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THE INHERENT POWER OF THE COURTS TO REGULATE THE PRACTICE OF LAW: AN HISTORICAL ANALYSIS

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INTRODUCTION

The increased public scrutiny of the legal profession in recent years has required state courts to decide whether they or the state legislatures possess the constitutional power to control the practice of law. With but few exceptions, the courts have determined that the doctrine of separation of powers limits or even precludes legislative regulation of this vital profession. Alexis de Tocqueville would not have been surprised. As he wrote in *Democracy in America*:

> If I were asked where I place the American aristocracy, I should reply without hesitation that it . . . occupies the judicial bench and the bar. The more we reflect upon all that occurs in the United States, the more we shall be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element.[1]

If the legal profession was to counterbalance the democratic element effectively, it certainly could not be subject to popular control. Regulation of the lower part of the profession by the higher, or the bar by the bench, would be essential. Tocqueville's contemporaries in the early nineteenth century would have been less prescient, for in those years neither the courts nor the legislature had as yet won the sole power to control the legal profession.

This Article examines how the courts came to assert successfully their claim to control the bar. It argues that they did not mount an offensive to gain ultimate control until the late nineteenth and early twentieth centuries. The history of the regulation of the profession prior to this time provided little justification and

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1. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 278 (Knopf ed. 1945).

less incentive for such an offensive. However, by the end of the last century the assertion of the claim had become necessary to protect professional interests from possible legislative interference. This Article contends that the courts justified their position by referring to models of lawyers as officers of the court and as members of a professional guild led by the courts and the bar associations. This Article argues further that while the desire to protect the bar persists, the justifications for doing so have lost much of their persuasiveness. Finally, it suggests that with these arguments removed, there is little reason to exempt lawyers from ultimate legislative control.

I. A Lawyer's Role: The Three Models

The lawyer can be seen in one of three ways: as a member of a guild, as an attorney for a client, or as an officer of a court.[2] Each view constitutes a model for how the lawyer should behave and, by implication, suggests the institution which should be responsible for governing the legal profession.[3] The nineteenth century case of *Splane's Petition*[4] illustrates these models.

Splane sought admission to practice law in the orphan's court of Allegheny County, Pennsylvania, basing his claim on a statute

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2. I am grateful to Mr. Daniel Coquillette of the Harvard Law School for suggesting these models.

3. These models are not mere abstractions but are derived from English history, and as such arose in an order different from that suggested in the text. By the end of the twelfth century, with the gradual replacement of trial by battle, first by a decentralized and then by a centralized court system, litigants needed attorneys who could travel to London to stand in for them and represent their interests. At first these attorneys were usually court employees who were experts in procedure. By the end of the thirteenth century, "common attorneys" who could devote their full time to private practice replaced the clerks, but the concept of lawyers as officers of the court persisted. *See* H. Kirk, Portrait of a Profession: A History of the Solicitor's Profession, 1100 to the Present Day 76 (1976). The guild model was the last to arise. By the end of the fourteenth century the inns of court (where barristers resided), "encouraged by the judges, began to insist upon the gentility of their members, and to aspire to the neo-classical ideal of a profession of gentlemen, detached from the pursuit of lucre and united in their devotion to a superior vocation." Baker, *Counsellors and Barristers: An Historical Study*, 27 Cambridge L.J. 205, 224 (1969). The guild mentality came later still to the other branch of the English legal profession, the solicitors. The early 1730s saw the formation of the Society of Gentlemen Practisers in the Courts of Law and Equity, the importance of which was "that there was for the first time a body of attorneys and solicitors formed for the purpose of improving the standards and representing the interest of the profession." Kirk, *supra* at 23.

4. 123 Pa. 527, 16 A. 481 (1889).

that governed the subject. The Pennsylvania Supreme Court, which evidently found him a somewhat seedy character who should not be set loose upon orphans, denied his petition. To justify its decision, the court ruled that the statute upon which Splane had relied was an unconstitutional encroachment upon its judicial powers. The court's explanation of this ruling illustrates all three models of the lawyer's role:

> [1] The profession of law is one of the highest and noblest in the world. [2] The relation between attorney and client is a close one, and involves matters of great delicacy. [3] The attorney is an officer of the court, and is brought into close and intimate relations with the court. [4] Whether he shall be admitted, or whether he shall be disbarred, is a judicial, and not a legislative, question.[5]

The first sentence illustrates the guild model. In this model, the lawyer's first duty is to the profession (or guild),[6] "one of the highest and noblest in the world."[7] The second sentence suggests the attorney model, which views the lawyer in relation to his client, to whom he owes his primary duty.[8] The third sentence clearly reflects the court model. The lawyer, as an officer of the court, owes a duty first to the judicial system, and his in-court activity defines this special character.[9]

Clearly, the Pennsylvania court erred in concluding that the courts can best control the practice of law. In fact, only a court model view of lawyers leads to that conclusion. Presumably, the lawyer should be governed by those to whom he owes an agent's duty. Each model suggests a different principal. The guild model views the lawyer as owing a duty to other lawyers, who should have power to govern the bar. The attorney model gives power to the client. Since each client cannot exercise control over the profession as a whole, the public, speaking through its representatives in the

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5. *Id.* at 540, 16 A. at 483.

6. The guild model lawyer should seek to preserve the profession from disrepute by, for instance, favoring minimum and maximum fee schedules and opposing advertising. Such measures, while probably denying immense wealth to any single lawyer, would provide a comfortable living for each member of the guild. They would also preserve the decorum of the profession and ward off charges of money grubbing.

7. *Splane's Petition*, 123 Pa. at 540, 16 A. at 483.

8. The attorney model lawyer (or, more pejoratively, the "hired gun") would oppose, among other things, any duty to disclose to a court wrongdoing by his client.

9. The court model lawyer would favor sanctions against lawyers who spoke to the press or in some other way attempted to influence the judical process.

legislature, must stand in the client's stead. The court model posits a duty to judges, who as embodiments of the judicial system should then control the bar.

Of these three options, complete self-regulation never has been feasible in the democratic United States. However, the bar associations at times have exercised a kind of quasi-jurisdiction[10] under the benign supervision of the courts. For example, the Massachusetts rules of court in 1810 gave county bar associations the right to limit the number of persons who could practice in the state's court of common pleas and supreme court. This power was attained when "[o]rganization men within the [legal] profession for the first time wholeheartedly accepted the primary role of the judiciary in formulating regulations for legal education and admission standards."[11] These men did not seek powers akin to those of a municipal corporation, but instead chose to place the bar under the aegis of a friendly branch of the state government.[12] In other states, too, final control of the bar generally has resided with either the legislature or the judiciary.[13] A glance at the three models suggests that the extent of judicial control somehow should be correlated both with the public's need for a specially protected legal guild and with the importance of the courts to the lawyer's professional life. If the public does not need to give the guild preferential treatment, and if the lawyer's work revolves primarily around noncourt matters, then the attorney model and the police power should give control to the legislature. Yet the extent of judicial control has been determined not just by models and arguments, but also by events. To understand how events and models interact, one must examine the history of the regulation of the legal profession.

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10. Bar association influence was limited in the first half of the nineteenth century but grew significantly thereafter. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 276, 561-66 (1973).

11. G. GAWALT, THE PROMISE OF POWER: THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840, at 107 (1979).

12. Since both the legislature and the governor in Massachusetts had taken recent anti-lawyer actions, it was not surprising that the bar leaders chose to ally themselves with the courts. *See id.* at 90, 93, 99.

13. In New Jersey, control over bar admissions remained formally with the executive branch from the colonial era until 1947. *In re* Branch, 70 N.J.L. 537, 57 A. 431 (1904). A constitutional revision in that year gave control over the bar to the judiciary. N.J. CONST. art. VI, § 2, ¶ 3.

II. The English and American Experience to 1776

The attorney, court, and guild models are not new. All three were established throughout Europe by the end of the Middle Ages, but their relative strengths varied in the different legal systems. On the Continent, young men decided early in their careers whether to become judges or lawyers, while in England only lawyers (indeed, only pleaders) became judges.[14] In contrast, the English system fostered a unity of interest between the courts and the legal profession and led to a unique judicial concern with and success in controlling that profession.[15]

To understand this development, one must bear in mind that the English legal profession is divided into two branches.[16] One branch assists the litigant in pleading; the other substitutes for the litigant. The first branch arose as a practical response of litigants to "[t]he captiousness of the old procedure."[17] Pleading was both so technical and so important that most litigants needed assistance. At first, the litigant's friends provided this aid, but the continuing demand for technical help produced professional pleaders by the end of the thirteenth century. The second branch was created by command rather than through custom. The notion that one person could not merely assist but actually could substitute for another did not come easily to traditional legal systems. The concept arose in England not because most litigants needed stand-ins, but because the monarch did. As Sir F.W. Maitland observed: "The king . . . appoints representatives to carry out his multitudinous law-suits, and the privilege that he asserts on his own behalf he can concede to others."[18] Thus, "[i]n England . . . the right to appoint an attorney [or substitute] is no outcome of ancient folk-law; it is a royal privilege."[19] The demands for this privilege probably outraced the king's ability to administer it. In any event, the Statute of Merton in 1236 allowed freemen to use attorneys in cer-

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14. *See* 1 F. Pollock & F.W. Maitland, The History of English Law Before the Time of Edward I 205 (2d ed. 1898); 2 W. Holdsworth, A History of English Law 229, 318-29 (4th ed. 1936); T.F.T. Plucknett, A Concise History of the Common Law 237 (5th ed. 1956); J.H. Baker, An Introduction to English Legal History 133-34 (2d ed. 1979).

15. *See generally* sources cited at note 14, *supra*.

16. *See generally* Baker, *supra* note 3.

17. 1 Pollock & Maitland, *supra* note 15, at 212.

18. *Id.* at 213.

19. *Id.*

tain cases without applying for specific royal writs.[20] The use of attorneys continued to grow, and in 1292 King Edward I in effect ceded control over both attorneys and pleaders to the justices of his courts.[21] As Maitland explained:

> In that year King Edward directed his justices to provide for every county a sufficient number of attorneys and apprentices [pleaders] from among the best, the most lawful and the most teachable, so that the king and people might be well served. The suggestion was made that a hundred and forty of such men would be enough, but the justices might, if they pleased, appoint a larger number.[22]

In practice, however, the English courts never were entrusted with exclusive control over either branch of the profession. During the next two centuries, the ancient category of pleaders generally was limited to those who had attained at least the status of barrister, so called because these lawyers had been admitted to the "bar" of one of the four inns of court.[23] The pleaders were effectively free from legislative control: "After 1275 no statute or ordinance was passed by the Parliament or made in council affecting the discipline of the pleaders, for it was they who advised both on matters affecting the law."[24] By the same token, the courts did not govern the barristers. Rather, the inns which had admitted these pleaders generally bore the responsibility for disciplining them. The courts could disbar barristers, and judges frequently controlled proceedings at the inns. Nevertheless, according to Sir W.S. Holdsworth: "The barrister . . . was in no sense an officer of the court and was much less directly under its control."[25]

In contrast, Holdsworth has argued that attorneys[26] were indeed officers of the court,[27] and to an extent this was true. A stat-

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20. *See* KIRK, *supra* note 3, at 2.

21. 1 ROT. PARL. 84 (1292). It is likely, however, that the king did not abandon entirely his power to appoint attorneys by writ. *See* KIRK, *supra* note 3, at 7; 2 HOLDSWORTH, *supra* note 15, at 317.

22. 1 POLLOCK & MAITLAND, *supra* note 15, at 216. For the Latin text of the directive, see KIRK, *supra* note 3, at 6.

23. *See* 6 HOLDSWORTH, *supra* note 15, at ch. 8.

24. KIRK, *supra* note 3, at 10.

25. 6 HOLDSWORTH, *supra* note 15, at 434. *But see* Karlin v. Culkin, 248 N.Y. 465, 472, 162 N.E. 487, 490 (1928) (Cardozo, C.J.) ("What the courts could not do by the instrument of a writ, the judges did by orders in their capacity as visitors").

26. The attorney was one of the predecessors of the modern solicitor. By 1700, the terms were essentially synonymous. *See* KIRK, *supra* note 3, at 14-16.

27. 6 HOLDSWORTH, *supra* note 15, at 435.

ute in 1403[28] gave the courts general supervisory powers over attorneys, and, after a period of instability, the judges began to exercise effective control. Further statutes required them to examine prospective attorneys and discipline those who had acted improperly.[29] Despite these powers, courts shared control over the practitioners.[30] In the first place, some attorneys—those representing the king—were not subject to such judicial governance.[31] More significantly, even private attorneys were controlled by judges who themselves operated under and were subject to the limitations of statutory law. Blackstone suggested the ambiguous nature of judicial control when he wrote that "attorneys . . . are in all points officers of the respective courts in which they are admitted; and . . . are peculiarly subject to the censure and animadversion of the judges. . . . And many subsequent statutes have laid them under farther regulation."[32]

Colonial American lawyers, like their English counterparts,

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28. 4 Hen. 4, c. 18 (1403).

29. *See* KIRK, *supra* note 3, at 68-72; Note, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82, 83 (1960).

30. Supporters of inherent judicial control have demurred to this suggestion that the legislature as well as the courts had a hand in governing attorneys. They support their position by asserting that, in these cases at least, Parliament did not act as a legislature: "The power possessed by Parliament is more analogous to the fully executed power of a constitutional convention ratified by the people." *In re* Cannon, 206 Wis. 374, 385, 240 N.W. 441, 446 (1932). Thus, Parliament did not legislate, but rather granted power to a separate branch of govenment. This contention is itself open to challenge. First, Parliament often provided specific instructions in its statutes concerning the legal profession. For example, a 1605 statute prohibited attorneys from allowing others to use their names for the purpose of acting as attorneys, and a 1633 statute required the judges on assize to compile a detailed list of the attorneys in the counties they visited. *See* KIRK, *supra* note 3, at 71. Detailed and frequent regulations of this sort can be characterized more felicitously as legislation than as constitutional mandates. Second, the very attempt to analogize parliaments in the years before the American Revolution to constitutional conventions is wrongheaded. *See infra* text accompanying note 39.

Some proponents of judicial control have appreciated this fact and have used it to support their position. For example, the court in *In re* Day, 181 Ill. 73, 54 N.E. 646 (1899), argued that the comparatively recent origin of separation of powers made any exercise of legislative control in England irrelevant to the question at hand, namely, "what the nature of the power [to control the bar] is, and whether it is one which naturally pertains to the courts." *Id.* at 84, 54 N.E. at 648. Such an interpretation, if seen properly, should render the actions of English courts as meaningless in this regard as those of Parliament. If this were so, only the early American experience would be relevant. That experience does not show that the power to control the bar pertained to the courts alone. *See infra* text accompanying notes 33-37.

31. 6 HOLDSWORTH, *supra* note 15, at 468.

32. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND * 26.

were governed by a hodgepodge of authorities. In three colonies, the courts produced rules to regulate legal practice.[33] In three other colonies, the courts governed the bar by virtue of legislative grants of power.[34] In two colonies, legislation gave the governor power to license lawyers, but the assemblies legislated on such post-admission questions as how many attorneys one party to an action could retain and what they could charge.[35] In four colonies,[36] the legislatures took an active role in all phases of the regulation of the legal profession.[37]

The English and American experiences before the Revolution provide little basis for the contention that control of the legal profession was or would have been regarded by the framers of the first state constitutions as an inherently judicial task and thus protected from legislative encroachment.[38] This may be attributable in part to the lack of a clearly formulated doctrine of separation of powers during this era. Such a doctrine was developed in the 1770s and 1780s; its fundamental principles were that all power lies with the people, that all branches of government hold power equally and directly from the people, and that each branch therefore has only those powers which the people in their constitutions have delegated to it.[39]

Where did the legal profession fit in this scheme? Did courts control it as part of their inherent judicial powers,[40] or did the leg-

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33. Massachusetts, North Carolina and Georgia. *See* C. WARREN, A HISTORY OF THE AMERICAN BAR 83-88, 123, 126 (1911).

34. Pennsylvania, South Carolina and Connecticut. *See id.* at 109, 121, 130.

35. New York and New Jersey. *See id.* at 95-96, 112.

36. Virginia, Maryland, New Hampshire and Rhode Island. *See id.* at 41-43, 53, 139, 141-42.

37. I was unable to discover how the legal profession in colonial Delaware was regulated.

38. For contentions of this sort, see, *e.g.*, Board of Comm'rs of Ala. State Bar v. State *ex rel.* Baxley, 295 Ala. 100, 324 So. 2d 256 (1975); *In re* Branch, 70 N.J.L. 537, 57 A. 431 (1904); *In re* Day, 181 Ill. 73, 54 N.E. 646 (1899); Green, *The Courts' Power Over Admission and Disbarment*, 4 TEX. L. REV. 1 (1925).

39. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 344-89 & *passim* (1969).

40. Because many state constitutions lack an explicit separation of powers clause, some commentators have felt impelled to distinguish between judicial power that arises from such clauses and "inherent" judicial power which courts are said to possess by virtue of their existence. *See, e.g.*, Miller, *The Illinois View of the Judical Power—A Reply*, 19 A.B.A.J. 616, 617 (1933); Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Deliniation*, 60 MINN. L. REV. 782, 784-87 (1976). The distinction seems unnecessary; one can almost certainly infer a separation of powers provision into any mod-

islature do so under its police powers? The first century of American independence gave no greater support to the proponents of judicial control than had the pre-Revolutionary years.

III. The United States, 1776-1876: The Era of Joint Control

Some combination of legislative and judicial control has characterized the practice of law in every state. Courts have justified their acceptance of a measure of legislative control in one of three ways:

(1) Legislative regulation is effective only insofar as the courts acquiesce in it. They acquiesce

(a) to encourage inter-branch comity,
(b) to avoid inter-branch tension, or
(c) because the legislature is merely declaring judicial power.

(2) Legislative regulation is acceptable when it aids courts but is unacceptable when it harms them.

(3) The legislature may control public welfare so long as it does not interfere with judicial functions.[41]

These justifications do not give courts much assistance in delineating legislative and judicial spheres, but during the country's first century such assistance seemed unnecessary. The two branches rarely fought over control of the legal profession.[42] Courts often were content to consider individual cases and let the legislature set general rules.[43] For example, the California Supreme Court gave the legislature "plenary control over the qualifications, admis-

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ern American state constitution. *See, e.g.*, City of Carrington v. Foster County, 166 N.W.2d 377, 382 (N.D. 1969); Attorney Gen. of Md. v. Waldron, 289 Md. 683, 691 n.6, 426 A.2d 929, 934 n.6 (1981). The distinction would gain importance only in the unlikely event that a state constitution explicitly gave control over the bar to the legislature and the state courts refused to abide by this provision, claiming that such power was inherently judicial. Such a decision might provide federal courts with a rare occasion to apply article IV, section 4 of the Constitution, by which the United States guarantees to each state a "Republican Form of Government."

41. See Note, *supra* note 40, at 798-99, which provides an excellent analysis of the strengths and weaknesses of each view. For similar but less sophisticated categorizations, see Green, *supra* note 38, at 2; Annot., 144 A.L.R. 150 (1943).

42. *See, e.g.*, Warren, *supra* note 33, at 232-33 (examples of continued legislative regulation of the practice of law in the late eighteenth and early nineteenth century United States).

43. *See* Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635, 637 (1935).

sions, oath, or duties of attorneys at law,"[44] yet it also upheld "the inherent power" of a district court judge to disbar a lawyer who failed to show him the proper respect.[45] Florida drew the distinction between general and specific control along the lines of admission and disbarment. The legislature could set general requirements for admission, but only the courts could disbar a specified lawyer.[46] Despite these clear divisions, conflicts sometimes arose. When this occured, courts were at least as likely to place ultimate power in the legislature as in themselves.

Probably the leading case from this period regarding the control of legal practice was *In re Cooper*,[47] decided in 1860. The New York legislature had enacted a statute which provided automatic admission to the bar for graduates of Columbia Law School. Cooper applied for admission under this law, but a state supreme court declared the statute unconstitutional and rejected him. The court of appeals reversed, on a four-to-three vote. It found that since the state constitution did not delegate power over the bar explicitly to the judiciary, such power remained with the legislature. The court held that the legislature could grant power over bar admissions to the courts, as it had previously done, but it was not required to do so. The court was willing to accept the concept of concurrent jurisdiction, but it saw ultimate power residing in the legislature.[48]

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44. *Ex parte* Yale, 24 Cal. 241, 245 (1864). *See also* Cohen v. Wright, 22 Cal. 293 (1863). Both of these cases affirmed the legislature's power to prescribe a test oath designed to prevent Confederate sympathizers from serving as lawyers. Tennessee upheld the legislature's power in this area by prohibiting a test oath designed by a district court judge and not approved by the legislature. Champion v. State, 43 Tenn. (3 Cold.) 111 (1866).

45. People *ex rel.* Mulford v. Turner, 1 Cal. 143 (1850). Today, the California Supreme Court claims for itself the inherent power to amend or annul statutory rules controlling the bar. *See* Stratmore v. State Bar, 14 Cal. 3d 887, 538 P.2d 229, 123 Cal. Rptr. 101 (1975); Brydonjack v. State, 208 Cal. 439, 281 P. 1018 (1929).

46. Wolfe v. Kirke, 12 Fla. 278 (1868). This position has since been disapproved, and control of the Florida bar has been given to the court, first by case law in Petition of Fla. State Bar Assoc., 134 Fla. 851, 186 So. 280 (1938), and then by constitutional provision, FLA. CONST. art. V, § 15.

47. 22 N.Y. 67 (1860). An American Law Reports annotation argues that *Cooper* was based primarily upon special provisions of the 1846 New York constitution. Annot., 144 A.L.R. 150, 172 (1943). *See also* Green, *supra* note 38, at 8-10. In fact, the court's opinion was much more broadly based. Moreover, these provisions were not carried forth into subsequent constitutions, and despite this, *Cooper* is still good law in New York. *See infra* note 96.

48. *Cooper*, 22 N.Y. at 93.

The *Cooper* position did not command universal assent, but clear challenges are difficult to locate. One candidate might be *Ex parte Secombe*.[49] Secombe had been disbarred by the Minnesota Territorial Court in 1856 for violating a territorial statute by his misbehavior in court. He filed for mandamus in the United States Supreme Court but the Court denied his petition. Speaking for the Court, Chief Justice Taney explained that the judiciary possessed a general supervisory power over the bar: "[I]t has been well-settled, by the rules and practices of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he is to be removed."[50] Secombe asserted that the lower court had based the disbarment not on its own powers but on a statute and that he had violated none of the statute's terms. These arguments failed to convince the Court, which held that the statute gave the lower court broad supervisory powers. The Court was never called upon to decide whether the lower court could have disbarred Secombe absent this statute. Thus, Taney's statement about well-settled judicial power is not just misleading history; it is also dictum.

The Court failed to clarify its position in *Ex parte Garland*,[51] a post-Civil War test oath case. Garland had served in the Confederate Congress but had received a presidential pardon after the Civil War. Thereafter, Congress passed a law requiring federal courts to refuse to license any former Confederate officials.[52] The Supreme Court, in a five-to-four decision, held this law unconstitutional. Writing for the Court, Justice Field asserted principally that the law was ex post facto and a bill of attainder[53] but also suggested that the bill interfered with judicial control over the practice of law: "Attorneys and counsellors are not officers of the United States. . . . They are officers of the court, admitted as such by its order."[54] Still, Field did not seem to object as much to the form of legislative control as to its substance. He acknowledged

49. 60 U.S. (19 How.) 9 (1857).

50. *Id.* at 13.

51. 71 U.S. (4 Wall.) 333 (1867).

52. *Id.* at 334-35.

53. Article I, section 9, clause 3 of the Constitution reads: "No Bill of Attainder or ex post facto Law shall be passed."

54. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378 (1867).

that the legislature can "prescribe qualifications for the office" of attorney as for any other, but held that in so doing the legislature could not inflict an unconstitutional punishment.[55] Dissenting, Justice Miller argued that only the common law gave courts control over legal practice; the legislature could reclaim that control at will.[56]

In many jurisdictions the issue of control over the legal profession remained peripheral. Some courts, such as those in Wisconsin, avoided doctrinal determinations while in practice deferring to the legislature.[57] Others, when faced with the question of deciding where ultimate authority lay, continued to adhere to legislative supremacy in theory as well.[58] Already, however, a growing professional self-awareness and the changing composition of the bar in the major northern industrial states was affecting both the amount of attention paid to the question of who should control the bar and the answer the question produced.

IV. 1876-1933: THE FORMULATION OF THE THEORY OF JUDICIAL CONTROL

A. *The Court Model*

The final third of the nineteenth century and initial third of the twentieth century saw a heightened commitment to professional identity and autonomy in the American bar. Using a strategy employed by other professionals in this period,[59] lawyers sought to increase their status and decrease their competition.[60] These efforts began in the 1870s with the reorganization of law school education, led by Harvard's Dean Christopher C. Langdell,[61] and the creation of powerful bar associations, first on a local and then on a national level.[62] At the same time, bar leaders tried to

55. *Id.* at 379-80.

56. *Id.* at 385 (Miller, J. dissenting).

57. *See, e.g., In re* Goodell, 48 Wis. 693, 81 N.W. 551 (1879).

58. *See In re* Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906). The holding there, that the legislature possesses the constitutional power to establish the qualifications for admission to the North Carolina bar, was reaffirmed recently. *In re* Smith, 301 N.C. 621, 272 S.E.2d 834 (1981); *In re* Willis, 288 N.C. 1, 215 S.E.2d 771 (1975).

59. *See generally* M. LARSON, THE RISE OF PROFESSIONALISM (1977).

60. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 550 (1973).

61. Langdell was appointed Dean of the Harvard Law School in 1870. *See* R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 35-72 (1983).

62. The Bar Association of the City of New York was founded in 1870, the American

limit the number and type of persons who were eligible to practice law. Their campaign gained special urgency as the population from which new lawyers could be drawn changed.

The influx of eastern and southern European immigrants into the United States profoundly influenced the American bar. Some of these immigrants became lawyers, often after attending night school or receiving some other nonelite form of legal education. Many members of the established bar attempted to limit the access of these newcomers to the profession,[63] frequently imposing higher educational standards for admittance.[64] Legislatures, however, sometimes refused to impose these standards; judges, being members of the bar, tended to be more receptive.[65] This, at least, was the experience of Illinois.

Prior to 1897, graduates of Illinois law schools received automatic admission to the bar on a showing of good character.[66] That year, the state supreme court promulgated rules requiring all candidates to take a bar examination and raising the mandated length of law school study prior to the examination to three years from two.[67] Students already enrolled in two-year law schools petitioned the court to exempt them from the operation of the new rules and secured a "sense of the assembly" resolution to that effect from the legislature.[68] Despite these efforts, "the court, intimating that the rule was framed in the interest of the people of Illinois, remained obdurate. . . ."[69] In response, the legislature enacted a law which exempted these students from the new admission requirements. Shortly thereafter, in 1899, Henry Day[70] and other graduates of two-year schools presented their diplomas and sought admission to the bar under the terms of this law.

Bar Association in 1878. *Id.* at 92.

63. Criticism of immigrant lawyers had occurred before, but it had never been so widespread. *See* LARSON, *supra* note 59, at 127 (describing attempts to control Irish-American lawyers in New York in the 1840s).

64. *See* J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 40-129 (1976).

65. *Id.*

66. *See* Lee, *The Constitutional Power of the Courts Over Admission to the Bar*, 13 HARV. L. REV. 233, 234 (1899).

67. *Id.* at 233.

68. *Id.*

69. *Id.* at 234.

70. The real leader of the Illinois students was reported to be William Angel. N.Y. Times, June 20, 1899, at 2, col. 4.

The Illinois Supreme Court would not tolerate even this minor interference with its plans to heighten bar admission standards. In *In re Day*,[71] it struck down the legislature's attempt to "encroach upon a power belonging to the judicial department."[72] This rigidity can be explained only by a fear, shared by many judges, that the bar was being overrun by persons they considered to be untrained and unqualified.[73] The court's attempt to distinguish *Cooper* provide a glimpse of this fear:

> The legislature of New York . . . only sought to admit the graduates of a great university [Columbia], who had been examined by eminent lawyers; but under our [former] rule, persons were admitted who had been only nominally in attendance for the stipulated period of time, upon schools of a very different grade. . . . In view of the disastrous consequences to the profession and the public, the rule by which it was only a step from the diploma mill to the bar was changed, and in an effort to discharge a duty to the public, the general standard of admission was raised.[74]

In short, the court could tolerate automatic bar admissions for students at Columbia but not for the graduates, often immigrants, of the "diploma mills."

When lawyers tried to heighten their prestige, they found it useful to restrict access to the bar by immigrants and newcomers.[75] As one analyst has noted: "Heterogeneity . . . threatens the capacity of lawyers to govern themselves, an essential element of their claim to professional status."[76] A decision such as *Day* reduced that threat, and it also furthered the goal of self-governance in a more general way. Bench and bar had long been closely linked because judges and lawyers were members of the same profession.[77] Judges previously had claimed and been given a special role in the control of that profession, but one generally subject to legislative limitation. Now, they wanted to turn the tables. They demanded that legislative power be restricted, if not altogether eliminated.

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71. 181 Ill. 73, 54 N.E. 646 (1899).

72. *Id.* at 98, 54 N.E. at 653.

73. *See generally* AUERBACH, *supra* note 64; A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF THE BAR AND BENCH 1887-1895 (1960).

74. *In re Day*, 181 Ill. at 97-98, 54 N.E. at 653.

75. Women were among the newcomers prevented from practicing law. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

76. Abel, *Toward a Political Economy of Lawyers*, 1981 WISC. L. REV. 1117, 1177. *See also* LARSON, *supra* note 59, at 40-47.

77. There were few lay judges in any but the lowest courts after 1800. *See* FRIEDMAN, *supra* note 60, at 109-11.

They justified this demand by using the traditional characterization of lawyers as officers of the court and then claiming that interference with these officers in turn interfered with the functioning of the judicial branch. This, they claimed, violated the doctrine of separation of powers. Thus, a guild model organization, in which lawyers were accountable to that branch of government composed almost entirely of lawyers, was legitimized by a court model justification.

Ironically, judges asserted this justification at precisely the time when the practice of law had begun to move out of the courtroom and into the law office. "The slow estrangement of the lawyer from his old and natural haunt, the court, was an outstanding fact of the practice in the second half of the [nineteenth] century."[78] One can only speculate as to whether judges simply ignored the tension between the court model and the changing reality or unconsciously revealed it in the stridency of their opinions.

The court model and the concomitant formulation of the separation of powers principle were in evidence in 1912, when an Ohio trial court decided *In re Thatcher*.[79] The state supreme court had disbarred Charles Thatcher for unethical practices, but the legislature subsequently passed a law that in effect nullified the disbarment. The Lucas County Common Pleas Court, by a three-to-one vote, found this law unconstitutional. The lead opinion of Judge Manton reveals the influence that the court model had begun to have on judges:

> We may ask . . . what would be the effect if the courts are deprived of the assistance of the bar, and all who have any acquaintance with the business of the courts would answer that the courts could not carry out their functions. Then would the courts be in any better condition if they were compelled to accept as members of the bar, persons without legal learning, and wanting in the proper conception of the ethics of the profession? But it will be answered that we presume that the legislature would not destroy the courts. But if the courts are menaced they are not a free agency, as the people intended they should be; free, in carrying out their delegated functions, from the control of the legislature. It can readily be seen how the general assembly, if it served its purpose, might cripple the courts by compelling them to accept an ineffi-

78. *Id.* at 549. *See also* 1 L. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1948, at 369-71 (1946).

79. *In re* Thatcher, 22 Ohio Dec. 116 (Lucas Co. Common Pleas Ct. 1912), *aff'd sub nom.* State *ex rel.* Thatcher v. Brough, 15 Ohio C.C. 97 (Cir. Ct. 1912), *aff'd mem.*, 90 Ohio St. 382 (1914).

> cient, incompetent, and immoral bar, and so destroy their usefulness as a co-ordinate branch of the government. . . .[80]

Here the court model justifies judicial control of the legal profession; the legislature cannot rule on disbarment, for allowing it to do so could menace the courts.

The question arises as to how persuasive this line of reasoning seems when it is applied to legal activities that are unrelated to the courtroom. The Oklahoma Supreme Court, for one, was not disposed to follow all the logical implications of *Thatcher* in a noncourtroom setting. In *In re Saddler*,[81] a 1913 case, the court upheld a state statute which prohibited courts from disbarring a lawyer for acts involving moral turpitude but unconnected with his professional duties, until after he had been convicted. The court accepted the view that judicial control over lawyers for actions touching directly upon the courts or upon clients was "so necessary to the full and complete administration of justice that such power cannot be taken from the courts by legislative enactment."[82] "But," the court asked, "does such a necessity exist when applied to the nonprofessional misconduct of an attorney, such as acts that may show deficiency of character and a lack of proper regard for his duties toward mankind generally, but that do not relate to his professional or official duties as an attorney?"[83] Noting that even judges were answerable to the legislature, via impeachment, the court could see no reason why lawyers should be immune from some legislative supervision.[84]

The *Saddler* opinion did not go far toward allowing legislative control. The judiciary still governed both the lawyer's court-related and client-related activities. Nonetheless, *Saddler* did suggest that the legislature could have the final say on at least some aspects of legal ethics. In the post-*Day* world, this clearly had become a minority position.[85]

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80. *In re Thatcher*, 22 Ohio Dec. at 121.

81. 35 Okla. 510, 130 P. 906 (1913).

82. *Id.* at 519, 130 P. at 910.

83. *Id.*

84. *Id.*

85. *See* cases cited in Dowling, *supra* note 43.

B. *The Court and Guild Models Linked*

Since *Day*, the argument that lawyers were officers of the court had been used to justify judicial control of the bar. Tied to this court model, sometimes explicitly and sometimes implicitly, was the guild model. The most eloquent plea to link them came from Chief Judge Benjamin Cardozo of the New York Court of Appeals. In the 1928 case of *Karlin v. Culkin*,[86] he described the corruption judges sought to eradicate:

> A petition by three leading bar associations . . . gave notice to the court that evil practices were rife among members of the bar. "Ambulance chasing" was spreading to a demoralizing extent. As a consequence, the poor were oppressed and the ignorant overreached. . . . Wrongdoing by lawyers for claimants was accompanied by other wrongdoing, almost as pernicious, by lawyers for defendants. . . . The bar as a whole felt the sting of the discredit thus put upon its membership by an unscrupulous minority.[87]

The courts responded by launching an investigation.[88] Karlin, a personal injury lawyer, refused to testify, arguing that the court lacked the power to examine him.[89] The court of appeals unanimously rejected this contention.[90]

Cardozo's opinion reveals both the persistence throughout this period of a reformist tradition and the much stronger persistence of the court model of the legal profession. Reformism by the late 1920s was not necessarily nativist; Cardozo himself was Jewish, albeit from the New York Sephardic "aristocracy." Still, in distinguishing between the "unscrupulous minority" of "ambulance chasers" and other lawyers, Cardozo revealed that he saw in the bar a stratified profession which had originated before World War I and which had solidified with the growth of corporate law firms in the 1920s.[91] Cardozo believed judges would tend to be responsive to the higher ranks of that profession, especially to the bar associations, which he referred to as "the organs of [the bar's] common will."[92] Other judges shared this view, and since the 1870s had

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86. 248 N.Y. 465, 162 N.E. 487 (1928).
87. *Id.* at 468, 162 N.E. at 488.
88. *Id.* at 468-69, 162 N.E. at 488-89.
89. *Id.* at 469, 162 N.E. at 489.
90. *Id.* at 479-80, 162 N.E. at 493.
91. *See* AUERBACH, *supra* note 64, at 40-73, 130-57.
92. *Karlin v. Culkin*, 248 N.Y. at 468, 162 N.E. at 488. On the bar associations as representing only one part of the profession, *see* AUERBACH, *supra* note 64, at 102-29.

been working with bar associations to govern the profession.[93]

Cardozo also believed that lawyers were closely bound to the courts and subject to their direction:

> The appellant was received into that ancient fellowship [of lawyers] for something more than private gain. He became an officer of the court itself, an instrument or agency to advance the ends of justice. His cooperation with the court was due, whenever justice would be imperiled if cooperation was withheld.[94]

Lawyers and judges were members of the same guild, and this guild existed for the aid and under the direction of the courts. Cardozo reaffirmed the significance of this link at the end of his opinion: "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work."[95] Cardozo thus tied together the guild and court models and provided a rationale for the link.

Unlike the court in *Day*, Cardozo did not attack concurrent legislative jurisdiction of the practice of law, although he clearly believed that legislatures should defer to courts as a matter of policy. He did not even need to overrule *Cooper*.[96] In this respect, he was typical of many judges of the period who wished to assert judicial power over lawyers and yet were unwilling or unable to deny some slight measure of legislative control. These judges tried to delineate a small sphere of legislative power. The old distinction between individual cases and general rules had broken down as other courts joined New York in conducting inquiries into the operation of the bar as a whole.[97] One analyst suggested in 1929 that recent cases were holding that "although the legislatures may require applicants to the bar to be good citizens, only the courts can set up standards for attorneys in their professional capacities."[98] As hard-

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93. *See* Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 620 (1978); Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 707-08 (1981).

94. *Karlin v. Culkin*, 248 N.Y. at 470-71, 162 N.E. at 489.

95. *Id.* at 480, 162 N.E. at 493.

96. *Id.* at 477, 162 N.E. at 492. Cardozo asserted that *Cooper* would be at issue only if the legislature sought to withdraw or modify judicial power. *Cooper* is still good law in New York. *See* Cohn v. Borchard, 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969); *In re* Bercu, 188 Misc. 406, 415, 69 N.Y.S.2d 730, 738 (Sup. Ct. 1947), *rev'd on other grounds* 273 A.D. 524, 78 N.Y.S.2d 209 (1948), *aff'd per curiam*, 299 N.Y. 728, 87 N.E.2d 451 (1949). *See also* N.Y. CONST. art. 6, § 30.

97. *See* Dowling, *supra* note 43, at 637-38 and cases cited therein.

98. Comment, *Legislative Encroachment on the Judiciary—Power Over Bar Admis-*

ship replaced prosperity that year, however, conflict destroyed even these limited attempts at a legislative-judicial accommodation.

V. The New Deal and After: The Court Model Challenged

New Deal critics attacked the bench and bar as among the elite American institutions allegedly serving the interests of a favored class rather than of society as a whole. It must therefore have come as no surprise when Charles A. Beardsley, a former president of the California State Bar, published in the October 1933 issue of the *American Bar Association Journal* the most direct attack to that date on the right of courts to regulate the practice of law.[99]

The Illinois Supreme Court had recently delegated some quasi-governmental powers to the voluntary Illinois State Bar; Beardsley claimed the court did not have the right to delegate a power which it did not possess. Breaking with the guild and court models, he denied that lawyers were officers of the court: " 'Officer of the court' is only a name, and . . . the name is not used in the constitutions."[100] By that time, after all, lawyers conducted most of their business outside the courtroom. Even in court, they owed a duty only to their clients. If lawyers owned a larger duty as a result of their specialized training, they owed it to society as a whole, to all three branches of government rather than to the courts alone.[101]

By using the attorney model, Beardsley pointed out the fallacies in the argument for judicial control of the bar. His attacks on the court model were particularly telling. The shift in the locus of legal practice away from the courtroom, which had begun in the late nineteenth century, continued unabated.[102] The argument that lawyers should be controlled by state assemblies as were other professionals, one would think, should have proven quite cogent. It must have seemed only a matter of time before members of Cardozo's "ancient fellowship" would join plumbers, barbers, and beauticians as, in effect, another legislatively regulated

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sions, 15 St. Louis L. Rev. 96, 98 (1929).

99. Beardsley, *The Judicial Claim to Inherent Power Over the Bar*, 19 A.B.A.J. 509 (1933).

100. *Id.* at 510.

101. *Id.*

102. *See, e.g.*, 2 Swaine, *supra* note 78, at 461-66.

monopoly.[103]

Though Beardsley's attack was not to be ignored, the initial response was relatively restrained. Amos C. Miller, the former president of the Illinois Bar, replied in the subsequent issue of the *American Bar Association Journal*.[104] He attempted to justify the actions taken by his organization and by the Illinois Supreme Court and to refute Beardsley's arguments. He did not, however, deny the legislature a role in the process of bar regulation, provided it acted in aid of the court. "No one," he said, "would question the right of our legislature to declare that any person ignorant of the law or of bad character should *not* hold himself out as an attorney at law."[105] While he seemed to favor, on principle, "the complete organization of the bar under the command and direction of the [state] Supreme Court," he knew that such action would have to await "the prevailing sentiment."[106]

While some commentators followed Miller's example of caution,[107] other writers and judges soon came to believe that the time for expanded judicial control of the profession was at hand. With the failure of the Roosevelt Court plan, many judges and establishment lawyers felt that the court had survived the worst of the New Deal onslaughts.[108] The prevailing sentiment now allowed them to take the offensive. They used two means to assert control, bar integration and a broader definition of the judicially controllable practice of law.

Bar integration required lawyers to join a state bar association under the ultimate control of the state supreme court. It was not a new concept. Herbert Harley, a midwestern lawyer and newspaper editor who founded the movement, called as early as 1914 for compulsory membership in bar associations.[109] Supporters urged its

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103. *See* Dowling, *supra* note 43, at 641.

104. *See* Miller, *supra* note 40.

105. *Id.* at 618 (emphasis original).

106. *Id.*

107. *See, e.g.*, Sheedy, Smith & Matuschka, *Legislative Power Over Officers of the Court*, 6 J.B.A. KANS. 311 (1938)(a majority of states rightly favors concurrent jurisdiction over lawyers); Comment, *Power of the Courts and Legislature to Regulate the Practice of Law and Procedure*, 36 MICH. L. REV. 82, 87-88 (1937) ("The inherent powers which are a part of the court's constitutional jurisdiction are only those necessary for its proper function").

108. *See* AUERBACH, *supra* note 64, at 191-97.

109. *Id.* at 120.

adoption to strengthen the power of the profession.[110] Northern devotees also suggested that it could be used to control the foreign-born and otherwise undesirable elements of the bar,[111] while some Southern whites saw in it an instrument to dominate black lawyers.[112] During the first twenty-five years of the movement, some legislatures integrated state bars by statute.[113] These laws often gave supervision over the bar to the courts. The courts in turn regularly sustained these laws and often declared that they, rather than the legislatures, were actually integrating the bars.[114]

Ironically, the same court which twenty-six years earlier had opened the door to some legislative control of the bar via its decision in *In re Saddler*,[115] now slammed it shut. The Oklahoma state legislature in 1929 had passed a law integrating the state bar, but repealed it ten years later.[116] The supreme court immediately reintegrated the bar by judicial order.[117] It based its decision on its "inherent power and authority to provide rules creating, controlling, regulating, and integrating the State Bar of Oklahoma."[118]

Following this action, other courts began to assert and exercise ultimate control over bar organization.[119] In 1943, for example, the Wisconsin Supreme Court took cognizance of a statute enacting bar integration but chose to postpone its consideration of whether to effect it until the many lawyers in military service had returned home.[120] Its opinion was moderate in tone, but it firmly asserted that both policy and constitutional considerations gave courts ultimate control over the profession.[121]

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110. *Id.*

111. *Id.*

112. *See* D.D. McKEAN, THE INTEGRATED BAR 44-45 (1963). Southern bars were integrated in both senses of the word. Three Southern states (North Carolina, Virginia and West Virginia) maintained racially integrated official state bars and segregated voluntary bar associations. *Id.* at 50.

113. *Id.* at 41-49.

114. *See id.* at 42-51. *See also* Dowling, *supra* note 43, at 638.

115. *See supra* notes 81-84 and accompanying text.

116. State Bar Act of 1929, OKLA. STAT. ANN. tit. 5, §§ 1-18 (repealed 1939).

117. *In re* Integration of State Bar of Okla., 185 Okla. 505, 508-11, 95 P.2d 113, 116-20 (1939).

118. *Id.* at 507-08, 95 P.2d at 116.

119. *See* McKEAN, *supra* note 112, at 47-49.

120. *In re* Integration of the Bar, 244 Wis. 8, 11 N.W.2d 604 (1943).

121. The court finally ordered temporary bar integration in 1956, *In re* Integration of the Bar, 273 Wis. 281, 77 N.W.2d 602 (1956), and made it permanent two years later, *In re* Integration of the Bar, 5 Wis. 2d 618, 93 N.W.2d 601 (1958).

Courts also manifested their growing unwillingness to share power with the legislature in cases involving legal practice outside the profession. Judges, as has been shown, had asserted their claim to control the bar by virtue of their close and ongoing relationship with it.[122] Yet, as legal work flowed out of the courtroom and into the office, that claim weakened. Courts had to consider not merely who could practice law, but also what consituted legal practice. Bar association members, for whom the issue barely had existed before the Depression, grew sufficiently alarmed over this "problem" by 1930 to form the first ABA Committee on the Unauthorized Practice of Law.[123] This committee and others like it kept the issue before the courts, hoping that the judiciary would protect their members from what they thought to be unlawful competition.[124]

Judges generally were receptive to pleas for protection, defining legal practice broadly to include a number of activities that affected courts only indirectly. By 1938, for example, case law provided that the preparation of legal instruments such as real estate documents constituted the practice of law.[125] It did not necessarily follow, however, that only courts could govern these activities. The Wisconsin Supreme Court, for example, gave such power to the legislature: "The Legislature may establish such qualifications as it chooses for those who are permitted to act as conveyancers, examiners of title, organizers of corporations, or any other type of legal services which does not give them power to influence the course of justice as administered by the courts."[126]

Most courts, however, were not so restrained. With a broad definition of legal practice came a willingness to increase judicial power in order to control it. Illinois again led the way, anticipating the course of decisions in other states. Expanding upon its decision in *In re Day*,[127] the state supreme court held in the 1932 case of

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122. *See supra* notes 59-98 and accompanying text.

123. *See* Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 6-10 (1981).

124. The elimination of the unauthorized practice of law was a major activity of the National Bar Program of the American Bar Association. During this period, the Association's Committee on Unauthorized Practice of the Law created a monthly journal devoted exclusively to this goal. *See* 1 UNAUTH. PRAC. NEWS 1 (1934).

125. Hill, *Real Estate Brokers and the Courts*, 5 LAW & CONTEMP. PROBS. 72 (1938).

126. *In re* Cannon, 206 Wis. 374, 395, 240 N.W. 441, 449 (1932). Subsequently, this language was held to be dicta and was disapproved. State *ex rel.* Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961).

127. 181 Ill. 73, 54 N.E. 646 (1899).

Illinois State Bar Association v. People's Stock Yards State Bank,[128] that it had the inherent power to punish for contempt any unauthorized practitioner, whether lawyer or lay person. The court reasoned that since a court could control authorized practice, it surely could control unauthorized practice.[129] The court accepted the contention that "[p]erhaps the major portion of the actual practice of law under modern conditions consists of the work of attorneys outside of any court and has nothing to do with court proceedings."[130] From this, though, it reached the surprising conclusion that such work nevertheless fell exclusively within its domain:

> It is just as essential to the administration of justice and the proper protection of society that unlicensed individuals should not be permitted to prey upon the public in that sphere of the practice of law as it is with respect to proceedings in the courts. It is no less a usurpation of the function and privilege of an attorney and an affront to the court having sole power to license attorneys, for one not licensed as such to perform the services of an attorney outside of court proceedings.[131]

Thus, not only could judges control all the activities of lawyers, no matter how tangentially connected to the court, they could even control the noncourt activities of nonlawyers, so long as these judges considered such activities to constitute the practice of law. The potential for expansion of power that the court model gave to judges had been demonstrated.[132]

The "imperial judiciary" grew as judges continued to expand their conception of the practice of law well beyond the limits of the courtroom. Some state courts struck down statutes that allowed nonlawyers to represent clients in adjudicatory hearings before adminstrative agencies.[133] They justified these decisions as necessary to protect the public.[134] Once judges moved so far beyond a traditional court model in order to justify their authority, however, they

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128. 344 Ill. 462, 176 N.E. 901 (1931).

129. *Id.* at 472-73, 176 N.E. at 906.

130. *Id.* at 473, 176 N.E. at 906.

131. *Id.*

132. For an explanation of the influence of the *People's Stock Yards Bank* case, see Sanders, *Procedures for the Punishment or Suppression of Unauthorized Practice of Law*, 5 LAW & CONTEMP. PROBS. 135, 143-47 (1938).

133. *See, e.g.*, West Virginia State Bar Ass'n v. Earley, 144 W. Va. 504, 109 S.E.2d 420 (1959); State *ex rel.* Johnson v. Childe, 139 Neb. 91, 295 N.W. 381 (1941).

134. *See, e.g.*, *Earley*, 144 W. Va. at 527, 109 S.E.2d at 435.

left themselves open to a new round of attacks. This second wave of assaults upon judicial power began in the early 1960s and has not yet abated.

VI. 1960-1983: THE GUILD MODEL CHALLENGED

Since the 1960s, lawyers have been subjected to heavy public criticism. A number of factors have contributed to this disenchantment. The civil rights movement and its successors increased public sensitivity to the inequities in the access to legal care.[135] Watergate led to a widespread suspicion that the term "legal ethics" was an oxymoron.[136] Most important, consumerism has produced concern that lawyers are failing to provide adequate and reasonably priced legal services.[137] Advocates of legal consumerism regard the interests of the client, who is the consumer of legal services, as paramount to those of the professional.[138] Accordingly, consumerism represents the attorney model and is in conflict with the guild model. The guild model has been used to justify judicial control of the bar; consumerism has attacked that control. Adopting Cardozo's formulation, one can say that critics did not trust lawyers to clean their own house; they preferred that the work be left to strangers.

These critics began by fighting the bar's claim to monopoly status. At first, they could only complain; for example, a 1960 law review comment denied that courts had the power to prevent nonlawyers from representing clients in hearings before adminstrative agencies.[139] Soon, though, they gained a powerful ally. The United States Supreme Court in a series of decisions beginning in 1963 held that state courts and bar groups could neither prohibit group legal services[140] or lawyer advertising,[141] nor promulgate

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135. *See* AUERBACH, *supra* note 64, at 263.

136. *See, e.g.*, Hertzberg, *Watergate: Has the Image of the Bar Been Diminished?*, 79 COM. L.J. 73 (1974). *But see* Auerbach, *The Legal Profession After Watergate*, 22 WAYNE L. REV. 1287, 1288 (1976)(legal profession has transformed "Watergate . . . from a badge of professional shame to a source of professional pride").

137. *See* Wolfram, *supra* note 93, at 621-23; Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WISC. L. REV. 639.

138. *See* Garth, *supra* note 137, at 641-42, 668-71 & *passim*.

139. Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162 (1960).

140. NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of R.R. Trainmen v. Virginia

minimum-fee schedules.[142]

State legislatures, but not state courts, have followed the Supreme Court's lead.[143] In so doing, the legislatures have placed themselves in potential or actual conflict with their respective state courts. For instance, the Texas legislature recently included the state's integrated bar under the provisions of a "sunset law" which requires state agencies periodically to justify their continued receipt of legislative funding.[144] The Washington state legislature went further in 1979 by enacting a statute allowing escrow agents and other lay persons to prepare loan documents and similar papers for purchasers and sellers of real estate,[145] presumably because clients could thereby be spared the additional expense of hiring a lawyer to perform these services. This statute in effect[146] challenged both a 1978 Washington Supreme Court ruling that lay performance of these services constituted the illegal practice of

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ex rel. Va. State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); United Transp. Union v. State Bar, 401 U.S. 576 (1971).

141. Bates v. State Bar, 433 U.S. 350 (1977); *In re* RMJ, 455 U.S. 191 (1982).

142. Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773 (1975).

143. This Article will not discuss the recent efforts of the Federal Trade Commission to investigate whether the current regulatory scheme hinders the provision of adequate legal services. Not surprisingly, the probe was resisted by most state bar associations. Its history and the efforts exerted to quash the investigation can be traced in a series of articles in the *A.B.A. Journal*. *FTC to Hear Appeal on AMA Ad Restraints*, 65 A.B.A.J. 171 (1979); *FTC Probe of Legal Profession Draws Fire*, 65 A.B.A.J. 330 (1979); *FTC "Profession-Probes" Under Fire in Senate*, 65 A.B.A.J. 1618 (1979); Slonim, *Bar Survey Should Be Voluntary—Peterson*, 66 A.B.A.J. 31 (1980); Slonim, *FTC Future Discussed as Lawyer Probe Renews*, 66 A.B.A.J. 1056 (1980); Middleton, *FTC Survey to Probe Lawyers Ad Practices*, 67 A.B.A.J. 1435 (1981); Middleton, *FTC Jurisdiction Issue Goes to Congress*, 68 A.B.A.J. 528 (1982).

The supremacy clause of the federal Constitution, U.S. CONST. art. 6, makes a separation of powers argument by state courts unavailing against any branch of the federal government. *See* Wolfram, *supra* note 93, at 643. Thus, the FTC's assertion of authority does not bear upon the conflict between the courts and the legislatures. It is, however, symptomatic of the erosion of support for the claim that state courts adequately regulate the legal profession.

144. *See* Jeffers, *Government of the Legal Profession: An Inherent Judicial Power Approach*, 9 ST. MARY'S L.J. 385, 392-94 (1978).

145. WASH. REV. CODE § 19.62:10 (West Supp. 1983).

146. The legislature attempted to write the statute so that it could be said to conform to the court's previous decisions. The attempt was a weak one, however, see Comment, *Great Western and Its Legislative Aftermath: Unconstitutional Usurpation of Court's Power?*, 16 WILLAMETTE L. REV. 917 (1980), and was not even discussed by the court in its subsequent review of the statute. *See* Bennion, Van Camp, Hagen & Kuhl v. Kassler Escrow, Inc., 96 Wash. 2d 443, 635 P.2d 730 (1981).

law,[147] and an earlier assertion that the court had "*sole jurisdiction*" over the practice of law in Washington.[148] Not surprisingly, the court later found that in passing the 1979 statute "the legislature impermissibly usurped the court's power."[149]

Legislatures and regulatory agencies have been willing to challenge courts directly by attempting to subject lawyers to their own jurisdiction.[150] After the Georgia Supreme Court ruled that only graduates of three-year law schools could take the bar examination, the state legislature imitated the Illinois legislature of the *Day* era: it exempted students then enrolled in other types of law schools (principally two-year schools).[151] Despite a prior declaration that it alone had the power to control the practice of law,[152] the Georgia Supreme Court did not have occasion to overrule the legislature on this matter. Others, however, have answered these challenges. Writers, the bar, and the courts have reasserted the view that the judiciary maintains an inherent power to control the practice of law. Lawyers[153] and law students[154] have written articles to that effect. Bar associations have secured, in some states, the passage of constitutional amendments expressly granting courts this power.[155]

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147. Washington State Bar Ass'n v. Great Western Union Sav. and Loan Ass'n, 91 Wash. 2d 48, 586 P.2d 870 (1978).

148. State *ex rel.* Schwab v. Washington State Bar Ass'n, 80 Wash. 2d 266, 269, 493 P.2d 1237, 1239 (1972) (emphasis original).

149. *Bennion, Van Camp, Hagen & Kuhl*, 96 Wash. 2d at 453, 635 P.2d at 736.

150. Commentators, too, have attacked the power of courts to regulate the legal profession. *See* Note, *supra* note 29; Wolfram, *supra* note 93.

151. GA. CODE ANN. § 9-103(b)(iii) (Supp. 1982). *See* Gunter, *Regulation of the Legal Profession—Judicial or Legislative?*, 10 GA. ST. BAR J. 589 (1974).

152. Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969), *cert. denied*, 397 U.S. 914 (1970).

153. *See, e.g.*, Jeffers, *supra* note 144.

154. *See, e.g.*, Comment, *supra* note 146.

155. The following states have constitutional provisions explicitly granting their courts power over the practice of law: Arkansas (ARK. CONST. art. XXVIII), Florida (FLA. CONST. art. V, § 15), Kentucky (KY. CONST. § 116), New Jersey (N.J. CONST. art. VI, § 2, ¶ 3), and Pennsylvania (PA. CONST. art. V, § 10(c)). Not all of these provisions are of recent vintage. Some state constitutions give state supreme courts "jurisdiction" over bar cases, and courts have interpreted these clauses to give them ultimate power to control the bar itself: Indiana (IND. CONST. art. VII, § 4, *see* Professional Adjusters, Inc., v. Tandon, 433 N.E.2d 779 (Ind. 1982)); Louisiana (LA. CONST. art. V, § 5(B), *see* Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437 (La. 1976)); Ohio (OHIO CONST. art. IV, § 2(B)(1)(g), *see* Smith v. Kates, 46 Ohio St. 2d 263, 348 N.E.2d 320 (1976)); and South Carolina (S.C. CONST. art. V, § 4, *see* Kirven v. Board of Comm'rs on Grievances and Discipline, 271 S.C. 194, 246 S.E.2d 857 (1978)). The South Dakota constitution is ambiguous. *See infra* note 176.

In Kentucky and Washington, state auditors have attempted to examine the books of their integrated bars, just as they would do for other state agencies, but neither Kentucky[156] nor Washington[157] judges have allowed the state-agency audits of their bars to take place. These judges have continued to use the rhetoric of the guild and court models to justify their control. The Maryland Court of Appeals recently remarked that "the legal profession, for time out of mind, has been infused with and, in a sense, been a trustee for, the public interest."[158] It then used the *People's Stock Yards Bank* logic[159] to conclude that the court should supervise the trustee:

> In light of the intimate relationship between the learning and character of attorneys, the perceptions of the public, and the performance by the courts of their constitutionally assigned functions, we are confident that, as a general matter, the proper repository for the authority, responsibility, and obligation to regulate the profession, in our scheme of constitutionally divided realms of power, is and must ultimately be the judiciary of this State.[160]

Using similar rhetoric, other courts have also reasserted their own power.[161]

VII. Toward Legislative Control

A. *Toward Shared Powers*

Despite the counterattack by much of the bench and bar, the earlier criticisms of the court model and the more recent attacks on the guild model have had some effect in producing a more moderate claim for judicial control. A recent law review note urges a "practical accommodation of separated powers."[162] To comport

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156. *Ex parte* Auditor of Public Accounts, 609 S.W.2d 682 (Ky. 1980) (holding that the audit would contravene Kentucky's constitutional provision giving the courts full power over the practice of law).

157. Graham v. Washington State Bar Ass'n, 86 Wash. 2d 624, 548 P.2d 310 (1976).

158. Attorney General of Md. v. Waldron, 289 Md. 683, 696, 426 A.2d 929, 937 (1981).

159. *See supra* notes 128-31 and accompanying text.

160. *Waldron*, 289 Md. at 697-98, 426 A.2d at 937.

161. *See, e.g.*, Board of Comm'r of Ala. State Bar v. State *ex rel.* Baxley, 295 Ala. 100, 324 So. 2d 256 (1975); Stratmore v. State Bar, 14 Cal. 3d 887, 538 P.2d 229, 123 Cal. Rptr. 101 (1975); Lublin v. Brown, 168 Conn. 212, 362 A.2d 769 (1975); Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779 (Ind. 1982); Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437 (La. 1976); Smith v. Kates, 46 Ohio St. 2d 263, 348 N.E.2d 320 (1976); *In re* Petition of Tenn. Bar Ass'n, 532 S.W.2d 224 (Tenn. 1975).

162. Note, *supra* note 40, at 795.

with the needs of today, it suggests a functional approach: legislative control should be presumed constitutional unless it "unreasonably hamper[s] the judiciary in the adjudicatory process."[163] This standard, liberally applied, would entitle a legislature to regulate most noncourt legal practice just as it regulates the practice of any other profession. The courts, however, would have the final say.

Some courts have moved in this direction. In *Sadler v. Oregon State Bar*,[164] the Oregon Supreme Court upheld a statute against its own rules when it granted the plaintiff access to disciplinary records held by the state bar. The court explained that it would sustain statutory regulation of the bar if the law did not "unduly burden or substantially interfere with the judiciary."[165] Since this statute did not touch the core functions of admission to the bar, suspension, or disbarment, it was acceptable.[166]

Balancing tests of this sort, however welcome in the shortrun, do not solve the problem of judicial control over the bar. In the first place, these "functional" analyses limit judicial power only slightly, because courts themselves can determine when they are "unreasonably hampered." If the *Sadler* decision, with its broad definition of core functions, is any guide, courts will probably be unwilling to concede much power to the legislature. Moreover, even when they effectively limit judicial power, the balancing tests are unsatisfactory. Those judges who are sympathetic to the legislature have no rational grounds on which to base their decisions. Rather, they must state that they were not unreasonably hampered, or that legislative action did not interfere with core judicial functions, or give some equally malleable *ratio decidendi*. In each of these cases, the judge could just as easily have reached a contrary conclusion and explained it with the same language. Decisions of this type merely encourage the belief that all case law is arbitrary.

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163. *Id.* at 802. *See also* Shapiro, *Judicial Control Over the Bar Versus Legislative Regulation of Governmental Ethics: The Pennsylvania Approach and a Proposed Alternative*, 20 DUQ. L. REV. 13 (1982).

164. 275 Or. 279, 550 P.2d 1218 (1976).

165. *Id.* at 285, 550 P.2d at 1222.

166. *Id.* at 293-95, 550 P.2d at 1226-27.

B. *Toward Legislative Control*

Over the years the scope of the police power has become "very broad and comprehensive and flexible enough for the state to meet the problems of changing social, economic and political conditions."[167] It has been defined as "simply the power to subject individuals to reasonable regulation for the purpose of achieving governmental objectives such as the public safety, health, morals and public welfare."[168] To secure these ends, "[t]he state has power to regulate a business, profession or occupation under its police power."[169] Under this authority, states have regulated such professions as medicine,[170] dentistry,[171] and engineering.[172] As a general proposition, the various state legislatures are primarily vested with this police power,[173] and while subject to the limitations of reasonableness and nondiscrimination, "it is for the legislature to determine what measures are appropriate and necessary to conserve and safeguard the public safety, health and welfare."[174]

Consistent with the doctrine of separation of powers,[175] the police power gives the legislature control over the practice of law, absent convincing arguments to the contrary. Such arguments were of questionable authority in the past and have no more force today. The "inherent power" to control the bar is not a long-preserved judicial heritage; it is a product of the late nineteenth century. As to the models on which it is based, the guild model has come increasingly to seem as self-serving, while the court model fails to define the core of present-day legal practice. They no longer justify a special exemption for lawyers from legislative control. Courts should recognize this and modify their constitutional interpretations accordingly. If they fail to act, the public should

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167. People v. Bielmeyer, 54 Misc. 2d 466, 468, 282 N.Y.S.2d 797, 799 (1967).

168. Doyle v. Board of Barber Examiners, 219 Cal. App. 2d 504, 509, 33 Cal. Rptr. 349, 353 (1963).

169. Pierstorff v. Board of Embalmers and Funeral Dirs., 68 Ohio App. 453, 41 N.E.2d 889, 890, *app. dismissed*, 138 Ohio St. 626, 37 N.E.2d 545 (1941).

170. *E.g.*, Locke v. Ionia Cir. Judge, 184 Mich. 535, 151 N.W. 623 (1915).

171. *E.g.*, Oshins v. York, 150 Fla. 690, 8 So. 2d 670 (1942).

172. *E.g.*, Commonwealth *ex rel.* Woodruff v. Humphrey, 288 Pa. 280, 136 A. 213 (1927).

173. 16 C.J.S. *Constitutional Law* § 177 (1956).

174. Vermont Woolen Corp. v. Wackerman, 122 Vt. 219, 224-25, 167 A.2d 533, 537 (1961).

175. *See, e.g.*, Sawyer v. Gilmore, 109 Me. 169, 180, 83 A. 673, 678 (1912)(under American constitutions, legislature has residual powers to act, except where otherwise restricted).

amend state constitutions to give power over the legal profession to their elected representatives.[176]

This transfer would not threaten legitimate interests of either the public or the courts. As to the former, popular control would not endanger civil liberties; the current system of bar regulation has not produced an admirable record of protecting civil liberties,[177] and the legislatures probably could not do much worse. If legislative encroachment occurred, it could be checked not by a special disciplinary system for lawyers, but by something applicable to all—the first amendment. Since the 1950s, the United States Supreme Court has acted to protect lawyers who choose to represent unpopular causes[178] or who are otherwise associated with such causes,[179] basing its holdings on the freedoms of association and expression. Any legislative attempts to threaten those freedoms likely would be met with similar decisions. As to the state courts, legislative exercise of the police power would not deprive them of their ability to control lawyers who appear before them, for they could still use the contempt sanction to protect the integrity of the judicial branch. Contempt might give the courts a smaller tool with which to work, but it is one more precisely suited to the task than the doctrine of inherent power has ever been.

Are the beneficial possibilities of legislative control as limited as the dangers? They might be. Legislatures have frequently acquiesced in judicial claims that the courts can best perform the day-to-day functions of bar governance, and even with greater power, the assemblies might continue to delegate these functions to the

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176. *See* ARIZ. CONST. art. XXVI; S.D. CONST. art. V, § 12. A 1962 Arizona constitutional amendment, ARIZ. CONST. art. XXVI, § 1, limits judicial control over the practice of law in Arizona by declaring that real estate brokers are allowed to practice law, in effect overruling State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *supplemented on reh'g* 91 Ariz. 293, 371 P.2d 1020 (1962). *See* Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A.J. 139 (1963). A 1972 South Dakota amendment gives the state supreme court the power to make rules to "govern . . . admission to the bar, and discipline of members of the bar," but adds that "[t]hese rules may be changed by the legislature." S.D. CONST. art. V, § 12. The South Dakota courts have not yet interpreted this amendment. *See* Comment, *An Inevitable Clash of Powers? Determining the Proper Role of the Legislature in the Administration of Justice*, 22 S.D. L. REV. 387 (1977). *See also* Wolfram, *supra* note 93 (state constitutional amendment process offers the best possibility of reducing judicial control of the practice of law).

177. *See* Martyn, *supra* note 93, at 720-22.

178. NAACP v. Button, 371 U.S. 415 (1963).

179. Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

courts. Nonetheless, once ultimate legislative control is recognized, the meaning of that delegation would change. The courts would then exercise control as a matter of legislative grace, not of constitutional right. The legislature could regain that power at any time by passing a law, and the courts, aware of this possibility, would constrain their activities accordingly.

Preferably, though, the legislatures would take a more active role in bar governance for two reasons. First, they would probably be less sympathetic toward the bar than are the courts. Legislators are more susceptible to the influence of consumers of legal services and they have no tradition of providing institutional protection for the bar. Also, while the proportion of lawyer-legislators might be high, it necessarily does not equal the proportion of lawyer-judges.[180] Nonlawyers in the legislatures seem to have different attitudes and ideas than do their lawyer counterparts,[181] and these differences should manifest themselves in debates over bar regulation. Despite these factors, legislatures might nevertheless follow the courts' lead and treat the bar with favor. They certainly are subject to the persuasive power of well organized interest groups,[182] such as the bar, and the lawyers among them might be especially inclined to protect the legal community. Still, over the last two decades, legislatures have shown themselves increasingly willing to challenge the bar.[183] While it is beyond the scope of this Article to suggest other specific actions that they could take, it is reasonable both to hope and expect that once legislatures gain control of the regulation of legal practice, they will continue to build on their recent efforts.

Second, legislative control would help to demystify the practice of law. Every other profession is governed by the edicts of the legislature. If one wins a legislative battle, the success is clearly political, and the public can use political means to ratify or overturn the legislative decision. But a victory in court is not seen as a political victory; it is seen as a victory of right over wrong. Yet the

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180. For example, only forty percent of the members of the 1981-1982 Texas legislature were lawyers. Clark, *Texas Legislators' Attitudes Toward the Legal Profession*, 45 TEX. BAR J. 571 (1982).

181. *See, e.g., id.*

182. *See, e.g.*, R. HARRIS, A SACRED TRUST (1966) (study of American Medical Association's efforts to block public health legislation).

183. *See supra* notes 135-61 and accompanying text.

decisions to adjust bar admission requirements, to integrate the bar, or not to place lawyers under administrative regulations are not questions of right and wrong; they are political and should be viewed as such.

CONCLUSION

In England and America before the Revolution, no single authority had control over the legal profession. In the century that followed, even with the advent of the doctrine of separation of powers, American courts and legislatures continued to share control, although ultimate power was probably thought to lie with the legislature. Toward the end of the nineteenth century courts began to assert their power to govern the practice of law, largely in order to protect the bar from external challenges. To do so, they appealed to two models of legal practice—the court and guild models. The New Deal era saw a challenge to the court model and an attempt to replace it with one that held attorneys responsible to their clients and to the public at large. After a period of hesitation, the courts nonetheless were able to overcome this effort and enunciate an even more comprehensive claim for judicial control over the profession than before. The 1960s and 1970s produced a challenge to the guild model. The attorney model that was advanced in the 1930s again was brought forth, this time to promote the interests of consumers of legal services. The outcome of these efforts remains uncertain, but their success clearly would prove beneficial to legal consumers.

While courts have continued to resist attacks on their power to control the legal profession, neither the court nor the guild model retains enough persuasive power to justify that control to the lay public. Lawyers cannot justify a claim for a special exemption from legislative jurisdiction; they should no longer be an American aristocracy.