

**Regulation of the Legal Profession, Federalism, and the Supreme Court:
Preserving the Independence of the Bar**

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Introduction

The Planning Committee for this Conference has crafted a daunting challenge for its participants by asking them to write a paper describing “The Three Most Important Features of My Country’s Legal System that Others Should Understand”. Upon a first reflection, the list of possibilities seems almost endless, and intellectual paralysis quickly sets in. Most of the participants, however, will eventually use the same filter to narrow the selection: our own teaching and scholarly interests. As a professor of legal ethics, I rarely entertain doubts about the crucial importance of the legal profession to society. In my view, democracy and the rule of law cannot exist in the absence of a strong and vibrant independent bar. An independent bar is crucial to protect individuals from overreaching by the State and mediate private conflicts.

It should come as little surprise then that the three features of the U.S. legal system that I have selected are the regulation of the legal profession, federalism, and the Supreme Court. This paper explores how federalism and the Supreme Court’s power to declare unconstitutional state actions regulating the practice of law have contributed to the current system of licensing, discipline, and professional responsibility. In concluding, it briefly examines the emerging forces that have the potential to play a highly influential role in shaping the regulation of the bar in the years to come.

I.

Federalism: Who Really Regulates the Legal Profession: The State Courts or the Organized Bar?

The doctrine of federalism is a foundational principle of the U.S. legal system. It is a mechanism for organizing, allocating, and policing the power of the central and state governments, two sovereigns co-existing within a single geographic unit. Moreover, since the very beginning of the Republic, the U.S. Supreme Court has played a pivotal role in managing and resolving conflicting claims of entitlement to power between those sovereigns.¹

While U.S. and foreign scholars have extensively analyzed multiple and varied applications of the doctrine of federalism, they have paid only modest and fleeting attention to how the doctrine has impacted the structure of the U.S. legal profession and the delivery of legal education. An appreciation of the impact is essential, however, as globalization continues to “flatten the world”,² inexorably leading to the

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¹ E.g., *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

² THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

emergence of a stateless legal profession and law school curricula only remotely tethered to the substance of any one country's laws. The first part of this paper argues that the Conference's subject matter, enriching the law school curriculum in an interrelated world, cannot proceed successfully without an appreciation for (1) the contradictions and inconsistencies existing between federalism as theoretically applied and federalism as actually exercised and (2) the Supreme Court's development of constitutional doctrine, limiting the states' ability to regulate the legal profession.

How power was to be shared by the central government and the states was among the most divisive issues at the Constitutional Convention of 1787. After extended debate, the Framers ultimately decided to resolve the issue by creating a central government limited by enumerated powers. For example, Article 1, Section 8 of the Constitution gave Congress the affirmative power to "regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." On the other hand, to reaffirm the limitation of enumerated powers, the Tenth Amendment added in 1791 as part of the Bill of Rights provided: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Not a single historical record suggests that the drafters of either the Constitution or the Bill of Rights gave so much as a passing thought as to how the federal structure of the new government would impact the regulation of the legal profession.³ The unstated understanding was clearly that the states would regulate the conduct of lawyers. While the states were in theory the sole overseers of the practice of law, they exercised that authority sparingly and in most instances not at all for almost a hundred years.⁴ Regulation -- to the extent that it existed -- was *ad hoc*. The organization of the bar was essentially "guildlike, based on local control and built on a restrictive system of personal alliances including marriage, paternal occupations, and extended apprenticeship."⁵ New modes for the delivery of legal services emerged in the last quarter of the nineteenth century in response to the industrialization of the economy and urbanization of the population. They included corporate law firms and in-house legal departments. While the state authorities assumed greater formal control during this period over the lawyers practicing within their boundaries, they showed little eagerness to exercise that control. They turned a blind eye to the lawyers practicing in corporate law firms and in in-house legal departments.

Reacting to this regulatory vacuum, lawyers began to band together in private associations for the purpose of controlling admissions, disciplining errant members, and promoting an ethic of professionalism.⁶ Among the most prominent of these

³ For the purpose of this essay, regulation means the exercise of control over the substantive content of a code of professional conduct and the rules and processes governing the admission and discipline of lawyers.

⁴ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 633-54 (1985). The power of the state courts to regulate the practice of law is generally considered an inherent power of the judiciary. Invoking the doctrine of separation of powers, the state courts have vigorously resisted attempts by the legislative and executive branches to regulate the conduct of lawyers. ABA/BNA *LAWYER'S MANUAL ON PROF'L CONDUCT* 201:101-109 (1996).

⁵ KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 212 (1989).

⁶ *Id.* 214-16.

organizations was the American Bar Association (ABA) formed in 1878. Regrettably, the laudable aims so loftily declaimed by the ABA and similar state organizations were often invoked to mask a strident anti-immigrant and anti-Semitic agenda.⁷ These organizations played an enormous role in persuading the state courts to impose higher educational standards on law school applicants and on law schools themselves. While these reforms nominally represented an exercise of independent judicial authority, the courts were in reality merely rubberstamping the private organizations' agenda of creating additional barriers to entry into the profession.⁸ Furthermore, these private organizations assumed almost complete control of the disciplinary system in the absence of any formal delegation by the courts and through local bar associations, a phenomenon described by law and economics scholars as "agency capture." As a practical matter, the power to regulate the legal profession reserved to the states through the Tenth Amendment was exercised by private organizations in the bar's interest not the public's.

The assumption of regulatory power by these private associations of lawyers went largely unchallenged by the states for almost a hundred years. Agency capture became the subject of intense unflattering publicity in 1970 when the ABA published a scathing report, describing the lawyer disciplinary system. Slowly over time, the state courts responded to the "scandalous situation"⁹ by assuming responsibility for the disciplinary system, creating an enforcement agency under their control, hiring professional staff, and imposing uniform sanctions.

Nonetheless, the historical legacy of non-action continues to this very day. With the possible exception of the disciplinary system, the states are quite circumspect in exercising the inherent power over the legal profession reserved to them by the 10th Amendment. For example, the states generally restrict admission to the bar to the graduates of ABA-accredited law schools.¹⁰ Consequently, it is the ABA, a private organization under the exclusive control of lawyers, that determines the standards for legal education not the states. The state courts are also responsible for adopting the standards governing the admission of lawyers who are already licensed in another state. The courts typically implement the local bar associations' recommendations with respect to these standards without performing a critical analysis. The recommendations are almost always tainted by self-interest, protectionism, and a fear of competition. The courts display a similar reflexive deference to the codes of lawyer conduct that are drafted by the ABA and state bar associations. Many provisions in these codes can be legitimately criticized as favoring the profession's interests over the public's. Only rarely do the courts draft their own rules of professional conduct or reject or modify the ones proposed to them.

⁷ JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 99-100 (1976).

⁸ CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 8 (1985).

⁹ ABA SPEC. COMM. ON EVA. OF DISCIPLINARY ENFORCEMENT, *PROBLEMS AND RECOMMENDATIONS* 1 (1970).

¹⁰ NATIONAL CONFERENCE OF BAR EXAMINERS AND AMERICAN BAR ASSOCIATION SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS* 2007 25-41 (2007).

In short, the doctrine of federalism as understood from 1781 through the twentieth century *allocates* the power to regulate the legal profession to the states. It does not *compel* them to exercise that power independently. While the formalities of control by the courts are prominently in place (*e.g.*, judicial rule making, supervision of the admission and disciplinary processes, etc.), private organizations continue to have a disproportionate impact at the state level.

II.

National Regulation of the Bar: The Limited Role of the Supreme Court

To date, only one organ of the central government, the United States Supreme Court, has been able to shape the regulation of the legal profession at a national level. Among the Court's most significant powers is the ability to declare unconstitutional state actions that contradict, undermine, or interfere with the rights guaranteed by the Constitution.¹¹ For example, the Court has extended the protection of the First Amendment to advertising by lawyers, striking down prohibitions in state codes of professional conduct.¹² It has also invoked the First Amendment to void unfavorable licensing decisions that denied applicants admission to the bar for impermissible reasons such as punishing them for their political views.¹³ It has relied upon the Due Process Clause of the Fourteenth Amendment to prevent disciplinary authorities from employing arbitrary procedures in reviewing complaints against lawyers¹⁴ and the Privilege and Immunities Clause of Article IV of the Constitution to eliminate residency requirements in state licensing requirements.¹⁵ It has even extended the protection of the Constitution to foreign lawyers, voiding a state's requirement of U.S. citizenship for admission to the bar.¹⁶

The Court's power, however, is constrained by its role in the constitutional system. It lacks the authority to regulate the legal profession affirmatively. The Supreme Court is constitutionally confined to the sidelines with respect to the pressing issues such as the abolishment of the state-based system of regulation of the legal profession and its replacement by a central system of licensing.

III.

Regulation of the Bar: New Actors on the National and International Scene

The *laissez faire* attitude of the states toward the regulation of the practice of law, the states' deference to the organized bar, and the Supreme Court's limited oversight have combined over the past two hundred years to foster the independence of the bar. Because the power to regulate was so diffuse and the power was actually

¹¹ The Court has on occasion interpreted federal statutes as barring certain types of state regulation. *E.g.*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (striking down a minimum-fee schedule imposed by a county bar association and enforced by the state bar association on the ground that it violated the federal anti-trust law).

¹² *E.g.*, *Bates. v. State Bar of Arizona*, 433 U.S. 350 (1977).

¹³ *E.g.*, *in re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).

¹⁴ *E.g.*, *in re Ruffalo*, 390 U.S. 544 (1968).

¹⁵ *E.g.*, *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988).

¹⁶ *E.g.*, *In re Griffiths*, 413 U.S. 717 (1973).

concentrated in the organized bar, it was extremely difficult for the central government or an individual state as a practical matter to coerce or threaten the legal profession in a meaningful way.

The continued independence of the bar is not guaranteed, however. Two new actors may upset the long standing allocation of power in which the states regulate the practice of law subject only to the Supreme Court's constitutional oversight: the legislative and executive branches of the United States government and the World Trade Organization.¹⁷ Until very recently, the central government displayed little interest in regulating the conduct of lawyers.¹⁸ As the economy became increasingly nationalized and state boundaries increasingly irrelevant, support for a central licensing system might have been expected, especially after World War II. Opposition by the organized bar and the states effectively squelched any suggestion that the fragmented and often dysfunctional system needed correction, however. Only the federal courts,¹⁹ the Office of Patent & Trademark,²⁰ and the Department of the Treasury²¹ displayed an affirmative interest in the regulation of lawyers.

In the 1990's, the United States experienced a series of massive corporate failures triggered by wide-spread fraud on the part of the companies' executives and outside advisors.²² Congress responded to the failures and frauds by enacting the Sarbanes-Oxley Act that made sweeping changes to the securities laws. Pursuant to the Act,²³ the Securities and Exchange Commission enacted regulations governing the conduct of lawyers who appeared before the Commission.²⁴ Despite claims to the contrary by the organized bar, little doubt exists that the provision of the Commerce Clause quoted at the outset of this essay authorizes Congress's action. Most commentators accept the proposition that Congress's power of preemption is actually much broader and could easily extend to regulation of all lawyers, displacing the current state-based system. The creation of a national bar and the elimination of state

¹⁷ ROBERT E. LUTZ, et al., TRANSNATIONAL LEGAL PRACTICE DEVELOPMENTS, 39 INT'L L.REV. 619 (2005).

¹⁸ In the late 1980's and 1990's, the Department of Justice, an agency of the Executive Branch of the central government, engaged in a heated battle with state regulators, insisting that the state disciplinary authorities lacked the authority to discipline lawyers employed by the federal government. Ultimately, Congress weighed in, passing legislation that favored state regulation. The dispute was an anomaly in the history of the regulation of the legal profession in the United States. Roy Simon, WASHINGTON STATE BAR TAKES ON THE SEC, N.Y. PROF. RES. REP., Oct. 2003, at 1.

¹⁹ For the most part, the federal courts have played a limited regulatory role. They generally deferred to the states with respect to the admission of lawyers, conditioning admission to the federal courts in part on a pre-existing admission to a state court. On occasion, they directly disciplined lawyers, relying on the courts' inherent authority to regulate the conduct of lawyers appearing before them, but they often referred questionable conduct to the state authorities. ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT 201:101-107 (1996).

²⁰ 37 C.F.R. §§ 10.1-.85 (2007).

²¹ 31 C.F.R. §§ 10.0-.51 (2007).

²² *E.g.*, NANCY B. RAPOPORT & BALA G. DHARAN, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (2004).

²³ 15 U.S.C. § 7245 (2002).

²⁴ 17 C.F.R. §§ 205.1-.7 (2007).

court control are thus theoretically possible and completely consistent with the doctrine of federalism.²⁵ Congressional regulation would undoubtedly facilitate multi-jurisdictional practice and the globalization of the legal profession.

The prospect that Congress will enact such legislation in the immediate future is slim. No influential constituency currently exists to promote this change, and any proposal for change would meet with fierce resistance by the states and bar organizations. It is much more likely that significant changes to the regulation of the legal profession will be forced by the WTO which is currently examining the extent to which the codes of professional conduct and licensing requirements imposed by the states constitute impermissible barriers to trade.²⁶ Trade negotiations, moreover, are conducted by the Office of the United States Trade Representative under the direction of the President. That office has no special duty to protect the independence of the legal profession. To it, the legal profession is simply a service profession, like accountancy or insurance.

In sum, while the independence of the bar is in no immediate danger of compromise, U.S. lawyers must remain diligent. Future corporate scandals implicating ethical norms such as confidentiality and conflicts of interest have the potential to prompt Congress to exercise its authority under the Commerce Clause and extend its reach, centralizing the regulation of the legal profession. International trade agreements may also weaken the states' power over the admission and licensing of lawyers.

²⁵ Simon, *supra* note 18.

²⁶ LAUREL S. TERRY, BUT WHAT WILL THE WTO DISCIPLINES APPLY TO? DISTINGUISHING AMONG MARKET ACCESS, NATIONAL TREATMENT AND ARTICLE VI:4 MEASURES WHEN APPLYING THE GATS TO LEGAL SERVICES, 2003 PROF. LAW. 83 (2004).