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COMPULSORY BAR DUES IN MONTANA: TWO (AND A HALF) CHALLENGES

Jim Reynolds

Since the morning of recorded Time there have been two conflicting and violently contending theories of control: One functions through understanding, cooperation, liberty of thought, and a willingness to conform to accepted rules of conduct. The other theory relies upon force, capricious will, dogmatic expedition of purpose, and the tyranny coexisting with entrenched power.¹

It has now been three years since the Montana supreme court adopted a constitution and by-laws to govern a newly-created judicial branch adjunct, the State Bar of Montana.² In its order, the court set forth a schedule of annual dues and assessments to be paid by active members of the State Bar³ in addition to the existing annual license tax paid to the clerk of the supreme court under legislative directive.⁴ The right of an attorney to practice law in Montana is contingent on the payment of these dues.⁵ Thus, an attorney, otherwise qualified to practice law, may not do so unless and until he or she has paid the compulsory dues.

The effort to unify the state bar and to impose the attendant compulsory fees did not go unchallenged;⁶ neither has the fact of unification quieted the critics.⁷ None of the arguments advanced to

1. *In re Integrating the Bar*, 222 Ark. 35, 40, 259 S.W.2d 144, 147 (1953) (Griffin Smith, C.J., dissenting).

2. *In re the Unified Bar of Montana*, 165 Mont. 1, 2, 530 P.2d 765, 765 (1975). Although the court issued the order adopting the constitution and by-laws on January 23, 1975, it had ordered the unification of the Montana Bar nearly a year earlier on January 29, 1974. Application of the President of the Montana Bar Association, 163 Mont. 523, 526, 518 P.2d 32, 33-34 (1974).

3. **BY-LAWS OF THE STATE BAR**, art. I, § 4(a). The assessments are for a client security fund established at the same time.

4. **REVISED CODES OF MONTANA** (1947) [hereinafter cited as R.C.M. 1947], § 93-2010. The annual license tax under this statute is a flat \$10 per year.

5. **CONST. OF STATE BAR**, art. II; **BY-LAWS OF STATE BAR**, art. I, § 4(b).

6. See Application of the President of the Montana Bar Association, 163 Mont. 523, 525, 518 P.2d 32, 33 (1974):

Arguments advanced by opponents of unification include: (1) no necessity exists for unification; (2) compulsory membership deprives an attorney of the fundamental liberty of freedom of choice; (3) conditions have not changed since the last denial of unification in Montana; (4) workable and proven rules for admission to practice and the conduct of attorneys exist outside the framework of unification; and (5) unification deprives an attorney of his property without due process of law and places him in a condition of involuntary servitude in violation of constitutional guarantees.

7. See, e.g., *In re Petition of Morris*, ___ Mont. ___, ___, 575 P.2d 37, 38 (1978) (collection of dues by state bar unlawful delegation of court's power, *inter alia*); *Douglas v. State Bar*, Civ. No. 13644 (Mont., filed Aug. 9, 1976) (amendment to by-laws by State Bar

date, however, has caused the Montana supreme court to retreat from its order unifying the bar and levying compulsory membership dues on every resident attorney in the state.

This article will present yet two more arguments against these compulsory dues and examine them with specific reference to Montana's constitution and case law. In addition, the article will examine the potential effect of a recent United States Supreme Court decision, *Aboud v. Detroit Board of Education*,⁸ on future bar activities.

As the discussion herein is styled as a challenge to the existing compulsory bar dues, rigid objectivity has been sacrificed to a degree. Nevertheless, the author feels the arguments presented raise serious questions and are presented fairly and accurately. In any case, the author agrees with the current president of the State Bar of Montana that: "Mandatory membership in anything must be well justified."⁹ If anything said in this article provokes discussion as to whether membership in the State Bar can or should be mandatory, the author has accomplished his purpose.

CHALLENGE NUMBER I:

Are Compulsory Bar Dues Valid?

[L]evying money for or to the use of the crown by pretense of prerogative, without grant of parliament for longer time, or in other manner than the same is or shall be granted, is illegal.¹⁰

"As developed in the United States, integration [unification] of the bar refers to the establishment . . . of a government sanc-

increasing dues unlawful); Mahan, *From the President*, Mont. Law., June, 1977, at 4; Toole, *From the President*, Mont. Law., Dec., 1977, at 4.

8. 431 U.S. 209 (1977).

9. Toole, *From the President*, Mont. Law., Dec., 1977, at 4.

10. Act of 1688 for "declaring the rights and liberties of the subject, and settling the succession of the crown" as cited in, *State ex rel. Journal Publishing Co. v. Kenney*, 9 Mont. 389, 396, 24 P. 96, 97 (1890). *Accord*, *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 556 (1895):

The men who framed and adopted [the Constitution] had just emerged from the struggle for independence whose rallying cry had been that "taxation and representation go together."

The mother country had taught the colonists, in the contests waged to establish that taxes could not be imposed by the sovereign except as they were granted by the representatives of the realm, that self-taxation constituted the main security against oppression. As Burke declared, in his speech on Conciliation with America, the defenders of the excellence of the English constitution "took infinite pains to inculcate, as a fundamental principle, that, in all monarchies, the people must, in effect, themselves, mediately or immediately, possess the power of granting their own money, or no shadow of liberty could subsist." The principle was that the consent of those who were expected to pay it was essential to the validity of any tax.

tioned, dues-paying organization of all lawyers admitted to practice in a state."¹¹ In Montana, integration has resulted in the same thing:

Membership in the State Bar of Montana is a condition to practicing law in this state. Non-payment of membership dues and assessments shall result in suspension of membership and the right to practice law until payment of all dues, assessments, and penalties in the manner provided in the by-laws.¹²

The Montana supreme court has defined "license" as meaning:

[A] right or permission granted by some competent authority to carry on a business or do an act which, without such license, would be illegal. It is a formal or official permit or permission to carry on some business or do some act which, without the license, would be unlawful¹³

That the payment of a compulsory fee is the purchase of the right to follow one's chosen occupation or calling has been recognized numerous times in Montana:

The license fee . . . is the purchase of the privilege of engaging in the occupation of selling goods, wares, and merchandise, just as may be exacted in the case of the auctioneer, peddler, saloon-keeper, or other trade or profession.¹⁴

Compulsory membership dues in an integrated state bar have specifically been termed license fees or taxes by the United States Supreme Court¹⁵ and by supreme courts of other states.¹⁶

11. Application of the Montana Bar Ass'n, 140 Mont. 101, 105, 368 P.2d 158, 161 (1962); *In re* Unification of the New Hampshire Bar, 109 N.H. 260, 262, 248 A.2d 709, 711 (1968).

12. CONST. OF STATE BAR, art. II, as adopted by the Montana supreme court in *In re* Unified Bar of Montana, 165 Mont. 1, 3, 530 P.2d 765, 765 (1975).

13. Standard Oil Co. v. State Bd. of Equalization, 110 Mont. 5, 19, 99 P.2d 229, 234 (1940). *Accord*, Duncan v. Truman, 74 Ariz. 328, 332, 248 P.2d 879, 883 (1952); Barber Examiners v. Walker, 67 Ariz. 156, 167, 192 P.2d 723, 730-31 (1948); Blatz Brewing Co. v. Collins, 69 Cal. App. 2d 639, 160 P.2d 37, 39 (1945); *State ex rel.* Peterson v. Woodruff, 179 Or. 640, 646, 173 P.2d 961, 964 (1946).

14. Territory v. Farnsworth, 5 Mont. 303, 318, 5 P. 869, 875 (1885). *See also* Peter Kiewit Sons' Co. v. State Bd. of Equalization, 161 Mont. 140, 505 P.2d 102 (1973); *State ex rel.* Schultz-Lindsay Constr. Co. v. State Bd. of Equalization, 145 Mont. 380, 403 P.2d 635 (1965); Stephen v. City of Great Falls, 119 Mont. 368, 175 P.2d 408 (1946); Standard Oil Co. v. State Bd. of Equalization, 110 Mont. 5, 99 P.2d 229 (1940); *State v.* Bays, 100 Mont. 125, 47 P.2d 50 (1935); Norum v. Ohio Oil Co., 83 Mont. 353, 272 P. 534 (1928); *State v.* McKinney, 29 Mont. 375, 74 P. 1095 (1904); *State ex rel.* Toi v. French, 17 Mont. 54, 41 P. 1078 (1895).

15. Lathrop v. Donohue, 367 U.S. 820, 844 (1961).

16. *E.g.*, In the Matter of Supreme Court License Fees, 251 Ark. 800, 802, 483 S.W.2d 174, 175 (1972); Wallace v. Wallace, 225 Ga. 102, 104, 166 S.E.2d 718, 720 (1969); *In re* Mundy, 202 La. 41, 50, 11 So. 2d 398, 400 (1942); Mississippi State Bar v. Collins, 214 Miss. 782, 803, 59 So. 2d 351, 356 (1952); *In re* Gibson, 35 N.M. 550, 561, 4 P.2d 643, 649 (1931); Sweeney v. Cannon, 23 App. Div. 2d 1, 4, 258 N.Y.S.2d 183, 187 (1965); Petition of Rhode Island Bar Association, — R.I. —, 374 A.2d 802, 803 (1977); Lathrop v. Donohue, 10 Wis.2d 230, 238, 102 N.W.2d 404, 408-09 (1960) *aff'd* 367 U.S. 820 (1961).

Judicial characterization of license fees has varied throughout Montana's history. In 1885, the territorial supreme court recognized the "right of a state to tax its own citizens for the prosecution of any particular business or profession"¹⁷ Shortly thereafter, the court moved away from defining a license fee as a tax: "A license fee is a tax sometimes, and for some purposes. Sometimes, and for some purposes, it is not a tax."¹⁸ Not content to leave the situation as it stood, the court attempted some years later to distinguish the two: "Taxes are imposed for the purpose of general revenue. License and other fees are ordinarily imposed to cover the cost and expense of supervision or regulation."¹⁹ Even this distinction has not completely clarified the issue. Thus, in 1965, the court again is referring to the imposition of a "license tax"²⁰ and, in 1973, again recognizing that certain occupations "may be subjected to special forms of regulation or *taxation* through an excise or license tax."²¹

Actually, the specific characterization of license fees—which the compulsory membership dues paid to the State Bar undeniably are²²—as either taxes for revenue or licenses for regulation is unimportant, for, as demonstrated hereafter, neither may be imposed by the Montana supreme court, and, as was recognized by the court in 1949: "[a] tax by any name is just as onerous . . . and especially so when the taxpayer . . . [has] been denied and deprived of [his] constitutional right to say 'Ye' or 'Nay' to the impressment of the tax."²³

The 1889 Montana constitution expressly vested in the Montana legislature the authority to impose a "license tax".²⁴ Although

17. *Territory v. Farnsworth*, 5 Mont. 303, 322, 5 P. 869, 877 (1885) quoting *Nathan v. Louisiana*, 49 U.S. (8 How.) 73, 80 (1850) (emphasis added).

18. *State ex rel. Toi v. French*, 17 Mont. 54, 57, 41 P. 1078, 1079 (1895).

19. *State ex rel. State Aeronautics Comm. v. Board of Examiners*, 121 Mont. 402, 407, 194 P.2d 633, 636 (1948). In the same decision, the court recognized that it "is sometimes difficult to ascertain whether a given exaction is a revenue or regulatory measure." *Id.* at 408, 194 P.2d at 637.

The distinction made in the text is widely recognized. See, e.g., *Foster's Inc. v. Boise City*, 63 Idaho 201, 217, 118 P.2d 721, 727-28 (1941); *Panhandle Eastern Pipe Line Co. v. Fadely*, 183 Kan. 803, 806-07, 332 P.2d 568, 571 (1958); *City of Shawnee v. Reid Bros. Plumbing Co.*, 201 Okla. 592, 593-94, 207 P.2d 779, 780 (1949); *Unemployment Compensation Comm'n v. Renner*, 59 Wyo. 437, 447, 143 P.2d 181, 184 (1943); *Western Auto Transp. Inc. v. City of Cheyenne*, 57 Wyo. 351, 368, 118 P.2d 761, 766 (1941).

20. *State ex rel. Schultz-Lindsay Constr. Co. v. State Bd. of Equalization*, 145 Mont. 380, 389, 403 P.2d 635, 641 (1965).

21. *Peter Kiewit Sons' Co. v. State Bd. of Equalization*, 161 Mont. 140, 150-51, 505 P.2d 102, 108 (1973) (emphasis added). Undoubtedly contributing to the confusion has been the enactment of statutes which impose license taxes on some occupations, see generally R.C.M. 1947, Title 84, chs. 10 to 26, and license fees on others, see generally R.C.M. 1947, Title 66.

22. See notes 15 and 16, and accompanying text, *supra*.

23. *Lindeen v. Montana Liquor Control Bd.*, 122 Mont. 549, 555, 207 P.2d 977, 979 (1949).

24. MONT. CONST. of 1889, art. XII, § 1.

this express authorization was not retained in the 1972 constitution, the convention notes to the corresponding article in the new constitution,²⁵ as well as the language of this section itself referring to taxes being levied by the general laws,²⁶ indicate that the intent of the new section is to continue the legislative power to determine tax structures.²⁷ The legislative power in Montana is vested in a legislature consisting of a senate and house of representatives.²⁸ Article III, § 1 of the Montana constitution provides that the power of the state government is divided into three distinct branches—legislative, executive, and judicial—and that “[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise *any* power properly belonging to either of the other, except as in this constitution *expressly* directed or permitted.”²⁹ It therefore becomes necessary to see whether any such express authorization exists to support the supreme court’s levying compulsory membership dues in the form of license fees and taxes.

Several constitutional provisions and judicial decisions establish the extent to which the legislature is given control of the state’s taxing power and revenue. Article VIII, § 2 provides that the power to tax, vested in the legislature by Article VIII, § 1, shall never be surrendered, suspended, or contracted away.³⁰ Article VIII, § 12 states that “[t]he legislature shall by law insure strict accountability of *all* revenue received and money spent by the state.” As the supreme court is part of the state,³¹ all money received or spent by it or by its order must be subject to strict accounting under a statute enacted by the legislature. No such statute has been enacted. Thus, either the legislature has been derelict in its duty or the supreme

25. MONT. CONST., art. VIII, § 1.

26. *Id.*

27. *Id.*, Convention Notes.

28. MONT. CONST. art. V, § 1.

29. MONT. CONST. art. III, § 1 (emphasis added). See quote in note 30, *infra*.

30. See also *Johnson v. City of Great Falls*, 38 Mont. 369, 373, 99 P. 1059, 1060-61 (1909):

Section 1, art. 12, of the [1889] Constitution, gives to the Legislature authority to raise revenue by the imposition of a license tax upon persons and corporations doing business in the state. The provisions of the Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise In the absence of express words declaring the contrary rule, we must hold that the provision of section 1, art. 12 . . . is prohibitory, and, the Constitution having conferred the power upon the legislative assembly, has denied the power to any other body

But with respect to a license imposed as a police regulation the situation is entirely different. In the absence of constitutional limitation, the *Legislature*, speaking generally, is left free to deal with the subject directly or through the agency of cities or towns . . . (emphasis added).

31. MONT. CONST. art. III, § 1; art. VII, § 1.

court has exceeded its constitutional authority. Neither alternative is proper.

Interpreting the above-cited constitutional provisions are several recent supreme court decisions. In *Board of Regents v. Judge*,³² the court stated that the “legislative appropriation power now extends beyond the general fund and encompasses all those public operating funds of state government.”³³ A few months later, the court stated that the “power to appropriate public funds and the power to levy and collect taxes are identical.”³⁴ This was a restatement of a premise set forth in 1975:

It is a basic premise of the law of taxation that the foundation for levying and assessing a tax depends upon the existence of a valid legislative act specifically designating the imposition of the tax. *Nothing is taxable unless clearly authorized by statute.*³⁵

The language of these constitutional provisions and court decisions, clearly leaving to the legislature the power to levy taxes, revives the questions whether the membership dues charged by the State Bar under the supreme court’s order constitute license fees for regulation or taxes for revenue, and whether this distinction matters. It does not.

Although, in some contexts, courts have held that constitutional limitations on the power to tax have no application to the exercise of the police power under which license fees are imposed,³⁶ never in the history of Montana has the supreme court itself indicated that any branch of state government other than the legislature could levy or authorize either a license fee for regulatory purposes or a tax for revenue purposes.³⁷

As early as 1885, the court stated that the “only restraint [on the right of a state to tax its own citizens for the pursuit of any particular profession] is found in the responsibility of the members of the legislature to their constituents.”³⁸ Nineteen years later, the court stated that the exercise of the power of designation of certain subjects upon which license fees could be imposed rested in the legislature.³⁹ Twenty-four years later, in *Hale v. County Treasurer*,⁴⁰

32. 168 Mont. 433, 543 P.2d 1323 (1975).

33. *Id.* at 446, 543 P.2d at 1331 (1975) (emphasis added).

34. *Huber v. Groff*, ___ Mont. ___, ___, 558 P.2d 1124, 1126 (1976).

35. *Connick v. Judge*, 167 Mont. 357, 361, 538 P.2d 1024, 1027 (1975) (emphasis added).

36. *E.g.*, *State ex rel. State Aeronautics Comm’n v. Board of Examiners*, 121 Mont. 402, 408, 194 P.2d 633, 637 (1948); *Frach v. Schoettler*, 46 Wash. 2d 281, 288, 280 P.2d 1038, 1043 (1955). In both cases, the question of the uniformity of the tax, not the authority of the branch of government imposing it, was under constitutional attack.

37. Not until *Application of the President of the Montana Bar Ass’n*, 163 Mont. 523, 518 P.2d 32 (1974), that is.

38. *Territory v. Farnsworth*, 5 Mont. 303, 323, 5 P. 869, 877 (1885).

39. *State v. McKinney*, 29 Mont. 375, 390, 74 P. 1095, 1099 (1904).

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the principle was reaffirmed: "It is within the legislative power to define the different classes [of occupations] and to fix the license tax required of each."⁴¹ In 1946, the principle was again stated: "It is well settled that the granting of licenses to carry on particular businesses, occupations, trades, or callings is . . . exercised by the legislative department of the state."⁴² Most recently, in *Peter Kiewit Sons' Co. v. State Board of Equalization*,⁴³ the court conceded a wide discretion to the legislature in the classification of occupations subject to regulation through license taxes.⁴⁴

It is obvious from the above holdings that, in Montana, historically at least, the power to license occupations has rested with the legislature, not the judiciary.⁴⁵

Perhaps the best answer to the question of whether a license is a tax was given by then-Justice Lee Metcalf in his dissent in *State ex rel. State Aeronautics Commission v. Board of Examiners*.⁴⁶

Without attempting an all-inclusive definition of the words "public money" as used in our constitution, they certainly include money raised by the state by compulsory process in order to carry out one of its governmental purposes.

. . . .
 . . . Under these constitutional provisions, it is immaterial whether the money is paid the state as a result of a revenue tax or is received from a license tax imposed under the police power. It is all income arising out of the exercise of the sovereign power of the state and is therefore public money and subject to the constitutional prohibitions.

. . . .
 . . . It is equally well recognized that the general term "taxes" is often used indiscriminately in statutes and in state Constitutions to mean either revenue taxes or regulatory taxes or both.

. . . [I]t is apparent that the Constitution does not distinguish between property taxes, license taxes, excise taxes, etc., but contemplates that the word "taxes" shall be used in its broadest and most comprehensive sense to include every charge imposed by the sovereign power upon persons, property, or privileges.⁴⁷

40. 82 Mont. 98, 265 P. 6 (1928).

41. *Id.* at 107, 265 P. at 9.

42. *Stephens v. City of Great Falls*, 119 Mont. 368, 371, 175 P.2d 408, 410 (1946).

43. 161 Mont. 140, 505 P.2d 102 (1973).

44. *Id.* at 150-51, 505 P.2d at 108.

45. *Accord, In re Integration of the Bar*, 249 Wis. 523, 527, 25 N.W.2d 500, 502 (1946); *Integration of Bar Case*, 244 Wis. 8, 51, 11 N.W.2d 604, 620 (1943).

46. 121 Mont. 402, 194 P.2d 633 (1948).

47. *Id.* at 434-36, 194 P.2d at 650. (Metcalf, J., dissenting). Chief Justice Adair also took a crack at defining "tax" in the same case:

A tax is a forced . . . exaction [or] imposition . . . by authority of a sovereign state upon the persons or property within its jurisdiction, to provide public revenue for

The above discussion makes abundantly clear that 1) be they called membership dues, license fees, or regulatory taxes, the moneys practicing attorneys pay to the State Bar, under compulsion by the supreme court and under threat of forfeiture of the privilege to practice law, are public moneys subject to all the constitutional provisions relating to such funds, and 2) the imposition of such compulsory dues, fees, or taxes must be by legislative act. Because no such legislative act has been passed, it remains to be seen if another source of authority for the supreme court's order exists.

The supreme court, in its order creating the State Bar and levying membership dues on all practicing attorneys, relied on its "inherent power to order unification" as established by a line of decisions, dating from 1939, on whether the bar should be unified.⁴⁸

Without attempting a detailed analysis of these past decisions, one could make some observations on the history of attempts to unify the bar in Montana. First, despite five previous petitions to the court, unification of the bar was not ordered until 1974. At the very least, this indicates historical judicial reluctance to do so. One reason for this reluctance was stated in the 1947 decision cited above: "[S]ome members of this court entertain the opinion that the integration of unification of the attorneys at law into a compulsory, all-inclusive organization must come through legislative and not through judicial action."⁴⁹

A second reason for this reluctance may be found in the court's reliance on the opinion of the practicing bar on the question of integration, as indicated by polls taken by the court.⁵⁰ For instance,

the support of the government, and administration of the law, or the payment of public expenses. Any payment exacted by the state . . . as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax.

Id. at 425, 194 P.2d at 645. (Adair, C.J., dissenting). *Accord*, *State ex rel. Pierce v. Gowdy*, 62 Mont. 119, 126-27, 203 P. 1115, 1116 (1922); *Matter of Washington State Bar Association*, 86 Wash.2d 624, 638, 548 P.2d 310, 319 (1976) (Rossellini, J., dissenting).

48. Application of the President of the Montana Bar Ass'n, 163 Mont. 523, 524, 518 P.2d 32, 32 (1974). See *In re Montana Bar*, 156 Mont. 515, 485 P.2d 945 (1971); Application of the Montana Bar Ass'n, 140 Mont. 101, 368 P.2d 158 (1962); *In re Unification of the Bar of This Court*, 119 Mont. 494, 175 P.2d 773 (1947); *In re Unification of the Montana Bar Association*, 107 Mont. 559, 87 P.2d 172 (1939).

49. *In re Unification of the Bar of This Court*, 119 Mont. 494, 494, 175 P.2d 773, 773 (1947). See also *In the Matter of Integration of the Bar of Hawaii*, 50 Haw. 107, 107-08, 432 P.2d 887, 887 (1967) (consensus of court that matter of unification be submitted initially to the legislature).

50. The Montana supreme court is not alone in its reliance on polls of the practicing bar as to the advisability of unification. The Florida (Petition of Florida State Bar Ass'n, 40 So. 2d 902, 904 (Fla. 1949)), Nebraska (*In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 284, 275 N.W. 265, 265-66 (1931)), New Hampshire (*In re Unified New Hampshire Bar*, 112 N.H. 204, 205, 291 A.2d 600, 600 (1972)), and Tennessee (*In re Adoption of Rule of Court for Unification of State Bar of Tennessee*, 479 S.W.2d 225, 226 (Tenn. 1972)) supreme courts all relied in part on polls taken of the practicing bar before granting or denying

in 1971, the poll conducted by the court indicated a "strong minority" of attorneys opposing unification.⁵¹ No similar poll was taken in 1974 prior to the order unifying the bar.

Secondly, those parties favoring unification appear to have made several attempts to accomplish their goal, not only through the court, but also through the legislature, all without success until 1974.⁵² That both the legislature, vested with licensing powers, and the judiciary, vested with supervisory powers, refused to integrate the bar for at least thirty-five years is significant.⁵³

Of more concern for the purposes of the challenge lodged herein, however, is the source and extent of the inherent power of the court to unify the bar and, more specifically, to levy compulsory membership dues.

The only constitutional provision that supports the court's action is Article VII, § 2(3) which provides that the supreme court "may make rules governing appellate procedure, practice and procedure for all other courts, *admission to the bar and the conduct of its members.*"⁵⁴ To date, no decision of the supreme court has interpreted the emphasized language.⁵⁵ A recent decision, however, indicates the way in which this language and the language of the other constitutional provisions cited herein should be construed. In speaking of the delineation of constitutional powers between the Board of Regents and the legislature, the court stated:

As noted above, the Regents are not mentioned in either Article III, Section 1, which creates the three branches of government, nor in Article V, which limits the powers of the legislature. Similarly,

petitions for unification. *See also* Petition for Integration of Bar of Minnesota, 216 Minn. 195, 201, 12 N.W.2d 515, 519 (1943):

[T]he beneficial results . . . can be attained and the evils avoided only if the order prayed for receives the wholehearted support of a decided majority of the bar . . .

Accord, In re Unification of Bar of Arkansas, 247 Ark. 926, 927, 448 S.W.2d 948, 949 (1970).

51. *In re* Montana Bar, 156 Mont. 515, 518, 485 P.2d 945, 946 (1971).

52. *See* Application of the Montana Bar Ass'n, 140 Mont. 101, 104, 368 P.2d 158, 160 (1962); *In re* Unification of Montana Bar Ass'n, 107 Mont. 559, 570, 87 P.2d 172, 176 (1939) (Morris, J., dissenting).

53. As stated by Chief Justice Taney of the United States Supreme Court in the famous *Dred Scott* decision:

No change in public opinion on questions of public policy can ever be given any weight in construing the provisions of a constitution where the meaning is clear, for the adoption of a constitution that might be deemed wise at one time and unwise at another would abrogate the judicial character of the court and make it the reflex of the popular opinion or passion of the day.

Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1856) as quoted in *State ex rel. State Aeronautics Comm'n v. Board of Examiners*, 121 Mont. 402, 429-30, 194 P.2d 633, 647 (1948) (Adair, C.J., dissenting).

54. MONT. CONST. art. VII, § 2(3) (emphasis added).

55. The court did not mention this section in its unification order. *See* Application of the President of the Montana Bar Ass'n, 163 Mont. 523, 518 P.2d 32 (1974).

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the legislature is not mentioned in Article X, Section 9(2) which entrusts the government and control of the university system to the Regents. By no rule of construction then can the powers of one be exercised or encroached upon by the other.⁵⁶

The analogy is clear. Nowhere in any of the articles of the Montana constitution relating to public funds or taxes is the judiciary or supreme court mentioned. Consequently, no rule of construction can justify the expansion of the judiciary's power to govern admission to the bar and the conduct of its members to include the legislative power to levy license fees. The additional constitutional requirement of express direction or permission before one branch of government can exercise a power properly belonging to another⁵⁷ serves as a further restriction on an overly expansive interpretation of the judicial power.

This challenge must be answered by reference to Montana's constitution, statutes, and case law. Unquestionably, however, the experience and decisions of other states, where integration of the bar was accomplished by court order without underlying legislative authorization for the levying of compulsory membership dues, are valuable guides for determining whether such an action is proper here.⁵⁸

In the overwhelming majority of states having an integrated bar, integration was accomplished by statute alone or by a combination of authorizing statute and court order. In only eight of the thirty-two states having a unified bar was the integration accomplished by court order alone.⁵⁹ In one of these eight states, Oklahoma, a statute authorizing integration had been repealed just prior to the court order.⁶⁰ Eighteen states do not have integrated bars.⁶¹

The challenge presented herein has been leveled at the court orders unifying the bar in other states and answered in a variety of ways.

The supreme courts of Hawaii,⁶² Nebraska,⁶³ and Tennessee⁶⁴

56. *Board of Regents v. Judge*, 163 Mont. 433, 451, 543 P.2d 1323, 1331 (1975). *See also State ex rel. State Aeronautics Comm'n v. Board of Examiners*, 121 Mont. 402, 429, 194 P.2d 633, 647 (1948) (Adair, C.J., dissenting):

We are mindful, too, that the declarations of Constitutions are placed therein to be obeyed, and are not to be frittered away by construction. Our duty in this respect remains the same no matter how urgent may be the desire to obtain money with which to carry on the much-needed program.

57. MONT. CONST. art. III, § 1.

58. *See In re Integrating the Bar*, 222 Ark. 35, 36, 259 S.W.2d 144, 146 (1953).

59. *See Appendix I.*

60. *In re Integration of the State Bar of Oklahoma*, 185 Okla. 505, 505, 95 P.2d 113, 113 (1939).

61. *See Appendix I.*

62. *In re Integration of the Bar of Hawaii*, 50 Haw. 107, 108, 432 P.2d 887, 888 (1967). The Hawaii supreme court, although holding it had the "inherent power" to do so, has not yet ordered integration. *See also note 49, supra.*

Reynolds: Compulsory Bar Dues In Montana: Two (And A Half) Challenges relied on the same undefined "inherent power" relied on by the Montana supreme court. The supreme courts of Arkansas⁶⁵ and Florida⁶⁶ used similar reasoning. In *Petition of Florida State Bar Association*,⁶⁷ the Florida supreme court recognized that "[i]f the membership fee could on any sound basis be construed as a tax, undoubtedly it should be imposed by the legislature under its police power."⁶⁸ The court then justified its imposition of compulsory dues:

[T]he power to regulate may carry with it the imposition of a charge for that purpose. . . . We think the doctrine of *implied* powers necessarily carries with it the power to impose such an exaction.⁶⁹

The Arkansas court, in reaching the same result, relied on "necessary implication" from "the imposition of duty of regulation" to find the power to impose an annual license fee.⁷⁰

This approach runs exactly contrary to the Montana constitution's requirement that powers properly belonging to one branch of government may be exercised by another branch only if "expressly directed or permitted" in the constitution.⁷¹ No express permission or direction is given to the Montana supreme court to exercise the legislative power to levy license fees.

The majority positions of the Florida and Arkansas supreme courts stated above did not go unchallenged by members of those courts who disagreed.⁷² Thus, in Florida, Justice Barns dissented, stating that:

For this Court to compel or coerce membership of the attorneys in an "integrated bar" association and to prescribe dues to be paid

63. *In re Integration of Nebraska State Bar Association*, 133 Neb. 283, 289, 275 N.W. 265, 268 (1931).

64. *Petition of Tennessee Bar Association*, 532 S.W.2d 224, 228 (Tenn. 1975). The Tennessee supreme court, although holding it had the "inherent power" to do so, has not yet ordered integration.

65. *In the Matter of Supreme Court License Fees*, 251 Ark. 800, 802, 483 S.W.2d 174, 175 (1972).

66. *Petition of Florida State Bar Association*, 40 So. 2d 902, 905 (Fla. 1949).

67. 40 So. 2d 902 (Fla. 1949).

68. *Id.* at 906.

69. *Id.* at 906-07.

70. *In the Matter of Supreme Court License Fees*, 251 Ark. 800, 802, 483 S.W.2d 174, 175 (1972).

71. MONT. CONST. art. III, § 1 (emphasis added).

72. Indeed, throughout the history of efforts to integrate state bars, there have been eloquent spokespersons speaking out in dissent. *See, e.g., In re Integrating the Bar*, 222 Ark. 35, 39, 259 S.W.2d 144, 147 (1953) (Griffin Smith, C.J., dissenting); *In re Unification of the New Hampshire Bar*, 109 N.H. 260, 269, 248 A.2d 709, 715 (1968) (Grimes, J., dissenting); *Kelly v. State Bar*, 148 Okla. 282, 283, 298 P. 623, 625 (1931) (Clark, V.C.J., dissenting); *Matter of Washington State Bar Association*, 86 Wash. 2d 624, 634, 548 P.2d 310, 318-19 (1976) (Rossellini, J., dissenting); *Integration of Bar Case*, 244 Wis. 8, 55, 11 N.W.2d 605, 625-26 (1943) (Fowler, J., dissenting).

by the members simply means that this Court is attempting to levy a tax, and the judiciary cannot lawfully levy a tax, by whatever name it may be called.⁷³

In Arkansas, it was Justice McFaddin, who dissented as follows:

Polish and paint the proposal as much as you will, the hard fact remains that this "integration" is a form of taxation which will be required for the privilege of being a licensed attorney⁷⁴

Finally, as to the proper division of authority between the legislative and judicial branches regarding the licensing and regulating of the bar of Montana, perhaps the best answer is contained in a recent Washington state decision:

The court's power with respect to attorneys is the power to admit, to discipline, and to disbar. Inherent in this power is the power to prescribe qualifications and standards. But the imposing of license fees is a legislative function.⁷⁵

There is no reason why the activities of the State Bar, to the extent they are designed to achieve a legitimate public purpose, should not be supported by a tax or license fee authorized by the legislature. "The executive depends on the legislature for funding" ⁷⁶ The supreme court itself is dependent on the legislature for its operating funds.⁷⁷ Why should not an adjunct of the supreme court be similarly funded? Can the supreme court exercise powers to fund the State Bar which it (the supreme court) could not exercise on its own behalf? Surely the answer must be "no."

One of the most carefully guarded and hard won rights guaranteed by our constitution is the right to have the legislature examine the financial structure of the state each two years and, having assessed the needs of each branch of government, go on record by taking affirmative action respecting the collection and expenditure of public funds extracted from the pockets of the taxpayers.⁷⁸ The system created by the supreme court by judicial edict substituting court-imposed license fees paid to a court-created agency is not only repugnant to our system, but dangerous to our form of government.⁷⁹

73. Petition of Florida State Bar Ass'n, 40 So. 2d 902, 909 (Fla. 1949) (Barns, J., dissenting).

74. *In re Integrating the Bar*, 222 Ark. 35, 44, 259 S.W.2d 144, 149 (1953) (McFaddin, J., dissenting).

75. Matter of Washington State Bar Ass'n, 86 Wash. 2d 624, 640, 548 P.2d 310, 320 (1976) (Rossellini, J., dissenting).

76. *Huber v. Groff*, ___ Mont. ___, ___, 558 P.2d 1124, 1131 (1976).

77. *E.g.*, Laws of Montana 1977, House Bills 143, 145.

78. *State ex rel. State Aeronautics Comm'n v. Board of Examiners*, 121 Mont. 402, 433, 194 P.2d 633, 649 (1948) (Adair, C.J., dissenting).

79. *Id.* at 431, 194 P.2d at 648.

The controls on legislative malfeasance developed over centuries of refinement by trial and error simply are not present in cases of judicial malfeasance. Supreme court justices are elected to adjudicate, not to legislate. The Montana constitution demands that they remain within their sphere of power.

In his concurring opinion in *Lathrop v. Donohue*,⁸⁰ the leading United States Supreme Court opinion on integration of state bars, Justice Harlan asked this rhetorical question:

Or could it be that the Federal Constitution requires a separation of state powers according to which a state legislature can tax and set up commissions but a state judiciary cannot do these things?⁸¹

A federal constitution may not require such a separation of powers. The Montana constitution explicitly does.

CHALLENGE NUMBER II:

Are Compulsory Bar Dues Excessive?

Our government was not designed to be paternal in form [T]he paternal theory of government is odious, and we should not treat lightly or disregard the sacred rights recognized and guaranteed by the Constitution.⁸²

If one concludes⁸³ that the compulsory membership fee in the State Bar exacted by the 1975 order of the Montana supreme court is a fee for regulation imposed under the police power rather than a tax for revenue imposed under the taxing power, then other considerations arise.⁸⁴

The police power of a state is to be exercised only for the purpose of promoting the public welfare,⁸⁵ and unless its exercise is to prevent manifest evil, or to insure the public welfare, the propriety of such exercise may be a matter for serious debate.⁸⁶ As noted by Justice Cooper of the Montana supreme court:

80. 367 U.S. 820 (1961). The case arose in Wisconsin which has a statute authorizing integration.

81. *Id.* at 865 (Harlan, J., concurring).

82. *Garden Spot Market, Inc. v. Byrne*, 141 Mont. 382, 394, 378 P.2d 220, 227 (1963) (citations omitted).

83. This has been the view of most courts when faced with the challenge. *See, e.g., In re Member of Bar*, 257 A.2d 382, 384 (Del. 1969); *Petition of Florida State Bar Ass'n*, 40 So. 2d 902, 906-07 (Fla. 1949); *Petition of Rhode Island Bar Ass'n*, ___ R.I. ___, ___, 374 A.2d 802, 803 (1977).

84. *Johnson v. City of Great Falls*, 38 Mont. 369, 373-75, 99 P. 1059, 1061 (1909). *See* note 35 and accompanying text, *supra*. *See also State ex rel. State Aeronautics Comm'n v. Board of Examiners*, 121 Mont. 402, 408, 194 P.2d 633, 637 (1948): "[I]t is sometimes difficult to ascertain whether a given exaction is a revenue or regulatory measure."

85. *State ex rel. Pierce v. Gowdy*, 62 Mont. 119, 128-29, 203 P. 1115, 1117 (1922).

86. *Id.* at 131, 203 P. at 1118 (Cooper, J., concurring).

Necessary as it undoubtedly is to raise revenue sufficient for the maintenance of the state, the authority must be exercised with delicate caution and within the precise limits found in the fundamental law which creates the power and defines its extent. The pressing needs of the state are not to be satisfied at the expense of guaranties indispensable to the constitutional government of a free people.⁸⁷

The Montana constitution does not specify which branch of government is the proper custodian of the police power of Montana.⁸⁸ Courts in other states, however, have held that, while the police power is generally considered an exclusive power of the legislature,⁸⁹ it may be exercised by the courts.⁹⁰

No matter which department of the government exercises the power, the limits on it remain the same. In the exercise of its police power, the state may exact from the practitioners of the profession the reasonable cost of supervision and regulation of the profession concerned.⁹¹ Although the state is neither bound to adjust the charge after the fact,⁹² nor is it tied to mathematical certainty in establishing the exactions,⁹³ the charge levied must be commensurate with the costs of issuing the license and regulating the profession.⁹⁴ In other words, if the imposition clearly and materially exceeds the cost of regulation, inspection or police control, it is gener-

87. *Id.*

88. *State ex rel. State Aeronautics Comm'n v. Board of Examiners*, 121 Mont. 402, 407-08, 194 P.2d 633, 637 (1948).

89. In Montana, the power has, with the single exception of the unification of the State Bar, apparently always been exercised by the legislature. *See, e.g.*, *Garden Spot Market, Inc. v. Byrne*, 141 Mont. 382, 396-97, 378 P.2d 220, 228 (1963); *Brackman v. Kruse*, 122 Mont. 91, 103-04, 199 P.2d 971, 977 (1948); *State ex rel. State Bd. of Equalization v. Glacier Park Co.*, 118 Mont. 205, 214, 164 P.2d 366, 370 (1945); *Standard Oil Co. v. State Bd. of Equalization*, 110 Mont. 5, 17-18, 99 P.2d 229, 233 (1940); *State ex rel. City of Bozeman v. Police Court*, 68 Mont. 435, 442-43, 219 P. 810, 812 (1923); *Johnson v. City of Great Falls*, 38 Mont. 369, 373-75, 99 P. 1059, 1061 (1909).

90. *E.g.*, *Petition of Florida State Bar Ass'n*, 40 So. 2d 902, 906 (Fla. 1949); *Lathrop v. Donohue*, 10 Wis.2d 230, 241, 102 N.W.2d 404, 410 (1960) *aff'd* 367 U.S. 820 (1961). Both cases involved challenges to court-imposed compulsory bar membership dues.

91. *Great Northern Ry. v. State of Washington*, 300 U.S. 154, 159-60 (1937).

92. *Id.* at 159.

93. *Urban v. Riley*, 21 Cal. 2d 232, 131 P.2d 4, 6 (1942); *Western Auto Transports v. City of Cheyenne*, 57 Wyo. 351, 368, 118 P.2d 761, 766 (1941).

94. *Brackman v. Kruse*, 122 Mont. 91, 104, 199 P.2d 971, 977 (1948); *State ex rel. City of Bozeman v. Police Court*, 68 Mont. 435, 442-43, 219 P. 810, 812 (1923). *Accord*, *Gospel Army v. City of Los Angeles*, 27 Cal.2d 232, 163 P.2d 704, 714 (1945); *Foster's Inc. v. Boise City*, 63 Idaho 201, 217, 118 P.2d 721, 728 (1941); *Panhandle Eastern Pipe Line Co. v. Fadely*, 183 Kan. 803, 806-07, 332 P.2d 568, 571 (1958); *City of Lovington v. Hall*, 68 N.M. 143, 145, 359 P.2d 769, 770 (1961); *City of Shawnee v. Reid Bros. Plumbing Co.*, 201 Okla. 592, 594, 207 P.2d 779, 780 (1949); *Eugene Theater Co. v. City of Eugene*, 194 Or. 603, 613, 243 P.2d 1060, 1065 (1952); *Unemployment Compensation Comm'n v. Renner*, 59 Wyo. 437, 448, 143 P.2d 181, 184 (1943).

ally held to be a tax or an illegal exercise of the police power.⁹⁵ That the fee charged produces more revenue than the actual cost and expense of the enforcement and supervision fails as an adequate objection to the exaction of the fees,⁹⁶ but if the amount of a license fee is grossly disproportionate to the sum required to pay the cost of due regulation of the business, the license fee will be struck down.⁹⁷ Clearly, a state, under the guise of police power regulation, cannot impose a revenue-producing tax.⁹⁸ The presumption is that the imposition is valid,⁹⁹ but

[s]uch an [imposition] may, in spite of the presumption of validity, show on its face that some part of the exactions is to be used for a purpose other than the legitimate one of supervision and regulation and may, for that reason, be void. And a statute fair upon its face may be shown to be void and unenforceable on account of its actual operation.¹⁰⁰

In the latter case, the burden is on the complainant to show the act is unreasonable.¹⁰¹

The applicability of these general rules to the regulation of the practice of law has been established.¹⁰² Thus, the practice of law is a fit subject for legislative and judicial regulation,¹⁰³ and the com-

95. *Garden Spot Market, Inc. v. Byrne*, 141 Mont. 382, 398-99, 378 P.2d 220, 229 (1963); *State ex rel. State Aeronautics Comm'n v. Board of Equalization*, 121 Mont. 402, 408, 194 P.2d 633, 637 (1948). *Accord*, *City of Shawnee v. Reid Bros. Plumbing Co.*, 201 Okla. 592, 594, 207 P.2d 779, 781 (1949); *Starker v. Scott*, 183 Or. 10, 15-16, 190 P.2d 532, 535 (1948).

96. *Glodt v. City of Missoula*, 121 Mont. 178, 186, 190 P.2d 545, 549 (1948); *State ex rel. State Aeronautics Comm'n v. Board of Examiners*, 121 Mont. 402, 408, 194 P.2d 633, 637 (1948); *State v. Pepper*, 70 Mont. 596, 605-06, 226 P. 1108, 1110 (1924). *Accord*, *Urban v. Riley*, 21 Cal.2d 232, —, 131 P.2d 4, 6 (1942); *Houston v. Kirshwing*, 117 Colo. 92, 98, 184 P.2d 487, 490 (1947); *Foster's Inc. v. Boise City*, 63 Idaho 201, 219, 118 P.2d 721, 728 (1941); *City of Lovington v. Hall*, 68 N.M. 143, 145, 359 P.2d 769, 770-71 (1961).

97. *Great Northern Ry. v. State of Washington*, 300 U.S. 154, 161 (1937); *Brackman v. Kruse*, 122 Mont. 91, 104, 199 P.2d 971, 977 (1948); *City of Shawnee v. Reid Bros. Plumbing Co.*, 201 Okla. 592, 594, 207 P.2d 779, 781 (1949).

98. *Brackman v. Kruse*, 122 Mont. 91, 112-13, 199 P.2d 971, 982 (1948); *State v. Pepper*, 70 Mont. 596, 605-06, 226 P. 1108, 1111 (1924). *Accord*, *Foster's, Inc. v. Boise City*, 63 Idaho 201, 217, 118 P.2d 721, 728 (1941); *City of Shawnee v. Reid Bros. Plumbing Co.*, 201 Okla. 592, 594, 207 P.2d 779, 780 (1949); *Unemployment Compensation Comm'n v. Renner*, 59 Wyo. 437, 447, 143 P.2d 181, 184 (1943).

99. *Great Northern Ry. v. State of Washington*, 300 U.S. 154, 160 (1937). *Accord*, *State ex rel. City of Bozeman v. Police Court*, 68 Mont. 435, 441-42, 291 P. 810, 812 (1923); *Starker v. Scott*, 183 Or. 10, 16, 190 P.2d 532, 535 (1948).

100. *Great Northern Ry. v. State of Washington*, 300 U.S. 154, 160-61 (1937).

101. *State v. Pepper*, 70 Mont. 596, 606-07, 226 P. 1108, 1111 (1924); *City of Shawnee v. Reid Bros. Plumbing Co.*, 201 Okla. 592, 594, 207 P.2d 779, 781 (1949).

102. *E.g.*, *Hulbert v. Mybeck*, 220 Ind. 530, 533, 44 N.E.2d 830, 831 (1942); *Goer v. Taylor*, 51 N.D. 792, 798, 200 N.W. 898, 899 (1924); *Integration of Bar Case*, 244 Wis. 8, 44, 11 N.W.2d 604, 620 (1943).

103. *Fuller v. Watts*, 74 So.2d 676, 678 (Fla. 1954); *Wallace v. Wallace*, 225 Ga. 102, 109, 166 S.E.2d 718, 723 (1969); *In re Mundy*, 202 La. 41, 50, 11 So. 2d 398, 400 (1942); *Board of Comm'rs. v. Collins*, 214 Miss. 782, 800, 59 So. 2d 351, 355 (1952); *State ex rel. Nebraska*

pulsory bar dues are viewed as exactions for regulatory purposes.¹⁰⁴ As such, the exactions must be commensurate with the legitimate costs of supervision and regulation.¹⁰⁵ That the level of compulsory bar dues in Montana far exceeds the level of expenses incurred in the supervision and regulation of the bar is the basis for this challenge to these compulsory dues.

While a complete examination of bar income and expenditures is beyond the scope of this article, a few salient features of the financial status of the State Bar will illustrate the evidence for this challenge.

Initially, it must be emphasized again that regulatory exactions must be for the legitimate costs of supervision and regulation.¹⁰⁶ In its order unifying the bar, the Montana supreme court specifically retained "original and exclusive jurisdiction in the enforcement or professional ethics and conduct of members of the Unified Bar of Montana."¹⁰⁷ The court also retained the already existing Commission on Practice to assist it in handling discipline and disbarment matters.¹⁰⁸ That this leaves the State Bar with precious few regulatory and supervisory duties, outside the collection of the mandatory dues, is obvious.¹⁰⁹ Under this view, whether any regulatory fees should be paid to the State Bar is a matter of serious debate.¹¹⁰

Assuming that the State Bar does perform some regulatory function and that *all* of its funds are expended to meet the costs thus

State Bar Ass'n v. Merten, 142 Neb. 780, 785-86, 7 N.W.2d 874, 877 (1943); In re Platz, 60 Nev. 296, 306, 108 P.2d 858, 863 (1940); In re Unification of the New Hampshire Bar, 109 N.H. 260, 264, 248 A.2d 709, 712 (1968); In re Gibson, 35 N.M. 550, 556-57, 4 P.2d 643, 647 (1931); In re Integration of State Bar of Oklahoma, 185 Okla. 505, 506, 95 P.2d 113, 114 (1939); Matter of Washington State Bar Ass'n, 86 Wash. 2d 624, 631, 548 P.2d 310, 315 (1976).

104. See BY-LAWS OF STATE BAR, art. I, § 4(a): "The dues shall constitute a fund for the payment of the expenses of the association." *Accord*, Herron v. State Bar, 24 Cal. 2d 53, —, 147 P.2d 543, 549 (1944), *cert. denied*, 323 U.S. 753; Petition of Florida State Bar Ass'n, 40 So. 2d 902, 907 (1949); In re Gibson, 35 N.M. 550, 562, 4 P.2d 643, 649 (1931); Goer v. Taylor, 51 N.D. 792, 800, 200 N.W. 898, 900 (1924); Kelly v. State Bar, 148 Okla. 282, 282, 298 P. 623, 624 (1931); Petition of Rhode Island Bar Ass'n, — R.I. —, —, 374 A.2d 802, 803 (1977).

105. Great Northern Ry. v. State of Washington, 300 U.S. 154, 161 (1937); Goer v. Taylor, 51 N.D. 792, 798, 200 N.W. 898, 899-900 (1924); Petition of Tennessee Bar Ass'n, 532 S.W.2d 224, 229 (Tenn. 1975).

106. See cases cited at notes 93 and 99 and accompanying text, *supra*.

107. Application of President of the Montana Bar Ass'n, 163 Mont. 523, 528, 518 P.2d 32, 34 (1974). *Accord*, R.C.M. 1947, § 93-2026.

108. Application of President of the Montana Bar Ass'n, 163 Mont. 523, 528, 518 P.2d 32, 34 (1974).

109. Toole, *From the President*, Mont. Law., Dec., 1977, at 4; Mahan, *From the President*, Mont. Law., Feb., 1977, at 4. See also Kelly v. State Bar, 148 Okla. 282, 284, 298 P. 623, 625 (1931) (Clark, V.C.J., dissenting): "[T]he number of unethical and unfaithful attorneys in this state is negligible, and to require each attorney in this state to pay a fee that a board of governors may be maintained is an unnecessary expense."

110. This was one of the main contentions in the unsuccessful petition of William Morris. In re Petition of Morris, — Mont. —, 575 P.2d 37 (1978).

incurred, there is still a major discrepancy between the dues paid and the cost of regulation. In fiscal year 1977, the State Bar had income from all sources¹¹¹ of \$188,575, including \$118,035 in membership dues.¹¹² The total expenses incurred for the year came to \$154,438.¹¹³ This left a total net income for the year of \$34,137 or 18.1% of total income and fully 28.9%—nearly one-third—of the members' dues paid.¹¹⁴

The above calculations are based on the assumption that all of bar expenses are incurred pursuant to its regulatory functions. A glance at the income statement reveals the fallacy of this assumption. Some items may be readily challenged as not having anything to do with regulation, although they may be beneficial otherwise:¹¹⁵

<u>ITEM</u>	<u>EXPENDITURE</u>
The Montana Lawyer ¹¹⁶	\$ 9,002
The Montana Law Review	12,697
Continuing Legal Education ¹¹⁷	9,466
Legislative Expense ¹¹⁸	7,005 ¹¹⁹
TOTAL	\$38,170

Reducing the above-stated total expenses by the total of these clearly non-regulatory expenses raises the degree to which total income of the State Bar exceeds total legitimate expenses. With these four items eliminated, net income for the year would have been \$72,307, 38.3% of total income and 61.3% of members' dues paid.¹²⁰

Neither are possible reductions of improper expenses limited to the above. By far the largest group of expenses incurred by the State Bar were the administrative expenses of the state office, totalling

111. In considering the reasonableness of a regulatory exaction, it is well established that one may look to other sources of funds available to the regulatory agency. See *City of Shawnee v. Reid Bros. Plumbing Co.*, 201 Okla. 592, 207 P.2d 779 (1949).

112. State Bar of Montana, Income Statement Detail, as reproduced in Mont. Law., Oct., 1977, at 11.

113. *Id.*

114. In fiscal year 1976, the comparable net to gross and net to members' dues paid ratios were even higher: 31.9% of total income (\$53,220 net income/\$166,645 total income) and 45.5% of members' dues paid (\$53,220 net income/\$114,490 members' dues). State Bar of Montana, Income Statement Detail, as reproduced in Mont. Law., Sept., 1976, at 10.

115. See quote at note 82, *supra*.

116. *But see* *Button v. Day*, 204 Va. 547, 555-56, 132 S.E.2d 292, 298-99 (1963).

117. As the seminars and services offered under this program are not mandatory, it is difficult to see the regulatory or supervisory aspect of them. *But see* *Lathrop v. Donohue*, 10 Wis.2d 230, 246, 102 N.W.2d 404, 413 (1960), *aff'd*, 367 U.S. 820 (1961).

118. See discussion under CHALLENGE NUMBER II (½), *infra*.

119. All figures from State Bar of Montana, Income Statement Detail, as reproduced in Mont. Law., Oct., 1977, at 10.

120. *Cf.* *Brackman v. Kruse*, 122 Mont. 91, 106, 199 P.2d 971, 978 (1948) (license fees collected exceeded the cost of regulation an average of 853% a year for ten years).

\$83,037.¹²¹ For the money, what are the executive director and staff doing? Statements excerpted from the Montana Lawyer give some indications:

The State Bar Executive Offices will be the central source for legislative lobbying and statements to be made before the Montana Legislature in 1977, and in the Congress. Through the executive offices, members of the State Bar will receive regular reports through a legislative reporting service informing members of the Bar of all developments in legislative matters.¹²²

You should have now received information regarding the Bar sponsored trip to Scandinavia.¹²³

The State Bar staff is administering group life and health insurance programs which are extremely competitive and of real value to you and your family.¹²⁴

These excerpts are not intended to indicate that the executive director or his staff are guilty of malfeasance in office or dereliction of duty. They *do* indicate that, at least part of the time, they are engaged in matters not even remotely connected to the regulation of the practice of law. The part of their salary paid for this portion of their time should not be borne by the compulsory membership dues paid to the State Bar as regulatory exactions.

Finally, the increases in the members' dues over the three years of the State Bar's existence warrant mention.¹²⁵ In its initial order adopting membership dues, the supreme court established a schedule of dues ranging from \$5 per year for a member admitted to practice for less than one year to a maximum of \$40 per year for a member admitted to practice for more than three years.¹²⁶ In the three years since that order, these minimum and maximum dues have been raised respectively to \$40 and \$100 per year,¹²⁷ an increase respectively of 800% and 250%. One may well ask: has the historical efficiency of the supreme court and its attorneys so changed for the worse as to require such an increase in funds just to control the rare errant attorney?¹²⁸ Or have the numbers of unethical and unfaithful

121. State Bar of Montana, Income Statement Detail, as reproduced in Mont. Law., Oct., 1977, at 11.

122. Parcell, *From the Executive Director*, Mont. Law., Jan., 1976, at 4.

123. Parcell, *From the Executive Director*, Mont. Law., March, 1976, at 4.

124. Parcell, *From the Executive Director*, Mont. Law., Sept., 1976, at 7.

125. See *Douglas v. State Bar*, Civ. No. 13644 (Mont., filed Aug. 9, 1976).

126. *In re Unified Bar of Montana*, 165 Mont. 1, 8, 530 P.2d 765, 768 (1975) (codified at BY-LAWS OF STATE BAR, art. I, § 4(a)).

127. BY-LAWS OF STATE BAR, art. I, § 4(a). For comparison, the cost of living, as measured by the Consumer Price Index, rose only 13% between January, 1975, and July, 1977. Bureau of Labor Statistics, U.S. Dept. of Labor as reported in WORLD ALMANAC 46 (1978).

128. See *In re Adoption of Rule of Court for Unification of State Bar*, 479 S.E.2d 225, 227-28 (Tenn. 1972).

Reynolds: Compulsory Bar Dues In Montana: Two (And A Half) Challenges attorneys in this state so increased in the last three years as to justify each attorney in the state having to pay at least a two-and-one-half-fold increase in fees to regulate them?¹²⁹ If so, the State Bar is a dismal failure at its only constitutionally permissible task of regulating and supervising the practice of law. If not, then the spread between the actual cost of administration and the amount of fees collected is so great as to evidence on its face a void revenue measure, rather than a valid regulatory measure.¹³⁰

CHALLENGE NUMBER II (½):¹³¹

Are Compulsory Bar Dues Improperly Used?

[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.¹³²

As noted in the last section, the State Bar of Montana maintains an active legislative effort,¹³³ which, in fiscal year 1977, spent \$7,005 of the State Bar's funds in lobbying before the Montana legislature.¹³⁴ Among the thirty bills followed by the State Bar¹³⁵ were proposals to make the medical malpractice statute of limitations applicable to minors;¹³⁶ to establish a comprehensive title insurance code;¹³⁷ to define the obligations of a health care provider;¹³⁸ to establish a system of no-fault vehicle insurance;¹³⁹ and to make uniform the application of the homestead allowance.¹⁴⁰

This selection of legislation was chosen to make a point: not all of the legislation supported or opposed by the State Bar in the 1977 Montana Legislature involved matters even tangentially related to its function of supervising or regulating the practice of law.

The importance of this point is underscored by a recent United

129. See *Kelly v. State Bar*, 148 Okla. 282, 284, 298 P. 623, 625 (1931) (Clark, V.C.J., dissenting).

130. *Foster's Inc. v. Boise City*, 63 Idaho 201, 219, 118 P.2d 721, 728 (1941).

131. The numbering of this section was adopted because of the similarity between this section and the previous one and because the discussion herein has only tentatively been applied to the issue of compulsory bar dues expenditures.

132. Thomas Jefferson as quoted in I. BRANT, *JAMES MADISON: THE NATIONALIST* 354 (1948) as quoted in *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 235 n.31 (1977).

133. See notes 117 and 121 and accompanying text, *supra*.

134. State Bar of Montana, Income Statement Detail, as reproduced in *Mont. Law.*, Oct., 1977, at 11.

135. As indicated by State Bar of Montana, Legislative Status Report, *Mont. Law.*, March, 1977, at 10-11.

136. H.201, 45th Mont. Legis. (1977) (opposed by State Bar: Killed).

137. H.413, 45th Mont. Legis. (1977) (State Bar withdrew opposition: Killed).

138. H.567, 45th Mont. Legis. (1977) (opposed by State Bar: Killed).

139. H.739, 45th Mont. Legis. (1977) (opposed by State Bar: Killed).

140. Laws of Montana 1977, ch. 153 (codified at R.C.M. 1947, § 91A-2-401) (supported by State Bar).

States Supreme Court decision, *Abood v. Detroit Board of Education*,¹⁴¹ in which non-union members, required to pay to the union, as a condition of employment, a service fee equal in amount to union dues, had challenged the union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.

In upholding their challenge, the Court stated:

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or towards the advancement of other ideological causes not germane to its duties as collective bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.¹⁴²

Although the Court was expressing only the convictions of some lower court justices,¹⁴³ the ramifications of the decision have shaken the integrated bar structure:¹⁴⁴

If this principle were extended fully to unified bars, it would disestablish them for all but their competence and discipline functions, leaving lawyers free to support or ignore bar social or political efforts as they wish.¹⁴⁵

141. 431 U.S. 209 (1977).

142. *Id.* at 235-36. The appellants had also alleged that the union sponsored social activities which were not open to nonmembers. The Court intimated that to the extent that these activities fell outside the union's duties as exclusive representative, they could not be paid out of objecting members' dues. *Id.* at 236 n. 33.

143. *E.g., In re Unified New Hampshire Bar*, 112 N.H. 204, 207, 291 A.2d 600, 602 (1972) (Grimes, J., dissenting): "I cannot cast my vote to compel all lawyers to belong to and financially support an association which may espouse causes with which they may disagree."

144. Another reason for concern among integrated bar devotees was the Court's treatment in *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 233 n. 29 (1977), which for seventeen years stood as the definitive statement of the Court in favor of integrated bars. The *Abood* Court, however, seemed to regard it more lightly:

The only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached. However, due to the disparate views of those five Justices on the merits and the failure of the other four Members of the Court to discuss the constitutional questions, *Lathrop* does not provide a clear holding to guide us in adjudicating the constitutional question here presented.

Abood v. Detroit Bd. of Education, 431 U.S. 209, 233 n. 29 (1977).

145. Woytash, *Unified Bars Are Under Siege*, BAR LEADER, Nov./Dec., 1977, at 33 [hereinafter cited as Woytash]. Woytash also reports on the running dispute the State Bar of California is having with Governor Brown, *id.* at 35-36, and the successful effort to include the legislature-created State Bar of Texas under that state's new Sunset Act requiring it to justify its existence or be abolished in 1979. *Id.* at 38-39; TEX. REV. CIV. STAT. ANN. art. 320a-1, § 2A (Vernon Supp. 1978). North Carolina's statutorily-created State Bar has similarly been made subject to that state's Sunset Act and will be abolished effective July 1, 1979, unless replevied. 1977 N.C. Sess. Laws, ch. 712, § 2.

Already one challenge based on *Abood* has been filed. Allan Falk, a commissioner for the Michigan Court of Appeals, is contending that the forced payment of dues to a unified bar under threat of suspension from the practice of law is a parallel situation, and that he should not be required to pay dues except to cover costs of the bar's regulatory activities.¹⁴⁶ Falk would like to see the state bar dismantled and a genuine regulatory agency established to weed out the incompetent and dishonest lawyers.¹⁴⁷ Whether *Abood* will lead to that end remains to be seen.

CONCLUSION

Many lawyers find this compulsory membership offensive
These feelings can and do engender as deep feelings as any other.¹⁴⁸

It has been fifty-six years since unification of a state bar was first adopted.¹⁴⁹ Since then challenges to unification have continued unabated, and they appear to be gaining momentum,¹⁵⁰ as individual lawyers assert that the price of integration, in terms of loss of freedom from court and peer control, is greater than any lawyer ought to be willing to pay.¹⁵¹

Admittedly, the state is vitally interested in the qualifications and integrity of those practicing law within its borders,¹⁵² but private rights cannot arbitrarily be invaded or annihilated under the mere guise of regulatory control.¹⁵³ Equally valid and important as a fundamental principle is that, in a free society, one's beliefs and associations should be shaped by one's mind and conscience, and not coerced by the state.¹⁵⁴

The Montana supreme court has come perilously close to disregarding these principles in compelling all lawyers in the state to join and contribute the State Bar of Montana as a condition to the practice of law. The court relied on tenuous constitutional grounds¹⁵⁵

146. *As reported in Woytash, supra note 145, at 33.*

147. *Id.* at 34.

148. *In re Unified New Hampshire Bar*, 112 N.H., 204, 207, 291 A.2d 600, 602 (1972) (Grimes, J., dissenting).

149. *Woytash, supra note 145, at 33.* North Dakota was the first state to integrate its bar, doing so in 1921 by statute. 1921 N.D. Sess. Laws, ch. 25 (codified at N.D. CENT. CODE. § 27-12-01).

150. *Woytash, supra note 145, at 33.*

151. This was the view of the Wisconsin Supreme Court, *In re Integration of the Bar*, 249 Wis. 523, 531, 25 N.W.2d 500, 503 (1946), before it integrated its bar in 1956. *In re Integration of the Bar*, 273 Wis. 281, 77 N.W.2d 602 (1956).

152. *Petition for Rule Activating, Integrating and Unifying the State Bar*, 78 Tenn. 78, 83, 282 S.W.2d 782, 784 (1955).

153. *Davis v. Ogden City*, 117 Utah 315, 326, 215 P.2d 616, 621 (1950).

154. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234-35 (1977).

155. *In re Adoption of Rule of Court for Unification of State Bar*, 479 S.W.2d 225, 227 (Tenn. 1972) (Humphreys, J., concurring): "The case for unification is much weaker than the

to make its order, the first time a branch of Montana government other than the legislature has imposed a license fee or tax. The court has since then failed to supervise properly the agency it thus created.

The danger is clear; for, as queried by James Madison:

Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?¹⁵⁶

The Montana supreme court should disestablish and disintegrate the State Bar of Montana.

case against it, viewed in the perspective of the competing constitutional powers of the judiciary and the legislature.”

156. II WRITINGS OF JAMES MADISON 186 (Hunt ed. 1901), as quoted in *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 235 (1977).

APPENDIX I

STATE	METHOD OF INTEGRATION	CITATIONS
Alabama	Statute	ALA. CODE tit. 46, §§ 21-62 (Michie 1958).
Alaska	Statute	ALASKA STAT. §§ 08.08.010-.250 (Michie 1962).
Arizona	Statute	ARIZ. REV. STAT. ANN. §§ 32-201 to 242 (West 1956); <i>but see</i> <i>Bridegroom v. State Bar</i> , 27 Ariz. App. 47, 550 P.2d 1089 (1976).
Arkansas	Court Order (Partially Integrated)	<i>In the Matter of Supreme Court License Fees</i> , 251 Ark. 800, 483 S.W.2d 174 (1972).
California	Statute	CAL. BUS. & PROF. CODE §§ 6000-6160 (West. 1974).
Colorado	Not Integrated	
Connecticut	Not Integrated	
Delaware	Not Integrated	
Florida	Court Order	Petition of Florida State Bar Association, 40 So. 2d 902 (Fla. 1949).
Georgia	Authorizing Statute and Court Order	GA. CODE ANN. §§ 9-701 to 705 (Harrison 1973); <i>In re</i> State Bar, 219 Ga. 873, ___S.E.2d___ (1963).
Hawaii	Not Integrated	<i>But see In re</i> Integration of the Bar, 50 Haw. 107, 432 P.2d 887 (1967).
Idaho	Statute	IDAHO CODE §§ 3-401 to 420 (Bobbs-Merrill 1948).
Illinois	Not Integrated	
Indiana	Not Integrated	
Iowa	Not Integrated	

Kansas	Not Integrated	
Kentucky	Authorizing Statute and Court Order	KY. REV. STAT. ANN. § 30.170 (Baldwin 1977); Ky. SUP. CT. RS. 3.010-530 (Baldwin 1978); <i>see also</i> Commonwealth <i>ex rel.</i> Ward v. Harrison, 266 Ky. 41, 98 S.W.2d 53 (1936).
Louisiana	Authorizing Statute and Court Order	1940 La. Acts No. 54; LA. REV. STAT. ANN. § 211 (West 1974); LA. REV. STAT. ANN. § 37.4-App. (West 1974); <i>see also In re</i> Jones, 202 La. 729, 12 So. 2d 795 (1943).
Maine	Not Integrated	
Maryland	Not Integrated	
Massachusetts	Not Integrated	
Michigan	Authorizing Statute and Court Order	MICH. COMP. LAWS. §§ 600.901-907 (MICH. STAT. ANN. §§ 27A.901-907 (Callaghan 1976)); MICH. SUP. CT. RS. CONCERNING THE STATE BAR, 273 Mich. xxxv (1935).
Minnesota	Not Integrated	
Mississippi	Statute	MISS. CODE ANN. §§ 73-3-101 to 171 (Harrison 1972); <i>see also</i> Board of Comm'rs v. Collins, 214 Miss. 782, 59 So. 2d 351 (1952).
Missouri	Court Order	MO. SUP. CT. R. 7; 352 Mo. xxxi (1944).
Montana	Court Order	<i>In re</i> Unified Bar, 165 Mont. 1, 530 P.2d 765 (1975).
Nebraska	Court Order	<i>In re</i> Integration of the Nebraska State Bar Association, 133 Neb. 283, 275 N.W. 265 (1937).
Nevada	(Originally by Statute) Authorizing Statute and Court Order	(1928 Nev. Stats., ch. 13, repealed by 1963 Nev. Stats., ch. 229, § 6). NEV. REV. STAT. § 7.275 (1973); NEV. SUP. CT. RS. 76-98; <i>see also In re</i> Scott, 53 Nev. 24, 292 P. 291 (1930).
New Hampshire	Court Order	<i>In re</i> Unification of the New Hampshire Bar, 109 N.H. 260, 248 A.2d 709 (1968).

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STATE	METHOD OF INTEGRATION	CITATIONS
New Jersey	Not Integrated	
New Mexico	Statute	N.M. STAT. ANN. §§ 18-1-1 to 7 (Smith 1953).
New York	Not Integrated	
North Carolina	Statute	N.C. GEN. STATS. §§ 84-15 to 38 (Michie 1975) (repealed eff. July 1, 1979, by 1977 N.C. Sess. Laws, ch. 712, § 2).
North Dakota	Statute	N.D. CENT. CODE §§ 27-12-01 to 08 (Smith 1974).
Ohio	Not Integrated	
Oklahoma	(Originally by statute) Court Order	(1929 Okla. Sess. Laws, ch. 264 repealed by 1939 Okla. Sess. Laws, ch. 22, § 6). <i>In re</i> Integration of State Bar, 185 Okla. 505, 95 S.W.2d 113 (1939).
Oregon	Statute	OR. REV. STATS. §§ 9,005-.665 (1977).
Pennsylvania	Not Integrated	
Rhode Island	Court Order	Petition of Rhode Island Bar Association, 111 R.I. 936, 306 A.2d 199 (1973).
South Carolina	Authorizing Statute and Court Order	S.C. CODE § 40-5-20 (Lawyers Co-operative 1977); S.C. SUP. CT. RS. CONCERNING THE S.C. BAR I-VI.
South Dakota	Statute	S.D. COMP. LAWS §§ 16-17-1 to 13 (Smith 1967).
Tennessee	Not Integrated	<i>But see</i> Petition of Tennessee Bar Association, 532 S.W.2d 224 (Tenn. 1975).
Texas	Authorizing Statute and Court Order	TEX. REV. CIV. STAT. art. 320a-1 (Vernon 1973); TEX. REV. CIV. STAT. tit. 14-App (Vernon 1973). <i>But see</i> TEX. REV. CIV. STAT. art. 320a-1, § 2A (Vernon Supp. 1978) (State Bar made subject to Texas Sunset Act, TEX. REV. CIV. STAT. art. 5429k (Vernon Supp. 1978)).

Utah	Statute	UTAH CODE ANN. §§ 78-51-1 to 12 (Smith 1958).
Vermont	Not Integrated	
Virginia	Authorizing Statute and Court Order	VA. CODE §§ 54-48 to 52.2 (Michie 1950); Rules for Integration of Virginia State Bar, 171 Va. xvii (1938).
Washington	Statute	WASH. REV. STAT. ANN. §§ 2.48.010-.230 (West 1962).
West Virginia	Authorizing Statute and Court Order	W. VA. CODE § 51-1-4a (Michie 1966); <i>In re</i> Adoption of a Constitution and Bylaws of the West Virginia Bar Association, 128 W. Va. lili (1947).
Wisconsin	Authorizing Statute and Court Order	Wis. STAT. ANN. § 257.25 (West Supp. 1977-78); <i>In re</i> Integration of the Bar, 273 Wis. 281, 77 N.W.2d 602 (1956). <i>See also</i> Lathrop v. Donohue, 10 Wis.2d 230, 102 N.W.2d 404 (1960), <i>aff'd</i> , 367 U.S. 820 (1961).
Wyoming	Authorizing Statute and Court Order	WYO. STAT. § 5-22 (Michie 1957); WYO. SUP. CT. RS. PROVIDING FOR ORGANIZATION AND GOVERNMENT OF THE BAR ASSOCIATION 1-19.

