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## GOVERNMENT OF THE LEGAL PROFESSION: AN INHERENT JUDICIAL POWER APPROACH

LEROY JEFFERS\*

This article on the government of the practice of law as a learned profession will be in sharp contrast to the philosophy embodied in *Advertising Restrictions on Licensed Occupations: An Antitrust Approach*.<sup>1</sup> There will be no acknowledgement here that the privileged practice of the learned profession of the law should be simply reduced to another "licensed occupation." One thesis has it that the practice of law should be governed through application and enforcement of the strictures of the Sherman, Clayton and Federal Trade Commission Acts by the federal antitrust bureaucracy so as to equate it with the sale of eye glasses, prepackaged drugs and used automobiles. A second theorem is that the detailed regulation of the legal profession should vary with the shifting winds of legislative caprice imposing either reward or retribution as the composition and temperature of each succeeding state legislature may dictate. The third postulate presented here is that the governance of lawyers as officers of the court and of the state bar as an agency of the court is an inherent judicial power and an inescapable judicial duty squarely reposed by the constitutional separation of powers in the supreme court of the state.

The recent United States Supreme Court decision in *Bates v. State Bar*<sup>2</sup> was foreseen in Mr. Justice Powell's masterful and per-

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1. 8 ST. MARY'S L.J. 729 (1977).

2. \_\_\_\_ U.S. \_\_\_\_, 97 S. Ct. 2691, 53 L.Ed. 2d 810 (1977).

ceptive dissent as destined to "effect profound changes in the practice of law, viewed for centuries as a learned profession."<sup>3</sup> Superficially there may seem little relationship between this evaluation and the "Sunset Act" provision to terminate the continued existence of the statutory State Bar of Texas in 1979 unless the Texas Legislature is sufficiently cajoled by then to grant it amnesty or stay of execution.<sup>4</sup> The connection indeed is there. At the heart of the Supreme Court decision and of the Texas statute is the ultimate and overpowering question: *By whom is the practice of law to be governed?*

### THE FEDERAL ANTITRUST APPROACH

The recent *Bates v. State Bar*, while according limited first amendment protection to lawyer advertising of "routine legal services," within peripheries which can only be defined by subsequent judicial decision, nevertheless with resounding unanimity held that the prohibition of lawyer advertising by a code provision promulgated by the state supreme court on the initiative of its agency, a unified State Bar, constituted *state action* beyond the ambit and application of the Sherman Antitrust Act under the vigorously reaffirmed doctrine of *Parker v. Brown*.<sup>5</sup>

Prior to *Bates*, ardent proponents of applying federal antitrust prohibitions to code provisions limiting lawyer advertising had labored mightily to parlay the decision in *Goldfarb v. Virginia State Bar*,<sup>6</sup> a narrow holding that fixing minimum attorney's fees on interstate residential real estate transactions without a state supreme court order directing or approving it violates section 1 of the Sherman Act, into a broad federal antitrust prohibition of numerous provisions of the Code of Professional Responsibility regulating lawyer conduct, including that strictly limiting lawyer advertising.<sup>7</sup> This wild inflation of the *Goldfarb* holding occurred despite the Supreme Court's specific caveat against it:

3. *Id.* at \_\_\_\_, 97 S. Ct. at 2712, 53 L.Ed. 2d at 840 (Powell, J., dissenting in part).

4. 1977 Tex. Gen. Laws, ch. 735, 2.019, at 1834 (*amending* TEX. REV. CIV. STAT. ANN. art. 320a-1, § 2A (Vernon 1973)).

5. 317 U.S. 341 (1943).

6. 421 U.S. 773 (1975).

7. See Boomer, Chamberlain, Horn, Weart & Winston, *Advertising Restrictions On Licensed Occupations: An Antitrust Approach*, 8 ST. MARY'S L.J. 729, 745 (1977) [hereinafter cited as *Advertising Restrictions*]; Morrison, *Institute on Advertising Within the Legal Profession-Pro*, 29 OKLA. L. REV. 609, 613-14 (1976); Sims, *Advertising By Attorneys: Two Views*, 3 VA. B.A.J. 10, 10-11 (1977).

It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the profession antitrust concepts which originated in other areas. The public service aspect and other features of the professions may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.<sup>8</sup>

*Parker v. Brown* placed a raisin production proration program, proposed by producers and adopted pursuant to state law following referendum approval by producers, beyond the ambit of the federal antitrust laws as immune *state action*. In *Goldfarb* the Supreme Court did not apply *Parker v. Brown* "because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anti-competitive activities of either respondent."<sup>9</sup>

Following *Goldfarb* the Supreme Court again declined to apply *Parker v. Brown* in *Cantor v. Detroit Edison Co.*<sup>10</sup> in which a state regulatory program allowing the free distribution of electric lightbulbs to residential customers by an electric utility was denied state action immunity.<sup>11</sup> Even though the lightbulb provision was contained in a tariff proposed and filed by the utility with the regulatory commission, the action of the commission did not require the free distribution of the lightbulbs but left such to the option of the utility. Further, the lightbulb provision was not an integral part of the state regulatory program.<sup>12</sup> Numerous proponents of lawyer advertising, including Deputy Assistant Attorney General Joe Sims and Federal Trade Commission staff members, coupled *Cantor* with *Goldfarb* in the enthusiastic claim that they imposed federal antitrust prohibitions upon the code provision on lawyer advertising.<sup>13</sup>

Infected by the extravagant claims made for the import of *Goldfarb* and *Cantor*, the *American Bar Association Journal* somewhat gleefully opined: "*Parker v. Brown*, like many another principle on which the Bar relied to defend its conduct, is proving less an oak and more a reed as the consumer wind rises."<sup>14</sup> With mounting

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8. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975).

9. *Id.* at 790.

10. 428 U.S. 579 (1976).

11. *Id.* at 598.

12. *Id.* at 597-98.

13. *Advertising Restrictions*, *supra* note 6, at 746-47; Sims, *Advertising By Attorneys: Two Views*, 3 VA. B.A.J. 10, 10-11 (1977).

14. 63 A.B.A.J. 786 (1977).

confidence and enthusiasm, federal antitrust enforcement authorities began to predict that state supreme court regulation through a unified State Bar as its agency would be deposed by federal antitrust regulation in the traditional areas of standards of legal education, ratings of law schools, standards of admission to the Bar, examination and licensing of lawyers, unauthorized practice of law prohibitions, legal specialization, and grievance and disciplinary procedures. The easy assertion of these analysts was that federal antitrust principles would not permit lawyer participation in these areas where only lawyers have expertise, because self-regulation is an antitrust anathema.<sup>15</sup>

The unanimous opinion in *Bates* that *Parker v. Brown* is not only alive and viable but that it precludes a finding of a Sherman Act violation in the state prohibition against lawyer advertising seems to torpedo the glib claims of pervasive antitrust regulation of the legal profession and of law practice in numerous areas that have historically been in the exclusive province of the state judiciary. *Goldfarb* and *Cantor* were found easily distinguishable, and state action immunity was found to apply because: "Although the state bar plays a part in the enforcement of the rules, its role is completely defined by the Court; the appellee acts as the agent of the court under its continuous supervision."<sup>16</sup> Further:

Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctions in *Cantor*. . . . The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed reexamination by the policymaker—the Arizona Supreme Court—in enforcement proceedings.<sup>17</sup>

*Bates* thus leaves no room for such dodges of the application of the *Parker v. Brown* principle as testing its applicability by "the degree of private involvement" in *state action*.<sup>18</sup> It surely leaves no room for supererogation to the Federal Trade Commission Act of a special and superior status above the Sherman Act and the Clayton Act exempting it from the application of the *Parker v. Brown* rule.<sup>19</sup>

15. See 286 TRADE REG. REP. (CCH) 3 (June 20, 1977).

16. *Bates v. State Bar*, \_\_\_ U.S. \_\_\_, \_\_\_, 97 S. Ct. 2691, 2697, 53 L.Ed. 2d 810, 822 (1977).

17. *Id.* at \_\_\_, 97 S. Ct. at 2698, 53 L.Ed. 2d at 822.

18. *Advertising Restrictions*, *supra* note 6, at 748-54.

19. *Id.* at 751.

The attempt of the FTC staffers<sup>20</sup> to analogize the antitrust issue on lawyer advertising with the first amendment issue posed in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>21</sup> is totally nullified by the *Bates* decision unanimously finding no antitrust violation but by a five to four vote finding a first amendment infringement.

The strenuous efforts of lawyer advertising proponents to ban all "private involvement" such as that by private bar associations in opposition to lawyer advertising will not withstand either antitrust or constitutional scrutiny. It is long established that private combinations to influence or to induce governmental action, however motivated, are likewise beyond the ambit and application of the federal antitrust laws. This principle has been well established as landmark law by the United States Supreme Court in *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*<sup>22</sup> and *United Mine Workers v. Pennington*<sup>23</sup> and their progeny. It seems clear that any effort by a private bar association, local or national, to influence and induce any governmental action in the lawyer advertising area or in any area of the governance and regulation of the legal profession and the practice of law is clearly exempt from the application of the federal antitrust laws. It would seem self-evident that it must be a hornbook correlative proposition that the first amendment protection of limited lawyer advertising is equally matched and balanced by a corresponding right to scorn, condemn and discourage it as being unprofessional and contrary to the public interest short of the invocation of a boycott or the taking of coercive, disciplinary or other retaliatory action. This is no different from the simple truth that the first amendment right to publish a book or to stage a play is matched by the correlative and corresponding first amendment right of the critics to take it apart.

The *Bates* decision, designated by the majority opinion as a "narrow one,"<sup>24</sup> expressly leaves open vast areas of the lawyer advertising field as appropriate subjects for "state action" free from anti-trust stricture when taken by state supreme courts and their agencies, unified State Bars, though influenced and induced by private bar associations, national or local. These areas which the majority

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20. *Id.* at 742.

21. 425 U.S. 748 (1976).

22. 365 U.S. 127 (1961).

23. 381 U.S. 657 (1965).

24. *Bates v. State Bar*, \_\_\_\_ U.S. \_\_\_\_, 97 S. Ct. 2691, 2700, 53 L.Ed. 2d 810, 825 (1977).

opinion expressly reserved from first amendment protection and in which State Bars and state supreme courts may act, and in which private bar associations may seek to induce action, free from federal antitrust controls, may be enumerated and amplified as follows:

(1) "Advertising claims relating to the *quality* of legal services" for the reason that such claims "probably are not susceptible to precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false."<sup>25</sup> Since the Supreme Court left "that issue for another day,"<sup>26</sup> the present code provision, which would clearly prohibit quality claims, is still effective.

(2) The narrow opinion expressly does "not resolve the problems associated with in-person solicitation of clients" for the reason that "[a]ctivity of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising." Since the Supreme Court itself declared that "this issue also is not before us," it necessarily follows that the existing code provision prohibiting solicitation remains fully effective.<sup>27</sup>

(3) Left open also are the "special problems of advertising on the electronic broadcast media" which the Supreme Court declares "will warrant special consideration."<sup>28</sup> Again, the existing code provision which would prohibit radio or television advertising is clearly operative.

(4) The majority opinion affirmatively invites state supreme court and State Bar action to restrain "advertising that is false, deceptive or misleading" and to impose "reasonable restraints on the time, place and manner of advertising."<sup>29</sup> It is these "reservations" in the majority opinion which Mr. Justice Powell's powerful dissent deemed "worthy of emphasis since they may serve to narrow its ultimate reach" which he couples with the conclusion that "if we are to have price advertisement of legal services, the public interest will require the most particularized regulation."<sup>30</sup>

The majority emphasized that it was holding only that "the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services" has first

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25. *Id.* at \_\_\_\_, 97 S. Ct. at 2700, 53 L.Ed. 2d at 825.

26. *Id.* at \_\_\_\_, 97 S. Ct. at 2700, 53 L.Ed. 2d at 825.

27. *Id.* at \_\_\_\_, 97 S. Ct. at 2700, 53 L.Ed. 2d at 825.

28. *Id.* at \_\_\_\_, 97 S. Ct. at 2708, 2709, 53 L.Ed. 2d at 835, 836.

29. *Id.* at \_\_\_\_, 97 S. Ct. at 2708, 2709, 53 L.Ed. 2d at 835, 936.

30. *Id.* at \_\_\_\_, 97 S. Ct. at 2717, 2718, 53 L.Ed. 2d at 846, 848.

amendment protection.<sup>31</sup> "Routine legal services," which perhaps may best be defined like "minor surgery" as that performed on somebody else, was in fact undefined in the majority opinion except by enumeration of: "the simple adoption, the uncontested personal bankruptcy, the change of name, and the like."<sup>32</sup> The abuses which quickly followed the announcement of the majority opinion, for example, publication in Texas metropolitan dailies of advertisements carrying fees on certain enumerated legal services with a telephone number only without giving either the name or office address of the lawyer and the listing as a deceptive lure of Minimum Fees,<sup>33</sup> already verifies Mr. Justice Powell's fear that the majority opinion "seriously understates the difficulties, and overestimates the capabilities of the Bar—or indeed of any agency, public or private—to assure with a reasonable degree of effectiveness that price advertising can at the same time be both unrestrained and truthful."<sup>34</sup> Nevertheless, great expanses of responsibility to the public are specifically opened up by the majority opinion for action by state supreme courts and State Bars who may be properly persuaded and influenced by individual lawyers and private bar associations as to the "state action" which should be taken.

The proposed amendments<sup>35</sup> to the code hastily adopted by the House of Delegates of the American Bar Association at its August, 1977, meeting before their contents had even been made known to the lawyer members of the ABA are, of course, binding upon no one. They represent nothing more than the opinions and recommendations of the small ad hoc committee that drafted them and that induced slightly over 100 members of the House of Delegates to vote for their adoption. It is submitted by way of private persuasion and, hopefully, inducement that a sounder, better reasoned statement of policy response to the *Bates* decision for state supreme courts and unified State Bars in general, and the State Bar of Texas and the Supreme Court of Texas in particular, would be the following:

While advertising by individual lawyers, as distinguished from institutional advertising by bar associations, lawyer referral services,

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31. *Id.* at \_\_\_\_, 97 S. Ct. at 2709, 53 L.Ed. 2d at 836.

32. *Id.* at \_\_\_\_, 97 S. Ct. at 2703, 53 L.Ed. 2d at 828.

33. The Houston Post, August 14, 1977, at 11B, col. 4; The Houston Chronicle, August 27, 1977, at 13, col. 5.

34. *Bates v. State Bar*, \_\_ U.S. \_\_\_\_, \_\_\_\_, 97 S. Ct. 2691, 2715, 53 L.Ed. 2d 810, 844 (1977).

35. "Proposal A" of Ad Hoc Committee Adopted by ABA House of Delegates, August 10, 1977.



and group legal service plans, is deemed unprofessional and something that should be discouraged in the public interest, no disciplinary action can or will be taken against individual lawyer newspaper advertising of fees that will be charged for routine legal services, when such advertising is not false, deceptive or misleading. The United States Supreme Court in *Bates and O'Steen v. State Bar of Arizona* has accorded first amendment protection to this type of newspaper advertising. It is recognized that only future judicial decisions can determine the exact limitations of and the guidelines to be followed in connection with such First Amendment protection. As such limits and guidelines are developed, the State Bar of Texas will, of course, adhere to them in its disciplinary procedures.

Since the ABA action, identified as its Proposal A, represents unnecessary panic-button action that goes far beyond anything mandated, indicated or warranted by the *Bates* decision, by for example, placing no limitation on advertising the "quality" of legal services and by permitting radio advertising and in effect inviting television advertising, it is submitted that it should not presently receive serious consideration for adoption by the Supreme Court of Texas or its agency, the State Bar of Texas.

The antitrust approach to government of the legal profession has been substantially aborted not only in the area of lawyer advertising, but in the other vital areas relating to the legal profession and to the practice of law which the supreme courts of the states and their agencies, the unified State Bars, have historically governed through state action.

#### THE STATE STATUTORY APPROACH

Since as early as 1919 the Board of Law Examiners, appointed by the Supreme Court of Texas and acting in effect as its agency under rules promulgated by it, has governed the examination and certification of persons seeking to be licensed by the Supreme Court of Texas to practice law in the State of Texas.<sup>36</sup> In 1939 the State Bar Act established the State Bar as "an administrative agency of the Judicial Department of the state, with power to contract with relation to its own affairs and which may sue and be sued and have such other powers as are reasonably necessary to carry out the purposes of this Act."<sup>37</sup> It is provided that:

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36. TEX. REV. CIV. STAT. ANN. arts. 304-20 (Vernon 1973).

37. *Id.* art. 320a-1, § 2(a).

All persons who are now or who shall hereafter be licensed to practice law in this State shall constitute and be members of the State Bar, and shall be subject to the provisions hereof and the rules adopted by the Supreme Court of Texas; and all persons not members of the State Bar are hereby prohibited from practicing law in this State.<sup>38</sup>

The State Bar Act provides for the administration of the State Bar by elected officers and an elected Board of Directors and then provides:

From time to time as to the Court may seem proper, the Supreme Court of Texas shall prepare and propose rules and regulations for disciplining, suspending, and disbaring attorneys at law; for the operation, maintenance and conduct of the State Bar; and prescribing a code of ethics governing the professional conduct of attorneys at law.<sup>39</sup>

The statute further provides for the submission of any such rules and regulations to a mail ballot referendum of the members of the State Bar and adoptions must be by a majority of the votes cast in an election at which at least fifty-one percent of the members shall have voted. Following such a vote of approval, such rules and regulations "shall be by said Court declared and adopted and shall be promulgated by said Court and shall become immediately effective."<sup>40</sup> Pursuant to this statutory provision, rules governing the State Bar of Texas have been adopted by the members of the State Bar of Texas and promulgated by the Supreme Court of Texas. These rules provide for governing the State Bar of Texas, for grievance and disciplinary action, for the various provisions in the Code of Professional Responsibility, and for Disciplinary Rules, including those relating to the Unauthorized Practice of the Law.<sup>41</sup> These rules governing the State Bar of Texas, Code of Professional Responsibility and Disciplinary Rules have the force of law. They represent *state action* beyond the ambit of the federal antitrust laws and obviously actions taken under their authority and pursuant to their express provisions, including referendum action by the membership, are clearly beyond the ambit of the federal antitrust laws under the rule of *Parker v. Brown* as reaffirmed and strengthened in *Bates v. State Bar*.

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38. *Id.* art. 320a-1, § 3.

39. *Id.* art. 320a-1, § 4(a).

40. *Id.* art. 320a-1, § 4(a).

41. *Id.* Title 14 App. (1973).

For almost forty years, 1939-1977, in the case of the State Bar Act, and for almost sixty years, from 1919-1977, in the case of the Board of Law Examiners Act, the Texas Legislature largely left the direction of these agencies to the Supreme Court of Texas in accordance with the delegating provisions of the statute. During the regular session of the 65th Legislature in 1977, numerous bills were introduced relating to both agencies but particularly to the State Bar of Texas. These range from bills limiting the maximum amount of State Bar dues, placing statutory limits on the compensation of State Bar officials, prohibiting the State Bar from advocating or opposing legislation, and requiring State Bar funds to be paid into the general fund and subjected to the legislative appropriation process to a bill repealing the State Bar Act. None of these bills was enacted, but both the Board of Law Examiners and the State Bar were included as agencies covered by the so-called Texas Sunset Act<sup>42</sup> under which their continued existence will be terminated unless they justify their being with the Commission created by the statute on the basis of thirteen criteria enumerated in section 1.10 of the Act.<sup>43</sup>

Section 1.06 of the Texas Sunset Act required the Board of Law Examiners and the State Bar before October 30, 1977, to report to the Commission on the application to each of the thirteen criteria contained in section 1.10 of the Act.<sup>44</sup> One of these criteria is: "[T]he extent to which the agency has encouraged participation by the public in making its rules and decisions as opposed to participation solely by those it regulates, and the extent to which the public participation has resulted in rules compatible with the objectives of the agency."

A giant issue has now been sharply raised as to whether a statutory basis is any longer satisfactory for the government of the legal profession and the practice of law. There is a much more acceptable alternative.

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42. 1977 Tex. Gen. Laws, ch. 735, at 1826. Effective August 29, 1977, the Texas Sunset Act added article 304(a) to the statutes, providing: "The Board of Law Examiners is subject to the Texas Sunset Act; and unless continued in existence as provided by that Act the board is abolished effective September 1, 1979." *Id.* at 1834. Section 2A is added to the State Bar Act as follows: "The State Bar is subject to the Texas Sunset Act; and unless continued in existence as provided by that Act the State Bar is abolished, and this Act expires effective September 1, 1979." *Id.* at 1834.

43. *Id.* at 1829.

44. *Id.* at 1829.

## THE INHERENT JUDICIAL POWER APPROACH

Implicit recognition of the inherent power of the state judiciary to govern the legal profession and the practice of law may be found in numerous assertions of the United States Supreme Court. In *Goldfarb* it is said:

The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." See *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 383 (1963); *Cohen v. Hurley*, 366 U.S. 117, 123-24 (1961); *Law Students Research Council v. Wadmond*, 401 U.S. 154, 157 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.<sup>45</sup>

In *Bates*, after quoting the language from *Goldfarb* that "in holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions," the majority opinion stated: "Allowing the instant Sherman Act challenge to the Disciplinary Rule would have precisely that undesired effect."<sup>46</sup>

Again in *Bates* the majority opinion, in refusing to apply the Sherman Act to the code provision on advertising promulgated by the Supreme Court of Arizona, states:

The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. *In re Wilson*, 106 Ariz. 34, 470 P.2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.<sup>47</sup>

Again the majority stated:

In the instant case, by contrast, the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B). That Court is the ultimate body wielding the State's power over the practice of law, see Ariz. Const. Art. 3; *In re Bailey*, 30 Ariz. 407, 248 P.29 (1926), and,

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45. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792-93 (1975).

46. *Bates v. State Bar*, \_\_\_ U.S. \_\_\_, \_\_\_, 97 S. Ct. 2691, 2697 n.11, 53 L.Ed. 2d 810, 821 n.11 (1977).

47. *Id.* at \_\_\_, 97 S. Ct. at 2697, 53 L.Ed. 2d at 821-22.

thus, the restraint is "compelled by direction of the State acting as a sovereign."<sup>48</sup>

Chief Justice Burger seemed to recognize the inherent primary responsibility of the state courts in the area, when he said in his *Bates* dissent: "The Court thus takes a great leap into an unexplored, sensitive regulatory area where the legal profession and the courts have not yet learned to crawl, let alone to stand up or walk."<sup>49</sup>

Clearly, Mr. Justice Powell recognized it when he asserted in his dissent: "The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective States to oversee the regulation of the profession have been weakened."<sup>50</sup> The Powell dissent reasserts it again as follows:

There are some 400,000 lawyers in this country. They have been licensed by the States, and the organized bars within the States—operating under Codes approved by the highest courts acting pursuant to statutory authority—have had the primary responsibility for assuring compliance with professional ethics and standards. The traditional means have been disciplinary proceedings conducted initially by voluntary bar committees subject to judicial review. In view of the sheer size of the profession, the existence of a multiplicity of jurisdictions, and the problems inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement in this country has proven to be extremely difficult. The Court's almost casual assumption that its authorization of price advertising can be policed effectively by the Bar reflects a striking underappreciation of the nature and magnitude of the disciplinary problem.<sup>51</sup>

On this point, the Powell dissent concludes: "The area into which the Court now ventures has, until today, largely been left to self-regulation by the profession within the framework of canons or standards of conduct prescribed by the respective States and enforced where necessary by the courts."<sup>52</sup>

The inherent judicial power of the Supreme Court of Texas to govern the legal profession and to regulate the practice of law stems from the separation of the powers of government contained in Article II of the Constitution of Texas as follows:

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48. *Id.* at \_\_\_\_, 97 S. Ct. at 2697, 53 L.Ed. 2d at 821.

49. *Id.* at \_\_\_\_, 97 S. Ct. at 2711, 53 L.Ed. 2d at 839 (Burger, J., dissenting in part).

50. *Id.* at \_\_\_\_, 97 S. Ct. at 2712, 53 L.Ed. 2d at 840 (Powell, J., dissenting in part).

51. *Id.* at \_\_\_\_, 97 S. Ct. at 2715, 53 L.Ed. 2d at 844.

52. *Id.* at \_\_\_\_, 97 S. Ct. at 2718, 53 L.Ed. 2d at 848.

The power of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

The thesis of this approach has as its major premise that the power of the government of the State of Texas to govern the legal profession and to regulate the practice of law is Judicial and is confined by Article II of the Constitution of Texas to the Judicial Department. The minor premise is that there are no "instances" in the Constitution of Texas where the exercise of any power over the government of the legal profession or over the regulation of the practice of law is "expressly permitted" to be exercised by the Legislative or by the Executive Department. The conclusion is that the constitutional power to govern the legal profession and to regulate the practice of law in Texas is vested exclusively in the Judicial Department. There is a great and growing body of judicial authority supporting this proposition.

A recent powerful assertion of inherent judicial power to govern the legal profession and the law practice is *In re Washington State Bar Association*,<sup>53</sup> in which the Washington State Auditor was prohibited from a post-audit of the unified state bar pursuant to a statute providing for post-audit of "state agencies." The holding was based *inter alia* upon the proposition "that the regulation of the practice of law in this state is within the inherent power of this Court."<sup>54</sup> The Washington Supreme Court then stated: "This is the holding of the vast majority of courts in this country that have considered this issue."<sup>55</sup>

The Washington Supreme Court had earlier said in *State ex rel. Schwab v. Washington State Bar Association*<sup>56</sup> that "this court does not share the power of discipline, disbarment, suspension or reinstatement with either the legislature or the state bar association.

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53. 548 P.2d 310 (Wash. 1976) (en banc).

54. *Id.* at 315.

55. *Id.* at 315; see, e.g., *In re Kaufman*, 206 P.2d 528, 539 (Idaho 1949); *Public Serv. Comm'n v. Hahn Transp., Inc.*, 253 A.2d 845, 852 (Md. 1969); *In re Patton*, 519 P.2d 288, 290 (N.M. 1974).

56. 493 P.2d 1237 (Wash. 1972) (en banc).

The ultimate constitutional power clearly lies within the *sole jurisdiction* of the Supreme Court" and that "membership in the state bar association and authorization to continue in the practice of law coexist under the aegis of one authority, the Supreme Court."<sup>57</sup> It was held in that case that the fact that the State Bar Act designated the State Bar as an "agency of government" did not permit it to be treated as one of the "state executive offices."<sup>58</sup> The decision emphasized "the fact that in many states the integration of the state bar has been accomplished by order of the supreme court of that state, without the necessity of legislative action" and in that connection sets out: "By 1971 eight states had integrated their bars by a supreme court rule acting under the inherent power to regulate the practice of law, and by necessary inference, the conduct and activities of the bar as an entity." Nothing in our constitution prohibits this court from the exercise of its inherent power in this manner as well. It was not necessary, therefore, for the legislature to act to accomplish the purposes achieved by the 1933 legislation. The power to accomplish the integration of the bar, its supervision and regulation is found first in this court, not the legislature. The legislature's characterization of the bar as an 'agency of the state' does not deprive this court of its right of control of the bar and its functions as a separate, independent branch of government."<sup>59</sup>

The Minnesota Supreme Court struck down a statute which sought to divert state bar membership dues into the general revenue fund of the state and subject it to legislative appropriation. In *Sharood v. Hatfield*,<sup>60</sup> it held that despite past acquiescence in regulatory statutes relating to the practice of law, this statute was being held unconstitutional as an unlawful usurpation of judicial power under the constitutional provision for separation of powers. It asserted that "the power to make the necessary rules and regulations governing the bar was intended to be vested exclusively in the supreme court, free from the dangers of encroachment either by the legislative or executive branches."<sup>61</sup>

Subsequent to the *Schwab* decision, the Washington Supreme Court reaffirmed "the fact that the source of the court's power to

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57. *Id.* at 1239.

58. *Id.* at 1240.

59. *Id.* at 1240 citing Hourihan, *The Unified Bar*, 38 D.C.B.J. 25, 27 (1971).

60. 210 N.W.2d 275 (Minn. 1973).

61. *Id.* at 280 (quoting *In re Integration of Bar of Minn.*, 12 N.W.2d 515, 516 (Minn. 1943)).

admit, enroll, disbar and discipline is exclusively in the Supreme Court as one of its inherent powers."<sup>62</sup> In another recent case asserting the inherent power of the state supreme court to govern the practice of law, *Ross v. Industrial Commission*,<sup>63</sup> it was held that the determination of the boundaries of what constitutes the illegal practice of law "is entrusted to the exclusive authority of the Colorado Supreme Court."<sup>64</sup> Again in *Mendincino v. Whitcurch*,<sup>65</sup> it was held that the Wyoming Supreme Court was not bound by the Administrative Procedure Act in the handling of lawyer discipline cases because "inherently, constitutionally, statutorially and by our own rules [the Supreme Court is] charged with the supervision of the attorneys who practice in our courts."<sup>66</sup>

The predominant line of cases holds that the supreme court of the state has inherent power to establish a unified bar and to govern the practice of law.<sup>67</sup>

*In re Integrating the Bar*,<sup>68</sup> is a decision by the Arkansas Supreme Court that it had inherent power to unify the bar.<sup>69</sup> *In re Houston*,<sup>70</sup> the Supreme Court of Alaska held that the legislature could not establish standards for the admission of attorneys to practice law because the establishment of such standards was an inherent power of the supreme court.<sup>71</sup> In *Richmond Association of Credit Men Inc. v. Bar Association*,<sup>72</sup> the Virginia Supreme Court held that it had inherent power to supervise the conduct of the state's attorneys.<sup>73</sup> Similarly, in *Collins v. Godfrey*,<sup>74</sup> the Massachusetts court held that the constitutional separation of powers vested the ultimate power

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62. *In re Schatz*, 497 P.2d 153, 155 (Wash. 1972) (en banc); see *State v. Cook*, 525 P.2d 761, 763 (Wash. 1974) (en banc).

63. 566 P.2d 367 (Colo. Ct. App. 1977).

64. *Id.* at 369.

65. 565 P.2d 460 (Wyo. 1977).

66. *Id.* at 475.

67. *In re Fla. State Bar Ass'n*, 186 So. 280, 285 (Fla. 1949) (en banc); *Wallace v. Wallace*, 166 S.E.2d 718, 723 (Ga.), cert. denied, 396 U.S. 939 (1969); *In re Richards*, 63 S.W.2d 672, 675 (Mo. 1933) (en banc); *In re Integration of Neb. State Bar Ass'n*, 275 N.W. 265, 268 (Neb. 1937); *In re Unified N.H. Bar*, 285 A.2d 792, 793 (N.H. 1973); *In re Unification N.H. Bar*, 248 A.2d 709, 712 (N.H. 1968); *In re Intregation of State Bar of Okla.*, 95 P.2d 113, 114 (Okla. 1939); *In re R.I. Bar Ass'n*, 306 A.2d 199 (R.I. 1973).

68. 259 S.W.2d 144 (Ark. 1953).

69. *Id.* at 145.

70. 378 P.2d 644 (Alas. 1963).

71. *Id.* at 645.

72. 189 S.E. 153 (Va. 1937).

73. *Id.* at 157.

74. 87 N.E.2d 838 (Mass. 1949).



and governance and the general control over the practice of law in the judicial department.<sup>75</sup> Other cases have held that the supreme court of the state has inherent power to unify and to govern the state bar without a statute, even though such action was not taken by the court.<sup>76</sup>

The principle that the supreme court of the state has inherent judicial power, under the constitutional separation of powers, to establish a unified State Bar and otherwise to govern the legal profession and to regulate the practice of law in all matters, including standards of admission, examinations, licensing, grievances and discipline, canons of ethics and the regulation of the unauthorized practice of law, flows at the crest of the rising stream of judicial decisions to this effect. This truth inevitably leads to the conclusion that the best interests of the public and the profession would both be served by permitting the Texas Sunset Act to run its course to the statutory demise of the Board of Law Examiners and the State Bar of Texas with the Supreme Court of Texas in the interim being petitioned to exercise its inherent judicial power and to discharge its inescapable judicial duty by establishing both agencies by orders of the supreme court.

#### PHILOSOPHY OF THE LEGAL PROFESSION

The approach to government of the bar which will be embraced is dependent upon the philosophy of the legal profession to which commitment is made. Those who regard the legal profession as just another "licensed occupation" or as a "legal services industry" engaged in the "delivery of legal services" to consumers comparable to the delivery of sewer and water pipe services by a plumber will prefer the federal antitrust approach or the state statutory approach dependent upon political preference for federal or state controls. Commitment to the inherent judicial power approach will be grounded upon a philosophy of the legal profession best expounded by Roscoe Pound in his monumental work *Jurisprudence*. Such philosophy as there stated includes:

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75. *Id.* at 841.

76. *In re* Integration of the Bar of Hawaii, 432 P.2d 887, 888 (Hawaii 1967); *In re* Mundy, 11 So.2d 398, 400 (La. 1942); *In re* Integration of the Bar of Minn., 12 N.W.2d 515, 518 (Minn. 1943); *Integration of Bar Case*, 11 N.W.2d 604, 625 (Wis. 1943).

A profession is a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because incidentally it may be a means of livelihood.

. . . . .  
A profession, such as the ministry, medicine, law, teaching, is much more than a calling which has a certain traditional dignity. Certain other callings in recent times have achieved or claim a like dignity, but lack the essential primary purpose. For example, if an engineer discovers a new process or invents a new mechanical device he may obtain a patent and retain for himself a profitable monopoly. If, on the other hand, a physician discovers a new specific for a disease or a surgeon invents a new surgical procedure they each publish their discovery or invention to the profession and so to the world. If a lawyer has learned through research or experience something useful to the profession and so to the administration of justice he publishes it in a legal periodical or expounds it before a bar association or in a lecture to law students. It is not his property. He may publish it in a copyrighted book and so have rights to the literary form in which he put it. But the process or method or developed principle he has worked out belongs to the world.<sup>77</sup>

The Pound philosophy deals with the antitrust approach to the government of the legal profession as follows:

There is no such thing as competition for clientage in a profession. Every lawyer should exert himself fully to do his tasks of advice, representation, and advocacy to the best of his ability. But competition with fellow members of the profession in any other way is forbidden. Competition belongs to activities which are primarily acquisitive. It is not allowable in those primarily for public service.<sup>78</sup>

The remaining contents of the Pound concept of the legal profession are stated as follows: "Next to the idea of public service the important ideas in a profession are organization and pursuit of a learned art."<sup>79</sup>

Pound refers repeatedly to the deprofessionalization of the law practice in the nineteenth century as the "era of decadence" which is described in terms hauntingly applicable to a growing movement today: "This was the lingering effect of a general movement to deprofessionalize the traditionally professional callings and put all callings in one category of money-making activities which was char-

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77. 5 R. POUND, JURISPRUDENCE 676-77 (1959).

78. *Id.* at 677-78.

79. *Id.* at 678.

acteristic of frontier modes of thought in the formative era of our institutions."<sup>80</sup>

For those who would straitjacket the legal profession with statutory restraints and regulations, Pound has this answer:

Professions are learned from the nature of the art professed. But they have also a cultural ideal side which furthers the exercise of the art. Problems of human relations in society, problems of disease, problems of the upright life guided by religion are to be dealt with by the resources of cultivated intelligence by lawyer, physician and clergyman. *But this was not understood in the United States in the frontier era.* There was a feeling that professions were undemocratic and un-American. *Legislation took training and admission to practice out of the hands of the bar.*<sup>81</sup>

Pound further declared prophetically that "today the idea of a profession is again seriously threatened"<sup>82</sup> and identified the political nature of the threat as follows:

Moreover the endeavor of many callings today to be classed as professions although primarily money-making in purpose and spirit must be taken into account. The movement to elevate the standards of business and of all callings is a worthy one. But in elevating these vigilance is needed that the purpose is not achieved by pulling down the standards of the old recognized professions to a common level with the newer ones. *One need not add that the professional tradition cannot be replaced by a political tradition of office holders owing primary allegiance to political parties and depending for advancement on the favor of political leaders.*<sup>83</sup>

Finally, Pound hails the "revival of professional organization for promoting the practice of a learned art in the spirit of a public service and advancing the administration of justice according to law."<sup>84</sup> He credits the American Bar Association with giving the impetus "toward the final stage of reprofessionalization before the penultimate stage was completed."<sup>85</sup> Penultimate reprofessionalization is described as beginning with "the first state bar to be integrated—i.e. organized as an inclusive body of all those practicing in the courts as representatives for litigation or doing any of the

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80. *Id.* at 678.

81. *Id.* at 679 (emphasis added).

82. *Id.* at 680.

83. *Id.* at 680 (emphasis added).

84. *Id.* at 693.

85. *Id.* at 706.

work of attorney, advocate, or counselor” leading toward the ultimate goal of full professionalization through all state bars being “integrated in a responsible organization with full power to make the professional ideal effective.”<sup>86</sup>

### *Conclusion*

The State Bar of Texas should have no difficulty in justifying its continued existence to the informed and objective. The vicious time pressures imposed by the Texas Sunset Act probably require its making its presentation to the statutory commission which is to sit in judgment upon whether a death penalty shall be imposed upon it. Rather than submit to any detailed strictures and restraints which either the statutory commission or the legislature may seek to impose upon it as the price of its continued statutory life, the State Bar of Texas should let the sun set on the statute. So should the State Board of Law Examiners. In any event, for the long-range good of the public and the profession, the ultimate goal of the State Bar of Texas should be to induce the Supreme Court of Texas to exercise its inherent judicial power by unifying the legal profession in Texas and providing for its government by order of that court.

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86. *Id.* at 706.