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Federalism, the Tenth Amendment, and the Legal Profession: The Power of a Federal Judge to Restrain a Convicted Attorney, as a Condition of Probation, from Practicing in the State Courts

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Federalism, the Tenth Amendment
And the Legal Profession: The Power
Of a Federal Judge to Restrain a
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The State Courts

I. INTRODUCTION

This article examines the power of a federal judge, when sen-
tencing an attorney who has been convicted of a federal felony to
a term of probation, to order that the attorney refrain from engag-
ing in the practice of law in the state courts. This issue was re-
cently before the United States Court of Appeals for the Second
Circuit in United States v. Pastore.1 In that case, the defendant,
an attorney, was found guilty of willfully and knowingly filing a
false income tax return in violation of 26 U.S.C. § 7206(1).2 The
presiding district court judge sentenced him to a term of probation.
Deriving his power from 18 U.S.C. § 3651, which provides that “[a
defendant may be] placed on probation for such period and upon
such terms and conditions as the court deems best,”3 the district
judge ordered that the defendant resign from the state bar.4 On
appeal, the defendant challenged the authority of the district court
to impose such a condition of probation. Although expressing
doubts concerning the sentencing judge’s authority to order the con-

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1. 537 F.2d 675 (2d Cir. 1976).
2. I.R.C. § 7206 (1).
   noted that “[i]t would be hard to use more general words.” 537 F.2d
   at 660.
4. 537 F.2d at 677.
dition, the Court of Appeals for the Second Circuit neither focused on that problem nor did it consider the constitutional issues raised by the defendant. Rather, the court held that under the circumstances involved and "in the exercise of [its] supervisory power ... this particular condition of probation was improper." Concurring in the majority's opinion, Judge Lumbard asserted that a federal court has no authority whatsoever to affect the right of an attorney to practice in state courts.

5. Id. at 677.
6. Id. at 684 (Lumbard, J., concurring). A distinction must be made between the federal judge's power to control an attorney's practice in federal courts and his power to control an attorney's practice in state courts. This article concerns only the latter issue.

A directly related question is the authority of a state court judge to restrain a convicted attorney, as a condition of probation, from practicing in the federal courts. In Yarbrough v. State, 166 S.E.2d 35 (Ga. App. 1969), an attorney was convicted in a state court for forgery of a warranty deed. The trial judge sentenced him to a twelve month probation term with the condition that he not engage in the practice of law in courts within the state during that period. On appeal, the Georgia Court of Appeals, upholding the condition, said that the trial judge needed this power in order to protect state citizens and the integrity of the state courts. Id. at 36. The court's opinion did not specify whether the condition limited only the attorney's practice in state courts, or whether it also applied to his practice in federal courts within Georgia. If it were meant to reach both, the arguments that this article presents concerning the attempt by a federal judge to control an attorney's practice in state courts would also apply to the state judge's order to the extent that it affected the attorney's federal court practice.

But the applicability of these constitutional arguments to the state judge's order may be limited. In Ginsburg v. Kovrak, 392 Pa. 143, 139 A.2d 889 (1958), appeal dismissed, 358 U.S. 52 (1958) (dismissed for lack of substantial federal question), an attorney, who was admitted to practice before numerous federal courts including the Eastern District of Pennsylvania, was enjoined by the Philadelphia Bar Association from practicing law because he was not authorized by the state to practice law before Pennsylvania state courts. The injunction prohibited him from practicing anywhere in Philadelphia except within the actual confines of the federal court buildings. On appeal, the attorney argued that a state court could not limit his federal practice in this way. To this assertion the court responded:

We do not presume to tell the Federal Courts whom they should or should not appoint as referees, special masters, amici curiae, and the like, for the prosecution of their work as they see it. That is a different matter from deciding what qualifications are needed by Pennsylvania citizens facing and affecting each other before the Bar in any court of law, State or Federal. In such matters we are State citizens before we are federal citizens, which is another way of saying that the States have not ceded to the Federal Government the right to qualify their lawyers.

139 A.2d at 892. Contra, Ex parte McCue, 211 Cal. 57, 293 P. 47 (1930).
From Pastore, it is clear that federal judges derive their extensive power to impose conditions of probation from 18 U.S.C. § 3651. Utilizing this almost unlimited grant of authority, federal judges frequently require that convicted felons, as a condition of probation, refrain from engaging in certain types of employment.\textsuperscript{7}

Although McCue presented facts similar to those in Ginsburg, the California court reached an opposite result. The court declared that:

The State Bar Act and other statutes enacted for the purpose of regulating the practice of law in this state are applicable to our state courts only. The federal courts are governed entirely by federal enactment and their own rules as to admission and professional conduct. This state, should it attempt . . . to regulate the practice of law in the federal courts or to place any restrictions or limitations upon the persons who might appear before the federal courts within this state, would be acting entirely without right and beyond its jurisdiction.

\textit{Id.} at 66, 293 P. at 51 (citations omitted).

\textsuperscript{7} E.g., United States v. Nu-Triumph, Inc., 500 F.2d 594 (9th Cir. 1974) (corporation found guilty of transporting obscene material through the mails was ordered not to engage in the distribution of obscene material); Whaley v. United States, 324 F.2d 356 (9th Cir. 1963), \textit{cert. denied}, 376 U.S. 911 (1964) (person convicted of impersonating an F.B.I. agent was ordered to give up his job in the repossession business); Barnhill v. United States, 279 F.2d 105 (5th Cir. 1960), \textit{cert. denied}, 364 U.S. 824 (1960) (four gamblers convicted of attempting to evade federal gambling taxes were required to refrain from practicing their chosen profession, \textit{i.e.}, gambling); Stone v. United States, 153 F.2d 331 (9th Cir. 1946) (five railroad dining hall stewards, who pleaded \textit{nolo contendere} to charges of unlawful conspiracy to take money from dining cars moving in interstate commerce, were ordered to refrain from interstate employment on railroad cars); United States v. Greenhaus, 85 F.2d 116 (2d Cir. 1936) (defendant, convicted of violating federal security laws, was prohibited from taking part in any stock or bond sale).

State judges, through sentencing authority as broad as that granted to federal judges, have also imposed conditions affecting employment. See, \textit{e.g.}, United States v. Villarín Gerena, 553 F.2d 723 (1st Cir. 1977) (member of the Puerto Rico police force, who struck a private citizen numerous times and then arrested him without probable cause, was sentenced to a term of probation conditioned upon his resignation from the police force); Bricker v. Michigan Parole Bd., 405 F. Supp. 1340 (E.D. Mich. 1975) (defendant convicted of grand theft ordered not to engage in the furnace or heating business); Yarbrough v. State, 166 S.E.2d 35 (Ga. App. 1969) (\textit{supra} note 6); People v. Bresin, 245 Cal. App. 2d 232, 53 Cal. Rptr. 687 (1966) (person convicted of grand theft and forgery required not to accept employment that would put him in a position to make sales to public); People v. Caruso, 174 Cal. App. 2d 624, 345 P.2d 232, 1 Cal. Rptr. 428 (1959) (defendant ordered to remain out of the automobile business); People v. Osslo, 50 Cal. 2d 75, 323 P.2d 397 (1958) (union members convicted of assault and related offenses barred from holding any union position or receiving any remuneration from any union); People v. Frank, 94 Cal. App. 2d 740, 211 P.2d 350 (1949) (pediatrician, found guilty of contributing to
This broad delegation of power has been sharply attacked by both
the judiciary and law review commentators. Perhaps in partial
response to this criticism, a bill, the Criminal Code Reform Act
of 1977, has been introduced in Congress. This bill, the current
version of the ill-fated “S. 1,” delineates more precisely the federal
judge’s probation condition power. Section 2103(b)(6) of the bill declares:

[T]he court may provide, as further conditions of a sentence to pro-
bation . . . that the defendant—

(6) refrain from engaging in a specified occupation, business,
or profession bearing a reasonable relationship to the offense, or
engage in such a specified occupation, business, or profession only
under stated circumstances.

The scant legislative history of this section, as it appeared in
“S. 1,” does not describe how section 2103(b)(6) was formulated.
The proposal, as originally introduced in 1973, however, sheds some light on this issue. Section 1-4A3(b) of the original bill states that:

[A] member of a licensed profession convicted of an offense may, as part of his sentence, be disqualified . . . from practicing his profession or may be required to . . . practice such profession subject to a specified condition for such period, not in excess of the authorized term of imprisonment for such offense, as the court may determine to be in the interest of justice.

This provision was eliminated from the bill reintroduced in 1975 and 1977. Although the reason for the deletion is not entirely clear, one explanation is that the harsh criticism directed at the proposal from many authorities, including the Justice Department, sources, a report submitted by the National Commission on Reform of Federal Criminal Laws, the American Law Institute's Model Penal Code, and the American Bar Association's Project on Minimum Standards for Criminal Justice. Report of the Comm. on the Judiciary of the United States Senate to Accompany S. 1, 93d Cong., 2d Sess., vol. II at 9-11 (1974). Neither the Brown Commission's proposed legislation, supra note 9, nor ABA Standards Relating to Probation, § 3.2, 44-45, 48 (1970), explicitly grants to a federal judge the power to forbid an attorney from practicing law in state courts.

The Committee Report discussing section 2103(b)(6) of S. 1 states that:

The condition is stated . . . to relate the proscribed occupation to the nature of the offense. Thus, a bank teller who embezzles funds might be required not to engage in an occupation involving the handling of funds in a fiduciary capacity.


A footnote to the above quotation assures the reader that "[t]he constitutional permissibility of such a condition has been recognized. See Whaley v. United States, 324 F.2d 356 (9th Cir. 1963), cert. denied, 376 U.S. 911 (1964)." Id. at 889 n.15. The report never mentions the applicability of the condition to members of state-regulated professions.

15. Hearings on the Reform of the Federal Criminal Laws Before the Subcommittee on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., pt. XI, 8047 (1974) (statement of John C. Keeney). When asked about section 1-4A3(b) of S. 1, Mr. Keeney declared that "[t]he Department [of Justice] preferred to leave [disqualification decisions] to the federal, state, and local licensing authorities, except as such power might be exercised as a condition of probation or parole." Id. at 8066. Albeit Mr. Keeney implied that the Department of Justice was opposed to the disqualification provision found within section 1-4A3(b), he offered no reasons for this opposition. More importantly, he failed to consider the problems of, or provide support for, the alternative solution favored by the Justice Department. But criticism of this provision was not universal. See Hearings on
prompted its removal. The commentators argued that the section invaded the reserved powers guaranteed to the states by the tenth amendment to the United States Constitution,\(^1\) that it was unnecessary because state licensing authorities already regulated the conduct of professionals holding state licenses,\(^1\) and that the provision was ambiguous because it provided no definition of the term "profession" and gave no guidance as to when the disqualification penalty should be imposed.\(^1\)

As the above discussion demonstrates, federal judges enjoy immense power under either 18 U.S.C. § 3651, or its proposed successor, section 2103(b)(6),\(^1\) to impose conditions of probation on members of the legal profession who have been convicted of federal felonies. In response to increasing public criticism of lawyers, due generally to unscrupulous conduct by certain members of the profession,\(^2\) federal courts must become more willing to administer strict penalties against attorneys who violate the law.\(^2\) Included among the array of possible sanctions at the disposal of federal judges is an order restraining a defendant, as a condition of probation, from practicing law in both the federal and state courts. Although this

\(^1\) The Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., pt. XI, 7863 (1974) (statement of Ralph Nader). Mr. Nader asseverated that "[s]uch a sanction is valuable, but it should be complemented by an affirmative authority for the courts to order the offender to perform socially useful activity." Id. at 7880. Another legal writer failed to discuss the applicability of the provision to attorneys. However, he did note its possible repercussions for an attorney's clients. Maddock, The Proposed Criminal Code: Business Lawyer Beware, 29 Bus. L.W. 711, 719-21 (1974).


\(^5\) See note 10 supra.


\(^7\) See United States v. Pastore, 537 F.2d at 684 (Lumbard, J., concurring).
sanction may appear at first glance to be a viable one, it raises grave social policy and constitutional issues that affect the essence of federal-state relations. It is the purpose of this article to analyze these problems and to reach a conclusion that is consistent with both the tenth amendment and the concept of federalism.

II. SOCIAL POLICY ANALYSIS

Aside from constitutional considerations, the propriety of action by a federal judge restraining a convicted attorney from practicing in the state courts must be examined. First, contentions supporting a federal court's entrance into this area are considered. This is followed by an inquiry into factors mandating that the states remain the sole regulators of the legal profession.

In support of federal court intervention, one must begin the analysis by noting that today public opinion of the legal profession is extremely low.22 The public's disrespect stems, in part, from a perception that, once admitted to practice, members of the profession are not effectively disciplined.23 Since the states have not fulfilled their obligation to regulate the profession, perhaps the federal government should be provided with the machinery to administer this task.24

In addition to the preceding argument, pragmatic considerations support the assumption of this power by a federal judge. First, in an effort to combat recidivism, a judge needs a wide range of

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22. See note 20 and accompanying text supra.
24. See Tunney & Frank, Federal Roles in Lawyer Reform, 27 Stan. L. Rev. 333, 339 (1975). But cf. the congressional enactment of 5 U.S.C. § 500(b) (1970) in 1965. This provision eliminated many federal agency-established admission requirements pertaining to practice by state licensed attorneys before federal agencies. Opponents of the bill argued that the lack of uniform admission and disciplinary regulations among the states necessitated the implementation of these agency-promulgated requirements. They further contended that the requirements were needed in order to bar undesirable attorneys from agency practice. See generally H.R. Rep. No. 1141, 89th Cong., 1st Sess. 2 (1965), reprinted in [1965] U.S. Code Cong. & Ad. News 4170. These arguments were rejected by Congress, which felt that surveillance by the states was a sufficient guarantee of professional integrity. Daley & Karmel, Attorneys' Responsibilities: Adversaries at the Bar of the SEC, 24 Emory L.J. 747, 780 (1975).
discretion when choosing appropriate probation conditions.\textsuperscript{25} If a convicted attorney's practice relates to the illegal acts upon which his conviction is based, a probation condition restricting his professional activities seems reasonable and even desirable. Second, the sentencing judge, because of his intimate involvement with the accused during the trial process, is in as good a position as anyone to appraise the defendant's moral character and his ability to function lawfully within society.\textsuperscript{26} Third, timing the imposition of professional discipline to coincide with the felony sentence better protects the public and more adequately assures the defendant a just determination than does the present bifurcated system.\textsuperscript{27} Finally, since the federal courts depend almost entirely on the states to regulate admission to the legal profession, the federal judiciary needs this power to protect is own interest in the fitness of the profession's members.\textsuperscript{28}

Countering the above arguments are considerations that favor the states' retention of sole control of this area. It is clear that the states have numerous interests that are served only through an effective regulation of attorneys. These interests include a desire to protect state residents, to make sure attorneys know local laws, and to assure a uniform and efficient administration of the state judicial system.\textsuperscript{29} Turning to the federal courts, one sees that


\textsuperscript{26} Cohen, supra note 16, at 347.

\textsuperscript{27} Id. But see In re Dreier, 258 F.2d 68 (3d Cir. 1958). Although not involving a probation condition, the case recognizes the importance of providing a convicted attorney with swift professional discipline. After being convicted for the commission of various state offenses, Dreier was suspended in another state proceeding from the practice of law in the state courts of Pennsylvania for one year (later reduced to six months). Four years later, a federal district court suspended his right to practice before that court solely because of the prior convictions. The court of appeals reversed the district court's action because the lower court had not considered whether, in the four years subsequent to his conviction, Dreier had rehabilitated himself and exhibited good character. Id. at 69. If a federal judge forbids a convicted attorney from engaging in the practice of law as a condition of probation, the public and courts are assured adequate protection, and the delay and resulting unfairness to the attorney, which required that Dreier be reversed, are avoided.


there is no indication that they will engage in a more efficacious regulation of the profession than the states have undertaken in the past. Indeed, because the federal courts, at present, suffer from an overburdened caseload, allowing them to assume the power to regulate an attorney's state court practice will increase the burden that has already been imposed upon them.

Another argument that may be raised concerns a fundamental issue of procedural due process, namely, that before an attorney can be subjected to professional discipline, he must receive notice of the charges against him and an opportunity to present a defense. Existing state regulatory mechanisms provide these constitutional safeguards. One must question, however, whether they are secured when a federal judge imposes restraints on an attorney's professional life through a condition of probation.

Related to the above assertion is the contention that state courts must remain the regulators in this area in order to safeguard the constitutional rights of attorneys. While state regulatory tribunals have not always protected the individual rights of attorneys, at least when the states have egregiously abridged such rights, the federal judiciary has vigilantly detected these violations. Query, however, if the federal courts acquire the power directly to control the practice of state-licensed attorneys, then what mechanism will act as a second filter to assure that federal judges do not abuse the rights of convicted attorneys? This problem becomes more

LAWYER FROM ANTICITY TO MODERN TIMES (1953), and C. WARREN, A HISTORY OF THE AMERICAN BAR (1911).
31. See Hufstedler, Comity and the Constitution: The Changing Role of the Federal Judiciary, 47 N.Y.U. L. REV. 841, 856-57 (1972). The author commends recent efforts to revise the federal criminal laws. She feels that this will provide relief from the inefficient and lethargic nature of federal court litigation.
32. See, e.g., Ex parte Robinson, 86 U.S. 505, 512-13 (1873); Nell v. United States, 450 F.2d 1090, 1093 (4th Cir. 1971).
33. United States v. Pastore, 537 F.2d at 662-83.
36. See, e.g., Sacher v. United States, 343 U.S. 1 (1952), where an attorney appealed a federal contempt citation. The Court, upholding the lower court's contempt finding, realized that a judge's "power over counsel, summary or otherwise, is capable of abuse." The Court further stated: "Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to
evident when one considers both the wide discretion that federal district judges exercise when sentencing convicted defendants and the deference with which these sentences are treated by reviewing courts on appeal.\textsuperscript{37} Thus, only if the federal courts remain in their overseer role, as opposed to functioning as direct regulators, will the individual rights of attorneys be adequately guarded.

The last reason for restraining the federal judges' entry into this realm reflects the ability of federal courts to influence public opinion.\textsuperscript{38} To a great extent, discipline of the legal profession is regulated by the state courts.\textsuperscript{39} When the federal courts assume responsibility in this area, arguably, they indicate a lack of confidence in the state's concurrent regulation.\textsuperscript{40} This attitude may be interpreted by the members of the legal profession, and the general populace, as a reflection upon the integrity of state courts.\textsuperscript{41} Because the importance of maintaining the public's trust in its state judicial system cannot be doubted, the federal courts must reinforce this trust by demonstrating their own faith in that system. The federal judiciary's confidence is felicitously displayed by avoiding usurpation of the state court's power to discipline its attorneys.

Up to this point, the discussion has focused upon the different social policy issues raised when a federal judge, as a condition of probation, restrains a convicted attorney from practicing in the state courts. The competing arguments are not balanced herein in

which human flesh is heir. Most judges, however, recognize and respect courageous, forthright lawyerly conduct."\textit{Id.} at 12.

\textsuperscript{37} \textit{See} M. FRANKEL, CRIMINAL SENTENCES, LAW WITHOUT ORDER 39-49, 75-85 (1973).


\textsuperscript{39} \textit{See in re} Ruffalo, 390 U.S. 544, 547 (1968); \textit{Note}, Disbarment in the Federal Courts, 85 YALE L.J. 975, 975-77 (1976).

\textsuperscript{40} Cf. Schware v. Board of Bar Examiners, 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring).

\textsuperscript{41} Cf. In re Abrams, 521 F.2d 1094 (3d Cir. 1975), cert. denied, 423 U.S. 1088 (1975), where the court noted:

[An] important policy behind the need to avoid disparate sanctions by the federal and state courts is the maintenance of public confidence in our legal system and in the bar . . . . Such an anomaly can only lead to confusion in the minds of the public, which justifiably may speculate why an attorney not qualified to practice in a federal court has sufficient moral character to practice in the state court.

\textit{Id.} at 1106. If public confidence is harmed when the state and federal governments reach different conclusions about the appropriate professional discipline for a convicted attorney, then it will be harmed to an ever greater extent if the federal judge goes one step beyond this and makes a disciplinary decision for the state. By taking that course, the judge indicates to the public his own lack of confidence in the state courts.
an effort to recommend a proper resolution, for, in the end, such a task is reduced to one of individual value preferences. Instead, the article asserts that these considerations must be disregarded by the courts because federal encroachment in this area is unconstitutional under either a tenth amendment or federalism analysis.

III. CONSTITUTIONAL ANALYSIS

The ensuing discussion establishes that the commission of this probation condition power to a federal judge is unconstitutional. First, this section will explain how the state's decision-making authority is displaced when a federal court forbids an attorney from practicing in the state courts as a condition of probation. Next, it will argue that this displacement is unconstitutional under either a tenth amendment or federalism analysis. Lastly, it will examine recent efforts made by the federal government to regulate the legal profession and will attempt to reconcile this federal intervention with the aforementioned constitutional arguments.

A. Displacement of State Authority

When a federal judge forbids a convicted attorney from engaging in the practice of law as a condition of probation, the judge's discretionary power to limit the individual rights of the attorney, although possibly subject to constitutional challenge, is not the relevant issue upon which to focus for the purposes of this article.

42. Quite obviously, an analysis based on the tenth amendment is inextricably intertwined with the concept of constitutional federalism. While both reflect the same considerations, and, in fact, the former is an enunciation of the latter, each serves to protect state sovereignty through a different approach. See National League of Cities v. Usery, 426 U.S. 833, 844 (1976), construed in 42 Mo. L. Rev. 114, 117-18 (1977). The tenth amendment analysis concentrates on powers implicitly "reserved" to the states by the constitution; the federalism analysis, emphasizing relationships between specific constitutional provisions and the structure of the constitution itself, focuses on the autonomy possessed by the states as governmental entities. See C. BLACK, PERSPECTIVES IN CONSTITUTIONAL LAW 40 (1963). But see Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954). A federal judge's attempt to limit an attorney's state court practice is examined under each approach, first, to highlight the differences between each analysis, and second, to expose comprehensively the federal judge's unconstitutional usurpation of state power.

43. This article does not attempt to delineate the extent to which a defendant may be forced to surrender constitutional rights as a condition of probation.
Rather, attention must be directed toward the state whose decision-making power has been displaced.\textsuperscript{44} Phrased another way, after an attorney has been convicted of a state or federal felony, the question arises whether he possesses the high degree of moral character required of members of the legal profession. But before this question can be addressed, the initial inquiry must focus upon which sovereignty, the federal or state government, has jurisdiction to determine whether the attorney should be permitted to continue his practice in the state courts. Virtually all states have statutes\textsuperscript{45} or decisional law\textsuperscript{46} that allow for the professional discipline of an attorney who has been convicted of a felony. If, however, the federal judge orders the attorney to refrain from practicing law in the state courts, that state's right to decide the "fitness to practice" question has been displaced.

The effect on a state is illustrated by the \textit{Pastore} case, in which the federal judge suspended the execution of eighteen months of a twenty-four month sentence on the condition that the defendant resign from the bar.\textsuperscript{47} Prior to the court's order, the state did not scrutinize the circumstances surrounding the attorney's conviction and, hence, made no judgment concerning his fitness for practice in its courts. Even if the state subsequently had made a determination regarding the attorney's professional character, that judgment would have no significance. Because the federal judge ordered him not to practice law in lieu of an additional prison term, \textit{Pastore} cannot practice in the state's courts even if allowed that privilege by the state.\textsuperscript{48}

Countering this argument is the assertion that the federal judge could legally have sentenced the attorney to a more severe punish-
ment, a term of incarceration. Punished in this manner, the attorney would have been unable to practice before the state courts whether or not the state decided he should be deprived of this right. Upon examination, however, one discovers that this approach is without merit. Merely because the federal judge may legally incarcerate the attorney, he does not thereby acquire the authority to impose a lesser sentence that displaces power reserved by the United States Constitution for use by state tribunals. When the federal judge restrains the convicted attorney from practicing in the state courts, he determines an issue that only the state may constitutionally decide.

B. Tenth Amendment Analysis

Over one hundred years ago, the Supreme Court declared that "the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the federal government." Although this language would appear to foreclose any contentions that a federal judge has the constitutional power to restrain a convicted attorney from practicing in the state tribunals, the Supreme

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49. See United States v. Pastore, 537 F.2d at 681:
Imprisonment obviously takes away the means of livelihood, while providing minimum sustenance. Why, then, should the lesser penalty be objectionable if the greater is not? The answer must be that the judge was exercising his discretion, and that this must be done lawfully whatever the penalty.

See also Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968); Comment, Another Look at Unconstitutional Conditions, 117 U. PA. L. REV. 144 (1968); Note, Unconstitutional Conditions, 73 HARV. L. REV. 1595 (1960). But see Ex parte Robinson, 86 U.S. 505 (1873). Robinson involved an attorney cited for contempt by a federal court judge. As punishment for the contempt citation, the judge disbarred the attorney. On appeal, the Supreme Court first noted that a federal judge may punish an attorney's violation of the federal contempt statute by imposing a fine or a term of imprisonment. The Court went on to state:

The power to disbar an attorney proceeds upon very different grounds. This power is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised where there has been such conduct on the part of the parties complained of as shows them to be unfit to be members of the profession... Before a judgment disbaring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence.

Id. at 512. Robinson is cited with approval by the Supreme Court in Cammer v. United States, 350 U.S. 399, 408 (1956).

Court has not since that time asserted with the same directness and force the tenth amendment's application to this problem. Therefore, an examination of this issue will follow.

It is clear that the police power is reserved to the states by the tenth amendment. Implicit in the state's police power is the authority to regulate the professions. But while a state may act in furtherance of this power, its authority to do so has been limited by the Supreme Court when it clashes with a validly asserted federal power. For example, in Sanitary District v. United States, the federal government sought to enjoin an Illinois state agency from controlling diversions of water from Lake Michigan. The federal government argued that because the state's action was lowering the water level in the Great Lakes System, and since that system was maintained by the federal government to facilitate the removal of obstructions affecting interstate and foreign commerce, the desire of the state to provide sewage disposal for its citizens must give way to federal control of the lake. Writing for the Court, Mr. Justice Holmes stated:

The [government's] main ground is the authority of the United States to remove obstructions to interstate and foreign commerce.
There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants...

In another case, Sperry v. Florida, the Court flatly rejected the argument that the tenth amendment reserves to the states the power to regulate the practice of federal agency-related law within their borders. Sperry was admitted to practice before the United States Patent Office under regulations promulgated by the Commissioner of Patents but was not authorized to practice law by the state of Florida. Florida sued to enjoin him from practicing patent

51. The tenth amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.
52. Cf. The Federalist, No. 45 (J. Madison) 313 (J. Cooke ed. 1961): "The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."
54. 266 U.S. 405 (1925).
55. Id. at 426. For a discussion of this decision, see Vandall, Constitutional Issues in Federal No-Fault, 27 Mercer L. Rev. 273, 276-77 (1975).
work in the state, claiming that his conduct constituted an unauthorized practice of law. The Supreme Court agreed that Sperry's conduct was within the ambit of practicing law as defined by the Florida courts, and that the state had a substantial interest in regulating this conduct.67 But recognizing the history of the Patent Office, congressional supremacy in the patents area,58 and the disruptive effects state regulation would have upon Patent Office proceedings, the Court held that Florida could not control Sperry's patent work.59 At the conclusion of its opinion, the Court turned to Florida's tenth amendment arguments and "[found] them singularly without merit."60 Adopting the "truism" view of the tenth amendment, which provides that "all is retained which has not been surrendered,"61 the Court found that Congress had acted

57. Id. at 383-84.
59. The Sperry decision was based on the supremacy clause. U.S. Const. art. VI, para. 2. Congressional preeminence in the patent area made the state's interest in the regulation of the profession irrelevant. 373 U.S. 383-85 (1963). See also Note, Retaining Out-Of-State Counsel: The Evolution of a Federal Right, 67 Colum. L. Rev. 731, 745 (1967). Dependence on the supremacy clause to validate the power of a federal judge to forbid an attorney from practicing law in state courts must be founded on two premises: (1) The asserted federal authority must be derived from some affirmative constitutional grant of power, e.g., the commerce clause, etc.; and (2) The displaced state authority must not be protected by the tenth amendment. This article does not consider the first premise and attempts to counter the second. On preemption generally, see Verkuil, Preemption of State Law by the Federal Trade Commission, 1976 Duke L.J. 225; Hirsch, Toward a New View of Federal Preemption, 1972 U. Ill. L.F. 515; Note, Preemption as a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208 (1959).
60. 374 U.S. at 403.
61. United States v. Darby, 312 U.S. 100, 123-24 (1940). See United States v. Collier, 478 F.2d 268 (5th Cir. 1973) (an example of this interpretation of the tenth amendment). In Collier, a physician was convicted in federal district court for his violation of a congressional enactment prescribing the distribution of methadone while not acting in the usual course of his professional practice. On appeal, the physician argued that this law invaded the state's residual police powers, and specifically, the power to control the practice of medicine. To this assertion, the court replied:

The Tenth Amendment does not operate upon a valid exercise of power delegated to Congress by the Commerce Clause. . . . Congress could reasonably decide that in order to effectively regulate interstate commerce in drugs, it was necessary to insure that persons within legitimate distribution channels, including dispensing physicians and pharmacists, did not divert drugs into the illicit market.

Id. at 272-73 (footnotes omitted).
within the scope of its constitutional power. Hence, the tenth amendment was not transgressed despite the fact that regulation of the legal profession was a matter normally within the control of the states. The

Countering the preceding two cases are two of the Court's most recent pronouncements on this issue which have transformed the tenth amendment from a truism into "an affirmative limitation on the exercise of [federal] power." The first case, Fry v. United States, involved the constitutionality of the Economic Stabilization Act of 1970, which authorized the President to stabilize wages and salaries. The federal government sought to enjoin the state of Ohio from granting wage increases to state employees in excess of the allowable level established by the President. Although holding for the federal government, the Court presaged the future development of the tenth amendment by stating: "The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."

The changing interpretation foreshadowed by Fry was completed in National League of Cities v. Usery. In that case, a 1974

62. One commentator suggests that the long range implications of Sperry will be greater than its immediate significance. 59 NW. U.L. REV. 86 (1964). The writer states that:

The special significance of Sperry lies in its impact on the conceptual view of the States' power to control practice of law. The prior concept of unlimited power to regulate practice is now circumscribed so that the States will not hinder the federal agencies' pursuit of their designated federal objectives.

... Since the court did not commit itself on the scope of federal authority, the decision may be used as a stepping stone for more severe limitations of the States' right in the regulation of the legal practice.

Id. at 90. For a contrary interpretation, see 1964 DUKL.J. 190.


64. 421 U.S. 542 (1973).

65. Id. at 547 n.7.

amendment to the Fair Labor Standards Act extending statutory
minimum wage and maximum hour provisions to employees of the
states and their political subdivisions was found unconstitutional.
Congressional power to reach the wages and hours of state employ-
ees through the Commerce Clause was not questioned. Instead, the
Court held that the amendment was unconstitutional because it
"operate[d] to directly displace the States' freedom to structure in-
tegral operations in areas of traditional governmental functions." 67

The Usery decision supports the assertion that the power of a
federal judge to order an attorney to refrain from the practice of
law in state courts infringes upon the state's tenth amendment
rights. 68 Congressional displacement of the power of the states to
make decisions concerning fundamental and traditional state func-
tions was basic to the Usery holding. 69 One of the most funda-
mental and traditional state functions is the creation and regulation
of a judicial system. 70 The state, in order to maintain the integrity

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67. 426 U.S. at 852. Mr. Justice Brennan took the opposite view. He felt
that Congress had the same authority under the Commerce Clause to
deal with the states as it had to deal with private individuals. Id.
at 861-66 (Brennan, J., dissenting). In describing the radical posture
of the Court's holding, he cited Sperry v. Florida as a case that ex-
pressly rejected the Usery interpretation of the tenth amendment. Id.
at 863 n.5 (Brennan, J., dissenting).

68. In Usery, the Supreme Court found that Congress had the authority
under the Commerce Clause to regulate individual businesses in the
manner provided by the 1974 amendments; the constitutional infirmity
arose because Congress attempted to act upon "States as States." Id.
at 845. The Court's reasoning is similar to a position taken earlier in
this article. See note 41 and accompanying text supra. Congress may
regulate private individuals through the Commerce Clause; and a fed-
eral judge, through his immense sentencing powers, may control a ma-
jor portion of a probationer's life. But neither Congress nor a federal
judge may constitutionally exercise these powers over an individual
in a way that acts to displace state decisionmaking authority protected
by the tenth amendment.

69. These employment decisions were found to be so important to the ef-
fective performance of the state government that if the state was de-
prived of the right to make them: (1) this deprivation would "sub-
stantially restructure traditional ways in which the local governments
have arranged their affairs" and (2) "there would be little left of the
States' 'separate and independent existence.'" Id. at 851 (citations
omitted).

70. One commentator wonders "how . . . one determine[s] what is and
what is not a 'traditional governmental function.'" Percy, supra note
63, at 105. But see 42 Mo. L. Rev. 114, 121 (1977). See also 25 Emory
L.J. 937, 953 (1976). In Usery, the Court said that the area of funda-
mental state government decisions included the "States' [ability] to
of this judicial system, regulates attorneys who practice within its jurisdiction. This function is as important to the state's "separate and independent existence" as the wage and hour decisions were found to be in *Usery*. Accordingly, a federal judge cannot restrain an attorney from practicing in the state courts because such action would impair "the States' integrity or their ability to function effectively in a federal system."

C. Federalism Analysis

The following discussion is based on considerations of federalism. To the extent that the professional life of an attorney derives from a state-granted license authorizing the right to practice in state courts, only the licensing state, in our federal system, has

structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." 425 U.S. at 851. The Court noted, however, that these examples were not exhaustive. A brief examination of these examples makes clear that they are all aspects of a broad attempt by the states to provide basic services to their residents. Another basic service that the states provide is a judicial system to manage conflicts arising between their citizens. Because in a structural sense attorneys are employees of the state's judicial system, the power to regulate these attorneys should be considered as a part of the basic services provided by the state. Hence, the ability to regulate employer-employee relationships, and specifically attorneys in the state's judicial system, could be included in the above list set out by the Court in *Usery*.

71. 426 U.S. at 851.
72. Although the huge costs that the states would be forced to incur as a result of the 1974 amendments were important to the *Usery* decision, congressional displacement of state power in an area fundamental to the effective performance of state functions was the primary basis for the decision. As the Court stated:

We do not believe particularized assessments of actual impact are crucial to resolution of the issue presented. . . . Thus, even if appellants may have overestimated the effect which the Act will have upon their current levels and patterns of governmental activity, the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the states in their capacity as sovereign governments. In doing so, Congress has sought to wield its power in [an unconstitutional] fashion . . . .

Id. at 851-52.
the authority to control that professional life. There are three reasons supporting this view. The first reason is based upon Theard v. United States,75 where the Supreme Court delineated the respective jurisdictions of the state and federal courts over the professional discipline of attorneys practicing before them. The Court stated:

It is not for this Court, except within the narrow limits for review open to this Court . . . to sit in judgment on [state] disbarments . . . . The two judicial systems of courts, the state judiciaries and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court.76

Thus, as defined by the Theard Court, and as required by our federal system,77 a federal judge has jurisdiction over the professional life of an attorney only in relation to the attorney's responsibilities to the federal court. Since the attorney's practice in state courts is unrelated to his federal court responsibilities, his state court practice does not fall within the jurisdiction of the federal judge. Therefore, the federal judge's order violates the constitutional principles enunciated in Theard to the extent that it restrains the convicted attorney from practicing in the state courts.78

The second argument involves an application of the Theard doctrine, which, not surprisingly, developed from Theard v. United States.79 Historically, the states have performed the initial examination for admission to the legal profession.80 Upon success-

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75. 354 U.S. 278 (1957).
76. Id. at 281.
78. The inherent power of a court to discipline the members of its own bar is beyond question. See Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866). In Garland the court stated that "[f]rom [their] entry the [attorneys] become officers of the court, and are responsible to it for professional misconduct." Id. at 378. In Ex parte Burr, 22 U.S. (9 Wheat.) 529 (1824), Mr. Chief Justice Marshall wrote that:

... It is extremely desirable that the respectability of the bar should be maintained . . . . For these objects, some controlling power, some discretion ought to reside in the Court. This discretion ought to be exercised with moderation and judgment, but it must be exercised . . . .

... The power is one which ought to be exercised with great caution, but which is, we think, incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession.

Id. at 530-31. See also 25 Baylor L. Rev. 368, 369 (1973).
80. In re Isserman, 345 U.S. 286, 287 (1953); In re Abrams, 521 F.2d 1094,
ful completion of this examination, an attorney is licensed by the examining state.81 Because possession of this license confers the right to practice only in the courts of the licensing state,82 the Theard doctrine affords that state the plenary authority to regulate the use of the license.83 Accordingly, when a state disciplines an attorney by suspending his license to practice in its courts, the federal judiciary cannot review the state's action except within narrow confines.84

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81. Admission to practice before the federal courts is derived entirely from the state licensing process. In re Ruffalo, 390 U.S. 544, 547 (1968). See also 85 YALE L.J. 975, 976 (1976).

82. See Brakel & Loh, Regulating the Multistate Practice of Law, 50 WASH. L. REV. 699, 726 (1975).

83. In Shenfield v. Prather, 387 F. Supp. 676 (N.D. Miss. 1974), recent graduates of law schools outside of Mississippi brought suit challenging certain bar admission requirements pertaining to graduates of non-Mississippi schools. The Theard doctrine was defined to mean "that states control professional licensing to the exclusion of the federal courts." Id. at 679 n.4. Compare Hopkins Federal Savings and Loan Ass'n v. Cleary, 296 U.S. 315 (1935) with United States v. California, 281 F.2d 726 (9th Cir. 1960).

84. In Martin-Trigona v. Underwood, 529 F.2d 33 (7th Cir. 1975), for example, the court refused to overturn a state denial to the petitioner of a license to practice law. Because the decision to license was primarily a state matter, the court's examination of the record ended when it determined that no constitutional challenges existed. Id. at 35. See also, e.g., MacKay v. Nesbett, 412 F.2d 846, 846 (9th Cir. 1969) ("The [Theard doctrine] serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems."); Ginger v. Circuit Court for County of Wayne, 372 F.2d 621, 625 (6th Cir. 1967) ("The courts of the State of Michigan have exclusive jurisdiction over . . . the regulation of the practice of law, and the discipline and disbarment of attorneys, so far as the practice in the state courts is concerned. . . . The federal courts do not have jurisdiction."); Clark v. Washington, 366 F.2d 678, 680 (9th Cir. 1966) ("The language of the Supreme Court in Theard suggests that a state court disbarment may not be reviewed by a federal court, and only under limited circumstances will the Supreme Court review such an order.") (Subsequent to the Clark decision, in Law Student Research Council v. Wadmond, 401 U.S. 154 (1970), the Supreme Court held by implication that lower federal courts may review state court disciplinary decisions to the same narrow extent that the Supreme Court exercises such review.); Gately v. Sutton, 310 F.2d 107, 108 (10th Cir. 1962) ("The Supreme Court of Colorado has exclusive jurisdiction to admit attorneys to practice in the Colorado courts and to strike them from the roll for misconduct."). See also Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974), cert. denied, 420 U.S. 928 (1975); Jones v.
The central theme of this doctrine is that the federal courts do not have jurisdiction to pass on the merits of state professional licensing decisions. The power to make these decisions is granted to the state that creates the license. When a federal judge decides that a convicted attorney should refrain from engaging in the practice of law in state courts, he is passing on the merits of a licensing decision, and, therefore, violates the *Theard* doctrine.

The third contention is based upon principles elicited from *Sperry v. Florida.* The holding of *Sperry,* when stripped to its bare analytic framework, prohibits an entity of one sovereignty from directly limiting an attorney's professional practice before the entities of another sovereignty. Viewing *Sperry* in this manner, the following conclusion becomes evident: when a federal judge imposes a probation condition requiring the attorney to refrain from engaging in his state court practice, the judge acts upon the attorney's right to practice before an entity of the state government. But as mandated by the principles of *Sperry,* the federal judge cannot regulate the attorney's practice in entities belonging to another sovereignty. Hence, the judge's imposition of this condition is unconstitutional.

Thus, the reasons provided above take three different paths to reach the same destination, namely, that a federal judge violates

Hulse, 391 F.2d 198 (8th Cir. 1968); Chaney v. State Bar of California, 396 F.2d 962 (9th Cir. 1967); Saier v. State Bar of Michigan, 293 F.2d 758 (6th Cir. 1961), cert. denied, 368 U.S. 947 (1961); Star v. State Bd., 159 F.2d 305 (7th Cir. 1947); Keesey v. Evans, 271 F. 520 (D. Or. 1921).

The *Theard* doctrine has not been limited to licenses authorizing the right to practice law. Haaf v. Board of County Comm'rs, 337 F. Supp. 772 (D. Minn. 1971), involved a challenge to the denial of a license "for the sale of beer and 'set-ups' and [to run] a dance hall." Although the court found that it had jurisdiction to adjudicate various constitutional claims, it emphasized "that . . . the function of federal courts [is not] to make decisions on the merits as to the granting or denying of particular license applications." Id. at 778.

Federal courts are not barred by the *Theard* doctrine from hearing constitutional challenges to state professional licensing decisions and procedures. In Shenfield v. Prather, 387 F. Supp. 676 (N.D. Miss. 1974), the court stated "[s]ince plaintiffs' make not insubstantial claims under the Fourteenth Amendment, the so-called *Theard* Doctrine' . . . is inapplicable to defeat our jurisdiction. Constitutional claims are adjudicable in the federal courts in the professional licensing context as well as in other areas." Id. at 679 n.4. See also, e.g., Haaf v. Board of County Comm'rs, 337 F. Supp. 772 (D. Minn. 1971); Lipman v. Van Zant, 329 F. Supp. 391 (N.E. Miss. 1971); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970).

fundamental principles of federalism by restraining a convicted defendant from practicing in the state courts. The first assertion acknowledges the autonomy possessed by each sovereign and points out that this autonomy requires that each court system, state and federal, must make independent decisions governing who may practice before their respective courts. The second assertion recognizes that since the state creates the license that authorizes an attorney to practice in its courts, only the state may act to limit the attorney's use of that license. Finally, the third contention demonstrates the consistency of the first two assertions with Sperry v. Florida.

86. It should be noted that even if federal court action in this area was not constitutionally barred, principles of abstention would demand that the federal court refrain from taking action. Abstention would be proper because federal court action would create conflict with a state's own affairs and would hinder the state in resolving questions of state law. Wright, Law of Federal Courts 218 (3d ed. 1976). For recent decisions concerning federal court abstention in a constitutional challenge to a state disciplinary complaint against an attorney, see American Civil Liberties Union v. Bozardt, 539 F.2d 340 (4th Cir.), cert. denied, 97 S. Ct. 639 (1976); Tedesco v. O'Sullivan, 420 F. Supp. 194 (D. Conn. 1976).

87. 373 U.S. 379 (1963). An examination of an analogous issue also sheds light on the problem dealt with in this section. This issue is the federal government's power to exert disciplinary control over the official conduct of state government officials, and specifically, state court judges. In Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947), the Supreme Court considered the constitutionality of section 12 of the Hatch Act. This section of the Act authorized the federal Civil Service Commission to suspend or remove certain state government public employees from office if the Commission found that the employees were engaged in activities involving political partisanship. Oklahoma, which based its challenge to the Act on the tenth amendment, asserted that section 12 was unconstitutional because it provided for "possible forfeiture of state office [and this constituted] an interference with the reserved powers of the state." Id. at 142 (emphasis in original). Although the Court avoided the state's tenth amendment assertion and thereby upheld the constitutionality of section 12, it did assert that "the United States is not concerned with, and has no power to regulate, local political activities as such of state officials." Id. at 143.

Although state court judges are officers of the state government, one may reasonably doubt that the Supreme Court meant to imply that the activities of state court judges should be included within the phrase "political activities." If this is correct, state judges would not be shielded from federal government regulation by Oklahoma v. Civil Service Comm'n. But despite this, federal regulation of state judges is blocked by the Constitution itself. The framers of the Constitution were obviously aware of the existence of state court judges. State court judges are directly acknowledged in the Full Faith and Credit Clause and the Supremacy Clause. If the framers had intended that state court judges be regulated by the federal government, they probably would have included language to that effect within the Constitution. In fact, when viewing the absence of a specific grant of power
D. Federal Regulation of the Legal Profession

Despite the above arguments, in recent years the federal government has become increasingly involved in the direct regulation of the legal profession. In order to defeat any lingering claims that a federal judge may legally exert control over a convicted attorney's professional life in state courts, this involvement must be explained. The federal government's inroads have occurred mainly in two areas: first, through court action designed to compel the implementation of constitutional requirements and safeguards in existing state regulatory mechanisms; and second, through regulation of the profession as an economic entity.

1. Implementation of Constitutional Requirements

The federal courts, through the fourteenth amendment, have held that certain state action regulating members of the legal profession to the federal government to regulate state judges together with the presence of the tenth amendment, one may infer that the framers implicitly denied the federal government the power to regulate state court judges. As noted by a passage from the Federalist: "There is one transcendent advantage belonging to the province of the State governments . . . I mean the ordinary administration of criminal and civil justice." The Federalist No. 17 (A. Hamilton) 107 (J. Cooke ed. 1961).

This quote from the Federalist illuminates the framers' intention to leave the basic judicial function to the states. The regulation of those serving as cogs in the machinery activated to provide this function is an inextricable part of the "administration of criminal and civil justice." Hence, the professional conduct of state court judges, as cogs in the judicial machinery, was designated by the framers to be regulated by the states.

The value of the analogy to state court judges now becomes clear. As the Supreme Court has declared, attorneys "are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character." Ex parte Garland, 71-U.S. (4 Wall.) 333, 378 (1866). Cf. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) ("[L]awyers are essential to the primary governmental function of administering justice . . . .") But see In re Griffiths, 413 U.S. 717, 729 (1973). They are, in other words, just as state court judges, cogs in the state's judicial machinery. So just as state court judges, attorneys cannot be regulated by the federal government insofar as their state court practice is concerned.

88. See Cheatham, The Supreme Court and the Profession of Law, 14 Cath. U.L. Rev. 192, 214 (1965). The author believes that the course charted by recent Supreme Court decisions may eventually bring the legal profession under federal control to the same extent that big business and organized labor have become federally controlled through, respectively, the Sherman Act and the National Labor Relations Act.
profession violates the first\(^8\) and fifth\(^9\) amendments. One commentator suggests that these decisions signify the courts' dissatisfaction with the performance of the legal profession or that they reflect larger social concerns of the 1950's and 1960's.\(^1\) Without appraising the merits of these assertions, it may be safely assumed that the implementation of constitutional safeguards indicates no wholesale attempt by the federal government to regulate the practice of law.\(^2\) Even accepting the premise that these decisions mandate that the federal courts assume a larger role in the adjudication of constitutional challenges to state regulatory procedures, the decisions surely do not grant federal courts the power to decide state professional disciplinary matters not involving constitutional infirmities.\(^3\)

But as recent cases demonstrate,\(^4\) federal courts have colossal authority to find violations of the fourteenth amendment and to re-


\(^1\) A.I. KAUFMAN, PROBLEMS IN LEGAL RESPONSIBILITY 491 (1976).

\(^2\) The cautious deference accorded to the states in this area is implied in Brown v. Supreme Court of Virginia, 359 F. Supp 549 (E.D. Vir. 1973), aff'd sub nom. Titus v. Supreme Court of Virginia, 414 U.S. 1034 (1973), where the court declared:

These cases involve an area of state-federal relations; namely, the right of a state to establish standards for admission to the bar—a field into which the federal court should be especially reluctant and slow to enter, but one in which there is a duty to investigate in appropriate cases.

Id. at 551.

Similar sentiments were echoed in Prosch v. Baxley, 345 F. Supp. 1063, 1066 (M.D. Ala. 1972):

Matters relating to the qualification of persons to pursue their livelihoods are reserved to the State under the Tenth Amendment, and the Federal Government should interfere only when the States' exercise of such jurisdiction infringes on rights protected by the Federal Constitution. In that event, a comparison of the weight of the conflicting constitutional infringements may be in order.


\(^4\) See, e.g., Baker v. Carr, 369 U.S. 186 (1962) (action challenging a Tennessee state apportionment statute. The plaintiffs alleged that the statute violated their fourteenth amendment rights. The Supreme Court held that the case presented a valid claim for relief and remanded it to the district court for a determination of the fourteenth amendment issue); James v. Wallace, 382 F. Supp. 1177 (M.D. Ala. 1974) (suit against state officials and prison authorities based on alleged violations of the eighth amendment; the court found that the
quire that the states abide by the structures of that amendment. Conceivably, a federal court might hold that the fourteenth amendments rights belonging to the clients of an attorney are violated if that attorney is allowed to continue practicing law, whether in the state or federal courts, after being convicted of a federal felony. Two reasons are offered to illustrate that such a holding is unlikely. First, in cases decided thus far, where a fourteenth amendment-based challenge to state regulation of the legal profession has been sustained, the challenge has always involved an appeal from a denial or revocation by a state of a license to practice law within its borders. Second, even if a federal judge, presiding over a trial

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plaintiffs, inmates in a state prison, stated a cause of action on which relief could be granted).

95. Although no federal court has made this finding, the Supreme Court has stated: “A state could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest.” Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1, 7 (1964).

96. See, e.g., Saier v. State Bar of Michigan, 293 F.2d 756 (6th Cir. 1961), cert. denied, 368 U.S. 947 (1961). In Saier, because the state took no action on a complaint that the plaintiff filed, which charged four attorneys with misconduct, the plaintiff claimed that his constitutional rights under the fourteenth amendment had been violated. The federal court dismissed the suit stating that it lacked jurisdiction.

See also, Glicker v. Michigan Liquor Control Comm’n, 160 F.2d 96 (6th Cir. 1947). In Glicker the state denied an applicant’s request for a liquor license. The applicant brought suit alleging that her fourteenth amendment rights were violated because of this denial. The court stated that:

We recognize the right of a state to regulate, or even prohibit, through the exercise of its police power, the pursuit of certain businesses and occupations which because of their nature may prove injurious or offensive to the public. . . . But it is equally well settled that such regulation is not unlimited in scope, but is subject to the limitations imposed by [the fourteenth amendment]. While the Federal Government does not have the right to regulate such matters, which are exclusively under the control and regulation of the state, yet it does have the right, by virtue of the Fourteenth Amendment to prevent such regulation from being arbitrary or discriminatory.

Id. at 100.

The probation condition power dealt with herein involves direct regulation of the profession by a federal judge, not indirect action by the federal judge to redress arbitrary or discriminatory state regulation. Addressing this issue in United States v. Pastore, 537 F.2d 675, 684 (2d Cir. 1976) (concurring opinion), Judge Lumbard declared that:

So far as protection of the public is concerned, I think it is obvious that the courts and the profession have been far too lax in imposing sanctions where there has been substantial basis for doing so. But that is not a matter where the federal courts have any right or duty to lead the way.
where an attorney has been convicted of a federal felony, wants to find that the attorney's continued practice of law in the state courts is proscribed by the fourteenth amendment, he lacks the authority to do so because the focuses of a federal felony prosecution and an attorney disciplinary proceeding involve different issues. An attorney disciplinary proceeding assesses the attorney's moral character at the time of the hearing. In contrast, the primary inquiry of a felony prosecution is directed solely to the attorney's prior conduct. Hence, because of these different focuses, the federal judge, in a felony prosecution, would lack jurisdiction to determine the attorney's present fitness to practice law.97

Lastly, it may be contended that Congress could decide that to allow a federally convicted attorney to practice law in state courts would violate the fourteenth amendment. On the basis of this finding, pursuant to its power under section 5 of the fourteenth amendment,98 Congress could enact a statute resembling the provision of S. 1437, § 2103(b)(6).99 The Supreme Court's decision in Katzenbach v. Morgan100 lends guidance in assessing the merit of this contention. In that case, a statute prohibiting the use of literacy tests to determine eligibility to vote was challenged. Upholding the validity of the statute, the Court stated that Congress could enforce

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97. See Cammer v. United States, 350 U.S. 399, 408 n.7 (1956); Ex parte Robinson, 86 U.S. (19 Wall.) 505 (1873). Robinson stands for the proposition that while a federal judge may punish an attorney for the commission of an illegal act, and while he may also control the attorney's federal court practice, he cannot legally perform the former function in a way that is directed at the latter. Even though the judge has the authority to discipline the attorney in both areas, as Robinson points out, he may not attempt to do both at the same time because his power to act in each area is based on a different ground. Applying this reasoning to the problem dealt with in this article, the tenth amendment and federalism issues herein discussed need not even be considered. Although the judge may punish the convicted attorney for his violation of federal law and may at some future time discipline the attorney professionally because of his unlawful conduct, the judge cannot do both at the same time because the authority for imposing punishment in each area is provided by a different source. If the federal judge may not limit the attorney's federal practice through the use of his probation power, he surely is not able to reach the attorney's state court practice by the same means. See also note 49 supra.

98. Section five of the fourteenth amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." For a general discussion of this issue see Nichol, An Examination of Congressional Powers Under § 5 of the 14th Amendment, 52 Notre Dame Law. 175 (1976).

99. See notes 9-17 and accompanying text supra.

the commands of the fourteenth amendment through its power under section five of that amendment.\textsuperscript{101}

The Morgan result is inapposite here for two reasons. First, the legislative history of the statute considered there indicated that Congress had exhaustively assessed and weighed the various conflicting constitutional considerations involved in the use of literacy tests. With respect to section 2103(b)(6), however, no substantial discussion of the constitutional factors appears in the legislative history. Second, the Usery decision may have limited congressional power under section five of the fourteenth amendment to the same extent that it limited the authority of Congress to act under the commerce clause.\textsuperscript{102} Thus, if Congress passed a proposal identical

\textsuperscript{101} Id. at 652-53.
\textsuperscript{102} The Supreme Court in Usery stated that it did not express the view that congressional power under section five of the fourteenth amendment was limited by its decision. 426 U.S. at 853. But as one commentator pointed out:

\[S\]ince the FLSA amendments could be considered to have a legitimate fourteenth amendment nexus . . . [c]ould it not be maintained that § 5 of the fourteenth amendment was being utilized by the Congress to rectify the denial of equal protection that results from state employees, being disadvantaged vis-a-vis comparable employees in the private sector?\]

Percy, \textit{supra} note 63, at 106 n.53.

\textit{But cf.} Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), where the Supreme Court, per Mr. Justice Rehnquist, stated that:

\[W\]e think that the Eleventh Amendment, and the principles of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

\textit{Id.} at 456 (citations omitted) (footnotes omitted).

Although this sweeping language deals only with the relationship between section five of the fourteenth amendment and the eleventh amendment, it could, arguably, be extended to the tenth amendment as some commentators have suggested. See, e.g., Baker, \textit{Federalism and the Eleventh Amendment}, 48 U. Col. L. Rev. 139, 171-72 (1977); Beaird \& Ellington, \textit{A Commerce Power Seesaw: Balancing National League of Cities}, 11 Ga. L. Rev. 35, 67 (1976); Comment, \textit{The State Sovereignty Doctrine Since National League of Cities v. Usery: A New Constitutional Interpretation Under the Commerce Clause}, 81
or similar to section 2103(b)(6), this enactment would be unconstitutional because it would infringe upon the states' reserved power to regulate the legal profession.

This position is bolstered by Oregon v. Mitchell. The statute considered in Mitchell lowered the minimum voting age to eighteen years for persons voting in United States elections. Turning its attention to the segment of the statute which applied to state and municipal elections, the Supreme Court declared:

- No function is more essential to the separate and independent existence of the states and their governments than the power to determine the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.

Hence, even though Congress based its authority to lower the voting age on section five of the fourteenth amendment, the portion of the statute affecting state and municipal elections was found unconstitutional. Because the authority to regulate the legal profession is also essential to the states' separate and independent existence, Mitchell deems that Congress cannot, even under its section five power, authorize a federal judge to exert control over a convicted attorney's state court practice.

2. Regulation of the Profession as an Economic Entity

The Supreme Court, in Goldfarb v. Virginia State Bar, held that a minimum fee schedule promulgated by a local bar association and enforced by the state bar violated the Sherman Act. More recently, the Court determined that outright bans against attorney advertising violated the first amendment. These actions...
may indicate a growing awareness by the federal government that the states are inefficiently regulating the market place.\textsuperscript{108}

Since inefficient governance of the market place is not involved in decisions concerning the continued fitness of an attorney to practice in state courts, this federal economic regulation does not support a federal judge's intrusion into this area.\textsuperscript{109} As the Supreme Court stated in \textit{Goldfarb}: "In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the state to regulate its professions."\textsuperscript{110} This statement signifies that while the Court may disfavor certain economic practices perpetuated by the state bar association, this disapproval does not extend to other areas of bar regulation, among which is included the regulation of attorneys convicted in federal forums.\textsuperscript{111}
E. Summation

The preceding discussion has asserted that a federal judge does not have the constitutional authority to restrain a convicted attorney, as a condition of probation, from practicing in the state courts. If a federal judge orders such a condition of probation, his decision is unconstitutional under either a tenth amendment or federalism analysis.¹¹²

IV. CONCLUSION

The fundamental factor... is that the States reserved, among other powers, that of regulating the practice of professions within their own borders. If that concept has less validity now than in the 18th century when it was made part of the “bargain” to create a federal union, it is nonetheless part of that compact.¹¹³

mulgated restraints on nonlocal counsel is to provide economic protection for the local bar. See generally Brakel & Loh, Regulating the Multistate Practice of Law, 50 WASH. L. REV. 699 (1975); Note, Retaining Out-of-State Counsel: The Evolution of a Federal Right, 67 COLUM. L. REV. 731 (1967); Note, Attorneys: Interstate and Federal Practice, 80 HARV. L. REV. 1711 (1967). Although a state regulation of this type was upheld in Martin v. Walton, 368 U.S. 25 (1961), in view of the Court's recent economic concerns these restrictions may be vulnerable targets.

¹¹². How can a federal judge limit the practice of law by an attorney who has been convicted of a federal felony? He can suspend the attorney's right to practice in federal courts. The most, though, that a federal judge may constitutionally do to limit the attorney's state court practice is to implement a procedure whereby the appropriate state mechanism is notified of the attorney's conviction at the time he is sentenced for the federal offense. See Hearings on the Reform of the Federal Criminal Law Before the Subcomm. of Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., pt. XI at 7811 (1975) (testimony of John K. Van de Kamp, Federal Public Defender, and Susan Harris, Deputy Federal Public Defender). The state mechanism must then be left to take whatever it considers to be the proper action.


The recognition by the Court that Congress' commerce power is subject to a “state sovereignty” limitation is a significant step toward the preservation of the vitality of our federal system of government. . . . This constitutional limitation safeguards the continued ability of the states to engage in independent decision-making in certain areas of activity. The importance of that ability to the prevention of the abuse of power by the federal government has been recognized, not only in the current political mood, but by the authors of the Constitution.

Id. at 121 (footnotes omitted).

But cf. Lay, States' Rights: The Emergence of a New Judicial Perspective, 22 S.D.L. REV. 1, 13 (1977) (author implies that the states
This principle, recently espoused by Mr. Justice Rehnquist, recognizes the basic issue at stake. A federal incursion on state power in this area may have "a salutary result, and [may have] a sufficiently rational relationship to commerce to validate [it]."\textsuperscript{114} But because such conduct would displace the states' freedom to structure their integral operations in an area of traditional governmental functions, federal intervention is impermissible.\textsuperscript{115} Thus, the states must retain the sole power to regulate the practice of law in state courts, not necessarily because they are especially well-suited for this task, but because that is what the Constitution requires.

\textsuperscript{114} National League of Cities v. Usery, 426 U.S. 833, 849 (1976).
\textsuperscript{115} Id. at 852.