

January 1934

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Recommended Citation

Louis Shanfeld, *The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar*, 19 ST. LOUIS L. REV. 163 (1934).

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ST. LOUIS LAW REVIEW

Vol. XIX

APRIL, 1934

No. 3

THE SCOPE OF JUDICIAL INDEPENDENCE OF THE LEGISLATURE IN MATTERS OF PROCEDURE AND CONTROL OF THE BAR*

BY LOUIS SHANFELD

Recently the administration of justice has received much criticism and discussion. Both the laymen and the lawyer have urged reform in the machinery of the judiciary. The phases of this machinery that have been most criticised are the regulation of procedure and the bar. Since the judiciary has borne the brunt of the criticism, it is faced with the problem of correction and reform. The issue is presented to what extent the judiciary may correct and reform independently of the legislature under our governmental distribution of powers. The extent of the judicial powers to regulate procedural matters and problems of the bar is determined by how defined and distinct these powers were at the time our independence was established. In *State v. Harmon*¹ it is said: "What constitutes judicial power, within the meaning of the Constitution, is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the Constitution." As a practical matter, not all governmental functions can be strictly classified. There are many powers which fall within the peripheral zones of judicial and legislative functions.² Historically

* The case of *In re Richards*, decided by the Supreme Court of Missouri subsequent to the writing of this article, is an enunciation of the doctrine of judicial independence by that court. See, Comment (1934) 19 ST. LOUIS LAW REVIEW 146.

¹ (1877) 31 Ohio 250.

² *Hampton v. U. S.* (1928) 276 U. S. 394; *In re Richardson* (1928) 247 N. Y. 401, 160 N. E. 655.

the regulation of procedural matters is illustrative of such a power.

At common law the power of regulation of procedure was considered a judicial power, or at least it was never considered distinctively legislative.³ History reveals, that as far back as the days of Richard II, rules of procedure had been promulgated by the judges.⁴ Mr. Morgan says:⁵ "Anciently, regulation of pleading and practice were principally of judicial origin. Some were the result of judicial decisions in individual cases; others were court rules formally declared; some few were enactments of Parliament, the latter of which were attempts to mitigate some of the most technical of the asperities." This common law background illustrates that the judiciary regulated procedure subject to Parliamentary supervision. The common law's inclination towards logic created the inelasticity and rigidity which prompted acts by Parliament. These acts were intended to aid and not abrogate the power in the courts to regulate procedure.⁶ The Civil Procedure Act of 1833 recognizes this inherent right in the courts. In 1873, the English system was modified so as to create an administrative body composed of members of the bench, the bar, and the executive departments, to enact rules of procedure for the courts.

The courts of this country followed the common law judicial decision method of procedure regulation until the code reform movement started in New York in 1848. This movement, resulting in legislative regulation of every detail of the adjective law, spread rapidly in the American states; but enthusiasm for the system was short-lived because this method proved as cumbersome and as inelastic as the system it replaced. Legislative regulation of procedure has seldom been questioned. Our heritage of the English system included, as we have seen, a dual control of the regulation of procedure. Parliamentary regulation is not a criterion to establish a legislative power. Parliament possesses omnipotent powers; the English courts are but instruments in the exercise of that power and thus entirely within the control of

³ Pound, Regulation of Judicial Procedure (1916) 10 Ill. L. Rev. 171.

⁴ Morgan, Judicial Regulation of Court Procedure (1918) 2 Minn. L. Rev. 80.

⁵ See note 4, *supra*.

⁶ Sunderland, Machinery of Procedural Reform (1924) 22 Mich. L. Rev. 295.

Parliament. Under the framework of our governments, national and state, the legislature and the judiciary are co-ordinate and independent. The transcendent powers of Parliament did not devolve upon the legislatures but upon the people.⁷ In our constitutional governments, no one department possessed superior power; each was limited. If the judiciary regulated procedure at common law, the exercise of this power by legal logic belongs to the judicial department of our governments.⁸ There may always be constitutional revision. Legal logic is, however, overpowered by actual legislative regulation of procedure. In fact, our inclination to believe that legislative codes are the only way in which court procedure can be prescribed is a result of the long duration of such control acquiesced in by the courts.⁹ It is legislative regulation that has been so recently criticised. This historical legislative exercise will to some extent impair independent judicial regulation.

The existence of a dual capacity to regulate procedure is brought out in those cases dealing with the constitutionality of what is regarded as an exclusive legislative power. In the federal courts, the history of judicial independence in matters of procedure dates from 1789 when the Judicial Code was enacted. In *Wayman v. Southard*,¹⁰ the delegation of the power to make rules in the Judiciary Act to the courts was upheld as the delegation of an act not "strictly and exclusively legislative." Construing the same Act, the Supreme Court had held that "Congress might regulate the whole practice of the courts, if it was deemed expedient so to do; but this power is vested in the courts."¹¹ Since the Constitution grants to Congress the right to create inferior federal courts, their scope of independence in these matters is subject to Congressional supervision. But the Supreme Court has established its right to regulate its procedure independently. In 1792, the Attorney-General of the United States requested information concerning the rules and regulations of the Supreme Court. It was said that the court considered the practice of the courts of King's Bench and Chancery in England, as affording

⁷ *Sharpless v. Mayor of Phila.* (1853) 21 Pa. 147.

⁸ Wigmore, *Constitutionality of Leg. Regulation of Procedure* (1929) 23 Ill. L. Rev. 276.

⁹ Paul, *Rule Making Power of the Courts* (1926) 1 Wash. L. Rev. 163, 223, 10 (1825) 10 Wheat. 1.

¹¹ *Bank of U. S. v. Halstead* (1825) 10 Wheat. 51.

outlines for the practice of this court; and that they would from time to time make such alterations therein as circumstances might render necessary.¹² Its appellate procedure is, however, subject to legislative regulation.¹³

State legislative enactments, transferring a rule making power in regard to procedure, have brought up the constitutional questions of delegation of that power by the legislature and the independence of the judiciary in its exercise of the power. If its right to exercise the power is to be determined principally by the constitutional issue whether the power may be delegated to it, then the judiciary possesses little independence in this field. The body that delegates may withdraw. The common law background is resorted to in order to sustain the delegation. In a recent Wisconsin case,¹⁴ where the state constitution contained no expression on the power to regulate procedure, it was said: "Where the power is not exclusively committed to any one department, it may be co-operatively enforced, responsively to the needs of society." Not all powers are expressly given by constitutions. There are implied and inherent powers.¹⁵ Ancient custom and practice determine what are implied and inherent powers. The legislature is said to have all powers not given to another department nor denied to it. This does not mean that such grant or denial may not be implied or inherent. "The Constitution does not attempt to make an abstract distribution of governmental functions."¹⁶ This Wisconsin case upheld the delegation of the power to regulate procedure on the ground that at the time the Constitution was adopted, this power was considered essentially a judicial power or "at least not a strictly legislative power." In 1925, the Legislature of Washington enacted a statute transferring power to make rules of practice and procedure to the courts.¹⁷ In *State ex rel. Foster-Wyman v. Superior Court*,¹⁸ this statute was sustained as not an improper delegation

¹² Hayburn's Case (1792) 2 Dallas 411. See Pound, Regulation of Jud. Procedure, note 3, *supra*. Since 1822, the Supreme Court has regulated procedure in equity for federal courts.

¹³ Ex parte McCardle (1869) 7 Wall. 506.

¹⁴ In re Constitutionality of a Wisconsin Statute (1931) 204 Wis. 501, 236 N. W. 717.

¹⁵ McCulloch v. Maryland (1819) 4 Wheat. 316.

¹⁶ State v. Bates (1905) 96 Minn. 110, 104 N. W. 709.

¹⁷ Laws 1925, c. 118.

¹⁸ (1928) 148 Wash. 1, 267 Pac. 770.

of legislative power although the legislature formerly functioned as the source of such rules; and it was held that they did not perform an act exclusively legislative. In both the Wisconsin and Washington cases, it is seen that the powers of the legislature over regulation of procedure was not challenged. In both, the power was recognized as subject to concurrent regulation; but the holdings sustain the conclusion that the judicial participation in this regulation is dependent upon the will of the legislature. Yet courts of New York and Colorado have sustained these statutes under similar constitutional provisions as the grant of a power which their courts possessed independently and inherently. In *Hanna v. Mitchell*,¹⁹ the decision was based on this inherent power of the courts, although rule making powers had been authorized by the statute. The court said: "The power to make rules governing the practice and procedure in the courts is a judicial and not a legislative power. This was clearly recognized when the Code of Procedure was authorized to be adopted by the legislature. The federal Constitution (Art. 3, sections 1 and 2) seems to give greater power to Congress over the proceedings in the federal courts than is given by the state Constitution to the Legislature. . . ." In the more recent case of *People v. Kolkman*,²⁰ the court considered the effect of a statute which stated: "The supreme court shall prescribe rules of practice and procedure in all courts of records and may change or rescind the same. Such rules shall supersede any statute in conflict therewith."²¹ The Supreme Court then enacted the following rule: "14(b). The rules governing comments by district judges shall be those now in force in the United States district courts." A comment by a trial judge pursuant to this rule was upheld. Preceding publication of the decision, the legislature amended its statute so as to nullify this rule permitting comments. The opinion of the court then asserted its independence to formulate rules of procedure "irrespective of the statute and the common law, but in conformity with constitutional provisions. . . . This is inherent in the judicial department." In effect, the statute was held declaratory of a power possessed by the court under its inherent

¹⁹ (1922) 202 App. Div. 504, 196 N. Y. S. 43.

²⁰ (1931) 89 Colo. 8, 300 Pac. 575. See comment (1933) 16 Jr. of Am. Jud. Soc. 151.

²¹ Laws 1913, p. 447, now embodied in (1921) Code Civ. Proc. sec. 444.

power. The legislature could not abrogate this rule. The majority opinion did not hold as to whether the judicial power was exclusive. The dissenting opinions, however, did treat the opinion as holding that the power was exclusively in the judiciary on the ground that the power to override legislative enactments was the assumption of absolute power. In an earlier case,²² the Colorado court held, in its majority opinion, that a statute regulating procedure in a divorce trial was invalid since the legislature had granted all rule making power to the courts with reference to procedure. The dissent held that what the legislature granted it could take away. On the rehearing the majority held that nothing said by it in its opinion was to reflect on the Code of Colorado. In view of these decisions, it cannot be said that Colorado holds the judiciary invested with independent and exclusive powers over matters of procedure. *State v. Kolkman* is, however, a remarkable assertion of the judicial independence in this phase of administration of justice.

Although courts respect legislative regulation of adjective law pertaining to procedure, they generally are not hesitant to assert an exclusive independence in routine procedural matters. In *Hoopes v. Bradshaw*,²³ the court said: "There are certain functions of the lower courts with which the legislature cannot interfere, one of them being the power to adopt rules to facilitate the proper dispatch of the business of such tribunals, such as instances of regulations relating to the service of notices and papers." In a case holding a legislative act requiring the courts to give their decisions in writing invalid, Justice Field said, "but where is the limit if its exercise in any particular be admitted."²⁴ Instances where legislative enactments provided that judges should write headnotes to their opinions,²⁵ that the court should reopen and rehear certain cases,²⁶ that the court should treat the verdict of the jury with a certain weight,²⁷ that there should be limitations of time for argument,²⁸ that the court should grant

²² *Walton v. Walton* (Colo. 1929) 278 Pac. 780.

²³ (1911) 231 Pa. 485, 80 Atl. 1098.

²⁴ *Houston v. Williams* (1859) 13 Cal. 24. See also *Vaughn v. Harp* (1857) 49 Ark. 160, 4 S. W. 751.

²⁵ *Ex parte Griffiths* (1889) 118 Ind. 83, 20 N. E. 513.

²⁶ *Dorsey v. Gary* (1872) 37 Md. 79; *Dorsey v. Dorsey* (1892) 77 Md. 64.

²⁷ *State v. Aetna Casualty Co.* (Fla. 1922) 92 So. 87.

²⁸ *Cobb Chocolate Co. v. Knudson* (1904) 207 Ill. 452, 69 N. E. 816; *Reagan v. St. Louis Transit Co.* (1904) 180 Mo. 117, 79 S. W. 435.

an appeal in specified cases,²⁹ that the court should be limited in vacating or modifying its judgment after term,³⁰ or that the court should be limited in granting a continuance pending case,³¹ are examples of what courts uphold as exclusively within their regulation.³² Legislative granting of new trials³³ or determinations of proper parties³⁴ are further illustrations of what courts regard as violative of the principle of the separation of powers. In *Epstein v. State*,³⁵ the court said: "It is not a legislative function to make rules for the court, or to say what the courts shall consider a sufficient brief." A legislative act abrogating a Supreme Court rule requiring briefs of counsel to contain concise statements of errors and exceptions was held invalid.³⁶ Courts differ as to the validity of a statute prohibiting suspension of imposition of sentence in criminal cases,³⁷ but generally sustained a statute prohibiting the power to suspend the execution of an imposed sentence.³⁸ Courts have also asserted an independence on issues of venue.³⁹ They also reserve to themselves the probative value of evidence,⁴⁰ although they respect legislative determinations of what shall be evidence.⁴¹ In matters relating to contempt proceedings, the judiciary has generally restrained legislation on the ground that regulation of contempts is an inherent

²⁹ *Miller v. State* (1849) 33 Md. 116.

³⁰ *Tuck v. Chapple* (1926) 114 Oh. St. 166, 151 N. E. 48.

³¹ *Burt v. Williams* (1863) 24 Ark. 91.

³² Other instances: *People v. Buener* (1931) 343 Ill. 146, 175 N. E. 400, providing that jury shall be judges of law and fact; *Atchison etc. R. Co. v. Long* (Ok. 1926) 251 Pac. 487, providing for appeals within a certain time.

³³ *De Chastellux v. Fairchild* (1850) 18 Pa. St. 18; *Taylor v. Place* (1856) 4 R. I. 324; *Merrill v. Sherburne* (1818) 1 N. H. 199.

³⁴ *Hay v. Issetts* (Fla. 1929) 125 So. 237.

³⁵ (Ind. 1920) 128 N. E. 353.

³⁶ Also: *Lacy v. State* (1928) 195 N. C. 284, 141 S. E. 886; *Davis v. State* (Ind. 1920) 128 N. E. 354. *Contra*: *Covington v. Home Hosiery Mills* (1928) 195 N. C. 478, 142 S. E. 705; *Kidd v. Jacksonville* (Fla. 1930) 128 So. 31.

³⁷ Cases sustaining validity: *People v. Ct. of Sessions* (1894) 141 N. Y. 291, 36 N. E. 386; *Iowa v. Voss* (1890) 80 Ia. 467; See *Gelismann v. Osborne* (1924) 79 N. J. E. 430, 82 Atl. 424. *Contra*: *People v. Allen* (1895) 155 Ill. 61, 39 N. E. 568; *People v. Brown* (1884) 54 Mich. 15, 19 N. W. 571; *State v. Hockett* (1907) 129 Mo. App. 639, 108 S. W. 599.

³⁸ *Ex parte U. S.* (1916) 242 U. S. 26; *Madjorous v. State* (Ohio 1924) 156 N. E. 916.

³⁹ *State v. Curtis* (Mo. 1920) 4 S. W. (2d) 467; *Farmer v. Christian* (Va. 1930) 152 S. E. 383.

⁴⁰ *Johnson v. Theodoron* (1927) 324 Ill. 543, 155 N. E. 481.

⁴¹ *Roth v. Gabbert* (1894) 121 Mo. 162, 27 S. W. 523; *Corbin v. Hill* (1877) 21 Ia. 70; *U. S. v. Klein* (1871) 80 U. S. 128; *State v. Torrello* (Conn. 1925) 131 Atl. 428.

power of the court;⁴² that they interfere with the orderly conduct of the business of a coordinate and independent department.⁴³ Congressional regulation of contempt in federal courts to the extent of providing for a jury in criminal contempts has been upheld.⁴⁴ In *Ex parte Garner*,⁴⁵ a state legislative act regulating procedure and the maximum punishment for contempts was upheld. A Missouri case upholds a statute limiting judicial power to punish constructive contempts.⁴⁶ But the courts generally deny statutes providing for jury trials in indirect contempts.⁴⁷

Judicial declarations of independence in these matters are made in order to establish an effective and unfettered administration of justice. Legislative acts are held unconstitutional because they infringe on judicial matters held to be exclusively committed to the judiciary. Based on English history, there was no distinction between routine and adjective matters of procedure. It would seem that the courts could, without legislative action, set up organizations to regulate all procedure, such as Parliament has set up in England. Historical practice, however, will influence us to apply to the legislature for action. In the American states, just as the common law method was supplanted by legislative regulation, the latter is being supplanted by judicial councils, somewhat similar to the English administrative body for the making of rules of court.⁴⁸ Practices in states like Colorado, where the legislature has transferred all rule making to courts, and New Jersey, where the legislature has enacted a short practice act concerned only with the fundamentals of procedure, thus leaving a broad field for judicial making of rules, illustrate the trend towards restoring the regulation of procedure to the judiciary.

In matters concerning control of the bar, dual regulation has also been manifest. As in matters of procedure the English background determines the limits. Parliament's power cannot

⁴² *Ex parte Le Mond* (1922) 295 Mo. 586, 245 S. W. 1057; *State v. Shumaker* (Ind. 1928) 164 N. E. 408.

⁴³ *Conley v. U. S.* (C. C. A. 8, 1932) 59 F. (2d) 1929.

⁴⁴ *Michaelson v. U. S.* (1924) 266 U. S. 42.

⁴⁵ (Cal. 1918) 177 Pac. 162.

⁴⁶ *Ex parte Greasy* (1912) 243 Mo. 679, 148 S. W. 914.

⁴⁷ *Carter v. Commonwealth* (1899) 96 Va. 791, 32 S. E. 780, and cases collected in 36 L. R. A. 253. See also *Fort v. Co-operative Farmers' Ex.* (Colo. 1927) 256 Pac. 319.

⁴⁸ (1931) 15 Jr. of Am. Jud. Soc. 14.

be held analogous to the powers possessed by legislatures of this country.⁴⁹ Ancient judicial practice, however, does determine the limits of judicial power under our governments.⁵⁰ It has been well said: "In matters of power over attorneys at law, the judicial branch is either wholly slave to the legislative branch or wholly free from its domination."⁵¹ Ancient exercise of a power does not absolutely establish the power. There must be a source.⁵² It is universally held that the right to practice law is not a natural or constitutional right.⁵³ The implication is that the right is attendant with restrictions and qualifications. The issue is which department of our governments can constitutionally limit or qualify. In all our governments, the legislature exercises police powers, the judiciary judicial powers. Regulation may fall within both powers. In Illinois, the legislature enacted a statute making the practice of law by a corporation unlawful.⁵⁴ The court, nevertheless, regulated such practice independently of this statute even though the corporation could not appear before it naturally.⁵⁵ The statute was an exercise of the police power; the court action an exercise of an inherent judicial power. It is apparent that the independence of a department in its rightful regulation may either be qualified by implication, or sustained by the superior position of the department.

The judicial extent of regulation of the bar is influenced by what the English practice was at the time our government became independent. From the beginning, the regulation of members of the bar was an inherent function of the English courts.⁵⁶ Parliament, at times, has regulated, but its regulation has recognized the inherent right of the courts.⁵⁷ It is often stated that

⁴⁹ *State v. Cannon* (Wis. 1932) 240 N. W. 441.

⁵⁰ See *State v. Harmon*, note 1, *supra*.

⁵¹ *In re Cate* (Cal. 1928) 270 Pac. 968, a logical argument sustaining the exclusive independent judicial regulation of these matters.

⁵² *In re Cate*, note 51, *supra*; *McCulloch v. Maryland*, note 15, *supra*.

⁵³ *State v. Rossman* (1929) 53 Wash. 1, 101 Pac. 357; *Ex parte Yale* (1863) 24 Cal. 241; *In re Gibbs* (Ariz. 1929) 278 Pac. 391; *State v. Rosborough* (1922) 152 La. 945, 94 So. 858; *In re Bailey* (1926) 30 Ariz. 407, 248 Pac. 29; *In re McDonald* (Ind. 1928) 164 N. E. 26; *State Bd. v. Phelan* (Wyo. 1931) 5 Pac. (2d) 263.

⁵⁴ Ill. Rev. St. (Smith-Hurd 1929) ch. 32, secs. 411-5.

⁵⁵ *People v. People's Stockyards State Bank* (1931) 344 Ill. 462, 176 N. E. 901. See *In re Morse* (1924) 98 Vt. 85, 126 Atl. 550.

⁵⁶ *In re Day* (1899) 181 Ill. 73, 54 N. E. 646; *State Bd. v. Phelan*, note 53, *supra*; *State v. Cannon*, note 49, *supra*.

⁵⁷ *State v. Cannon*, note 49, *supra*. See (1899) 13 Harv. L. Rev. 233.

the judicial control over admissions sprang from the statute 4 Henry IV, c. 18, and is therefore a statutory origin while the right to disbar was an inherent common law right.⁵⁸ Since this statute, the Inns of Court, which are voluntary, unincorporated associations, have determined the applicants to practice before the bench. These Inns have always been under the supervision of the courts.⁵⁹ Parliament may regulate the bench and the bar as a superior power.⁶⁰ In statute 54, 9 and 10 Vict., it gave the barristers equal right and privilege before the common pleas as the sergeants at law. Nothing short of an act of Parliament could accomplish this. English courts could exercise the power of conducting general inquisitions into the general conduct of their attorneys.⁶¹ Whether the history of the admission of attorneys in England justifies the exercise of control over the bar by the legislature depends on how analogous it is made to supervisory regulation by Parliament. Yet it is stated in *In re Day*:⁶² "Whatever the English practice may have been, the question must be what the nature of the power is, and whether it is one which naturally pertains to the court. If it is judicial in its nature, the legislatures are expressly prohibited from exercising it." This statement emphasizes the logical approach to whether the judiciary may regulate the bar independently of the legislature. It is not to be determined wholly by English practice but also by interpretation of the power under our framework of government.

It is almost universally conceded that the judiciary has an inherent independent power over the act of admission of attorneys to the bar.⁶³ The act is regarded as an exclusive judicial function

⁵⁸ *State v. Kirke* (1869) 12 Fla. 278; *In re Mills* (1844) 1 Mich. 392; *In re Robinson* (1907) 48 Wash. 153, 92 Pac. 929; *State v. Reynolds* (1916) 22 N. M. 1, 158 Pac. 413; *Ex parte Bradley* (1868) 74 U. S. 364. See 44 L. R. A. (N. S.) 1195.

⁵⁹ "But all the power they have concerning the admission to the bar, is delegated to them from the judges, and, in every instance their conduct is subject to their control as visitors." Lord Mansfield in *The King against the Benchers of Gray's Inn, on the Prosecution of William Hart.* (1778) 1 Doug. Rep. 353.

⁶⁰ *State v. Cannon*, note 49, *supra*.

⁶¹ *People ex rel. Karlin v. Culken* (1928) 248 N. Y. 465, 162 N. E. 487.

⁶² See note 56, *supra*.

⁶³ *Brydonjack v. State Bar* (Cal. 1929) 281 Pac. 1018; *O'Brien's Petition* (1906) 79 Conn. 46, 63 Atl. 777. *State v. Cannon* (1928) 196 Wis. 534, 221 N. W. 603; see 6 C. J. 572. In all the states except New Jersey (*In re Raisch* (1914) 83 N. J. Eq. 82, 90 Atl. 12) attorneys receive their formal license to practice law by their admission as members of the bar of the court so ad-

and not merely ministerial.⁶⁴ Mandamus will not lie from a superior court to compel admission by a lower court.⁶⁵

The exercise of the power to prescribe qualifications for applicants to the bar brings out the conflict between the legislative and judicial departments. It is doubtful whether there is authority for the principle that the courts have the sole right to prescribe for themselves the qualifications of members of the bar and rules and regulations for their admission without interference by a coordinate branch of the government. *In re Day* is often cited for this view. In this case a statute requiring admission to the bar if the applicant possessed a degree from an established law school of the state was held invalid as an encroachment by the legislature on the judicial powers. Yet it is difficult to uphold this case as establishing the principle for which it is cited because the court admits that the legislature may prescribe reasonable police regulations. *In re Splane's Petition*⁶⁶ presents the view as dicta since the decision concerned an application for mandamus to compel a lower court to admit. Conversely, however, there is support for the view that the legislature may enact the ultimate qualifications and that the judiciary has no right to exact additional requirements. *In re Cooper* is the leading case in support.⁶⁷ The legislature of New York required admittance of graduates of a certain law school to the bar without examination. Basing the decision on its interpretation of the English law as it existed at the time the New York constitution was adopted, it held that the regulation of bar requirements was entirely within the realm of legislation. A North Carolina case has also held that admission is not an inherent judicial power, but one falling entirely within the exercise of police powers.⁶⁸

mitting. In West Virginia, a distinction is made between the granting of the license and the act of admission.

⁶⁴ *Ex parte Garland* (1867) 4 Wall. 333; *Ex parte Secomb* (1856) 19 How. 9; and cases cited in note 63, *supra*.

⁶⁵ *Ex parte Garland*, note 64, *supra*; *Ex parte Secome*, note 64, *supra*; *Splane's Petition* (1899) 123 Pa. 527, 57 Atl. 731.

⁶⁶ See note 65, *supra*.

⁶⁷ (1860) 22 N. Y. 67.

⁶⁸ *In re Applicants for License* (1906) 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288. The reporter to the note said: "Aside from the above case, no case can be found wherein the court holds or recognizes the right of the legislature to encroach upon the right of the court to require that the attorneys practicing before it shall be of a good moral character." Besides the *Cooper* case and this, there is support in *In re Bowers* (1918) 138 Tenn. 662, 200

Neither expresses the prevailing view. It is conceded in perhaps all other jurisdictions that the legislature may make reasonable regulations that will be followed by the courts, in exercising the power of admission.⁶⁹ In *State Board v. Phelan*⁷⁰ it is said: "Submission by the courts to such regulations need not be viewed as an abdication of power, but as showing the willingness of the judiciary to recognize and follow statutory regulations that do not put an unreasonable restraint on the exercise of the power." Determination by the court whether a restraint is reasonable or not is said to deny a "power" in the legislature to regulate.⁷¹ But what its exercise is termed does not evade its effects. Although a Massachusetts court has recently denied the binding effect of legislative acts over courts in matters of control of the bar, it nevertheless expresses respect for statutes which may afford "appropriate instrumentalities" for the ascertainment of qualifications of applicants.⁷² All courts recognize the important function of the legislature in promoting public welfare by protecting the public from the result of incompetence, imposition, and fraud on the part of those who assume to practice professions requiring special training. Yet, as said in *State v. Cannon*: "It is apparent, however, that the judiciary may have another and different interest in the talents, qualifications and character of those who are to become officers of the court. . . ." There is no cited case in which the courts have evaded reasonable

S. W. 821, holding that board of examiners created by legislature had ultimate power to decide fitness of applicants. In re Cooper has been distinguished on the basis that but one side of the case was presented on appeal and that the brief presented misinterpreted or misunderstood the English law. See 13 Harv. L. Rev. 233, and In re Day, note 56, *supra*. The North Carolina case goes back to 1777 for precedents and at that time a parliamentary system of government existed in the state. The year after this case, the legislature enacted a law giving the court discretion as to fitness. The dissent in In re Applicants for License to Practice (1910) 67 W. Va. 213, 67 S. E. 597 also supports this view of legislative power. Contra cases are: In re Humphrey (Minn. 1929) 227 N. W. 179; In re Grantham (Minn. 1929) 227 N. W. 180; Hanson v. Gratton (1911) 84 Kan. 843, 115 Pac. 646; *State v. Cannon*, note 49, *supra* (legislative act of admission); In re Edwards (Idaho 1928) 266 Pac. 665. See Code of Ala. (1923) sec. 6226, for provision making degree from a certain law school conclusive as to ability.

⁶⁹ *State v. Cannon*, note 49, *supra*; *Brydonjack v. State Bar*, note 63, *supra*; and see note, 66 A. L. R. 1512.

⁷⁰ See note 53, *supra*.

⁷¹ In re Cate, note 51, *supra*; In re Goodell (1879) 39 Wis. 232, 81 N. W. 551; Hanson v. Gratton, note 68, *supra*; In re Bailey, note 53, *supra*.

⁷² In re Opinion of the Justices (Mass. 1932) 180 N. E. 725.

requirements; the extent of the assertion of their independence being that of exercising strict oversight and summary power over the position of attorney. In other words, the ultimate power over admission is jealously guarded by the courts; and so it is held that the power of the legislature over the courts in judicial matters is limited, and can in no way be exercised so as to impair the actual independence of the judiciary; and that the control by the legislative department of admission to the bar, so far as it exists under the usual American constitution, is at most a power to prevent the admission of unsuitable persons.

The discipline and removal of attorneys is universally recognized as inherent in all courts. In England, the statute 4 Henry IV c. 18, is the first expression by Parliament on removal or disbarment. It was enacted with the intent of correcting a public evil resulting from ignorant men professing to act as attorneys. The courts always possessed the right to discipline independently of statute.⁷³ For this reason it is often held that the power is a common law power while the power to admit is statutory.⁷⁴ But for the purposes of determining the independence of the judiciary in matters pertaining to the bar, the courts' inherent powers applied to both at the time our freedom was established. A court's right to discipline does not depend on whether it has a power to admit.⁷⁵ There may be legislative regulations of this inherent power to discipline only so far as restricting or broadening the effect of the discipline on other courts.⁷⁶ In *Weeks on Attorneys at Law*⁷⁷ it is said: "The power to strike from the rolls is inherent in the court itself. No statute or rule is necessary to authorize the punishment in proper cases. Statutes and rules may regulate the power, but they do not create it."⁷⁸ . . . And where certain grounds are specified by the statute, this does not necessarily exclude striking from the rolls for causes not specified."⁷⁹ In *People v. Culkin*,⁸⁰ the power of the court to direct a

⁷³ See (1844) 4 Law Times 102, concerning statute 3 Edw. I c. 29.

⁷⁴ See note 58, *supra*, for cases.

⁷⁵ *State v. Reynolds*, note 58, *supra*; *State v. Kirke*, note 58, *supra*.

⁷⁶ *Legal Club of Lynchburg v. Light* (1923) 137 Va. 249, 119 S. E. 55.

⁷⁷ Sec. 80.

⁷⁸ *In re Zirinsky* (1932) 255 N. Y. S. 492.

⁷⁹ *In re Sadler* (1913) 35 Okla. 510, 130 Pac. 906.

⁸⁰ See note 61, *supra*; and see *Rubin v. State* (1927) 194 Wis. 207, 216 N. W. 513.

general inquiry into the conduct of attorneys was upheld on the basis of the common law as it existed in England when New York adopted its constitution. There is a conflict in the courts as to whether disbarment may lie for acts disconnected with the practice.⁸¹ Those cases declaring that it does not, base their holdings on the ground that such discipline or disbarment is not within the inherent power of the court generally to discipline and disbar. There would seem to be no distinction in determining moral fitness to continue in the profession based on professional or non-professional conduct.

The courts are not as free to disbar as they are to discipline. When a legislative act enumerates certain offenses, it is generally held that these are not restrictive on the court's power to disbar for other acts.⁸² However, the commission of an offense so enumerated is generally held to be conclusive on the courts to disbar.⁸³ This is the Missouri law.⁸⁴

The constitutional independence of the court may also arise in connection with the procedure in disbarment proceedings. The weight of authority holds that such a proceeding is not criminal in its nature, but rather civil, or even *sui generis* and so controlled by special rules.⁸⁵ The proceedings are also held generally not for the purpose of punishment, but rather for regulation of the profession.⁸⁶ It is also held that technical pleadings are not required and that the main purpose of pleadings is achieved if ample notice is given.⁸⁷ Since the courts are held to have an in-

⁸¹ In re Sadder, cited note 79, *supra*, restricts to professional misconduct but In re Platz (1913) 42 Utah 439, 132 Pac. 390, and In re Durant (1903) 80 Conn. 140, 67 Atl. 497, hold that discipline and disbarment may be for non-professional as well.

⁸² Wolfe's Disbarment (Pa. 1927) 135 Atl. 732; Howe v. State Bar, (Cal. 1931) 298 Pac. 25; People v. Berezniak (1920) 292 Ill. 305, 127 N. E. 36. But see Re Ebbs (1908) 150 N. C. 44, 63 S. E. 190, and Re Haywood (1872) 66 N. C. 1, upholding legislative grounds as exclusive. If held exclusive, it would seem that the right to disbar is not as inherent in the court as the right to punish for contempt.

⁸³ In re Elliott (1927) 122 Okla. 180, 253 Pac. 103; In re Collins (1922) 188 Cal. 701, 206 Pac. 990.

⁸⁴ In re Wallace (1929) 323 Mo. 203, 19 S. W. (2d) 625.

⁸⁵ Philbrook v. Newman (C. C. Cal. 1898) 85 F. 139; In re Ulmer (1929) 268 Mass. 373, 167 N. E. 749. See (1921) 5 Minn. L. Rev. 141. *Contra*: In re Eaton (N. D. 1931) 235 N. W. 587.

⁸⁶ In re Egan (1928) 52 S. D. 394, 218 N. W. 1; State v. Ledbetter (1927) 127 Okla. 85, 260 Pac. 454; Ex parte Wall (1882) 107 U. S. 265.

⁸⁷ Bar Ass'n v. Scott (1911) 209 Mass. 200, 95 N. E. 402.

herent right to disbar, the courts generally sustain non-statutory proceedings.⁸⁸ In recent cases, statutes providing for jury trials in such proceedings have been upheld.⁸⁹

The legislative power of taxation may bring out a constitutional conflict with the judicial control of members of the bar. If the tax is for revenue only, the act is generally upheld.⁹⁰ If it is for regulation, an effective restraint on the judiciary must be brought out more clearly than by mere implication.⁹¹ It is apparent that this power of taxation may be made an effective regulation of the bar.

Other restrictions on judicial independence in control of the bar may be made by legislative application of the statute of limitations; or by an implied denial to disbar as an attorney, one who holds a public trust.⁹² Even where the office required the holder to be an attorney and the constitution provided for removal, the court exercised its inherent power to disbar.⁹³

Judicial independence of the legislature has been more widely asserted in matters concerning the bar than in matters of procedure. Both phases of the administration of justice should, logically, independently be regulated by the judiciary. Public opinion, the bar, and the press should prove sufficient checks if the judicial department does assert its independence. "The judges are best qualified to determine what experience requires and how the rule is working."⁹⁴

⁸⁸ In re Royall (1930) 34 N. M. 554, 286 Pac. 156; State Bar Comm. v. Sullivan (1915) 35 Okla. 745, 131 Pac. 703. *Contra*: In re Herron (Cal. 1930) 291 Pac. 164; Grievance Committee v. Strickland (1931) 200 N. C. 630, 158 S. E. 110. See (1932) 10 N. C. L. Rev. 58.

⁸⁹ State Board v. Phelan, cited note 53, *supra*; Verimont v. State (1911) 101 Ark. 210, 142 S. W. 194.

⁹⁰ Goldwaite v. Montgomery (1876) 50 Ala. 486; Lent v. Portland (1903) 42 Or. 488, 71 Pac. 645.

⁹¹ Goldwaite v. Montgomery, note 90, *supra*; State v. Gazlay (1831) 5 Ohio 14; In re Gibson (N. M. 1931) 4 Pac. (2d) 643.

⁹² State v. Jennings (S. C. 1931) 159 S. E. 627.

⁹³ In re Stolen (Wis. 1927) 214 N. W. 379; Danforth v. Egan (1909) 23 S. D. 43, 119 N. W. 1021.

⁹⁴ In re Stolen, note 93, *supra*.

⁹⁵ Pound, Regulation of Jud. Procedure, note 3, *supra*.