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## Lobbying and Litigating Against "Legal Bootleggers"--The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century

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**LOBBYING AND LITIGATING AGAINST “LEGAL  
BOOTLEGGERS”—THE ROLE OF THE ORGANIZED BAR IN  
THE EXPANSION OF THE COURTS’ INHERENT POWERS IN  
THE EARLY TWENTIETH CENTURY**

LAUREL A. RIGERTAS\*

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\* Assistant Professor, Northern Illinois University, College of Law. I want to thank Professors Daniel Reynolds and Lorraine Schmall, and my father, John Haskell, for their comments and advice. I also want to thank my research assistants Elizabeth Shapiro, Joseph Hoffman and Christopher Sparks for their help. Lastly, I want to thank the members of the California Western Law Review for their editorial work.

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*“[C]onstant vigilance and activity by committees on unauthorized practice of law are essential lest we have a repetition of the encroachment in the professional field by ‘legal bootleggers,’ which took place during the first World War.”<sup>1</sup>*

### INTRODUCTION

Since at least the early twentieth century, the organized bar<sup>2</sup> has sought to protect the legal profession from encroachment by nonlawyers engaged in the unauthorized practice of law.<sup>3</sup> Scholars have noted that the organized bar, and particularly the American Bar Association (“ABA”), made a concerted effort to curb the unauthorized practice of law in the 1930s and 40s by filing lawsuits that sought to have the courts enjoin and punish those engaged in the unauthorized practice of law.<sup>4</sup> It is correct that the efforts of the organized bar to curb the unauthorized practice of law reached their apex during that time frame; however, those efforts were not the organized bar’s first campaign to curtail the unauthorized practice of law.

The organized bar first focused on curbing the unauthorized practice of law in the 1920s and, at that time, its main strategy was to lobby state legislatures to enact definitions of the practice of law.<sup>5</sup> The

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1. Edwin M. Otterbourg et al., *Report of the Standing Committee on Unauthorized Practice of the Law*, 68 A.B.A. REPORTS 242 (1943).

2. The term “organized bar” in this paper is used to refer to local, state and national organized bar associations comprised of voluntary members. The main focus in this article is the efforts of the ABA; however, other regional bar associations were engaged in similar efforts and are also discussed.

3. See *infra* notes 133-37 and accompanying text.

4. See *infra* note 239 and accompanying text.

5. See *infra* Part III.A which discusses the organized bar’s strategy to curb the unauthorized practice of law in the 1920s. The unauthorized practice of law, as used in this article, includes both the practice of law by nonlawyers, as well as the practice of law through corporate entities, many of which utilized lawyers to provide

bar hoped to use these statutes as an enforcement mechanism against nonlawyers who engaged in activities that constituted the unauthorized practice of law.<sup>6</sup> The organized bar did not appear to question whether or not the legislatures possessed the power to define the practice of law. Instead, the organized bar appears to have assumed that the legislatures had this power as part of their police powers, which allow them to regulate a variety of professions.<sup>7</sup> This legislative campaign, however, was not successful—very few state legislatures enacted a definition of the practice of law during the 1920s.<sup>8</sup>

By the mid-1920s, the organized bar's legislative reform efforts waned.<sup>9</sup> There is evidence to suggest that the organized bar was concerned about its lobbying efforts being countered by the lobbying efforts of other interest groups, such as title companies and realtors, which could have had a deleterious effect on the organized bar's proposed definition of the practice of law.<sup>10</sup> There is also evidence to suggest that, even though legislatures were largely made up of lawyers, not all lawyers shared the views of the organized bar and the state legislatures were not necessarily a friendly forum for the organized bar's lobbying efforts.<sup>11</sup>

In the 1930s, the organized bar renewed its efforts to curb the unauthorized practice of law.<sup>12</sup> After the start of the Great Depression, the legal profession's income fell dramatically.<sup>13</sup> The organized bar attributed this not only to the economic pressures of the time, but also to the overcrowding of the profession and to competition from

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those services.

6. *See infra* text accompanying notes 148-54.

7. *Cf.* *Chenoweth v. State Bd. of Med. Exam'r*, 141 P. 132, 133 (Colo. 1913) (“[U]nder the police power inherent in the state, the Legislature may enact reasonable regulations for the examination and registration of physicians, in the practice of medicine and surgery . . .”).

8. *See infra* notes 178-79 and accompanying text.

9. *See infra* text accompanying notes 172-79.

10. *See infra* text accompanying notes 217, 233-34.

11. *See infra* text accompanying notes 195-98; *see also infra* note 199.

12. *See infra* Part III.B which discusses the organized bar's efforts to curb the unauthorized practice of law in the 1930s.

13. *See infra* text accompanying note 191.

nonlawyers.<sup>14</sup> These reasons were a driving force behind the revival of the organized bar's interest in the unauthorized practice of law in the 1930s.<sup>15</sup> Much of the bar's rhetoric, however, was focused on improving the integrity of the bar and protecting the public from unqualified practitioners.<sup>16</sup> The purportedly injured public, however, frequently perceived the attempts of attorneys to consolidate these powers into the judicial branch as self-motivated and anti-competitive efforts.<sup>17</sup>

The organized bar's renewed focus on the unauthorized practice of law in the 1930s did not seek to have the legislature define the practice of law as it did in the 1920s.<sup>18</sup> Instead, the organized bar shifted its strategy. It moved from lobbying for legislative reform to litigating, filing hundreds of lawsuits against individuals and corporations allegedly engaged in the unauthorized practice of law.<sup>19</sup> It also moved from seeking a definition of the practice of law to arguing that it was unwise to try to define the practice of law.<sup>20</sup> To this end, the organized bar moved from asking legislatures to define the practice of law to arguing that it was unconstitutional for the legislatures to do so and contending that only the judicial departments of government have the power to define the practice of law.<sup>21</sup> In other words, its strategic shift sought to remove the power to define the practice of law from the democratic process of the legislative branch and to put it into the hands of the courts on a case-by-case basis. This change in strategy was successful and the organized bar's arguments were overwhelmingly adopted in the decisional law of the 1930s and 40s.<sup>22</sup>

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14. *See infra* text accompanying notes 184-91.

15. *See infra* text accompanying notes 202-06.

16. *See infra* text accompanying notes 211, 227-28.

17. *See infra* text accompanying note 229.

18. *See infra* text accompanying note 210.

19. *See infra* Part III.B which discusses the organized bar's strategy to curb the unauthorized practice of law in the 1930s.

20. *See infra* Part III.B which discusses the organized bar's strategy to curb the unauthorized practice of law in the 1930s.

21. *See infra* Part III.B which discusses the organized bar's strategy to curb the unauthorized practice of law in the 1930s.

22. *E.g.*, *People ex rel. Chicago Bar Ass'n v. Goodman*, 8 N.E.2d 941, 945 (Ill. 1937) (holding that the General Assembly has no right to authorize a nonlawyer

The result of this strategic shift was the expansion of the courts' inherent powers to regulate the legal profession, which prevails today.<sup>23</sup> No state constitution explicitly grants any judicial branch the power to define the practice of law.<sup>24</sup> The state supreme courts, however, have reasoned that their power to define the practice of law originates from the separation of powers doctrine delineated in the state constitutions and the inherent powers they consider necessary to operate as an independent branch of government.<sup>25</sup> The inherent

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to appear in a representative capacity before the Industrial Commission because "[t]he General Assembly has no authority to grant a layman the right to practice law."); *Meunier v. Bernich*, 170 So. 567, 575 (La. Ct. App. 1936) (holding that the court's inherent powers include the power to define the practice of law); *R.I. Bar Ass'n v. Auto. Serv. Ass'n*, 179 A. 139, 142 (R.I. 1935) (holding that "[a]uthority to admit to the bar and to disbar necessarily carries with it power to define what constitutes the [unauthorized] practice of law"). *But see Eagle Indem. Co. v. Indus. Accident Comm'n*, 217 Cal. 244, 247-48 (1933) (holding that the Legislature did have the authority to permit nonlawyers to appear before the Industrial Accident Commission).

23. *See, e.g., State v. DeJesus*, 953 A.2d 45, 104 (Conn. 2008); *Dayton Supply & Tool Co. v. Montgomery County Bd. of Revision*, 856 N.E.2d 926, 937 (Ohio 2006); *Ford Motor Credit Co. v. Sperry*, 827 N.E.2d 422, 429 (Ill. 2005).

24. It is worth noting, however, that several modern state constitutions provide that the judicial branch has the power to regulate the practice of law, including the admission and disbarment of attorneys. *E.g.,* FL CONST. art. V, § 15 ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."); KY CONST. § 116 ("The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar."); N.J. CONST. art. VI, § 2, para. 3 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."); N.D. CONST. art. VI, § 3 ("The supreme court shall have authority . . . to promulgate rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law."). Courts have construed these provisions as granting them the power to define the practice of law. *E.g., Fagas v. Scott*, 597 A.2d 571, 591 (N.J. Super. Ct. Law Div. 1991) (suggesting that the court's constitutional power to make rules regarding the practice of law and the admission to the practice of law includes the exclusive power to define the practice of law).

25. *E.g., Frye v. Tenderloin Hous. Clinic, Inc.*, 129 P.3d 408, 424 (Cal. 2006) (discussing court's inherent responsibility and authority over the core functions of admission and discipline of attorneys); *Denver Bar Ass'n v. Pub. Utils. Comm'n*, 391 P.2d 467, 470 (Colo. 1964) (holding that the supreme court has the exclusive power to define and regulate the practice of law by virtue of the constitutional provision distributing the powers of government; there is no authority in these respects in the legislative or executive departments); *In re Nenzo*, 472 A.2d 815,

powers doctrine derives from the idea that upon the creation of the courts, “power sprang into being independent of any written law.”<sup>26</sup> Courts have reasoned that these inherent powers are necessary for the court “to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency.”<sup>27</sup> As a result of the efforts of the organized bar in the 1930s and 40s, courts began to hold that they have the inherent and exclusive power to define the practice of law.<sup>28</sup>

Following the precedents established in the 1930s and 40s, today most state judicial branches assert that the power to regulate the legal profession is a power that resides in their branch of government.<sup>29</sup>

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819 (Del. 1983) (holding that the supreme court has the responsibility for interpreting its rules implementing aspects of the court’s exclusive right to govern the practice of law; “[t]his principle is immutable. It inheres in and derives from the very nature of the doctrine of separation of powers.”).

26. *State v. Cannon*, 221 N.W. 603, 605 (Wis. 1928).

27. *Id.* at 604 (quoting *In re Courtroom & Officers of Fifth Branch Circuit Court, Milwaukee County*, 134 N.W. 490, 495 (1912)); see also *In re Cate*, 273 P. 617, 620 (Cal. Ct. App. 1928) (reasoning that inherent powers of the courts derive from the constitution). By the 1800s courts used the inherent powers doctrine as a rationale for their contempt powers. See, e.g., *Hale v. State*, 45 N.E. 199, 200 (Ohio 1896) (holding that courts have inherent contempt powers that do not require any express constitutional or legislative grant of power). For articles discussing the inherent powers doctrine, see generally: Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525 (1983); Charles Beardsley, *The Judicial Claim to Inherent Power Over the Bar*, 19 A.B.A. J. 509 (1933); Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635 (1935); Louis Shanfeld, *The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar*, 19 ST. LOUIS L. REV. 163 (1934); Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619 (1978); Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1 (1989-90); Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162 (1960); Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783 (1976). See also Robert J. Martineau & Samuel D. Conti, *Regulation of the Legal Profession: The Relationship Between Judicial and Legislative Power*, (Report prepared for the National Center for State Courts Northeastern Regional Office) (1987).

28. See *infra* Part III.B-C.

29. E.g., *Spears v. Stewart*, 283 F.3d 992, 1014 (9th Cir. 2002), cert. denied, 537 U.S. 977 (2002) (holding that, under Arizona law, the judiciary has the exclusive authority to regulate the practice of law.); *In re Brown*, 708 N.W.2d 251,

They also typically assert that their power to regulate the legal profession includes the power to determine what constitutes the unauthorized practice of law and, concomitantly, the power to define the practice of law.<sup>30</sup> The result of these holdings is that most legislative branches of state government cannot define what acts constitute, or do not constitute, the practice of law.<sup>31</sup> Thus, unlike other professions that the legislatures regulate, such as the medical profession which is stratified into different types of professionals with different levels of training and costs to consumers—doctors, nurse practitioners, chiropractors, physician’s assistants, etc.—the legal profession has largely evolved such that only lawyers may provide legal services.<sup>32</sup>

The shift in the organized bar’s strategy, and the timing of the shift, raises the question of whether the courts’ inherent power to define the practice of law has a solid mandate from state constitutions and the separation of powers doctrine, or whether the power developed to serve protectionist interests of a private trade group—the bar—which had the cooperation of judiciary due to their shared membership in the legal profession. In other words, the doctrine may have developed not because the legislatures lacked the power to define the practice of law, but because the organized bar was concerned about how the legislatures would use that power during a time of economic stagnation.

This article suggests that the judicial branches of state government may have overreached by holding in the 1930s and 40s that the state legislatures did not have the constitutional power to define the practice

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256 (Neb. 2006) (“The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in [that] state and to fix qualifications for admission to the Nebraska bar.”).

30. *E.g.*, *Neal v. Wilson*, 873 S.W.2d 552, 557 (Ark. 1994) (“The power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government.”); *Unauthorized Practice of Law Comm. of Supreme Court of Colo. v. Employers Unity, Inc.*, 716 P.2d 460, 463 (Colo. 1986) (“The Colorado Supreme Court has the exclusive authority to define and to regulate the practice of law.”); *State Bar Ass’n of Conn. v. Conn. Bank & Trust Co.*, 131 A.2d 646, 656 (Conn. Super. Ct. 1957) (“The power to regulate, control and define the practice of law reposes in the judicial department.”).

31. *See* cases cited *supra* note 22.

32. There are a few exceptions to this, particularly in the federal system. *See infra* text accompanying notes 284-87.

of law. These holdings arose from the efforts of the organized bar, which may have been more motivated by fears of competing lobbying groups than by legitimate constitutional constraints on the legislatures' power. This body of decisional law put the development of the legal profession on a trajectory that may not ultimately be in the best interest of consumers of legal services.

Part I of this article gives a brief historical overview of the early development of the separation of powers doctrine in the first state constitutions and how the early state constitutions allocated the power to regulate the legal profession. Part II examines the development of the inherent powers doctrine with respect to the regulation of the legal profession around the turn of the nineteenth century, which set the stage for the doctrine to expand to the courts' power to define the practice of law. Part III of this article traces how the organized bar shifted its strategy from lobbying for legislation to define the practice of law in the 1920s, to litigating in the 1930s and arguing that it is unwise to try to define the practice of law and, furthermore, unconstitutional for the legislatures to do so. Part IV of this article examines the conclusion that the judicial departments must have the power to define the practice of law in order to maintain their status as an independent branch of government. Lastly, Part V briefly looks at the modern implications of delegating the power to define the practice of law to the judicial branches of state governments. This section suggests that modern legal reform efforts should consider challenging precedents that have held there is a constitutional basis for the judiciary to claim the exclusive power to define the practice of law. The main opponent to such challenges would be the organized bar. This section further suggests that the organized bar should reconsider its position on such issues.

#### I. THE EARLY HISTORY OF THE SEPARATION OF POWERS DOCTRINE AND THE REGULATION OF ATTORNEYS

The balance of power between the judicial and legislative branches with respect to the regulation of the legal profession has not been fixed over time. Prior to the American Revolution, there were no distinct branches of government and the regulation of attorneys

spanned both judicial and legislative bodies.<sup>33</sup> After the Revolution, most colonies enacted constitutions that framed a government consisting of separate branches with distinct and separate powers.<sup>34</sup> However, early constitutions did not usually delineate which branch of government should regulate the legal profession.<sup>35</sup> The supremacy of the judicial branches over the regulation of the legal profession developed over time and mainly through decisional law.<sup>36</sup>

### *A. Colonial Times and the Regulation of the Legal Profession*

Lawyering was not a welcome vocation in early Colonial times.<sup>37</sup> Colonies such as Massachusetts and Pennsylvania relied heavily on the clergy to administrate justice and did not see a need for a judiciary in their early history.<sup>38</sup> Even those colonies that were not intertwined with the clergy looked unfavorably on lawyers.<sup>39</sup> Attorneys in Colonial times had no requirements for training, admissions, or standards of conduct; therefore, those who held themselves out as lawyers frequently were considered to be "sharppers, pettifoggers and spellbinders," and often rightfully so.<sup>40</sup> During the early Colonial times, there were initially no schools to train lawyers.<sup>41</sup> Even as schools started to be established, it was not at all uncommon for one to hold himself out as an attorney after receiving little formal training.<sup>42</sup>

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33. 1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION* 22-23 (1965).

34. *See infra* notes 55-61 and accompanying text.

35. *See infra* notes 62-64 and accompanying text.

36. *See infra* Part II.

37. *See generally* CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 4-8 (1911) (discussing hostilities toward the legal profession during Colonial times and the possible reasons for such attitudes).

38. CHROUST, *supra* note 33, at 28-29, 207; *see also* Roscoe Pound, *The Lay Tradition as to the Lawyer*, 12 MICH. L. REV. 627, 632-36 (1913-14) (discussing the history of the administration of justice, which began in the hands of the clergy, and theorizing that the clergy did not relinquish the practice of law without a protest).

39. *See* CHROUST, *supra* note 33, at 191. Public hearings were held in New York in 1768 on the question of "'Whether a Lawyer could possibly be an honest Man,' and apparently too many . . . citizens [believed] not." *Id.*

40. *Id.* at 27, 117.

41. *Id.* at 29.

42. *See id.* at 30-39.

In response to the low status of the attorney, the colonies regularly used statutes as a means to regulate the legal profession and frequently in ways that obstructed the profession.<sup>43</sup> Some of the colonies enacted statutes that required those who appeared in court on behalf of another to be approved by that court and to take an oath.<sup>44</sup> The oaths were adopted in hopes of eliminating pettifoggers.<sup>45</sup> The early acts and statutes that provided for admission upon the taking of an oath were focused on attorneys' activities in the courts; they did not address the practice of law in other contexts. For example, Pennsylvania adopted the following Act for Establishing Courts of Judicature in 1722, which provided:

That there may be a competent number of persons of an honest disposition, and learned in the law, admitted by the justices of the . . . respective courts, to practice as attorneys there, who shall behave themselves justly and faithfully in their practice. . . . [A]ttorneys, so admitted, may practice in all the courts of this government, without any further or other license or admittance.<sup>46</sup>

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43. See generally WARREN, *supra* note 37, at 26, 29, 41-43; ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 136-38 (1953) (discussing early legislation that was hostile to the legal profession).

44. See, e.g., 5 *THE COLONY OF CONNECTICUT PUBLIC RECORDS* (1706-1716) 48 (Charles J. Hoadly ed., AMS Press, Inc. & Johnson Reprint Corp. 1968) (1870) (requiring "[t]hat no person, except in his own case, shall be admitted to make any plea at the bar, without being first approved of by the court before whom the plea is to be made, nor until he shall take in the said court the following oath . . .").

45. See CHROUST, *supra* note 33, at 85 (discussing the oath adopted in Massachusetts in 1686 that adopted the attorney's oath that had been used in England since 1402 or 1403). The oath contained early ethical obligations to:

Swear That you will Do no falsehood nor deceit nor Consent to any to be done in this Court and if you know of any to be done you shall give knowledge thereof to the Judge of this Court for the time being or some other of his Majestyes Councill or assistants of this Court that it may be reformed.

*Id.* at 85-86.

46. Act for Establishing Courts of Judicature, ch. 255, sec. 15 (1722), in 3 *THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682-1801*, at 308 (Comp. by James T. Mitchell & Henry Flanders, Harrisburg, Clarence M. Busch, State Printer of Pennsylvania 1896). Other jurisdictions adopted similar provisions. See, e.g., *THE FIRST LAWS OF THE ORIGINAL THIRTEEN STATES: 1 THE FIRST LAWS OF THE STATE OF DELAWARE* 132-33 (John D. Cushing ed., Michael Glazier, Inc. 1981).

The colonies' negative attitudes towards attorneys also led to statutory efforts to try to restrict the proliferation of attorneys, including statutes that: outright prohibited anyone from appearing in court as an attorney on behalf of another;<sup>47</sup> prohibited the payment of attorneys' fees;<sup>48</sup> restricted fees to set amounts;<sup>49</sup> prohibited certain people from engaging in the practice of law;<sup>50</sup> and restricted the number of attorneys in the colony.<sup>51</sup> Some colonies eventually

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47. 2 THE COLONY OF CONNECTICUT PUBLIC RECORDS (1665-1678) 59 (Charles J. Hoadly ed., AMS Press, Inc. & Johnson Reprint Corp. 1968) (1852) (prohibiting attorneys from appearing on behalf of another who "is charged and prosecuted for delinquency," and providing that those who do so shall be fined "ten shillings . . . or sit in stocks one hour for every such offense.").

48. See, e.g., Massachusetts Body of Liberties of 1641, § 26, as reprinted in SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY, 1606-1775, at 77 (William MacDonald ed., London, MacMillan 1899). This law prohibited attorneys' fees and stated that:

Every man that findeth himselfe unfit to plead his owne cause in any Court, shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee, or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him.  
[sic]

*Id.* Massachusetts eventually allowed attorneys to appear on behalf of others in court in 1673, but subsequent acts restricted attorneys' fees. CHROUST, *supra* note 33, at 79-80, 85. Virginia also at one point prohibited any attorney from pleading in any court of judicature "for any kind of reward or profit whatsoever." 1 HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSIONS OF THE LEGISLATURE, IN THE YEAR 1619, at 482 (Univ. Press of Va. Charlottesville ed., 1969) (1823).

49. See, e.g., CHROUST, *supra* note 33, at 71-72, 85, 117-19, 139-40, 159-60, 199-200, 270-71 (discussing restrictions and prohibitions on attorneys' fees throughout various colonies); 1 ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY FROM [1703-1752] 338-52 (Samuel Neville ed., n.p., William Bradford 1752) (comprehensive act regulating the practice of law and lawyers' fees); HENING, *supra* note 48, at 275-76, 302 (restricting attorneys' fees to a maximum of twenty pounds of tobacco on the County Court and fifty pounds in the Quarter Court).

50. See, e.g., CHROUST, *supra* note 33, at 197 (citing GRANTS, CONCESSIONS AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 120 (1676 statute), 343 (1694 statute) (A. Leaming and J. Spicer eds., Philadelphia, 1758) for two statutes that "barr[ed] justices of the peace, sheriffs, deputies, clerks, and even messengers of attorneys from engaging in the practice of law.").

51. Connecticut found that "many persons of late have taken upon them to be attourneys at the bar, so that quarrels and lawsuits are multiplied, and the King's

imposed a licensure requirement, although sometimes it was the governor, not the courts, which held the power to grant licenses.<sup>52</sup>

While the various oath requirements and fee or appearance prohibitions were contained in statutes and acts, it is important to note that during early Colonial times the functions of the courts and legislatures were frequently contained within one governmental body.<sup>53</sup> There were, therefore, no issues to grapple with regarding which branch of government had the power to regulate the profession at this juncture in history. Also, while the regulation of the legal profession was beginning to develop during this time period, the focus was on court appearances; the unauthorized practice of law and how to define the practice of law do not seem to have been issues at this time.<sup>54</sup>

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good subjects disturbed,” and in response it passed an Act that restricted the number of attorneys in the colony of Connecticut to eleven. 7 THE COLONY OF CONNECTICUT PUBLIC RECORDS (1726-1735) 279 (Charles J. Hoadly ed., AMS Press, Inc. & Johnson Reprint Corp. 1968) (1873). That Act was repealed fifteen months later. *Id.* at 358. New Hampshire enacted a similar Act Relating to Attorneys in 1714. CHROUST, *supra* note 33, at 130. And Delaware also enacted a similar provision in 1797. THE FIRST LAWS OF THE ORIGINAL THIRTEEN STATES, LAWS OF THE STATE OF DELAWARE 56 (John D. Cushing ed., Michael Glazier Inc. 1981).

52. CHROUST, *supra* note 33, at 157-58. In New York, the power to disbar, suspend and readmit was initially vested in the governor and the supreme court; however, at some point in time the Royal Governor claimed that he had the sole right to license attorneys. *Id.* By 1730, the court was sharing the power again by setting forth qualifications for candidates who sought a license from the governor. *Id.* at 172-73. It was also the governor who set up the first commission to hear complaints about the conduct of attorneys. *Id.* at 173-74. Similarly, in New Jersey an act was passed in 1698 that prohibited persons from appearing on behalf of another in court proceedings unless they had been licensed to practice by the governor. *Id.* at 197.

53. CHROUST, *supra* note 33, at 22-23, 65-66, 136, 145-46, 194 (discussing the history of colonies and the lack of a judiciary that existed separate from the legislative body until the last decade of the seventeenth century and in some instances, not until far into the eighteenth century); *see also* WARREN, *supra* note 37, at 3-4.

54. *See* RICHARD L. ABEL, AMERICAN LAWYERS 112 (Oxford University Press 1989).

### *B. Post-Revolution and the Separation of Powers*

After the American Revolution, between 1776 and 1780, eleven of the thirteen states adopted constitutions.<sup>55</sup> The other two of the thirteen original states—Connecticut and Rhode Island—continued to operate under their Colonial charters for some time after independence.<sup>56</sup> Six of the new state constitutions—Georgia, Massachusetts, Maryland, North Carolina, Pennsylvania and Virginia—explicitly set out that there would be separate and distinct legislative, executive, and judicial branches of government.<sup>57</sup> A

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55. See DEL. CONST. of 1776, as reprinted in 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 199-205 (William F. Swindler ed., 1973) [hereinafter SOURCES AND DOCUMENTS]; GA. CONST. of 1777, as reprinted in 2 SOURCES AND DOCUMENTS, *supra*, at 443-51; MD. CONST. of 1776, as reprinted in 4 SOURCES AND DOCUMENTS, *supra*, at 372-93; MASS. CONST. of 1780, as reprinted in 5 SOURCES AND DOCUMENTS, *supra*, at 92-110; N.H. CONST. of 1776, as reprinted in 6 SOURCES AND DOCUMENTS, *supra*, at 342-43; N.J. CONST. of 1776, as reprinted in 6 SOURCES AND DOCUMENTS, *supra*, at 449-53; N.Y. CONST. of 1777, as reprinted in 7 SOURCES AND DOCUMENTS, *supra*, at 168-80; N.C. CONST. of 1776, as reprinted in 7 SOURCES AND DOCUMENTS, *supra*, at 402-11; PA. CONST. of 1776, as reprinted in 8 SOURCES AND DOCUMENTS, *supra*, at 277-85; S.C. CONST. of 1776, as reprinted in 8 SOURCES AND DOCUMENTS, *supra*, at 462-67; VA. CONST. of 1776, as reprinted in 10 SOURCES AND DOCUMENTS, *supra*, at 51-56.

56. In 1776 Connecticut enacted an ordinance that declared the "Form of Civil Government, contained in the Charter from Charles the second, King of England," to be the civil constitution of Connecticut. Constitutional Ordinance of 1776, as reprinted in 2 SOURCES AND DOCUMENTS, *supra* note 55, at 143. In 1818, Connecticut adopted a constitution that explicitly provided in article II that the government should be divided into three branches: the legislative, executive, and judicial. CONN. CONST. of 1818, art. II, as reprinted in 2 SOURCES AND DOCUMENTS, *supra* note 55, at 145. Similarly, Rhode Island continued to operate "under its colonial charter for almost seventy years after independence." 8 SOURCES AND DOCUMENTS, *supra* note 55, at 340. It adopted its first constitution in 1842, which set out the three branches of government. R.I. CONST. of 1842, as reprinted in 8 SOURCES AND DOCUMENTS, *supra* note 55, at 389-92.

57. GA. CONST. of 1777, art. I, as reprinted in 2 SOURCES AND DOCUMENTS, *supra* note 55, at 444; MD. CONST. of 1776, art. VI, as reprinted in 4 SOURCES AND DOCUMENTS, *supra* note 55, at 373; MASS. CONST. of 1780, art. XXX, as reprinted in 5 SOURCES AND DOCUMENTS, *supra* note 55, at 96; N.C. CONST. of 1776, art. IV, as reprinted in 7 SOURCES AND DOCUMENTS, *supra* note 55, at 402; PA. CONST. of 1776, Plan or Frame of Government, §§ 1-4, as reprinted in 8 SOURCES AND DOCUMENTS, *supra* note 55, at 279; VA. CONST. of 1776, Bill of Rights, § 5, as reprinted in 10 SOURCES AND DOCUMENTS, *supra* note 55, at 49.

typical provision provided, “That the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other.”<sup>58</sup> Five other states—Delaware, New Hampshire, New Jersey, New York, and South Carolina—adopted constitutions that did not contain an explicit statement about the separation of powers.<sup>59</sup> However, during the 1800s all of the state constitutions that did not clearly delineate three branches of government were amended to provide for three distinct branches of government either explicitly<sup>60</sup> or implicitly through their structure.<sup>61</sup>

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58. *E.g.*, MD. CONST. of 1776 art. VI, *as reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 55, at 373.

59. New Hampshire’s Constitution of 1776 was very basic and expressed hope of reconciliation with Great Britain. N.H. CONST. of 1776, *as reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 55, at 342-43. Similarly, neither Delaware nor New Jersey’s Constitutions of 1776 were very comprehensive and they did not explicitly delineate three distinct branches of government. DEL. CONST. of 1776, *as reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 55, at 199; *see also* editorial notes *in* 2 SOURCES AND DOCUMENTS, *supra* note 55, at 204-05; N.J. CONST. of 1776, *as reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 55, at 449-53. New York and South Carolina had more comprehensive first constitutions and, while they alluded to the three branches of government, they did not explicitly set them out as separate and distinct. N.Y. CONST. of 1777, *as reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 55, at 168-80; S.C. CONST. of 1776, *as reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 55, at 462-67.

60. New Hampshire articulated a more comprehensive form of government in its constitution of 1784 and that constitution explicitly provided for the three branches of government. N.H. CONST. of 1784, art. I, § XXXVII, *as reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 55, at 347. New Jersey explicitly set out the three branches of government in its constitution adopted in 1844. N.J. CONST. of 1844, art. III, *as reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 55, at 455. South Carolina’s Constitution of 1868 contained a provision setting out the three branches of government. S.C. CONST. of 1868, art. I, § 26, *as reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 55, at 496.

61. New York did not have an explicit separation of powers provision, but that concept is reflected in the structure of its subsequent constitutions starting in 1821. *See* N.Y. CONST. of 1821, *as reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 55, at 181-91. In 1776, Delaware adopted a very basic constitution that did not explicitly set out the three branches of government. DEL. CONST. of 1776, *as reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 55, at 199; *see also* editorial notes *in* 2 SOURCES AND DOCUMENTS, *supra* note 55, at 204. It has never adopted a specific provision that articulates the three separate branches of government, but the structure of its constitution has reflected this doctrine since 1792. *See* DEL. CONST. of 1792, *as reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 55, at 205-15.

These early constitutions generally did not contain an explicit statement as to which branch of government should control the regulation of the legal profession—two exceptions were Georgia and New York.<sup>62</sup> Georgia's Constitution of 1777 provided that the House of Assembly would determine who was authorized to appear in the courts:

No person shall be allowed to plead in the courts of law in this State, except those who are authorized so to do by the house of assembly; and if any person so authorized shall be found guilty of malpractice before the house of assembly, they shall have power to suspend them. This is not intended to exclude any person from that inherent privilege of every *freeman*, the liberty to plead his own cause.<sup>63</sup>

In contrast, New York's Constitution of 1777 explicitly placed the power to admit attorneys with the courts: "all attorneys, solicitors, and counsellors at law hereafter to be appointed, be appointed by the court, and licensed by the first judge of the court in which they shall respectively plead or practise, and be regulated by the rules and orders of the said courts."<sup>64</sup> As states joined the Union in the late 1700s and

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62. GA. CONST. of 1777, art. LVIII, as reprinted in 2 SOURCES AND DOCUMENTS, *supra* note 55, at 449; N.Y. CONST. of 1777, art. XXVII, as reprinted in 7 SOURCES AND DOCUMENTS, *supra* note 55, at 176-77.

63. GA. CONST. of 1777, art. LVIII, as reprinted in 2 SOURCES AND DOCUMENTS, *supra* note 55, at 449. Subsequent constitutions in Georgia did not contain this provision, but they did explicitly allow for some legislative regulation of the courts, such as allowing the legislature to limit the courts' powers to punish for contempt. *See, e.g.*, GA. CONST. of 1865 art. I, § 12, as reprinted in 2 SOURCES AND DOCUMENTS, *supra* note 55, at 487.

64. N.Y. CONST. of 1777, art. XXVII, as reprinted in 7 SOURCES AND DOCUMENTS, *supra* note 55, at 177. Prior to the Revolution, the power of appointing attorneys was exercised by the governor of the colony, but that power was transferred to the courts in the New York Constitution of 1777. *People v. Justices of the Del. Common Pleas*, 1 Johns. Cas. 181, 181 (N.Y. 1799). The language in the 1777 constitution was dropped from the constitution of 1846, which then provided: "Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state." N.Y. CONST. of 1846, art. VI, § 8, as reprinted in 7 SOURCES AND DOCUMENTS, *supra* note 55, at 200. Even though the courts had the power to appoint attorneys, the legislature still acted in this arena—in 1779 it suspended all law licenses issued before April 21, 1777, subject to

1800s, the separation of powers doctrine was usually incorporated into their constitutions, either explicitly or implicitly in the structure of their constitutions.<sup>65</sup>

Without any clear delegation of power to regulate the legal profession in most state constitutions, both the judicial branches and the legislative branches played a role in regulating the legal profession, particularly regarding the admission of attorneys to the bar.<sup>66</sup> Local courts usually had the power to admit persons to appear before them as an attorney in a representative capacity; however, legislatures routinely imposed requirements for such admission. For example, in 1820 the Maine legislature adopted an act that regulated the admission of attorneys to those who had good moral character, “devoted seven years at least to the acquisition of scientific and legal attainments,” and took an oath.<sup>67</sup> Some legislatures continued to enact laws that related to attorneys’ fees and put limits on them.<sup>68</sup>

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reinstatement if the attorney proved allegiance to the American cause. WARREN, *supra* note 37, at 295, n.1.

65. *See, e.g.*, ALA. CONST. of 1819, art. II, *as reprinted in* 1 SOURCES AND DOCUMENTS, *supra* note 55, at 33-34.

66. *See, e.g.*, An Act Regulating the Admission of Attornies to Practise Law in the Several Courts of this State, ch. 268 (1831), *as reprinted in* 2 THE GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND, FROM THE YEAR 1692 TO 1839 INCLUSIVE 1032-34 (Clement Dorsey ed., Baltimore, John D. Toy 1840) (requiring that applicants shall have at least two years legal study and present evidence of his character and if evidence of these requirements are satisfactorily provided to the court, it shall admit the applicant); An Act to Regulate the Admission of Attornies at Law, No. 1269 (1785), *as reprinted in* 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 668-69 (Thomas Cooper ed., Columbia, A.S. Johnston 1838) (proscribing requirements and procedure for admission to the bar).

67. An Act Regulating the Admission of Attornies, 1820, *as reprinted in* LAWS OF THE STATE OF MAINE 319-20 (Hallowell, Goodale, Glazier & Co. 1822); *see also* CHROUST, *supra* note 33, at 28-30 (1965) (discussing some of the statutes passed after the Revolution); An Act Regulating the Admission of Attornies (1785), *as reprinted in* THE FIRST LAWS OF THE ORIGINAL THIRTEEN STATES: THE FIRST LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 169-70 (John D. Cushing ed., Michael Glazier, Inc. 1981) (statute providing that only those of “good moral character, and well affected to the constitution and government of this Commonwealth” and upon the taking of an oath shall be admitted as an attorney to the court). Many oaths required attorneys to plead their allegiance to the American cause. *See, e.g.*, Act of Oct. 9, 1779, ch.12, *as reprinted in* THE FIRST LAWS OF THE ORIGINAL THIRTEEN STATES: THE FIRST LAWS OF THE STATE OF NEW YORK 77-78

The regulation of the legal profession prior to the Revolution possibly helped to ease some of the public's antipathy towards attorneys.<sup>69</sup> However, after the Revolution, the distrust of attorneys appears to have returned, and with it came more anti-lawyer legislation.<sup>70</sup> In the early to mid-1800s, the public embraced democratic principles and extended those principles to the legal profession.<sup>71</sup> A movement emerged seeking to simplify the law by reducing technical language and making it understandable to the layperson, thus rejecting the perceived elitism of the British system, which was steeped in privilege, wealth, and social rank.<sup>72</sup> The logical extension of this movement was that if a layperson could understand the law, then any person could hold himself out as an attorney.<sup>73</sup> In response to anti-lawyer legislation, among other reasons, the legal profession became more organized, particularly with the creation of

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(John D. Cushing ed., Michael Glazier, Inc. 1984).

68. See, e.g., 2 THE FIRST LAWS OF THE ORIGINAL THIRTEEN STATES: THE FIRST LAWS OF THE STATE OF NORTH CAROLINA 584-85 (John D. Cushing ed., Michael Glazier, Inc. 1984) (setting attorneys' fees for certain activities).

69. WARREN, *supra* note 37, at 211.

70. See *id.* at 212-24, 532. In 1786, the citizens of one Massachusetts town voted that "We humbly request that there may be such laws compiled as may crush or at least put a proper check or restraint on that order of Gentlemen denominated Lawyers." *Id.* at 215; see also POUND, *supra* note 43, at 177-85.

71. See, e.g., POUND, *supra* note 43, at 182-83; WARREN, *supra* note 37, at 446-47; Roscoe Pound, *The Lay Tradition as to the Lawyer*, 12 MICH. L. REV. 627, 630-32 (1914).

72. See generally POUND, *supra* note 43, at 7-8, 13-14 (discussing the American frontier mode of thought in the last third of the nineteenth century that sought to de-professionalize the learned callings such as the legal profession); WARREN, *supra* note 37, at 532-33; W.G. Hammond, *The Legal Profession—Its Past—Its Present—Its Duty*, 9 W. JURIST 1, 8-14 (1875) (discussing how the increased accessibility of the law—fewer technical terms, fewer Latin terms and simpler pleadings—made the profession more accessible to the average layman, whereas before it was only knowable to the privileged and the wealthy). Whether the law really became accessible to the average person is questionable. See James J. Robinson, *Admission to the Bar as Provided for in the Indiana Constitutional Convention of 1850-51*, 1 IND. L.J. 209, 210 (1926) (discussing the inability of the common man to understand the law in 1850).

73. See POUND, *supra* note 43, at 232-37.

the American Bar Association in 1878, and it began to take a strong interest in improving the integrity of the profession.<sup>74</sup>

## II. THE ROLE OF THE ORGANIZED BAR IN THE DEVELOPMENT OF THE INHERENT POWERS DOCTRINE AND THE POWER OF THE JUDICIARY TO REGULATE THE LEGAL PROFESSION

During the post-Revolution period and until the late 1800s, the legislative power to enact statutes that regulated the legal profession was not challenged. However, as the legal profession grew and became more organized, it began to challenge the scope of the legislatures' power to regulate the practice of law and, eventually, challenged the legislatures' power to define the practice of law.<sup>75</sup>

Nationwide, during the end of the nineteenth century and especially up through the 1920s, the growth of the legal profession was rapid.<sup>76</sup> This was attributed to the increase of part-time law schools which "charged low tuition and accepted virtually all applicants."<sup>77</sup> The growth of the profession was a particularly urbanized phenomenon at this time with the majority of full and part-time law schools opening in cities.<sup>78</sup> This urban expansion of educational opportunities provided a means for immigrants to enter

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74. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 495-98 (3d ed. 2005) (discussing the organization of the bar in the late nineteenth century); POUND, *supra* note 43, at 13-20, 242-50 (same).

75. See *infra* Part II for a discussion of challenges to the legislatures' power to regulate the legal profession and Part III.C for a discussion of challenges to the legislatures' power to define the practice of law.

76. ABEL, *supra* note 54, at 75, 277 tbl. 21 (1989). "In the first three decades of [the twentieth century] admissions rose at an annualized rate of 10.3 percent, growing nearly fourfold between 1900 and 1928 (see Table 21)." *Id.* at 75; see also FRIEDMAN, *supra* note 74, at 483.

77. ABEL, *supra* note 54, at 6; see also ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 75-76 (1983) ("The success of the part-time schools alarmed the leaders of the profession. They realized that powerful forces, societal demands, appropriate facilities, and simple practicality had not only prompted the second proprietary school movement but also apparently insured its success."). By 1917, Chicago had nine law schools. *Id.* at 76.

78. STEVENS, *supra* note 77, at 73-91 (discussing the growth of law schools and admissions between the late 1800s and early 1900s, as well as the urbanization of legal education).

the legal profession, which further grew the profession.<sup>79</sup> With the growth of the profession came further organization in state and regional bar associations.<sup>80</sup> These organized bars began to take a strong interest in the regulation and protection of the legal profession.<sup>81</sup>

As previously discussed, state legislatures played a role in the regulation of attorneys after the Revolution.<sup>82</sup> However, as the legal profession became organized, it started challenging the power of the legislative branches to regulate the legal profession. In Illinois, for example, an early advocate for the legal profession was the Chicago Bar Association ("CBA"), which had its corporate charter issued on May 27, 1874.<sup>83</sup> The organizers of the CBA had articulated several objectives for the association, including "the elevation of the character of the profession ('both as to its learning and morals'); the securing of proper discipline of 'unworthy members of the bar'; [and] the exercise of influence in matters of legislation and the administration of justice."<sup>84</sup> One of its earliest objectives was to curb unlicensed practitioners and to improve the requirements of those seeking to become lawyers.<sup>85</sup> An issue of great debate was whether those seeking admission to the bar should be required to obtain any formal legal

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79. The increase of immigrant attorneys did cause some concern among the bar, and perhaps some xenophobia, which may have been part of the motivation to increase the requirements for admission to the bar. *See, e.g.*, LOUIS ANTHES, *LAWYERS AND IMMIGRANTS, 1870-1940: A CULTURAL HISTORY* 176-80 (2003) (discussing the rise of the part-time law school and the increase in the number of immigrants seeking admission to the bar); JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 102-29 (Oxford University Press 1976) (discussing ethnic and immigrant prejudices in the legal profession after World War I); George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 *CARDOZO L. REV.* 2091, 2118 (1998) (discussing prejudice against foreign-born lawyers as a possible rationale for the ABA's attempt to limit the growth of the bar); Annual Report of the Illinois State Bar Association (1922) 162-65 (discussing bar passage rates of foreign-born versus U.S.-born applicants to the bar).

80. *See, e.g., infra* notes 83-86 and accompanying text.

81. *See, e.g., id.*; FRIEDMAN, *supra* note 74, at 484.

82. *See, e.g., supra* notes 66-68 and accompanying text.

83. HERMAN KOGAN, *THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION* 37 (1974).

84. *Id.* at 16.

85. *Id.* at 82-83.

training or education, and if so, the number of years of such education.<sup>86</sup>

An early and significant challenge to a state legislature's power to regulate the practice of law arose in Illinois in the late 1800s.<sup>87</sup> The CBA, through its member Julian Rosenthal, recommended that the Illinois Supreme Court adopt uniform standards by establishing a State Board of Law Examiners; a change from appellate courts each administering their own examinations.<sup>88</sup> Rosenthal proclaimed: "Unfit and unworthy men have been admitted. The time of the courts has been uselessly consumed. Progress has been impeded. Litigation has increased and justice has been delayed."<sup>89</sup> He was also extremely critical of "fly-by-night" two-year law schools that gave diplomas regardless of whether students had diligently attended classes and concluded that these types of law schools were "doubtless one of the chief causes of the great increase in the number of lawyers, many of whom [were] entirely unfitted for the exercise of their professional obligations to the client and to the state."<sup>90</sup>

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86. *Id.* at 82-85; see also George Harris Smith, *History of the Activity of the American Bar Association in Relation to Legal Education and Admission to the Bar*, 7 AM. L. SCH. REV. 1 (1930) (summarizing the efforts of the organized bar to increase educational requirements).

87. See *In re Day*, 54 N.E. 646 (1899). Discussed in more detail at *infra* notes 98-114 and accompanying text.

88. KOGAN, *supra* note 83, at 85-86.

89. *Id.* at 85. The Illinois State Bar Association ("ISBA") was also interested in the issue of increasing legal education requirements, as was the American Bar Association, which formed a section on Legal Education in 1893. See Henry Wade Rogers, Special Address at the Proceedings of the Twenty-First Annual Meeting of the Illinois State Bar Association (July 1 and 2, 1897), in PROC. OF THE ILL. ST. BAR ASS'N., 1897, Part II, at 53 (1897). The ISBA was critical of the Illinois Supreme Court's lack of effort on this issue prior to the adoption of Rule 39. *Id.* at 55-56 ("The door of admission to the bar must swing on reluctant hinges . . .").

90. KOGAN, *supra* note 83, at 85. In 1890, law school enrollment nationwide was 4518 students; in 1900, it was up to 12,516. ABEL, *supra* note 54, at 277 tbl. 21. The ease with which men could become attorneys was also threatening the profession's social status. An address to the graduating class in the Law Department of Iowa State University in 1875 commented:

[T]he legal profession has undoubtedly lost that character of exclusiveness, and that arbitrary social rank that once belonged to it. . . . Commerce, once regarded as only a better sort of peddling, has now become a liberal pursuit, in which educated men find all their powers fully

On November 4, 1897, the Illinois Supreme Court enacted Rule 39, which adopted the CBA's proposal to establish a State Board of Law Examiners that would hold examinations on a regular basis throughout the year.<sup>91</sup> The court also agreed to extend the length of required study (either in school or in a law office) from two years to three years.<sup>92</sup> Students who were enrolled in two-year programs immediately objected to the injustice of changing their admission requirements in the midst of their programs of study.<sup>93</sup>

After unsuccessfully petitioning the Illinois Supreme Court to modify Rule 39 so it would exempt those already enrolled in a two-year program, the students took their cause to the state legislature.<sup>94</sup> With only one dissenting vote, in 1899 the general assembly passed an act that required the Supreme Court to admit those students who had enrolled in a two-year program prior to the adoption of Rule 39.<sup>95</sup> Students who could avail themselves of the act's exemption moved the Supreme Court for admission to the bar.<sup>96</sup> The CBA opposed this motion.<sup>97</sup>

The matter was adjudicated in the case of *In re Day*.<sup>98</sup> In that case, the Illinois Supreme Court denied the students' motion to be admitted

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employed. If successful, it offers prizes to which the average gains of the lawyer bear no comparison. Thus the bar has lost its privileged position, and its members stand on the same broad social platform with the rest of that great army who earn their bread by the labor of their brains, rather than their hands.

W.G. Hammond, *The Legal Profession—Its Past—Its Present—Its Duty*, 9 W. JURIST 1, 4, 7 (1875).

91. See *In re Day*, 54 N.E. 646, 647 (Ill. 1899) (discussing the enactment of Rule 39 and whether the rule applied to bar applicants who began the study of law before November 4, 1897); see also KOGAN, *supra* note 83, at 86. The Supreme Court named Rosenthal as the Board of Examiner's secretary. *Id.* Rule 39 now relates to the appointment of associate judges. See ILL. SUP. CT. RULES 701, 703, and 704 for the current rules related to qualifications and bar examinations.

92. KOGAN, *supra* note 83, at 86.

93. *Id.*

94. *Id.* at 86-87.

95. *Day*, 54 N.E. at 646; KOGAN, *supra* note 83, at 87.

96. KOGAN, *supra* note 83, at 87.

97. *Day*, 54 N.E. at 646; see also KOGAN, *supra* note 83, at 118 (noting that among those appearing on behalf of the CBA was Lessing Rosenthal, who was the son of Julius Rosenthal).

98. 54 N.E. 646 (Ill. 1899). *Day* has been one of the most influential cases

pursuant to the legislation for two reasons.<sup>99</sup> First, it held that the act was special legislation that granted privileges to a special class of persons, which violated the state constitution.<sup>100</sup> Second, and more significantly, the court held that the legislature's enactment assumed the exercise of a power that properly belonged to the judicial branch.<sup>101</sup>

On the second point, the court spent some time examining English history and Parliament's legislation regarding admission to the bar. The court, however, concluded that the English and United States' systems were not comparable enough to find the analogy useful; the court considered the separation of powers in this country as being materially different from the parliamentary system of Britain.<sup>102</sup> The court then examined the limited precedent in this country and found several cases that supported the proposition that the admission of attorneys was a purely judicial function over which the legislature had no power.<sup>103</sup>

There was, however, one prior case from New York where the court upheld the validity of a statute enacted by the legislature that required the court to admit graduates from Columbia College to the

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regarding the power of the judicial branch. It has been cited by over half of the states' courts in support of the conclusion that the judicial branch has exclusive powers over the regulation of the practice of law. There were, however, some earlier cases that addressed the power of the judicial branch. *See, e.g., Ex rel Brackenridge*, 1 Serg. & Rawle 187, 1814 WL 1360 (Pa. 1814) (holding that a court's admission of an attorney is a judicial act, not a ministerial act, and therefore, not a subject for the writ of mandamus); *In re Goodell*, 39 Wis. 232, 1875 WL 3615, \*5 (1875) (stating that courts have deferred to reasonable legislative acts regarding the admission of attorneys without considering the question of the legislative branch's power to do so). *But see Ex parte Yale*, 24 Cal. 241, 245 (1864) (holding a legislative act valid, which required a person to take an oath as a condition precedent to admission to the bar); *In re Cooper*, 22 N.Y. 67 (1860) (holding a legislative act valid, which stated that a diploma from Columbia Law School was conclusive evidence of the ability to practice law).

99. *Day*, 54 N.E. at 653.

100. *Id.* at 648.

101. *Id.* at 653.

102. *Id.* at 648-50.

103. *Id.* at 650 (stating that "[i]n this country the courts of the United States have always controlled the admission of attorneys."). This is not entirely correct. *See supra* note 63 and accompanying text.

bar.<sup>104</sup> The New York court had reasoned that, while "the appointment of attorneys [to the bar had] usually been entrusted . . . to the courts," it was not "a necessary or inherent part of their judicial power" and, therefore, the matter was subject to legislative action.<sup>105</sup> The Illinois Supreme Court rejected this reasoning and claimed that the New York decision had "been greatly deplored by eminent men, abundantly able to judge of the injustice to the public resulting from the rule then established, under which other special laws were passed."<sup>106</sup>

The *Day* court did not, however, completely exclude the legislature from the regulation of the legal profession. Instead, it made a distinction between legislative acts that mandated admission to bar and legislative acts that addressed protecting the public from those unfit to practice law.<sup>107</sup> The court stated, "[T]he power of the legislature to protect the public against persons unfit to practice law and to pass laws for that purpose has never been denied."<sup>108</sup> As an example, the court affirmed a prior case where it had denied Myra Bradwell admission to the bar.<sup>109</sup> Mrs. Bradwell's application for admission to the bar was considered by the court, and it found that she had the requisite learning and ability.<sup>110</sup> However, the court denied her admission to the bar because the legislature had enacted a statute that limited admission to men only.<sup>111</sup>

The *Day* court stated that Mrs. Bradwell was properly denied admission—the court had exercised its power to assess the issue of qualifications, but the legislature had the police power to prohibit admission for other reasons that it believed were in the public's interest.<sup>112</sup> What the court considered essential was that courts had the

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104. *Day*, 54 N.E. at 651 (citing *In re Cooper*, 22 N.Y. 67, 94-95 (1860)).

105. *In re Cooper*, 22 N.Y. 67, 90-91 (1860). *But see In re Janitor of Supreme Court*, 35 Wis. 410 (1874) (taking a very contrary view, the Wisconsin Supreme Court held that its judicial power extended to the selection of the court's janitor).

106. *Day*, 54 N.E. at 651.

107. *Id.* at 652.

108. *Id.*

109. *Id.* (citing *In re Bradwell*, 55 Ill. 535 (1869)). Mrs. Bradwell was later granted her law license after the legislature passed an amendment stating that no person should be denied a license on the basis of gender. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (noting that in the *Bradwell* case, "[t]he legislature did not undertake

power to “protect themselves against ignorance and want of skill, [without which] they cannot properly administer justice.”<sup>113</sup> In light of the “diploma mill” that the court saw from law schools, which could be started by anyone and had no state supervision, the court held that it properly exercised its powers to enact a rule regarding qualifications for admission and, under the separation of powers clause in the Illinois Constitution, the legislature could not encroach upon that rule.<sup>114</sup>

The judicial and legislative branches’ dispute over the power to regulate the legal profession was far from over after *Day*.<sup>115</sup> Many courts continued to find that the legislature had some limited powers to act in the areas of attorney admission, discipline, and disbarment.<sup>116</sup>

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by the amendment to deprive the court of passing upon her learning and fitness to practice law.”).

113. *Id.* The court explicitly stated that the legislature’s police powers over the qualifications of those admitted to other fields, such as doctors, plumbers and horseshoers, had no influence on the issue before it. *Id.* at 653.

114. *Id.* Like many states, Illinois’ constitution did not explicitly delegate the power to regulate the legal profession to the judicial branch. The Illinois Constitution of 1870 only stated:

The powers of the government of [the State of Illinois] are divided into three distinct departments, the legislative, executive, and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

ILL. CONST. of 1870, art. III, § 1, *as reprinted in* 3 SOURCES AND DOCUMENTS, *supra* note 55, at 288.

115. *See generally* Leon Green, *The Courts’ Power Over Admission and Disbarment*, 4 TEX. L. REV. 1 (1925) (discussing different theories regarding which agency of the state government is vested with the power to regulate the legal profession).

116. *See, e.g., In re Miller*, 244 P. 376, 380 (Ariz. 1926) (“We are of the opinion that under its police power the Legislature has the right to say what qualifications a citizen must possess in order to be permitted to practice law the same that it may determine the requirements for practicing medicine, dentistry, pharmacy, or any other profession, vocation or calling.”); *In re Collins*, 81 P. 220, 222 (Cal. 1905) (holding that the legislature has the power to specify the conduct upon which an attorney may be disbarred and that the court does not have inherent powers to disbar attorneys for other reasons), *overruled by* *Stratmore v. State Bar of Cal.*, 538 P.2d 229, 230 (Cal. 1975); *In re Applicants for License*, 55 S.E. 635, 636-37 (N.C. 1906) (holding that the legislature, as part of its police powers, has the power to establish qualifications for professions, including attorneys; the court has no inherent power to determine who may become an attorney, although it does have inherent powers over those who have been admitted and have behaved

*Day* did, however, become a very influential case in the nation with respect to the balance of power between the judicial and legislative branches and the use of the inherent powers doctrine. Many courts cited *Day* and adopted its holding that the legislatures can enact some statutes that speak to the minimum qualifications for admission to the bar, but that the courts have the exclusive and ultimate authority to determine who shall be admitted and disbarred.<sup>117</sup> As one court explained:

The manner, terms, and conditions of [attorneys'] admission to practice, as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute. *The only restraints upon the exercise of this power by the Legislature are that the regulations prescribed by that branch of the government shall be reasonable and shall not deprive the judicial branch of its power to prescribe additional conditions under which applicants shall be admitted, nor take from the courts the right and duty of actually making orders admitting them.* In some jurisdictions it has been determined, it is true, that the power to regulate the machinery governing admissions to the bar is strictly judicial and that the legislative branch cannot

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inappropriately); *In re Saddler*, 130 P. 906, 909-10 (Okla. 1913) (holding that courts have a common law power to disbar attorneys, but that the power to admit attorneys is of statutory origin); *see also* Green, *supra* note 115, at 2-18 (surveying the main approaches that courts had taken regarding which agency of state government has the power to regulate the legal profession).

117. *See, e.g.*, *Hanson v. Grattan*, 115 P. 646, 647 (Kan. 1911) (holding the legislature can prescribe qualifications for the admission and disbarment of attorneys, to which courts have deferred in order to avoid friction between branches of government); *In re Thatcher*, 22 Ohio Dec. 116, 1912 WL 849, at \*1, \*2-4 (1912) (holding that the general assembly may provide that an attorney found guilty of moral turpitude shall not be permitted to practice in any court; however, it may not say that any particular applicant shall practice as an attorney); *Ex rel. Thatcher v. Brough*, 23 Ohio Cir. Dec. 257, 1912 WL 685, at \*8 (1912) (holding the legislative act that reinstated disbarred attorneys unconstitutional); *In re Olmsted*, 140 A. 634, 636 (Pa. 1928) (holding that statutes dealing with admissions to the bar will be recognized as valid unless they interfere with the right of the courts to determine who shall be entitled to practice before them).

be concerned with it, but in our opinion such a view is consonant neither with reason nor with the weight of authority.<sup>118</sup>

*Day* has been cited by over half of the states in support of the power of the judicial branch to regulate the practice of law and admission of attorneys.<sup>119</sup> *Day's* main rationale was that courts possess certain inherent powers that the legislature cannot override without threatening the judicial branch's ability to function as an independent branch of government.<sup>120</sup> Even though the state constitutions did not usually vest the courts with the express power to regulate the legal profession, *Day* and subsequent courts reasoned that when the state constitutions created the judicial branches, upon their creation "power sprang into being independent of any written law."<sup>121</sup> These inherent powers were necessary for the court "to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency."<sup>122</sup>

While *Day* held that the judicial branch had the ultimate power to determine who should be admitted to the bar, many courts used a similar rationale to claim the additional and related exclusive power to determine who should be disciplined and who should be disbarred.<sup>123</sup>

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118. *In re Chapelle*, 234 P. 906, 907-08 (Cal. Ct. App. 1925) (citations omitted) (emphasis added); *see also In re Crum*, 204 P. 948, 949-50 (Or. 1922) (holding that determining who is qualified to practice law is a judicial function, but the legislature may prescribe the qualifications and provide the regulations under which citizens may engage in the practice of law); *State v. Cannon*, 221 N.W. 603, 604-05 (Wis. 1928) (holding that the power to admit and disbar attorneys is not one that derives from statutes or constitutions, but is inherent in the courts and when courts follow statutes, they are merely deferring to them).

119. Author's search of Westlaw in 2009. *See, e.g., Bump v. Dist. Court of Polk County*, 5 N.W.2d 914, 917 (Iowa 1942); *Meunier v. Bernich*, 170 So. 567, 576 (La. Ct. App. 1936); *Clark v. Austin*, 101 S.W.2d 977, 982 (Mo. 1937); *R.I. Bar Ass'n v. Auto. Serv. Ass'n*, 179 A. 139, 142 (R.I. 1935).

120. *In re Day*, 54 N.E. 646, 652 (Ill. 1899); *see also Alpert, supra note 27*, at 536-40 (examining *Day* and the justifications given by the court for its holding).

121. *See, e.g., State v. Cannon*, 221 N.W. 603, 605 (Wis. 1928).

122. *Id.* at 603; *see also In re Cate*, 273 P. 617, 620 (Cal. Ct. App. 1928) (reasoning that inherent powers of the courts derive from the constitution).

123. *See, e.g., People ex rel. Ill. State Bar Ass'n v. People's Stock Yard State Bank*, 176 N.E. 901, 905 (Ill. 1931) (holding that the court has the inherent power to determine the educational and moral qualification for bar admissions, as well as the inherent power to discipline and disbar attorneys); *In re Raisch*, 90 A. 12, 21 (N.J.

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The rationale in support of that expansion was generally consistent with the following decision:

An attorney at law is not merely a member of a profession practicing for personal gain, nor is he on the other hand a public officer. He is an officer of the court. *The court, by reason of the necessary and inherent power vested in it to control the conduct of its own affairs and to maintain its own dignity, has a summary jurisdiction to deal with the alleged misconduct of an attorney.* A proceeding for disbarment is simply the exercise of jurisdiction over an officer, an inquiry into his conduct not for the purpose of granting redress to a client or other person for wrong done, but only for the maintenance of the purity and dignity of the court by removing an unfit officer.<sup>124</sup>

Eventually, many courts extended the inherent powers doctrine to the proposition that the judicial branch has the exclusive authority to define the practice of law.<sup>125</sup> However, this last proposition was not presented to and accepted by the courts until the 1930s, when the organized bar made its most significant efforts to curb the unauthorized practice of law.

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1914) (asserting that regardless of statutes, courts have the inherent power to suspend or expel its own derelict officers).

124. *Bar Ass'n of City of Boston v. Casey*, 97 N.E. 751, 754 (Mass. 1912) (citations omitted) (emphasis added); *see also* *People ex rel. Wayman v. Chamberlin*, 89 N.E. 994, 997 (Ill. 1909) (holding that the power of the court to disbar an attorney is an inherent power that is independent of any statute on the subject). Some courts had to acknowledge the fact that the legislatures had been regulating the practice of law. One court justified departing from this past practice as follows:

Our courts have been slow, perhaps neglectful, in the exercise of their authority [to regulate admissions to the bar]. Their failure to act may even have invited the Legislature to take action amounting to an attempt to take over the performance of this judicial duty, but this fact, if it be one, cannot affect in the slightest degree the constitutional apportionment of the separate governmental functions. Nor is the duty of the courts to safeguard their independence any less clear and imperative because such action if taken now would be belated and perhaps might result in the criticism of certain former decisions not altogether well or fully considered.

*In re Cate*, 273 P. 617, 625 (Cal. Ct. App. 1928) (Craig, J., concurring).

125. *See infra* Part III.C.

### III. THE SHIFTING STRATEGY OF THE ORGANIZED BAR TO CURB THE UNAUTHORIZED PRACTICE OF LAW IN THE 1920S AND 1930S

In the early 1900s, the legal profession's concerns included not only establishing higher qualifications for admission to the bar, which was at issue in *Day*, but also improving the integrity of the profession and limiting competition.<sup>126</sup> The legal profession addressed these concerns by trying to prohibit the unauthorized practice of law by nonlawyers and by corporations that used lawyers to provide legal services.<sup>127</sup> Although the organized bar had great success in having the judicial branch assert power over the regulation of attorneys, it did not initially look to the judicial branch to assist it with curbing the unauthorized practice of law.<sup>128</sup> Instead, the organized bar first lobbied the state legislatures to enact statutes that would define the practice of law and penalize those engaged in the unauthorized practice of law.<sup>129</sup> This strategy was not successful so the organized bar shifted gears in the 1930s and asserted that it was unwise to try to define the practice of law and, furthermore, unconstitutional for the legislative branch to do so.<sup>130</sup>

#### A. *The Conference of the Delegates and Its Legislative Efforts to Define the Practice of Law in the 1920s*

During the end of the nineteenth century, the nature of legal practice was changing and becoming more complex, particularly in the business world.<sup>131</sup> These changes brought increased competition

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126. These concerns were not new in the early 1900s, but there were heightened efforts to address them. The concerns started as early as the mid-1700s and have been credited for encouraging the development of bar meetings and bar associations. See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 165-67 (1980).

127. See *id.*

128. See *infra* Part III.A.

129. See *infra* Part III.A.

130. See *infra* Part III.B-C.

131. See generally FRIEDMAN, *supra* note 74, at 483-95 (discussing changes in the legal profession in the late 1800s and early 1900s); see also Silas H. Strawn, *Our Changing Responsibilities*, 13 A.B.A. J. 613 (1927) (discussing the impact of the “labyrinth of laws and regulations that have come into force in the last twenty-five

not only from nonlawyers, but also from attorneys who worked for corporations and performed legal work for their customers:

Abstract and title-insurance companies were invading the field of real estate law, banks and trust companies were handling the settlement of estates, insurance firms were beginning to indemnify policyholders against risks that formerly needed the services of lawyers, and there was an increasing tendency of many litigants to make out-of-court settlements instead of engaging in prolonged expensive lawsuits.<sup>132</sup>

While scholars have noted that the legal profession's interest in preventing nonlawyers and corporations from engaging in activities they considered the practice of law reached its apex in the 1930s and 40s, the organized bar's concerns about the unauthorized practice of law began earlier than the 1930s.<sup>133</sup> In 1905, the Chicago Bar Association formed the Committee on Persons Assuming to Practice Law without a License.<sup>134</sup> The New York County Lawyers' Association next established an unauthorized practice of law committee in 1914.<sup>135</sup> That committee focused on the practice of law

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years" and their impact on the legal profession).

132. KOGAN, *supra* note 83, at 88.

133. Several factors have been attributed to this movement—mainly, the creation of bar associations that centralized the interests of the legal profession, increased competition from businesses and corporations, and the legal profession's desire to limit competition, which the Great Depression fueled. Alpert, *supra* note 27, at 536-38; *see also* Christensen, *supra* note 126, at 159, 189-97; FRIEDMAN, *supra* note 74, at 483.

134. ABEL, *supra* note 54, at 113; DEBORAH L. RHODE, *ACCESS TO JUSTICE* 74-75 (Oxford Univ. Press 2004).

135. ABEL, *supra* note 54, at 113; RHODE, *supra* note 134, at 74-75; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 7-8 (1981) (citing J.W. HURST, *THE GROWTH OF AMERICAN LAW* 323 (1950)). The efforts of the New York County Lawyers Association may have been influenced by a contemporary Yale law review article. Paul H. Sanders, *Foreword to Symposium, The "Unauthorized Practice of Law" Controversy*, 5 *LAW & CONTEMP. PROBS.* 1, 2 (1938) (citing George W. Bristol, *The Passing of the Legal Profession*, 22 *YALE L. J.* 590 (1913) as being published around the same time that New York City and other metropolitan areas began to focus on the unauthorized practice of law); *see also Unlawful Practice of the Law by Laymen and Corporations—Report of a Committee of the New York County Lawyers' Association*, in 79 *CENT. L. J.* 22, 24 (1914).

by notaries, corporations, collection agencies, and those pretending to be attorneys.<sup>136</sup> The committee hoped that its report would “invite the attention of the bar everywhere and the report might well become the basis for definite action and possibly some new legislation in every state.”<sup>137</sup>

The beginning of the American Bar Association’s interest in preventing the unauthorized practice of law is generally dated to 1933, when it formed a Standing Committee on the Unauthorized Practice of Law.<sup>138</sup> However, as one scholar noted, the beginning of the ABA’s interest in the issue actually can be dated to 1919, when it was first taken up at the Conference of Bar Delegates during the annual ABA meeting:

It is thought by the public generally that this movement of the organized Bar to repress unauthorized practice of the law is of quite recent development, dating from the depression in 1929. The truth of the matter is that the organized movement against unauthorized practice [of law], excluding local developments in New York [which started in 1913], was first agitated as many other matters were, in the Conference of Bar Association Delegates in 1919.<sup>139</sup>

The Conference of the Delegates of State and Local Bar Associations (“Conference of Delegates”) first met in 1916 at the

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136. *Unlawful Practice of the Law by Laymen and Corporations—Report of a Committee of the New York County Lawyers’ Association*, in 79 CENT. L. J. 22, 22-23 (1914).

137. *Id.* at 22 n.1.

138. See, e.g., FREDERICK C. HICKS & ELLIOTT R. KATZ, UNAUTHORIZED PRACTICE OF LAW: A HANDBOOK FOR LAWYERS AND LAYMEN 6 (1934); RHODE, *supra* note 134, at 75; Christensen, *supra* note 126, at 159, 190. During the 1933 meeting of the American Bar Association, the executive committee recommended creating a new standing committee on the unauthorized practice of law. Clarence E. Martin et al., *Report of the Executive Committee*, 58 A.B.A. REPORTS 312 (1933). The recommendation was accepted that year. *Id.* at 182; see also *Standing Committees 1933-1934*, 58 A.B.A. Reports 33 (1933). Prior to the creation of the standing committee there had been a special committee on the unauthorized practice of law, which was created in 1930. See *infra* text accompanying notes 204-07.

139. M. Louise Rutherford, *The Influence of the American Bar Association on Public Opinion and Legislation 93-94* (August, 1937) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with Northern Illinois University, College of Law Library).

annual ABA meeting.<sup>140</sup> The attendees were delegates from the ABA, state bar associations, and local bar associations, who came together to discuss and make recommendations regarding various topics of importance to the bar.<sup>141</sup>

During the fourth annual meeting of the Conference of Delegates, which was held in Boston on September 2, 1919, a main topic of discussion was the relationship between trust companies and the practice of law.<sup>142</sup> The President of the Conference of Delegates, Elihu Root, opened the discussion by commenting that, "In the large cities, corporations, in the nature of trust companies, have taken over in a large measure a great deal of business which was formerly transacted by lawyers."<sup>143</sup> He concluded that it seemed desirable to draw some line between the two.<sup>144</sup>

The next speaker, William Piatt, asserted the need for a clear line between the business of a trust company and the practice of law. He proclaimed that a trust company is organized mainly for the commercial purpose of generating a profit; however, the practice of law is an undertaking primarily to render service to the community and not to generate a profit.<sup>145</sup> Interestingly, Piatt did not argue that the trust companies were in any way mishandling the tasks that he thought crossed into the practice of law. His main rationale for prohibiting their activities was as follows:

[E]very time a trust company or a title company, or a collection agency, secures a piece of law business, it gets it upon the claim that it will do it more expeditiously, and with more fidelity towards discharging the financial obligation to the client for the money it

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140. *Conference of Bar Association Delegates*, 41 A.B.A. REPORTS 588 (1916).

141. *New York State Bar Association, Proceedings of the Forty-Fourth Annual Meeting*, 44 N.Y. STATE BAR ASS'N R. 288 (1921) [hereinafter NYSBA Proceedings].

142. Elihu Root, President of the Conference of Delegates, Address to the Conference of Delegates of State and Local Bar Associations (Sept. 2, 1919), in 6 A.B.A. J. 14, 19 (1920).

143. *Id.*

144. *Id.*

145. William H. H. Piatt, Mo. Member of the Am. Bar Ass'n, Address to the Conference of Delegates of State and Local Bar Associations (Sept. 2, 1919), in 6 A.B.A. J. 14, 20 (1920).

may have to handle—thereby imputing to lawyers lack of business sense and dishonesty.<sup>146</sup>

In other words, his concern was not so much about the quality of the services that the consumers would receive as it was about the impact competition would have on attorneys' reputations. Piatt concluded that "it is time the Bar Associations began to examine the question of whether the constant attack on lawyers and courts should be permitted to longer continue."<sup>147</sup>

As the discussion among the Conference of Delegates continued, other attendees recognized the need to deal with the unauthorized practice of law.<sup>148</sup> What is particularly noteworthy is that the attendees were focused on curbing the unauthorized practice of law through the passage of favorable legislation.<sup>149</sup> The delegate from Colorado noted that trust companies had been convicted of violating a statute in New York.<sup>150</sup> The Colorado Bar Association used the New York bill as a model for a proposed bill that it presented to its legislature.<sup>151</sup> It came within a vote or two of passing, and the Colorado delegate said, "[b]ut you should have seen the lobby that the trust companies had."<sup>152</sup>

Mr. Piatt told the Conference that "in 1915, Missouri passed an act defining the practice of law, and now, when a trust company undertakes to practice law, we can have the court determine what is the practice of law."<sup>153</sup> He claimed that the bad practices of trust

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146. *Id.* at 21. He continued "that all over the country there has been a constant undermining of confidence in the Bench and Bar by laymen who desire to practice law for the sake of fees." *Id.* The resolutions adopted by the Conference of Delegates at the end of this meeting further reasoned that the relationship of attorney and client was one that needed to be preserved "and that corporate or lay practice of law is destructive of that relationship and tends to lower the standard of professional responsibility." NYSBA Proceedings, *supra* note 141, at 299.

147. Piatt, *supra* note 145, at 23.

148. *Conference of Delegates of State and Local Bar Associations*, 6 A.B.A. J. 14, 25-30 (1920).

149. *Id.* at 26, 30.

150. *Id.* at 26.

151. *Id.*

152. *Id.*

153. Piatt, *supra* note 145, at 30. His argument seems to assume that in the absence of this statute, the courts may not have had the power to determine a correct definition of the practice of law.

companies had virtually disappeared after the passage of this act. Piatt concluded, "the question which it seems to me confronts the lawyers is the question of determining what is a correct definition of the practice of law."<sup>154</sup>

The delegate from Washington recommended that those present at the meeting pass a resolution "urging the state legislatures to enact a law which shall clearly define the relationship existing between the trust companies and the lawyers."<sup>155</sup> The Conference of Delegates agreed, and it adopted a resolution providing that a special committee ("Special Committee") of six would "be appointed to prepare for the use of state and local bar associations a careful brief of what constitutes practice of the law and what constitutes unlawful and improper practice of the law by laymen or lay agencies, and that said committee report at the next Conference."<sup>156</sup> No attendees appear to have questioned whether the state legislatures had the authority to define the practice of law.

While the Conference of Delegates focused on legislation to help curb the unauthorized practice of law, it simultaneously lamented the state bars' inability to influence state legislation on a variety of topics. The delegates noted that state bar membership was weak, communication was poor, and discipline of attorneys was not being adequately addressed.<sup>157</sup> The organized bar was concerned that it would not be able to improve the reputation of the legal profession

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154. *Id.*

155. *Conference of Delegates of State and Local Bar Associations*, 6 A.B.A. J. 14, 26 (1920).

156. *Id.* at 41.

157. Herbert Harley, Ill. Member of the Am. Bar Ass'n, Remarks Before the Conference of Delegates of State and Local Bar Associations (Sept. 2, 1919), in 6 A.B.A. J. 14, 32-34 (1920). Some of the delegates were also interested in having the Bar recognized as an independent political body because they were concerned that they did not have an adequate voice in the political process. Clarence N. Goodwin, Ill. Member of the Am. Bar Ass'n, Remarks Before the Conference of Delegates of State and Local Bar Associations (Sept. 2, 1919), in 6 A.B.A. J. 14, 38 (1920). The importance of this issue was also discussed during the 1921 meeting of the New York State Bar Association. It was noted that the bar was not influencing "public opinion equal to the forces of other agencies that were influencing public opinion, and that it was highly important that the Bar of each State should be organized and should be an official part of the organization of the judicial system of the states." NYSBA Proceedings, *supra* note 141, at 291.

and its impact on legislation unless it had a strong organized voice in the states, such as becoming an integrated bar.<sup>158</sup> However, the state bar organizations were having little success in influencing the legislatures on this issue.<sup>159</sup> Herbert Harley from Illinois complained:

Important subjects are coming up every year and yet we know that the demands of the bar associations are not receiving as much consideration from the state legislatures as they are entitled to, notwithstanding the fact that in every legislature there are more lawyers than any other class of people, and that the judiciary committees where these measures usually fail, are composed of lawyers.<sup>160</sup>

The Conference of Delegates next met on August 24, 1920, and the Special Committee reported it had written a brief with a proposed definition of the practice of law.<sup>161</sup> The Special Committee had endeavored to formulate a definition that would be “all inclusive and all exclusive to the end that there may not be under the definition a little unlawful practice of the law.”<sup>162</sup> The Special Committee noted

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158. The Committee on State Bar Organization’s report, which was presented during the 1921 Conference of Bar Association Delegates, concluded the following: First, that it was in the public’s interest to protect the public from unqualified lay practitioners, as well as from unscrupulous lawyers; second, that the public will not sympathize with the Bar until membership in it is a badge of honor with a guaranty of honesty among its members; and lastly, that the path to improving the reputation of the bar is “legislative action in the several states, recognizing the Bar of the state as a body politic and giving it power to govern itself, both in the matter of admission and discipline.” *Proceedings of the Sixth Annual Conference of Bar Association Delegates*, 46 A.B.A. REPORTS 572 (1921).

159. Harley, *supra* note 157, at 32. The organized bar had noted that the majority of those in the legislatures were lawyers. Merrel Price Calloway, Vice President of the NY Guar. Trust Co., Remarks Before the Conference of Delegates of State and Local Bar Associations (Sept. 2, 1919), in 6 A.B.A. J. 14, 29 (1920). However, only about 20-25% of lawyers were involved in bar associations. Harley, *supra* note 157, at 32. Therefore, as a group, they may not have had much influence before the legislatures despite the fact that lawyers heavily populated the legislatures.

160. Harley, *supra* note 157, at 32.

161. *Proceedings of the Forty-Third Annual Meeting of American Bar Association*, 45 A.B.A. REPORTS 55 (1920). A full copy of the brief can be found reprinted in 44 N.Y. STATE BAR ASS’N R. app. A at 299-367 (1921).

162. NYSBA Proceedings, *supra* note 141, at 300.

that court decisions defining the practice of law were limited because they "necessarily define[d] practice of the law as to the issues presented by the particular case, and . . . the several states by statute have in but few instances attempted a definition either by including things allowed or prohibited things not allowed."<sup>163</sup>

The brief reasoned that a definition was necessary for the protection and the benefit of society, not for the benefit of the practitioner.<sup>164</sup> The Special Committee's rationale for a definition continued to focus on maintaining the status of law as a profession and preventing its demise into a business:

Practice of the law is not a business in the general acceptance of that term, never was, and never can be. The sole inducement to the layman to practice law and do law business is the fee derived therefrom . . . . The layman, a natural person or corporate, may only compete with the lawyer in the practice of the law and the doing of law business by orally soliciting or advertising to do it more expeditiously, faithfully, intelligently, and at less expense than the lawyer, thereby imputing to the lawyer slothfulness, infidelity, and extortion. A loss of confidence in the courts and lawyers is a sign of governmental decline, and a forerunner of disintegration and anarchy.<sup>165</sup>

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163. *Id.*

164. *Id.* at 302. The brief does not contain any argument that the integrity of the judicial branch requires curbing the unauthorized practice of law, which becomes the lead rationale adopted by the courts in the 1930s and 40s. *See infra* Part III.C.

165. NYSBA Proceedings, *supra* note 141, at 302-03. The brief further focused on the lawyer's role as a servant to the State. The brief reasoned:

In normal times, when the world seemed somehow better ordered and smoother running than now, the Lawyer, unless he ascended the bench or entered some branch of the government or public life, was not often called upon for an active discharge of his broader duty to the State. But today the Lawyer's public duty predominates. . . . Forces of evil break out on all sides. The press is a daily chronicle of strikes, profiteering, soapbox chicanery and blatant crime. There is trouble now and there is trouble ahead.

*Id.* at 304.

The Special Committee's proposed definition was expansive, although it focused on performing certain acts only when done as a vocation:

Present day practice of the law, in its broadest sense, therefore *embraces and comprehends the vocation* of personally appearing as an advocate in a representative capacity, or the drawing of any papers, pleadings, documents, or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee, master, or any body, board, committee, commission or officer constituted by law, or having authority to settle controversies, or the advising, or counseling *as a vocation* any person, firm, association or corporation as to any secular law, or the drawing or the procuring of assistance in the drawing, *as a vocation*, of any papers, documents, or instruments affecting or relating to secular rights, or the doing, *as a vocation*, of any act in a representative capacity on behalf of another, obtaining or tending to obtain, or securing or tending to secure for such other any property or property rights whatever. The doing in a representative capacity, *as a vocation*, of any of the foregoing by a person not licensed as an attorney, or by a corporation constitutes unlawful and improper practice by such person or corporation.<sup>166</sup>

The definition's focus on providing services as a vocation was consistent with a couple of state statutes that had been enacted, which only prohibited certain activities when they were done for a fee or other consideration.<sup>167</sup> This prohibition was consistent with the bar's

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166. *Id.* at 301 (emphasis added). A variety of authorities were cited in support of this definition. *Id.* at 305-10. The brief notes that few states had, by statute, attempted to define the practice of law. Instead, they had left the enumeration of prohibited practices to the interpretation of the courts on a case-by-case basis. *Id.* at 301-02. The brief commented on the juxtaposition between this legislative absence and the legislatures' common requirements regarding admission to the bar such as requirements that applicants have good moral character and that they take an oath. *Id.* at 302. The brief does not question whether the legislature has the power to define the practice of law. *Id.* at 297-367. Indeed, it did discuss statutory definitions and prohibitions existing in Massachusetts, Missouri, Montana, New York, and Oregon. *Id.* at 346-58.

167. *Id.* at 346-48, 357.

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focus on preventing the commercialization of the profession.<sup>168</sup> The Special Committee's brief stated that:

[W]herever and whenever a layman or lay agency charges a fee, as an attorney's fee, for services rendered by it of a kind, character, and in a manner that an attorney may render and charge an attorney's fee for rendering, such layman or lay agency in such instance is unlawfully and improperly practicing law.<sup>169</sup>

During the 1920 meeting, the delegates resolved "[t]hat the definition of the practice of law contained in the report of the Special Committee (Mr. Piatt's committee) be recommended to the various state and local bar associations for adoption in their state laws *by appropriate legislation.*"<sup>170</sup> A copy of the brief containing the definition was sent to all state and local bar associations.<sup>171</sup>

The Conference of Delegates' initiative to have state legislatures enact a definition of the practice of law gained little traction.<sup>172</sup> The subsequent conference reports give little indication as to whether the bars' efforts were unsuccessful in the state legislatures or whether, for other reasons not disclosed in the conference reports, the state and local bars lost their motivation to pursue the issue. During the 1921 meeting of the Conference of Delegates, the following was reported:

It was made clearly manifest that the Bar is showing greater activity in the fields of professional effort than ever before. It was evident also that the resolutions submitted at previous meetings of the Council have had marked effect in many localities, especially in the

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168. See *supra* note 145 and accompanying text.

169. NYSBA Proceedings, *supra* note 141, at 360. The brief also discussed Missouri's statute that defined the practice of law and noted that "no layman is penalized for practicing law and doing law business without charge." *Id.* at 346. If no attorney was available to draft a will, a contract, or other agreement, or if a person does not want to pay an attorney to draft such documents, "in such instance he may have the services of a layman." *Id.* at 346-47.

170. *Proceedings of the Fifth Annual Conference of Bar Association Delegates*, 45 A.B.A. REPORTS 396 (1920) (emphasis added); see also Rutherford, *supra* note 139, at 94.

171. *Proceedings of the Fifth Annual Conference of Bar Association Delegates*, 45 A.B.A. REPORTS 396 (1920).

172. By the end of the 1920s, very few states had enacted definitions of the practice of law. See *infra* note 178 and accompanying text.

matter of curbing unlawful practice of the law, and the encouragement of legal aid work.<sup>173</sup>

However, no specific efforts were discussed and no mention was made of any state that had passed or even considered legislation adopting the proposed definition of the practice of law, or any other definition of the practice of law.<sup>174</sup> During the next meeting in 1922, it was reported that California had passed an act to prevent the unlawful practice of law, but it would not take place until approved on referendum. The meeting report notes that, “The banks and trust companies of the state are making an open campaign against the measure.”<sup>175</sup>

By the 1923 annual meeting of the Conference of Delegates, the topic of the unauthorized practice of law, and the specific subject of legislation defining the practice of law, were not mentioned at all in the annual report.<sup>176</sup> However, Chief Justice Taft gave a speech during that meeting that was critical of legislatures and said that they “do not give sufficient attention to the general subject of legal reform and procedures.”<sup>177</sup> Whether Chief Justice Taft was commenting on the failure to have statutes passed defining the practice of law, or other legal reform measure the bar was proposing such as integrated bars, is pure speculation.

By 1927, only a few states had passed legislation that defined the practice of law.<sup>178</sup> At least one of these states had passed legislation defining the practice of law prior to the efforts of the Conference of Bar Delegates.<sup>179</sup> Overall, the organized bar’s lobbying efforts appear to have produced anemic results.

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173. *Proceedings of the Sixth Annual Conference of Bar Association Delegates*, 46 A.B.A. REPORTS 572 (1921).

174. *Id.* at 572-73.

175. *Proceedings of the Seventh Annual Conference of Bar Association Delegates*, 47 A.B.A. REPORTS 597 (1922).

176. *Proceedings of the Eighth Annual Conference of Bar Association Delegates*, 48 A.B.A. REPORTS 548-64 (1923).

177. William Howard Taft, U.S. Chief Justice, Remarks at the Eighth Annual Conference of Bar Association Delegates (Aug. 28, 1923), in 48 A.B.A. REPORTS 548, 549 (1923).

178. See, e.g., MT. REV. CODES § 8944 (1921), reprinted in HICKS & KATZ, *supra* note 138, at 39; see also *infra* note 179.

179. Missouri had already enacted a definition of the practice of law prior to

*B. The Organized Bar's Renewed Efforts to Curb the Unauthorized Practice of Law in the 1930s and Its Shift Away from Defining the Practice of Law*

After the Conference of Delegates' strong interest in 1919-1920 to curb the unauthorized practice of law and have legislation passed defining the practice of law, by 1923 the issue became dormant.<sup>180</sup> The bar's focus on the unauthorized practice of law did not experience a major revival until after the beginning of the Great Depression, when it became a prominent topic at the ABA's annual meeting in 1930.<sup>181</sup> Some scholars have theorized that the Great Depression was the driving force behind several protectionist measures that the legal profession promulgated, including eliminating for-profit law schools,<sup>182</sup> increasing educational requirements for admission to the bar, giving more severe bar examinations, and imposing more stringent character requirements.<sup>183</sup>

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the efforts of the Conference of Delegates. *See supra* text accompanying note 153. By 1934, several other states had enacted statutes that defined the practice of law. *See infra* note 235.

180. *See supra* note 176 and accompanying text.

181. *Proceedings of the Fifty-Third Annual Meeting of American Bar Association*, 55 A.B.A. REPORTS 94 (1930); *see also* Rutherford, *supra* note 139, at 94. The efforts of the Conference of Delegates were mentioned in the 1925 annual report, but not in the context of any specific reform efforts such as having the practice of law defined. In 1925, the Standing Committee on Professional Ethics and Grievances mentioned the 1920 report adopted by the Conference of Delegates in the context of giving an ethics opinion about whether a lawyer may accept employment from a lay intermediary who will profit from the lawyer's services. ABA Comm. On Prof'l Ethics and Grievances, Formal Op. 8, in 50 A.B.A. REPORTS 518, 520-21 (1925).

182. *See, e.g.,* Shepherd & Shepherd, *supra* note 79, at 2114-25 (citing a 1937 article by the Dean of Columbia Law School that sought the elimination of all for-profit law schools).

183. *See, e.g., id.*; AUERBACH, *supra* note 79, at 108-29; *see also* James Grafton Rogers, U.S. Assistant Sec'y of State, Overcrowding of the Bar, Address at the Fifty-Fifth Annual Meeting of American Bar Association Proceedings of the Section of Legal Education and Admissions to the Bar, in 57 A.B.A. REPORTS 681-83 (1932); Young B. Smith, *The Overcrowding of the Bar and What Can Be Done About It*, 7 AM. L. SCH. REV. 565 (1932).

In the 1930s, much of the organized bar concluded that the legal profession was overcrowded.<sup>184</sup> The number of attorneys nationwide increased from 122,500 in 1920 to 160,600 in 1930.<sup>185</sup> This was a thirty-one percent increase in the number of lawyers, whereas the general population increased by only sixteen percent during the same period of time.<sup>186</sup> Some members of the profession recognized that more attorneys meant greater public access to attorneys and better price competition for the public.<sup>187</sup> Other people in the legal profession argued that the bar was not overcrowded, at least when measured against community need.<sup>188</sup> There was, however, much sentiment among the profession that the growing number of attorneys “will be altogether evil.”<sup>189</sup>

Regardless of whether or not the profession was overcrowded, there was no doubt that the income of attorneys had declined significantly after the Depression, although not in an amount that was

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184. See *Proceedings of the Section of Legal Education and Admissions to the Bar*, 57 A.B.A. REPORTS 649-52 (1932); Rogers, *supra* note 183, at 679; and Wiley B. Rutledge, *A Survey of the Welfare of the Missouri Bar*, 8 AM. L. SCH. REV. 128, 130 (1934) for a discussion of the overcrowding of the bar at that time.

185. Rogers, *supra* note 183, at 679. However, during World War II, law school enrollments dropped dramatically. See ABEL, *supra* note 54, at 74; Smith, *supra* note 183, at 668-71 (1932).

186. Rogers, *supra* note 183, at 680-81.

187. *Id.*

188. Lloyd G. Garrison, *Results of the Wisconsin Bar Survey*, 8 AM. L. SCH. REV. 116, 121 (1934) (arguing that empirical research showed that the volume of legal business had increased in Wisconsin at a greater rate than the number of attorneys); Smith, *supra* note 183, at 668-76 (arguing that the increase in attorneys from 1920 to 1930 may not signify an overcrowding of the bar because there may have been an insufficient number of attorneys in 1920). *But see* Isidor Lazarus, *The Economic Crisis in the Legal Profession*, 1 NAT'L LAW. GUILD Q. 17, 21 (1937-1938) (“The ‘depression’ never will be entirely overcome. In the absence of fundamental adjustments, fewer lawyers are needed *per capita* of population than formerly because business has become concentrated and fewer individuals need lawyers for ordinary business purposes.”).

189. Rogers, *supra* note 183, at 680-81; *see also* Lazarus, *supra* note 188, at 23 (arguing that overcrowding of the profession hurts the public because it is then “subjected to demoralized professional standards and the menace of unethical conduct on the part of those economically depressed, unable to turn to other employment, yet understandably unwilling to starve.”).

disproportionate to other professions.<sup>190</sup> It was estimated that the drop in lawyers' income from 1929 to 1932 was 39.9%; but engineers dropped 38.4%, and doctors and surgeons dropped 38.8% during the same time period.<sup>191</sup> The decline in income generated some discussion among the legal profession about setting minimum fee schedules to protect incomes,<sup>192</sup> as well as establishing quotas for the number of attorneys admitted to practice.<sup>193</sup>

During the 1930s, the organized bar returned again to the issue of educational requirements for admission to the bar as one way to address the perceived overcrowding of the bar. The ABA and the American Association of Law Schools ("AALS") joined forces to convince state legislatures and courts to deny law licenses to those who received their training through apprenticeships or from for-profit law schools, which largely consisted of part-time law schools.<sup>194</sup> Again, the bar's efforts to lobby the state legislatures were not immediately fruitful.<sup>195</sup> One article has theorized that the lack of success was due to the fact that state legislatures were "filled with the graduates of the night law schools that the ABA and AALS hoped to eliminate."<sup>196</sup>

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190. See Garrison, *supra* note 188, at 123-24.

191. *Id.* at 124; see also Rutledge, *supra* note 184, at 130-32 (analyzing decline of incomes of lawyers in Missouri from 1929 to 1933).

192. Shepherd & Shepherd, *supra* note 79, at 2225. *But see* Rutledge, *supra* note 184, at 133-34 (opposing minimum fee schedules).

193. See Lazarus, *supra* note 188, at 23 (recommending serious study be given to a quota system to deal with the overcrowding of the bar); Shepherd & Shepherd, *supra* note 79, at 2124 (discussing quotas imposed on the number of new attorneys in Pennsylvania in 1935).

194. Shepherd & Shepherd, *supra* note 79, at 2116-17. The efforts to limit admission to the bar may have been nationalist as well as protectionist. The student population of the part-time law schools was largely foreign born. *Id.* at 2118. Yale Law School was worried about the "Jewish Problem," and wanted to reserve slots for those of "old American" ancestry. *Id.* at 2119. Similarly, a bar leader opined that "Jewish applicants for the bar were 'without the incalculable advantage of having been brought up in the American family life,' and therefore they 'can hardly be taught the ethics of the profession as adequately as we desire.'" *Id.* (citation omitted).

195. *Id.* at 2120.

196. *Id.*

For example, during the 1920s, an average of twenty-five graduates of Suffolk Law School served in the Massachusetts legislature. The legislators still remembered Abraham Lincoln, who had not attended law school. They believed that law schools should remain open to the “poor and worthy.” . . . *The deans of the new law schools understood that the elite law schools, most of which were associated with colleges, were attempting to eliminate the new schools by convincing state legislatures not to license students from the new schools.* For example, at the 1929 ABA meetings, the dean of Suffolk Law school, in an address entitled “Facts and Implications of College Monopoly of Legal Education,” noted that the ABA and AALS had hired a lobbyist “at a \$10,000 a year salary as field agent to capture the various states of the Union for the college monopoly.”<sup>197</sup>

To some extent, a class war may have been waging among attorneys with different types of practices, training and education.<sup>198</sup> This class distinction can be seen as early as 1875 in a speech given to a graduating law class, in which the speaker characterized the profession as containing a “nominal bar” and a “true bar”:

[O]thers fancy that [admission to the bar] adds respectability to some of the less recognized, but more immediately lucrative occupations,— real estate, brokerage, tax-paying, insurance agency, etc., etc. All these classes together have made the *nominal* bar a great, ill sorted, disjointed body of self-appointed members, having little or nothing in common with the *true* bar, composed of men who study the law for its own sake and practice it as the work of their lives.<sup>199</sup>

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197. *Id.* at 2120-21 (emphasis added) (citations omitted).

198. See AUERBACH, *supra* note 79, at 40-73; FRIEDMAN, *supra* note 74, at 497-98; Quintin Johnstone, *The Unauthorized Practice Controversy, A Struggle Among Power Groups*, 4 U. KAN. L. REV. 1, 2-3 (1955); Shepherd & Shepherd, *supra* note 79, at 2116 (1998) (arguing that in the 1920s the ABA represented an elite class of attorneys, which only represented about 9% of the legal profession).

199. Hammond, *supra* note 90, at 15. Another commentator later complained that men not fit to become lawyers were debasing the profession by entering the profession and then being “despised as the hangers on of police courts and the nibblers of crumbs which a dog ought to be ashamed to touch. It would be a blessing if some Noachian deluge would engulf half of those who have license to practice.” Rogers, *supra* note 89, at 53. This class war may also be reflected in the organized

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Despite the initial resistance, the bar's movement to restrict admission to the bar to those who had attended accredited law schools eventually gained strength.<sup>200</sup> In 1927, no state required graduation from a law school as a requirement for admission; by 1941, forty-one states required graduation from an ABA accredited law school as a prerequisite to bar admission.<sup>201</sup>

The economic times of the 1930s also caused a renewed discussion among the organized bar about services that nonlawyers and corporations were providing to the public.<sup>202</sup> As one writer complained, "[T]here are many positions now filled by laymen which should more appropriately be filled by lawyers, and . . . the profession should continue to fight for such change."<sup>203</sup> During the ABA's 1930 meeting, the Standing Committee on Professional Ethics and Grievances ("Ethics Committee") reported that it was concerned about corporations hiring attorneys to provide legal services to the corporations' patrons, members, or subscribers.<sup>204</sup> Collection agencies, which were seen to control almost all collection and bankruptcy work, were also a concern.<sup>205</sup> The ABA's annual report stated:

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bar's inability to get legislation passed that favored its interests despite the fact that the legislatures were heavily comprised of lawyers. *See supra* notes 195-98 and accompanying text.

200. Shepherd & Shepherd, *supra* note 79, at 2121-22. George and William Shepherd theorize that while the ABA's members only consisted of a minority of practicing lawyers, there was no rival group of organized lawyers; therefore, the ABA could purport to speak for the profession. *Id.*

201. *Id.* at 2122. The accredited law schools, however, struggled with enrollment numbers as young men were called into military service during World War II. In 1943, the New York Times reported: "Ingatius M. Wilkinson, dean of Fordham Law School, declared the enrollment of women in the law at Fordham had nearly doubled and that if the war went on only women and physically handicapped young men would be in training for the legal profession." *State Bar Fearful of "Bootleg" Law*, N.Y. TIMES, Jan. 24, 1943, at 30.

202. Wiley B. Rutledge, *A Survey of the Welfare of the Missouri Bar*, 8 AM. L. SCH. REV. 128, 132 (1935); Charles E. Clark, *The Proposed National Survey of the Bar*, 8 AM. L. SCH. REV. 138, 146 (1935).

203. Lazarus, *supra* note 188, at 24.

204. Thomas Francis Howe et al., *Report of the Standing Committee on Professional Ethics and Grievances*, 55 A.B.A. REPORTS 480-85 (1930).

205. *Id.* at 482.

There have been, and in some places still are, differences of opinion as to what constitutes the practice of law. Despite the many decisions to the contrary, some lawyers will contend that lay organizations are not practicing law so long as they employ licensed attorneys to handle the legal matters entrusted to them by their patrons. . . . As this report is being prepared, these contentions are being raised in cases pending in the Supreme Courts of both Illinois and Minnesota.<sup>206</sup>

The Ethics Committee suggested that a special committee be formed to investigate the unauthorized practice of law (“Special Committee on UPL”) and to consider actions that could be taken to protect the public from such activities.<sup>207</sup> The focus at this point was legal services provided by lawyers through entities such as corporations, banks, trust companies, and collection agencies.<sup>208</sup> In other words, the Ethics Committee was focused on situations that could not “exist without the participation and cooperation of lawyers.”<sup>209</sup>

The report of the Ethics Committee contained no mention of the Conference of Delegates’ earlier efforts to curb the unauthorized practice of law, or its desire to have a definition of the practice of law adopted by the state legislatures. In fact, contrary to the position taken by the Conference of Delegates a decade earlier, the 1931 joint report of the Ethics Committee and Special Committee on UPL praised recent court decisions for refraining from adopting a definition of the practice of law:

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206. *Id.* at 481.

207. *Id.* at 476.

208. The Ethics Committee’s report does note that most states have statutes of some kind that prohibit the practice of law by corporations, but that there had been little prosecution under them. In fact, lawyers resisted any enforcement of these statutes because many of them were performing this legal work on behalf of banks and trust companies. Similarly, lawyers employed by collection agencies were thought of as now being dominated by the opinions of that industry. *Id.* at 481-82; see also Frederick Hicks & Elliott R. Katz, *The Practice of Law by Laymen and Lay Agencies*, 41 YALE L.J. 69, 70 (1931) (discussing lay agencies such as trust, title and insurance companies, banks, tax experts, accountants, collection agencies, notaries, and real estate brokers that were “performing functions heretofore commonly regarded as within the exclusive province of the lawyer.”).

209. Thomas Francis Howe et al., *Report of the Standing Committee on Professional Ethics and Grievances*, 55 A.B.A. REPORTS 483 (1930).

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*In these decisions the courts have wisely refrained from any precise definition of what constitutes the practice of law . . . .* However, these decisions refer to a definition made by a committee of this Association, which is of such a general nature as to be worthy of repetition here: "The practice of law is any service, involving legal knowledge, whether of representation, counsel, or advocacy, in or out of court, rendered in respect of the rights, duties, obligations, liabilities or business relations of the one requesting the service."<sup>210</sup>

Like the Conference of Delegates, the Ethics Committee and Special Committee on UPL did not argue that nonlawyers were incompetently performing any services. Instead, they complained that the use of attorneys by lay intermediaries "undermine[d] the profession's capacity for disinterested service and [destroyed] thereby its usefulness to the public."<sup>211</sup>

The Special Committee on UPL started its investigation of the practice of law by corporations and lay individuals by sending to all bar associations a questionnaire regarding the nature and extent of the unauthorized practice of law within their jurisdiction.<sup>212</sup> During the 1931 annual meeting, the Special Committee on UPL concluded that the responses "established beyond question that unauthorized practices were general and were increasing throughout the country

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210. Thomas Francis Howe et al., *Report of the Standing Committee on Professional Ethics and Grievances*, 56 A.B.A. REPORTS 431-32 (1931) (emphasis added). The report does not identify the source of the quote regarding a prior definition of the practice of law drafted by a committee of the association. It is possible that this is referencing Piatt's brief, although the specific quoted language is not present in the definition presented in the brief. See NYSBA Proceedings, *supra* note 141 app. A, at 287-367 (1921).

211. Thomas Francis Howe et al., *Report of the Standing Committee on Professional Ethics and Grievances*, 56 A.B.A. REPORTS 432 (1931). This idea was restated the following year: "Every lawyer's license is granted to him by the state primarily for the protection of the public. The earning of a livelihood by the lawyer is merely incidental in so far as the state's purpose in granting the license is concerned." John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of the Law*, 57 A.B.A. REPORTS 564 (1932); see also John G. Jackson, *The Unauthorized Practice of Law*, 12 NEB. L. BULL. 332, 335-38 (1933-34) (arguing that the legal profession cannot compete with nonlawyers because it will commercialize the profession and focus the profession on pecuniary gain instead of public service).

212. John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of the Law*, 56 A.B.A. REPORTS 471 (1931).

except in the rural districts.”<sup>213</sup> Specifically, the committee concluded that: banks and trust companies were preparing legal documents for others; collection agencies were instituting actions on behalf of creditors and preparing the associated legal documents (sometimes by hiring a lawyer); trade associations and clubs were hiring attorneys to provide legal services to their members; title companies were furnishing opinions on titles; lay persons were preparing corporate charters, bylaws, and stock certificates; and notary publics and justices of the peace were preparing wills, bills of sales, deeds, and other documents affecting property rights.<sup>214</sup> The ABA’s main area of concern continued to be corporate entities hiring attorneys to provide legal services and then exerting control over their professional judgment.<sup>215</sup>

The Special Committee on UPL also reported that the questionnaires revealed a paucity of penal statutes prohibiting the practice of law by corporations and lay individuals.<sup>216</sup> The committee

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213. *Id.*

214. *Id.* at 471-72.

215. John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of the Law*, 57 A.B.A. REPORTS 569 (1932). The 1932 report of the Special Committee on UPL stated:

Instances have come to our attention where the attorney has been specifically directed [by collection agencies] to pursue harassing and coercive tactics not justified by the facts. . . . All such evils are the outgrowth of the commercialized intervention of one or more lay intermediaries between an attorney and his client. . . . When lay agencies undertake to do this they are clearly practicing law unlawfully.

*Id.* at 569-70. In its 1935 report, the committee stated that the unauthorized practice of law could not exist unless lawyers were participating because it had “discovered that the public will not accept legal advice and will not accept the practice of law by laymen.” *Proceedings of the Fifty-Eighth Annual Meeting of American Bar Association*, 60 A.B.A. REPORTS 144 (1935). This, however, seems inconsistent with the committee’s report in 1934, which contained results of a nationwide questionnaire regarding the unauthorized practice of law, and showed that individuals who were not members of the bar, such as Justices of the Peace, notaries public, bankers, real estate agents, insurance agents, and others, were providing legal advice for payment of a fee. Arthur E. Sutherland et al., *Report of the Standing Committee on Professional Ethics and Grievances*, 59 A.B.A. REPORTS 523-33 (1934).

216. John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of the Law*, 56 A.B.A. REPORTS 473 (1931); see also Arthur E. Sutherland et al., *Report of the Standing Committee on Professional Ethics and Grievances*, 59

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further noted, without details, that a number of states had proposed legislation that was "unfair and retaliatory," presumably toward the legal profession.<sup>217</sup> While the Special Committee on UPL favored statutes that penalized the corporate and unauthorized practice of law, it proclaimed it was "of the opinion that no such statute should undertake to define what constitutes 'the practice of law,' believing that this should be left to the courts for development through decisions."<sup>218</sup> The committee did not provide any explanation for this opinion, nor did it acknowledge that it was a departure from the Conference of Delegates' opinion a decade earlier. In the 1932 Report of the Special Committee on UPL, the committee continued to reiterate its position "that legislation which attempts to define or limit

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A.B.A. REPORTS 531-36 (1934) (detailing results of a subsequent similar questionnaire).

217. John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of the Law*, 56 A.B.A. REPORTS 473 (1931).

218. *Id.* In 1931, the committee expressed the following rationale for curbing the increase in the unauthorized practice of law:

The practice of law by unauthorized persons is an evil because it endangers the personal and property rights of the public and interferes with the proper administration of justice. It is not an evil because it takes business away from lawyers. If law work could be as well accomplished by laymen, the requirements of honesty, learning and good character would not have been established and insisted on as conditions precedent to the right to enter the profession.

*Id.* at 477. The idea of having statutes penalize the unauthorized practice of law, but refrain from defining the unauthorized practice of law, is one that has gained significant traction over time. Today, every state penalizes the unauthorized practice of law by statute, but hardly any states provide a definition of the unauthorized practice of law. *See* ABA CTR. FOR PROF'L RESPONSIBILITY, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE 55-248 (1996) (state-by-state summary of unauthorized practice of law statutes and rules). Several challenges have been raised to the constitutionality of statutes that punish conduct that they have not defined, but none of these challenges have been successful. *See, e.g.,* *State v. Foster*, 674 So. 2d 747, 750-51 (Fla. Dist. Ct. App. 1996); *State v. Wees*, 58 P.3d 103, 107-08 (Idaho Ct. App. 2002); *Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. Sturgeon*, 635 N.W.2d 679, 685 (Iowa 2001); *Mont. Supreme Court Comm'n on Unauthorized Practice of Law v. O'Neil*, 147 P.3d 200, 215 (Mont. 2006); *State v. Rogers*, 705 A.2d 397, 401 (N.J. Super. Ct. App. Div. 1998); *State v. Hunt*, 880 P.2d 96, 99-100 (Wash. Ct. App. 1994); *see also* *LAS Collection Mgmt. v. Pagan*, 858 N.E.2d 273, 276 (Mass. 2006) ("Statutes may provide penalties for the unlicensed practice of law, but may not extend the privilege.").

the practice of the law or to establish a basis of relationship between lawyers and lay organizations is ill-advised and provocative of trouble.”<sup>219</sup>

The Special Committee on the Unauthorized Practice of Law became an ABA standing committee in 1933 (“Standing Committee on UPL”).<sup>220</sup> The Standing Committee on UPL continued to take the position that it was unwise to try to define the practice of law:

The committee is convinced that statutes imposing a penalty on corporations and unlicensed individuals undertaking to practice law are desirable and should be enacted in states where no such legislation exists. It is highly important *first*, that such statutes should not be emasculated by exceptions in favor of any class or business, and *second*, that they should not undertake to define the practice of the law. We believe no such definition is either practicable or advisable. A study of definitions heretofore attempted makes it obvious that in the last analysis of whether or not a particular course of conduct does or does not constitute practice of the law must be left to the courts. *A legislative definition is highly undesirable as self-limiting and inviting evasion.*<sup>221</sup>

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219. John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of the Law*, 57 A.B.A. REPORTS 563 (1932); see also *State Bar Favors Jury Trial System*, N.Y. TIMES, Jan. 23, 1932, at 5 (quoting the former president of the ABA as saying “My own view is that it is very fortunate that there is not a statutory definition of the [practice of] law. Every statutory definition is easily evaded.”). At that time, the ABA had not taken the position that the judicial branch was the only branch of government with the power to define the practice of law. Instead, it merely asserted that the question of what constituted the practice of law could be decided only by the state, through its proper tribunal, and not by the bar association or corporations. Jackson et al., *supra*, at 563. The report did not elaborate on whether the proper tribunal was the court, the legislature, or either. *Id.*

220. *Proceedings of the Fifty-Sixth Annual Meeting of American Bar Association*, 58 A.B.A. REPORTS 182 (1933). The Standing Committee on UPL sent out an additional questionnaire to bar associations around the country to try to assess the magnitude of the unauthorized practice of law. The questionnaire is reprinted in 20 A.B.A. J. 152-54 (1934).

221. *Proceedings of the Fifty-Sixth Annual Meeting of American Bar Association*, 58 A.B.A. REPORTS 482-83 (1933) (emphasis added). Some members of the ABA went further and stated that not only was it undesirable to define the practice of law, it was impossible to do so. See, e.g., Ralph T. Catterall, *The Unauthorized Practice of the Law*, 19 A.B.A. J. 652, 652 (1933) (“It is impossible to define the practice of law.”); William Boyd Henderson, *Unauthorized Practice of*

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That same year, the ABA adopted a National Bar Program and Coordination Plan that sought "to focus the attention of lawyers throughout the country on . . . four subjects," one of which was the unauthorized practice of law.<sup>222</sup> In furtherance of that program, *The Unauthorized Practice News* started its monthly publication in 1934 as a way of disseminating information about the efforts around the country to quell the unauthorized practice of law.<sup>223</sup>

The Standing Committee on UPL published a handbook on the unauthorized practice of law in 1934.<sup>224</sup> In the handbook's foreword, the committee chair urged states to make sure that their statutes imposed penalties on corporations and unlicensed individuals who undertook to practice law.<sup>225</sup> However, the ABA continued to advocate that such statutes "should not undertake to define the practice of the law, for definitions undertaking this have been universally found to be self-limiting and to invite evasion. Whether or not a particular course of conduct constitutes the practice of law should be left to the courts for determination."<sup>226</sup>

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*the Law*, 35 COM. L.J. 722, 722 (1930). Henderson argued that "the profession is entitled to have its work defined by the courts." Henderson, *supra*, at 722. He reasoned that in Minnesota there was a constitutional basis for this power:

I contend that under our Constitution, the courts have complete authority to define and regulate the practice of law, and to regulate the persons who engage therein, whether they be licensed attorneys or not. The mere fact that the legislature in some states has undertaken in a measure to exercise some control by the passage of certain legislation does not exclude the courts for the exercise of their own proper jurisdiction in the exclusive domain of the judiciary. . . . I believe the less legislation on the subject the better.

*Id.* at 722-23. Among other authority, Henderson cited *Day. Id.* at 722.

222. John G. Jackson, *National Bar Program Questionnaire on Unauthorized Practice of the Law*, 20 A.B.A. J. 151, 151 (1934); Jefferson P. Chandler et al., *Report of the Special Committee on Coordination of the Bar*, 58 A.B.A. REPORTS 442-44 (1933) (discussing the formation of the National Bar Program).

223. Stanley B. Houch et al., *Report of the Standing Committee on Unauthorized Practice of the Law*, 60 A.B.A. REPORTS 522 (1935).

224. HICKS & KATZ, *supra* note 138.

225. *Id.* at 5.

226. *Id.* at 5-6; *see also* John G. Jackson, *The Unauthorized Practice of the Law*, 12 NEB. L. BULL. 332, 334 (1933-34); John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of the Law*, 58 A.B.A. REPORTS 483 (1933). Despite proposing that the courts should decide what conduct constituted the

While the stated purpose of the Standing Committee on UPL was to address both the corporate and individual unauthorized practice of law, the primary focus of its activities continued to be on entities that employed attorneys to provide legal services to their patrons.<sup>227</sup> Thus, at this time, the committee's rationale for curbing the unauthorized practice of law continued to be on the integrity of the attorney, whom such entities were using, but whose duty should be to the court and to justice.<sup>228</sup> However, the public and the press were tending to see the

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practice of law, the bar associations were actively seeking informal agreements with entities such as banks and trust companies regarding the proper scope of their services. Because most lawsuits relating to the unauthorized practice of law were being filed by bar associations, these informal agreements had the effect of allowing the bar to determine the proper scope of these entities' activities. *See, e.g., Proceedings of the Fifty-Seventh Annual Meeting of American Bar Association*, 59 A.B.A. REPORTS 163-64 (1934) (quoting agreements between the Chicago Bar Association and corporate organizations such as trust companies); John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of the Law*, 58 A.B.A. REPORTS 477-78 (1933) (Special Committee on UPL recommending that bar associations use negotiation of agreements to end unauthorized practice activities by title and abstract companies and, if that is unsuccessful, to file an action to enjoin them from engaging in such activities); John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of the Law*, 57 A.B.A. REPORTS 565-66 (1932) (discussing cooperative efforts between organized bars and bank and trust companies); John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of the Law*, 56 A.B.A. REPORTS 482-86 (1931) (summary of unauthorized practice cases decided, which demonstrate that they were primarily brought by practitioners and bar associations).

227. *See, e.g., Proceedings of the Fifty-Seventh Annual Meeting of American Bar Association*, 59 A.B.A. REPORTS 154-55 (1934).

228. *Id.* at 159. The Standing Committee on UPL asked:

Can a high sense of service or a proper realization of duty to be performed exist on the part of a lawyer whose daily living depends upon satisfying, not the client to whom he really owes his service, but the man who gives him his pay check at the end of the month or the man who solicits business for him?

*Id.* The committee also proclaimed that the unauthorized practice of law was not an evil because it took work away from lawyers, but because if "law work could be as well accomplished in the interest of the public by laymen, the requirements of honesty, learning and good character would not have been established and insisted on as conditions precedent to the right to enter the profession." John G. Jackson et al., *Report of the Standing Committee on Unauthorized Practice of the Law*, 59 A.B.A. REPORTS, *supra*, at 531. The profession also continued to reason that the unauthorized practice of law was harmful to the public. *See, e.g., Roland G. Swaffield, Unlawful Practice of the Law: The Profession's Responsibility in*

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bars' efforts as acts of selfish protectionism.<sup>229</sup> As one New York Times article noted, "Unauthorized practice must appeal to the self-preservative instinct of every lawyer who doesn't have a hand in it."<sup>230</sup>

Some members of the bar still argued that it was beneficial to try to define the practice of law.<sup>231</sup> As one member of the Seattle bar wrote in 1930:

[W]e need a general acceptance of a new type of definition. We need a delineation of the field which is exclusively legal; a definition which excludes the activities of bankers, realtors, tax advisors, insurance experts, accountants, investment counsel, ad infinitum. We need a definition comprehending all matters which should be ours exclusively, yet not including activities which are

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*Relation Thereto*, 5 S. CAL. L. REV. 181 (1932) (discussing the unauthorized practice of law's impact on the public welfare as well on its impact on commercializing the legal profession).

229. See, e.g., *Proceedings of the Fifty-Eighth Annual Meeting of American Bar Association*, 60 A.B.A. REPORTS 146 (1935); *Proceedings of the Fifty-Seventh Annual Meeting of American Bar Association*, 59 A.B.A. REPORTS 159-60 (1934); Ralph T. Catterall, *The Unauthorized Practice of the Law*, 19 A.B.A. J. 652, 652 (1933) ("The lay public, for whose protection the restrictions exist, is not interested."); Fred E. Gleason, *Unauthorized Practice of the Law*, 21 A.B.A. J. 243, 243 (1935) (discussing the bar's duty to "make plain to the public that the real objection [to the unauthorized practice] is based on much higher and more fundamental grounds [than self-interest]."); Taylor E. Groninger, *Unauthorized Practice of Law*, 13 IND. L. J. 71, 71 (1937-38) (arguing that while lawyers may initially seem like fee-grabbers, they are actually "acting in the interest of the public welfare"); *Lawyers Will Act Under Piper Bill*, N.Y. TIMES, June 13, 1937, at 39 (quoting chair of New York County Lawyer Association's committee on the unauthorized practice of law who was promoting the public's interest in curbing the unauthorized practice of law).

230. *A National Bar Program*, N.Y. TIMES, Oct. 17, 1933, at 20. These perceptions probably were not helped when courts ruled that it was improper for attorneys to give free legal advice on the radio or for members of associations to receive legal services through those associations. Larry Wolters, *Radio Court Feature May Come to City*, CHI. DAILY TRIB., Dec. 17, 1936, at 21; *High Court Fines Motor Club for Legal Services*, CHI. DAILY TRIB., Oct. 15, 1935, at 14.

231. See, e.g., Paul B. Ashley, *The Unauthorized Practice of Law*, 16 A.B.A. J. 558 (1930) (criticizing definitions enacted by legislatures to date, but still arguing that better definitions would be beneficial to the public and to the profession).

ours—competitively. *More important, the public needs such a delineation for its guidance and protection.*<sup>232</sup>

The ABA, however, had become very critical of any efforts to define the practice of law and reasoned that “lay groups generally have enough influence with the legislature to obtain undesirable exceptions in their favor that are extremely dangerous.”<sup>233</sup> A Report of the Standing Committee on UPL further explained:

Bitter hostility toward the bar has been engendered by such proposed legislation from realtors, title, and title insurance companies, trade associations and other service organizations, collection agencies and other similar groups which are engaged in unlawful activities fully within the power of the courts unassisted to prevent. These groups mistakenly think their activities are lawful unless prohibited by statute; hence, the fight from their viewpoint is against an unwarranted encroachment by the bar, and when successful in defeating such legislation or emasculating it with provisos and exceptions, they think their rights have been confirmed and legalized. Disillusionment is often accompanied by deep resentment and lasting animosities.<sup>234</sup>

Despite the ABA’s new position that it was unwise for legislatures to define the practice of law, between 1931 and 1933 a few state legislatures enacted or amended a definition of “the practice of law.”<sup>235</sup> While the definitions varied somewhat, the Missouri statute captures the essence of the definitions:

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232. *Id.* at 560 (emphasis added). Ashley also opined that defining the practice of law to include only those areas that are exclusive to the legal profession might have more success in the “legislatures which have balked at omnibus definitions.” *Id.*

233. Henry B. Brennan et al., *Report of the Standing Committee on Unauthorized Practice of the Law*, 64 A.B.A. REPORTS 269 (1939).

234. *Id.*

235. ALA. GEN. ACTS, § 1 (1931); 1931 GA. LAWS 191 (1931); LA. GEN. STATUTES (Dart.), § 442 (1932); MO. ANN. STAT. § 11692 (West 1932); OR. REV. STAT. ANN. § 22-1213 (West 1930); 1933 TEX. GEN. LAWS 835 (1933), *all reprinted in HICKS & KATZ, supra* note 138, at Part I. Some of these states had previously enacted statutes that defined the practice of law. *See, e.g.*, ALA. CODE § 6248 (1927), *in THE ALABAMA CODE OF 1928: THE GENERAL LAWS TO AND INCLUDING THE LEGISLATIVE SESSION OF 1927: COMPLETE ANNOTATIONS* 1014 (A. Hewson Michie, ed., Charlottesville, The Michie Co. 1929).

The "practice of the law" is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies. The "law business" is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.<sup>236</sup>

Notwithstanding a handful of statutes being enacted, by the mid-1930s the organized bar's position that the "practice of law" should not be defined became the prevailing position.<sup>237</sup> As the Standing Committee on UPL reported in 1935:

Most of our state legislatures recently have met. Attempts again have been made to solve unauthorized practice of law problems by legislation. The incidents which have arisen out of these proposals have caused the committee to review, analyze and seriously reconsider its attitude, and its previously expressed views toward such legislative efforts. . . . *No legislative definition of the practice of law should be attempted.*<sup>238</sup>

Since 1933, hardly any state legislatures have enacted any type of comprehensive definition of the practice of law.<sup>239</sup> The organized

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236. MO. ANN. STAT. § 11692 (West 1932), reprinted in HICKS & KATZ, *supra* note 138, at 37.

237. Stanley B. Houck et al., *Report of the Standing Committee on Unauthorized Practice of the Law*, 60 A.B.A. REPORTS 522-23 (1935).

238. *Id.* (emphasis added).

239. Only seven states today have statutes that attempt to provide a comprehensive definition of the practice of law, and many of those statutes were originally enacted between 1931-33. See ALA. CODE § 34-3-6 (LexisNexis 1992); GA. CODE ANN. § 15-19-51 (1993); LA. REV. STAT. ANN. § 37:212 (1998); MO.

bar's next important move was to expand its position—not only was it unwise for the legislatures to attempt to define the practice of law, the organized bar began to argue that it was constitutionally impermissible for them to do so.

*C. The Organized Bar's Litigation Strategy and the Expansion of the Inherent Powers Doctrine*

In the 1930s, the organized bar had evolved from lobbyist to litigant, which resulted in bar associations filing lawsuits to prohibit the unauthorized practice of law in almost every jurisdiction.<sup>240</sup> It was this litigation strategy that shaped the debate on the unauthorized practice of law into a constitutional question that turned on the separation of powers. The organized bar's litigation strategy included arguments about the courts' inherent powers, which expanded on the rationales already established in cases such as *Day*.<sup>241</sup> Courts first held that they had inherent power to punish those who engaged in the unauthorized practice of law, particularly through their contempt powers, which did not require statutory authorization.<sup>242</sup> The

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ANN. STAT. § 484.010 (West 2006); N.C. GEN. STAT. § 84-2.1 (2007), TEX. GOV'T CODE ANN. § 81.101 (Vernon 2006), TENN. CODE ANN. § 23-3-101 (2007). A minority of courts have adopted a definition of the practice of law through their rule making powers. *See, e.g.*, ALASKA BAR RULE 63; ARIZ. SUP. CT. RULE 31; CONN. RULES FOR THE SUP. CT. § 2-44A; KY SUP. CT. RULE 3.020; UTAH SUP. CT. RULE 1 (2005); VA. SUP. CT. RULE., Part 6, § 1; WA GEN. RULE 24; WY. SUP. CT. RULE 11.1.

240. *See* Garner W. Denmead et al., *Unauthorized Practice of Law*, 4 INS. COUNSEL J. 75, 75 (1937) (“In practically every state, Bar Associations have instituted proceedings to prohibit laymen from continuing to perform work that is claimed to constitute the practice of law . . . .”); Sanders, *supra* note 135, at 1-2 (noting that in a 1937 compilation of cases relating to the unauthorized practice of law, the first 98 pages were devoted to cases before 1930 and the rest of the 838 pages dealt with cases after 1930).

241. *See supra* notes 98-114 and accompanying text.

242. *See, e.g.*, *Fitchette v. Taylor*, 254 N.W. 910, 911 (Minn. 1934) (“[T]he admission to practice of attorneys and their disbarment is a part of the judicial power allocated to the court by the departmentalization of our government. . . . [I]t would be anomalous if we had no similar power to protect the public from the illegal practice of law by laymen.”) (citations omitted); *People ex rel. Ill. State Bar Ass'n v. People's Stock Yard State Bank*, 176 N.E. 901, 906 (Ill. 1931) (“Of what avail is the power to license in the absence of power to prevent one not licensed from practicing as an attorney?”).

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extension of this proposition was that the courts had the power to determine what constituted the unauthorized practice of law.<sup>243</sup> And, if the courts had the power to determine what constituted the unauthorized practice of law, then, they further reasoned, they must have the exclusive power to define what constituted the practice of law.<sup>244</sup>

One of the earliest overt clashes between the legislature and courts over the power to define the practice of law arose in 1936 in the Louisiana case of *Meunier v. Bernich*.<sup>245</sup> In *Meunier*, the parents of a child killed in a railroad accident contracted with a nonlawyer claims adjuster to investigate and settle their claim. The railroad offered \$150 to settle, which the parents refused. They then hired an attorney who resolved the case for \$4,000. Under the parents' contract with the claims adjuster, he was entitled to a 25% fee for investigating the claims and preparing the case for the attorney to take over. The parents refused to pay, so the claims adjuster sued them for payment.<sup>246</sup>

The parents argued their contract with the claims adjuster was void and violated public policy because the claims adjuster was practicing law without a license.<sup>247</sup> The claims adjuster argued his business was specifically exempted from the definition of the practice of law that the state legislature had adopted.<sup>248</sup> The parents conceded

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243. See cases cited *infra* note 257.

244. See, e.g., R.I. Bar Ass'n v. Auto. Serv. Ass'n, 179 A. 139, 142 (R.I. 1935) ("Authority to admit to the bar and to disbar necessarily carries with it power to define what constitutes the practice of law."). But see *Eagle Indem. Co. v. Indus. Accident Comm'n*, 18 P.2d 341, 342-43 (Cal. 1933) (holding that the Legislature did have the authority to permit nonlawyers to appear before the Industrial Accident Commission). California still permits its legislature to carve out exceptions to what might otherwise be considered the practice of law. The holding in *Eagle* was affirmed as recently as 2006. *Benninghoff v. Superior Ct.*, 136 Cal. App. 4th 61, 70 (Cal. Ct. App. 2006). This minority position likely explains why California statutes authorize nonlawyer legal document preparers. See, e.g., CAL. BUS. & PROF. CODE § 6400, et seq. (West 2003).

245. *Meunier v. Bernich*, 170 So. 567 (La. Ct. App. 1936).

246. *Id.* at 570.

247. *Id.*

248. *Id.* The Louisiana statute defined the practice of law, in part, as follows: [T]he doing of any act, in behalf of another, tend[ing] to obtain or secure for such other the prevention or the redress of a wrong, or the enforcement

the adjuster's acts were exempted under the statute, but they argued that the statute was an unconstitutional encroachment on the inherent power of the judiciary.<sup>249</sup> The Committee on the Unauthorized Practice of Law of the New Orleans Bar Association intervened in the lawsuit to support the parents' arguments.<sup>250</sup>

The lower court ruled for the claims adjuster and the parents and intervener appealed.<sup>251</sup> On appeal, the court framed the question as follows:

[H]as the Legislature power, under the general grant of police power bestowed on it by the Constitution, to prescribe the rules and regulations concerning the various acts which may or may not be considered as being the practice of law (which necessarily would confer upon it the right to define the practice of law), or, does the power to regulate the practice of law lie inherently in the judicial department of our government?<sup>252</sup>

The parents and intervener conceded the legislature may enact statutes to aid the inherent power of the courts, such as setting minimum standards for admission to the bar, but they contended it did not have the power to "encroach upon or frustrate the power invested in the courts by the passage of statutes tending to prescribe maximum requirements for those desiring to engage in the law practice."<sup>253</sup> The court recognized the powers of the courts are not defined or enumerated in the Constitution, and that courts have sometimes found it necessary "to exert powers which were never expressly bestowed upon them by the Constitution or by statute."<sup>254</sup> Here, the court held that statutory exceptions tended to destroy its authority over the legal profession. It reasoned:

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or establishment of a right, except, without resort to court proceedings, the enforcing, securing, settling, adjusting or compromising of defaulted, controverted or disputed accounts, or claims.

LA. GEN. STAT. § 443 (1932), *reprinted in* HICKS & KATZ, *supra* note 138, at 27.

249. *Meunier*, 170 So. at 570.

250. *Id.*

251. *Id.*

252. *Id.* at 571.

253. *Id.* at 573-74.

254. *Id.* at 574.

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If the courts have the inherent power to prescribe rules and regulations for those seeking admission to the bar and if the court has the authority to discipline or disbar members of the legal profession, it follows that the scope of power residing in the judiciary embraces the right to define, by court rules, or by adjudication as cases may arise, the acts constituting the practice of law; for, if it were otherwise, the Legislature could, as it has attempted to do in this case, nullify and render ineffective the inherent judicial authority, by providing that a certain course of conduct by laymen is not the practice of law, in the face of previous adjudications by the court describing and defining the functions of the lawyer in the pursuit of his profession.<sup>255</sup>

The court held "[w]hen the Legislature passes a statute which attempts to define the practice of law, it directly impinges upon the constitutional grant of power bestowed upon the courts respecting the regulation of the conduct of the members of the legal profession."<sup>256</sup>

Most courts faced with similar issues have adopted reasoning comparable to *Meunier* and held that the judiciary has the exclusive power to define the practice of law.<sup>257</sup> A few judges in the 1930s questioned this reasoning, but their position never gained much support. For example, in *Clark v. Austin*, the Missouri Supreme Court

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255. *Id.* at 575. The court reiterated that the legislature may act to aid the inherent powers of the court, but the court will not tolerate any legislation that tends to strip it of its inherent powers. *Id.* at 575-76.

256. *Id.* at 577.

257. *See, e.g., In re Pate*, 107 S.W.2d 157, 162 (Mo. 1937) (holding that, although the state Constitution does not vest any particular branch of government with the power to define the practice of law, it most naturally belongs to the judicial branch); *Clark v. Austin*, 101 S.W.2d 977, 980 (Mo. 1937) ("[T]his court has inherent power to define and regulate the practice of law independent of any statute on the subject."); *In re Unification of Mont. Bar Ass'n*, 87 P.2d 172, 173 (Mont. 1939) (holding that, although the state Constitution does not vest any particular branch of government with the power to define the practice of law, it most naturally belongs to the judicial branch); *State ex rel. Hunter v. Kirk*, 276 N.W. 380, 382 (Neb. 1937) (same); *In re Integration of Neb. State Bar Ass'n*, 275 N.W. 265, 268 (Neb. 1937) ("The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government."); *Judd v. City Trust & Sav. Bank*, 12 N.E.2d 288, 290 (Ohio 1937) ("[T]he power to regulate, control and define the practice of law reposes in the judicial branch of the government.").

held that it had the exclusive power to define the practice of law and, therefore, statutes defining the practice of law are unconstitutional.<sup>258</sup>

Chief Justice Ellison of Missouri, however, believed the statutes were valid.<sup>259</sup> He argued that there was a role for both the legislature and the judiciary, which the court had previously recognized with its acknowledgement that the legislature may enact statutes to aid the judicial branch.<sup>260</sup> Here, Chief Justice Ellison argued, the court went further and held that its powers over the regulation of the practice of law were exclusive.<sup>261</sup> He concluded that the logical extension of the court's holding would be to find that a whole body of law, including the entire code of civil procedure, would have to be declared unconstitutional.<sup>262</sup>

The chief justice did not think the judicial branch had exclusive powers over the regulation of the legal profession because such a holding would deny the legislative branch its ability to exercise its police powers.<sup>263</sup> He believed the legislature should have a voice in these areas because, "The ultimate objective of both departments may be the same—the good of the people in the administration of justice; but the powers are fundamentally different. The courts' power essentially is protective and self-serving; the legislative power is to advance the public welfare."<sup>264</sup> Chief Justice Ellison's opinion concluded that the legislature should be able to enact laws in the area of the regulation of the practice of law; however, he still believed the

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258. *Clark v. Austin*, 101 S.W.2d 977, 980 (Mo. 1937).

259. *Id.* at 985 (Ellison, C.J., concurring and dissenting). The chief justice agreed the respondents in the case behaved improperly, but he believed they violated the statute as drafted. He did not think it was proper to hold the statutes unconstitutional and then punish the respondents through the court's inherent contempt powers. *Id.*

260. *Id.* at 985-86.

261. *Id.*

262. *Id.* at 986.

263. *Id.* at 994 ("Courts do not exercise the police power. . . . If the courts were lax and slothful in regulating the practice of law, it would hardly be contended lawyers would be left free to prey upon the public, because, forsooth, they are officers of the court, and that the legislative department would be helpless.").

264. *Id.*

judiciary had the power to strike down any laws that unreasonably encroached upon its powers.<sup>265</sup>

That same month, in *People ex rel. Chicago Bar Association v. Goodman*, a dissenting justice argued the inherent powers of the court should not extend beyond those who appear in the courts.<sup>266</sup> In *Goodman*, the Chicago Bar Association brought an action against a nonlawyer who was adjusting workmen's compensation claims for a contingency fee.<sup>267</sup> The CBA successfully argued that his conduct was the unauthorized practice of law.<sup>268</sup>

The majority opinion held it had the inherent power to regulate and define the practice of law and to discipline those who engaged in the unauthorized practice of law.<sup>269</sup> One of the dissenting justices, however, argued that the inherent power of the court should be limited to its "power to refuse to accept as its officers any who are not acceptable to it."<sup>270</sup> He argued that if "the Legislature may not tell us whom shall be admitted as attorneys, it follows inexorably that we cannot tell the administrative or executive department whom they shall receive before their boards or commissions."<sup>271</sup> These minority opinions have not prevailed in the unauthorized practice of law jurisprudence.

#### IV. A CRITIQUE OF THE CONSTITUTIONAL BASIS FOR THE COURTS' INHERENT POWERS TO DEFINE THE PRACTICE OF LAW

For purposes of this article, several assumptions will be made. First, this article will assume that the judicial departments possess certain inherent powers that are not explicitly enumerated in state constitutions, but which are necessary for their proper functioning as an independent branch of government. Next, this article will assume that the regulation of the legal profession—meaning the power to determine who shall be admitted to the bar, disciplined, or disbarred—

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265. *Id.* at 994-95.

266. *People ex rel. Chi. Bar Ass'n v. Goodman*, 8 N.E.2d 941, 948-49 (Ill. 1937) (Orr, J., dissenting).

267. *Id.*

268. *Id.* at 947 (majority opinion).

269. *Id.* at 944.

270. *Id.* at 950 (Shaw, J., dissenting).

271. *Id.*

is one of the inherent powers of the courts. Lastly, this article will assume that courts have the inherent power to determine who shall appear before them, subject to constitutional limitations such as the right to appear pro se.<sup>272</sup> What this last section of the article examines is the conclusion that, deriving from the foregoing assumptions, the judicial departments must have the exclusive power to define the practice of law—including determining what acts outside the courtroom constitute the unauthorized practice of law—in order to maintain their status as an independent branch of government. The evidence suggests that the constitutional footings on which this conclusion is based are not strong.

As an initial matter, no state constitution explicitly grants the judicial branch the power to define the practice of law.<sup>273</sup> Several modern amendments to constitutions do provide that the judicial branch has the power to regulate the practice of law, including the admission and disbarment of attorneys, and general rule-making powers.<sup>274</sup> Courts have construed these provisions as granting them the power to define the practice of law,<sup>275</sup> but the plain language of

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272. *See* *Faretta v. California*, 422 U.S. 806, 819 (1975) (holding that the Sixth Amendment provides individuals with a constitutional right to represent themselves pro se in criminal proceedings). Because individuals do not have a right to counsel in civil cases, it follows that they also have the right to represent themselves pro se in civil actions in order to have access to the courts. *See, e.g.*, *Muka v. N.Y. State Bar Ass'n*, 466 N.Y.S.2d 891, 895 (Sup. Ct. 1983) (“The right to represent oneself in both civil and criminal matters is basic to our system of justice.”). The federal courts and many state courts have affirmed this by statute. *See, e.g.*, 28 U.S.C. § 1654 (2006) (“In all courts of the United States the parties may plead and conduct their own cases personally . . . .”); N.Y. C.P.L.R. 321 (McKinney 2003) (“A party . . . may prosecute or defend a civil action in person or by an attorney . . . .”); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. d (2000) (“Every jurisdiction recognizes the right of an individual to proceed ‘pro se’ . . . .”).

273. *See* *Beardsley*, *supra* note 27, at 510 (arguing that “[t]he claim of an implied grant of power imputes to those who framed and adopted our constitutions an intention that finds no supporting evidence in the constitutional provisions creating the judicial departments, or elsewhere.”).

274. *E.g.*, ARK. CONST. amend. 28; COLO. CONST. art. VI, § 21; MO. CONST. art. V, § 5; N.J. CONST. art. VI, § 2.

275. *See, e.g.*, *Neal v. Wilson*, 873 S.W.2d 552, 557 (Ark. 1994) (holding that rule-making powers in the state constitution gives the court the power to regulate and define the practice of law).

these provisions could be construed to include only the power to admit, disbar, and discipline attorneys.

Next, the inherent powers doctrine was expanded to include the power to define the practice of law as the direct result of the organized bar's strategic shift from lobbyist to litigant.<sup>276</sup> The circumstances and timing of this strategic shift suggest that the bar's main motivation was to protect the legal profession from competition, as opposed to protecting the independence of the judicial branch. The organized bar's strategic shift occurred after the start of the Great Depression, when the economic pressures on the profession had intensified.<sup>277</sup> Thus, the organized bar had economic motivation to limit competition from nonlawyers and corporations.<sup>278</sup>

The evidence further suggests that the organized bar abandoned its legislative strategy not because of separation of powers concerns, but because its influence in the legislatures was weak<sup>279</sup> and it feared that the lobbying efforts of other interest groups would lead to infringement on the scope of the legal profession's monopoly.<sup>280</sup> Overall, the organized bar appears to have concluded that the legislature was not a friendly forum for its agenda.<sup>281</sup> Notably, the reports of bar association meetings did not articulate protecting the independence of the judicial branch of government as part of its agenda. It became necessary, however, for the organized bar to argue that the judicial branch needed the exclusive power to define the practice of law once the bar started to assert that the legislatures should not be involved in defining the practice of law.<sup>282</sup>

Lastly, the *Meunier* court articulated the basic reasoning courts have used when holding that the judicial departments must have the power to define the practice of law—namely, that if the courts have

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276. See *supra* Part III.B-C.

277. See *supra* text accompanying notes 181-83, 190-93.

278. See *supra* text accompanying notes 181-83, 190-93.

279. See *supra* text accompanying notes 157-60, 195-97; see also Beardsley, *supra* note 27, at 510 (arguing that one of the reasons the inherent powers doctrine persists is because "it is not always easy to persuade legislatures to pass progressive legislation.").

280. See *supra* text accompanying note 233.

281. The legal profession had a long history of unfavorable treatment by the legislatures. See *supra* text accompanying notes 43-51.

282. See *supra* Part III.B.

the power to determine who shall be admitted to practice law, then the courts must be able to define what acts constitute the practice of law.<sup>283</sup> There is, however, evidence to suggest that this is not a necessary conclusion.

An examination of the federal system provides strong evidence that other branches of government can be involved in defining tasks that nonlawyers may perform outside the courtroom—i.e., defining activities that are not the unauthorized practice of law—without impairing the independence of the judicial branch. Federal courts license attorneys to appear before them and have the power to punish improper conduct by attorneys, as well as nonlawyers, in connection with proceedings before the federal courts.<sup>284</sup> However, with respect to activities outside the courthouse, the executive and legislative branches of the federal government have authorized nonlawyers to perform services that could be considered the practice of law.<sup>285</sup> For example, while the Bankruptcy Code does not explicitly authorize nonlawyers to prepare bankruptcy petitions for a fee, its section that governs the conduct of nonlawyer “bankruptcy petition preparers” implicitly authorizes such conduct.<sup>286</sup> Also, many federal statutes and regulations authorize nonlawyers to appear in a representative capacity in many types of administrative proceedings.<sup>287</sup> Therefore, nonlawyers can, and do, perform tasks that lawyers also perform.

When nonlawyers engage in such tasks, consumers do not necessarily benefit from the attorney-client privilege, client protections contained in the rules of ethics, the ability to bring

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283. *See Meunier v. Bernich*, 170 So. 567 (La. Ct. App. 1936).

284. These federal courts have held that they have the right to determine who will appear before them and neither state statutes nor state courts can determine who may appear in federal proceedings. *E.g.*, *United States v. Louisiana*, 751 F. Supp. 608, 614 (E.D. La. 1990).

285. *See infra* notes 286-87 and accompanying text.

286. 11 U.S.C. § 110 (2006).

287. *See, e.g.*, 5 U.S.C. § 555(b) (2006) (permitting federal agencies to determine whether nonlawyers may appear in administrative proceedings in a representative capacity); 26 C.F.R. § 601.502 (2009) (permitting certain nonlawyers to represent taxpayers before the Internal Revenue Service), 49 C.F.R. §§ 511.71-511.73 (2009) (permitting nonlawyers to represent parties before the National Highway Traffic Safety Administration); *see also* Johnstone, *supra* note 198, at 9-11 (discussing federal agencies permitting laymen to appear in a representative capacity).

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malpractice claims, or the ability to report conduct to disciplinary commissions.<sup>288</sup> This does not, however, mean that consumers are left with no recourse if nonlawyers mishandle their affairs. Civil actions such as negligence claims and consumer protection laws still provide protection for those who choose to utilize a nonlawyer for certain tasks that a lawyer might also perform outside the courtroom.<sup>289</sup> Whether consumers choose to pay for an attorney and the accompanying benefits, or to hire a nonlawyer, is a matter of consumer choice in situations where nonlawyers can compete. There is no evidence to suggest that this has undermined the independence of the judicial branch in the federal system, which would suggest that the independence of state judicial departments could survive similar efforts by state legislatures.

#### V. THE MODERN IMPACT OF THE EXPANSION OF THE INHERENT POWERS DOCTRINE IN THE 1930S AND 40S

As a result of the organized bar's strategy in the 1930s and 40s, legislatures have not defined the practice of law, and the courts usually only grapple with the issue when it arises in the context of a specific litigated controversy. Even then, they often find the task difficult.<sup>290</sup> The impact of this result is two-fold. First, nonlawyers

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288. See Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 96-100 (2007) (discussing different approaches courts have taken with respect to the standard of care for legal activities by nonlawyers).

289. *Id.*; see also *Richard F. Mallen & Assocs. v. Myinjuryclaim.com Corp.*, 769 N.E.2d 74, 75 (Ill. App. Ct. 2002) (licensed attorneys alleged claims against nonlawyers under the Illinois Uniform Deceptive Trade Practices Act and the Illinois Consumer Fraud Act).

290. See, e.g., *State ex rel. Fla. Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962) ("Many courts have attempted to set forth a broad definition of the practice of law. Being of the view that such is nigh onto impossible and may injuriously affect the rights of others not here involved, we will not attempt to do so here."); *Denver Bar Ass'n v. Pub. Utils. Comm'n*, 391 P.2d 467, 471 (Colo. 1964) ("There is no wholly satisfactory definition as to what constitutes the practice of law; it is not easy to give an all-inclusive definition."); *People ex rel. Ill. State Bar Ass'n v. Schafer*, 87 N.E.2d 773, 776 (Ill. 1949) ("It would be difficult, if not impossible, to lay down a formula or definition of what constitutes the practice of law."); *Cowern v. Nelson*, 290 N.W. 795, 797 (Minn. 1940) ("The line between what is and what is not the practice of law cannot be drawn with precision."); *Creditors' Serv. Corp. v.*

frequently lack clear guidance regarding what tasks they may perform until the matter is litigated, and second, consumers have limited choices with respect to assistance for their legal issues.

Regarding the first impact, because legislatures cannot define the practice of law, and courts have rarely done so through their rulemaking powers, nonlawyers often do not receive meaningful guidance as to what tasks they may legitimately perform until they engage in the conduct and a lawsuit is subsequently filed.<sup>291</sup> The absence of a clear delineation of what constitutes the unauthorized practice of law was of significant concern to certain business industries in the 1930s that were concerned about the organized bar's increased litigation activity. For example, realtors became concerned when state bar associations began filing suits that would prohibit real estate agents from filling out forms such as preliminary contracts, simple deeds, leases, and mortgages.<sup>292</sup> The Executive Vice President of the National Association of Real Estate Boards wrote:

It may be pointed out that if there be such a thing as the *unauthorized practice* of the law, there must be such a thing as the *authorized practice* of the law. Yet it is difficult to find any definition that fits the phrases. Lawyers and jurists have been satisfied with broad generalizations. *Some of the state bar associations have frankly advised that there should be no attempt to formulate such definitions and I believe I may say that the committee of the American Bar Association on the subject, headed by Mr. Stanley B. Houck, of Minneapolis, made it clear to my Association that the bar does not consider it possible or desirable that the so-called authorized practice of law shall be defined. In*

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Cummings, 190 A. 2, 9 (R.I. 1937) ("What constitutes the practice of law is extremely difficult, if not unwise, to even attempt to define, and so the determination of any issue that presents this question must be left to the facts in each particular case.").

291. See Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 806-15 (2003) (discussing areas where prohibitions on the unauthorized practice of law are clear and where they are vague and ambiguous).

292. Herbert U. Nelson, *Drafting of Real Estate Instruments: The Problem from the Standpoint of Realtors*, 5 LAW & CONTEMP. PROBS. 57, 57-59 (1938); *Warning is Voiced of Realty Menace*, N.Y. TIMES, Jan. 24, 1937, at RE2 (quoting Herbert U. Nelson's concerns about the litigation being instituted by state and local bars against the real estate community).

*fairness, surely, there must come some attempt to establish frontiers or lines of demarcation.*<sup>293</sup>

Attempts to establish lines of demarcation did occur, but ironically not by the courts or the legislatures. Even though the bar's litigation strategy resulted in favorable court decisions,<sup>294</sup> in the late 1930s the bar convened with other professionals, such as realtors, to negotiate the lines of demarcation and memorialize them in declarations of principles or consent decrees.<sup>295</sup> Through these statements of principles and consent decrees, it was private trade groups, not the courts or the legislatures, that were defining the appropriate scope of nonlawyer activities.<sup>296</sup> This effectively removed the question from the reach of any branch of government and any democratic participation by citizens, and allowed private industries to dictate the scope of the practice of law and areas of competition between lawyers and nonlawyers. Such agreements have largely been

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293. Nelson, *supra* note 292, at 59 (emphasis added). The author expressed concern that without any clear definition of the practice of law, a real estate agent "is constantly moving at his own peril without a knowledge of what the law is." *Id.* at 60. He encouraged the bar to submit appropriate legislation to the various states to clearly define the practice of law "so that all citizens may know their rights and obligations in this respect, and so that no one going about the ordinary conduct of his business affairs need be subjected to legislation that is not in the books as such but that exists by reason of judicial interpretation by the various courts." *Id.*

294. See *supra* Part III.C.

295. See, e.g., Henry B. Brennan et al., *Report of the Standing Committee on Unauthorized Practice of the Law*, 64 A.B.A. REPORTS 271-76 (1939) (discussing consent decrees and statements of principles agreed upon between various bar associations and insurance companies, banks, trust companies, and collection agencies); Edwin M. Otterbourg et al., *Report of the Standing Committee on Unauthorized Practice of the Law*, 66 A.B.A. REPORTS 274-75, 277-78 (1941) (statements of principles with the American Bankers Associations Trust Division); Edwin M. Otterbourg et al., *Resolution Adopted between the Standing Committee on Unauthorized Practice of Law of the American Bar Association and Representatives of the National Association of Real Estate Boards on May 5, 1942, at Memphis Tennessee*, in 67 A.B.A. REPORTS 224-25 (1942); HICKS & KATZ, *supra* note 138, at 122-71 (compilation of statement of principles adopted); see also Johnstone, *supra* note 198, at 22-29 (discussing agreements entered into between the American Bar Association and eight competing businesses); see also *supra* note 226.

296. See, e.g., *Real Estate and Law to be Kept Distinct*, N.Y. TIMES, Jan. 14, 1942, at RE2 (discussing conference between lawyers and real estate men to determine proper contours of each profession).

abandoned because of their potential anti-trust implications, although tacit agreements may still exist.<sup>297</sup> Since the rescission or abandonment of statements of principles between industry groups, the responsibility of defining the practice of law and the appropriate scope of activities by nonlawyers has remained with the judicial departments, usually on a case-by-case basis.<sup>298</sup>

If the organized bar had been successful in lobbying the state legislatures to enact a definition of the practice of law, it is possible that the state legislatures would still have a role today in defining what acts constitute the practice of law and what acts nonlawyers may perform without causing undue consumer harm, much as we see to some extent in the federal system.<sup>299</sup> This could have led to different categories of professionals—attorneys, independent paralegals, legal document preparers, nonlawyer bankruptcy advisors, etc.—similar to the diverse fields within the medical profession where legislatures have, through the exercise of their police powers, provided the public with a variety of options when faced with a medical problem.<sup>300</sup> Different categories of professionals with different levels of training

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297. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 9-10, 20-21 (1981) (discussing statements of principles and noting that even where they have been formally abandoned, there still exists informal or tacit agreements among the bar and various industries).

298. See, e.g., *In re Discipline of Lerner*, 197 P.3d 1067, 1069 (Nev. 2008) (“[W]hat constitutes the practice of law must be determined on a case-by-case basis.”). Washington has taken a different route and has enacted a rule that specifically authorizes nonlawyers to engage in limited tasks that might otherwise be considered the unauthorized practice of law. WASH. SUP. CT. RULE 24(b).

299. See *supra* notes 285-87 and accompanying text.

300. For example, in California, the following licenses (among others) are available in the health care field: CAL. BUS. & PROF. CODE §§ 1000-04 (West 2003) (chiropractors); CAL. BUS. & PROF. CODE §§ 2080-99, *et seq.* (West 2003) (physicians and surgeons); CAL. BUS. & PROF. CODE §§ 2505-21 (West 2003) (midwives and nurse-midwives); CAL. BUS. & PROF. CODE §§ 2834-37 (West 2003) (nurse practitioners); CAL. BUS. & PROF. CODE §§ 2830-33.6 (West 2003) (clinical nurse specialists); CAL. BUS. & PROF. CODE §§ 2940-51 (West 2003) (psychologists); CAL. BUS. & PROF. CODE § 3500 (West 2003) (physician’s assistants); CAL. BUS. & PROF. CODE §§ 3610-15 (West 2003) (naturopathic doctors); CAL. BUS. & PROF. CODE §§ 4935-49 (West 2003) (acupuncturists).

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and fees, could potentially increase access to the legal system,<sup>301</sup> as well as reduce the cost of utilizing the legal system.<sup>302</sup> Such options have never been fully explored as a result of the trajectory set by the efforts of the organized bar in the 1930s and 40s.

If only the courts can constitutionally define the practice of law, then a constitutional amendment is required to overrule a court's decision about the scope of the legal profession's monopoly. For example, in Arizona the court held that only attorneys could fill out and complete forms associated with real estate transactions such as deeds, mortgages, and contracts for the sale of real estate.<sup>303</sup> Unhappy with this ruling, the citizens of Arizona amended the state constitution

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301. Cf. Benjamin G. Druss et al., *Trends in Care by Nonphysician Clinicians in the United States*, 348 NEW ENGL. J. MED. 130 (2003) (examining trends in outpatient care between 1987 and 1997 when the passage of legislation increased the scope and number of nonphysician clinicians, which resulted in an increase of the population who saw a nonphysician clinician from 30.6% to 36.1%); Edward S. Sekscenski et al., *State Practice Environments and the Supply of Physician Assistants, Nurse Practitioners, and Certified Nurse-Midwives*, 331 NEW ENGL. J. MED. 1266 (1994) (analyzing the increase in the number of physician assistants, nurse practitioners and certified nurse-midwives in states with favorable practice environments for those professions and noting their ability to increase access to primary care). These sources explain that there is evidence in the health care field that the increased availability of additional types of health care providers has increased access to health care.

302. The Federal Trade Commission has frequently expressed concerns that prohibiting laypersons from engaging in conduct that does not require specialized legal training—such as conducting real estate closings, writing advocacy letters, writing amicus curie briefs, and serving as mediators—limits consumer choice and increases the costs of services to consumers. See, e.g., Letter from the Fed. Trade Comm'n Office of Policy Planning, Bureau of Competition, and Bureau of Econ. to Carl E. Testo, Counsel for the Rules Comm. of the Superior Court of Conn. (May 17, 2007), <http://www.ftc.gov/be/V070006.pdf> (expressing concerns that a proposed rule to define the practice of law would be interpreted in an overly broad manner and would have a negative impact on consumers and competition); Letter from Fed. Trade Comm'n & Dep't of Justice to N.C. State Bar Ethics Comm. (December 14, 2001), <http://www.ftc.gov/be/V020006.shtm> (expressing opposition to recent opinions requiring the presence of an attorney at all real estate closings, and providing empirical data regarding the increased costs to consumers when nonlawyers cannot compete in the area of real estate closings); see also John P. Brown, *The Pros and Cons of Competition*, in LEGAL SERVICES FOR THE POOR 155-57 (Douglas J. Besharov, ed. 1990).

303. *State Bar of Ariz. v. Ariz. Land Title and Trust Co.*, 366 P.2d 1, 14-15 (Ariz. 1961), *supplemented by* 371 P.2d 1020 (Ariz. 1962).

to provide that any individual holding a valid license as a real estate broker or salesperson “shall have the right to draft or fill out and complete, without charge, any and all instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale.”<sup>304</sup> A constitutional amendment, however, is an onerous process by which to experiment and explore areas where nonlawyers can compete with lawyers.<sup>305</sup>

There may, however, be some room for legislatures to act in this area and challenge the precedent regarding the power of the judicial branches. As an initial matter, while the courts have claimed the power to define the practice of law, they have largely avoided the concomitant responsibility to do so.<sup>306</sup> Even with rulemaking powers, few judicial departments have attempted to enact a comprehensive definition of the practice of law.<sup>307</sup> Deciding what acts constitute the unauthorized practice of law on a case-by-case basis may have an undue chilling effect on businesses, competition, and consumer choice. Furthermore, the language of the decisional law leaves a crack in the door for legislative involvement because many of the decisions state that the legislature may regulate in the area of the legal profession if it “aids the court.”<sup>308</sup>

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304. ARIZ. CONST. art. 26, § 1.

305. See Johnstone, *supra* note 291, at 842-43 (discussing ways to reduce the courts’ power over the unauthorized practice of law including constitutional amendments); Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 19 (1989-90) (discussing the difficulty with constitutional amendments as a way to reform the inherent powers doctrine).

306. See *supra* note 290.

307. See *supra* note 239.

308. See, e.g., *Meunier v. Bernich*, 170 So. 567, 576 (La. Ct. App. 1936) (“Due to the fact that courts are not empowered to enact laws, the jurisprudence has approved legislation passed in aid of the courts’ inherent powers.”). Some courts have also said they will defer to reasonable legislation, although “this deference is one of comity or courtesy, rather than an acknowledgement of power.” *State v. Cannon*, 221 N.W. 603, 605 (Wis. 1928). See also Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 19-20 (1989-90) (suggesting that legislatures try to reduce the broad scope of the definition of the unauthorized practice of law as one possible way to increase public participation in legal reform).

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If state legislatures became more active in assessing and authorizing tasks that nonlawyers can provide to consumers,<sup>309</sup> which might otherwise be considered the practice of law, the main resistance would likely come from the organized bar.<sup>310</sup> The organized bar should, however, reconsider its position on this issue. First, as discussed, the history of its position raises questions about the constitutional footings of its separation of powers arguments. Second, when the organized bar resists competition, it puts the legal profession in the position of being the main obstruction to exploring ways to increase access to the legal system.

The legal profession has never met, and likely never will meet, the legal needs of the population.<sup>311</sup> Thus, consumers could likely benefit from nonlawyers performing some tasks that lawyers traditionally perform.<sup>312</sup> Increased nonlawyer assistance could be accomplished by

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309. For articles discussing the role that the legislature should have in regulating the legal profession, see generally: Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167 (2003); Thomas P. Bingman, *Separation of Powers: Who Should Control the Bar?*, 47 J. URB. L. 715 (1969); Johnstone, *supra* note 198; Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices for the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765 (2003-04).

310. As a plaintiff or an intervenor, the organized bar continues to be the main proponent of arguments that nonlawyer conduct is the unauthorized practice of law. *See, e.g.*, *Richard F. Mallen & Assoc. v. Myinjuryclaim.com Corp.*, 769 N.E.2d 74, 75 (Ill. App. Ct. 2002) (plaintiff was a personal injury attorney who filed an action on behalf of all Illinois attorneys practicing personal injury law, and the Illinois State Bar Association was granted leave to file an amicus brief).

311. *See* RHODE, *supra* note 134, at 103. For example, a 2005 study regarding the legal needs of low-income Illinoisans ("Illinois Report") found that low income residents of Illinois faced over 1.3 million civil legal problems in 2003. LAWYERS TRUST FUND OF ILL. ET AL., *THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS 1-2* (2005), <http://www.ltf.org/docs/legalneeds.pdf>. Low income households in Illinois had legal assistance for only one out of every six of these legal problems, which meant that this population handled 1.1 million legal problems without legal assistance. *Id.* *See also* ALBERT H. CANTRIL, ABA, *AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE*, at vii (1996) (noting that about half of low and moderate income families face a legal problem each year, but a large portion of those problems never become part of the legal system).

312. Many modern scholars who have examined the issue have concluded that there are some legal services that nonlawyers could provide competently. *See, e.g.*,

defining certain services that nonlawyers may provide, which would allow nonlawyers to provide some legal services without the supervision of an attorney.<sup>313</sup> If appropriate, this could require some level of training and licensure. Allowing nonlawyers to provide some services that are generally considered the practice of law could also increase competition and lower prices for services provided by attorneys.<sup>314</sup> The result would be increased consumer choice and more access to the legal system for the largely underserved low and middle class population.<sup>315</sup> When a substantial portion of the population lacks meaningful access to the legal system, the rule of law is threatened.<sup>316</sup> As proponents of the rule of law, the organized bar should reconsider whether it wants to continue being a barrier to exploring ways to

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RHODE, *supra* note 134, at 15, 87. Other countries have allowed nonlawyers to perform some services that only lawyers may provide in the United States, and there has been no evidence of consumer harm from these policies. *Id.* at 89. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4, cmt. c (2000) (noting that in the few states that have allowed extensive nonlawyer provision of legal services, there has been no indication of any significant risks to consumers); ALBERT H. CANTRIL, ABA, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 11-12 (1996) (recommendations in the ABA's 1996 report on access to justice also included "find new ways for lawyers to work with nonlegal third parties and expand roles for paralegals."); Alan Morrison, *Making Competition Work*, in LEGAL SERVICES FOR THE POOR 150-55 (Douglas J. Besharov, ed. 1990); Thomas D. Zilavy & Andrew J. Chevez, *The Unauthorized Practice of Law: Court Tells Profession, Show Us the Harm*, 78 WIS. LAW., Oct. 2005, at 8. *But see* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537 (2005).

313. We can find a couple of examples of this. In California, the legislature passed a statute that authorizes nonlawyers to act as Legal Document Assistants. CAL. BUS. & PROF. CODE §§ 6400 *et seq.* (West 2003). In Washington, the Supreme Court enacted a rule that authorizes nonlawyers to perform limited tasks such as acting as a lay representative in administrative tribunals. WASH. SUP. CT. RULE 24(b).

314. *See supra* note 302.

315. RHODE, *supra* note 134, at 7, 13-14, 103 (discussing underserved populations and insufficient access to legal assistance).

316. *See* Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 431 (2003); *cf.* Gillian K. Hadfield, *Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies*, 46 DEPAUL L. REV. 401, 416-19 (2007).

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increase access to the legal system.<sup>317</sup> Thus, it may be time to reconsider its litigation strategy that started in the 1930s.<sup>318</sup>

### CONCLUSION

The inherent power of the courts to define the practice of law merits reexamination for several reasons. Courts expanded the inherent powers doctrine under circumstances that raise questions about whether the inherent power to define the practice of law is necessary for the judicial branches to maintain their independence. It was the organized bar that made this argument, but it may have done so because it believed the courts would be a more amenable forum to their economic interests than the legislatures. Evidence suggests that in the 1930s and 40s the organized bar abandoned efforts for legislative reform not because of concerns about the separation of powers, but because the legislatures had not proved to be friendly forums for the organized bar's agenda, and the bar feared the influence of other interest groups in the legislative process.

Furthermore, the impact of the trajectory that was set by the organized bar's change in strategy from lobbyist to litigant in the 1930s has been to exclude the legislative branches from exercising their police powers in an important area of regulation. If state legislatures cannot speak to the issue of what acts are and are not the practice of law, then they cannot assess and authorize services that nonlawyers might provide to consumers without undue harm. If legislatures could act in this area, then a stratified legal profession

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317. Many members of the bar provide numerous hours of pro bono services. While these efforts are laudable, they have not come close to meeting the legal needs of the population and are not likely to do so unless pro bono work is required of all attorneys. *See, e.g.*, ALBERT H. CANTRIL, ABA, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 26-28 (1996) (noting that "[f]ewer than one in six private attorneys participate in pro bono programs"). The ABA was unsuccessful with its efforts in 1983, 1993, and 2001 to have the Model Rules of Professional Conduct require some amount of pro bono service as a mandatory obligation. Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 426 (2003).

318. *See* Beardsley, *supra* note 27, at 511 (arguing that the "inherent power doctrine is more readily utilized as a bar, than as an aid, to progress," and the doctrine is detrimental to the courts and the bar with respect to their standing with the public).

could develop with persons other than lawyers providing some limited services. In the federal system, for example, the executive and legislative branches have authorized nonlawyers to perform acts such as assisting with the preparation of bankruptcy petitions and appearing in a representative capacity in administrative proceedings without an adverse impact on the balance of power among the federal branches of government.

If legislatures were engaged in determining and authorizing services that nonlawyers could provide, the main resistance would likely come from the organized bar. The bar should, however, reassess its response to such efforts. The legal profession should have an interest in improving access to the legal system and should acknowledge that the legal profession has not met all of the legal needs of the citizenry, and it is unlikely to do so anytime in the foreseeable future. There may be areas where persons with lesser training, such as independent paralegals, could fill in some of the gaps in the delivery of legal services. The legislatures would be the appropriate place to explore such options, but the organized bar's litigation efforts have extinguished legislative involvement. Legislatures should consider trying to reestablish some power to define the practice of law, and the organized bar should reassess whether it serves the public interest to continue resisting such efforts.