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LEGISLATION

Admission to the Bar—Legal Profession—Residence Requirements for Student Applicants to the Bar

Residence requirements for prospective applicants for admission to the bar are imposed by most states.[1] The required period of residence prior to the examination varies from fifteen months[2] to twenty-five days.[3] In addition, from two to four months is usually needed to grade the examinations. The asserted purpose of a residence period is to give the state time to determine the moral character of the applicants;[4] this determination is said to be the resultant of two processes

1. These requirements are collected in RULES FOR ADMISSION TO THE BAR (West Pub. Co. 1963 ed.), and in ABA, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS IN THE UNITED STATES (1962) [hereinafter cited as BAR ADMISSION REQUIREMENTS].

Two jurisdictions which do not require a residence period are Michigan, BAR ADMISSION REQUIREMENTS 29, and the District of Columbia, *id.* at 28. Some other states, such as Oregon, *id.* at 31, and Tennessee, *ibid.*, require only an intent to reside.

Many states also have some type of residence requirements for foreign attorneys. (*E.g.*, Mississippi requires two years residence, Arizona requires six months, Texas and California require three months. AM. JUR. 2d DESK BOOK 243 (1962).) These requirements should be eliminated, since their avowed purpose is to facilitate determining the attorney's moral character, and an inquiry at his former place of practice would quickly yield a more comprehensive report of the attorney's moral character as evidenced by actual conditions of legal practice over a period of years.

"If a lawyer must be a resident for one year or more prior to applying for comity admission, it is quite clear that unless he has a substantial income outside of his practice, he cannot abandon his office and settle down for a year in idleness in order to establish such a residence. On the other hand, the attorney who does not have a sufficient practice on which to live can come into the state, get a job of a non-legal nature and thus fulfill the residence requirement for comity admission. For him the requirements are not exclusionary and there is nothing to prevent the bar of the state from being filled up with lawyers whose abilities have not assured them a living elsewhere from their profession. In other words, the residence restriction has worked only to exclude the lawyers of better quality while in itself it is in no way a barrier to the one who has already proven himself professionally incompetent and a failure in another state." Horack, *"Trade Barriers" to Bar Admission*, 28 J. AM. JUD. SOC'Y 102, 103 (1944), reprinted in 14 BAR EXAM. 10 (1945).

2. Mississippi requires twelve months residence before filing the application, and the application must be filed three months before taking the examination. BAR ADMISSION REQUIREMENTS 29.

3. Iowa. BAR ADMISSION REQUIREMENTS 28. The most frequent requirement is six months. *E.g.*, Arizona, Maine, and Montana. *Id.* at 27, 29.

4. Horack, *supra* note 1, at 104. Some states waive residence requirements for war veterans. Farley, *Admission of Attorneys from Other Jurisdictions*, 19 BAR EXAM. 227, 237 (1950), reprinted in SURVEY OF THE LEGAL PROFESSION: REPORTS OF CONSULTANT AND THE ADVISORY AND EDITORIAL COMMITTEE ON BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 151, 164 (1952). Such waiver has been approved by a committee of the American Bar Association, which at the same time warned against

—observation and investigation. These requirements obviously present the nonresident applicant with the unwelcome choice of either being denied admission to the state's bar or of undergoing the probable hardship of residing in the state the required time before admission. During the waiting period the applicant may have no income or be forced to accept some nonlegal employment, unless he happens to find a law firm which will employ him as a law clerk while his bar admission is pending.[5] Residence requirements favor large law firms, which can afford to employ prospects, over small firms, which can afford to employ only licensed attorneys. A third effect is on the legal profession itself. While originally intended to protect the profession and the public from morally unqualified applicants, today these requirements serve as protection for established attorneys who wish to reduce competition.[6] A fourth and even more important objection to residence requirements is that they are contrary to our national policy of free movement of persons, goods, and ideas. That ours is a mobile and fluid society was long ago recognized by the framers of the Constitution, who embodied in the instrument itself safeguards for this free movement. Thus we are assured free movement of interstate commerce and freedom to express our ideas. Residence requirements discourage free movement of prospective members of the legal profession; this in turn deprives the excluding

lowering any other requirements. 11 BAR EXAM. 31, 34 (1942). This indicates that residence requirements are of little importance in determining fitness of a prospective applicant to the bar.

5. This gives the resident student a great advantage over the nonresident. Example: Student *A* of state *X* and student *B* of state *Y* both seek admission to the bar of state *X*. Student *A* passes the bar and is immediately admitted to practice. Student *B*, with excellent qualifications, must first qualify as a resident. But the law firm which he plans to enter, being in a small rural community, needs an attorney immediately; despite wanting *B* very badly the firm cannot wait for him nor can it afford to carry him. Thus *B* decides not to enter the bar of state *X*. Who has benefited from this? No one, unless it be the person whom the firm selects in place of *B*. Who has been injured? (1) *B* has been deprived of an opportunity to join the law firm of his choice. (2) The small law firm has been denied a prospect whom it may never be able to replace. (3) The people of the state, particularly those of the rural community, have been denied the services which *B* could have provided them.

6. These requirements show "a distinct leaning toward the protection of the local student and the local lawyer with much the same effect as is created by ordinary trade barriers. . . . In so far as the restraints imposed do not depend on capacity and training nor insure proper character investigation, they serve to protect local interests from competition, rather than to secure a better quality of legal service." Horack, *supra* note 1, at 102.

A more appropriate solution to the problem of economic competition would be for the profession to stimulate the demand for legal services by alerting the public to the advantages of legal counsel. See Garrison, *The Problem of Overcrowding: A Call for Imagination, Experimentation and Organization*, 16 TENN. L. REV. 658 (1941). See also Shea, *Overcrowded?—The Price of Certain Remedies*, 39 COLUM. L. REV. 191 (1939).

state's profession and citizenry of youth, vitality, and exposure to new ideas, all of which are needed to insure progressive development of the law. Not only are residence requirements contrary to this constitutionally protected national policy of fluidity and mobility, they may also violate the privileges and immunities clause by unreasonably discriminating against nonresidents in the admission to the bar of the state.[7]

Several states require prospective bar applicants to register for admission to the bar soon after entering law school.[8] This early registration forces a student to choose his place of practice long before he can have sufficient information to make an intelligent choice; in addition the time period is unnecessarily long for a determination of moral character. Three years is far more than is needed to investigate the student's background—the National Conference of Bar Examiners can conduct such an investigation quickly and inexpensively.[9] As an observation period, the time is of little value since the student is neither practicing nor associating with practicing attorneys.[10]

An even more stringent requirement, typified by the Pennsylvania provision,[11] requires the registrant to associate with a preceptor when registering and to serve a six-month preceptorship, at least four months to be served after he takes the bar examination. This registration-preceptorship requirement is subject to the same objections as the registration requirement alone, and the additional requirement

7. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. See Blake v. McClung, 172 U.S. 239 (1898). It has been suggested that such a right to a professional pursuit is guaranteed by this clause. Corfield v. Coryell, 6 Fed. Cas. 546, 552 (No. 3230) (E.D. Pa. 1823). But a more recent case upheld a state requirement that a person be a resident insurance agent two years before being licensed as an insurance broker. La Tourette v. McMaster, 248 U.S. 465 (1919). If this case is in point it is suggested that it be reexamined; however, the case may not be pertinent to the present controversy as the Court did not discuss the question of whether an otherwise qualified nouresident was being discriminated against. Likewise the Court failed to meet the issue head-on by discussing any valid reasons for such a requirement, but rather summarily upheld it as a valid exercise of the police power.

8. *E.g.*, Missouri and Ohio. BAR ADMISSION REQUIREMENTS 29, 30. A recent article describes the mechanics and relative success of the registration system as employed by Florida. Kanner, *Dual Character Investigation: At Time of Law School Registration and Prior to Admission to the Bar*, 30 BAR EXAM. 60 (1961). Calling this registration a continuing investigation of the student, the author points out that the law student intending to practice in Florida must file with the state within 150 days of his entering law school. The registration form is then converted into an application to take the bar examination at an appropriate time. The State Board of Examiners may in its discretion permit late registration at an additional charge of $65.

9. Horack, *supra* note 1, at 105; Note, 98 U. PA. L. REV. 710, 712 (1950).

10. See Note, 98 U. PA. L. REV. 710, 712 (1950), for a criticism of registration requirements.

11. BAR ADMISSION REQUIREMENTS 31. The registration is required soon after entering law school.

of apprenticeship serves as a further barrier to mobility in the legal profession. It has also been severely criticized on its merits as failing to serve any good purpose while doing much harm.[12]

It has been suggested that registration and residence requirements should be waived if the applicant can sustain the burden of producing evidence to establish his good moral character.[13] However, an independent investigative service could very probably obtain more accurate information, as persons would be more likely to give honest opinions of the applicant to a neutral party than to the applicant himself, and the applicant would be spared his own time and cost. Other proposed alternatives to a residence requirement are that the applicant be allowed to associate provisionally with the profession while under observation and investigation, or that his license be withheld until the state is satisfied as to his moral character.[14] Once again it should be said that a true picture of the applicant's character is unlikely to emerge, as a person under observation can be expected to be on his best behavior. In addition, it is doubtful if a state, except in extreme circumstances, would refuse acceptance to an applicant who has proceeded this far. Further, if it be assumed that observation in practice is necessary for determining the applicant's moral character, it should be applied to residents as well as nonresidents. Present requirements, as well as these proposed changes, discriminate against nonresident students for no good reason.

Since the proper justification for residence requirements is the need to determine the applicant's moral character, any alternative to those requirements must satisfy that purpose.[15] As has been stated before, the asserted reasons for the waiting period are (1) to observe the applicant, and (2) to inquire into the applicant's background. Since no present observation is generally undertaken of resident students, there is no reason to require it of nonresidents. Even if required of both, to reiterate, an applicant will be on his best behavior when he knows he is under observation. Even if observation would prove useful, the difficulty in observing persons in large metropolitan areas where they may have few contacts with the community or the legal profession would greatly lessen its utility.[16] This leaves only the

12. See Currie, *The Law Practice Clerkship*, 24 PA. B.A.Q. 223 (1953).

13. See Note, 98 U. PA. L. REV. 710, 716 (1950).

14. Horack, *supra* note 1, at 105.

15. A necessary inquiry is just what acts satisfy the requirement of residence. If its purpose is to be served, then nothing less than full-time living in the state would be satisfactory. But it is very improbable that the states continually inquire into the whereabouts of an applicant. Instances have come to this writer's attention of the requirement being satisfied by an applicant going to a state, getting a post office box, going back to his home state, and waiting the required time. If residence requirements can be so easily evaded, this is only one more reason why they should be eliminated.

16. Horack, *supra* note 1, at 104.

second asserted reason, the time needed to inquire into the applicant's background. This can be done conveniently and thoroughly by the National Conference of Bar Examiners.[17] There is no need for the applicant to be within the inquiring state while this investigation procceds. He should ouly be required to make application at least four weeks before taking the examination.[18] This period would give the state adequate notice for deciding whether the nonresident student is morally qualified to practice within the state; if found not to be so qualified he could be informed before taking the bar examination.[19] No useful purpose is served by requiring an applicant to indicate an intent to reside in the state, either at the time of application or when taking the examination. The objective of an intent requirement could better be accomplished by a requirement that a practitioner maintain residence or an office in the state or forfeit his license. However, these are not qualifying requirements, but are a disqualifying procedure and are not of immediate relevance to a discussion of residence requirements for admission to the bar. A person is certainly tempted to state an intent to reside whether or not such intent exists, and any requirement that tempts prevarication is undesirable. In summary, the residence requirements serve no useful purpose while placing burdens on applicants, the profession, and the nation as a whole by restricting freedom of movement. It is therefore recommended that each state eliminate residence requirements for students seeking admission to the bar.[20]

Corporations—Bylaws—Allocation of Power Between Shareholders and Directors

The problem of how much power shareholders should have over corporate bylaws is a major issue in the difficult area of protection of shareholders from abuses of power by the board of directors. Since bylaws control the daily operation of a company, an overzealous effort to protect shareholders may result in the directors' inability to transact

17. *Id.* at 105.

18. This is only a suggested minimum time limit, and certainly a longer period, if reasonably necessary to complete an examination of the applicant's moral character, would be permissible.

19. The propriety of residence requirements was challenged as long as thirty years ago. Bierer, *Admission of Attorneys from Other States*, 2 BAR EXAM. 73 (1932). Although the author was mainly concerned with nonresident attorneys, much of what was said is apropos of this discussion of nonresident students.

20. See note 1, *supra*, recommending the abolition of residence requirements for foreign attorneys.

business effectively. The American Bar Association Model Business Corporation Act, on the other hand, has been criticized for its failure to protect shareholders from the authority of the directors.[1] The Model Act goes to the extreme of placing almost complete control over the corporation in the hands of the directors. The extent of this control becomes evident when the provision granting directors full power over the bylaws[2] is read in connection with two other sections of the act. The first of these sections deals with amendments to the articles of incorporation. Since shareholders are denied any control over the bylaws, their only protection from arbitrary acts of the board must lie in the articles of incorporation; but, under the Model Act, amendments to the articles must be proposed by the board of directors.[3] Furthermore, the effect of the second provision is to minimize the number of restrictions on the power of the board which, in order to be effective, must be included in the articles of incorporation.[4] Other restraints may be placed in the articles;[5] however, those who produce the original charter and bylaws of a corporation will often become its directors. Prospective directors could propose, as bylaws, restraints on the board which provide reasonable protection for the shareholders, but which are subject to later repeal by the board. When these sections are read together, it becomes obvious that shareholders have little protection against the board of directors under the Model Act.

Several states have attempted to modify this aspect of the Model Act by giving the shareholders power to adopt bylaws which are not subject to amendment or repeal by the board of directors.[6] Such a provision should be included in a corporation act intended to protect

1. See, *e.g.*, Harris, *The Model Business Corporation Act—Invitation to Irresponsibility?*, 50 NW. U.L. REV. 1 (1955); Jennings, *The Role of the States in Corporate Regulation and Investor Protection*, 23 LAW & CONTEMP. PROB. 193 (1958).

2. ABA-ALI MODEL BUS. CORP. ACT § 25 [hereinafter cited as MODEL ACT]: "The initial by-laws of a corporation shall be adopted by its board of directors. The power to alter, amend or repeal the by-laws or adopt new by-laws shall be vested in the board of directors unless reserved to the shareholders by the articles of incorporation."

3. MODEL ACT § 54: "Amendments to the articles of incorporation shall be made in the following manner: (a) The board of directors shall adopt a resolution setting forth the proposed amendment . . . ." Although the wisdom of this provision may be open to dispute, its consideration is beyond the scope of this writing.

4. MODEL ACT § 48.

5. MODEL ACT § 25. This liberal provision is, in itself, an admirable attempt to provide flexibility in corporate charters and to combat the unnecessary formalism which has resulted from more rigid attempts to prescribe exactly what items must be placed in the charter and what other items must be included in the bylaws. See, *e.g.*, Gow v. Consolidated Coppermines Corp., 19 Del. Ch. 172, 165 Atl. 136 (1933), where it was held that a charter provision fixing the number of directors was not enforceable, because the statute said that such provisions were to be set forth in the bylaws.

6. S.C. CODE § 12-16.1(c) (Supp. 1963): "The directors may adopt, amend, or repeal a bylaw adopted by the shareholders unless such bylaw shall forbid amendment or repeal or limit the extent to which it may be amended or repealed." North Carolina

shareholders adequately, since the shareholders thereby receive a broad and flexible power to correct abuses by the directors. But bylaws adopted under these statutes will normally be directed against *specific* acts of the directors and will be adopted only after these acts have taken place. Shareholders can hardly be expected to pass a comprehensive series of measures designed to prevent types of director misconduct which have not already manifested themselves. The main efficacy of these statutes, therefore, lies in correcting problems as they arise and not in preventing other types of problems which may appear in the future.

For this reason, a desirable corporation act should include a measure designed to prevent the more predictable varieties of director misconduct as well as to give shareholders the power to correct other abuses as they arise. To accomplish this purpose, certain types of bylaws may be placed beyond the power of the board by a provision of the statute rather than by a shareholder resolution that the board is to have no amending power. In determining what types of bylaws should be placed in this category, two considerations are relevant. First is that action of the board should be regulated which would change the allocation of power within the corporation. Such activities as purchase or sale of treasury or unissued capital stock may be used to place a majority of voting shares in the hands of the directors.[7] A second consideration is whether the subject dealt with in a bylaw is traditionally a fertile area for unscrupulous action by directors. The matter of direct and indirect compensation of directors and officers is subject to frequent disputes and abuses of power,[8] and bylaws which limit the board's freedom in this area should not be subject to repeal or amendment by the board. Finally, bylaws establishing procedural rights of shareholders should not be changed by action of the board. Section 25 of the Model Act should, therefore, be amended to read as follows:

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goes farther by providing that, in the absence of a specific statement in a shareholder-adopted bylaw that it is to be subject to the power of the board, the board lacks power to alter the bylaw. N.C. GEN. STAT. § 55-16 (1960). Ohio adopts a slightly more forceful position by terming shareholder-adopted provisions "regulations" and placing them in a position intermediate between the bylaws and the charter. OHIO REV. CODE ANN. § 1701.11 (Baldwin 1958). For other statutes allowing shareholders to prevent the directors from repealing bylaws, see CAL. CORP. CODE § 500; VA. CODE ANN. § 13.1-24 (1956). Missouri takes a position opposite that of the Model Act by vesting power over the bylaws in the shareholders, except to the extent that such power may be granted to the directors in the articles. MO. ANN. STAT. § 351.290 (1952). Under this system the incorporators can, as a matter of course, be expected to reserve all bylaw power to the directors.

7. See, *e.g.*, Dunlay v. Avenue M Garage & Repair Co., 253 N.Y. 274, 170 N.E. 917 (1930); Petre v. Bruce, 157 Tenn. 131, 7 S.W.2d 43 (1928).

8. See, *e.g.*, Rogers v. Hill, 289 U.S. 582 (1933); Blish v. Thompson Automatic Arms Corp., 30 Del. Ch. 538, 64 A.2d 581 (1948).

(a) The bylaws of a corporation may be adopted, amended, or repealed either by the board of directors or by the shareholders.

(b) A bylaw falling within any of the following categories may be repealed or amended only by the shareholders, except that directors may so amend the bylaw as to further restrict their authority:

(1) Restrictions on the sale or purchase of unissued stock or of treasury stock of the corporation. For purposes of this section, stock of a parent corporation held by another corporation more than fifty per cent of whose voting stock is owned by the parent corporation is to be treated as treasury stock.

(2) Any limitations on the authority of the board to compensate directors, officers, or employees by means of salaries, bonuses, options to purchase stock, or payments proportioned to earnings of the corporation.[9]

(3) Rules granting shareholders options to purchase additional stock issued by the corporation.[10]

(4) Rules establishing procedure by which shareholders may require a shareholders' meeting, may have access to the books of the corporation or to its list of shareholders, or may exercise any other procedural rights which statute, charter, or bylaws may grant to the shareholders.

(5) Provisions passed by the shareholders which specifically provide that they are to be beyond the power of the board of directors to amend or to repeal.

Courts—Administration of Justice—Restricting the Appellate Jurisdiction of Courts of Last Resort

The great increase in litigation resulting from the growth and increasing complexity of our society has caused a decrease in the percentage of cases that can effectively be handled by our state courts of last resort. Though in practice it may be a difficult process, theoretically the lower levels of a judicial system may be expanded to whatever size is necessary to accommodate an increasing burden of litigation. At the apex of a judicial hierarchy, however, the need for a single court of final authority[1] presents a more difficult problem.

9. For another approach to this problem, see N.C. GEN. STAT. § 55-16(a)(3) (1960), providing that any profit-sharing plan passed by the board of directors will become void if not ratified within five years by the shareholders.

10. Some statutes require that any rules limiting shareholders' pre-emptive rights be set forth in the charter. See, *e.g.*, VA. CODE ANN. § 13.1-49(f) (1956). The broader language of the proposal in this article is intended to prevent circumvention as well as direct repeal of pre-emptive rights. For a discussion of the dangers of such circumvention, see O'Neal, *Arrangements Which Protect Minority Shareholders Against "Squeeze-Outs,"* 45 MINN. L. REV. 537 (1961).

1. To a limited extent it is possible to have several courts of final authority. Texas, with its separate courts of last resort for civil and criminal appeals, is a well known example of such a jurisdiction. TEX. CONST. art. 5, §§ 3, 5.

One solution has been to create a system of intermediate appellate courts to make appeals readily available.[2] This allows the bulk of appeals to be finally decided in the intermediate court and permits restriction of the jurisdiction of the highest court. By limiting the number of appeals as of right, the highest court may devote its time to cases of exceptional importance.[3] Among the states which have adopted this method of alleviating the work load of the highest court, the extent to which the jurisdiction of the court is limited varies remarkably. An examination of the jurisdiction of the highest court in states with an intermediate appellate court[4] might suggest a desirable balance between the need to leave the highest court free to choose only important cases and the desirability that certain types of cases be appealable.

In Tennessee[5] and Georgia,[6] for example, the highest court's appellate jurisdiction extends to broad categories of cases, bringing a large number of direct appeals to the court. Such broad grants not only tend to nullify the beneficial effects of limiting jurisdiction,[7] but also create

2. This is not an exclusive solution and indeed has its critics. The alternative is to have the highest court operate in divisions. For a good discussion of the merits of the divisional system, see Sunderland, *A Simplified System of Appellate Procedure*, 17 TENN. L. REV. 651, 661-67 (1943), and AMERICAN BAR ASSOCIATION, REPORTS OF THE SECTION OF JUDICIAL ADMINISTRATION 104-06 (1938), reprinted in VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 600-02 (1949).

3. It was recommended that Florida create an intermediate court of appeals and severely restrict the jurisdiction of the supreme court "to reserve the time and energies of the members of that court for the more important cases (i.e., those involving the death penalty, those involving constitutional questions, those involving questions of great public importance, and those in which the decision is in conflict with the decisions of other district courts or of the supreme court itself). Furthermore, the members of the supreme court will be able to give more deliberate consideration to these cases than heretofore." Florida Judicial Council, Improving Florida's Court System 32, July 1, 1956, quoted in Wilson & Brodnax, *The Florida Appellate Review*, 11 FLA. L. REV. 1, 11 (1958). A constitutional amendment, based on this recommendation, reorganizing Florida's judiciary was later passed. See note 12 *infra*.

4. Fourteen states have an intermediate appellate court. AM. JUR. 2d, DESK BOOK 198 (1962).

5. Examples of cases which may be appealed to the Supreme Court of Tennessee are those involving: (1) the constitutionality of a statute or city ordinance; (2) the right to hold public office; (3) workmen's compensation; (4) state revenue; (5) mandamus; (6) quo warranto; (7) ouster; (8) matters finally determined in the lower court on demurrer or in which the facts have heen stipulated; and (9) criminal prosecutions. TENN. CODE ANN. §§ 16-408, 40-3401 (1956).

6. Examplcs of cases which may be appealed to the Supreme Court of Georgia are: (1) those involving constitutional questions; (2) those involving title to land; (3) those involving validity and construction of wills; (4) those involving conviction of capital felony; (5) all equity cases; (6) all habeas corpus cases; and (7) all divorce and alimony cases. GA. CONST. art. VI, § 2, para. IV.

7. An examination of the cases printed in volume 208 of the *Tennessee Reports* reveals that out of a total of eighty-nine cases, thirteen workmen's compensation and twenty-six criminal cases were before the court on direct appeal. Only thirteen cases were in the court on certiorari to the court of appeals.

confusion as to whether the highest or an intermediate court has jurisdiction of the appeal.[8] On the other hand, the *Model State Judicial Article* provides for a high court of very narrow jurisdiction, allowing compulsory appeals only where the death penalty or imprisonment for a period of greater than 25 years has been imposed.[9]

In general there are two methods of designating appeals as of right to the highest court—some appeals are allowed because of the subject matter of the case and some are allowed because of the manner of disposition in the lower courts. Two fairly recent judicial reforms indicate modern thinking as to the kinds of cases which, because of their subject matter, should be appealable as of right. In 1958, the Louisiana constitution was amended[10] to effect an eighty per cent reduction in the number of cases appealable to that state's supreme court[11] by confining the court's appellate jurisdiction to cases involving the following issues: (1) the constitutionality of a tax or assessment; (2) a lower court finding that a law is unconstitutional; (3) contest of orders of the Louisiana Public Service Commission; (4) certain election contests; and (5) possibility of imposition of the death penalty or imprisonment at hard labor, or actual imposition of a fine exceeding three hundred dollars or imprisonment exceeding six months. A 1956 Florida constitutional amendment[12] is similar except that the only criminal cases which the high court must take on appeal are those in which the death penalty has been imposed. For the most part, the subject matter of the types of cases singled out for appeal in Louisiana and Florida involve questions which need to be quickly and finally determined. Allowing appeals as of right for the kind of cases where, in the public interest, immediate finality is desirable serves a definite purpose, will add only slightly to the court's work, and will probably not be a source of confusion as to jurisdiction.

In addition to allowing appeal as of right because of the subject matter of the case, some states permit appeals according to the manner of disposition of the case in the lower court. In both New York[13] and New Jersey[14] a case may be appealed where there has been a dissent

8. That this can be a continuing problem is indicated by the extensive annotations in GA. CODE ANN. § 2-3704 (1948, Supp. 1963).

9. AMERICAN BAR ASSOCIATION SECTION OF JUDICIAL ADMINISTRATION, MODEL JUDICIAL ARTICLE § 2, ¶2(B) (1962), reprinted in Holt, *The Model State Judicial Article in Perspective*, 47 J. AM. JUD. SOC'Y 6, 9 (1963). Most states also provide for appeal as of right when the death penalty has been imposed. The basis for this seems to be tradition. There is no reason why the intermediate court could not adequately handle such appeals.

10. LA. CONST. art. 7, § 10.

11. Tucker, Tate & McMahon, *Appellate Reorganization in Louisiana*, 19 LA. L. REV. 287, 289 (1958).

12. FLA. CONST. art. 5, § 4(2).

13. N.Y. CONST. art. 6, § 7(1).

14. N.J. CONST. art. 6, § 5, para. 1(b).

in the appellate division; in New York an appeal is proper if the appellate division has reversed or modified the trial court's decision. The advantages of these objective criteria for selecting appeals are that where error is presumably more likely because of disagreement among judges, review can be had even though the case lacks the "great public importance" required for certiorari, and that providing objective criteria for granting appeals tends to lessen the criticism of the mystique that shrouds the granting of certiorari.[15] On the other hand, allowing these appeals to the highest court has been criticized as tending to lessen respect for decisions of the intermediate court.[16] Furthermore, experience has indicated that this exposes the highest court to many inconsequential appeals.[17] The latter reasons seem more substantial than the former. Correction of error should not usually be the primary concern of the highest court in a tri-level judicial system. The task of the intermediate court is to correct error on appeal; the task of the highest court is to insure uniformity in the law and to mold and develop the law as it affects the public generally.[18] Appropriately modified for application in a state court the following rule of the United States Supreme Court describes the kind of case that the highest court should hear:

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.[19]

There is no need for an arbitrary rule forcing the court to take appeals because of dissent in the lower courts; if a case merits review, the

15. For a detailed argument supporting the desirability of these objective criteria, see Institute of Judicial Administration, Intermediate Appellate Courts 5-7, May 11, 1954.

16. See Note, *To Hear or Not To Hear: A Question for the California Supreme Court,* 3 STAN. L. REV. 243, 265-68 (1951).

17. See Desmond, *The Limited Jurisdiction of the New York Court of Appeals—How Does It Work?,* 2 SYRACUSE L. REV. 1, 7 (1950).

18. Commenting on the United States Supreme Court, Chief Justice Vinson stated: "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. . . . To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." Vinson, *Work of the U.S. Supreme Court,* 12 TEXAS B.J. 551-52 (1949).

19. U.S. SUP. CT. R. 19(1)b.

court should be expected to recognize the fact and grant certiorari. The court of last resort for the ordinary case lacking great public importance should be the intermediate appellate court.

The only cases in which it seems necessary to provide for appeal as of right to the highest court are those cases in which the public interest demands immediate finality. Since these cases are of public importance and therefore the kind that the court would be likely to take on certiorari, providing for direct appeals would add little to the burden of the court and avoid the evils of multiple appeals. With these ideas in mind, it is suggested that the following would appropriately define the jurisdiction of the supreme court in a state with an intermediate appellate court:[20]

(a) Appeals from a judgment of a District Court involving
(1) a federal or state constitutional question;
(2) the validity of a tax or assessment; or
(3) the right to hold public office
shall be taken directly to the Supreme Court. In all other cases, review by the Supreme Court shall be had only upon certiorari to the Court of Appeals.
(b) Except as provided in (a) appeal from the judgment of a District Court shall be taken to the Court of Appeals.

Nonprofit Corporations—Definition

Every American jurisdiction gives special benefits[1] to nonprofit corporations in recognition of the services they render society. Complex legislation has grown up in many states, defining the nonprofit corporation in a piecemeal and incomplete fashion. Several states have no statutory definition;[2] and many of the existing definitions are expressed in such ambiguous terms that they are useless, leaving for judicial determination the question of which associations can incorporate under the nonprofit corporation laws of that jurisdiction.[3] In

20. The proposed statutory language uses "District Court" to designate the trial court of general jurisdiction, "Court of Appeals" to designate the intermediate appellate court, and "Supreme Court" to designate the highest court of the state.

1. Such benefits include exemption from corporate income tax at state and federal levels, exemption in some incidences from ad valorem and franchise taxes, and a loose corporate form.

2. See DEL. CODE ANN. tit. 8 (1953); HAWAII REV. LAWS § 173-40 (1955); KAN. GEN. STAT. ANN. § 17-2504 (1949); MD. ANN. CODE art. 23 (1957); N.H. REV. STAT. ANN. §§ 292-96 (1955); OKLA. STAT. ANN. tit. 18, § 1.3 (1951); S.C. CODE §§ 11.13-.19 (1939); VT. STAT. ANN. tit. 11 (1958); W. VA. CODE ANN. § 3014 (1961).

3. For a discussion of judicial determination, see Note, *Judicial Approval as a Prerequisite to Incorporation of Non-Profit Organizations in New York and Pennsylvania*, 55 COLUM. L. REV. 380 (1955).

consequence, an association seeking the benefit of the nonprofit corporation laws of a state often has little guidance as to whether it qualifies as such a corporation. Also, since the definitions used in different jurisdictions are inconsistent, a nonprofit association which is incorporated in one state may not be able to qualify under the nonprofit provisions of another jurisdiction in which it desires incorporation.[4] Some of the problems caused by the nonexistence, ambiguity, and inconsistency of the statutory definitions of the nonprofit corporation would be resolved by the enactment of a definition which concisely expresses a determination by the legislature as to what groups will be allowed nonprofit incorporation in that jurisdiction.

Two general approaches have been used in drafting statutes to solve these problems. One is a functional approach that enumerates the permissible purposes and activities of a nonprofit corporation. The other is an economic approach which makes the right of nonprofit incorporation depend on the economic relationship between the corporation and its members.[5] A state legislature that uses the functional approach must compile a list of acceptable purposes for nonprofit corporations, and in order to incorporate under these statutes, an organization must fit its purpose into one of the enumerated categories. Common classifications under this type of statute are benevolent and charitable, social, recreational, trade and professional, educational, cultural, civic, religious, and scientific.[6] The functional approach, however, has various shortcomings. Since the state legislature must determine the acceptable purposes of a nonprofit corporation, there are unjustifiable omissions in the individual statutes and thus a lack of uniformity among the jurisdictions.[7] The permitted purposes, moreover, are often ambiguous.[8] Also, because these enumerations are based on a judgment of the worthiness of the possible purposes, they tend to become outmoded as social values change.[9] A definition based on the economic approach, on the other hand,

4. *E.g.*, in Tennessee, social clubs can incorporate under the nonprofit corporation provisions; in Mississippi, they cannot. MISS. CODE ANN. § 5310.1 (Supp. 1962); TENN. CODE ANN. § 48-1101 (6) (1955).

5. Note, *Permissible Purposes for Nonprofit Corporations*, 51 COLUM. L. REV. 889 (1951).

6. *Id.* at 891-92.

7. See, *e.g.*, statutes cited note 4 *supra*.

8. Some state statutes include provisions similar to the following: "Organizations or other associations organized for the promotion of literature, education, science or art, or any other association organized for the promotion of bodily or mental health, and all other organizations organized to promote either or all of the above named objects." TENN. CODE ANN. § 48-1101(12) (Supp. 1963).

9. *E.g.*, in Tennessee, debating societies and societies for the organization and support of battleground associations can become nonprofit corporations. TENN. CODE ANN. § 48-1101 (1955).

defines a nonprofit corporation as one which is organized for any purpose other than bestowing pecuniary gain or profit on its members. This connotive type of definition is superior since it is directed at the fundamental nature of the organization rather than merely enumerating organizations of this nature. Also it eliminates unjustifiable omissions and the possibility of social antiquation, and, if widely adopted, it would further uniformity among the states.

The primary problem encountered in using the economic approach is the ambiguity of the word "profit." The view accepted by a majority of the courts defines profits as dividends or any other direct return on an investment;[10] profit must be tangible, something of value that the member receives directly from the corporation.[11] In contrast, the minority view considers profit to be any possible pecuniary benefit, even though indirect.[12] The first view, of course, makes the coverage of a nonprofit statute very broad—any organization which does not distribute directly to its members a return on their investment will fall within the scope of the statute. The *ABA-ALI Model Nonprofit Corporation Act* [hereinafter referred to as the Model Act], enacted in several jurisdictions,[13] adopts this first view by defining the nonprofit corporation as "a corporation no part of the income of which is distributable to its members, directors or officers."[14] Legislation that takes the more limited position has been enacted in Pennsylvania: " 'Nonprofit Corporation' means a corporation organized for a purpose or purposes not involving pecuniary profit, incidental or otherwise, to its members."[15] Under this statute, any organization the purpose of which is to even indirectly affect the earnings of its members is excluded from nonprofit incorporation.[16] The interpretation of both types of statutes would, of course, include the organizations which are

10. See Southland *ex rel.* Snider v. Decimo Club, Inc., 16 Del. Ch. 183, 142 Atl. 786 (1928); Read v. Tidewater Coal Exch., Inc., 13 Del. Ch. 195, 116 Atl. 898 (1922); Snyder v. Chamber of Commerce, 53 Ohio St. 1, 41 N.E. 33 (1895).

11. Read v. Tidewater Coal Exch., Inc., *supra* note 10, at 904.

12. See Hebeler's Appeal, 296 Pa. 431, 146 Atl. 26 (1929); Krassen-Luber Family Circle Foundation, 71 Pa. D. & C. 353 (C.P. 1950); *In re* Automatic Phonograph Owners Ass'n, 45 Pa. D. & C. 165 (C.P. 1938); *In re* Fayette Gasoline Retailers Ass'n, 32 Pa. D. & C. 165 (C.P. 1938).

13. The definitional sections are: ALA. CODE tit. 10, § 204 (1958); CONN. GEN. STAT. REV. § 33-421 (1961); D.C. CODE ANN. § 29-1002 (Supp. II 1963); FLA. STAT. ANN. § 617.012 (Supp. 1962); ILL. ANN. STAT. ch. 32, § 163 (Smith-Hurd 1954); NEB. REV. STAT. § 21-1901 (Supp. 1961); N.D. CENT. CODE § 10-24-02 (1960); ORE. REV. STAT. § 61.011 (1961); TEX. REV. CIV. STAT. ANN. art. 1396-1.02 (1962); UTAH CODE ANN. § 16-6-19 (Supp. 1963); WIS. STAT. ANN. § 181.02 (1957).

14. ABA-ALI MODEL NONPROFIT CORP. ACT § 2 (1957). For similar definitions, see model codes proposed in BOYER, NONPROFIT CORPORATION STATUTES 151 (1957); OLECK, NON-PROFIT CORPORATIONS AND ASSOCIATIONS 419 (1956).

15. PA. STAT. ANN. tit. 15, § 2851-52 (1958).

16. *In re* Fayette Gasoline Retailers Ass'n, *supra* note 12.

always considered nonprofit groups, such as churches, charities, hospitals, schools, clubs, and similar organizations. Two types of organizations, however, receive different treatment under each of these statutes.

The first type receiving diverse treatment is the organization that benefits its members by gaining for them reduced prices for goods and services, such as an association formed to secure for its members at cost the benefits of home ownership[17] or one organized to provide inexpensive medical care for its members.[18] The direct benefit approach includes such an association as a nonprofit corporation since income is not distributed to its members.[19] On the other hand, the indirect benefit approach considers the saving of expense to be a pecuniary benefit and thus excludes such organizations from nonprofit incorporation.[20] Such organizations, however, show a distinct similarity to cooperative associations. If the organization "furnishes an economic service without entrepreneur or capital profit and is owned and controlled on a substantially equal basis by those for whom the association is rendering service,"[21] it should be incorporated under the cooperative association laws of the jurisdiction rather than the nonprofit corporation laws. When an association has the characteristics of a cooperative,[22] it does not qualify for nonprofit incorporation under the Pennsylvania statute;[23] and if it meets the local definition of a cooperative, it is specifically excluded from Model Act coverage.[24] Since

17. See State *ex rel.* Russell v. Sweeney, 153 Ohio St. 66, 91 N.E.2d 13 (1950), 12 OHIO ST. L.J. 138 (1951).

18. See State *ex rel.* Troy v. Lumbermen's Clinic, 186 Wash. 384, 58 P.2d 812 (1936).

19. Read v. Tidewater Coal Exch., Inc., *supra* note 10; Associated Hosp. Serv., Inc. v. City of Milwaukee, 13 Wis. 2d 447, 109 N.W.2d 271 (1961).

20. State *ex rel.* Russell v. Sweeney, *supra* note 17; State *ex rel.* Troy v. Lumbermen's Clinic, *supra* note 18.

21. PACKEL, THE ORGANIZATION AND OPERATION OF COOPERATIVES 3 (2d ed. 1947). See American Box Shook Export Ass'n v. Commissioner, 156 F.2d 629 (9th cir. 1946).

22. The following general criteria for qualification as a cooperative have been suggested: "(1) [C]ontrol of each of the associates over the management of the association is substantially equal; (2) ownership interests of each of the associates are substantially equal; (3) associates are limited to those who will avail themselves of the services furnished by the association; (4) transfer of the ownership interests is prohibited or limited; (5) capital investment receives no return or a limited return; (6) economic benefits pass to the associates on a substantially equal basis or on the basis of their patronage of the association; (7) death, bankruptcy or withdrawal of one or more associates does not terminate the association; and (8) services of the association are furnished primarily for the use of the associates." PACKEL, *op. cit. supra* note 21, at 4. (Footnote omitted.)

23. See note 20 *supra*. As a cooperative, however, the association may receive some of the same benefits as a nonprofit corporation. For a survey of the federal tax implications of cooperation, see Jensen, *The Federal Income Tax Status of Nonexempt Cooperatives*, 6 UTAH L. REV. 23 (1959).

24. "[L]abor unions, cooperative organizations, and organizations subject to any

many states provide only for the incorporation of certain types of cooperatives,[25] it may be argued that it would be improper to deprive other types of cooperatives special treatment. Nevertheless, the pecuniary benefit bestowed on the members of such an organization is readily demonstrable;[26] and a saving is no less a profit than the same amount given to the member as a dividend. Cooperatives are recognized as business associations formed to give their members pecuniary benefits.[27] Consequently, any similar organization, although it might not qualify as a cooperative under the statutes of the jurisdiction, would be a business association whose primary purpose is to bestow definite, though indirect, pecuniary benefits on its members, and should be excluded from nonprofit incorporation. If special treatment is desired for such associations, the proper remedy would be expansion of the cooperative association laws of the jurisdiction.[28]

The other type of organization receiving different treatment is the commercial association commonly referred to as a trade association. Such organizations are of two types: (1) those formed to promote business generally by emphasizing public service or attempting to stimulate good will among or toward businessmen, such as the Chamber of Commerce; and (2) organizations "made up of business competitors whose aim is to work together, within the limits of the antitrust laws, to advance their economic interests."[29] The activities of the latter include statistical reporting services, distribution of price information, standardization and simplification of products, lobbying, and technical research.[30] Such organizations are permitted nonprofit

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of the provisions of the insurance laws of this State may not be organized under this Act." ABA-ALI MODEL NONPROFIT CORP. ACT § 4 (1957).

25. *E.g.*, Tennessee allows the incorporation of only three types of cooperatives: agricultural cooperative marketing associations, mutual life insurance companies, and electric cooperatives. TENN. CODE ANN. §§ 43-1812, 56-1801, 65-2503 (1955).

26. The following table shows the percentage of savings to members of cooperatives and cooperative supermarkets from 1953 through 1959:

Year	33 Coops	20 Coops With Supermarkets
	(net savings to members as per cent of sales)	
1953	2.19	2.15
1954	1.98	1.98
1955	2.17	2.16
1956	2.28	2.27
1957	2.32	2.45
1958	2.25	2.32
1959	2.33	2.39

VOORHIS, AMERICAN COOPERATIVES 165 (1961).

27. "All of the cooperative association acts of the several states authorize incorporation only for furthering business purposes of the associated members. Cooperatives are definitely a part of the business enterprise operations of their member-patrons." JENSEN, COOPERATIVE CORPORATE ASSOCIATION LAW AND ACCOUNTING 76 (1950).

28. This topic will be treated in a forthcoming issue of this law review.

29. LAMB & KITTELLE, TRADE ASSOCIATION LAW AND PRACTICE § 1.1, at 4 (1956).

30. See generally LAMB & KITTELLE, *op. cit. supra* note 29.

incorporation under the Model Act.[31] The reasons appear to be, first, that any benefits received by the members of such associations are too indirect to be considered profits, and second, that if these associations are not included, they have to incorporate under business corporation provisions which require the issuance of stock and provide for strict regulation of corporate affairs. Stock issuance is inappropriate since trade associations usually depend on dues and assessments to provide operating funds,[32] and they do not require strict regulation since they usually do not have stockholders whose investments require protection. The tax consequences of either inclusion or exclusion generally do not appear great. Although, as in the case of nonprofit corporations, such associations might receive an exemption from corporate income and franchise taxes, such benefits would have little effect on trade associations since they usually earn no profit on which they might be taxed. The form of incorporation, moreover, will not affect a trade association's federal tax exemption if the purposes section of the articles of incorporation is properly drafted.[33] The Pennsylvania view, on the other hand, holds that a trade association is a business for profit, since its objective is to enhance the pecuniary position of its members and not to promote any social, educational, religious, fraternal, or other like cause.[34] The latter requirement is a judicial addition to the statutory definition. These pecuniary benefits which inure to the members, however, are so indirect that they are practically impossible to determine; and to require trade associations to operate under the restrictions of a business corporation act would be an unjustifiable hardship since their nature is similar to that of the nonprofit corporation.

In consequence, a definition of the nonprofit corporation should include trade associations while excluding those organizations which are similar to cooperatives. Profit to the members of an organization, therefore, can be either a distribution of income by that organization

31. "Corporations may be organized under this Act for any lawful purpose or purposes, including, without being limited to, any one or more of the following purposes: . . . professional, commercial, industrial or trade association . . . ." ABA-ALI MODEL NONPROFIT CORP. ACT § 4 (1957).

32. LAMB & KITTELLE, *op. cit. supra note* 29, §§ 13.12.13.

33. The exemption includes "business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inure to the benefit of any private shareholder or individual." INT. REV. CODE OF 1954, § 501(c)(6). A "business league" is defined as "an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit." Treas. Reg. § 1.501(c)(6)-1 (1958). See LAMB & KITTELLE, *op. cit. supra* note 29, § 17.3.

34. Hebeler's Appeal, *supra* note 12; *In re* Fayette Gasoline Retailers Ass'n, *supra* note 12.

or any tangible pecuniary benefit derived from the activity of the organization, whether it be buying goods or services for the members or selling the goods or services of the members. If a comprehensive act regulating cooperatives existed in the jurisdiction, organizations giving rise to this less direct kind of profit could be excluded merely by specific reference to cooperatives. Certain exceptions to this rule exist, however. First, the corporation must be able to compensate any members in its employment;[35] and, second, it should be capable of distributing certain parts of its assets to its members on dissolution or liquidation.[36] The following definition of the nonprofit corporation, embodying these two manners in which profit is derived and the exceptions, should aid in solution of the problems existing under present legislation:

> (a) A "Nonprofit Corporation" is a corporation no part of the income of which is distributable to its members, directors, or officers, and the members, directors, or officers of which are not permitted to receive tangible benefit arising from common or centralized purchasing or selling of goods or services for the members.
>
> (b) The following will not prevent qualification as a nonprofit corporation:
>
> (1) the payment of reasonable compensation for services rendered, or
>
> (2) the making of distribution upon dissolution or final liquidation as permitted in this chapter.
>
> (c) Organizations subject to the insurance laws of this State may not be organized under this act.

35. This exception is included in the statutory definition enacted in five jurisdictions. See CONN. GEN. STAT. REV. § 33-421(k) (1961); D.C. CODE ANN. § 29-1002 (Supp. II 1963); ILL. ANN. STAT. ch. 32, § 163 (Smith-Hurd 1954); LA. REV. STAT. § 12.101 (1950); OHIO REV. CODE ANN. § 1702(c) (Baldwin 1963).

36. The definitions enacted in all the jurisdictions enumerated in note 35 *supra*, except Louisiana, include this exception. The act should limit the distribution of assets to a member on dissolution or liquidation to the amount which he has contributed to the corporation, in order to prevent abuse of the right of distribution. See ABA-ALI MODEL NONPROFIT CORP. ACT § 46 (1957); OLECK, NON-PROFIT CORPORATIONS AND ASSOCIATIONS §§ 232-33 (1956). For the federal tax implications involved, see Treas. Reg. § 1.501(c)(3)-1(b)(4) (1954).