Justice Douglas' Dissent in *Lathrop*, which has now become law in *Keller*

LATHROP v. DONOHUE, 367 U.S. 820 (1961)

367 U.S. 820

LATHROP v. DONOHUE.
APPEAL FROM THE SUPREME COURT OF WISCONSIN.
No. 200.
Argued January 18, 1961.
Decided June 19, 1961.

MR. JUSTICE DOUGLAS, dissenting.

The question in the present case concerns the power of a State to compel lawyers to belong to a statewide [367 U.S. 820, 878] bar association, the organization commonly referred to in this country as the "integrated bar." There can be no doubt that lawyers, like doctors and dentists, can be required to pass examinations that test their character and their fitness to practice the profession. No question of that nature is presented. There is also no doubt that a State for cause shown can deprive a lawyer of his license. No question of that kind is involved in the present case. 1 The sole question is the extent of the power of a State over a lawyer who rebels at becoming a member of the integrated bar and paying dues to support activities that are offensive to him. Thus the First Amendment, made applicable to the States by the Fourteenth, is brought into play. And for the reasons stated by MR. JUSTICE BLACK, I think all issues in the case are ripe for decision.

If the State can compel all lawyers to join a guild, I see no reason why it cannot make the same requirement of doctors, dentists, and nurses. They too have responsibilities to the public; and they also have interests beyond making a living. The groups whose activities are or may be deemed affected with a public interest are indeed numerous. Teachers are an obvious example. Insurance agents, brokers, and pharmacists have long been under licensing requirements or supervisory regimes. As the interdependency of each person on the other increases with the complexities of modern society, the circle of people performing vital services increases. Precedents once established often gain momentum by the force of their existence. Doctrine has a habit of following the path of inexorable logic. [367 U.S. 820, 879]

We established no such precedent in Railway Employes' Dept. v. Hanson, 351 U.S. 225 . We dealt there only with a problem in collective bargaining, viz., is it beyond legislative competence to require all who benefit from the process of collective bargaining and enjoy its fruits to contribute to its costs? We held that the evil of those who are "free riders" may be so disruptive of labor relations and therefore so fraught with danger to the movement of commerce that Congress has the power to permit a union-shop agreement that exacts from each beneficiary his share of the cost of getting increased wages and improved working conditions. The power of a State to manage its internal affairs by requiring a union-shop agreement would seem to be as great.

In the Hanson case we said, to be sure, that if a lawyer could be required to join an integrated bar, an employee could be compelled to join a union shop. But on reflection the analogy fails.

Of course any group purports to serve a group cause. A medical association that fights socialized medicine protects the fees of the profession. Yet not even an immediate cause of that character is served by the integrated bar. Its contribution is in policing the members of the legal profession and in promoting what the majority of the Bar thinks is desirable legislation.

The Supreme Court of Wisconsin said that the integrated bar, unlike a voluntary bar association, was confined in its legislative activities. Though the Wisconsin Bar was active in the legislative field, it was restricted to administration of justice, court reform, and legal practice. The court however added:

> "The plaintiff complains that certain proposed legislation, upon which the State Bar has taken a stand, embody changes in substantive law, and points to the recently enacted Family Code. Among other things, such measure made many changes in divorce [367 U.S. 820, 880] procedure, and, therefore, legal practice. We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal with legal practice and the administration of justice merely because it also makes some changes in substantive law." 10 Wis. 2d 230, 239, 102 N. W. 2d 404, 409.

It is difficult for me to see how the State can compel even that degree of subservience of the individual to the group.

It is true that one of the purposes of the State Bar Association is "to safeguard the proper professional interests of the members of the bar." State Bar of Wisconsin, Rule 1, 2. In this connection, the association has been active in exploiting the monopoly position given by the licensed character of the profession. Thus, the Bar has compiled and published a schedule of recommended minimum fees. See Wis. Bar Bull., Aug. 1960, p. 40. Along the same line, the Committee on Unauthorized Practice of the Law, along with a Committee on Inter-professional and Business Relations, has been set up to police activities by nonprofessionals within "the proper scope of the practice of law." State Bar of Wisconsin, By-Laws, Art. IV, 8, 11.

Yet this is a far cry from the history which stood behind the decision of Congress to foster the well-established institution of collective bargaining as one of the means of preserving industrial peace. That history is partially crystallized in the language of the Wagner and Taft-Hartley Acts: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees." [367 U.S. 820, 881] National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 137, 29 U.S.C. 151. It was with this history in mind that we spoke when we said that "One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work." Railway Employes' Dept. v. Hanson, supra, 235.

Nor can the present association be defended on grounds that it renders only public services.

If we had here a law which required lawyers to contribute to a fund out of which clients would be paid in case attorneys turned out to be embezzlers, [2] the present objection might not be relevant. In that case, one risk of the profession would be distributed among all members of the group. The fact that a dissident member did not feel he had within him the seeds of an embezzler might not bar a levy on the whole profession for one sad but notorious risk of the profession. We would also have a different case if lawyers were assessed to raise money to finance the defense of indigents. Cf. In re Florida Bar, 62 So.2d 20, 24. That would be an imposition of a duty on the calling which partook of service to the public. Here the objection strikes deeper. An attorney objects to a forced association with a group that demands his money for the promotion of causes with which he disagrees, from which he obtains no gain, and which is not part and parcel of service owing litigants or courts.

The right of association is an important incident of First Amendment rights. The right to belong - or not to [367 U.S. 820, 882] belong - is deep in the American tradition. Joining is one method of expression. This freedom of association is not an absolute. For as I have noted in my opinion in International Assn. of Machinists v. Street, ante. p. 775, decided this day, the necessities of life put us into relations with others that may be undesirable or even abhorrent, if individual standards were to obtain. Yet if this right is to be curtailed by law, if the individual is to be compelled to associate with others in a common cause, then I think exceptional circumstances should be shown. I would treat laws of this character like any that touch on First Amendment rights. Congestion of traffic, street fights, riots and such may justify curtailment of opportunities or occasions to speak freely. Cf. Chaplinsky v. New Hampshire, 315 U.S. 568 . But when those laws are sustained, we require them to be "narrowly drawn" (Cantwell v. Connecticut, 310 U.S. 296, 311) so as to be confined to the precise evil within the competence of the legislature. See Shelton v. Tucker, 364 U.S. 479 ; Louisiana v. N. A. A. C. P., 366 U.S. 293 . There is here no evil shown. It has the mark of "a lawyer class or caste" - the system of "a self-governing and self-disciplining bar" such as England has. 3 The pattern of this legislation is regimentation. The inroads of an integrated bar on the liberty and freedom of lawyers to espouse such causes as they choose was emphasized by William D. Guthrie 4 of the New York Bar: 5

> "The idea seems to be, contrary to all human experience, that if power be vested in this at present unknown and untried as well as indifferent outside body, holding themselves aloof from their profession, they will somehow become inspired with a high professional [367 U.S. 820, 883] sentiment or sense of duty and cooperation and will unselfishly exercise their majority power for the good of their profession and the public, that they can be trusted to choose as their officers and leaders lawyers of the type who are now leaders, that the responsibility of power will necessarily sober and elevate their minds, and finally that democracy calls for the rule of the majority.
> "Thus, the traditions and ethics of our great profession would be left to the mercy of mere numbers officially authorized to speak for us! This would be adopting all the vices of democracy without the reasonable hope in common sense of securing any of its virtues. It would be forcing the democratic dogma of mass or majority rule to a dangerous and pernicious extreme.
> "Although in political democracy the rule of the majority is necessary, the American system of democracy is based upon the recognition of the imperative necessity of limitations upon the will of the majority. In the proposed compulsory or involuntary incorporation of the bar, there would be no limitation whatever, and the best sentiments and traditions of the profession, of the public-spirited and high-minded lawyers who are now active in the voluntary bar associations of the state, could be wholly and wantonly disregarded and overruled." 6

This regimentation appears in humble form today. Yet we know that the Bar and Bench do not move to a single [367 U.S. 820, 884] "nonpartisan" objective. The obvious fact that they are not so motivated is plain from Cohen v. Hurley, 366 U.S. 117 , which we decided only the other day. Once we approve this measure, we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose. I look on the Hanson case as a narrow exception to be closely confined. Unless we so treat it, we practically give carte blanche to any legislature to put at least professional people into goose-stepping brigades. 7 [367 U.S. 820, 885] Those brigades are not compatible with the First Amendment. While the legislature has few limits where strictly social legislation is concerned (Giboney v. Empire Storage Co., 336 U.S. 490 ; Tot v. United States, 319 U.S. 463), the First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority.

[Footnote 1] A self-policing provision whereby lawyers were given the power to investigate and disbar their associates would raise under most, if not all, state constitutions the type of problem presented in Schechter Corp. v. United States, 295 U.S. 495 . See 1 Davis, Administrative Law Treatise, 2.14.

[Footnote 2] See 84 Rep. Am. Bar Assn., pp. 365-367, 513-515, 604-606 (1959); Voorhees, A Progress Report: The Clients' Security Fund Program, 46 Am. Bar Assn. Jour., 496 (1960); Voorhees, Should The Bar Adopt Client Security Funds?, 28 Jour. Bar Assn. Kan. 5 (1959). As of May 1961, Arizona, Colorado, Connecticut, New Hampshire, New Mexico, Ohio, Pennsylvania, and Washington have such funds.

[Footnote 3] Guthrie, The Proposed Compulsory Incorporation of the Bar, 4 N. Y. L. Rev. 223, 231 (1926).

[Footnote 4] See Swaine, The Cravath Firm (1946), Vol. I, pp. 359, 518.

[Footnote 5] Guthrie, supra, note 3, 234-235.

[Footnote 6] Compare with this the language of the court below in this case: "[I]t promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the [Integrated] State Bar." 10 Wis. 2d 230, 242, 102 N. W. 2d 404.

[Footnote 7] A current observer has commented on the results of the regimented Bar in England:

> "Britain is moving towards a dangerous dictatorship not only in journalism, wireless, and television, but in finance and law. The immense groups controlling financial operations are becoming more and more interlocked and have an increasing tendency to cover up each other's errors.
> "The great firms of solicitors are less and less inclined to offend the powerful financial houses which place the biggest business; and if dishonesty is alleged they all too often refuse `to act' if this should involve one of the great interests upon which the big and profitable business of our times depends.
> "Slowly, dangerously, and without the public fully realising what is happening, a nation of great power bottled up in a tiny geographical area is being brought within the grip of a minority of extremely powerful men whose genius is to deny the smallest pretension to power, but who, in fact, are wholly ruthless in a persistent search for power.
> "In this search, although money is vital, they are ready to be Radical in many ways - particularly in the destruction of all rivalry for influence which might spring from a widespread continuity of wealth in the hands of proprietors of family businesses or land.
> . . . . .
> "To destroy this movement towards Press monopoly and financial `cover-up,' it will be necessary for individuals still preserved from `take-over' to support every form of independent journalism and finance. Unhappily, in the field of journalism the smaller groups are so afraid of worse than already threatens, that the tendency is towards surrender. This must be stopped." The Weekly Review, Feb. 3, 1961, pp. 1, 2. [367 U.S. 820, 886]