear his pro rata share of the liability?

In his Memorandum of Approval⁵³ on the Business Corporation Law, Governor Rockefeller lauded the changes made therein, but concluded:

While opinions may differ as to the wisdom of particular changes made by the bill, its delayed effective date will permit enactment at the next two regular sessions of the Legislature of any amendments which are considered necessary or desirable before the new law takes effect.⁵⁴

It is suggested that further study is required and that amendment, perhaps even repeal, might well be one of the actions "which are considered necessary or desirable before the new law takes effect".⁵⁵

THE INTEGRATED BAR ASSOCIATION

Advocates of bar integration found some measure of encouragement, however small, when, on June 19, 1961, the United States Supreme Court, in *Lathrop v. Donohue*,¹ upheld the constitutionality of the compulsory state bar association as established in the State of Wisconsin.

An integrated bar is defined as an official state organization requiring membership and financial support of all attorneys admitted to practice in that jurisdiction.² It has two facets which set it apart from a voluntary bar association—official organization by authority of the state and compulsory membership.

The purpose of an integrated bar is substantially the same as that of voluntary associations. A generally representative summary is found in the Wisconsin State Bar which aims

to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the

53. Governor's Memorandum of Approval, in N.Y. Bus. Corp. Law p. 1 (McKinney's 1961).

54. *Id.* at 3.

55. *Ibid.*

1. 367 U.S. 820 (1961), affirming 10 Wis. 2d 230, 102 N.W.2d 404 (1960). Trayton L. Lathrop, a Wisconsin lawyer sued Joseph Donohue, treasurer of the Wisconsin Bar Association, to recover his \$15 dues on the ground that the integrated bar of Wisconsin was unconstitutional as infringing on his rights of freedom of association and speech. The Wisconsin Supreme Court held that the integrated bar did not violate the United States Constitution. The Supreme Court of the United States affirmed with Justices Black and Douglas dissenting. See note 29 *infra* and accompanying text.

2. *In re Mundy*, 202 La. 41, 11 So. 2d 398 (1942); *Ayres v. Hadaway*, 303 Mich. 589, 6 N.W.2d 905 (1942); *In re Gibson*, 35 N.M. 550, 4 P.2d 643 (1931).

discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged.³

The integrated bar movement is not a recent innovation. On the contrary, it has had its advocates in this country since 1914⁴ and has existed in various parts of the United Kingdom for many years.⁵ In 1921, a few years after a model bar act was published by the American Judicature Society,⁶ North Dakota became the first jurisdiction to establish an integrated bar.⁷ To date there are twenty-seven states and two federal jurisdictions, Puerto Rico and the Virgin Islands, which have followed suit.⁸

3. Wis. Stat. Ann. ch. 256 app., rule 1, § 2 (1957), quoted with approval in *Lathrop v. Donohue*, 367 U.S. at 826.

4. *Harley, A Lawyer's Trust*, 29 J. Am. Jud. Soc'y 50 (1945). Impressed by the effectiveness of the Canadian Bar, Herbert Harley, the founder of the American Judicature Society, initiated the movement in this country with his Address Before Lancaster County, Neb. Bar Ass'n, Dec. 28, 1914.

5. See *Winters, Integration of the Bar—You Can't Lose*, 39 J. Am. Jud. Soc'y 140, 141 (1956).

6. 4 J. Am. Jud. Soc'y 111-24 (1920).

7. N.D. Cent. Code §§ 27-11-01 to -27 (1960).

8. Table of Integrated Jurisdictions:

(A) Statutory Integration:

Alabama: Ala. Code tit. 46, §§ 21-26 (1958).

Alaska: Alaska Comp. Laws Ann. §§ 35-2-77a to -77o (Supp. 1958).

Arizona: Ariz. Rev. Stat. Ann. §§ 32-201 to -275 (1956).

California: Cal. Bus. & Prof. Code §§ 6000-154.

Idaho: Idaho Code Ann. §§ 3-101 to -420 (1948).

Mississippi: Miss. Code Ann. §§ 8685-724 (1956).

Nevada: Nev. Rev. Stat. §§ 7.270-.600 (1960).

New Mexico: N.M. Stat. Ann. §§ 18-1-1 to -36 (1953).

North Carolina: N.C. Gen. Stat. §§ 84-15 to -38 (1958).

North Dakota: N.D. Cent. Code §§ 27-11-01 to -27 (1960).

Oregon: Ore. Code Ann. §§ 28-101 to -111 (1930).

Puerto Rico: P.R. Laws Ann. tit. 4, §§ 771-85 (1954).

South Dakota: S.D. Code §§ 32.1101-.1124 (1939).

Utah: Utah Code Ann. §§ 78-51-1 to -44 (1953).

Washington: Wash. Rev. Code Ann. §§ 2.48.010-.230 (1961).

(B) Court Rule:

Florida: *Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949).

Missouri: *Leimer v. Hulse*, 352 Mo. 451, 178 S.W.2d 335, cert. denied, 323 U.S. 744 (1944).

Nebraska: *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937).

Oklahoma: *In re Integration of State Bar*, 185 Okla. 505, 95 P.2d 113 (1939).

Virgin Islands: 2 V.I. Code Ann. tit. 5, Judicial Procedure app., pt. III, rule 51 (1957).

(C) Combination of Statute and Court Rule

Kentucky: Ky. Rev. Stat. Ann. §§ 30.010-.990 (1955) (§ 30.170—court rules to govern State Bar); *Commonwealth v. Defever*, 241 Ky. 834, 45 S.W.2d 489 (1932).

Bar integration has been accomplished in three principal ways. The most common is by a detailed act of the legislature in the exercise of its police powers; the second is by rule of court based on the court's inherent power to regulate and control the practice of law; and the third is by a combination of legislative act and court rule, the legislature first creating the organization and the court acting pursuant to an enabling statute to develop the particulars of its structure and of its government by court promulgated rules.

The validity of an integrated bar created by statute has been sustained in several state court decisions.⁹ And it has also been held that there is no delegation of a legislative function when the integration is accomplished by rule of court.¹⁰ Since integration is an incident to the exercise of the judicial power vested in the courts, it has been said that it is not a legislative function, and an enabling statute is not a prerequisite to its exercise.¹¹ Thus when the Oklahoma legislature repealed its state bar act in 1939, the Supreme Court of Oklahoma asserted its inherent power to integrate the bar without reliance upon statutory authority.¹² Several other jurisdictions also have adopted integration purely by rule of court.¹³ In those jurisdictions the integrated

Louisiana: La. Rev. Stat. §§ 37:211-:218 (1950); 195 La. xiv-xlvii (1940).

Michigan: Mich. Stat. Ann. §§ 691.51-52 (1948); 273 Mich. xxxv-xlv (1935).

Texas: Tex. Rev. Civ. Stat. Ann. art. 320a-1 (1959).

Virginia: Va. Code Ann. § 54-49 (1950); 171 Va. xvii-lvii (1938).

West Virginia: W. Va. Code Ann. § 5183 (1) (1961); 128 W. Va. liii-kiii (1947).

Wisconsin: Wis. Stat. Ann. § 256.31 (1957); *In re Integrated Bar*, 273 Wis. 281, 77 N.W. 2d 602 (1956).

Wyoming: Wyo. Comp. Stat. Ann. § 5-22 (1957); Wyo. Comp. Stat. Ann. Sup. Ct. Rules for State Bar, rule 5 (1957).

(D) Constitutional Amendment

Arkansas: Ark. Const. amend. xxviii.

9. *Hinds v. State Bar*, 19 Cal. 2d 87, 119 P.2d 134 (1941); *Hill v. State Bar*, 14 Cal. 2d 732, 97 P.2d 236 (1939), sustaining the statute as a regulatory measure under the police power; *Ayres v. Hadaway*, 303 Mich. 589, 6 N.W.2d 905 (1942), holding that such statutes do not violate the due process clause of the United States Constitution.

10. *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943).

11. *In re Sparks*, 267 Ky. 93, 101 S.W.2d 194 (1937). The court stated that "the power to regulate the conduct and qualifications of its officers does not depend upon constitutional or statutory grounds. It is a power which is inherent in this court as a court—appropriate, indeed necessary, to the proper administration of justice. That we have in deference to the Bar Integration Act . . . set up a standing Board of Commissioners and machinery to conduct and report on investigations concerning the conduct of attorneys, does not alter the fact that we are but exerting an inherent power . . ." *Id.* at 95, 101 S.W.2d at 196. In *In re Day*, 181 Ill. 73, 54 N.E. 646 (1899), the court went further and stated that any act of the legislature purporting to grant to the judiciary the power to regulate the bar, is itself a usurpation of judicial power by the legislature.

12. *In re Integration of State Bar*, 185 Okla. 505, 95 P.2d 113 (1939). A new statute to the same effect was enacted shortly thereafter. Okla. Stat. Ann. tit. 5, §13 (1941).

13. Florida, Missouri, Nebraska, Oklahoma, and the Virgin Islands. See note 23 *infra* and accompanying text.

bar was characterized as "an agency of the court"¹⁴ to provide for the discipline of all attorneys admitted to practice and for the levy and collection of annual dues for the privilege of practicing law.

FUTURE OF INTEGRATION IN NEW YORK

By reason of its peculiar constitutional history and court structure it is doubtful whether in New York integration could be accomplished by rule of court. New York is one of several states which have patterned their judicial systems on that of Great Britain. The New York State constitution of 1777 specifically continued in existence the then existing courts,¹⁵ of which the supreme court was paramount.¹⁶ After 1777, appeals from the supreme court were treated in much the same way as they were in colonial times,¹⁷ the state's highest tribunal being composed almost entirely of nonjudicial members, who convened irregularly. From the outset, the power to discipline attorneys was vested in the supreme court and remained there through every subsequent statutory and constitutional revision.¹⁸ Section 88 of the Judiciary Law,¹⁹ amended in 1912²⁰ to read substantially as it does today, gives the supreme court express power and control over attorneys and counselors at law.²¹

Traditionally then, it is clear that the granted or asserted general control and disciplinary powers which the highest tribunals of other states have, are not within the domain of the Court of Appeals of New York. Its primary function is to hear and pass on questions of law.²² The four states²³ in

14. *In re Mundy*, 202 La. 41, 43, 11 So. 2d 398, 400 (1942).

15. N.Y. Const. art. XXVII (1777).

16. Two years prior to the Declaration of Independence, Governor Tryon, New York's ablest executive during the colonial period, summed up the judicial structure in New York in his report to the home country: "Of the Courts of Common Law the Chief is called the Supreme Court—The Judges of which have all the Powers of the King's Bench, Common Pleas & Exchequer in England." 1 Lincoln, *The Constitutional History of New York* 39 (1906).

17. 1 Lincoln, *op. cit. supra* note 16, at 39-40. In the colonial period the supreme court was the highest tribunal with appeals going to the Royal Governor and his Council only in certain instances. An appeal from there to the Privy Council was only allowed where the amount in controversy exceeded £500 sterling.

18. See *People v. Culkin*, 248 N.Y. 465, 477, 162 N.E. 487, 492 (1928), where Judge Cardozo traced the history and development of this power.

19. N.Y. Judiciary Law § 88 (now N.Y. Judiciary Law § 90).

20. N.Y. Sess. Laws 1912, ch. 253.

21. N.Y. Judiciary Law § 90(2). See also N.Y. Judiciary Law § 90, which enumerates as being delegated or confirmed in the supreme court the majority of powers claimed to be inherent in the highest courts of other states.

22. N.Y. Const. art. VI, § 7. The facts are reviewable only in capital cases; the court may also review where the appellate division, reviewing a trial held without a jury, finds new facts and reverses the trial court.

23. Florida, *Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949); Nebraska, *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937); Okla-

which integration was adopted by rule of court had the following in common: (1) governments established long after the colonial era; (2) pyramidal legal systems modeled after that of the federal government; (3) constitutions expressly granting broad judicial powers;²⁴ (4) original jurisdiction vested, in many instances, in their highest courts; (5) rule making power claimed by inherent right; and, (6) a tradition of judicial supremacy in the fields of admission and discipline.²⁵

It is safe to say that if there is to be an integrated bar in New York, it may be accomplished only by act of the legislature.

ARGUMENTS IN FAVOR OF INTEGRATION
Effective Disciplinary Program

The argument most often urged in favor of the integrated bar is that integration provides the most effective method of policing and disciplining the legal profession. All-inclusive membership, in addition to official status, makes it possible to clothe the bar with the power of self-government. As a result, all lawyers admitted to practice within the jurisdiction are required to conform to uniform standards of conduct. The advocates of integration in New York cite this as affording a remedy for the often conflicting rules of the four departments of the appellate division. It is argued in rebuttal that lawyers who fail to abide by the accepted standards of practice are subject to disbarment under the system now existing, and higher standards can easily be imposed through more difficult and searching bar examinations as well as by raising the requirements relating to scholastic achievement. It is a plausible proposition. The basic problem however, is that the standards of practice are not clearly defined. There is an ever present need to raise moral, ethical, and general qualifications both for admission to the bar and for the continuing practice of law. And the further objection has been made that since this determination would rest in a committee's discretion we would have a system essentially "undemocratic." It would seem that the policing of professional ranks by the members themselves represents a traditional form of self-government. But, even aside from that fact, is this any different than the present New York system which puts the character committees into the various voluntary bar associations, particularly in view of the fact that as bar integration has proceeded in other states the ultimate authority for disciplinary action has been placed in the highest court of each state?

homa, *In re Integration of State Bar*, 185 Okla. 505, 95 P.2d 113 (1939); *Missouri, Leimer v. Hulse*, 352 Mo. 451, 178 S.W.2d 335 (1944). See also *Virgin Islands*, 2 V.I. Code Ann. tit. 5, Judicial Procedure app. pt. III, rule 51 (1957).

24. Fla. Const. art. V, § 1; Mo. Const. art. V, §§ 1-2; Neb. Const. art. V, §§ 1-2; Okla. Const. art. VII, § 1.

25. *State v. City of Avon Park*, 117 Fla. 565, 158 So. 159 (1934); *Keen v. State*, 89 Fla. 113, 103 So. 399 (1925); *In re Sparrow*, 338 Mo. 203, 90 S.W.2d 401 (1935); *In re Richards*, 333 Mo. 907, 63 S.W.2d 672 (1933); *In re Sizer*, 300 Mo. 369, 254 S.W. 82 (1923); *State v. Reynolds*, 252 Mo. 369, 158 S.W. 671 (1913); *State v. Turner*, 141 Neb. 556, 4 N.W.2d 302 (1942); *State v. Barlow*, 131 Neb. 294, 268 N.W. 95 (1936).

A Unified Voice

Integration gives the bar increased prominence in the community by providing a unified voice,²⁶ so that greater force is given to the opinions of the bar on matters of interest to lawyers. This is significant in New York where the numerous voluntary bar associations have created a fragmentation of the bar.²⁷ It is argued, however, that this unity would be a false one, imposed upon minority groups espousing divergent views on questions of bar discipline, standards, ethics, and unauthorized practice. Furthermore, chief among the bar's functions is lobbying for measures deemed necessary and advantageous for good government and the proper administration of justice. The question naturally arises as to the propriety of compelling an individual to join and support an organization which campaigns for measures to which he may be opposed.²⁸

ARGUMENTS AGAINST INTEGRATION

Membership Fee as a Tax

One of the main objections to integration by court rule has been that membership fees would be a tax which the courts are not empowered to levy. Several cases have found this objection, as well as the related protest that the involuntary assessment constituted a deprivation of property without due process of law, to be without merit.²⁹

In *Lathrop v. Donohue*,³⁰ the United States Supreme Court did not come to grips with these constitutional questions. The petitioner contended that both the action of the state supreme court integrating the Wisconsin bar, coupled with that bar's campaigns for legal reforms, were violative of due process and equal protection as guaranteed by the fourteenth amendment. The Court could find no violation of the first amendment's guarantee of freedom of association but, because adequate facts did not appear in the record, it did not pass upon the alleged violation of freedom of speech or upon any of the other constitutional issues.³¹ In view of the increased interest

26. Petition of Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949). The court outlined the progress made by the California integrated bar, indicating the effectiveness of the greater resources of a unified bar. It publishes a journal with a mailing list of 16,000, giving in detail the accomplishments of the integrated bar. It has a membership of 15,000 and a budget of \$250,000 annually. *Id.* at 905.

27. See Porter, *The Bar: Fragmented All Apart*, 18 B. Bull. 50 (N.Y. County Lawyers' Ass'n 1960).

28. See note 29 *infra* and accompanying text.

29. *In re Mundy*, 202 La. 41, 11 So. 2d 398 (1942); *Ayes v. Hadaway*, 303 Mich. 589, 6 N.W.2d 905 (1942); *Petition for Integration of the Bar*, 216 Minn. 195, 12 N.W.2d 515 (1943).

30. 367 U.S. 820 (1961). See 45 J. Am. Jud. Soc'y 49 (Aug., 1961); 34 Wis. B. Bull. 43 (Oct. 1961).

31. Mr. Justice Brennan, writing for the Court was joined by Mr. Chief Justice Warren and Justices Clark and Stewart. This segment of the Court relied, to a large extent, upon *Railway Employees Dep't v. Hanson*, 351 U.S. 225 (1956), which held that the reasonable expectation of the union shop, being a stabilizing force in interstate commerce, justified

in the integrated bar it appears doubtful that the Court will be able to avoid indefinitely the constitutional issues raised by *Lathrop*. Until such a time the state courts will be faced with the "disquieting constitutional uncertainty"³² created by the plurality.

Political Encroachment

Those who disagree with the usefulness of bar integration have questioned the independence of such an organization from political parties, especially in a state such as New York, where control of judicial patronage plays a major role in the functioning of the county organizations.³³ There is evidence of some presently existing political control of a few bar associations and the fear has therefore been raised that these occasional attempts by political factions to dominate individual voluntary bar groups might turn into a fierce struggle for control of a monolithic integrated bar if such bar had a great voice in the selection of judges.³⁴

Unnecessary Where Voluntary Bars Are Active

The advantages claimed for the integrated bar are the same that an efficiently operating bar association offers.³⁵ The advocates of bar integration stress the fact that no state that has integrated has ever returned to its old system.³⁶ On the other hand, no state with an efficiently operated voluntary bar of which a high percentage of actively practicing attorneys were members, has found it necessary to integrate. Only states with inadequate voluntary bar associations have integrated. Hence, in Kansas, Illinois, and Iowa, where 83%, 78-85%, and 93% respectively, of the active lawyers in the state belong

governmental action designed to foster union membership. Thus it was reasoned that the requirement that lawyers practicing in the state become members of the integrated bar and pay reasonable annual dues did not violate the first amendment's guarantee of freedom of association as made applicable to the states through the fourteenth amendment. Mr. Justice Harlan, with whom Mr. Justice Frankfurter joined, concurred in the judgment. Their view was that constitutional rights had not been impinged upon, and that the first amendment question should not be left in doubt. Mr. Justice Whittaker concurred in a separate and tersely stated opinion in which he declared flatly that the requirement of a \$15 annual fee did not violate any constitutional provision. Mr. Justice Black, in his dissent, concluded that there could be "few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against." 367 U.S. at 873. Mr. Justice Douglas, in his dissent, looked upon the Hanson case "as a narrow exception to be closely confined . . . [t]he we practically give carte blanche to any legislature to put at least professional people into goose-stepping brigades." *Id.* at 884.

32. *Id.* at 848 (Black, J., dissenting).

33. Sayre & Kaufman, *Governing New York City* 538-48 (1960).

34. *Id.* at 551.

35. Edmonds, *Integration of the Bar: A Boon or A Bust?*, 32 N.Y.S.B. Bull. 297, 303 (1960).

36. The Oklahoma legislature did repeal its integration statute in 1939, after seven years of operation, but a new and similar statute was enacted within a few years. See note 12 *supra* and accompanying text.