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The Nebraska Supreme Court, the Practice of Law, and the Regulation of Attorneys

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I. INTRODUCTION

Attorneys serve an important function in modern American society. The practice of law and attorneys are subject to rigorous control and regulation.[1] Which governmental institution, the judiciary or the legislature, has the ultimate constitutional authority to exercise this control? In the words of the Nebraska Constitution, is ultimate authority over the practice of law and attorneys an aspect of "judicial power"[2] or of "legislative authority?"[3] What is the proper application of the doctrine of separation of powers?[4]

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1. This proposition is easily supported by examining any casebook on the legal profession. *See, e.g.*, M. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION 405-25 (1979). Of course, any important profession, and some that are not so important, are subject to extensive regulation pursuant to the state's police power. *See* Fellman, *Due Process of Law in Nebraska* (pt. 3), 9 NEB. L. REV. 484, 517-29 (1930).
2. The Kansas-Nebraska Act of 1854 vested the judicial power of the territory in the supreme court, the district courts, and several other courts. *See* An Act to Organize the Territories of Nebraska and Kansas, Ch. LIX, § 9 (1854) [hereinafter cited as Kansas-Nebraska Act]. This provision was essentially repeated in the state constitutions. *See* NEB. CONST. of 1866, art. IV, § 1; NEB. CONST. of 1875, art. VI, § 1; NEB. CONST. of 1920, art V, § 1.
3. The Kansas-Nebraska Act vested the legislative power and authority in the governor and the legislature. *See* Kansas-Nebraska Act, *supra* note 2, § 4. The Nebraska Constitution of 1866 vested the legislative authority in the legislature. *See* NEB. CONST. of 1866, art. II, § 1. This was essentially repeated in subsequent constitutions. *See* NEB. CONST. of 1875, art. III, § 1; NEB. CONST. of 1920, art III, § 1.
4. There was no separation of powers clause in either the Kansas-Nebraska Act or the Nebraska Constitution of 1866, which was patterned after the territorial legislation. *See* 3 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE NEBRASKA CONSTITUTIONAL CONVENTION 495 (A. Watkins ed. 1913) [hereinafter cited as NEBRASKA CONSTITUTIONAL CONVENTION]. The proposed Constitution of 1871 had a separation of powers clause. *See* Proposed Constitution of 1871, art. II, § 1, which was incorporated in the Constitution of 1875. "The powers of the government of this state are divided into three distinct depart-

In *State v. Barlow*[5] and *In re Integration of the Bar*,[6] decided in 1936 and 1937, the Nebraska Supreme Court held a layperson in constructive criminal contempt for the unauthorized practice of law and compelled all Nebraska attorneys to be members of the Nebraska State Bar Association, respectively. The court asserted that it had the ultimate authority to police and to regulate the practice of law and attorneys in order to promote its view of the public good. The court premised its decision on a claim of exclusive "inherent" and natural authority. Five years later, in *State v. Turner*,[7] the court insisted on its authority to establish more than the minimum bar admission standards established by the legislature. The court mechanically based its claim on its "inherent" authority.[8] However, a careful reading of the case suggests a more sensitive understanding of the appropriate functional roles of the judiciary and the legislature in controlling the practice of law and attorneys. The court implicitly recognized the legislature's ultimate authority to regulate the legal profession unless a different rule or regulation

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ments: the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." NEB. CONST. of 1875, art. II, § 1; NEB. CONST. of 1920, art II, § 1.

5. 131 Neb. 294, 268 N.W. 95 (1936).
6. 133 Neb. 283, 275 N.W. 265 (1937).
7. 141 Neb. 556, 4 N.W.2d 302 (1942).
8. Courts in other jurisdictions have also made this claim of inherent power. Exactly what it means, however, is difficult to determine. Too frequently, there is more assertion than analysis. Some courts have asserted exclusive authority. *See, e.g.*, State v. Cannon, 196 Wis. 534, 221 N.W. 603 (1928). Other courts have accepted legislative regulation if it "aids" the judiciary. *See, e.g.*, People v. Goodman, 366 Ill. 346, 349, 8 N.E.2d 941, 944 (1937). Still other courts have stated that the legislature can regulate the practice of law in the public interest, so long as the regulation does not interfere with the judiciary's function. *See, e.g.*, Clark v. Austin, 340 Mo. 467, 482, 101 S.W.2d 977, 985 (1935) (Gantt, J., concurring). *See generally* Comment, *Separation of Powers: Who Should Control the Bar?* 47 J. URB. L. 715 (1969); Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783 (1976).

   The *Barlow* and *In re Integration* rhetoric suggests that the Nebraska Supreme Court believes that it is in the first category; that the issue is subject to the judiciary's exclusive authority. However, *Turner* suggests that it may be in the last category; that the problem is subject to legislative authority with some judicial limitations.

   The Nebraska Supreme Court has not, to date, regulated the legal profession as extensively as has the judiciary in other jurisdictions. For example, the Nebraska Supreme Court only minimally regulates the attorney-client contingent fee arrangement. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 2 (1978). *But see* Kovarik v. County of Banner, 192 Neb. 816, 224 N.W.2d 761 (1975), in which the supreme court held that a county court could appoint an attorney to represent a defendant in a misdemeanor case. The court then found, in the existing statutory scheme, that the county had to pay the attorney's fees.

was strictly necessary to assure the proper functioning of the judicial process.

The analytic thesis of this article is that the functional analysis suggested in *Turner* is the correct way to frame the separation of powers issue, *i.e.*, whether the legislature or the judiciary has the ultimate authority to regulate the legal profession. The analysis begins with a description of the proper function of these two governmental institutions. It is submitted that the judiciary is charged with resolving particular disputes, construing regulations, statutes and constitutions in the context of such disputes and of creating law in the common law tradition. This is the "judicial process."[9] It is also submitted that the legislature, as the more democratic institution, is charged with the primary responsibility of promoting the community's general welfare; ideally, it acts, or fails to act, to advance its view of the public good.[10] The analysis continues by asking whether a particular rule or regulation (or absence thereof) is important to assure the proper functioning of the judicial process or to advance the public good. If the former, ultimate authority to regulate ought to rest with the judiciary; attorneys should be perceived as "officers of the court." If the latter, ultimate authority to regulate ought to rest with the legislature; attorneys should be perceived as active and important participants in community life. The analysis concludes by noting that sometimes the legislative and judicial functions overlap. The legislature may, for example, regulate (or fail to regulate) the legal profession in a way which will affect the judicial process. It is submitted that the judiciary ought to defer to the legislature in these cases unless a contrary rule or regulation is strictly necessary to the proper functioning of the judicial process.[11] Such a theory of deference is consistent with democratic theory. The legislature, in acting or failing to act in order to advance the public good, presumably considers the importance of a properly functioning judicial process. Moreover, such judicial restraint is important in a constitutional

9. Note, *supra* note 8, at 797.

10. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1012-16 (1924); Fellman, *supra* note 1, at 223-27.

11. The test proposed here is one of "strict necessity." It is analagous to one of the tests now being used to determine under what circumstances the judiciary can mandate the legislature to appropriate funds for its use. In Wayne Circuit Judges v. County of Wayne, 383 Mich. 10, 23, 172 N.W.2d 436, 440 (1969), the court held that it would only demand money if inadequate appropriations would impair the "effectively continuing function of the court." In Smith v. Miller, 153 Colo. 35, 384 P.2d 738 (1963) the court held that it could insist on an appropriation if reasonable. *See generally* Brennan, *Judicial Fiscal Independence*, XXIII FLA. L. REV. 277 (1971); Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972).

system which gives the last word to the judiciary. If the judiciary does not restrain itself, no other institution will.

A court, using the functional analysis, would presume that legislation affecting the practice of law and attorneys was valid; it would only strike down such regulations (perhaps substituting its own alternative rules) if that action were strictly necessary to the proper functioning of the judicial process.[12] Moreover, a court would not construe legislative silence on a particular issue as a *carte blanche* to prescribe its own rules and regulations to advance its own view of the public good. It would presume that the legislature's failure to act was in order to enhance the public good.

A court, using the functional analysis, will also be able to interpret actual legislation authorizing it to regulate the legal profession. If the legislature merely restates, that is, declares an authority the court already had to regulate as strictly necessary to assure the proper functioning of the judicial process, nothing will have been added to the court's authority. If, on the other hand, the legislature delegates its own authority to the court, then the court will have the derivative power to interpret and to implement the statute so as to advance a view of the public good. Thus, for example, a court may, on its own authority, implement a rule for attorney conduct in order to protect the judicial process. On the other hand, a court may, if delegated authority by the legislature, implement a rule for attorney conduct in order to advance a broader view of the public good. In either case of declared or delegated authority, a court may find in the legislation, using appropriate canons of statutory construction, additional and necessary powers, such as the power to raise and to spend money, to advance the legislative goals. Again, for example, if there is no legislation authorizing the court to admit attorneys to practice, a court may not on its own authority charge a fee for admission to the bar. However, if the legislature has authorized it to admit attorneys to practice, then the court may find in the words and purpose of the enactment the implied authority to charge such an admission fee.

The historical thesis of this article is that until 1936 Nebraska jurisprudence recognized and adhered to the functional approach. The concept of judicial power in the mid-nineteenth century connoted only minimal judicial authority to regulate the practice of

12. Note, *supra* note 9, at 802. *See generally* Robertson & Buehler, *The Separation of Powers and the Regulation of the Practice of Law in Oregon*, 13 WILL. L.J. 273 (1977); Comment, *The Supreme Court's Power Over Admission and Disbarments: Inherent or Statutory*, 25 BAYLOR L. REV. 368 (1973); Comment, *Separation of Powers: Who Should Control the Bar*, 47 J. URB. L. 715 (1969); Comment, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82 (1960).

law and attorneys. What powers the judiciary had related only to practice directly related to the judicial process. The concept also connoted no criminal contempt powers vis-a-vis persons or activities unrelated to the judicial process. Nebraska legislation and relevant judicial decisions reflected this understanding. *Barlow* and *In re Integration* were therefore not only analytically unsound, they were deviations from the historical pattern.

In unravelling these developments, certain problems and related themes should be mentioned. First, there has been substantial legislation relating to the legal profession and the practice of law. It will not always be clear, however, whether the legislature is declaring an authority the court already had, or whether it is delegating its own authority. Moreover, judicial adherence to a legislative rule may be explained by several theories, such as functional deference, the approach approved of in this article, or mere comity in which the court insists on its own authority but goes along with the legislative rule as a matter of convenience.[13] Second, merely because the judiciary has either ultimate constitutional authority or delegated authority, or an implied power from either source, it does not necessarily follow that the Nebraska Supreme Court is the proper court to exercise these powers.[14] In many instances, the district courts will be appropriate, and in some circumstances the supreme court may opine that it does or does not have certain powers vis-a-vis the district courts.[15] These assertions may appear

13. This comity theory would be what would be later used to explain away the court's deference to legislative directives. This article suggests a more straightforward reading of legislative and judicial acts. If the legislature enacted a rule, it believed it had the power; if the court accepted a legislative rule, it was because the court believed the legislature had the power.

14. The Kansas-Nebraska Act of 1854 provided that the supreme court was to have jurisdicition as provided by law. *See* Kansas-Nebraska Act, *supra* note 2, § 9. The 1866 Nebraska Constitution provided that the supreme court shall have appellate jurisdiction only except in cases "relating to revenue, mandamus, quo warranto, [and] habeas corpus . . . ." NEB. CONST. of 1866, art. IV, § 3. The 1875 constitution provided that the supreme court was also to have original jurisdiction in "civil cases in which the state shall be a party . . . ." NEB. CONST. of 1875, art. VI, § 2; NEB. CONST. of 1920, art. V, § 2. (This addition was proposed in 1871, so as to allow the legislature to determine that the supreme court could have original jurisdiction to hear cases against the state. *See* 2 NEBRASKA CONSTITUTIONAL CONVENTION, *supra* note 4, at 109-115, 161-164.

In 1970, the constitution was amended to vest the supreme court with "general administrative authority over all courts in this state . . . . *See* NEB. CONST., art. V, § 1. It is clear, however, that this last addition was not designed to broaden the court's authority over the legal profession, but rather was designed to improve the efficiency of the Nebraska court system. *See* REPORT OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION 64 (1970) [hereinafter cited as REVISION REPORT].

15. The district courts have consistently had common law jurisdiction, as pro-

to be claims about its ultimate authority vis-a-vis the legislature. Third, there may be confusion over the judiciary's authority to act, such as to admit an attorney to practice law, and its authority to establish substantive standards governing its act, such as admission rules.[16]

Part one will demonstrate that, as an historical matter, Nebraska jurisprudence, until 1936, understood the judiciary's power over the legal profession and the practice of law in the functional sense. Part two will focus on *Barlow, In re Integration*, and *Turner*. This section will demonstrate that the court asserted its ultimate constitutional authority in *Barlow* and *In re Integration* in order to promote its vision of the public interest. In *Turner* it continued its expansive language, but suggested a more functional analysis. Part three will recommend a method for the future.

I. THE FUNCTIONAL SENSE OF PRE-1936 JUDICIAL POWER

In 1854, with the passage of the Kansas-Nebraska Act, Congress vested several territorial courts with judicial power.[17] In 1866, when the first Nebraska Constitution was adopted, the judicial power was vested in several state courts.[18] Did this concept of judicial power—in the mid-nineteenth century—connote an *inherent* and broad authority for the judiciary to control the legal profession

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vided by law. *See* NEB. CONST. of 1866, art. IV, §§ 3, 4; NEB. CONST. of 1875, art. VI, § 9; NEB. CONST. of 1920, art. V, § 9.

16. This article will not focus on the court's "inherent" power to control the procedures by which standards are enforced. The court has held, for example, that disbarment proceedings are *sui generis*, and it has felt free to develop the procedural rules for these cases (within appropriate constitutional limitations). *See* State v. Merten, 142 Neb. 780, 7 N.W.2d 874 (1943); State v. Fisher, 170 Neb. 483, 103 N.W.2d 325 (1960). But in developing these procedures, the court had regularly looked to Nebraska legislation for guidance. For example, in State v. Priest, 118 Neb. 47, 223 N.W. 635 (1929) the Court held that since disbarment was a civil proceeding, the use of depositions pursuant to statute was allowed. Would the United States Constitution permit the use of such depositions today? *See* Willner v. Committee of Character and Fitness, 373 U.S. 96 (1963); *In re* Ruffalo, 390 U.S. 544 (1968).

Moreover, this article will not focus on the issue of to what extent the court has the authority to regulate the legal profession by enactment (rule) rather than decisions. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 3 (1958); Shanfeld, *The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar*, XIX ST. LOUIS L. REV. 163, 173 (1934).

17. Kansas-Nebraska Act, *supra* note 2, § 9.

18. NEB. CONST. of 1866, art. IV, § 1; *see also* NEB. CONST. of 1875, art. VI, § 1. The 1875 constitution also contained a separation of powers clause. *See* NEB. CONST. of 1875, art. II, § 1.

and the practice of law? In other words, did the concept *necessarily* connote a broad judicial authority?[19]

To answer this question in the negative, it should be sufficient to offer reputable historical precedents in which the concept did not imply broad authority. Such precedents would not, of course, prove that the majority of jurisdictions did not believe that the concept implied broad authority. Nor would it negate the fact that courts later might determine that broad judicial authority had been the general rule. But such examples will establish that the concept of judicial power did not *necessarily* connote broad authority.

It is conceded that each court often had the authority to act, that is, to admit attorneys to the practice of law[20] and to dismiss (*i.e.*, disbar or suspend) attorneys from the practice of law for unprofessional conduct.[21] But even this power over the legal profession was of limited impact, for the mid-nineteenth century judiciary only admitted or dismissed attorneys from "the practice of law," and this concept only covered activities related to the judicial process.

Of course, attorneys were engaged in a variety of activities, not only related to the judicial process, but also including drafting, conveyancing and advising.[22] Laypersons, however, also engaged in these latter activities.[23] The inquiry here is not what attorneys did, but what activities the courts would permit only them, and not laypersons, to do. The judiciary's power, therefore, can be measured by the scope of the attorney's monopoly of the profession.

Attorneys only had a monopoly over work directly related to the judicial process. The few pre-1890 cases which address this is-

19. Inherent powers of a court are defined as those "reasonably necessary for the administration of justice." BLACK'S LAW DICTIONARY 921 (4th ed. 1968). Inherent is defined as "involved in the constitution or essential character of something . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1163 (1971).

20. This was the standard, although not uniform, practice. In several jurisidictions, attorneys had been admitted to practice before the courts by an act of the executive or the legislature. *See* A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA ii, 224-80. Moreover, by the mid-nineteenth century, several jurisdictions permitted one court to admit an attorney to practice before all the courts of the jurisdiction. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 564-566 (1973).

21. *See* Steele, *Cleaning Up the Legal Profession: The Power to Discipline—The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413, 414 (1978). Of course, a court's power to disqualify a person from practice before it does not entail the power either to set the substantive standards or to disqualify persons from practice before other courts.

22. L. FRIEDMAN, *supra* note 20, at 265-275.

23. J. HURST, THE GROWTH OF LAW IN AMERICA 320 (1950).

sue make this clear. In *Robb v. Smith*,[24] the Illinois Supreme Court dismissed a petition in a civil action signed by an "agent" who was not an attorney. In *People v. May*,[25] the Michigan Supreme Court held that a layperson could not be elected to the office of prosecuting attorney. The court placed primary reliance on the fact that the prosecuting attorney would be engaged in business "of a criminal character in the courts of law."[26] In *Cobb v. Judge of Superior Court*,[27] the Michigan Supreme Court prohibited a disbarred attorney from representing a person in litigation as an "agent."

Judicial power vested the courts with the authority to admit and to dismiss practitioners only from this narrow range of activities.[28] It did not necessarily vest the courts with the authority to establish substantive standards for admission and discipline. Two

24. 4 Ill. 46 (1841).
25. 3 Mich. 598 (1855).
26. *Id.* at 606.
27. 43 Mich. 289, 5 N.W. 309 (1880).
28. This broad statement is premised on the work: G. BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937). This book is the most complete collection of related cases, and the only included cases decided before 1890 are cited in the text. *See also* Hicks & Katz, *The Practice of Law by Laymen and Lay Agencies*, 41 YALE L.J. 69, 75 (1931). Further support for this proposition can be found by negative inference from 1 E. THORNTON, A TREATISE ON ATTORNEYS AT LAW (1914). He asserts:

> It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the managment of such actions and proceedings in behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all actions taken for them in matters connected with the law.

Id. at 105-106 (footnotes omitted).

But in support of such an "obvious" proposition he cites no case prior to 1902! The inference is that he could find none.

In Nebraska, it is certain that until 1905 attorneys only had a monopoly on work related to the judicial process. And perhaps the monopoly remained this narrow until 1936. In 1895, the attorney admission law was consolidated as follows:

> No person shall be admitted to practice as an attorney or counsellor at law, or to commence, conduct, or defend any action or proceeding in which he is not a party concerned, either by using or subscribing his own name, or the name of any other person, in any court of record in this state, unless he has been previously admitted to the bar by order of the Supreme Court . . . .

1895 Neb. Laws 72. In 1905, violation of this statute was made a crime. 1905 Neb. Laws 58.

After 1905, it is unclear whether it was a crime to do law-type work, unrelated to the judicial process, without a law license. In 1936, in *Barlow*, Barlow was held in contempt for activity unrelated to litigation. The court, in insist-

important cases establish this point.[29]

The leading mid-nineteenth century case on admission standards is *In re Admission of Cooper*.[30] In *Cooper*, the trial court, which had authority to admit attorneys to the practice of law, refused to admit Cooper because he had not taken or passed an examination. The court of appeals first held that such a denial was a judicial act which could be appealed. It then held that since the state legislature had provided that a holder of a law degree from Columbia College need not take the exam, Cooper, who held such a degree, was to be admitted to practice. The court concluded that the legislature had the authority to determine conclusively what was sufficient evidence of adequate legal training.[31] This is tantamount to dictating the substantive admission standards.[32]

The leading mid-nineteenth century case on substantive standards of conduct is *In re Secombe*.[33] Congress had delegated judicial power to several courts in the Minnesota Territory.[34] Secombe had been disbarred by the territorial court. He sought, from the United States Supreme Court, a mandate to reinstate him. The

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ing on its inherent right to hold Barlow in contempt, did not clearly state that his act was a crime. It merely assumed it.

> Defendant further contends that, since the legislature has, by statute, provided a penalty for the practice of law without a license and has not, by statute, made such practice a contempt, this court is powerless so to do. That an act denounced by statute as a crime may constitute a contempt of the court is beyond question, notwithstanding the offender may be prosecuted under a criminal statute.

31 Neb. at 302, 268 N.W. at 98.

However, in Cornett v. State, 155 Neb. 766, 53 N.W.2d 747 (1952) the court held Cornett, a bondsman, in criminal contempt. "Where the legislature has not made the unauthorized practice of law a statutory crime the Supreme Court has the exclusive power to punish those who practice law without a license." *Id.* at 770, 53 N.W.2d at 750. One can infer from this statement that the court believed that what Cornett did was not a crime. Thus, it is arguable that the 1905 statute only made it a crime for a layperson to do law work related to the judicial process. *See* Hicks & Katz, *supra*, at 77.

29. Not only do these cases prove the point, but also the countless cases in which the courts went along with legislative rules support it.
30. 22 N.Y. 67 (1860).
31. *Id.* at 95.
32. Concededly, *Cooper* may not be a holding, in all contexts, that the legislature of a state has the ultimate authority to establish rules of admission. New York constitutional history was unique. The governor had once appointed attorneys, and it was believed that the constitution authorized a shift of authority from the governor to the legislature. *See*, *In re* Day, 181 Ill. 73, 54 N.E. 646 (1899); Green, *The Court's Power over Admission and Disbarment*, 4 TEX. L. REV. 1, 8-10 (1925).
33. 60 U.S. 9 (1856).
34. An Act to Establish the Territorial Government of Minnesota § 9, 13th Cong., 2d Sess. (1849), *reprinted in* 4 F. THORPE, AMERICAN CHARTERS CONSTITUTIONS AND ORGANIC LAWS 1984 (1909).

Court analyzed the case as if the territorial legislature could set the substantive standards of disbarment.[35] The Court noted that in so doing, the legislature had defined the duty of an attorney "to maintain the respect due to courts of justice and judicial officers."[36] It was therefore left to the territorial courts to apply and to implement the rule. The legislature had set the standards, and it had delegated broad authority to the judiciary to apply it.[37]

The mid-nineteenth century thus offers at least two notable examples of courts deferring to legislative standards with respect to admission to and dismissal from the narrow range of activities which constituted the practice of law.[38] The concept of judicial power did not therefore *necessarily* connote a broad authority over the legal profession. The concept also did not empower the courts to hold laypersons in criminal contempt for activities engaged in outside the court and not related to the judicial process.[39] This is

35. Notwithstanding the Court's analysis, in dictum it said: "And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." 60 U.S. 9, 13 (1865).

36. *Id.* at 14.

37. Of course, it is arguable that the legislature merely declared the authority already possessed by the court. But such an interpretation would ignore the court's actual reasoning. *See* Comment, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133 (1962); Note, *supra* note 8, at 788 n.27.

38. Some commentators might argue that the interpretation of *In re* Secombe is inapposite, for it presented the court with a problem of the meaning of judicial power in the territorial context. But Supreme Court dictum ten years later belies this contention. In *Ex Parte* Garland, 71 U.S. 333 (1866), the Court struck down a congressionally mandated attorney's oath because it was a bill of attainder and ex post facto legislation. However, the Court stated:

> The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution.

71 U.S. 379-80.

39. A leading commentator has defined criminal contempt as "an act of disobedience or disrespect toward a judicial . . . body, or interference with its orderly processes, for which a summary punishment is usually exacted." Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L.Q. 1, 1. Its purpose is punitive rather than remedial if the contemptuous act is done outside the presence of the court, it is indirect, or constructive contempt.

In the *Barlow* case, Barlow's trial was summary. He could be compelled to testify against himself, depositions could be used, and he was afforded no protection by any statute of limitation. Most importantly, he was not entitled to a jury trial. *See* State v. Barlow, 132 Neb. 166, 271 N.W. 282 (1937).

The last forty years has seen increased judicial insistence on procedural

best established by noting what was assumed in the debates over the courts' contempt power. The most troublesome issue was whether the courts could hold a publisher in criminal contempt for comments made outside the court.[40] Proponents of the power relied heavily on language in *The King v. Wilkes*,[41] in which it was said that summary criminal contempt would lie for "the offense of libelling judges for what they do in their judicial capacities, [said comments being] either in court or out of court . . . ."[42] The debate was intense. It was apparently assumed, however, that to be

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protection in summary contempt matters, so today the power is not as awesome as it once was. *See* Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39 (1978); Comment, *The Application of Criminal Contempt Procedures to Attorneys*, 64 J. CRIM. L.C. & P.S. 300 (1973). Regardless, contempt is still subject to judicial control, and the accused is still not afforded all the protection he might have in a pure criminal proceeding.

40. *See* Frankfurter & Landis, *supra* note 10, at 1023-29; Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 423-430 (1928).

41. This case is also known as *The King v. Alman*. *See* Fox, *The King v. Alman*, 24 L.Q. REV. 184, 184 (1908).

42. The power which the Courts in Westminister Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the fact of it (I. Vent. I) and the issuing of attachments by the supreme courts of justice in Westminister Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terrae* and within the exception of Magna Charta as the issuing any other legal process whatever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction but can find none. It is an ancient as any other part of the common law; there is no priority or posteriority to be discovered about it and therefore (it) cannot be said to invade the common law but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation and basis as trials by jury do—immemorial usage and practice; it is a constitutional remedy in particular cases and the judges in those cases are as much bound to give an activity to this part of the law as to any other part of it. Indeed it is admitted that attachments are very properly granted for resistance of process or a contumelious treatment of it or any violence or abuse of the ministers or others employed to execute it. But it is said that the course of justice in those cases is obstructed and the obstruction must be instantly removed; that there is no such necessity in the case of libels upon Courts or judges, which may wait for the ordinary method of prosecution without any inconvenience whatsoever. But when the nature of the offence of libelling judges for what they do in their judicial capacities, either in court or out of court, comes to be considered, it does in my opinion become more proper for an attachment than any other cause whatsoever.

Fox, *supra* note 41, at 185-86.

proscribed, the comments had to relate to the judicial process. The quoted language emphasizes that the libel is "for what [the judges] do in their judicial capacities."[43]

In 1831, Congress enacted legislation declaring the common understanding of the contempt power. The courts, said Congress, had no authority to hold persons in criminal contempt for activities unrelated to the judicial process.[44] The judiciary could protect its own processes by the use of contempt power; it was not believed to have the authority to establish its view of the public good by the use of this power.[45]

The concept of judicial power in the nineteenth century did not necessarily connote broad judicial authority to regulate the legal profession and the practice of law. Nebraska jurisprudence recognized this, and, in fact, adhered to a functional approach to the is-

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43. Fox, *supra* note 41, at 186. Modern commentators have also emphasized that contempt of court must be related to the judicial process. Professor Dobbs has observed:

> Contempt of court consists of an act or omission substantially disrupting or obstructing the judicial process in a particular case. This may include behavior during a trial, such as disruptions of the proceedings, or it may include obstructive behavior outside the courtroom itself. Contempt may also include disobedience of judicial orders, as, for example, where a defendant violates an injunction or where a witness refuses to answer a question when ordered to do so by the judge.

Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 185-86 (1971).

44. *Be it enacted* . . . [t]hat the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance of any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

SEC. 2. *And be it further enacted*, That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefore, by indictment . . . .

4 Stat. 487. *See* Frankfurter & Landis, *supra* note 10, at 1023-29; Nelles & King, *supra* note 40, at 423-30.

45. Whatever the authority of the federal courts with respect to contempt, Congress could limit it. In *Ex Parte* Robinson, 86 U.S. 505 (1873) the trial court had found Robinson in contempt of court and had disbarred him. The Supreme Court reversed, noting that Congress had not provided the punishment of disbarment for contempt. 86 U.S. 505, 512 (1873). *But see*, *In re* Dunn, 85 Neb. 606, 124 N.W. 120 (1909).

sues. Nebraska legislation consistently established standards for admission to law practice, and defined standards for attorney conduct, presumably to advance the legislature's view of the public good.[46] Moreover the legislature defined the courts' authority with respect to criminal contempt in order to deny judicial authority over laypersons for acts away from the courts and unrelated to the judicial process.[47]

In nineteenth century Nebraska, the courts had the power to admit and discipline practitioners. But the scope of law practice was the same in Nebraska as it was elsewhere. It only related to activities relevant to the judicial process. The legislature offered no mechanism for expanding this power until 1905 when it made the unauthorized practice of law a crime.[48] Prior to that date (and perhaps even after it) the legislature acted as if whatever authority the courts might have, such power could not affect activities and occupations unrelated to the judicial process.[49]

Early Nebraska legislation on admission to practice reflected a view that the legislature had the ultimate authority to set admission standards, and that it could mandate judicial conformity to its rules. The 1855 territorial legislature mandated that if an applicant

46. *See generally* Kalish, *Legal History and Bar Admissions: A History of the Nebraska Experience*, 55 NEB. L. REV. 596 (1976).

47. In 1866, in Nebraska, the following was enacted:

> SEC. 669. Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts:
> First. Disorderly, contemptuous or insolent behavior towards the court, or any of its officers, in its presence.
> Second. Any breach of the peace, noise, or other disturbance tending to interrupt its proceedings.
> Third. Willful disobedience of, or resistance willfully offered to any lawful process or order of said courts.
> Fourth. Any willfull attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings or process pending before the courts.
> Fifth. The contumacious and unlawful refusal of any person to be sworn or affirmed as a witness, and, when sworn or affirmed, the refusal to answer any legal and proper interrogatory.
> SEC. 670. Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense.
> SEC. 671. Persons punished for contempt under the preceding provisions, shall nevertheless be liable to indictment, if such contempt shall amount to an indictable offense; but the court before which the conviction shall be had, may, in determining the punishment, take into consideration the punishment before inflicted, in mitigation of the sentence.

Revised Statutes of the Territory of Nebraska, Tit. XX, §§ 669-71 (1866).

48. 1905 Neb. Laws 58.

49. *See* text accompanying note 28 *supra*.

met certain standards, he had to be admitted to practice.[50] In 1857, the statutory language changed from a "shall" admit to "may" admit, but this language change did not affect its mandatory quality.[51] Moreover, even when the legislature exercised its authority to establish admission standards by delegation of this power to the court, it explicitly reserved its ultimate authority to set the standards. The 1855 legislature provided that "The supreme court of this territory may make such rules and regulations as they may deem proper, in relation to the admission of attorneys; *Provided, No rules shall be made which conflict with any enactment of the legislative assembly.*"[52]

Clearly, the territorial legislature believed it could set bar admission standards. It is arguable, however, that an 1866 syntax change in the bar admission statute demonstrated that the state legislature understood the courts' authority in this area to be broader.[53] This argument was presented in *Turner*: (1) Prior to statehood, the legislature could, and did, mandate bar admission

50. Any person twenty-one years of age, who can produce satisfactory evidence of a good moral character, and pass an examination before either of the judges of the district court, or before the justices of the supreme court of this territory *shall* be licensed to practice as attorney at law and solicitor in chancery in all the courts of this territory. Territorial Laws of 1855 at 199 (emphasis added).

For the first two years of the Territory's existence, the Supreme Court also had the delegated authority to admit attorneys to practice.

51. 1857 Neb. Laws 54, provided:

> Section 1. Any white male citizen of the United States who is actually an inhabitant of this territory and who shall, by examination in open court, satisfy any district court of this territory, and shall satisfy the court that he is of good, moral character, may by such court be permitted to practice in all the district courts of the territory, upon taking the usual oath of office.
>
> Sec. 2. The supreme court may on motion admit any practicing attorney of the district court to practice in the supreme court upon his taking the usual oath of office.

See State v. Turner, 141 Neb. 556, 560-62 (1942) for the proposition that this statute still mandated the courts to admit persons who met the legislative qualifications.

52. 1855 Neb. Laws 199 (emphasis added).

53. *See* Revised Statutes of the Territory of Nebraska, Tit. III, §§ 1-2 (1866). It provided:

> Section 1. No person shall be admitted to practice as an attorney in the supreme or district courts of this territory hereafter, unless such person shall have previously studied in the office of a practicing attorney, for the period of two years, and pass a satisfactory examination upon the principles of the common law, under the direction of the court to which application is made, and it is shown to the satisfaction of said court that such applicant sustains a good moral character.
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> SEC. 2. The supreme court may, on motion, admit any practicing attorney of the district court to practice in the supreme court, upon his taking the usual oath of office.

standards. (2) This was constitutionally permissible since territorial government did not reflect a separation of powers theory. (3) In 1866, the bar admission statute was changed syntactically from a form which provided that if an applicant *shall* meet certain criteria, he *may* be admitted, to a form which provided that *no person shall* be admitted *unless* he shall have met certain criteria. This apparently endorsed the court's authority at least to increase admission requirements over what the legislature had prescribed. (4) Since this change occurred coincident with statehood, it reflected a new legislative understanding of its powers consistent with the state separation of powers doctrine. In other words, after statehood, even the legislature recognized that the judiciary had broader authority over attorneys pursuant to separation of powers theory.[54]

The *Turner* argument, however, is suspect, for the Nebraska Constitution of 1866 did not incorporate the separation of powers doctrine. The constitution was designed to resemble the territorial enabling act.[55] It was not until 1875 that separation of powers clearly became a part of Nebraska government.[56] Thus, whatever might have been the intent of the 1866 legislature in changing the syntax, it is unlikely that it reflected a different attitude concerning the constitutional significance of judicial power. The legislature may have wanted to delegate part of its authority to set more than minimum bar admission standards to the judiciary, but it did not believe it was merely restating a judicial authority mandated by separation of powers considerations.

With respect to the setting of attorney conduct standards, the Nebraska legislature, as early as 1857, required attorneys to swear to "discharge the duty of an attorney and counsellor," and it defined the duty as, *inter alia*, "to abstain from all offensive practice."[57] Realistically, this authorized the judiciary to define "offensive practice." Since the standard is so broad, it is impossible to know if the Nebraska legislature believed it was delegating some of its own authority to the judiciary or simply declaring an authority the judiciary already had. It is arguable, however, that the legislature thought that if it had defined the standards differently, the judiciary would have been obligated to apply these different standards.[58]

54. 141 Neb. 556, 560-61 (1942).
55. *See* 3 NEBRASKA CONSTITUTIONAL CONVENTION, *supra* note 4, at 495.
56. *See* text accompanying note 4 *supra*.
57. 1857 Neb. Laws 54.
58. This seems the more straightforward interpretation. It is of course also arguable that the legislature was merely restating the judiciary's broad authority in this area. The judiciary would thus not be deferring to a legislative decision as much as it would be exercising its own authority. It could even be

Nebraska legislation with respect to the court's authority to hold persons in contempt of court paralleled the federal statute. As early as 1866, the legislature defined contempt in a way which precluded its application to laypersons' activities unrelated to the judicial process.[59]

The Nebraska courts, as well as the legislature, also adhered to a functional analysis in the nineteenth century and the first two decades of the twentieth century. The legislature had the authority to regulate the practice of law and the legal profession, and the judiciary deferred to its judgment. This deference was most apparent in cases which focused on legislative decisions allocating the power to admit or to disbar among the several courts.

In the nineteenth century, each district court was authorized to admit applicants to general practice in the courts, and the supreme court was authorized to admit, on motion (and thus without testing), "any practicing attorney of the district court" to practice before it. This pattern was most clearly stated in the territorial legislation of 1857. It clearly provided that any district court could admit attorneys to practice in all the courts of the state, and that the supreme court could admit "any practicing attorney of the district court" to practice before it.[60] The language of this statute changed slightly in 1866,[61] but the authority to admit generally continued in the district courts, and this remained the general practice until the late nineteenth century.[62]

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argued that the legislature was acquiescing, and even recognizing, the judiciary's ultimate authority in this area.

59. *See* text accompanying note 47 *supra*.

60. *See* note 51 *supra*.

61. *See* note 53 *supra*.

62. In fact, section 1 of the 1866 law seems to authorize the supreme court to admit applicants, but there are at least four reasons for assuming that it was only given the authority to admit, on motion, practicing attorneys. First, the territorial law gave the exclusive authority to admit in the first instance to the district courts. There is no practical reason for the scheme to have changed in 1866. Second, the 1866 scheme made sense as interpreted. The district courts were to test and to examine the applicants; the supreme court was not compelled to give any additional examination. Third, the law also permitted any attorney from another jurisdiction to be admitted, without further academic testing, in any court in Nebraska. Section 9 of the 1866 law reads as follows:

> Any person producing a license, or other satisfactory voucher, proving that he has been regularly admitted an attorney at law, in any court of record within the United States, that he is of good moral character, may be licensed and permitted to practice as a counselor and attorney at law in any court in this territory, without examination.

Revised Statutes of the Territory of Nebraska Tit. III, § 9 (1866). This supports the argument that the supreme court was not to be a court which examined applicants. Fourth, the practice until 1895 was for the district courts

In 1895, the legislatue consolidated the attorney admission process.[63] It gave exclusive admission authority to the supreme court.[64] In 1900 the supreme court reviewed the consolidation law

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to admit applicants in the first instance. In Niklaus v. Simmons, 196 F. Supp. 691, 699 (D. Neb. 1961) the court said:

> With the legislation in that situation, a practice arose, whereby admission to the bar was granted by the several district—or trial—courts. And much of the more amusing folklore of the profession has arisen out of the informality, and lack of penetrating inquiry, which characterized what in those courts were flatteringly regarded as 'examinations' upon applicants for admission to the bar. In that earlier interval admission to the bar by the Supreme Court of the state was not invariable and usually followed admission in one or another of the district courts of the state.

See also Kalish, *supra* note 46, at 598-607.

63. The consolidation statute provided:

> SECTION 1. No person shall be admitted to practice as an attorney or counselor at law, or to commence, conduct, or defend any action or proceeding in which he is not a party concerned, either by using or subscribing his own name, or the name of any other person, in any court of record in this state, unless he has been previously admitted to the bar by order of supreme court, or of two judges thereof; but this section shall not apply to persons admitted under pre-existing laws.
>
> SEC. 2. The supreme court shall fix times when examinations shall take place, which may be either in term or vacation, and shall prescribe and publish rules to govern such examinations, and may appoint a commission composed of not less than three persons learned in the law to assist in or conduct any such examination or examinations. But no person shall be admitted to bar unless such person shall have regularly and attentively studied law in the office of a practicing attorney for the period of two years, and shall pass a satisfactory examination upon the principles of the common law, or as a regular graduate of the College of Law of the University of Nebraska, and is twenty-one years of age, and it is shown to the court that such person sustains a good moral character.

1895 Neb. Laws 72.

64. The supreme court could delegate some of this task to a commission.

Independent of the issue of whether the judiciary's authority to admit attorneys is inherent or delegated, there is the issue of whether the Nebraska Supreme Court, rather than the district courts, has the jurisdiction to exercise this authority.

The Nebraska Supreme Court was, and remains, a court of limited jurisdiction. *See* note 14 *supra*. Does it have jurisdiction to admit, or disbar, attorneys? Even if the power is inherent in the judiciary, is the supreme court the appropriate court? Even if the ultimate authority rests in the legislature, can it delegate that authority to the supreme court, rather than to the district courts?

Two answers to these questions are popular. First, it has been argued that the power to admit and to disbar is inherent in the judiciary, but since these acts are investigatory, rather than adjudicatory, no particular jurisdiction is needed for a court to exercise the power. In *In re* Richards, 333 Mo. 907, 63 S.W. 2d 672, (1933) the court said:

> Since the power as to judicial matters naturally belongs to the judicial department and is not expressly lodged elsewhere in the Con-

in *In re Admission*.[65] The court's principal holding was that only the supreme court, and not the district courts, could admit attorneys to law practice. The court explained: "The plain intention of the legislative power, and the necessary effect of [the consolidation act], was to vest the power to admit persons to practice as attorneys and counsellors of the courts of this state, solely in the supreme court."[66] The court's reasoning was functional; the legislature could legislate to promote its view of the public good; the court's job was to interpret the statue. The court never mentioned its inherent power, and its deference to legislative authority indicates that it did not believe that it had ultimate authority to contest the legislation.

As early as 1857, the legislature had specified that attorneys could be disbarred.[67] Since this legislation did not provide for a particular "disbarring" court, the inference must be that each

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stitution, it remains for us to determine whether it is excluded or restricted by any constitutional provision. Counsel for respondent say that it is excluded as to the Supreme Court by the provisions of Sections 2 and 3 of Article VI which allot "appellate jurisdiction only" to that court together with "general superintending control over all inferior courts" and "power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same," . . . . The contention apparently grows out of the thought that disbarment is an adversary proceeding between parties which must fall within or without the allotted jurisdiction of cases. This is an erroneous conception. Disbarment is not an adversary proceeding in that sense.

Id. at 915-16, 63 S.W. 2d at 675-76. Second, it is conceded that even if the authority is ultimately legislative, it can still be delegated to the court because the function is quasi-administrative, and therefore the court needs no jurisdiction. In Bell v. Templin, 26 Neb. 249, 41 N.W. 1093 (1889) the legislature was permitted to delegate the authority to hear (investigate) certain election contests.

Perhaps the most extreme view was expressed in State v. Cannon, 196 Wis. 534, 221 N.W. 603 (1928) in which the court said it had this power regardless of what any statute, or even the state constitution provided. It said: "It is not a power derived from the constitution or the statutes of this state. It is a power which is inherent in this court. It is a power that inheres because attorneys at law are officers of the court." *Id.* at 539, 221 N.W. at 604.

To the extent these theories depend on the act of admission and disbarment being non-adjudicatory, it is possible that they are no longer viable. Recent developments in constitutional law have insisted that bar applicants and attorneys are entitled to a number of procedural safeguards as if the acts of admission and disbarment were adjudicatory. *See In re* Ruffalo, 390 U.S. 544 (1968).

65. 61 Neb. 58, 84 N.W. 611 (1900).

66. *Id.* at 59, 81 N.W. at 612 (1900). The court is focusing on the issue of its power vis-á-vis the district courts, not the legislature.

67. An attorney and counselor who is guilty of deceit or collusion, and consents thereto, with intent to deceive a court, or judge, or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages, to be recovered in a civil action.

1857 Neb. Laws 54.

court could disbar an attorney from practice before it, or, at most, the court that had the authority to admit attorneys to practice in all the state courts could disbar them from practice in all these courts.[68]

In essence, this statute remains the same today, although the provision with respect to treble damages was deleted after it was found unconstitutional in Abel v. Conover, 170 Neb. 926, 104 N.W. 2d 684 (1960); 1973 Neb. Laws 128.

68. Almost all courts have accepted the position that the court which has the power to admit impliedly has the power to disbar. *See, Ex Parte* Wall, 107 U.S. 265 (1882); Steele, *Cleaning Up the Legal Profession: The Power to Discipline— The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413, 415-16 (1979).

This was the probable understanding in Nebraska. However, it is arguable that the Nebraska Supreme Court believed it had the power to disbar attorneys generally as early as 1886, before it had the general power to admit. In State v. Burr, 19 Neb. 593, 28 N.W. 261 (1886), Burr, a Nebraska attorney, had practiced deceit against a U.S. Commissioner. The court said that he could be disbarred. The court said:

> The next and last question presented is as to the jurisdiction of the court to take cognizance of the professional conduct of one of its officers. Under the facts and circumstances of this case it seems that jurisdiction cannot be successfully questioned. While it is true that any attorney is accountable directly to the court whose dignity he has insulted or whose process he has resisted, yet we think it equally true if a deceit or other wrong is practiced by an attorney in his character as such, although not in a proceeding or suit pending in the court, yet he may be removed or suspended by any court of which he was a member.

Id. at 607-608, 28 N.W. at 268. The court said the "legal effect [of the suspension] will be to deprive him of the power to practice as an attorney in any other court of record of this state . . . ." *Id.* at 608-609, 28 N.W. at 269. The court is unclear as to why this should be. Perhaps it did not mean "legal" effect, but rather "practical" effect. It perhaps believed that the various district courts in the state would follow its lead and disbar Burr. On the other hand, it might have believed that it had the inherent power to deny any attorney the right to practice in any court in the state. However this is unlikely.

The court does offer some explanation. It writes: "In *The People v. Goodrich*, 79 Ill. 148, it was held that the supreme court having power by express statute to grant a license to practice law, has an inherent right to see that the license is not abused or perverted to a use not contemplated by the grant." *Id.*

But, that case does not support the conclusion that the Nebraska Supreme Court could bar attorneys from practice before all courts in the state. In *Goodrich*, the Illinois Supreme Court disbarred an attorney for activities which were not deceit and collusion against it. But it only disbarred Goodrich from practice *before it*. The Illinois court concluded: "His name will be stricken from the role of attorneys of *this* court." 79 Ill. 148, 154 (1875) (emphasis added). Of course, in Illinois this might have had the legal effect of disbarring Goodrich from all courts, but if so, it was because the legislature had made the Illinois Supreme Court the appropriate agency for admission to all the courts of that state. ILL. REV. STAT. ch. 13, §§ 5-6 (1874).

This was very different than the situation in Nebraska. In Nebraska the supreme court was not the principal agency to admit attorneys. Thus, *Burr*

In the early twentieth century, the Nebraska Supreme Court addressed the issue of the source of its authority to disbar attorneys from practice in all the state courts. In *In re Newby*,[69] the court suggested that the legislature had delegated this authority to it. The court said that since it "has the sole power of admission to the bar, [it] therefore has sole power to annul such admission when sufficient cause appears."[70] The supreme court, rather than the district courts, had the authority to disbar because the legislature had authorized it to admit attorneys to practice generally.[71]

The court also deferred to the legislature concerning certain procedural problems related to disbarment, such as the proper handling of costs in disbarment or suspension proceedings. If the court believed that it had "inherent" authority over disbarment proceedings, it might well have assessed costs against unreliable informers or in favor of the attorney general. However, the distribution of costs in disbarment proceedings was a question of public policy, and was therefore appropriately left to the legislature. In *Morton v. Watkins*,[72] the district court had awarded costs to the defendant attorney against the informers. The supreme court reversed, noting that costs could only be allocated by statute.[73] A few years later, in *State v. Fisher*,[74] the court repeated this position and disallowed costs to the attorney general. The legislature responded in 1911 by authorizing the court to tax costs for the attorney general or against informers in certain situations.[75]

The supreme court's attitude to the legislative determination of

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perhaps stated the legal effect of its opinion more broadly than was appropriate. Regardless, it displayed the logic which would govern the court's thoughts: that the court which could admit generally would have the power to disbar generally.

69. 76 Neb. 482, 107 N.W. 850 (1906).

70. *Id.* at 490, 107 N.W. at 853. *See also* Dysart v. Yeiser, 110 Neb. 65, 192 N.W. 953 (1923), *aff'd*, 267 U.S. 540 (1925), in which the Nebraska Supreme Court held that the district courts could only disbar attorneys from practice in their districts.

71. The court believed that its power to disbar could be implied from its power to admit. Thus, the supreme court jurisdictional issue with respect to disbarment parallels the issues with respect to admission.

72. 60 Neb. 672, 84 N.W. 91 (1900).

73. *Id.* at 674, 84 N.W. at 91.

74. 82 Neb. 361, 117 N.W. 882 (1908).

75. The law read:

> In all proceedings instituted for the suspension or disbarment of attorneys at law, and in all contempt proceedings, the court costs shall be taxed to the person suspended or disbarred or found guilty of contempt. When brought by the attorney general in the supreme court, and the charges are not sustained, the costs shall be paid by the state. When commenced on motion of the court or by a member of the bar, or any other person, and the charges are not sustained, the costs shall be paid by the county in which the same is begun unless

admission standards was also deferential and functional, although admittedly more ambiguous. *In re Admission*[76] is again the leading case. The court said:

> The object of the statute was evidently to secure a higher standard of legal attainments, and a full knowledge of the moral character of those who seek to exercise the powers of a great profession. With that object the court is, of course, in full sympathy; and it can be attained only by placing on its provisions a reasonably strict construction.[77]

Most probably this is an expression of the court's sympathy with the spirit of the statute, a spirit which guided its interpretation. Throughout its opinion, it referred to the statutory language. For example, the court said that the statute provided that a person had to be twenty-one to take the exams.

> [For a younger persons to take the exam] is not the spirit and intent of the statute. The age of majority, with the attendant right of controlling one's own actions free of the claim of the parent or guardian, are necessary to admission to the bar of this court; and it is contemplated that the report shall follow on the examination, and show that at that time the applicant had all the qualifications prescribed by the act of the legislature.[78]

Regarding the statutory requirement that the apprenticeship work be done with a Nebraska attorney, the court wrote:

> But such was doubtless the intention of the legislative power. The reasons for such a construction seem plain.[79]

Finally, with respect to the statutory rule that only University of Nebraska Law graduates were exempt from the bar examination the court commented:

> The provisions of the statute are plain as to the terms on which examination can be had, and study, otherwise than therein provided, can not avail the applicant.[80]

The court's language demonstrates its willingness to accept legislative standards for bar admission. The court even accepted less desirable legislative standards than it might have wanted, apparently because its desired standards were not strictly necessary to assure the proper functioning of the judicial process. As *In re Admission* indicates, the court apparently believed that law school graduates were more qualified to practice than those educated in more traditional ways. Nevertheless, the court accepted a statute which provided that an attorney could get his legal education in

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> the court shall find that the informer acted in bad faith in making the charge, in which case the cost shall be taxed to said informer."
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> 1911 Neb. Laws 547. *See also* Note 16 *supra*.

76. 61 Neb. 58, 84 N.W. 611 (1900).
77. *Id.* at 61, 84 N.W. at 612.
78. *Id.* at 60, 84 N.W. at 612.
79. *Id.* at 61, 84 N.W. at 612.
80. *Id.* at 60, 84 N.W. at 612.

alternative ways.[81]

The court's approach to standards of conduct (*i.e.*, grounds for dismissal) has caused confusion.[82] This is because the legislature had defined the duties of attorneys so generally that in any given case what the judiciary did might be interpreted either as applying the legislative standard or as exercising its own authority.[83] *In re Dunn*[84] illustrates the dilemma. The court, in disbarring Dunn, concluded that attorneys have an "obligation resting upon them, both by the statute and by the ethics of their calling, to 'maintain the respect due to the courts of justice and to judicial officers' and to 'abstain from all offensive practices . . . .' "[85] Arguably, but not certainly, the court was merely applying the legislative standard.

The court's attitude towards its constructive criminal contempt authority was equally functional. Although the court claimed ultimate authority with respect to some remedial aspects of the contempt power, it never extended the parameters of its authority to cover laypersons' activities which were unrelated to the judicial process.[86]

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81. For a number of years the court admitted applicants who had not been to law school. *See* 1891 NEB. CONS. STAT. 130; Kalish, *supra* note 46, at 602-16. In 1893 the law was amended to allow graduation of the Nebraska law school to be admitted without taking the bar examination. 1893 Neb. Laws 63.

82. Although the "disbarment" statute specified deceit and collusion as clear grounds for disbarment, it was widely accepted that an attorney could be dismissed from practice for failing to meet his professional duties. In State v. Burr, 19 Neb. 593, 28 N.W. 261 (1886) the supreme court disbarred an attorney for deceit directed to another court.

83. *See* text accompanying note 57 *supra*.

84. 85 Neb. 606, 124 N.W. 120 (1909).

85. *Id.* at 632, 124 N.W. 130. The court disbarred Dunn pursuant to a contempt citation. In discussing its power to afford this remedy in a contempt proceeding, the court said:

> It is also to be observed that there is no statutory provision in this state conferring, limiting, or controlling the powers of the courts of the state in the matter of the suspension or disbarment of attorneys, but that that is left to the inherent powers of the courts unaffected by any legislative sanction or limitation, except [the disbarment section], which was evidently not intended to limit those inherent powers.

Id. at 614, 124 N.W. at 124.

The most likely meaning of "inherent powers" is that the court had inherent authority to expand contempt remedies given it by the legislature. In other words, this is not a case in which the court suggests that it has inherent power to change the substantive conduct code. The court's reliance on the broad legislative language suggests that it was deferential to legislative standards.

86. The cases in which the court claimed contempt powers beyond the statute were not cases in which it extended the parameters of constructive criminal contempt, but were instead cases in which a new remedy was applied to standard contempt circumstances. For example, in Nebraska Children's Home

In *State v. Burr*,[87] the attorney general presented an original information against Burr in the Nebraska Supreme Court, asserting that Burr, an attorney, had knowingly deceived a United States Commissioner in order to convince him that he could release a certain prisoner while the case was pending in the United States Supreme Court. The Nebraska Supreme Court disbarred Burr. Judge Reese concluded that the action was one for disbarment, not contempt, for "[Burr] is in no sense within the jurisdiction of the court so far as the infliction of any fine or imprisonment is concerned."[88] The supreme court had no "jurisdiction" over Burr because its constructive contempt authority did not cover Burr's activities. Not only was Burr's activity out of the court's presence, but it was also unrelated to any judicial proceedings in the Nebraska Supreme Court.[89]

The supreme court's acceptance of the traditional boundaries of

Soc'y v. State, 57 Neb. 765, 78 N.W. 267 (1899) it was argued that a judge "in vacation" possesses only such powers as are expressly granted, and since the power of contempt is not expressly granted, the judge does not have it. In finding that the judge did have the power of contempt, the court said: "We conceive that the principles governing the question are, after all, simple and not difficult of application. Contempts are punished by that tribunal, and that one alone, whose order is violated or whose proceedings are interrupted." *Id.* at 772, 78 N.W. at 270. The actual contempt, the defendant's failure to adhere to a direct judicial order, was well within the traditional constructive contempt parameters.

In *In re* Dunn, 85 Neb. 606, 124 N.W. 120 (1909) the court held an attorney in criminal contempt, but instead of fining or punishing him, as the statute provided, the court disbarred him. The court stated that the contempt statutes "are but declarative of the common law, as far as the provisions go, but do not circumscribe the powers of the courts." *Id.* at 614, 124 N.W. at 123. However, all the court did was add a penalty to the legislative list; it did not extend the scope of its authority.

See also State v. Frontier Airlines, 174 Neb. 172, 116 N.W. 2d 281 (1962). In Kreigel v. Bartling, 23 Neb. 848, 37 N.W. 668 (1888) the court wrote: "The power to punish for contempt is incident to every judicial tribune, derived from its very constitution, without any expressed aid." However, in *Kreigel* this power was only used to compel a party to comply with an explicit court order. *Id.* at 852, 37 N.W. at 670.

87. 19 Neb. 593, 28 N.W.261 (1886).

88. *Id.* at 607, 28 N.W. at 268.

89. The court might have believed that the only way properly to initiate a contempt proceeding was by attachment, and order to show cause. Although it cited no cases for this position, four years earlier, in Gandy v. State, 13 Neb. 445, 14 N.W. 143 (1882) the court stated that a proceeding for constructive criminal contempt must be commenced by information, and then "an attachment may then be issued, or order to show cause." *Id.* at 451, 14 N.W. at 146. The court used the permissive word "may," but this mode of procedure became standard practice.

The Court later said: "While this language was largely *obiter*, it was used evidently for the purpose of removing uncertainty and pointing out the regular and orderly procedure. The case was decided in 1882, and has undoubt-

its constructive contempt authority is also manifest in *State v. Bee Publishing Co.*[90] In that case, the attorney general brought an original action for constructive criminal contempt against a newspaper for the publication of certain articles. The court asserted that Nebraska legislation was "merely declaratory of the law as it existed for hundreds of years."[91] The court held that even though the publication was out of the presence of the court, it was about a pending case, and therefore affected the judicial process. Bee Publishing was properly held in constructive criminal contempt only because its out-of-court statements related to a judicial proceeding. *Bee* thus held that the statute accurately reflected a narrow authority with respect to constructive criminal contempt power.

Until 1936, the concept of judicial power did not necessarily imply that the judiciary had broad authority to regulate the legal profession and the practice of law. Nebraska jurisprudence, as reflected in legislation and supreme court cases, indicates that the Nebraska understanding was that the judicial authority was narrow. The courts were only to have the power to admit, to disbar, and to hold persons in criminal contempt for contemptuous acts related to the judical process.[92] The legislature certainly had the authority to set substantive standards of admission, and probably the authority to set substantive standards of conduct. The court's proper stance toward legislation was to presume it constitutional, that is, to be deferential. Although the case did not arise, the court probably would not have struck down legislation affecting the legal profession and the practice of law unless it were strictly necessary to assure the proper functioning of the judicial process.[93]

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edly been accepted as a guide in many cases." Nebraska's Children's Home Soc'y v. State, 57 Neb. 765, 778, 78 N.W. 267, 272 (1899).

90. 60 Neb. 282, 83 N.W. 204 (1900).

91. *Id.* at 295, 83 N.W. at 205.

92. *See also* State v. Lovell, 117 Neb. 710, 718, 222 N.W. 625 (1929); Kropp v. State, 124 Neb. 363, 246 N.W. 718 (1933) in which the court stated, "The [contempt] statute is a legislative expression of the common-law power." 124 Neb. at 365, 246 N.W. at 719.

93. If the Nebraska Supreme Court had expressed its attitude with respect to contempt in 1915, it probably would have used the language of Murphy v. Townley, 67 N.D. 560, 274 N.W. 857 (1937):

> The inherent power of the court to punish for contempt is exercised to prevent the obstruction of the course of justice, to prevent prejudice to the trial of any action or proceeding then pending in court. The court is created for the administration of justice through matters coming before it, and anything which interferes with or obstructs the work of the court is within the inherent power of the court to punish. But this power is not to be extended by the court beyond this field. It is often difficult to place the dividing line. The court would be derelict in its duty and false to the defense of the judicial power vested in it by the Constitution if it did not exercise this inherent power on all proper occasions. On the other hand, the court must

II. THE *BARLOW, IN RE INTEGRATION* AND *TURNER* DECISIONS

In 1936 and 1937, Nebraska jurisprudence with respect to the supreme court's ultimate authority over the legal profession was radically altered. The court asserted its exclusive authority to define and to police the proper boundaries of the practice of law by the use of its criminal contempt powers.[94] It subjected all attorneys to its close control, compelling them to be members of the Nebraska State Bar Association, taxing them for a variety of activities, and causing this money to be spent without legislative approval.[95] It established substantive rules of admission and conduct.[96] The court turned its back on functional jurisprudence; it abandoned its traditional deferential role, and instead it regulated in order to advance its view of the public good. The court claimed its authority was natural and inherent.

In *Barlow*, the supreme court asserted that it had the ultimate authority, in original proceedings, to hold a lay county judge in criminal contempt for engaging in the practice of law.[97] Barlow, purporting to be an attorney, gave legal advice and drafted certain

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be careful to see that power so lodged in the court is not extended unduly. The inherent power to punish for contempt does not extend beyond those matters that clearly tend to the obstruction of the course of justice.

Id. at 568-69, 274 N.W. at 861.

94. State v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936).

95. *In re* Integration of the Bar, 133 Neb. 283, 275 N.W. 265 (1937).

96. *Id.* The court adopted the American Bar Association's Canons of Ethics. The court said that it adopted these canons to advance a view of the public good, not merely to assure the proper functioning of the judicial process. It acted, it said, pursuant to its inherent authority. However, since there was a broad legislative standard of attorney conduct, the adoption of these canons is not necessarily inconsistent with the functional approach. The court could have been implementing broad legislation. *See* NEB. REV. STAT. §§ 7-103 to -104 (Cum. Supp. 1977). This explains such cases as State v. Scoville, 123 Neb. 457, 243 N.W. 269 (1932), and State v. Goldman, 127 Neb. 338, 258 N.W. 639 (1934) in which the court disbarred attorneys for activities unrelated to the judicial process. The court acted in order to advance a view of the public good. In both cases, ultimate authority was premised on the broad statement of legislatively defined duty. In *Goldman*, for example, the American Bar Association's Canon 28 was found to be descriptive of the legislative duty to avoid all offensive practices. 127 Neb. 338, 258 N.W. 639 (1934).

See also State v. Priest, 118 Neb. 47, 223 N.W. 635 (1929); State v. Ireland, 125 Neb. 570, 251 N.W. 106 (1933). The court consistently has held that in holding a license, attorneys impliedly agree to behave according to appropriate standards. 12 NEB. L. BULL. 150, 151 (1933).

97. The fact that it was a lay county judge did not influence the opinion. One year later, in State v. Kirk, 133 Neb. 625, 276 N.W. 380 (1937), the *Barlow* principle was applied to a lay person who prepared pleadings and conducted cases in a justice court. In 1940, in State v. Hinckle, 137 Neb. 735, 291 N.W. 68

legal documents.[98] Barlow's acts were not in violation of any direct court order, were not in the presence of the court and were unrelated to the judicial process. Traditionally, no court could have held him in criminal contempt.

The court, however, asserted that its power was inherent. Its reasoning was subtle, for it required the extension of the law in two situations, both of which might have been logical alone, but when joined were neither logical nor appropriate.[99]

First, the Court suggested that it had the exclusive constitutional authority to admit attorneys to the practice of law. Why the court believed that it had this authority is unclear. It only said that it was vested with this exclusive power. It never referred to the 1895 consolidation statute. Instead, it seemed to rely on dictum in *Newby* (which relied on *In re Admission*) which stated: "This court alone can pass upon the qualifications of applicants for admission to the bar . . . ."[100] But as has been noted, in *Newby* and in *In re Admission*, the court was examining the scope of its delegated authority vis-a-vis the district courts. The *Barlow* court thus probably converted delegated legislative authority to admit attorneys to practice into ultimate constitutional authority, that is, inherent authority, to do so.

Regardless, there was no doubt that in 1936 the supreme court had at least the delegated authority to admit persons to the prac-

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(1940), *Barlow* was again applied to a lay person who engaged in "ambulance-chasing."

The district courts retained their own contempt powers. In Cornett v. State, 155 Neb. 766, 53 N.W. 247 (1952) the court noted that the district courts still had the authority to hold persons in contempt for being "a hinderance to the administration of justice in proceedings . . . ." before them. *Id.* at 770.

98. Among other activities, Barlow gave advice and counsel concerning the execution and delivery of a promissory note and chattel mortgage.

99. In 1920, the Nebraska Constitution was amended to permit the supreme court to "promulgate rules of practice and procedures. . . not in conflict with laws governing such matters." NEB. CONST. art. V, § 25. The section was introduced by the Committee on the Judiciary, and adopted without debate. 1 JOURNAL OF THE NEBRASKA CONSTITUTIONAL CONVENTION 676-81 (convened 1919). In 1970 the Nebraska Constitutional Revision Commission suggested that the phrase "not in conflict with laws governing such matters" be deleted. REVISION REPORT, *supra* note 14, at 64-65. This change was never made. The *Barlow* court asserted that these were rules of practice and procedures, and rules affecting the legal profession and the practice of law were not of this category. Therefore the express limitation that such rules not be in conflict with legislation was irrelevant. But the Nebraska Bar Association (and the court) apparently believed that rules of procedure relating to disciplinary matters were covered by this section. *See, Proceedings of the Twenty-Ninth Annual Meeting of the Nebraska State Bar Association, reprinted in* 8 NEB. L. BULL. 7, 18 (1929).

100. 131 Neb. 294, 299, 268 N.W. at 97 (1936). *See* text accompanying notes 65-71 *supra*.

tice of law. The court inferred from this that its authority to admit would be ineffectual if it did not have a concomitant contempt authority with respect to those who practiced law without a license.[101] The court's failure to grant a person a license became, by inference, an order not to practice law, and therefore a violation of

101. The Nebraska Supreme Court relied on several cases from other jurisdictions. *In re* Morse, 98 Vt. 85, 126 A. 550 (1924) held a layperson in criminal contempt for interfering with the judicial process of another court because (1) the court had been delegated, by the legislature, the authority to admit attorneys to practice and (2) it was necessary to protect the judicial process. The court said:

> That the express legislative grant to this court of exclusive and full authority to determine who shall practice as attorneys before the courts of this State carries with it the implied power to do whatever may be reasonably necessary to make such grant effective, even to punishment for contempt those pretending to such office, cannot be doubted. Otherwise the act of Legislature is nugatory.

Id. at 95, 126 A. 553.

In People v. Peoples Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931) the court extended this position to matters unrelated to the judicial process and it did so to protect the public. It wrote:

> It is just as essential to the administration of justice and the proper protection of society that unlicensed individuals should not be permitted to prey upon the public in that sphere of the practice of law as it is with respect to proceedings in the courts. It is no less a usurpation of the function and privilege of an attorney and an affront to the court having sole power to license attorneys, for one not licensed as such to perform the services of an attorney outside of court proceedings.

Id. at 473, 176 N.E. at 908.

Moreover, even though the supreme court was of limited jurisdiction, it had jurisdiction here. *See* note 14 *supra.*

Finally, in Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 55 R.I. 122, 179 A. 139 (1935), the court warned against too liberal a use of these powers. It said:

> Nevertheless, we do not encourage it. In trivial or unimportant instances of illegal practice of the law, it should not be used. Where other remedies are available and efficient to right the wrong complained of, they should first be invoked, unless there is, as in the instant case, an evident need for summary action to protect the public and the jurisdiction of the court. This inherent power of the judiciary to punish for contempt is a necessary but also a dangerous power, and is therefore to be used with great caution. In this instance, the peculiar circumstances seem to call it forth to vindicate the jurisdiction and authority of this court over a matter that is intimately related to the administration of justice and that deeply affects the public welfare. For these reasons it seems to us that this proceeding is a warranted exercise of the power. If these respondents are engaged in the practice of law, a great wrong is being done to the public, and the ancient and exclusive rights and privileges of the bar are being invaded in contempt of the authority of this court, which alone has the power to license attorneys and counselors at law in the courts of this state, and to admit them to practice law.

Id. at 129, 179 A. at 142.

The Nebraska Supreme Court ignored this warning.

this "order" was grounds for contempt. This was at least logical, and it might have been appropriate if the court had been trying to do what was strictly necessary in order to assure the proper functioning of the judicial process. The court did say that it possessed "inherent power to protect itself and its officers from any unlawful interference with its function as a court."[102] The difficulty with this line of explanation, however, is that Barlow's activities did not relate to the judicial process.

Second, the court expanded its definition of what only lawyers could do. Traditionally, lawyers, who admittedly served a variety of societal functions, had a monopoly only on law work related to the judicial process. The *Barlow* Court expanded this monopoly. The court asserted that the practice of law properly included a wide range of activities, not all of them associated with the judicial process.[103]

This extension was logical and it also might have been appropriate in some cases. For example, the legislature had, as early as 1905, made the unauthorized practice of law a crime, and the court would have been acting appropriately if it had interpreted the statute, pursuant to certain canons of statutory construction, in a way which would have advanced a view of the public good, such as, a view that only lawyers, because of certain skills which they had, should draft conveyancing documents.[104] The difficulty with this explanation, however, is that *Barlow* did not purport to interpret a statute. The court, therefore, had no legitimate basis for expanding the scope of the practice of law in order to advance a view of the public good.

In joining the "inherent" authority to hold in contempt those who practiced law without a license with the broad interpretation of "practice of law," the supreme court changed the traditional balance of authority. The court asserted that it could preclude, by the use of its contempt powers, anyone from doing anything which it deemed to be the practice of law. There was no need to justify its power by relating its use to the proper functioning of the judicial

102. 131 Neb. at 302, 268 N.W. at 99 (1936).

103. The court said:

> An all embracing definition of the term, 'practice of law', would involve great difficulty. For the purpose of this proceeding, it is sufficient to say that it includes not only the trial of causes in court and the preparation of pleadings to be filed in court, but also includes drawing and advising as to the legal effect of petitions for the probate of wills, the drawing of wills, deeds, mortgages, and other instruments of like character, where a legal knowledge is required, and where counsel and advice are given with respect to the validity and legal effect of such instruments.

131 Neb. at 296, 268 N.W. at 96.

104. *See* note 48 *supra*.

process. It was sufficient to argue that the result advanced the court's view of the public good. The *Barlow* court stated that its conclusion was:

> in the interest of the public at large to prevent it from being exploited and injured by one unlawfully assuming to act as an officer of the court. There are many instances where persons' rights have been jeopardized and sacrificed because of following the counsel and advice of unlicensed persons, giving or attempting to give legal advice.[105]

The court's underlying arrogance is further illustrated by noting that there were in fact other mechanisms for advancing the court's view of the public good. There were several routes in 1936 by which the public could have been protected from unlicensed practitioners. First, it was a crime to engage in the unauthorized practice of law. The normal method of criminal enforcement could have been used to protect the public.[106] Second, attorneys, with a property interest in their franchise, could have enjoined the unauthorized practice of law in the district courts.[107] Third, the attor-

105. 131 Neb. at 302, 268 N.W. at 99.

106. *See* 1905 Neb. Laws 58; NEB. REV. STAT. § 7-101 (Cum. Supp. 1977); *see also* note 48 *supra*. *See generally* Sanders, *Procedures for the Punishment or Suppression of Unauthorized Practice of Law*, 5 L. & CONTEMP. PROB. 135, 136-140 (1938).

107. In Depew v. Wichita Retail Credit Ass'n, 141 Kan. 481, 42 P.2d 214 (1935), the court expressed this view:

> So whether or not the interest of the plaintiffs in their professional capacities is in the nature of a property right, they have . . . a special privilege, franchise and duty as officers of the court to protect the legal profession, the courts, and the administration of justice generally. And it would seem to be well within such special franchise and privilege to protect, not only themselves and others of their profession, but the courts of which they are officers, against the illegal and unprofessional conduct of others.
>
> . . . .
>
> Licensed privileges of attorneys and duties as court officers are so closely related and interwoven as to justify their maintaining an action to sustain the honor of the court and restrain the unlawful practice of law.

Id. at 485-87, 42 P.2d at 217-18.

In Fitchette v. Taylor, 191 Minn. 582, 254 N.W. 910 (1934) the Minnesota Supreme Court ignored the need for damage to a property interest.

> But in this case we do not perceive that we are in a new or strange field of injunctional relief. Attorneys, as officers of court, exercise a privilege peculiar to themselves and not enjoyed by those outside of the profession. Hence, it is in a very real sense a franchise and property right. . . . That is enough to show that these plaintiffs, suing not for themselves alone but for the benefit of all the affected members of their profession, are entitled to injunction to prevent the unlawful intrusion of defendant Taylor into their office and professional field. In such a case, the extent of the damage to the property rights is unimportant. The existence or threat of real damage is enough to warrant relief.

See also Unger v. Landlords' Mgm't Corp., 114 N.J. Eq. 68, 168 A 229 (1933);

ney general could have enjoined the unauthorized practice of law as a public nuisance in either the district courts or the supreme court.[108] The difficulty, from the court's perspective, with these other methods is that their use, or failure to be used, was either a policy judgment of the prosecutor or subject to ultimate legislative authority, such as a change in public nuisance law. The only way the court could be sure of advancing its view of the public good was to assume ultimate authority itself.

Four years later, in *State v. Childe*,[109] the court carried its reasoning in *Barlow* to its logical extreme. Childe was a lay practitioner who practiced before the State Railway Commission, a constitutionally established tribunal with broad powers to establish its own rules and procedures.[110] It had permitted Childe to practice before it.[111] The court held him in constructive criminal contempt for engaging in the unauthorized practice of law. The court demonstrated just how far from a functional analysis it had come when it wrote:

Dworken v. Apartment House Owners Ass'n, 38 Ohio App. 265, 176 N.E. 577 (1931).

108. This is true in spite of the fact that the relevant jurisdictional grant to the supreme court was originally designed for cases in which the state was a defendant. *See* note 14 *supra*. In State v. Chicago Burlington & Quincy R.R., 88 Neb. 669, 130 N.W. 295 (1911) the supreme court held it had original jurisdiction, on the relation of the attorney general, to enjoin the railroad from violating a criminal statute relating to the use of alcoholic beverages. The court held (1) that the criminal statute was no bar to equitable relief, (2) that equity would protect values other than property, and (3) that the continuing activities of the railroad constituted a public nuisance. *See also* Sanders, *Procedures for the Punishment or Suppression of Unauthorized Practice of Law*, 5 L. & CONTEMP. PROB. 135, 163-164 (1938); Note, *Remedies Available to Combat the Unauthorized Practice of Law*, 62 COLUM. L. REV. 504, (1962).

109. 139 Neb. 91, 295 N.W. 381 (1941).

110. NEB. CONST. art. IV, § 20.

In 1919, the court had described the powers of this commission as follows: "The commission, as a co-ordinate department of the state, acts independently. . . . The commission is free to adopt its own rules and course of procedure, and to do everything necessary to inspire and bring about absolute respect for it and its judgments." Omaha & Council Bluffs Street Railway Co. v. Nebraska Railway Commission, 103 Neb. 695, 701-702, 173 N.W. 690, 693 (1919).

111. *See* Durisch, *Judicial Review of the Railway Commission in Nebraska*, 11 NEB. L. BULL. 365 (1933); Harding, *Practice and Procedure Before the Nebraska State Railway Commission*, 37 NEB. L. REV. 486 (1958); Overcash, *Practice and Procedure Before the Nebraska State Railway Commission*, 28 NEB. L. REV. 142 (1949); Comment, *New Rules of Practice and Procedure Before the Nebraska Railway Commission*, 40 NEB. L. REV. 129 (1960).

There is substantial debate over whether it is even desirable to have only lawyers practicing before administrative agencies. *See* V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, THE LAWYER IN MODERN SOCIETY 501-03 (2d ed. 1976).

> The sole power to define and regulate the practice of law is in the judicial branch . . . . Any legislative attempt to authorize the practices of law by one not duly licensed by the supreme court is absolutely void as an attempt to exercise judicial powers by the legislative branch of the government.[112]

Having asserted its authority to define and to monitor the boundaries of the practice of law, in 1937, in *In re Integration of the Bar*, the court asserted its authority to police and to regulate the legal profession itself.[113] The act of integration compelled all Nebraska lawyers to be members of the Nebraska State Bar Association;[114] it prescribed annual dues;[115] it designated the secretary-treasurer of the association to be custodian of the money, and to

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112. 139 Neb. at 96-97, 295 N.W. at 384 (1941).

In 1946, when *Childe* was finally tried, Judge Yeager vociferiously dissented:

> The Supreme Court is but a creature of the Constitution within the judicial department. Its jurisdiction is limited by that Constitution (Art. V, sec. 2) and neither within its limits nor within the limits of any legislative grant may there be found any semblance of power to police any class of people except they be members of the bar of the state or except they have some contact with the functioning of the court. To say that the power to police or discipline beyond the sphere of its own constitutional or statutory activity inheres in the Supreme Court is, in my opinion, an inexcusable, unwarranted, and unconstitutional arrogation.
>
> Police power is an attribute of sovereignty usually implemented by the Legislature. There has been no implementation the effect of which is to grant the Supreme Court power to police persons who assume to practice law without admission to the bar.
>
> I grant the right of this court to punish as for contempt those not admitted to the bar who attempt to practice law before the courts but beyond that I cannot go. Beyond that it is a matter of legislative and not of original judicial concern exactly as in the case of the practice of medicine, dentistry, or any other profession or occupation subject to regulation under sovereign police authority.

147 Neb. 527, 536-37, 23 N.W. 2d 720, 724 (1947) (Yeager, J., dissenting).

113. 133 Neb. 283, 275 N.W. 265 (1937).

114. This article will not discuss constitutional objections to the integrated bar analogous to 1st and 14th amendment arguments. *See* NEB. CONST. of 1920, art. I, §§ 5, 19, 3. *See also* Lathrop v. Donohue, 367 U.S. 820 (1961); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

Also, this paper does not focus on any purported violation of Nebraska's right to work constitutional provisions; not only were these not adopted until 1946, but they apply only to "labor organizations." The bar association is not a labor organization: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." NEB. CONST. of 1920, art. XV, § 14.

115. The court requires dues for association membership, and now a fee or assessment for operating a disciplinary counsel office and for maintaining the client security fund. REVISED RULES OF THE SUPREME COURT OF THE STATE OF NEBRASKA 65 (1977).

dispense it pursuant to directives of the bar's executive council.[116]

The articulated purposes of the integrated association were: "For the advancement of the administration of justice according to law, and for the advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among the members thereof, for the improvement of the service rendered the public by the Bench and Bar . . . ."[117]

The Nebraska Supreme Court was the first state court to integrate its bar by court rule.[118] Although not without some legal difficulty, several other state legislatures had determined either to integrate their respective state bars or to authorize their state supreme courts to integrate them.[119] In Nebraska, several bills to integrate the bar had been presented to the state legislature, but

116. *Rules Creating, Controlling and Regulating Nebraska State Bar Association* art. XV, *in* NEBRASKA STATE BAR ASS'N, LAWYER'S DESK BOOK (1971) [hereinafter cited as *Rules*].

Since the court has ultimate authority over the Nebraska State Bar Association, this paper will not focus on the internal operations and procedures of the bar association, nor on any particular arrangement between the court and the association. The association derives all its power and authority from the court.

117. 133 Neb. at 291, 275 N.W. at 269 (1937). In 1971 these purposes were expanded:

> The purposes of this Association are to improve the administration of justice; to foster and maintain high standards of conduct, integrity, confidence and public service on the part of those engaged in the practice of law; to safeguard and promote the proper professional interests of the members of the Bar; to provide improvements in the education and qualifications for admission to the Bar, and for the study of the Science of Jurisprudence and Law Reform, and the continuing legal education of the members of the Bar; to improve the relations of the Bar with the public; to carry on a continuing program of legal research; and to encourage cordial relations among the members of the Bar; all to the end that the public responsibilities of the legal profession may be more effectively discharged.

Rules, *supra* note 116, art. II, § 1.

118. Subsequently, other states integrated by rule. *In re* Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949); *In re* Unified Bar, 165 Mont. 1, 530 P.2d 765 (1975); *In re* Unification of New Hampshire Bar, 109 N.H. 260, 248 A.2d 709 (1968); *In re* Integration of State Bar, 185 Okla. 505, 95 P.2d 113 (1973); *In re* Rhode Island Bar Ass'n, 111 R.I. 936, 306 A.2d 199 (1973).

119. The two principal legal issues were (1) Did the legislature delegate too much "judicial power" to the Bar? The courts insisted that the act of disciplining must rest with the judiciary, but that if this act remained with the courts, other powers and duties could be assigned to the bar. *See, In re* Shattack, 208 Cal 6, 279 P.998 (1929); *In re* Edwards, 415 Idaho 676, 266 P. 665 (1928); *In re* Scott, 53 Nev. 24, 292 P. 291 (1931); *In re* Gibson, 35 N.M. 550, 4 P.2d 643 (1931); *In re* Royall, 33 N.M. 386, 268 P. 570 (1928); State Bar v. McGhee, 148 Okla. 219, 298 P.580 (1931); *In re* Barclay, 82 Utah 288, 24 P.2d 302 (1933); *In re* Bruen, 102 Wash. 472, 172 P. 1152 (1918). (2) Was the act of bar integration a prohibited private incorporation? *See* Jackson v. Gallet, 39 Idaho 383, 228 P. 1068 (1924); *In re* Edwards, 45 Idaho 676, 266 P. 665 (1928).

none had been adopted.[120] Thus, in 1937, the Nebraska Supreme Court acted without legislative authority, and, if one construes legislative inaction as a negative statement, in the face of legislative opposition.

The court could not rely on tradition to support its actions. There was no tradition of compelled membership in an association over which the court retained regulatory control. Historically, the closest example of such an association are the English Inns. But there, the courts merely accepted Inn membership as a showing of appropriate qualifications for law practice, and the judiciary had no exclusive regulatory powers over the Inns.[121] How, then, did the court justify its actions?

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120. For twenty years prior to *In re* Integration of the Bar, there had been agitation, both within the legal community and outside of it, for integrated bar associations. The "kick-off" speech for the American campaign was in Lincoln, Nebraska in 1914. Herbert Hailey delivered an address entitled "A Lawyer's Trust: An Agreement for a Self-Governing and Responsible Bar" to the Lancaster County Bar Association. D. MCKEAN, THE INTEGRATED BAR 34 (1968). The American Judicature Society promoted it, and generally lobbied for it. *Id.* at 36. The Nebraska Bar Association, a state-wide voluntary association, lobbied for it in Nebraska, and for over a decade it sought legislation establishing an integrated bar, or, at least legislation enabling the court to integrate the bar. They were consistently unsuccessful. In the early 1930's the bar shifted its lobbying focus to the Nebraska Supreme Court. Quinlan, An Historical View of the Integration of the Nebraska State Bar Association (on file with the Nebraska Law Review).

121. The English experience is not particularly relevant in this paper, for English Constitutional history and theory is so different. This was recognized in *In re* Day, 181 Ill. 73, 54 N.E. 646 (1899) the leading case holding that the judiciary has broad inherent authority in the development of substantive admission standards. It said:

> That history is very interesting, but is of little benefit in determining whether the power is one properly belonging to courts or to the legislature. The difference in the principles underlying the systems of government is such as to render a conclusion inapplicable even if it should be found that parliament had exercised such power.

Id. at 82-83, 54 N.E. at 848.

However, the relevant history does negate a tradition of compelled membership in a controlled bar association. English barristers were called to the bar by the benchers, or governors, of the respective inns of court, and the courts subsequently admitted inn members to law practice. The inns of court were independent societies, unique in England's governmental structure. The courts exercised no direct control over their admission standards or their internal operations. *See* King v. Benchers of Gray's Inn, 1 Doug. 353 (1780), *reprinted in* G. COSTIGAN, JR., CASES AND OTHER AUTHORITIES ON LEGAL ETHICS 43 (1917); Chroust, *The Beginning, Flourishing and Decline of the Inns of Court: The Consolidation of the English Legal Profession After* 1400, 10 Vand. L. Rev. 79 (1956); HOLDSWORTH, HISTORY OF ENGLISH LAW, ii, 508-509; PREST, THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS 21-71, (1973); Comment, *Admission to the Bar and Separation of Powers*, 7 UTAH L. REV. 82 (1961).

In addition to citing inapposite cases which merely held that the legislature could integrate the bar or that the judiciary could integrate the bar pursuant to an enabling statute,[122] the court justified its authority, in form at least, by referring to its belief that attorneys were "officers of the court" and that it was important to the "efficient administration of justice" that they be subject to this type of judicial control.[123] But this was a functional argument in form only.

The functional analysis would afford the court such power only if it were strictly necessary to assure the proper functioning of the judicial process. The court did not make such a finding. Instead, it relied on its belief that integration was merely desirable, not strictly necessary. This should be clear when it is recognized that the court was responding to a bar petition which argued that bar integration was a means, not the only means, to a certain end.

Moreover, the functional form is not consistent with what the court actually did. Bar membership was compelled for the advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among the mem-

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122. *See* note 119 *supra*. The Nebraska court placed principal reliance on the Kentucky experience, but that situation too was inapposite for the Kentucky Supreme Court had only integrated its bar after there had been enabling legislation. *See* Pirsig, *Integration of the Bar and Judicial Responsibility*, 32 MINN. L. REV. 1, 5-7 (1947).

The Kentucky Supreme Court, although its jurisdiction was limited to "appellate jurisdiction," believed it had the authority to integrate the bar. It noted, however, that it based this on the enabling legislation. In Commonwealth v. Harrington, 266 Ky. 41, 51, 98 S.W.2d 53 (1936), the court said:

> But it is not necessary for us at this time to take a position with reference [to whether the court has jurisdiction to integrate the bar without statutory authorization]—it being only sufficient to say that the court proceeded to act under the authority that the legislature attempted to confer upon it by the 1934 statute, and in doing so no constitutional principle was violated.

Id. at 51-52, 93 S.W. 2d at 58.

This supports the argument that jurisdiction to integrate is not needed because the legislature simply designated the court a quasi-administrative agency to regulate the bar. *See* note 64 *supra*.

123. The court said:

> The primary duty of courts is the proper and efficient administration of justice. Attorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of this state. It is their duty honestly and ably to aid the court in securing an efficient administration of justice. The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government.

133 Neb. at 289, 275 N.W. at 260.

bers . . . ."[124] Neither goal relates to the proper functioning of the judicial process. The original establishment of several standing committees is also unrelated to the purported end of a functioning judicial process. The Committee on American Citizenship was to promote loyal adherence to American ideals. The Committee on Cooperation with the American Law Institute was to cooperate in the development of certain restatements. The Committee on Unauthorized Practice of Law was to police professional encroachment. All these activities may have been desirable. The court obviously thought that they were. But they were not necessarily related to the proper functioning of the judicial process.

Finally, the court argued that integration would serve the public good. It was responding to a bar petition which argued that bar integration was a means of serving the public. The court responded to this petition by noting that the image of the bar had been tarnished, that this was undesirable for the bar and for the public, and that bar integration might well change this undesirable situation. In other words, this regulation was desirable to promote a view of the public good.[125]

The Court not only compelled membership in a regulated association in order to advance a view of the public good, but it also compelled payments from attorneys and provided for bar association expenditures without legislative approval. This amounted to the raising of revenue and the making of appropriations. These judicial acts were not strictly necessary to enhance the proper functioning of the judicial process, and they encroached on traditionally legislative functions.

One of the most important rights of Americans is to have their property or money protected from an unfair taking or a taking

124. 133 Neb. at 291, 275 N.W. at 269.

125. The court wrote:

> That the courts and lawyers have been subjected to public criticism is common knowledge. That a few unethical practitioners have degraded the public esteem of the bar as a whole is a fact well known to every lawyer. The denunciation of the bar by the public is based on the belief that the bar could purge itself if it would, but that it does not wish to do so. In the past, reliance has been placed in the bar associations of the state to accomplish effective corrective results. We have overlooked the fact that the bench and bar are so intimately related that the problems of one are the problems of the other. We have come to the conclusion that the bar, of itself, can do little to better the situation. But, with a cooperating bench and bar, it appears to us that a more effective and efficient regulation of the bar would be the result. Under the plan suggested by the petitioners, it can be accomplished without invoking any power that this court has not already exercised in the past and without the delegation of any of its judicial functions to any agency of the bar.

133 Neb. at 290, 275 N.W. at 268.

without representation. To secure this right, American constitutions frequently provide that a legislative body must determine the desirability of a money raising assessment, and that it do so fairly.[126] The Nebraska Constitution provides that necessary revenue shall be raised "by taxation in such manner as the legislature may direct," and that these taxes must be uniform.[127] Of course, all takings of money need not be for necessary revenue, and thus this taxation provision of the constitution will not always apply when money is demanded. For example, the supreme court has held that non-excessive regulatory fees, such as license fees, are not taxation, and therefore need not comply with the uniformity restrictions of the constitutional taxation clause.[128] But even in those non-taxation cases, the taking of money can only be assessed pursuant to the legislature's police power.[129] This has been the consistent rule in Nebraska.[130]

126. *See* U.S. CONST. art. I, §§ 7, 9; *id.* amend. V, XVI.

127. NEB. CONST. art. VIII, § 1.

128. Nutting, *Taxation In Nebraska*, 19 NEB. L. BULL. 7 (1940); 29 NEB. L. REV. 80 (1950).

129. Nash-Finch Co. v. Beel, 124 Neb. 835, 248 N.W. 374 (1933); Century Oil Co. v. Department of Agriculture, 112 Neb. 73, 198 N.W. 569 (1924); Century Oil Co. v. Department of Agriculture, 110 Neb. 100, 192 N.W. 958 (1923); State v. Standard Oil Co., 100 Neb. 826, 161 N.W. 537 (1917); Littlefield v. State, 42 Neb. 223, 60 N.W. 724 (1894).

This article will not discuss whether the bar fees are excessive. *See* Comment, *Compulsory Bar Dues in Montana: Two (And A Half) Challenges*, 39 MONT. L. REV. 269 (1978).

130. In Nash-Finch Co. v. Beel, the court said:

> The rule in Nebraska is that the legislature has a considerable latitude in fixing license fees by a regulatory statute enacted *in the exercise of police power* and courts will not declare such legislation void unless from its inherent character, or, by proofs adduced, it is shown to be unreasonable.

124 Neb. at 835, 840, 248 N.W. 374, 377 (1933) (emphasis added).

In part this is due to the fact that the court has long recognized an essential similarity between fees and taxes. For example, the Nebraska Constitution provided, in 1894, that "license money" raised at the local level shall be used for the "support of the common schools." *See* NEB. CONST. of 1875, art. VIII, § 5; NEB. CONST. of 1920, art. VII, § 5. In Littlefield v. State, 42 Neb. 223, 60 N.W. 724 (1894), the court rejected a certain milk producer's challenge to a city ordinance which assessed a licensed fee for regulatory purposes. The court concluded that the milk producer did not have standing. But the court acknowledged that both fees and taxes serve the purposes of the state. If the fees were used for purpose A rather than purpose B, tax revenue would have to make up the difference, the court noted. Therefore both are ultimately legislative determinations. *Id.* at 229, 60 N.W. at 725-26.

Additionally, this "license money" section is not relevant to the inquiry here because (1) the fees are not raised "under the general laws of the state" and (2) the provision only applies to funds raised at the local level. *Cf.* Wilcox v. Havekost, 144 Neb. 562, 13 N.W.2d 889 (1944) (constitution does not forbid hunting and fishing license fee).

In *In re Integration*, the court compelled attorneys to pay money as a condition of holding a license.[131] These funds were raised to promote the administration of justice on a state-wide basis. Since this serves exactly the same purpose as some taxes raised by the legislature, it is apropriate to deem these funds "necessary revenue of the state," and therefore taxes, and therefore subject to legislative command only.[132]

However, even if the money were a fee or an assessment, fees and assessments can only be authorized pursuant to the legislature's police power.[133] All Nebraska cases which distinguish taxes from fees have assumed this. Moreover, even in *Board of Regents v. Exon*, in which the court apparently held that the legislature had no control over the regents' use of certain student fees, the power to assess the fees had their source in explicit legislation.[134]

Since there has clearly been no explicit legislative grant to the court to charge bar dues, might not the court make a colorable claim, using appropriate canons of statutory constuction, that

131. Today, the court requires a fee for admission, for bar dues, for disciplinary counsel and for the client security fund. *Rules, supra* note 116 art. iii, § 4. *See* REVISED RULES OF THE SUPREME COURT OF THE STATE OF NEBRASKA, art. II, § 6 (1977).

132. Of course, the assessment of a fee, whatever it is called, is appropriate if the legislature authorizes it. *In re* Gibson, 35 N.M. 550, 4 P.2d 643 (1931); Kelley v. State Bar, 148 Okla. 282, 298 P. 623 (1931). It is appropriate if the legislature enabled the court to assess the fee. Carpenter v. State Bar, 211 Cal. 360 (1931).

However, without any legislation, the problem is more difficult. Most courts have upheld the fees, but not without vigorous dissent. In Florida, Justice Barns wrote:

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

In re State Bar Ass'n, 40 S. 2d 902, 909 (Fla. 1949).

In Arkansas, Justice McFaddin wrote: "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 attorney . . . ." *In re* Integration of the Bar, 222 Ark. 35, 44, 259 S.W.2d 144, 149 (1953) (McFaddin J., dissenting).

In Washington, Justice Rossellini wrote: "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." *In re* Washington State Bar Ass'n, 86 Wash. 624, 640, 548 P.2d 310, 320 (1978).

133. Assessments, too, are ultimately based in the police power. *See* Erickson v. Nine Mile Irrigation District, 109 Neb. 189, 190 N.W. 573 (1922); Board of Directors v. Collins, 46 Neb. 411, 64 N.W. 1086 (1895).

134. 199 Neb. 146, 256 N.W. 2d 330 (1977); *See* 1869 Neb. Laws 177; NEB. REV. STAT. § 85-121 (Reissue 1976).

there has been an implied delegation of such authority? The court might advance this type of argument to justify a fee for administering admission and disciplinary systems. The legislature has authorized the court to admit, and to discipline. In the first case, the legislation is explicit; in the second case, the court's power is implicit in the legislatively announced power to admit attorneys. The court could, using appropriate statutory interpretation techniques, find the power to charge a fee as necessary to implement the statute. This argument, however, would be of little use with respect to bar dues, for in Nebraska there is no legislative authorization, either by declaration or delegation, for judicially compelled association membership.[135]

The Nebraska Constitution also requires that each legislature make appropriations for the expense of government, and that no money shall be drawn from the treasury except in pursuance of a specific appropriation.[136] This safeguard maintains the power of the purse in the hands of the people.[137] Bar association funds, although commanded by the state (*i.e.*, the court), are not subject to the legislative appropriation requirement. Money is spent without the people having a direct say.[138] Is this constitutional?

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135. There is also no legislative authorization for a Nebraska client security fund. *But see, In re* Member of the Bar, 257 A.2d 382 (Del. Supr. 1969) which held the assessment of fees for a client security fund, without legislative authorization, permissible. The Court said:

> Finally, respondent argues that the assessment laid upon Delaware lawyers is unconstitutional because it is the levying of a tax which is a legislative and not a judicial function. The short answer to this contention is that the payment required is an assessment and not a tax. We have held that we have the power to order the creation of the Fund and, that being so, it necessarily follows that we have the power to direct the imposition of a reasonable assessment to accomplish the purpose.

Id. at 385.

See also, In re Supreme Court License Fees, 251 Ark. 800, 483 S.W.2d 174 (1972). In that case, however, there was an explicit constitutional provision permitting the Arkansas Supreme Court to regulate the legal profession.

136. NEB. CONST. art. III, §§ 22, 26. The major difference between this provision and earlier ones is that the earlier provisions had limitations on the duration of the appropriation. *See also* U.S. CONST. art. I, § 9.

137. In Rein v. Johnson, 149 Neb. 67, 30 N.W.2d 548 (1947), the court stated:

> The object and purpose of such a constitutional provision was to render all departments of the state government dependent upon the will of the people as expressed by their duly elected representatives, and to require such departments of government, except as otherwise provided in the Constitution, to return to that source at regular stated intervals for the necessary means of existence, because the people have learned and will continue to learn that the very preservation of their liberty depends largely upon control of the purse of their periodically elected representatives.

Id. at 77, 30 N.W.2d at 555.

138. Of course, under the current arrangement, money never goes to the treas-

Nebraska law clearly indicates that it is not. There must be a legislative appropriation unless the legislature had established a special fund, and then money can be drawn from this fund without particular appropriations only as long as the legislature wishes. In *State v. Hall*,[139] the statutory scheme provided for paying the expenses of the fire commissioner out of fees paid by fire insurance companies. The monies received were to be held in a "special fund" by the state treasurer. The court held that only taxpayers could complain about the payments from this fund. However, the court suggested, in dictum, that no specific appropriations were needed when there was a legislatively established special fund.[140] Thirty years later, in *Rein v. Johnson*,[141] the court made it clear that such a legislative determination of special fund status could not run beyond a legislature's later decision to reallocate the funds.[142]

The same reasoning applies to a constitutionally authorized agency, with independent authority, such as the University of Nebraska Board of Regents. As has been noted, the legislature had delegated to the regents the authority to raise fees. Could the regents spend this money without particular legislative appropriation? In *Board of Regents v. Exon*,[143] the court *apparently* answered that it could, but further analysis indicates that this was because appropriate enabling legislation existed.[144]

The court first said that the regents need no legislative appropriation with respect to money received from funds which were

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urer. But this is a technical distinction, for the purpose of the appropriations clause is to permit legislative control of state expenditures.

139. 99 Neb. 89, 155 N.W. 228 (1915).

140. *Id.* at 93, 94, 155 N.W.2d at 230.

141. 149 Neb. 67, 30 N.W.2d 548 (1977).

142. The court said:

> Plaintiff argued that the State Assistance Fund was a special fund created for a particular purpose and could not be legislatively diverted to other purposes. It is true that public revenue derived from taxation and lawfully allocated to a special fund such as the State Assistance Fund, or specifically appropriated thereto for its purposes, could not administratively or by legislative resolution, as distinguished from legislative law enacted by bill, be diverted or taken therefrom for other purposes. Nevertheless, any such allocation or specific appropriation, or any unexpended balance of such an appropriation remaining therein at the expiration of the first fiscal quarter after adjournment of the next regular session, would be under the plenary control of the Legislature and subject to its constitutionally enacted laws. That conclusion is inevitable, or section 22, article III, Constitution of Nebraska, would be of no force and effect as a prohibition of continuing appropriations.

Id. at 78-79, 30 N.W.2d at 556.

143. 199 Neb. 146, 256 N.W.2d 330 (1977).

144. *See* note 134 *supra*.

not derived from taxation.[145] The court relied on *State v. Searle*[146] and *State v. Brian*,[147] decided in 1906, and 1909, respectively. However, neither *Searle* nor *Brian* is apposite on the issue of whether the regents need a particular legislative appropriation to spend money raised by legislatively authorized fees. Both those cases focused on the regents' authority to spend donations by the United States government to the university. The court relied on article VIII, sec. 2 of the 1875 Nebraska Constitution (and certain legislative enactments) which provided that "All lands, money, or other property granted, or bequeathed or in any manner conveyed to the state for educational purposes, shall be used and expended in accordance with the terms of such grant, bequest or conveyance."[148] Not only are student fees not such a conveyance, but the relevant constitutional provision has been repealed.[149]

In *Board of Regents*, however, the court additionally alluded to the legislative special fund theory to justify the circumvention by the regents of the particular appropriations scheme. The court said:

> The provision in section 85-131, R.R.S. 1943, that "All money accruing to the university funds is hereby appropriated to the use of the state university" is a legislative recognition of the status of these funds. They can be expended only by the Board of Regents for the benefit of the University. They are trust funds, or have a similar status, and are not available to the Legislature for general governmental purposes.[150]

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145. The court said:

> The funds of the University, which are not derived from taxation, have a different status [than funds to be used for general state expenses]. In State *ex rel* Spencer Lens Co. v. Searle, 77 Neb. 155, 108 N.W. 119, 109 N.W. 770, this court held that the Board of Regents could expend funds donated by the federal government to the University without a specific appropriation by the Legislature. In State *ex rel.* Ledwith v. Brian, 84 Neb. 30, 120 N.W. 916, this court granted mandamus to compel the State Treasurer to countersign a warrant drawn on the University temporary fund although there had been no biennial appropriation from the fund. This court said: 'We can see no reason for a biennial appropriation of these funds. It was the pledged duty of the state to apply them to the use of the university and agricultural college, and the motives which prompted the makers of the constitution to hold the purse strings in the hands of the people cannot apply to the situation presented. The regents of the university under the law are the proper persons and the only persons who may expend this money, and it can be used for no other purpose.'
>
> We are further of the opinion that, when once set apart and appropriated to the proper custodian and beneficiary, subsequent biennial appropriations are not required.

Id. at 151, 256 N.W.2d at 334.

146. 77 Neb. 155, 108 N.W. 1119, 109 N.W. 770 (1906).

147. 84 Neb. 30, 120 N.W. 916 (1909).

148. NEB. CONST. of 1875, art. VIII, § 2. This provision was deleted in 1972. REVISION REPORT, *supra* note 14, at 81-84.

149. *See* note 148 *supra*.

The key to this paragraph is the term "legislative recognition." The court appreciated that the legislature had considered the collection and expenditure of student fees and that it had in fact insulated these funds from general government use. In other words, it was this legislation which permitted the regents to spend what other legislation had permitted them to raise.[151]

The legislature has not explicitly recognized the status of bar dues. Whether the court could find an implied recognition, again using appropriate canons of statutory construction, would turn on the existence of a relevant statute. For example, as suggested above, the court might argue that since the legislature had authorized it to admit and to discipline attorneys, there was implied authority to charge a reasonable fee for those purposes. The court might further argue that it had the additional implied authority to use the money for those purposes as if its special status had been legislatively recognized. However, since there is no statute authorizing bar integration, such reasoning could not be used to justify bar dues expenditures for bar association activities.[152] How much the court spends (or permits the Bar Association to spend) is an important issue for Nebraskans.[153] It is therefore important that the amount of the funds which it does spend be subject to legislative determination.[154]

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150. 199 Neb. at 151, 256 N.W.2d at 334.

151. The Regents could have argued that the legislative authorization to raise fees also gave them the power to spend the fees. But this argument was unnecessary. It is unlikely that "legislative recognition" meant the recognition of the regent's constitutional authority.

152. The same argument can be made for the client security fund.

153. What is at issue is the total amount spent by the courts. Just as the legislature may not legislate in a manner "so detailed and specific in nature as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed," 199 Neb. 146, 149, 256 N.W.2d at 333, the legislature may not so dictate to the judiciary.

154. This very point was addressed in Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924). In that case, the legislature had provided for attorney license fees to be paid to the treasury, and to be disbursed by order of the board of commissioners. The constitution provided that "no money shall be drawn from the treasury, but [by] appropriations made by the law." *Id.* at 286, 228 P. at 1068. The court said that the statute delegating to the board of commissioners the power to order the disbursement of money was not an appropriation, and therefore disbursements could not be made. *See also* Goer v. Taylor, 51 N.D. 792, 200 N.W. 898 (1924).

However, Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973) was decided differently. In that case the court assessed a license fee against lawyers. It was paid to the treasurer, and pursuant to a statute, was designated a special fund. Monies were appropriated annually to meet costs of regulating the practice of law. Later, the legislature amended the law to credit these funds to the general funds, and to provide for the regulation of law through a

In 1936 and 1937, the court asserted its inherent power to police the boundaries of law practice, to regulate the internal affairs of the profession, to tax attorneys, and to spend their money. In 1941, in *State v. Turner*,[155] the court made it clear that it had the ultimate authority to insist on higher standards than the legislature had enacted for bar admissions. The court employed the rhetoric of inherent authority. Implicity, it suggested a functional analysis. In 1937, the statutory requirements for taking the bar examination included graduation from a "reputable school."[156] The court defined "reputable" as meaning a law school on the American Bar Association's approved list.[157] In the fall of 1938, Ralston, the actual plaintiff in the case, enrolled in the University of Omaha Law College, a law school not on the ABA's approved list. In early 1941, the Nebraska legislature defined "reputable" as "all resident law schools now organized within this state . . . ."[158] Ralston, who had graduated from a legislatively-defined reputable law school sought to take the bar examination. The clerk refused him permission, and he brought a writ of mandate.

The supreme court posed the following question: "Does the legislative or judicial department have authority to prescribe rules for admission to the bar?" The court answered: "L.B. 114 is unconstitutional in that it directly usurps the inherent power of this court to fix and determine the qualifications of an applicant for admission to the bar in this state on a subject which naturally falls within the orbit of the judicial branch of government."[159]

Much of the court's analysis has been addressed elsewhere in

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standard appropriations mechanism. The legislature was treating the legal profession like other professions. The court insisted that the legislature could not do this, for, *inter alia*, it encroached on the inherent powers of the court. The court said:

> Application of the above principles to the case before us can lead only to the conclusion that, if we were to permit L. 1973, c. 638, to stand, it would effectively interfere with the right of this court to control the admission of attorneys to practice and their removal and discipline. If the funds that belong to the attorneys of this state were transferred to the general revenue fund, with no appropriation, there would be no money to operate either the Board of Law Examiners or the Board of Professional Responsibility. An examination for admission to the bar is scheduled for July of this year, and if the Board of Law Examiners were left without money to pay the expenses of such examination, it would be impossible to conduct it. Similarly, without any money, the Board of Professional Responsibility would have to discontinue its work.

Id. at 427-28, 210 N.W. 2d at 281-82.

155. 141 Neb. 556, 4 N.W.2d 302 (1941).
156. 1929 NEB. CONS. STAT. § 7-102.
157. Nebraska Supreme Court Journal CCC 154 (1937).
158. 1941 Neb. Laws 75.
159. 141 Neb. at 573, 4 N.W.2d at 312. The court also said:

this article. First, the syntax of admission statutes implied that the court had this ultimate authority;[160] second, the legislature had acquiesced in the court's exercise of this power;[161] third, the court had not objected to, and had accepted, no more than legislative minimum standards;[162] and fourth, the constitutional provision for rules of practice and procedure did not apply here.[163] In addition, the court cited several cases which it believed supported its conclusion.[164]

However, what distinguished *Turner* from *Barlow* and *In re Ingration* was the court's concession that the legislature had the authority to regulate the legal profession to advance the legislature's view of the public good. The court made no claim that the court's higher standards were to assure the public good. They served a different function, namely, they were needed to assure the proper functioning of the judicial process. In *Turner*, the court quoted the Wisconsin Supreme Court in *State v. Cannon*[165] with approval. The Wisconsin court had said:

> When it [the legislature] does legislate fixing a standard of qualifications required of attorneys at law *in order that public interest may be protected*, such qualifications constitute only a minimum standard and limit the class from which the court must make its selection. Such legislative qualifications do not constitute the ultimate qualifications beyond which the court cannot go in fixing additional qualifications *deemed necessary by the courts for the proper adminsitration of judicial functions.*[166]

> L.B. 114 constitutes an endeavor on the part of the legislature to go beyond the concept of minimum requirements for an applicant to take an examination for admission to the bar, and to dictate to the supreme court, . . . that the judicial department shall be shorn of its power to place higher standards or requirements of applicants for admission to the bar than the legislature has provided. *Id.* at 573, 4 N.W.2d at 311.

160. *See* text accompanying notes 53-56 *supra*.

161. *See* notes 13, 58 *supra*. The court also argued the legislature had acquiesced in the supreme court's earlier insistence on higher standards. In 1936 the supreme court had revoked the diploma privilege, Supreme Court Journal BBB 317-19 (1936), in spite of clear legislative language that, at the least, University of Nebraska Law graduates were entitled to the privilege, 1929 NEB. CONS. STAT. § 7-102; and in 1937, the court insisted on a pre-legal education requirement of two years of college, Supreme Court Journal CCC 236 (1937), when the statute only required three years of high school. 1929 NEB. CONS. STAT. § 7-102.

162. *See* text accompanying notes 76-81 *supra*.

163. *See* note 99, *supra*.

164. For its claim of inherent authority the court relied on *In re* Admission to the Bar, 133 Neb. 283, 275 N.W. 265 (1937) and *In re* Newby, 76 Neb. 482, 107 N.W. 850 (1906) (both of which focused on the supreme court's authority vis-a-vis the district courts, not the legislature), and, *Barlow* and *In re Integration.*

Ultimate reliance on cases from other jurisdictions was placed on State v. Cannon, 206 Wis. 374, 240 N.W. 441 (1932).

165. 206 Wis. 374, 240 N.W. 441 (1932).

166. 141 Neb. 556, 570, 4 N.W.2d 302, 310 (1942).

In a passage from the same case which the Nebraska court did not quote, but which it apparently would have agreed with, the Wisconsin court said:

> [W]e admit that courts have no concern with the qualifications of lawyers except in so far as they are permitted to participate in the adminsitration of the law in actions and proceedings in court. . . . If the legislature desires to classify attorneys at law, we are free to say that courts would not be concerned with the qualifications of those permitted to perform legal services or to give advice which has nothing to do with the administration of the law in actions and proceedings in courts. . . . The legislature may establish such qualifications as it chooses for those who are permitted to act as conveyancers, examiners of title, organizers of corporations, or any other type of legal services which does not give them power to influence the course of justice as administered by the courts.[167]

This is clearly a functional analysis, and it harkens back to the traditional authority of the Nebraska court over the legal profession and the practice of law. By emphasizing its own processes, and by insisting on protecting its judicial functions as necessary, the court correctly implemented the separation of powers doctrine, and implicitly undermined much of its own rhetoric about "inherent" and "natural" authority.

III. RECOMMENDATIONS

The Nebraska Supreme Court ought to adopt the functional approach. To do so, it must carefully determine the source of its authority with respect to its acts and rules related to the practice of law and the legal profession. On the one hand, if the legislature has merely declared the court's traditional authority, the statute will not expand this authority. If, on the other hand, the legislature had delegated authority to the court, then the court's proper function is to construe the delegating statute in light of its purpose. In either case, the court may find an implied authority in the statute to raise and to spend money to advance certain legislative goals.

If there is no statute, then the court should only act as strictly necessary to protect the judicial process. It has no legitimate concern with the general public good. Moreover, even where it must act to assure the proper functioning of the judicial process, since there is no statute declaring or delegating authority, the court will not be able to find, by any techniques of statutory construction, an implied independent power to raise and to spend money. It can only mandate that the legislature appropriate adequate funds to allow it to do what it believes is strictly necessary for the proper functioning of the judicial process.[168]

167. 206 Wis. at 395, 240 N.W. at 449.
168. *See* note 11 *supra.*

The application of the functional approach will not be easy. The scope of delegated authority, the demarcation between delegated legislative authority and legislatively declared judicial authority, the scope of the "judicial process," the meaning of "strictly necessary," and the proper ambit of the authority to tax and to spend are difficult and complex issues. But in a constitutional system which gives the last word to the judiciary, the court must face these issues honestly.

It has been suggested here that it is not strictly necessary to protect the judicial process to hold laypersons in criminal contempt for activities outside of the court's presence and unrelated to the judicial process. It also is not strictly necessary to require bar association membership. Moreover, since there is no statute even condoning bar integration, the court has no power to raise or to spend money for these bar association activities.[169]

With respect to the substantive admission and disbarment standards, the legislature has delegated authority to the court to admit, and it has effectively delegated, by its broad definition of professional conduct, the authority to elaborate these standards. It is this legislative authoriztion which permits the court to adopt rules of admission and of conduct designed to promote a view for the public good, for the court is not exercising its own authority as much as it is implementing, or interpreting, legislation. In other words, the court ought to appreciate that its task is to advance, as far as is possible, the legislature's public policy goal. Therefore, when the legislative goal is clear, such as an admission policy which would permit the holders of certain law degrees to be admitted to practice without examination, or which would permit the graduates of certain law schools to take the bar examination, the court must, if possible, defer to these legislative statements. The functional approach insists that public policy judgment be left to the legislature.

The only exception to this conclusion will be when a contrary rule is strictly necessary to assure the proper functioning of the judicial process. But the court must be sensitive in this determination. Attorneys are both officers of the court and participants in community life. The legislature may have determined that a person with a particular level of education could serve the community well. In denying this person the opportunity to be a lawyer, because more education is "strictly necessary" to assure the proper functioning of the judicial process, the court may simultaneously deny the public the services of someone who the legislature believed was qualified to serve in community activities. Under Ne-

169. This argument applies to the client security fund.

braska's constitutional scheme, the court will have the last word in balancing these competing goals. To assure that it does so wisely it should adhere, as has been its tradition, to functional analysis of separation of powers problems affecting the legal profession and the practice of law.