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LAWYER TURF AND LAWYER REGULATION—THE ROLE OF THE INHERENT-POWERS DOCTRINE*

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Almost a year ago to this day in Washington, D.C., a consumer-activist group called HALT held their annual convention. HALT is dedicated to arresting the power of lawyers and to expanding the prerogatives of non-lawyers in dealing with legal problems. HALT officers asked me to give a luncheon speech to HALT's members on the so-called inherent-powers doctrine. I gave the speech and was carried from the dining room on the shoulders of a jubilant audience.

Speaking to a roomful of smiling faces and approvingly nodding heads is pleasant enough. But, it struck me at the time as less than challenging to the ideas conveyed. Reading to them from their own choirbook, I didn't need to persuade HALT members that lawyers and courts were doing them in through the inherent-powers doctrine. I would not be surprised to find that proposition stated as axiomatic in HALT's charter. One forthright about the ideas in the talk, I said to myself, should be prepared to speak the same sentiments to an audience of lawyers and law students. It was not long after that I was asked to give this Altheimer Lecture. I readily agreed.

The Altheimer Lecture series has long been distinguished as a forum for free-thinking figures concerned with legal ethics. My asso-

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ciate reporter on the *Restatement of the Law Governing Lawyers*, Professor Thomas D. Morgan of Emory School of Law, came before this same lectern a year ago and very thoughtfully criticized the use of the Chinese Wall as an all-purpose conflict-of-interest screening device in law firms.[1] He is now re-thinking a conceptualization of those notions in the Restatement itself.[2] Chinese Walls are much favored by law firms, particularly large ones. I have no doubt that some here were not too pleased with Professor Morgan's position. I trust that you weren't too rough on him. My point is that Altheimer lecturers have been provocative. I hope that I can follow in that tradition by provoking your critical thoughts and critical reactions.

This is not the same speech that I delivered to HALT's members. Theirs was an informal luncheon talk. I forewarn you that this analysis is somewhat more substantial and much more lawyerly. However, I have preserved the basic message and method of discourse of the original talk. In so doing, I suspect that I will appear to many of you as the sort of clumsy invited lecturer who goes home leaving no converts and few friends. Or, as a sociologist of the legal profession, who is not a lawyer, recently put it, I risk conducting myself on this occasion like colonial administrators of European empires in the nineteenth century: setting foot on foreign shores to preach an ideology that will almost certainly be resented, probably misunderstood, and only occasionally vindicated.[3]

What I am about to say is largely critical of a doctrine that lawyers and judges have constructed and embraced. Even law students might consider themselves the prospective objects of my barbs. Am I just another tiresome lawyer-basher with a kinky disposition to bash lawyers in front of other lawyers? You will never know, of course. Lawyer-bashing has almost become an alternative national pastime. It even enjoys some advantages over baseball; it can be played in the winter as well as in warmer months, and you can play it indoors in crowded conditions even better than outside. The chief advantage of lawyer-bashing is that it is universally participatory—anybody can play. Sometimes it seems as if everyone is.

In talks such as this, a selection of crude lawyer jokes typically

1. Morgan, *Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem*, 10 U. ARK. LITTLE ROCK L.J. 37 (1987).

2. *See* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS (Preliminary Draft No. 4A, 1989) and (Council Draft No. 3, 1989).

3. *See* HALIDAY, FORMATIVE PROFESSIONALISM AND THE THREE REVOLUTIONS: LEGAL CAREERS IN THE CHICAGO BAR, 1850-1900, at 2 (1986) (American Bar Foundation Working Paper No. 8715).

make their obligatory appearance. I'll pass over them in the interests of time and our senses of self-esteem. They are mainly tasteless and only funny in a perverse or wicked way. Moreover, let me not be misunderstood on a fundamental matter: I am a lawyer. I admire and respect my profession and the members of it. I think lawyers perform functions that are useful to society; some of them are indispensable. I firmly believe that it is both possible and natural for a law school graduate to be a good lawyer and a good person. I cannot conceive of a society that is at once both free and orderly that could exist without a profession performing the tasks that lawyers perform in ours. On those simple propositions, I take it, we are agreed.

Having said that, the main burden of my remarks will be to *challenge* lawyers to allow more competition, with the almost certain result that lawyers, at least the statistically average lawyer, will lose income. I believe the lawyer monopoly is largely self-created and self-perpetuated, the arguments sustaining it are unconvincing, and the particular doctrine I wish to examine cannot withstand analysis. That doctrine is the *inherent-powers doctrine*—a judge-made, lawyer-supported[4] doctrine holding that courts, and *only* courts, may regulate the practice of law. The doctrine has many applications. One particular use I will refer to from time to time concerns the unauthorized practice of law and the power that courts claim in defining that exclusive turf on behalf of lawyers.

The role of the inherent-powers doctrine, particularly in the unauthorized practice debate that is now stirring around the nation, reminds me of a story told in the U.S.S.R. It concerns Boris, a KGB guard at the gate of a state-owned factory. Every evening the scene would unfold. Boris would stop the same worker, Yuri. Yuri was about to wheel through the factory gate a wheelbarrow full of sawdust. Boris would yell, "Ha, Yuri! Trying to smuggle something out in that sawdust, eh?" Boris would then dig into the sawdust and sift and search, but he never found anything. Days, weeks, months went by. The factory was consistently unprofitable, among other things, because of the loss of inventory. The inept Party functionaries running the factory had to do something to validate their diligence. So they sent guard Boris off to a labor camp in Siberia.

One day several winters later, Boris was surprised to see his old

4. Lawyer support is persistent and long-standing. As the most recent example, two months ago in Denver at its semi-annual meeting, the American Bar Association House of Delegates passed a resolution reasserting the exclusive province of courts in regulating the legal profession. *See* McMillion, *New Legislative Priorities*, A.B.A. J., April 1989, at 129.

nemesis Yuri arrive with a trainload of new inmates. "So," cried Boris, "they caught you at last. Tell me, what in the name of Mother Russia were you stealing?" "My friend," said the worker, "you should have known. I was stealing wheelbarrows."

It is perhaps not too hyperbolic to say that what lawyers and their judicial colleagues have been doing for years in some areas of law practice is stealing wheelbarrows. The problem is that lawyers have defined a large area of human service as their exclusive preserve. They have accomplished that by means of court rulings regulating unauthorized practice and limiting admission to law practice. Many reformist organizations that object to such rulings and that oppose the resulting lawyer monopoly, spend much of their effort thinking of ways to combat the rulings. In a sense, the reformers were only sifting sawdust, and missing the wheelbarrow.

The wheelbarrow, I would suggest, is that little-known legal doctrine of inherent-powers. Most nonlawyers have never heard of it, but then most *lawyers* haven't either. You can talk to twenty lawyers at random and I doubt that more than one or two would be able to describe it with even rough accuracy. In former years I have talked to colleagues who taught law school courses dealing with regulation of the legal profession, and some of them were unaware of the full significance of the doctrine. But in many states it appears often enough and with such powerful force that it has become a shield behind which the legal profession has staked a claim to self-regulation radically unlike that of any other profession.

Let me first describe the doctrine of inherent-powers so that we share an understanding of the general concepts and some points of terminology. Then I would like to describe a few recent judicial decisions invoking the inherent-powers doctrine, and conclude with some ruminations about where-one-goes-from-here.

I begin with a basic description of what I call the affirmative and the negative aspects of the inherent-powers doctrine. The *affirmative* aspect of the inherent-powers doctrine I find sound and compatible with fundamental themes in the law. The affirmative aspect posits, in effect, that, even in the absence of statutes specifically saying that a court may do so, a court nonetheless "inherently" has the power to regulate the legal profession. That aspect of the inherent-powers doctrine is a doctrine of empowerment.

Historically, this part of the inherent-powers claim is fairly well-founded. There is the slight embarrassment of legislative enactments clearly regulating lawyers—certain Acts of Parliament in thirteenth and fourteenth-century England and many more throughout the colonial and post-colonial periods in the United States.[5] But, for the most part, Anglo-American courts, and not legislatures, have traditionally served as the official body regulating lawyers. And, again for the most part, courts have regulated lawyers without legislative authorization. A century or more ago the predominant role of courts in regulating lawyers would have seemed simply inescapable, natural, and inevitable to anyone. Most of the business of lawyers necessarily involved going to the courthouse. Judges and lawyers formed a close social group, traveling about the country on "circuit." Admission to practice law was admission to a court (a vestige that still remains as a mandatory gateway to authorized law practice), and the examinations required for admission were often conducted personally by judges or by committees of lawyers appointed by judges.

Today, given the historical role of courts as regulators of lawyers, it continues to make sense to perpetuate the premise of the affirmative aspect of the inherent-powers doctrine. Of course, it is true that lawyers and the relationship of their work to courts have changed dramatically and almost certainly irreversibly. The average lawyer no longer spends very much time in court. In fact, the great majority of lawyers would starve if they had to make their livings out of court appearances. Most lawyers make their money in their offices by giving advice, drafting documents, analyzing legal situations, assisting in transactions on "deals" of all sorts—land deals, business deals, salary deals, government-regulation deals. Very little of this involves work in courts. Nonetheless, courts are staffed at the top exclusively by lawyers, which is probably sound. It is fitting to have experts who intimately know the special context of law practice take a leadership role in providing regulatory guidance of the legal profession. In short, I have no problem with continued judicial supervision of the legal profession as a starting proposition.

As a matter of doctrine, the affirmative aspect of the inherent-powers doctrine starts, not with history or with everyday practical reality, but with the language of state constitutions and with a kind of reasoning about the nature of judicial functions. The language in the state constitutions varies, but it basically runs something along the following lines: "The judicial power shall be vested in courts consisting of a supreme court and such other courts of inferior jurisdiction as the legislature may establish." The reasoning elaborates such stark "judicial power" phrases into a proliferated concept that includes,

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5. *See* C. WOLFRAM, MODERN LEGAL ETHICS 26 n.35 (1986).

among the traditional powers of courts, the power to regulate the practice of law.

I should add a parenthetical point of particular interest to an Arkansas audience, and to others as well. When Dean Lawrence Averill and I discussed inherent-powers as a theme for this talk, I had overlooked the point—but an always helpful research assistant reminded me—that, possibly unique among all the states, Arkansas' Supreme Court need not rely upon a doctrine of implied or inherent power to regulate lawyers. That power explicitly belongs to the supreme court in Amendment 28 of the Arkansas Constitution: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of lawyers."[6] The date of the constitutional amendment—1939—is suggestive. Although we were unable to unearth any illuminating legislative history surrounding the 1939 amendment,[7] one of my hunches is that, among other things, it had something to do with a sub-theme of my remarks—the intertie with regulating unauthorized nonlawyer practitioners. My suspicion is that the amendment was intended, among other things, to remove any doubt that the Arkansas Supreme Court was empowered to regulate *non*lawyers under the unauthorized-practice-of-law rubric. Despite the Arkansas constitutional amendment, as I will discuss later, at least one aspect of the doctrine of inherent powers—the focus of my remarks—remains extremely relevant in Arkansas as elsewhere.

But that gets ahead of the story. My first point is simply this: Were the affirmative aspect of the inherent-powers doctrine all there were to it, there would be very little to say against the doctrine. But there is a dark side of inherent-powers to which I now turn—its *negative* aspect.

Courts in almost every jurisdiction do not stop with the claim that they have the inherent power to regulate lawyers. Courts further claim that they have the *exclusive* prerogative of regulating lawyers. That is obviously a much more grandiose claim. For example, to say that as a citizen I have the power to vote normally does not also entail

6. ARK. CONST. amend. XXVIII.

7. The publisher's note to the amendment states that "the amendment was proposed by initiative petition and approved at the general election on November 8, 1938, by a vote of 74,290 for and 46,932 against." Initiative petitions, of course, are launched by interested groups of citizens, such as in this case bar associations, but I have been unable thus far to identify the interests specifically behind the initiative. Apparently the first important use of the court's power was promulgating rules regulating lawyers (the 1908 Canons of Ethics of the American Bar Association). *See* Creekmore v. Izard, 236 Ark. 558, 568, 367 S.W.2d 419, 425 (1963) (McFaddin, J., dissenting).

a claim that no *other* citizen has the same right. But that is essentially what courts have claimed. The negative aspect means that an attempt by a legislature or an administrative agency of a state to pass a law or to write a regulation that affects lawyers or lawyering risks a judgment by the state's courts that the law is unconstitutional. The specific rationale of the courts is that, by enacting the law, the legislature or the executive branch of government has overstepped the lines of the separation-of-powers doctrine. Being unconstitutional, the attempted enactment is not law and the courts instead will either refuse to enforce any regulation in the area or will enforce their *own* regulations, even if they dramatically conflict with the invalid legislation.[8]

It is this vast power under the inherent-powers doctrine to strike down reforming legislation that is my chief concern. Just so there is no misunderstanding, when I use the phrase *inherent-powers* from this point on, you can safely assume that I am talking about its negative aspect, and not its affirmative side. We could, of course, use the phrase *separation-of-powers* to describe the doctrine, but I believe that would only confuse rather than clarify. There is a general doctrine of separation-of-powers—a doctrine that applies to every branch of the government. Occasionally, that doctrine requires that courts invalidate legislation that effectively invades the province of a coordinate branch of government. But that general doctrine is characterized by judicial restraint in its application. In that important hallmark it bears no close resemblance to its much more robust and shabby cousin, the negative aspect of the inherent-powers doctrine.

Let me start my consideration of this negative aspect with a disclaimer in the form of a somewhat lengthy digression. I do not for a moment claim that all possible applications of the negative aspect of the inherent-powers doctrine are outlandish and doctrinally unsound. In a milder form of the doctrine than is sometimes encountered, I would have nothing critical to say against its application. Indeed, I will urge that the doctrine should sometimes be applied when courts have refused to do so. Consider two examples that strike me as entirely acceptable holdings of unconstitutionality.

First, suppose a state legislature passed a statute denying criminal defendants the right to be represented by lawyers, but instead required them to represent themselves or be represented by nonlawyers. Note, particularly, that the legislation has removed lawyers entirely from the courtroom; it has not merely provided that others,

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8. For an analysis of the negative aspect of the inherent-powers doctrine, see C. WOLFRAM, MODERN LEGAL ETHICS 27-31 (1986).

at the free election of the accused, could represent an accused in place of a lawyer.

That preposterous statute, of course, is in serious trouble under the provisions of the federal and state constitutions that protect the right to the assistance of counsel. But I think there is another good reason why a state court also might hold the statute unconstitutional. It is not really imaginable that courts could effectively try criminal cases, employing even the minimal procedural guarantees of due process, unless lawyers were able to represent persons accused of crime. The process of justice would virtually cease; certainly it would become impossibly unwieldy. The effect of the legislation on the courts would be to trench deeply upon the ability of the courts to function in an essential area. We can rather comfortably and confidently say that it would impinge on the inherent powers of courts. I would gladly join efforts to have the statute declared unconstitutional under the negative aspect of the inherent-powers doctrine.

The actual cases are somewhat less obvious than a law professor's extreme hypothetical; no state legislature will write our first imagined statute. But take a more life-like case—facts that very recently brought down a negative inherent-powers dictum from the Supreme Court of Florida. The case, *White v. Board of County Commissioners*,[9] involves a variation on a situation that is all too familiar. In our outrage over crime rates that appear to be rising, we demand that our political leaders declare all-out war on crime. But then, unlike other wars, we show no enthusiasm for paying for its costs, and our political leaders are fully aware of this reserve. Thus, when it comes time for state legislatures to appropriate funds to implement the state's obligation to provide the effective assistance of counsel to those whom the state accuses of being in the wrong trenches in the war against crime, the legislature often listens more carefully to the strong under-current of citizen opposition to crime-fighting expenditures. The results are often ludicrously inadequate fee schedules for compensating court-appointed lawyers in criminal cases.

The law in the area (although not the compensation) is rich. The particular twist in the Florida case was that the legislature had extended the statutory cap on fees for capital cases.[10] Thus, believe it or not, a defense lawyer in a murder case in Florida in which the death

9. 537 So. 2d 1376 (Fla. 1989).

10. *See* FLA. STAT. ANN. § 925.035(2) (1985) (providing for compensation of appointed counsel in capital cases at rates provided in § 925.036); § 925.036(2)(d) (compensation in capital case "shall not exceed" $3,500.00).

sentence could be imposed was limited by statute to a fee of $3,500.00. In *White*, that compensation worked out to fifty-five dollars per hour for sixty-four hours of work in the trial of the case. Other cases, depending on the lawyer's decisions about how much time to invest in the defense, might involve many more hours and a much lower hourly rate of compensation. The problem is how to provide any kind of effective defense with Florida's Depression-era pay ceiling for a capital case. One lawyer, the lawyer in *White*, resorted to the argument that the courts should ignore the maximum fee set in the lawyer compensation statute. The Florida Supreme Court agreed. In a wide-ranging opinion, the court essentially held that providing competent and appropriately motivated counsel in death-penalty cases required that the statutory maximum be ignored in any case in which the lawyer's reasonable expenditure of time brought the lawyer's fee above the cap.[11]

The Florida court anticipated its holding in *White* in an earlier decision holding that it would exercise its inherent power to set aside the statutory fee cap in some instances. The court in *Makemson v. Martin County*[12] held that a lawyer who reasonably and necessarily spent 248.3 hours in defending a capital case was entitled to compensation at a rate above the statutory maximum, which would have worked out to a maximum compensation of just under $14.11 per hour. The court rested its decision firmly on the inherent-powers doctrine.[13] Finding that the facts were sufficiently extraordinary, the court held that it had to ignore the statutory limit in order to enable the court "to perform its essential judicial function of ensuring adequate representation by competent counsel."[14]

The later *White* decision, in effect, held that all death-penalty cases were extraordinary and, accordingly, were occasions on which trial courts should exercise the inherent power to ignore the statutory fee cap.[15] The *White* court also firmly rested its decision upon the

> 11. Due to the bifurcated nature of the proceedings, the increased cost of living since the statute was last amended, the amount of time and effort the attorney must expend, and the severity of the penalty faced by the defendant, a trial court must be allowed to award fees in excess of the statutory maximum when appropriate.

537 So. 2d at 1380.

12. 491 So. 2d 1109 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987).

13. *Id.* at 1112-13.

14. *Id.* at 1113.

15. 537 So. 2d at 1380. The court observed that: "We find that virtually every capital case fits within this [extraordinary-circumstances] standard and justifies the court's exercise of its inherent power to award attorney's fees in excess of the current statutory fee cap . . . ." *Id.*

inherent-powers doctrine.[16]

The approach of the Florida court is sound. There comes a point at which compensation for defense counsel in capital cases is so low that the court can have no confidence that a lawyer of ordinary prudence, competence, and economic needs will expend the effort needed to secure a just result—at least a result that, if conviction occurs, will be immune from being overturned on the ground of ineffective assistance of counsel. The low fees, in short, may interfere with the functioning of the courts in just the way that, in the exotic hypothetical, we concluded that a court would be jeopardized by legislation prohibiting lawyers from appearing to defend. The degree of impairment from inadequate compensation is, of course, less. But at some point a court is warranted in saying that the degree of impairment has reached the point of unconstitutional encroachment on the essential functioning of a court. At that point the legislative act is unconstitutional.

Turning to Arkansas for a moment, I regret to say that the Arkansas Supreme Court has been much less venturesome than the Florida Supreme Court on the matter of legislative limits on compensating court-appointed lawyers in criminal cases. The Arkansas legislation provides shockingly low rates of compensation. In the double-speak sometimes found in statutes, the Arkansas statute provides that "the amount of the attorney's fee shall be not less than twenty-five dollars ($25.00) nor more than three hundred fifty dollars ($350)."[17] Surely, the "not less than twenty-five dollars ($25.00)" is a cynical legislative joke. It falsely suggests that judges hitherto had been compensating lawyers at a lesser rate instead of their full entitlement of twenty-five dollars. The amount allowed in a capital murder case is "not more than one thousand dollars ($1,000)."[18]

Unfortunately, in my view, the Arkansas Supreme Court has ap-

16. *Id.* The court further explained that:

> The statute is unconstitutional when applied in such a manner that curtails the court's inherent power to secure effective, experienced counsel for the representation of the indigent defendants in capital cases. At that point the statute impermissibly encroaches upon a sensitive area of judicial concern and violates [the judicial article of the state's constitution].

Id. at 1379.

17. ARK. CODE ANN. § 16-92-108(b)(1) (1987). The statute shows similar generosity for investigation expenses: "the amount allowed for investigation expenses shall not exceed one hundred dollars ($100) . . . ." *Id.* The $350.00 maximum has appeared in the statute at least since 1977. *See* ARK. STAT. ANN. § 43-2419 (1977 Supp.). Adjusted downward for inflation in the intervening years, the 1977 Arkansas statute originally provided a real-money equivalent at least twice as large as the present paltry value.

18. ARK. CODE ANN. § 16-92-108(b)(2) (1987).

parently taken the absolute position that the statute is constitutional, regardless of its impact upon the operation of the state's trial courts. In *State v. Ruiz*,[19] a 1980 decision, the court rejected an inherent-powers attack on the statute that had been accepted in the trial court. Instead, the supreme court held the statute constitutional because lawyers could be forced to provide representation without *any* compensation, and because it was no fault of the counties involved that the commission of a crime required the appointment of counsel.[20] So much for the presumption of innocence. The court also held that the lawyers involved were estopped to claim additional compensation because they had taken a solemn "lawyer's oath." In the oath, they swore never to "reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD."[21] (No similar oath, apparently, is taken by officers of counties in this state—or by officers of the state itself.) Since the statute requires every lawyer to take the oath,[22] the court is actually saying that it is constitutional for a state to coerce lawyers into serving for free.[23]

Does this suggest that Arkansas does not follow the negative aspect of the inherent-powers doctrine? Not at all. More recently, two years ago the supreme court held in *Ball v. Roberts*[24] that another Arkansas statute was unconstitutional under that very doctrine. The contrast between *Ball* and *Ruiz* is fascinating. While each decision involved the problem of providing court-appointed lawyers to indigent defendants in criminal cases, the cases reached diametrically opposite results. *Ball* involved a legislative amendment to the very statute involved in *Ruiz*. The amendment bears reciting:

> An attorney shall not be so appointed by a court if the attorney certifies to the court, in writing, that he or she has not attended or taken a prescribed course in criminal law in an accredited school of law within twenty-five (25) years prior to the date of appointment,

19. 269 Ark. 331, 602 S.W.2d 625 (1980).

20. *Id.* at 335, 602 S.W.2d at 627.

21. *Id.* at 334, 602 S.W.2d at 627.

22. *See* ARK. CODE ANN. § 16-22-205 (1987).

23. A more recent decision of the United States Supreme Court sheds little direct light on the constitutionality of coercing lawyers to serve as court-appointed counsel without adequate compensation. *See* Mallard v. United States District Court, 109 S. Ct. 1814 (1989) (5-4 decision) (under statute permitting federal district court to "request" counsel to serve indigent in civil case, court was not empowered to require such service when lawyer asserted incompetence). The majority in *Mallard* was careful to point out that the Court was not passing on the constitutionality of schemes to compel counsel to serve without compensation. *Id.* at 1821 n.6.

24. 291 Ark. 84, 722 S.W.2d 829 (1987).

that the attorney does not hold himself or herself out to the public as a criminal lawyer, and that he or she does not regularly engage in the practice of criminal law.[25]

In short, the statute said that an apparently incompetent criminal defense lawyer need not serve. "Unconstitutional," said the court: the statutory amendment infringes on the exclusive judicial power to regulate the practice of law and professional conduct of lawyers.[26] For whatever reason and with whatever effects, the Arkansas Supreme Court in *Ball*, unlike its approach in *Ruiz*, struck down legislation as unconstitutional under the negative aspect of the inherent-powers doctrine.

It seems to me that the court got it precisely backwards in the *Ruiz* and *Ball* decisions. If the court had declared the ludicrous fee-limitation statute unconstitutional in *Ruiz*, adequate numbers of competent criminal defense lawyers could be found to shoulder the burden that the court in *Ball* felt compelled to force upon every lawyer in the state, whether competent or not. Perhaps the court in *Ball* felt it had to spread fairly the wretched burden of inadequately compensated court appointments. With whatever practical effects, the cases establish two other points about the doctrine's embodiment of the negative aspect of the inherent-powers doctrine—its unpredictability and the looseness with which it is applied.

Far better, it seems to me, would be a doctrine that hews more closely to the essence of the sensible separation-of-powers concept that underlies the negative aspect.[27] Legislation, and to a lesser extent

25. ARK. CODE ANN. § 16-92-108(d) (1987) (added by 1985 Ark. Acts, No. 1076, § 1).

26. Under the statute, a law student intending to head into general practice would have some incentive to avoid electing criminal law as a law school course. Omitting to take the course would provide an automatic opt-out under the statute, which might be advantageous because of the very low rate of compensation for criminal defense appointments. Possibly the *Ball* decision is to be understood, in part, as a judicial method of assuring that law students not labor under unwise and artificial constraints in deciding whether to elect an important law school course.

Among other bizarre effects, the legislation effectively limits the burden of court appointments to two groups of lawyers—those who regularly practice criminal defense work and younger lawyers. Established lawyers in the twilight last-third of their careers in civil practice would be entirely relieved. Such lawyers are also, of course, statistically those in the best economic position to assume the heavy financial burdens of court appointments under the Arkansas statute.

27. What follows is a summary of arguments considered in greater detail in C. WOLFRAM, MODERN LEGAL ETHICS § 2.2.3, at 27-31 (1986). For an excellent analysis, upon which the above draws heavily, that employs a very similar "functional" analysis of judicial and legislative powers, see Kalish, *The Nebraska Supreme Court, the Practice of Law and the Regulation of Attorneys*, 59 NEB. L. REV. 555 (1980). Professor Kalish's analysis deserves much greater attention than courts have given it.

executive actions, may be thought to trench in all sorts of ways upon the judicial branch—if by "trench" we mean affect in any significant way. (The same is true, of course, of the effect of judicial action upon legislation—for example, judicial decisions construing a statute.) It simply will not do, however, to employ the inherent-powers doctrine as if it attempted to preclude literally any member of one branch from exercising any power that affects another branch.[28] Surely it is not enough that legislation or executive action affects the judicial branch. Such a broad-brush approach, if applied consistently, would make it unconstitutional for a legislature to take such steps as appropriating funds to pay the salaries of judges. And surely it is not enough, to justify the inherent-powers doctrine in a particular case, that the legislation in question affects judicial functions in a way that judges regret or might do differently were they elected members of the legislature. The interactions and interconnections between the common law and legislation are many and fascinating; but surely the mere fact that a judge, or a bench of appellate judges, disagrees with a statutory formulation has, in no other area of the law, been thought sufficient to invalidate the statute. In many states, for example, the rules of evidence to be employed in courts are enacted by the legislature. It would be insensible in such a state to hold that the statutory definition of an evidentiary privilege offends the separation-of-powers concept simply because the court would have defined the privilege differently if it were to consider it under its common-law jurisdiction.

The key to applying the inherent-powers doctrine is best found in a formula that I borrow loosely from the great conservative proceduralist, the late Henry M. Hart, Jr. Professor Hart is best known for his work in connection with the jurisdiction of federal courts. On the question of the extent to which Congress may enact legislation that strips jurisdiction from the Supreme Court, Hart took the position that such legislation, no matter (I would add) how regrettable from a policy point of view, should not be struck down unless its effect would be that of destroying the essential role of the Supreme Court in the constitutional scheme.[29] While there are potentially interesting parallels between Hart's problem and ours, for present purposes I wish only to borrow the phrase and its embedded idea and

28. I engage here in a careful near-paraphrase of the separation-of-powers provision of the Arkansas Constitution: "No person, or collection of persons, being one of these departments [legislative, executive, judicial], shall exercise any power belonging to either of the others . . . ." ARK. CONST. art. 4, § 2.

29. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

leave behind the peculiar baggage of the jurisprudence of jurisdiction-stripping statutes.

What makes the negative aspect of the inherent-powers doctrine potent and controversial is that it is applied far beyond the isolated example of legislation that cuts to the very core of essential judicial functions. Instead, the courts in many states have invoked the negative aspect of the doctrine to outlaw legislation that has nothing to do with lawyers functioning in courts. The logic that courts have followed runs approximately[30] as follows:

> Major Premise: Courts have the inherent power to regulate the legal profession.
>
> Minor Premise: Legislation that also attempts to regulate the legal profession trenches upon that power of the judiciary.
>
> Quod erat demonstrandum: The legislation violates the separation-of-powers provisions of the state constitution, and it is void.

The problem with the argument is that its concept of separate powers of the branches of government reminds us of flat-earth geography. It attempts to define all of governmental reality from the perspective of the viewer—the courts, in this case. It purports to take literally the Fourth-of-July rhetoric about each of the three branches being protected against invasion of its province in any way. But the plain fact is that separation-of-powers, as with many other doctrines of American state and national constitutional law, is not a doctrine of absolutes; it is not a doctrine about air-tight separation. It is a doctrine, more or less, of balance and accommodation. It is a doctrine that says regulation through law works best if it is an interrelated enterprise among the branches. It is also a doctrine that should give primacy to the most truly democratic organ of government: the legislature.

The negative aspect of the inherent-powers doctrine is a very powerful tool in regulating the legal profession and in forcing upon a state's population a conception of public policy in a wide range of vaguely related areas that is held by a court-and-lawyer elite. Under that conception, state courts have at least threatened to hold void many legislative and executive branch attempts to regulate the legal profession in any but the most indirect ways. Courts have, in effect, employed the concept to keep the legislative and administrative

30. The reader's natural temptation to suspect that the paraphrase is unfair can be quickly put to rest by considering such decisions as Ball v. Roberts, 291 Ark. 84, 722 S.W.2d 829 (1987).

branches off the exclusive judicial turf of "regulating the legal profession."

Let me illustrate the working of the negative aspect of the inherent-powers doctrine with some recent decisions drawn from courts around the country. One of my favorite decisions was brought to my attention by a student writing a law review note.[31] She came into my office amazed by a decision of the Minnesota Supreme Court. The decision[32] had declared unconstitutional a recently enacted state statute providing that monies collected by the Minnesota Supreme Court from lawyers in the state as their annual registration dues should be deposited in the state treasury. Because regulating the legal profession was the exclusive role of the state supreme court and because the statute, no matter how mildly, also dealt with regulating the legal profession, the statute was void.

Another illustrative decision comes from Idaho.[33] A state administrative agency dealt with the problems of business people. It found these problems were often relatively minor matters of small business people, neither complex nor weighty enough to warrant requiring applicants to hire lawyers to represent them before the agency. The agency thus adopted a rule providing that, for the purpose of appearances before the administrative agency in minor matters, a person with a small business[34] did not have to be represented by a lawyer. There was nothing to suggest that the Idaho administrative agency was in any way saying the nonlawyer could continue the representation if the matter were later taken to court. The regulation only applied to activities directly before the agency. "Foul deed!" decreed the Idaho Supreme Court. The regulation purports to deal with the practice of law, and that is the exclusive turf of the judges.

There are more such cases, but those sufficiently illustrate the point. Those cases are not common, but I do assert they are typical. They illustrate, perhaps in the same distorted fashion as the cover of a body-building magazine, what the inherent-powers doctrine can become at its most grotesquely developed stage.

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31. Her student note remains one of the best studies of the inherent-powers doctrine. *See* Note, *The Inherent Power of the Judicial to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783 (1976).

32. Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973).

33. Idaho State Bar Ass'n v. Idaho Pub. Utilities Comm'n, 102 Idaho 672, 637 P.2d 1168 (1981).

34. The regulation permitted a "partner, officer, duly authorized representative" or lawyer to represent a utility or motor carrier with annual gross income less than $100,000. *Id.* at 673, 637 P. 2d at 1169.

There is one more important part to the story, a way of toning down the inevitable tension that the inherent-powers doctrine can create between court and legislature. In some decisions, although in only some, a state supreme court might be led to say that, while a statute or regulation "technically" violates the inherent-powers doctrine, the court will forebear striking it down because the court agrees with the policy objectives of the statute. The court will therefore enforce the statute under its affirmative inherent-powers jurisdiction and in the spirit of *comity*.[35] The end of it is that the statute is saved and given effect. Again, that result is not common, and the occasions on which the comity notion will be invoked are not readily predictable. For the most part, the statutes that are saved by the comity doctrine from judicial vaporization seem to be housekeeping rules that receive the strong support of the bar or at least avoid the opposition of the legal profession.

What is the legal and political impact of the negative aspect of the inherent-powers doctrine? The impact is clear—and clearly disturbing. Consider the following points.

First, lawyers, and *only* lawyers, now regulate the legal profession. Lawyers entirely control the process by which lawyer rules of conduct are written and adopted. In drafting disciplinary rules, every state to a greater (usually) or lesser (infrequently) extent follows the lead of the American Bar Association. Often states follow that lead slavishly. And only a lawyer would think that many of the departures are truly significant. The ABA calls the major shots and most of the minor ones. The ABA is a private, exclusive, unrepresentative national organization whose membership consists only of lawyers—nonlawyers need not apply. It has never included even half of all lawyers in the United States, and is skewed toward large-firm, older, and established lawyers.

Lawyers dominate the process of lawyer discipline—or lawyer *non*-discipline, as one's perception might have it in some jurisdictions. True, a trend has recently developed in the states to admit non-lawyers to positions in decision-making bodies in certain bar-regulatory agencies, such as lawyer discipline agencies. But the invitation is issued only by the organized legal profession and seems to be issued

35. *See, e.g.*, McKenzie v. Burris, 255 Ark. 330, 342, 500 S.W.2d 357, 365 (1973) (statute extending right of comity to out-of-state lawyer to practice in state construed as aiding and not superseding or detracting from power of courts); Arkansas Bar Ass'n v. Union Nat'l Bank, 224 Ark. 48, 54, 273 S.W.2d 408, 412 (1954) (statute defining unauthorized practice of law by banks "given approval" by court because statute was "considered to be in aid of the judicial prerogative to regulate the practice of law and not to be in derogation thereof").

only to friends, or at least not avowed critics, of the legal profession. Moreover, the invitations are not issued in great numbers. I am aware of no lawyer disciplinary agency in which nonlawyers constitute a majority of members or in which nonlawyers really exercise leadership roles.

Second, lawyers, and *only* lawyers, define the extent to which the legal profession will face economic competition. This is accomplished by the legal profession's control of the very concept and definition of legal services. Control occurs in several ways and on several linked fronts.

Lawyers control admission to law practice—the chief means of regulating the number of lawyer-competitors. Lawyers, and *only* lawyers, determine what requirements will be imposed on applicants, what questions will be asked on bar examinations, how those examinations are to be graded, and what a minimal passing score must be.

Lawyers, and *only* lawyers, control the entire process of preparation for admission. As part of the admission process, with a few trivial exceptions, almost every person seeking admission to practice today must pursue a lengthy and expensive course of legal education. Because of rules made by lawyers, legal education must occur in institutions that are operated and controlled almost entirely by lawyers.

Lawyers, and *only* lawyers, also define the large areas of human activity that only lawyers can engage in. They can do this, of course, because only lawyers control the process of defining the unauthorized practice of law—the doctrines and rules that define and limit those areas of "the practice of law" that only lawyers may touch. The inherent-powers doctrine very importantly limits the power of the legislature in almost every state to retract any part of that definition. Lawyers also entirely control the measures by which unauthorized-practice regulations are enforced—both criminal and civil enforcement lawsuits.

Third—and this forms the tap-root of the legal profession's power—lawyers, and *only* lawyers, control almost all of the levers of power that are necessary for establishing the basic ground rules by which power will be divided between the legal profession, their clients, and the public. By that, I refer to the readily observable fact that only lawyers control the process of judicial decision by which acts of the legislature or regulations of administrative agencies can be declared invalid or protected against such declarations. The inherent-power doctrine stands as a powerful barrier shielding the legal profession from any of its critics who wish to urge legislative reform of the profession. Because the inherent-powers doctrine is based on the state constitution, it is only by the cumbersome process of constitutional reform that either clients or the public can clearly seize back from the legal profession the power to control the work of the legal profession and both the force and direction of the impacts of the legal profession upon both clients and the public.

In short, the very definition of unauthorized practice is itself claimed to be part of the exclusive province of the courts. At the very most, according to some courts, it is a power of definition that the courts are prepared to share only at the margins—only, in fact, when the courts agree with the far-reaching sweep of prohibition defined by the legislature.

The legal profession has in that way both identified and "protected" the interests of clients and the public without permitting them to participate in any way in those processes. We should not be surprised that neither clients nor, to an increasing extent, the public believes that that arrangement adequately protects public and client interests.

Lawyers did not invent this process of self-regulation, although they may have perfected it as an art form. Most other professions and work groups have accomplished a more modest form of self-regulation. This is more or less true in medicine, nursing, accounting, veterinary practice, barbering, horseshoeing, cosmetology, plumbing, carpentry, engineering, the ministry, architecture, midwifery, dentistry, selling real estate, selling stock, and so on. Those occupational groups have, to a greater or lesser extent, also been successful in establishing admission barriers and unauthorized-practice restrictions and in exercising a measure of self-regulation.

What is profoundly different about the legal profession is that lawyers, and *only* lawyers, have the powerful advantage of the negative aspect of the inherent-powers doctrine. That doctrine permits lawyers, and *only* lawyers, to frustrate attempts at legislative or administrative reform of their profession. I think you can now see the absolutely pivotal role that this little-known doctrine plays in warning off the field of lawyer self-regulation any regulatory aspirant other than the legal profession itself. Doctors don't have it, plumbers don't have it, not even stock brokers have it. If we don't like the way doctors are regulating themselves, at least we know that if we undertake the time-consuming and expensive process of lobbying a reform measure through a state legislative body, the reform will have a chance to take hold. That has been a proven waste of time, or largely so, in many states in which nonlawyer groups have attempted to take back some of the turf that lawyers have captured for themselves.

Is there any answer? Must client groups, legal reformers, and the public at large accept exclusive lawyer domination of their self-defined province of legal services? The balanced answer, I believe, is that there are three kinds of constructive measures that critics and others interested in the reform of the legal profession can take. The measures are difficult and problematic, but they offer some hope of pushing through reform from outside the legal profession. One measure is constitutional amendment. The other is the passage of legislation. (Although I just described legislation as largely a waste of time, I will elaborate on that shortly.) The third is more fundamental legal reform.

The first method, constitutional amendment, would have as its objective altering the basic document on which the inherent-powers doctrine is said to rest: the state constitution. The possibilities for amendment include an across-the-board approach—for example, a state constitutional amendment simply providing that the legislative and executive branches, equally with the judicial, also have the power to regulate the legal profession. A gradualist in reform politics might urge a less drastic approach—an amendment, perhaps the first in a series, providing, for example, that a named administrative agency has the power to admit nonlawyers to practice before it or providing that real estate agents, as well as lawyers, have the power to fill out land purchase contract documents.[36]

Constitutional amendment is no easy matter. It requires coalition building, a political war chest, diligent effort, and the right political climate including sympathetic handling by a mercurial and largely ill-informed media—in short, large measures of those four indispensable political ingredients: friends, cash, work, and good luck.

Second, legislation is worth thinking about, even though it might well fall victim to the inherent-power doctrine in many jurisdictions, and thus prove worthless, from one perspective. In other words, it might, for example, be worthwhile for state legislatures to attempt to reduce the broad sweep of the definition of unauthorized practice of law, despite the threat of a judicial veto. Two reasons suggest that such an effort on selected issues might bear fruit. First, in many

36. That particular reform would not be necessary in Arkansas following the decision in Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963), limiting in part Arkansas Bar Ass'n v. Block, 230 Ark. 430, 323 S.W.2d 912 (1959), and Block v. Arkansas Bar Ass'n, 233 Ark. 516, 345 S.W.2d 471 (1961).

states, a state legislature, once aroused on an issue, is not an institution with which a state supreme court will lightly trifle. Recall the possibility that the court will regard a particular measure—particularly one that has very wide legislative and public support—as a step that the court should accept as a matter of "comity." The reform might be able to run the gauntlet of the negative aspect of the inherent-powers doctrine without serious injury. Second, if the court strikes down the legislation, the episode could result in a political situation more congenial to generating the support needed for a state constitutional amendment. Legislators, naturally, don't like to have courts strike down their enactments. The inherent-powers basis for such a ruling would be of very limited appeal beyond the legal profession, and the legal profession would almost certainly find itself very much on the defensive in any follow-up campaign to obtain constitutional relief.

The third, and final, type of approach is systemic reform. Let me edge my way into systemic reform by telling you about some conversations I have had over the years. Because, I suspect, my name sometimes appears in the media in connection with legal ethics issues, I occasionally receive telephone calls from strangers in places both far and near. Some callers are nonlawyers complaining about the high cost and frustrating delay associated with the lawyer-dominated process of estate probate. Probate, of course, is the process by which the homes and other possessions of decedents pass to their children and other heirs. Probate of most estates almost always follows if decedents leave their property by will and inevitably follows if they don't. In each case, the caller wanted to know what they could do about a lawyer problem. The lawyer had, for example, written a will for a now-dead client that funneled all of the client's property through probate. It also named the lawyer as the executor of the probate estate and—although this is never stated in the will—permitted the lawyer-executor to hire his or her own law firm as the "attorneys for the executor." The unknowing testator, of course, probably thought that the point of naming a lawyer as executor was to obtain whatever legal help was needed. The upshot is that the fees of the two professionals mount nicely. The lawyer-executor signs a check to pay a heating bill (on the house that stands vacant while the laborious process of probate grinds on), and the lawyer-executor's law partner sagely reviews the check for legal flaws. Each of the two then bills the estate for separate services.

The result, of course, is that the $250,000 house that was to go to the decedent's children must be sold to pay off the $15,000 "executor's fee" and the $17,000 legal fees of the "attorneys for the executor." The modest estate is substantially diminished by two sizable fees of professionals who perform duties that, almost without exception, most high school drop-outs could be taught to execute.

Someone distressed by an overblown and unnecessary system of probate administration might decide to take action in one of several different ways. The reformer might, for example, if he was a Connecticut businessman named Norman Dacey, sit down and write a mad-as-hell book called *How to Avoid Probate*,[37] play the fox that starts the bar association hounds in unauthorized-practice pursuits for several years, and then enjoy a wealthy old age on the book royalties that flow in following all the publicity. I'm sure Mr. Dacey enjoyed his moral triumph as much as his financial success. And I detect that most law students who learn of Mr. Dacey harbor at least a touch of admiration for the grit of a person who stood up to persistent attack by an entrenched arm of the establishment. But Dacey's position in a gallery of national demi-heroes is equivocal. After all, he left the probate system itself basically untouched. In fact, some people might use his probate-avoidance suggestions in a clumsy and injurious way. The complex probate system remains both dominated by lawyers and firmly in place both before and after Dacey, and courts can strike down a Dacey "living trust" or construe it in unkindly fashion, unless it's done just right.

Another reaction to the scandal of probate might be to try to provide the same high-priced services that lawyers provide in probate administration, but at a much lower price. One could readily do that through probate administration using only the services of paralegals and clerical staff—except for one important consideration. It would be against the law in every state I know of to have such an enterprise operate in any way except under the direction and control, and for the ultimate profit, of a lawyer. Probate administration by nonlawyers practicing alone would constitute the unauthorized practice of law. Moreover, even if it were possible for paralegals practicing alone to practice probate law, there is no reason to think that nonlawyers would prove any less grasping than lawyers once they got a toe-hold in probate administration. Remember guard Boris and the worker with the wheelbarrow. There is not much point to supplying wheel-

37. This all-time best-selling legal aid for everyman can be found at popular-book counters everywhere. The seventeenth edition (1987) claimed on its cover that over 2,500,000 copies of prior editions had been sold.

barrows to more workers if we just end up having more wheelbarrows ripped off.

It seems to me far better to take a long, hard look at the procession of wheelbarrows going past us—in the instance under immediate scrutiny, at the system of probate itself. Would the world be better off by bringing probate down to earth by eliminating it in many cases or, at least, making it optional? Why not simply eliminate the traditional system of probate for anyone who elects to do without its arcane, intricate, heavily lawyered, horribly expensive and largely unnecessary protection? Now you probably are aware that just such schemes are being actively pursued in several states. California, as one example, passed legislation in 1986 that will allow many estates to escape the worst of the expense and delay of probate through a process called "simple probate."[38]

Those sorts of systemic reforms—simple probate, no-fault automobile insurance protection, do-it-yourself divorces, realtor-handled land transactions—are the sorts of legislative reforms that, if well drafted, can accomplish three worthwhile goals.

First, they can remove much of the unnecessary expense and delay that often accompany routine tasks performed by lawyers.

Second, those reforms leave law and its administration much closer to the common man and woman and much less in the exclusive control of mysterious professional processes, and thus they will surely lead to better public understanding and acceptance of their consequences.

Third, and germane to our immediate present purpose, they can be accomplished through legislation immune from the threat of the inherent-powers doctrine. They do not attempt to regulate the practice of law as such. They simply, but profoundly, make the practice of law irrelevant to an area of human behavior where lawyers are largely not needed.

In conclusion, suppose, for a heady moment, that we lived in a world in which such reforms were in place. Would we then live in a political and social Nirvana? Could we all then realize that most persistent of utopian dreams—a society without lawyers? Would I be out of a job as an educator of lawyers? Would you be out of jobs as lawyers? I hardly think so, although there would doubtless be fewer law students in the United States. There would still be plenty of problems and issues to occupy the very real and very important talents that

38. *See* CAL. PROB. CODE §§ 13000 to 13660 (West 1989 Supp.) (added by 1986 CAL. STAT. ch. 783, § 24, effective July 1, 1987).

good lawyers possess. Lawyers should be about those socially necessary and socially useful tasks. They should leave the rest to others, or at least not prohibit others from doing what they can to lead the kinds of professional lives that good lawyers lead: serving the public and making a decent living while doing it.