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The Integrated Bar After *Lathrop v. Donohue* – Integration or Disintegration?

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Comments / The Integrated Bar After

Lathrop v. Donohue—Integration or Disintegration?

I. HISTORY AND MECHANICS

OVER ONE HUNDRED YEARS AGO the *American Jurist* stated:

We think that everything relating to the early history and antiquities of the Inns of Court must be interesting to the profession here. Wherever the common law is studied and practiced they must be regarded as the original fountainheads of the law, towards which the true lawyer must feel as a Jew does towards Jerusalem and a Mussulman towards Mecca.¹

Today, a student of the common law in this country may find that these “fountainheads of the law” are no longer revered, nay, perceived. Since the concept of the integrated bar is derived from the Inns of Court it is necessary to examine briefly this aspect of our common law heritage.

The British Inns of Court are four in number: Lincoln’s Inn, Inner Temple, Middle Temple and Gray’s Inn. Each Inn consists of Masters of the Bench (commonly called Benchers), Barristers and students. Every man (or woman) who wishes to become a barrister must become a member of one of the Inns; he may select which one he prefers. The student must keep a certain number of terms, generally twelve, which usually is done by dining in the hall of the Inn. This is considered of prime importance as a social method of observing the principles and standards of honor required in an honorable profession. Here the student rubs elbows with the elders of the law and receives his legal training. Examinations are controlled by the Benchers of the four Inns through

¹ Cited in Fooshee, *The English Inns of Court: Their Background and Beginnings*, 46 A.B.A.J. 616, 617 (1960). For a more detailed history of the Inns of Court see Hughes, *The British Inns of Court*, 1 FED. B. ASSN. J. 52 (1932); COHEN, HISTORY OF THE ENGLISH SPEAKING BAR (1929).

a joint committee appointed for this purpose. Education and discipline of the barrister is entirely in the hands of the Inns subject to review by the Supreme Court.

Early colonial history reveals that the tradition of the Inns of Court did not flourish in this country. Our lack of heterogeneity, sense of independence and frontier spirit were not receptive to this method of regulation. As the nation expanded westward it became increasingly difficult to supervise the practice of law. It was under these conditions that voluntary bar associations developed in the various states. The voluntary bar association is a satellite type of organization not representative of the entire legal profession of the jurisdiction. Membership is not a condition precedent to practice. By 1914 Herbert Harley, the founder of the American Judicature Society, had noted that the effectiveness of these voluntary associations corresponded to the extent that they represented the entire state bar. Mr. Harley began his campaign for bar integration on the pages of his journal. The society published a model bar act patterned after the Canadian system of an integrated bar.² The integrated bar is the official association of all the members of the bar of the jurisdiction. The two key words are "all" and "official."³ It must include all the members of the bar. Bar integration recognizes the lawyer as an officer of the courts and sets up by governmental authority an official organization.⁴ It is official in that it speaks for the legal profession of the jurisdiction, self-governing and self-disciplining. It is necessary to observe that a voluntary association cannot become integrated merely by enlisting all the lawyers of a state, as it would still lack the power to bind all of its members.

Integration may be accomplished in three ways:

- A. *Statute*—An act of the legislature sets forth in detail the structure and powers of the organization corresponding in content to the existing bar. This method is based on the legislative police power.
- B. *Statute and Court Rule*—The legislature enacts a statute in short form, authorizing the highest court in the state to integrate the bar, leaving to the court the task of adopting rules providing for the details of organization.
- C. *Court Rule*—Direct application by the bar to the highest court of the state for the adoption of such rules. This method is based on the court's inherent power to regulate the legal profession.

As of this writing twenty-six states beginning with North Dakota in 1921, and two territories have integrated bars.⁵

² While the Canadians share with us the heritage of English laws and institutions, unlike us they have retained the tradition and discipline of the Inns of Court.

³ Winters, *Integration of the Bar—You Can't Lose*, 39 J. AM. JUD. Soc'y 140, 141 (1956).

⁴ *Ibid.*

⁵ American Judicature Society, *Citations and Bibliography of the Integrated Bar in the United States I* (1961). Arkansas has a limited form of bar integration for disciplinary purposes only. See *In Re Integration of the Bar*, 222 Ark. 35, 259 S.W. 2d 144 (1953).

<i>Jurisdiction</i>	<i>Date</i>	<i>Means of Integration</i>
Alabama	1923	Statute
Alaska	1955	Statute
Arizona	1933	Statute
Arkansas	1938	Const. Amendment
California	1927	Statute
Florida	1949	Court Rule
Idaho	1923	Statute
Kentucky	1934	Statute & Court Rule
Louisiana	1940	Statute & Court Rule
Michigan	1935	Statute & Court Rule
Mississippi	1930	Statute
Missouri	1944	Court Rule
Nebraska	1937	Court Rule
Nevada	1929	Statute
New Mexico	1925	Statute
North Carolina	1933	Statute
North Dakota	1921	Statute
Oklahoma	1939	Court Rule
Oregon	1935	Statute
Puerto Rico	1932	Statute
South Dakota	1931	Statute
Texas	1939	Statute & Court Rule
Utah	1931	Statute
Virginia	1938	Statute & Court Rule
Virgin Islands	1956	Court Rule
Washington	1933	Statute
West Virginia	1945	Statute & Court Rule
Wisconsin	1956	Statute & Court Rule
Wyoming	1939	Statute & Court Rule

II. THE GREAT DEBATE: PRO'S AND CON'S

In 1926 the integration movement was gaining momentum. Four states had adopted the integrated bar and many others had it under consideration.⁶ At this time the disciplinary procedures in most states were cumbersome and ineffective. Public and formal trials were necessary; no penalties were available short of disbarment or suspension. In practice judges often disciplined leniently. During the 1920's and 1930's there were many rumors and some exposés of unethical conduct on the part of the bench and bar. The legal profession may have reached its lowest level in the opinion of the public.⁷ In every state

⁶ Citations, *supra* note 5, at 1.

⁷ Glasser, *The Debate over the Integrated Bar 2* (New York: Columbia University Bureau of Applied Social Research, 1960).

the topic of integration brought forth great debates and subsequent law suits.⁸ New York is an excellent example because of the quality of the leadership and the bitterness of the battle. At this time in New York there was a strong movement towards integration headed by Charles Evans Hughes, long an advocate for judicial reform. Others, particularly in New York City, were deeply concerned over the quantity of new lawyers as well as their professional fitness. The rival sentiments can best be expressed by the following exchanges recorded at New York and Washington Bar Association meetings.

MR. HUGHES: Anybody who is admitted to the bar receives a privilege on condition. I have no doubt that one of these conditions can be that he shall become a responsible member of an organization of this sort. The state can certainly, it seems to me, impose that condition upon his being admitted to the privilege of practice. Bring him into this range of responsibility. Have him understand that he is not simply amenable to discipline by some organization to which he has no relation, but that he is a part of the bar maintaining these standards which control his conduct.⁹

MR. GUTHRIE: But I am convinced that the truth is otherwise. . . . We cannot create a new spirit and sentiment among these undesirable members by merely enacting a program devised for that purpose and compulsorily grouping them with us. . . . We, who are a voluntary body of lawyers, have been drawn together by the fact that we are interested in all that is best and highest and noblest in our great profession. It is because we are thus, that we are representative not so much of the whole bar but the elite of the bar, of the best part of the bar. You will accomplish nothing by what is called democratizing the bar, pulling down the bar to the level of the great majority and destroying that incentive to work which now inspires most of us in an organization of this kind.¹⁰

MR. HUGHES: It is said the standards of the bar are already in peril of being dissipated by numbers. Instead of that being the reason to oppose organization of the entire bar, it is a fundamental ground for urging that organization.¹¹

MR. GUTHRIE: Democracy does not require that in such organizations as the bar and the medical profession the fit and the unfit must be admitted [to the bar association] without distinction and without selection.¹²

Although successful in many states¹³ the battle for integration was lost in New York. This is attributed mainly to the vigorous opposition of William D. Guthrie. Out of the New York state and other proceedings a number of pro's

⁸ Citations, *supra* note 5, at 11-24.

⁹ 49 N.Y. ST. B. A. REP. 91 (1926).

¹⁰ Report as President of the Association of the Bar of the City of New York on the Gibbs Bill, April 1926, 49 N.Y. ST. B. A. REP. 273 (1926).

¹¹ 49 N.Y. ST. B. A. REP. 91 (1926).

¹² Special meeting on Bar Organization in Washington, D.C., 12 A.B.A.J. 326, 330 (1926).

¹³ See chart, p. 87.

and con's have been formulated. The main arguments may be condensed as follows:

PRO'S:

Representative organization. Every lawyer is a member. Responsibility is squarely on the profession. Grievance procedures conducted by the bar instead of the courts would make possible private investigations and penalties less drastic than disbarment.

Conservation of financial resources. It would no longer be necessary to expend large sums of money and time on membership drives. Compulsory fees give the organization a powerful weapon.

Esprit de Corps. In the tradition of the English Inns of Court the integrated bar would create a professional consciousness of honor, trust and loyalty in the entire bar. The integrated bar would create a common meeting ground for judges and lawyers to discuss problems arising in the practice of law.

Promote judicial reform. The primary function of the integrated bar is to advocate substantive and procedural improvements in the law and the administration of justice. The integrated bar has greater influence as it embraces the entire legal profession. By improving the quality of the profession through improved admissions and disciplinary procedures the bar would gain prestige and respect in the eyes of the public.

CON'S:

Constitutional objections. Opponents urge that compulsory membership would violate their guarantees under the first and fourteenth amendments. These objections are dealt with in the treatment of the *Lathrop* case. (Part III, *infra*)

Proof of need. Dissenters argue that the existing voluntary associations are adequate, thus there is no need to integrate.

Political overtones. Opponents point to the natural tendency of lawyers to introduce politics into the profession. One faction may gain control. The dominant faction then would promote self-interests, binding the entire legal profession.

Control by the state government. Critics object that integration would place the bar under the control of the state legislature and the state Supreme Court.¹⁴

The principal objections (outside of the constitutional questions) have carried very little weight. One must expect that the "undesirable" element will tend to follow the leadership of those respected and gifted rather than reduce the organization to the level of the unethical. It is also pointed out that the

¹⁴ Glasser, *supra* note 7, at 20.

state supreme court can always review these decisions.¹⁵ The chief justices of various states, with integrated bars, have stated their work load has been reduced; that in their opinions it has been an unqualified success, and failures, if any, have been undetected.¹⁶ Integrationists point out that the courts and legislatures possess regulatory powers without integration; in fact integration will delegate more self-governmental powers to the state bar.

The above (non-constitutional) objections are considered the major practical arguments against integration. It is submitted that it is difficult to raise valid intellectual objections to the integrated bar.

III. *Lathrop v. Donohue*.¹⁷ BEGINNING OR END?

The most recent judicial expression on the integrated bar may have, through non-decision, decided the future of integration in this country. Trayton L. Lathrop, a Wisconsin attorney, paid his 1959 dues under protest. He then sued the treasurer of the State Bar, Joseph D. Donohue in the Circuit Court for Fond du Lac County to recover the dues. The plaintiff alleged that the integration constituted coercion and violated his freedoms of free speech and free association and the fourteenth amendment of the Federal Constitution.¹⁸ The defendant demurred on the ground, among others, that the complaint failed to state a cause of action. The demurrer was sustained and the complaint dismissed. On appeal, the Wisconsin Supreme Court affirmed holding that the orders integrating the State Bar did not violate the attorney's freedom of speech or association under either the Federal or State Constitution.¹⁹

It is significant that when the *Lathrop* appeal was filed the Supreme Court of the United States set it down for oral argument immediately after the union-shop case of *International Association of Machinists v. Street*,²⁰ treated them as companion cases and decided both at the same time.²¹ A thorough treatment of the *Lathrop* decision requires an understanding of the *Street* case.

¹⁵ Note, *Bar Integration Through Supreme Court Rule*, 16 J. AM. JUD. Soc'y 154, 155 (1933).

¹⁶ Unpublished letters from chief justices of fifteen states with integrated bars to the Chief Justice of Wisconsin and the President of the Wisconsin Bar Association, January-March 1956.

¹⁷ 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961). *Reh. denied* 368 U.S. 871, 82 S. Ct. 23, 7 L. Ed. 2d 72 (1961).

¹⁸ *Lathrop v. Donohue*, 10 Wisc. 2d 230, 102 N.W. 2d 404 (1960).

¹⁹ *Id.* at 406-407. The Wisconsin Supreme Court held that the Circuit Court was without jurisdiction to pass upon the validity of an order of the Wisconsin Supreme Court which regulates the practice of law but since this action was one *public juris* in which the court had the benefit of thorough and adequate briefs and oral arguments it would work an injustice on the plaintiff if he was made to commence a new proceeding to relitigate the same issue. Thus the court treated the case as if it were properly brought and decided on the merits.

²⁰ 367 U.S. 740, 81 S.Ct. 1784, 6 L. Ed. 2d 1141 (1961).

²¹ Since Wisconsin integrated under Statute and Court Rule and the Wisconsin Supreme Court's order integrating the state bar did not dispose of any issues between parties the United States Supreme Court treated the decision as an order equivalent to a statute for the purposes of 28 U.S.C. §1257 (2) (1958). That section authorizes the Supreme Court to review on appeal a final judgment of the highest court of a state when the validity of a state statute is at issue.

In *Street* a group of employees brought a class action to restrain enforcement of a unionshop agreement on the grounds that their dues were used to support political candidates and causes they opposed. The trial court granted an injunction. It held that §2, Eleventh of the Railway Labor Act, 45 U.S.C. §152, Eleventh, violated the first amendment to the extent that it permitted the unions to use the dues to support causes which their members opposed. The Supreme Court of Georgia affirmed.²²

On appeal the United States Supreme Court reversed. In a plurality opinion written by Justice Brennan the court avoided the constitutional issues²³ and interpreted the Federal Statute as denying authority to the union, over objections, to use the money in support of causes which were so opposed.²⁴ The Georgia court was reversed because the union-shop agreement is in itself lawful and the union dues must be paid. The restraint on collection of all dues from dissenting employees went too far since the objections centered only on the use of a fraction of their dues. The remedy for dissenters, as stated by the Court, would be to seek an injunction against the spending of that fraction of their dues based upon the proportion of the union's total expenditures on political causes to its total budget; or to seek restitution of that fraction expended for political causes to which the member objected and had so advised the union.²⁵ Since the Court concluded that the employee must first state his objections to the union, a class action will not lie. Each individual must seek relief only in respect to his dues, and then only as to a fraction of them. It is to be noted that in the *Street* case the court had before it a record which set out in great detail the expenditure of dues money in support of political causes.

Justice Brennan also wrote the opinion in the *Lathrop* case, joined by the same plurality of Chief Justice Warren, Justice Clark and Stewart. Justice Harlan wrote a concurring opinion which was joined by Justice Frankfurter. Justice Whittaker also wrote a concurring opinion. Justices Black and Douglas each wrote a dissenting opinion.

Plurality Opinion:

The Court rejected the constitutional objection of freedom of association stating, "In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in *Railway Employees*

²² *International Association of Machinists et al v. Street*, 215 Ga. 27, 108 S.E. 2d 796 (1959).

²³ For the theory that the Supreme Court should avoid constitutional issues whenever possible, see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S. Ct. 588, 80 L. Ed. 1011 (1936); *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951).

²⁴ The constitutionality of the union-shop agreement had been upheld by a unanimous Court in an earlier case. *Railway Employees Dept. v. Hanson*, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956).

²⁵ 81 S. Ct. at 1803.

Dep't v. Hanson, 351 U.S. 225.”²⁶ The Court then relied on the analogy drawn by Justice Douglas in the *Hanson* case that, “On the present record, there is no more an infringement or impairment of first amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.”²⁷ On the record presented Justice Brennan could not find any abridgement of the appellant’s freedom of association.

We think that the Supreme Court of Wisconsin, in order to further the State’s legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the membership requirement to the compulsory payment of reasonable dues, we are unable to find any impingement upon protected rights of association.²⁸

The Court refused to consider the appellant’s other contention, that freedom of speech is violated when the dues are used to support causes he opposes. The Court felt that the record was insufficient to support this contention *not* that the contention was, in itself, invalid. “Nowhere are we clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization’s political activities.”²⁹ The plurality went to to reemphasize that they were *reserving* the issue of the constitutionality of compelling the appellant to contribute to causes he opposes.

Concurring Opinions:

Justice Whittaker seeing no constitutional question, concurred in a one sentence opinion which is a carbon copy of Charles Evans Hughes’ statement (*supra* p. 8) during the 1926 debates in New York. The practice of law is a privilege upon condition, one of the conditions being the payment of an annual fee.³⁰

In the other concurring opinion Justice Harlan, joined by Justice Frankfurter, believing that “the Constitutional issue is inescapably before us” voted to affirm the decision of the Wisconsin Supreme Court that a state can, without violating the Federal Constitution, compel a lawyer to join and use part

²⁶ *Id.* at 1837.

²⁷ *Id.* at 1838.

²⁸ *Id.* at 1838 citing 351 U. S. 225, 235.

²⁹ *Id.* at 1839.

³⁰ *Id.* at 1849.

of his dues to support causes to which he objects.³¹ They objected to the separation of the liberties of "freedom of speech" and "freedom of association" in the consideration of the case as "a refinement that is too subtle to grasp." Justice Harlan then dealt with the constitutional issue of "free speech" which he felt the plurality, in effect, had affirmed as a valid objection upon a complete record. He then discussed and rejected each of the arguments the appellant raised on the free speech issue. In answer to the claim that the dissenting lawyer is being forced to support causes he objects to, Justice Harlan stated:

It seems to me these arguments have little force. In the first place, their supposition is that the voice of the dissenter is less effective if he speaks it first in an attempt to influence the action of a democratically organized group and then, if necessary, in dissent to the recommendations of that group. This is not at all convincing. The dissenter is not being made to contribute funds to the furtherance of views he opposes but is rather being made to contribute funds to a group expenditure about which he will have something to say.³²

Recognizing, along with the plurality, the supervisory powers of the state, with the courts, in regulating the practice of law Justice Harlan closed stating:

I end as I began. It is exceedingly regrettable that such specious contentions as appellant makes in this case should have resulted in putting the Integrated Bar under this cloud of partial unconstitutionality.³³

Dissenting Opinions:

There were two dissenting opinions, one by Justice Black and the other by Justice Douglas. Justice Black decided that there is a constitutional issue before the Court and that the first amendment right of free speech is abridged when funds are used to support causes, candidates or ideologies the attorney opposes. He would, under the decision in the *Street* case, reverse and direct the Wisconsin Supreme Court to refund the dues exacted and used to support measures the appellant objects to.³⁴ Justice Douglas goes one step further, arguing that the integrated bar is unconstitutional *per se*. He believes that abridgement of the right of free association should be allowed only in exceptional circumstances and that *Hanson* should be "closely confined."³⁵ Justice Douglas also rejected the analogy of the union-shop and the integrated bar that he made, writing for a unanimous Court, in the *Hanson* case. The result of approving even the partial regimentation of professional people would, he states,

³¹ *Id.* at 1841.

³² *Id.* at 1845.

³³ *Id.* at 1849.

³⁴ *Id.* at 1856.

³⁵ *Id.* at 1859.

[p]ractically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades. Those brigades are not compatible with the First Amendment.³⁶

Conclusion:

The conclusion is inescapable that with this "cloud of partial unconstitutionality" hanging over its head the integrated bar cannot work as an effective advocate of legislative and judicial reform. It is generally agreed that these are among its most important functions. If it has to stand the constant test of judicial review, then its effectiveness will be meager. The integrated bar will become a powerless force bound by the outcry of each dissident member. All of the arguments used in support of the integrated bar (Part II, *supra*) will fail.

Viewing the *Lathrop* decision one's first reaction might be to hail it as the removal of the last obstacle in the way of integration. However, as this writer has indicated, it must be read in the light of its companion case, *International Association of Machinists v. Street*. Analyzing both cases the following deductions are made:

1. Integration, in itself, is constitutional. The decision of a unanimous Court in *Hanson* and the Court's opinion in both the *Lathrop* and *Street* cases support this contention. Only Justice Douglas limits *Hanson* to its facts.
2. The *Street* case has established that a dissident member can seek restitution for the proportionate amount spent on causes he opposes provided he presents an adequate record of the expenditures and proof of prior objection. There is no reason to believe that the plurality would not apply the same reasoning to a proper case under the integrated bar.
3. As pointed out by Justice Harlan in the *Lathrop* case, there is a strong indication that the plurality has, in effect, decided that a proper case would be held to violate "free speech". Justice Black and Justice Douglas have consistently held that this is so. There is a strong probability that the plurality would join the latter two and strike down the use of funds in any case in which the record is adequate. This statement is supported by their express "reservation" of this issue in the *Lathrop* case.³⁷ Only Justices Harlan, Frankfurter and Whittaker have held that the "free speech" issue is without merit.
4. If the statement in the *Street* case that a class action will not lie is upheld, each objecting member will have to seek his own relief. Admittedly, this will present a formidable obstacle to many suits but this does not mean that the courts will not be flooded with "strike" suits. An integrated bar subject

³⁶ *Ibid.*

³⁷ *Id.* at 1840.

to the threat of such suits will, in reality, be a voluntary association and no more.

The optimism expressed by the American Judicature Society and others after the *Lathrop* decision is premature.³⁸ As of this writing the only established fact is that integration, in itself, is constitutional. It is regrettable that our profession can be so conscious of the need for reforms and unable to accept the best tool—the integrated bar.

Perhaps the answer lies in this statement written during the first skirmishes over integration:

The Incorporated bar will come when the profession is ready for it, when it has, if it ever can, raised itself by its bootstraps.³⁹

HENRY E. FORGIONE II

³⁸ *Citations, supra* note 5, at 1.

³⁹ Wickser, *Bar Associations*, 15 CORN. L.Q. 390, 408 (1930).