

The 1973 Constitutional Shift—How Judicial Power Became Unchecked

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The Legislature's Surrender of Licensing Authority

One of the most consequential changes in Montana's 1972 Constitutional Convention was the legislature's decision to cede its authority over attorney licensing to the judicial branch. Prior to this, the legislature had the power to define who could practice law in the state. But under the new constitution, that authority was transferred to the Montana Supreme Court.

This shift had profound implications:

- **Judges Control the Pipeline:** Because most judges are former attorneys, the Supreme Court now controls who enters the profession and, ultimately, who ascends to the bench.
- **No Legislative Oversight:** The legislature lost its ability to directly shape or contest the standards for legal practice—except through a narrow and easily circumvented provision.

The State Bar Mandate: Executive Power in Judicial Hands

Soon after gaining control over attorney licensing, the Montana Supreme Court issued a rule mandating that all practicing attorneys must be members of the State Bar of Montana. This effectively created a **quasi-executive agency** under judicial control:

- The Bar enforces rules, disciplines attorneys, and regulates continuing education.
- It acts as both gatekeeper and enforcer—functions traditionally reserved for the executive branch.

This move blurred the separation of powers. The judiciary not only interprets laws but now **enforces them through an administrative body**, giving it executive-like authority without the checks and balances that normally constrain such power.

The One-Year Legislative Review Loophole

Montana's constitution technically allows the legislature to contest any Supreme Court



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rule related to attorney licensing within one year of its adoption. However, the judiciary has routinely sidestepped this safeguard by claiming that new rules are merely “updates” to existing ones—not new rules subject to review.

This legal sleight of hand has allowed the Supreme Court to:

- Expand its regulatory reach without triggering legislative oversight
- Maintain control over the legal profession with minimal external accountability
- Reinforce ideological continuity by shaping who can practice law and who can become judges

The Result: A Judiciary Beyond Checks and Balances

These structural changes have created a legal ecosystem in Montana where:

- The Supreme Court acts as lawmaker, enforcer, and adjudicator
- The legislature is effectively locked out of regulating the legal profession
- The Bar and law school system reinforce ideological conformity

This concentration of power has distorted the principle of blind justice. With limited ideological diversity among lawyers and judges, conservative voices are marginalized, and laws passed by the legislature are frequently overturned by courts that reflect a narrow worldview.

Why SB 15 Is the Necessary Remedy

In this context, SB 15 is not just a bill—it's a constitutional countermeasure. It offers the legislature a way to:

- Reassert authority over officials who misuse their power
- Hold judges accountable for incompetence, corruption, and misconduct
- Restore balance in a system where traditional checks have failed

While other reforms—like judicial term limits, Bar restructuring, or law school competition—might help in the long term, they require constitutional amendments, institutional buy-in, and years of political effort. SB 15, by contrast, is **immediate, actionable, and targeted.** 🏛️