

2
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SB 474

SB 474

RE-ENVISIONING THE BAR:
CONSTITUTIONAL REASONS FOR A LEGISLATIVE CONTROL
OVER ADMISSION TO THE PRACTICE OF LAW

**CURRENT MONTANA LAW VESTS TOO MUCH POWER & DISCRETION
IN THE SUPREME COURT**

Admission to the practice of law in the State of Montana is currently governed by the "Rules for Admission to the Bar of Montana", promulgated by the Supreme Court of Montana subject to the following Rules of Administration:

The Montana Supreme Court is the final authority as to who may be admitted and under what circumstances an applicant may be admitted to practice law in Montana. The Court may, under circumstances it deems sufficient, waive any requirement under these rules.

Rules for Admission to the Bar of Montana, Section VII(A.): Administration

All commissions, committees, boards, and their members and personnel, including personnel and employees of the State Bar of Montana, acting on behalf of the Supreme Court under these Rules, shall enjoy such judicial immunity as the Supreme Court would have if performing the same functions. Records, statements of opinion and other information regarding an applicant for admission to the bar communicated in good faith and without malice by any entity, including any person, firm, or institution, to any commission, committee or board involved in the admissions process, including its members, employees or agents, are privileged and no evidence thereof is admissible in any lawsuit. Waiver, if any, of such privilege by voluntary disclosure shall be determined under Rule 503, Mont.R.Evid. (As Amended 4/10/01).

Rules for Admission to the Bar of Montana, Section VII(B.): Administration

These rules and the cloak of judicial immunity, often said to be "absolute" which cloak the Montana Supreme Court and its administrative agents, employees, or underlings permit a degree of absolute, unquestionable, power and discretion which is utterly and completely INCOMPATIBLE WITH ALL PRINCIPLES OF EGALITARIAN, DEMOCRATIC SOCIETY, and should be repealed and replaced.

The purpose of SB 474 is to open the admissions process, and scrutiny over the admissions and licensing process of attorneys, in a manner more in keeping with the American way of life, and less reminiscent of the Divine Right of Kings. However much confidence any of us as individuals may have in the current membership or employees of the Supreme Court of Montana, it is plain that the Court, by the above-quoted provisions, has arrogated excessive, unbridled, unquestionable, and unreviewable power to itself, and that such absolute power tends to corrupt absolutely---in the long, if not the short, run of history. It is not too late for the people of Montana to reclaim their right to open and honest access to the practice of law, and enactment of the present bill 474 is designed for this purpose.

THE FUNDAMENTAL RIGHT TO LEARN AND ANALYZE THE LAW

The most conservative, the narrowest construction, of the First Amendment is that its protections were originally intended to guarantee the free discussion of the law---its political aspects (what the law can do or should be) and its judicial aspects (what the law is, and how to interpret the law in particular situations, situations constituting "cases or controversies" between parties to a dispute with reference to rights or interests in life, liberty, or property arising under or defined by the law)¹.

THE ROLE OF LEGAL ANALYSIS IN REPRESENTATIVE DEMOCRACY

What legislators do is clearly covered by any definition of legal debate---yet it would obviously be an unacceptable political outrage if legislators were all required to be attorneys as a prerequisite to their election to this Senate, the House, or any other politically elected body in order to discuss the law as applied to particular situations. However, it is precisely this kind of "legislative" discourse---the analysis and rendering of opinions concerning the application of present or proposed laws to particular people, factual situations, and under specified circumstance---that is the nearest descriptive phrase which can be said to constitute a practical definition of the practice of law.

LEGISLATION (LAW MAKING) AND

THE JUDICIARY (INTERPRETATION OF THE LAW)

If legislators---who are, for all practical and theoretical purposes, engaged in the practice of law in this first branch of government (Article I of the U.S. Constitution), are not first required to be reviewed and qualified by the Judiciary regarding their qualifications to discuss, analyze, and make predictions regarding the consequences and future application and impact of laws---why should all other lawyers first (and last) have their individual qualifications established according to standards which are assessed and reviewed at all stages by the Judiciary?

The licensing of attorneys by the judiciary is clearly an infringement upon the fundamental rights conferred by the First Amendment, in that the licensing of attorneys creates a class of "specialists" in speaking about the law---even regarding choices of conscience to be made concerning the law, and the organization and structure of any restriction on freedom of speech cannot be disguised as a mere "commercial" regulation of the bar, but must pass constitutional muster at the "strict scrutiny" level of constitutional review.

THERE IS NO COMPELLING REASON WHY THE JUDICIARY SHOULD CONTROL THE LICENSING OF ATTORNEYS—THERE ARE COMPELLING REASONS WHY THE LEGISLATURE SHOULD DO SO.

¹ The First Amendment to the Constitution of the United States is perhaps the most familiar and often discussed provision of our most fundamental law. There has been a great deal of debate, over the years, about the proper scope and purpose of the protections afforded to freedom of speech, freedom of assembly, and the right to petition the government for redress of grievances. However, whatever other kinds of speech the first amendment may cover---it covers ALL aspects of debate and discussion concerning the law and the interpretation of the law without any question whatsoever. This is as clear from the Congressional debates concerning the adoption of the bill of rights as from the commentary on law and practice in the Federalist papers as well as the debates in the Virginia Assembly regarding Thomas Jefferson's "Virginia Bill of Rights" which served as the primary model and guide for the U.S. Bill of Rights.

The mere fact that a constitutional challenge has not previously been raised to the structure and organization of the "law licensing" scheme here in Montana or elsewhere does not mean that the idea is at all far fetched. SB 474 proposes that the current structure and organization of the bar is clearly antithetical both to the core first amendment purposes of preserving free debate regarding both law (what the law is, how it should be applied) AND politics (what the law can do or should be).

The present organization and structure of the bar creates the most incestuous of relationships between attorneys and the judiciary which is entirely inconsistent with one of the most basic precepts of United States Constitutional law---

SEPARATION OF POWERS DEMANDS SEPARATION BETWEEN THE LEGISLATURE AND THE JUDICIARY, BUT IT ALSO DEMANDS CONFRONTATIONAL OPPOSITION ON AN EQUAL FOOTING

The constitutional problems inherent in the regime of judicial oversight and licensing of legal interpretation has not been readily recognized, perhaps, because the precept in question is an aspect of the Federal Constitution which derives not from its text but its structure, and may be equally well known by the general electorate alongside the First Amendment, and this aspect is the principal called "Separation of Powers." The phrase never actually occurs in the Constitution---the existence of the notion of "separation of powers" arose during the debates enshrined in the Federalist Papers and later in the early opinions of Chief Justice John Marshall.

"Separation of powers" relates to the allocation of authority in our system between a legislature, an executive, and a judiciary, Articles I, II, and III of the Federal Constitution. Every state, including Montana, has adopted and internalized the doctrine of separation of powers, as well as the basic precepts of the First Amendment.

The legislature of the State of Montana has authorized the issuance of countless occupational or technical licenses, from driving trucks to the practice of medicine to public accountancy. These licenses are then issued and administrated by the executive branch, through various administrative agencies. Licenses can normally be revoked only by administrative process analogous to judicial proceedings, or by judicial proceedings themselves, and the final revocation or suspension of licenses defined by the legislature and issued or administered by the executive can effectively be contested by recourse to the judiciary.

The doctrine of separation of powers, so conceived and so integrated into our State Constitution, is essentially fair, equitable, and entirely consistent with the doctrine of separation of powers envisioned by the Founding Fathers in Philadelphia in 1787.

The Constitution of the State of Montana specifies only ONE license which may be issued by the Supreme Court of Montana, and that is the license to practice law. The license to practice law is essentially the license to speak authoritatively about the present status of the law---what the law is today, and how it should be judicially applied in distinct cases and controversies. Among the Founding Fathers, there were many lawyers who claimed that status on grounds of education, vocational choice & experience. There were no licensed attorneys among the Founding Fathers, because no such beings existed in the New World.

“Admission to the Bar” was an English concept which in the dim mists of the past originated in the extension of “the king’s peace” throughout the land. But like the Royal Court at which the King himself provided, “admission to the bar” [in ancient times as in modern] was [and to some degree remains] a matter of Royal Grace, discretionary selection, and arbitrary expulsion.

In other words, “admission to the bar” was at the absolute least, in Old England, a petty title of nobility. Admission to the bar was authority to interpret or “comment upon” the law, deriving from the crown, to present cases and controversies involving the ordinary people or “Crown subjects” to the King or his appointed representatives, to plead or to “make a plea” for justice on their behalf, which justice was dispensed according to certain highly formalized writings or writs issued under Royal Seal only, and which only those admitted to the bar could properly interpret.

“Interpretation of the king’s law” was reserved to those appointed by the King, and admitted to his “bar” or “court”---and these “courtiers” could be summoned or dismissed on the king’s pleasure. To be “banished from Court” was the greatest disgrace that could befall an English Nobleman, even if he lost no other elements of his titles of peerage or property---a Nobleman or woman who displeased the king so as to be banished was little better than a well-dressed outlaw.

The power of a king to act arbitrarily and capriciously on monarchical whim is allegedly anathema to our Republican way of Government, yet by now the reader who is willing to “listen, look, and learn” from historical experience will realize that the licensing of attorneys by the Supreme Court of this or any State is a relic of monarchical power and privilege in this country.

There is, oddly enough, no nationwide or “Federal” Bar Exam or procedure for admission to the practice of law in any of the Federal Courts which are charged to administer the Supreme Law of the Land under the Supremacy Clause of the United States Constitution. Rather, Congress has delegated to each U.S. District Court and Circuit Court of Appeals, individually, and to the U.S. Supreme Court, separately, to establish rules for admitting attorneys to practice...and all those Federal Courts in turn rely largely on the several state judiciaries to admit or “ban” lawyers from the bar. The state judiciaries are, in short, the sole judges of the education, experience, and vocational choices involving the practice of law in these United States.

We would recognize a violation of the separation of powers doctrine if the United States President decreed a series of adjustments in the percentage rates or “brackets” by which the Income Tax was charged, without reference to or consultation with Congress. We would equally recognize a violation of separation of powers if the Montana State Legislature tried to directly command the movements and provisioning of Montana National Guard units on duty in Iraq.

I propose that we now recognize a separation of powers violation which predates the United States Constitution, which the Federal Constitution was intended to destroy (and did in fact destroy after the Revolution and throughout most of the 19th century), but which reemerged and resurfaced in the 20th century: That Violation was to start allowing the king’s representatives to admit or banish people from Court once again.

That violation was called the establishment of the mandatory, compulsory, or “integrated” bar by the Supreme Court of the several states. Judges decide who can practice law AND judges decide who cannot practice law. And as surely as courtiers in

the Courts of the Absolutist Tudors, the Jacobite Stuarts or the early Hanoverian Kings of England would not dare to disagree or turn their backs on the monarchs who admitted or banished them from Court, modern American lawyers hardly dare to disagree or turn their backs on the Judges who can, by simple reference or complaint, punish and sanction them by disgrace, discipline, or disbarment.

SB 474 by itself would not radically change the practice of law, except to restore a healthy confrontational separation of powers between the legislative and judicial branches of government. SB 474 will, then, change NOT the law but the judiciary by reducing its absolute and discretionary power over those permitted to "approach the bar."

If the legislature is entrusted with the definition of the requirements for admission they will be looking after the economic and political rights of the people whom they represent, in determining who will protect their fundamental rights to life, liberty, and property.